



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1326 OF 1990

JUDY WANJIRU WAINAINA.....PLAINTIFF

VERSUS

MATHEW MBUGUA WAIGWA.....DEFENDANT

JUDGEMENT

The original plaint which was dated 12th February, 1990 and filed on 15th March, 1990 was amended on 8th June, 2001.

The plaintiff pleads that, for a period of six months running from 1st February, 1988 to 23rd July, 1988 she and the defendant had cohabited and had lived in the same house at Kasarani, in Nairobi. This affectionate relationship, however, ended distressfully on 23rd July, 1988 when the defendant destroyed her property and her documents by means of fire *inter alia*. She asserts that the defendant on that occasion also took and/or converted some of her documents and property. She asserts that the defendant appropriated her money (Kshs.500/=); plot allocation certificate No. 1794 for plot No. 1515, Njiru, Nairobi; and receipts for various construction materials and other records relating to the said plot No. 1515. She pleads that the plaintiff is and was at all material times the freehold owner of the said plot No. 1515, which is also described as L.R. No. 8479, Njiru, Nairobi measuring 50 square feet. She pleads too that the plaintiff is and was at all material times the registered owner and entitled to the possession of land and premises situated at Njiru, Nairobi known as L.R. No. Nairobi/Block 144/11. She states that in September, 1991 the defendant wrongfully entered the said land and has taken possession of the same, and has been trespassing thereupon since then. The plaintiff pleads that she has suffered loss and damage, on account of the trespass.

The plaintiff states that notwithstanding her demands and expression of intention to sue, the defendant has neglected or refused to make good the loss. Consequently she now prays for judgement for –

- a. Possession of the land and premises in question;
- b. general damages;
- c. damages or mesne profits at the rate of Kshs.2000 per month from September 1991 until possession is delivered up;
- d. an order of restitution to the plaintiff;
- e. receipts for various construction materials as well as other records;

f. eviction of the defendant from the suit premises.

The defendant's statement of defence and a counter-claim dated 15th October, 2001 were filed on 16th October, 2001. He denies ever having

Maliciously and unlawfully damaged or caused to be damaged the property and documents belonging to the plaintiff. He denies having converted the plaintiff's documents or properties. He denies that the plaintiff was and is still the owner of plot L.R. No. Nairobi/Block 144/1. He contends that he and the plaintiff were joint-owners of plot No. 1515 within L.R. 8479, Njiru, Nairobi which the plaintiff has caused to be fraudulently registered as land parcel No. Nairobi/Block 1441/1 after the institution of this suit in the plaintiff's name.

The defendant sets out as particulars of fraud: (i) causing of the whole suit plot to be registered in the plaintiff's name while knowing that the suit had belonged to both the plaintiff and the defendant in equal shares; (ii) changing the number of the plot during the subsistence of the suit without informing the defendant.

In the counterclaim, the defendant prays for the rectification of the register to indicate that the plaintiff and the defendant are co-owners in common, in equal shares, in respect of L.R. No. Nairobi/Block 1441/1.

The defendant prays that the plaintiff's suit be dismissed with costs; and that the Court be pleased to order rectification of the register to show that the plaintiff and the defendant are co-owners in common of L.R. No. Nairobi/Block 1441/1. He also prays for costs of the suit.

The plaintiff responded by filing a reply to defence and defence to counterclaim, of even date, on 9th June, 2003. She denied the particulars of fraud pleaded by the defendant, and averred that she is the rightful owner of L.R. No. Nairobi/Block 144/1. She averred further that it is the defendant who had attempted to defraud her of her property.

The trial of this case began on 3rd December, 2003 when learned counsel for the plaintiff, **Mr. Chebii**, made his introductory remarks. He stated his strategy as being to show that the plaintiff is the registered owner of land parcel L.R. No. Nairobi/Block 144/1 – ownership having been acquired by purchase from a company known as Mutirithia wa Andu Company Ltd., in 1988. The plaintiff was the sole owner of the said parcel of land and the defendant had no share on it. The plaintiff after purchasing the land, had effected certain improvements thereon. The defendant, counsel stated, attempted to defraud the plaintiff by inserting his name in the plaintiff's share certificate, in the payment receipts, and in the transfer documents. The plaintiff would be seeking orders for possession of the suit land; orders of eviction of the defendant; and orders for payment of mesne profits by the defendant.

