



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 130 of 1999

CHABHADIA ENTERPRISES LTD 1ST PLAINTIFF

RAMJI K. VISHARAM 2ND PLAINTIFF

VS

MARY NASIMIYU DEFENDANT

JUDGMENT

In a plaint dated 3rd November 1999 Chabhadia Enterprises Ltd and Ramji K. Visharam, the 1st and 2nd plaintiffs respectively, sued Mary Nasimiyu, the defendant herein, in which they claimed for the following:

- a) An order declaring illegal the defendant's attachment of the Plaintiffs' trading stock illegal and for a further order lifting the attachment.
- b) An order restraining the defendant from demanding rent accruing from the plaintiffs' tenancy in plot No.MUCHI/75.
- c) The defendant denied the plaintiffs' claim by filing a defence which she later amended to include a counter claim.

When the suit came up for hearing on 11TH May 2005, the same was adjourned at the instance of the plaintiffs on condition that they pay Court adjournment fees and the defendant's costs before the next hearing date. The suit was listed for hearing on 21.7.2005. On that date the plaintiffs applied for an adjournment. The application for adjournment was rejected by this Court when it became apparent that the plaintiffs had not paid the Court adjournment fees and the defendant's costs as per the Court Order of 11.5.2005. In exercise of its inherent power this court dismissed the plaintiffs' suit and allowed the defendant to proceed for hearing with the counter claim.

The counter claim is contained in the amended defence. In that counter claim the defendant prayed for the following orders against the plaintiffs:

- a) Payment of mesne profits at a rate of Ksh.15,000/= with effect from 1st January 1994 until they vacate the suit premises.
- b) An order of eviction against the plaintiffs from the suit premises.
- c) Costs of the suit plus interest thereon.

At the hearing of this suit, the defendant testified and called one independent witness in support of her case against the plaintiffs.

Mary Nasimiyu was the first to take the witness box. She told this Court that she came to know the plaintiffs in the month of December 1993 when they leased business premises in plot NO.MUCHI/75 of Webuye Municipality also known as TITLE NO.WEBUYE MUNICIPALITY/BLOCK 1/30 hereinafter referred to as the suit premises. She said the premises were registered in the names of Ben Masoni Wanyonyi now deceased. She further told this Court that she bought the suit premises from Ben Masoni, her deceased brother in 1979. She produced in evidence an agreement dated 8th December 1979 she and her brother executed before Dan Omukunda advocate. The defendant claimed that she complied with the terms of the aforesaid agreement but her late brother did not honour the bargain and this prompted her to file an action in the chief Magistrate's Court at Kakamega for specific performance. She produced in evidence certified copies of the judgment and the decree in Kakamega P.M.C.C.C no.207 of 1994. The defendant stated that the judgment and decree directed her brother, Ben Masoni to execute a transfer of the suit premises to her. She also claimed that the judgment and decree nullified the tenancy between the plaintiffs and her late brother. It is her evidence that the Webuye Municipal council gave her an allotment letter over the suit premises pursuant to the decree issued by the Kakamega Chief magistrate's Court. A copy of the allotment letter dated 5th February 2001 was produced in evidence. The defendant also produced a copy of the certificate of lease issued to her on 15th February 2002 to show that she is the registered proprietor of the suit premises.

Mary Nasimiyu also produced a certified copy of a demand letter dated 4.2.1994 She instructed her advocates to write to the plaintiffs informing them of her proprietary interest over the suit premises. She claimed she gave a copy of the judgment and decree to the plaintiffs to enable them deal directly with her instead of her deceased brother. She accused the plaintiffs of failing to meet her demands and for continuing to remain in the suit premises without paying her rent accruing from the property. She consequently prayed for the plaintiffs' eviction from the suit premises. She also asked for payment of mesne profits of Ksh.15,000/= per month with effect from 1994 up to date. She accused the plaintiffs for dealing with Ben Masoni Wanyonyi yet they knew he had lost proprietary interest over the suit premises. The defendant further produced in evidence copies of the receipts issued by Webuye Municipal Council acknowledging payment of land rates and rent.

