

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 100 of 1999

LUCY JEPCHUMBA MURREY RIENOLDT PLAINTIFF

VERSUS

SAMMY CHULA DEFENDANT

Coram: Before Hon. Justice Mwera

In person the plaintiff

Miss Okumu for defendants

Court clerk – Kazungu

JUDGEMENT

The suit was filed on 10th March 1999. By it the plaintiff sought eviction of the defendant from a parcel of land described as subdivision NO. 2710 SECTION III MN measuring 0.4047ha.

She pleaded that without her permission or consent the defendant entered this land, built a structure there and moved in to stay. So this court should order the defendant out and order him to pay damages.

In a short defence filed on 30th March 1999, the defendant denied the claim that the plaintiff owned the portion of land stated or that the defendant had entered on it without consent or authority, built and proceeded to live there. He claimed that infact the subject portion of land was his even by registration after he purchased it.

One Siegfried Otto Riewoldt (PW1) told the court that the plaintiff donated a power of attorney to him on 15th January 2002. That he and the plaintiff were wife and husband; she lived in Germany (Exh P1). But that prior to that the two bought the subject piece of land in 1987 for Kshs. 65,000/-. An agreement for sale and payment receipt were produced (Exh P2(a) (b)). That after the local land control board gave its consent (Exh P3 (a) (b)) the seller one Zubeida Wazir transferred the land to the couple (Exh P4) followed by a title deed (Exh. P5). That PW1 fenced the land in 1988 but he noticed later that the fence had been breached by somebody who had put up some makuti structures on the land. (Exh P6 photographs). That the occupants of those structures told PW1 that the defendant (Sammy Chula) had authorized them to live in the houses there. That when PW1 caused Chula to be summoned to the local chief's offices on this issue, he declined to appear. PW1 exhibited several letters in this regard (Exh P7 (a) to (e)), all leading to this suit being brought.

In cross examination the court heard that PW1 came to Kenya from Germany as a tourist; he later met and married the plaintiff in 1984. That she has been permanently resident in Germany. PW1 said that the negotiations to buy the land were concluded with one Juma Mohamed, Zubeida's agent. That closed the plaintiff's case before Onyancha J, on 12th April 2002.

On 22nd April 2004 the matter came up for hearing the defence case which opened with Sammy Chula (DW1) in the witness box on 20th May 2004. DW1 knew the plaintiff since 1987. He claimed that he bought the piece of land, now the subject matter in 1987 and that he lived on it. That he bought the land via the seller's (Zubeida Wazir) agent M/S Mtwapa Properties for Kshs. 40,000/- which he paid by instalments. The sale agreement (Exh D1) of 10th September 1985 showed that the defendant bought a

SUBPLOT NO. T2 of PLOT NO. 90 SECTION III M.N. Mtwapa and payment receipts (Exh D2) showed that. So, did the land control board consent of 18th December 1985. The defendant also exhibited a letter dated 9th February 1996 from the local assistant chief following the disagreement of who between the 2 litigants was the rightful owner of the disputed plot (Exh D3). According to the defendant, the plaintiff at no time produced documents before the local administrators to show her claim to the plot. She was registered owner on 19th September 1996. That the plaintiff got the registration even as the litigants were awaiting a further meeting with the local district officer over this plot. That on his part he bought the land earlier, moved onto it and even got a land control board consent for the transaction.

In cross examination the defendant said that he paid a total of Kshs. 25,000/- and was still owing Kshs. 15,000/-. DW1 agreed that the plaintiff had the title to the land. From 21st May 2004 when the defendant was heard and allowed time to complete his case by tendering further evidence if he had any, saw nothing of the sort taking place. After several dates to see whether the defendant would bring more witnesses, after over a year, ie on 7th July 2005, the court considered that the trial ought to be closed and it was. The defendant had not shown good reasons why he had over one year not completed his defence case if he had any more evidence to call. No side submitted (the plaintiff had been acting in persons since 4th May 2005) and judgment was drafted as per the pleadings and evidence on record.

From all the above it looks certain that the parties are disputing over one physical plot. But while the plaintiff has SUBDIVISION NO. 2710 SECTION III XXN, the defendant's papers talk of SUBPLOT T 2 of PLOT NO. 90 SECTION III MN, Mtwapa. But be that as it may, the physical plot on the ground should be one and the same otherwise no dispute would have arisen. So between these two to whom does the subject plot belong? On the balance of probabilities, it is the plaintiff. The defendant may have bought the plot a little earlier but his effort only ended at paying part of the agreed price and getting the relevant land board consent. He did not move to get the land transferred and registered in his name. Quite probably because he did not finish the purchase price. But the plaintiff of who bought the same portion later went through all the requisite steps ending with registration and procuring of the title deed on 19th September 1996. With that in hand the plaintiff is the lawful owner of the subject plot. The defendant is on it without her authority, consent or otherwise. He is ordered to vacate it in the next three (3) months.

As for general damages, it is accepted that trespass is actionable per se. That is the principle of law. One does not need to prove actual damage / loss to get damages. The court on being satisfied that a trespass has been committed can assess and award the same. Although the plaintiff did not seem to press for that remedy here, it could still issue. It is however not awarded save that the defendant should vacate in the next 3 months. If he fails to do so, then the court will be justified to consider to condemn him in general damages.

The plaintiff also gets costs.

Judgement accordingly.

Delivered on 21st July, 2005.

J.W. MWERA

JUDGE