Counsel then introduced as PW1 the plaintiff herself, **Judy Wanjiru Wainaina**, who was sworn and led through the evidence-in-chief. She testified that she was unemployed and lived at the Mathare North Estate in Nairobi. She said she knew the defendant who had been a driver at a transport company known as KENATCO, where she herself had been station controller. The two had become close friends in 1984, and from then till 1988 he was a frequent visitor at her Umoja Estate house. In 1988 she sold her Umoja house to enable her to buy a more substantial plot; and all along her plans were well known to her friend, the defendant. She relocated to Kasarani Estate in 1988 and rented a two-roomed house. She had intentions to purchase a lot in the Kasarani area. The defendant moved in with the plaintiff, when she took up accommodation at Kasarani – and this entailed his leaving his own family which stayed at the Kawangware Estate.

The plaintiff got interested in two plots situated by the road. They were owned by an Italian, by name, **Vincenzo Castigliani**. She approached the owner, who agreed to sell. She kept the defendant informed of her plans. When she visited her bank to withdraw Shs.70,000/= for payment in respect of the two plots, the defendant was in her company. She went together with the defendant, in his car, to **Castigliani's** house which was in Kasarani, and paid up; following which the three together went in the defendant's car

to Mutirithia wa Andu Co. Ltd for share-registration change – from Castigliani’s name to that of the plaintiff. The plaintiff had purchased two plots from **Castigliani** - plots No. 1515 and No. 1521. **Castigliani** himself had acquired those plots through being a shareholder of Mutirithia wa Andu Co. Ltd; and so it was necessary to have the share certificates re-issued in the name of the purchaser.

Plaintiff’s Exhibit 1 was a letter dated 10th February, 1988 and signed by **Castigliani** Driving Licence No. 174212. It relates to plot No. 1515, and states: “I **Mr. Castigliani**...wish to inform you that I have sold plot No. 1515 to **Judy Wanjiru Wainaina** of Box 52684, Nairobi, Id. No. 3472737/66 according to transfer of the said plot. I declare that I have no further interest in regard to that above plot and indemnify Mutirithia wa Andu Co. Ltd. of any claim that may arise thereafter.” Although this letter is tendered as a copy, it is certified by Mutirithia wa Andu Co. Ltd. as a true copy of the original. The witness testified that the originals of her transfer documents had been taken away by the defendant. The share certificate issued to the plaintiff in respect of plot No.1515 bore only one name that of the plaintiff. It was noted that the defendant has shown the original of that share certificate as a document in the list of documents which he field in support of his case. When the plaintiff saw that original which had been held by the police, she found that the defendant’s name had now been listed alongside that of the plaintiff.

PW1 testified that: “When I completed payment, I gave the defendant] some money for use in the construction. We were very good friends.” Soon thereafter, she testified, bad relations began, characterised by violence, forcing her to make an escape. She averred that while she was away, the defendant had converted her documents, and destroyed her property. She had to report these incidents to the police station, on 24th July, 1988. Among the plaintiff’s documents taken by the defendant were the original share certificate for Plot No. 1515, receipt No. 0220 and receipts in respect of purchases of building materials. Plaintiff’s Exhibit No. 2 is receipt No. 0220 and relates to Plot No. 1515 which had been purchased by the plaintiff. It is dated 11th February, 1988 and the regular entries on it which are in lower case, read as follows:

“Received from Judy Wanjiru Wainaina the sum of shillings five hundred only in payment of transfer fees.”

Now out of line and well above the plaintiff’s name is entered in capitals: “**MATHEW MBUGUA WAIGWA**”. The ink marks in that line are blue like the other entries, but they are a lot thicker – tending to show that the entries were made at different times; with different pens; by different persons; or all of these together.