Richard Wandera, was called as a witness by the defendant in this matter. He said he was a cousin to the defendant. His evidence basically confirmed the fact that the letter dated 4th February 1994 was served upon the plaintiffs in his presence. This is the letter the defendant claimed she had instructed her advocate J. M. Wafula, to inform the plaintiffs of her proprietary interest over the suit property.

After receiving the evidence, Mr. Samba, the defendant's advocate prayed for leave to file written submissions. That application was granted and the learned advocate filed the written submissions dated 28th July 2005. The learned advocate also supplied this Court with authorities he relied in form of case law.

Mr. Samba urged this court to enter judgment in favour of the defendant as against the plaintiffs in terms of the counter-claim on the basis of the evidence tendered by the defendant and her witness. The learned advocate was of the view that the plaintiffs had moved into the suit premises without the defendant's consent and authority in 1993. It was also argued that the late Ben Masoni Wanyonyi had no authority from the defendant to transact business on behalf of the defendant. The learned advocate pointed out that this position was confirmed by the judgment and decree of kakamega Chief Magistrate's court vide kakamega P.M.C.C.C. no.207 of 1994. He further argued that the plaintiffs were aware of the judgment and the subsequent decree through the demand letter by J.M. Wafula Advocate of 4th February 1994. It is the submission of the defendant's advocate that the plaintiffs become stubborn and continued to pay rent to the late Ben Masoni Wanyonyi despite knowledge of their new landlord. He said this provoked the defendant to levy distress to recover rent which action provoked the plaintiffs to move to Court to restrain the defendant from actualizing her intentions. The learned advocate urged this court to determine two issues namely:

i) Whether or not the defendant is entitled to mesne profits from the plaintiffs

ii) In view of the judgment of Kakamega P.M.C.C.C.no.207 of 1994 whether or not payments of rent to Ben Masoni Wanyonyi between 1st January 1994 and the date of his demise discharge the plaintiffs from liability to pay mesne profits to the defendant over the same period.

On the first issue the learned advocate urged this Court to hold that the defendant is entitled to payment of Ksh.15,000/= per month for 141 months leading a total sum of Ksh.2,115,000/=. He urged this court to take note of the fact that the defendant had proved that she had no lease agreement with the plaintiffs despite the fact that the defendant had proved that she had acquired proprietary interest over the suit premises from the late Ben Masoni Wanyonyi.

Let me now consider the entire evidence and the submissions over the first issue: The defendant tendered evidence to show that she acquired

TITLE O.WEBUYE/MUNICIPALITY/BLOCK 1/30 formerly known as plot NO.MUCHI/75 from her late brother, Ben Masoni Wanyonyi, deceased. The process of acquisition of the suit premises commenced in 1979 via a written agreement dated 8th December 1979. It would appear the late Ben Masoni Wanyonyi was reluctant to have the suit premises transferred to the defendant. This prompted the defendant to institute a suit against her late brother which action culminated to her finally obtaining proprietary interest over the suit property as expressed in the certificate of lease issued on 15th February 2002. A certified copy of the judgment in KAKAMEGA P.M.C.C.C NO.207 of 1994 shows that the defendant had applied to have the 5 years lease beginning from 18th December 1993 between the late Ben Masoni Wanyonyi, deceased and Ramji K. Visharam, the 2nd plaintiff to be nullified. The aforesaid judgment shows that the defendant was granted the prayer which decision is expressed in a decree dated 25th October 2000. The defendant said that this judgment was brought to the attention of the plaintiffs via a demand letter dated 4th February 1994 written by the firm of J. M. Wafula Advocate. Richard Wandera (P.W.2) said that he accompanied the defendant to present this letter (P.Ex.no.6) to the defendant. I have perused the aforesaid letter. Let me have the contents of the letter reproduced in part as follows:

"J. M. Wafula

advocate

P. O. BOX 1366

KITALE

Mr. Ben Masoni Wanyonyi,

P. O. Box 145,

WEBUYE.

CC:

Ramji K. Visharam,

P. O. Box 1282.

WEBUYE.