PW1 gave evidence that after she had complained to the police about the harm caused to her by the defendant, the police had summoned the defendant who made a document on oath averring that he was husband to the plaintiff and had wanted to have his name included on the share certificate for the suit land. She later learned that the police wanted the grievance to be dealt with as a civil matter; and so she visited Kituo Cha Sheria which filed suit on her behalf. The said affidavit was tendered by the plaintiff as her Exhibit No. 4. It is dated 11th July, 1988, sworn by **Mathew Mbugua Waigwa**, and reads in part as follows:

“That my wife is called Judy Wanjiru Wainaina.

“That my wife and I are shareholders in an undertaking known as Mutirithia wa Andu Company Limited.

“That by virtue of the said shareholding my wife and I have been allocated plot Number 1515 in L.R. 8479/NJIRU, NAIROBI.

“That I mutually agreed with my wife that she should be registered as the sole proprietor of the said plot; attached is copy of the certificate marked ‘BN 1’.

“That I would like both of us to be registered jointly as proprietors of the said plot.

“That what is stated herein is true.”

It is not clear what the said affidavit was in aid of, or to which body it was presented, apart from the police, and with what consequence in terms of decision making and issuance of instruments bearing legal force. As things stand, that affidavit is merely a floating phenomenon; its only utility to the Court is that it shows how the defendant was perceiving the suit property.

PW1 testified that the two plots which she had purchased are in one area and share a common boundary – are of these being Plot No. 1515 (which is the suit plot) and the other being Plot No. 1521.

The plaintiff’s construction works were in progress in Plot No. 1515 rather than 1521. When she left the construction site she had done the ground floor and the first floor. Roofing was about to commence, when she left. She testified that in 1991, she received information that the defendant had done the roofing on her building, and indeed, with effect from November, 1991 had moved into the house, together with his family.

PW1 contested the claim by the defendant in his pleadings, that the suit plot was jointly owned. She produced a certified copy of a letter dated 12th November, 1991 from the Director of Mutirithia wa Andu Co. Ltd. The letter is addressed to “whom it may concern”, and it relates to Plot No. 1515 on L.R. No. 8479/NJIRU. The letter states:

“This is to confirm that according to records of this Company, the above plot is owned by Judy Wanjiru Wainaina of P.O. Box 52684 owner of Id No. 3472737/66.”

The said Director of Mutirithia wa Andu Co. Ltd wrote still another letter to “whom it May Concern” (plaintiff’s Exhibit No.6), in respect of **Judy Wanjiru Wainaina** (the plaintiff). The letter states as follows:

“This is to confirm that the above named is the owner of Plot No. 1515 in the subdivision of LR 8479. She was issued with a plot allocation certificate No.1794 pending issue of a letter of allocation.

“After the survey, the plot was allocated title number NAIROBI/BLOCK 144/1. We are applying to the Commissioner of Lands for the letter of allocation which we shall hand over to the abovenamed as soon as it is ready.”

The importance of this letter is that it contradicts the claim made in the counterclaim by the defendant, that the plaintiff had secured the exclusive registration of the suit plot in her name through fraud. The letter would tend to show that the plaintiff did not even take any active step to secure the creation of the property title, or to have it registered in her name; instead the creation of the title and its registration would appear to have been a matter of course effected by the company which had sold the land to the plaintiff and who therefore readily identified her as the proprietor of the same.

PW1 testified that since she left the suit plot in 1991, she has not been back there, but she is now the holder of the title deed for the same. The company which had allocated her the land had been in contact with her regarding the payment of survey fees, as well as City Council fees. On 4th August, 1999 the company had written to her in relation to the processing of the title deed and the payment of certain charges. She had also received a letter of 1st February, 2001 from the Ministry of Lands and Settlement, regarding charges to be paid. The company had written to her on 2nd February, 1999 asking her to pay survey fees and ground rent, and she had duly paid up. Subsequently the title deed was processed, and the plaintiff was issued with the lease bearing the number NAIROBI/BLOCK 144/1, dated 2nd May, 2001 and running for a 99-year duration.

PW1 prayed that the Court do restore the suit plot to her; that the defendant be evicted; t hat the defendant be required to pay to her the sum of Kshs.2000 per month from the time he entered the suit property. She

denied the claim in the statement of defence that plot No. 1515 which became NAIROBI/BLOCK 144/1 was held in equal shares by both parties; she averred that only lot No. 1521 was held on the basis alleged by the defendant. She averred that in any event, the defendant had paid no money for either of the two plots.

The next date of hearing was 19th May, 2005 when PW1 was cross-examined by learned counsel for the defendant, **Mr. Kamonde**. She testified that the Plot No. 1515 was acquired in 1988, at a time when she was cohabiting with the defendant. The original share certificate for the said plot was in the name of **Vincenzo Castigliani**, but that name was cancelled by Mutirithia wa Andu Co. Ltd, which substituted her name. She averred that the defendant's name had not been inserted in the said share certificate. PW1 testified that the defendant had made no financial contribution in respect of Plot No. 1515; and even as regards Plot No. 1521 "he did not contribute." She averred that the original receipt for 1515, dated 11th February, 1988 was in her name exclusively. At this point learned counsel for the plaintiff, **Mr. Chebii**, confirmed that in the documents which had been exchanged between counsel in the run-up to the trial, the defendant's name was not included in the receipt in question. PW1 said she had put up a building on plot 1515, and she had done so in 1988. She averred that the defendant was witness to her construction initiatives in plot 1515 and he was even helping the plaintiff with the works.

On re-examination, PW1 re-stated that she alone made payment in the purchase of plot 1515, as well as for the processing of the share certificate for the same. She averred that the name of the defendant appearing alongside hers in the share certificate for plot 1515 must have been inserted by the defendant himself, as it does not appear in the Company's register. She noted that in her duly certified copy of the same share certificate, the defendant's name did not appear.

PW1 testified that although she is the one who had put up the building on plot 1515, it was the defendant who was staying there, as he had done continuously since 1991.

On 19th May, 2005 PW2, **Frank Remeru Matuto**, was sworn and gave his evidence. He said he was director of a land-buying company, known as Mutirithia wa Andu Company Ltd. He said he did know the plaintiff, who was his customer. She had purchased land from **Vincenzo Castigliani** who had held land with the said company, acquired through shareholding in the company. The plaintiff was not an original shareholder; she purchased plot No. 1515 from **Castigliani**, and this later became L.R. No. Nairobi/Block 144/1. The witness had the company's share-register records, showing the counterfoil from which share certificate No. 1794 for Plot No. 1515 had been issued. He confirmed that share certificate had been issued in the name of **Judy Wanjiru Wainaina**, the plaintiff. There was no other name on the counterfoil, which showed that the said plot was for the plaintiff alone. The witness averred that for the neighbouring plot which the plaintiff also purchased, two names appeared on the relevant counterfoil, that of the plaintiff and that of the defendant. With regard to Plot No. 1515, the witness stated that he did not know who could have inserted the defendant's name in the register; it was certainly not the company, Mutirithia wa Andu Co. Ltd; for if the company had made a change on the share certificate it would have reflected such a change on the counterfoil. The witness stated that the company had already processed title for Plot No. 1515 in the name of the plaintiff. For Plot No. 1521, the applicable counterfoil was No. 1795 – and this counterfoil carried two names, that of the plaintiff and that of the defendant.

In cross-examination, PW2 stated that the company kept a very large register, and details were extracted from this register. Any alteration on the company's share certificate required three signatures; and as these were missing in respect of the alteration to the certificate for Plot No. 1515, it followed that the change which the defendant had canvassed before the Court was not a genuine one. When the original certificate had been issued, the **Castigliani** name had been deleted using white-out; but what was now presented as the content of the original certificate was not genuine: "it was with clients; tis content is not reflected in the counterfoil."

On 12th July, 2005 DW1, the defendant, was sworn and led through the evidence-in-chief. He said he was a born-again Christian and a follower of the Apostolic Christian Ministry of God – Kenya. He said he lives on plot No. 1515 at Kasarani-Mwiki, Phase II.