Scholastica Wakasa,

P. O. Box 2264

KITALE.

Dear Sir,

RE: PLOT NO.75 SITUATED ON THE MAIN STREET WITHIN WEBUYE TOWNSHIP OUR CLIENT – SCHOLASTICA WAKASA

Under instructions received from our client above named, we have to write to you as hereunder:

That our client bought the above plot from you and has been in possession of the said plot for over 10 years. On 18.12.93, you unlawfully leased 1/2 of the said plot to one Ramji K. Visharam for a term of 5 years starting from 1.1.94 – 31.12.1998.

Take Notice that since you sold your plot, you have no legal right over the said plot therefore the agreement which you signed with Mr. R. K. Visharam is null and void as it has no legal basis.

We warn you to stop any further act as regards our client's plot and if you continue with any illegal act, we have strict instructions to go to Court to restrain you from doing so and you will pay all costs that we shall incur.

By copy of this letter Mr. R. K. Visharam is informed that you are not the legal owner of the plot.

Yours faithfully

J. M. WAFULA "

In short, the above quoted letter is the one which the defendant and her witness presented in evidence to prove that the plaintiffs knew that ownership of the suit premises had changed hands through an agreement which was ordered performed by an order of Court. In the circumstances of this case it is necessary for the defendant to prove on a balance of probabilities that she indeed served both the plaintiffs with the letter of demand from J. M. Wafula Advocate, the Judgment, the decree and of course the certificate of lease. Looking at the letter of J. M. Wafula dated 4.2.1994 which was produced as exhibit no.6, it is clear that the same was addressed to the late Ben Masoni Wanyonyi and copied to the 2nd plaintiff and to Scholastica Wakasa. The same letter reveals that it was written on the instructions of one Scholastica Wakasa. This court was not told the relationship between Scholastica Wakasa and the defendant herein. The letter simply says that Scholastica Wakasa acquired the suit premises. The agreement, the judgment and the certificate of lease show that the suit property were acquired by Mary Nasimiyu. Richard Wandera said that he saw the defendant serve the 2nd plaintiff with the letter. He does not state whether he read the contents of the letter before it was served. The letter was not registered so that one can be sure that the same reached the 2nd plaintiff. I am not satisfied by the evidence of service that the letter reached the 2nd plaintiff. There is no evidence tendered by the defendant that the letter was served upon Chabhadia Enterprises Ltd, the 1st plaintiff herein.

In the absence of the evidence of a process server or an affidavit of service I am not satisfied that the plaintiffs were served with Exhibit no.6.

Assuming that there was proper service of the demand letter (Ex. No.6), then what remains is for the Court to examine the information passed over to the plaintiffs. Upon perusal of the letter, it is

clear that the 2nd plaintiff was only told of the fact that the late Ben Masoni Wanyonyi (deceased) had sold his proprietary interest to one Scholastica Wakasa. The letter did not require the plaintiffs to do anything. It simply told the plaintiffs that Ben Masoni Wanyonyi was no longer the owner of the suit premises. There was no evidence that a copy of the judgment, decree and a copy of the certificate of lease were forwarded to the plaintiffs. In a nutshell I am not satisfied from the evidence tendered that the plaintiffs were aware of the defendant's acquired proprietary interest. In any case the evidence tendered shows that the defendant had her proprietary interest registered upon issuance of the lease dated 15th February 2002. The defendant knew all along that the plaintiffs paid rent to the lessor i.e Ben Masoni Wanyonyi. Why didn't she enjoin Ben Masoni Wanyonyi or his estate to the suit and yet she knew the deceased continued to receive rent from the plaintiffs? It therefore means that the defendant can only be entitled to mesne profits from the plaintiffs if she is able to show that their possession of the suit premises was unlawful. It is admitted that the plaintiffs were put into occupation of the suit premises by the late Ben Masoni Wanyonyi. From the evidence tendered it is clear that the late Ben Masoni Wanyonyi was the legal owner of the suit premises until 15th February 2002 when a certificate of lease was granted to the defendant. Since there is no cogent evidence that the defendant brought to the attention of the plaintiffs of her acquired rights, it cannot be said that the plaintiffs were unlawfully in possession of the suit premises. Mesne profits is defined as the profits of an estate received by a tenant in wrongful possession between two dates also termed as medium tempus. For the foregoing I am of the humble view that the defendant has not established that she is entitled to mesne profits as against the plaintiffs. The evidence on record shows that the plaintiffs paid rents from the suit premises to Ben Masoni Wanyonyi and upon his demise to his Estate. If well advised the defendant would know who to follow for mesne profits.