DW1 said the plaintiff is well known to her: “we lived four four years as friends; I had not paid bridewealth; we were not married.” He said that while he lived together with the plaintiff in 1987, he purchased a plot at Kasarani-Mwiki, which is not the suit plot: “I purchased it myself.” He said plot No.1515 on which he lives “is jointly owned between her and myself.” He said they had jointly purchased plot 1515, at a time when they lived together. He produced original share certificate No.1794, showing his own name inserted in capital letters above the name of the plaintiff which was regularly entered and was in lower-case letters.

DW1 made certain averments which materially differ from the testimony of the plaintiff, but the truth of which must in the end be determined – since this matter is critical to the outcome of this case.

Mr. Mathew Mbugua Waigwa restated what is common cause: that he had accompanied the plaintiff both to the vendor, **Castigliani**, and to the offices of Mutirithia wa Andu Co. Ltd. when the sale transactions for land in Kasarani had taken place. DW1 said he had at an earlier point in time, purchased a plot other than the suit land; but he did not identify this other plot or indicate how that particular transaction was related to Plot No.1515 which is the suit plot. He then said that he had accompanied the plaintiff, on the basis of a husband-and-wife relationship, to **Castigliani**, for the purpose of purchasing a parcel of land, and that he and the plaintiff had each contributed Kshs.15,000/= towards the purchase price. He said he was the one having custody of all the money required, and that when he and the plaintiff came to **Castigliani's** home, their intention had been to purchase two plots. He testified that **Castigliani** recorded both his name and the plaintiff's name, and they made payment to the vendor. He said he hired a taxi, to take the three of them to the offices of Mutirithia wa Andu, for the purpose of changing the names on the share certificate. He said that **Castigliani** had brought the certificates with him and, at the Mutirithia offices, the plaintiff and the defendant were left in the foyer while **Castigliani** spoke to the Director, a **Mr. Njogu**. DW1 said that **Castigliani** at one stage came out and took the identity cards of both parties, and these were used for making entries on the share certificate.

I recorded, as the defendant rendered the foregoing account, as follows: “The defendant is talking very fast, in spite of caution, and runs on and on.”

Dw1 went on to aver that **Castigliani** had then left the Director's office with a certificate which he handed over to DW1, and it was dated 9th February, 1987. The parties then took **Castigliani** back to his home in Njiru.

DW1 testified that there were two adjoining plots, one of these obviously being No.1515. He did not say much about the other plot, and did not attempt to link its story with a plot which he had said he purchased much earlier on. But he went on to say that the parties conceived their plans for the two adjoining plots together; in his words: “We agreed we would start building on one plot – facing the road; the first steps in building were joint, belonging to both of us.” DW1 said: “Later we quarrelled in 1989 and Judy left, after two floors had been constructed.” Up-to that point, the defendant testified, “we worked together. She made contributions and I made contributions. She had sold her house at Umoja. I had sold my business at Kawangware.”

The defendant said he had sold his Kawangware business for Shs.20,000/=, got retirement benefits in the sum of Kshs.38,000/=, and also took bank loans. He said he had committed his money in the sum of Kshs.87,000/= to the construction on Plot No.1515; he said too that the plaintiff had contributed Shs.86,765/60 towards that same construction. He said he had been responsible for the construction, and was paying the workers. He produced records (defendant's Exhibit Nos. 3 and 4) to show that he was the one signing for payment arrangements for the workers. He testified that he had fitted the doors of the building, fenced it and installed water following the departure of the plaintiff.

On cross-examination, DW1 acknowledged that the declaration form signed by **Mr. Castigliani** and dated 10th February, 1988 showed only the name of the plaintiff as the purchaser of Plot No.1515. In the case of Plot No.1521 (which adjoins Plot No.1515) DW1 said both parties had paid the purchase price. This leads to the inference that Plot No.1521 is not the plot the defendant said he had purchased on his own, much earlier than at the time of the transactions involving **Mr. Castigliani**.

As regards the parallel entry of his name, on 11th February, 1988 on receipt No. 0220 for Plot No. 1515, he justified the different ink and writing characteristics indicating his name-entry, on the basis that there were two clerks at the offices of Mutirithia wa Andu Co. Ltd, and so the entries could have been made by different clerks. In my view, however, such reasoning appears strained and probably has little to do with the truth.

DW1 testified that he had broken up in the cohabitation setting with the plaintiff, in July, 1988 when he learned that the plaintiff was planning to sell of Plot No. 1515 where construction was already taking place. This is an important statement in so far as it shows that DW1 recognised that the plaintiff did have the legal capacity to sell and transfer Plot No. 1515. It is evidence that the defendant recognised that **Judy Wanjiru Wainaina** had the indicia of proprietorship to dispose of Plot No. 1515 on her own.

The defendant averred that he had sworn an affidavit on 11th July, 1988 (defendant's Exhibit No.4) for use at the offices of Mutirithia wa Andu Co. Ltd, to show that he jointly owned Plot No. 1515 with the plaintiff. At this point counsel sought to know why a person whose name already appeared on the share certificate, as the defendant claims to have been true of himself, still needed to swear an affidavit to take to Mutirithia wa Andu Co. Ltd. The defendant's answer was that, truly, his name was already on the share certificate, but his worker had told him that the plaintiff had been to **Castigliani** seeking changes to the transfer documents. This reasoning, in my view, is strained and may not at all be carrying the truth. It is not clear to me why the defendant had to swear an affidavit regarding the ownership of Plot No. 1515.

Learned counsel drew to the attention of DW1 the content of an order regarding Plot 1515, made by **Githinji, J** (as he then was) on 12th November, 1991. This was a consent order and it read as follows:

“1. THAT the defendant herein by himself, his servants and/or his agents be and are hereby restrained from disposing, alienating, erecting any fixtures or in any manner dealing with the above-said parcel of land Plot No. 1515, L.R. 8479 NJIRU/NAIROBI until the final determination of this suit.

2. THAT the status quo be maintained until the determination of this suit.”

Counsel wanted to know how the defendant came to accomplish the further constructions he alleges he did after the plaintiff departed, notwithstanding the restraint imposed by the above Court order. DW1 said: “I got a letter from lawyers authorising me to proceed with construction.” He did not, however, produce such letters. I take it that he did the alleged further works on the suit premises entirely without lawful authority.

DW1 said that on the neighbouring Plot, No.1521 (purchased jointly by the plaintiff and the defendant), he had constructed a Church complex costing some Kshs.200,000/=. He “has fenced the whole place,” and lives with his family in Plot No. 1515. He said he had used as much as Kshs.1.7 million to develop the property. He was aware, however, that the certificate of title for Plot No. 1515 was with the plaintiff. But he insisted: “The plot is for both of us. I have lived there since 1988.”

The parties having closed their cases, the matter came up for submissions on 26th July, 2005. Learned counsel, **Mr. Kamonde** for the defendant, started and indicated he merely wanted to observe that there was “sufficient evidence to guide the Court on who is telling the truth and who is not telling the truth.”

Learned counsel for the plaintiff, **Mr. Chebii**, submitted that the plaintiff had proved her case on a balance of probabilities. He submitted that the case turned on two questions: (i) is the plaintiff the registered owner of Plot No. 1515, now bearing title No. Nairobi/Block 144/1? (ii) is the defendant a joint-owner of that plot?

Counsel submitted that from the evidence, the plaintiff is the registered owner of Plot No. 1515; she purchased the same from the Italian vendor, **Castigliani**, using proceeds which she obtained from the sale of her house in Umoja Estate. She was registered as the sole owner of Plot 1515, and the vendor executed

an instrument indicating he had sold the plot to the plaintiff. Her name appeared in share certificate No. 1794 as the sole owner of the suit plot. The addition of the defendant's name to the share certificate, counsel submitted, was unlawfully done by the defendant. Counsel placed significance on the evidence of PW2, who demonstrated that Plot No. 1515 had been purchased exclusively by the plaintiff and it was her property.

Learned counsel submitted that the evidence given by the defendant was not true, and the receipts which the defendant had produced as exhibits were actually the property of the plaintiff – but which the defendant had attempted to convert and to falsify.

Counsel noted, moreover, that the defendant had abandoned a counterclaim which he had filed, with the pleading that the plaintiff was guilty of fraud. This, in my view, is a valid point. The counterclaim had apparently been pleaded in van; it was not urged any further; and no evidence of fraud on the part of the plaintiff was produced.