Even if I were to hold that the defendant was entitled to mesne profits, the defendant must specifically plead and tender proof to the standard required in civil cases. The defendant had prayed for mesne profits at a monthly rent of Ksh.15,000/= per month. She claimed that her adjacent neighbour charged a sum of Ksh.21,000/= per month. However the defendant did not call for the evidence of her 'neighbour' or the tenants occupying her 'neighbour's' premises. The defendant also failed to call for the evidence of a valuer to assess how much rent was payable in respect of the defendant's premises. In the absence of such crucial evidence I am not satisfied that the defendant has proved her case as to the exact amount in respect of mesne profits. In brief, she has not proved the amount of monthly rent paid by the tenants occupying the suit premises. The law requires me to assess the figure in such claims. But since there are no figures which can be relied on I decline to make any award in that respect. I would have given an award on the basis of the monthly rent payable but no figure has been fixed save for what the defendant has quoted as being fair. But I have said she did not establish what she pleaded.

Let me now turn to the second issue raised by the defendant's advocate. Mr. Samba submitted that the plaintiffs ought to have declined to make payments of rent to Ben Masoni the moment they were made aware that the suit property had been sold to the defendant. The learned advocate was of the view that the plaintiffs were authors of their own misfortunes. I think I have already dealt with in detail over this ground. In the first instance there is no evidence that the 1st plaintiff was made aware of the sale. I have already expressed doubt as to whether the 2nd plaintiff was served with any document proving that ownership of the suit premises had passed over to the defendant. The evidence tendered by the defendant shows that the plaintiffs were forced to file this action when the defendant attempted to levy distress against them to recover unpaid rent.

In conclusion, the truth in this dispute is that the defendant acquired the suit premises from the late Ben Masoni Wanyonyi when she knew that the plaintiffs were tenants in the suit premises. This fact is manifested in the judgment delivered vide Kakamega P.M.C.C.C. no.207 of 1994. That judgment nullified the tenancy relationship between the 2nd plaintiff and the late Ben Masoni Wanyonyi. There is no evidence to prove that the tenancy between the late Ben Masoni Wanyonyi and Chabhadia Enterprises Ltd, the 1st Plaintiff, was ever nullified by a court order. It would appear from the pleadings on record, that the late Ben Masoni Wanyonyi went ahead to renew the

plaintiffs' leases. Consequently at the time of acquiring the leasehold, the plaintiffs were legally tenants in the suit premises so to speak. The defendant's attempt to distress for rent through Mararo Auctioneers was blocked by an order of this court. In view of the evidence and the circumstances of this case the question remains to be answered is: Should this court grant the order of eviction as prayed? I am of the view that I should not grant such an order. I am satisfied that the defendant has established that she is the registered proprietor of the suit premises. Her interest is manifested in the certificate of lease which was tendered in evidence. However, the defendant acquired these rights when the plaintiffs were sitting tenants. The law does not permit a person who acquires proprietary interest in the manner the defendant did to proceed to levy distress or to evict tenants. Such a person must dispossess the tenants of the occupation of such premises in the manner prescribed for by law. That is to say that the new land-lord can only remove them as sitting tenants.

The upshot is that the counter claim is dismissed for lack of merit. I shall make no order for costs in favour of the plaintiffs because the plaintiffs were excluded from participating in these proceedings when they flagrantly disobeyed this Court's Orders of 11th May 2005.

Dated and delivered this 28th day of October 2005.

J. K. SERGON

JUDGE