Counsel noted that while there was a consent order restraining the defendant, he went ahead and did further construction on works previously begun on the suit land; and this was in flagrant disregard of the orders.

Counsel noted that whereas the plaintiff had been homeless since 1988, with no job and living in hardship, the defendant had converted to his own purposes both Plot No. 1515 and No. 1521 – and he had conceded the same.

Learned counsel, **Mr. Kamonde**, in his rejoinder merely urged that the plaintiff's claim on mesne profits had not been supported by any evidence.

As is clear from the analysis undertaking herein, I am not convinced that the plaintiff's legal ownership of Plot No. 1515 or L.R. Nairobi/Block 144/1 was achieved by way of fraud. And since allegation of fraud on the plaintiff's plot is the basis of the defendant's counterclaim, it follows that the counterclaim must fail.

No credible evidence has been tendered to show that the plaintiff and the defendant were joint-owners of Plot No. 1515. Indeed, such evidence as exists would show that the defendant had attempted by irregular means to have himself recognised as co-owner of that plot.

It is thus clearly inappropriate that the defendant went on to appropriate possession of Plot 1515, to settle there with his family and to derive the full benefit therefrom, at the expense of the legal owner, namely the plaintiff.

It is still more censurable that the defendant proceeded with his completion works on the plaintiff's property after he forced the plaintiff out, and after this Court issued orders requiring maintenance of the status quo. His constructions were, in the circumstances, in violation of the Court's express orders.

While it is common ground that the suit property had been purchased during a period of close friendship and cohabitation between the plaintiff and the defendant, it is equally clear that the purchaser and the owner of plot 1515 was the plaintiff alone. She remains in law the owner, and the defendant's claims on her land, cannot change that legal position. Even if it were true that the defendant had helped with the management of the construction of the house on plot 1515, and even if some of the defendant's money could have gone into the works, the legal position is that the property belongs to the plaintiff; and if the defendant would have any valid claim against the plaintiff, it would be restricted to pecuniary and not proprietary matters, as far as Plot 1515 is concerned.

I believe that the fairest interpretation of all the evidence in this case shows that the plaintiff has a cogent case, whereas the defendant's position feeble and unsustainable. I did not form the view that the defendant was entirely honest, in his testimony that he had contributed to the purchase price for Plot No. 1515. I was not convinced that the defendant would have been justified in taking possession of the suit

premises, occupying them with his family for more than a decade, annexing the next plot said to have been jointly purchased (Plot 1521) and making a gift to himself both plots as if the plaintiff neither existed nor had any interest at all in those properties. Such conduct would fall plainly within the meaning of cupidity. This Court can allow that cupidity is not alien to human nature, but cannot allow the defendant's avarice to wholly nullify the plaintiff's recognised rights to own and enjoy her own property.

I will decide on the plaintiff's suit by decreeing as follows

1. Within 30 days of the date hereof, the date hereof, the defendant shall vacate Plot No. 1515, namely L.R. No. Nairobi/Block 144/1 and hand over vacant possession to the plaintiff or her servants or agents.
2. The defendant shall hand over possession of the suit premises, in the terms set out in the first order herein, with the building intact and all its fixtures unaltered and unvandalised.
3. If the defendant shall fail to comply with the first order herein, an eviction order shall issue to remove him and his family and any others under his charge, from the suit premises.
4. The defendant shall pay to the plaintiff general damages in the sum of Kshs.600,000/=, which sum shall accrue interest at Court rates from the date hereof until payment in full.
5. The defendant shall pay the plaintiff's costs in this suit, with interest at Court rates with effect from the date of filing suit, until payment in full.
6. The defendant's counterclaim is dismissed with costs to the plaintiff, and these costs shall bear interest at Court rates from the date hereof, until payment in full.

DATED and DELIVERED at Nairobi this 7th day of October, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Mwangi

For the Plaintiff: Mr. Chebii, instructed by M/s. M.K. Chebii & Co. Advocates

For the Defendant: Mr. Kamonde, instructed by M/s. G. Kamonde Advocate