



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NO 3399 OF 1991

MICHAEL KILILI PLAINTIFF

VERSUS

RUTH MBETI DEFENDANT

JUDGMENT

The Plaintiff filed this suit seeking Judgment against the Defendant as follows:

“(a) An injunction to restrain the Defendant from interfering with plot No 97 Matuu Market (hereinafter referred to as “the suit plot”)

(b) Damages for trespass

(c) General Damages

(d) (Interest)

(e) (Costs)

(f) (Other relief).”

In his Complaint, the Plaintiff averred that he was the registered owner of the suit plot and that the Defendant had trespassed and continued to trespass thereon by erecting structures without his authority.

The Defendant filed Defence to the action and averred that she was the legal allottee of the suit plot and that the registration in favour of the Plaintiff was fraudulent. According to her, the Plaintiff connived with the County Council Officers (of the Council in which the suit plot was located) known to him to alter the records of registration in respect of the suit plot. In the alternative, the Defendant averred that she was entitled to the suit plot by adverse possession.

At the hearing of the suit, three witnesses were called in support of the Plaintiff’s case.

The first witness (PW 1, the Plaintiff himself) said that he bought the suit plot from one Muia Mbithi in 1978 for Kshs.25,000/=. It is common ground that the said Mbithi is now deceased and could not be called as a witness in this case. Over the years, the Plaintiff paid the annual rents in respect of the suit

plot. He produced as exhibits in this case a bundle of receipts of some of the rents paid by him (See P Exhibit 3). When he began constructing on the suit plot, he was stopped by the Defendant. The Defendant later built a structure on the suit plot. The Plaintiff said that he obtained a building plan from the Machakos County Council which was evidence that one was allowed to build on the plot in respect of which it was issued – in this case the suit plot.

PW 2 was Mr Dan Joshua Kasina. Mr Kasina is an Advocate of this court. His role was limited to producing an Agreement of sale between the Plaintiff and the Deceased which was not in the language of the court together with its translation into English. Those were produced as P Exhibit 1 and P Exhibit 1a respectively. According to that Agreement, the Deceased sold the suit plot to the Plaintiff on 16th May, 1978 for Kshs.25,000/=. Kshs.500/= was paid at or before the execution of that Agreement and the balance of Kshs.24,500/= was to be paid on 3rd June, 1978. The Agreement was executed by the parties thereto. Although he did not have proof of the same, the Plaintiff stated in his testimony that he subsequently paid the Deceased the balance of the purchase price.

PW 3 was Mr John Nduva Motonye. Mr Motonye is a Town Council surveyor in the Town Council within which the suit plot is located. He said that according to the records of the Council, the suit plot belonged to the Plaintiff. He produced two documents to support this. The first one was a letter dated 28th June, 1991 (P Exhibit 4). That letter was written by the Acting County Clerk of the Council. It stated that the suit plot was registered in the name of the Plaintiff. He also produced a certified copy of the register which showed that the Plaintiff was the registered proprietor of the suit plot. The register was also cited to the court with the same result. The Defence called two witnesses. The first defence witness was the Defendant herself (DW 1). She said that she bought the suit plot from one Muya. She said she did not remember his last name even though this was clearly indicated on the alleged Agreement between her and the vendor which was placed before me by consent. That Agreement was entered into on 21st September, 1977. By that Agreement, the Deceased sold the suit plot to the Defendant for Kshs.3,000/=. On cross examination, she said that she was allocated the suit plot although she admitted that she did not have any proof of the allocation to her. She also said that the Plaintiff got the suit plot by fraud but once again admitted that she did not have proof of the fraud. Finally, she also said that she had been in possession of the suit plot for over 12 years and once again she did not have proof of that.

The other defence witness was Mulee Kivuvo (DW 2). DW 2 said that he was present when the Deceased sold the suit plot to the Defendant and even countered that he is the one who wrote the Agreement for the sale.

I have carefully considered the testimony of the witnesses and I am compelled to find that the Plaintiff has established his case on a balance of probability to entitle him to Judgment. His testimony and that of his witnesses was consistent with his claim. In her Defence, the Defendant purported to base her claim of the suit plot on allotment and adverse possession yet she did not disclose to the court who allocated it to her or how long she had occupied it before the Plaintiff brought this action to challenge her claim thereto. In the written submissions filed by her Counsel, the claim for adverse possession was not urged and I take it that it was abandoned. That was proper as there was no evidence whatsoever to support such a claim. In any event, there was no counterclaim set up by her upon which she could make such claim.

In the written submissions filed by the Defendant's Counsel, a lot of emphasis was placed on the question of whether the Plaintiff completed paying the purchase price to the Deceased. This could not assist the defence case in any way and in my view, was a non-issue. Even if I were to consider that point, for arguments sake, I do not think that it lay in the Defendant's mouth to urge the point. This is because she was not the one selling the suit plot nor was she the one entitled to payment. That being the case, she could not be heard to say that the Plaintiff breached the Agreement which he entered into with the Deceased.

The Plaintiff proved before me on a balance of probability that he is registered as the owner of the suit plot in the records of the Council in which it is located. It appears that that Council is the one which had power to allocate the suit plot. Whether it did so properly or not is another case but not sufficient to disinherit the Plaintiff against whom there was no evidence of any wrong doing.

In the result, I find for the Plaintiff and enter Judgment against the Defendant by issuing an injunction to restrain her from interfering with the suit plot.

I was not guided on the quantum of damages to be awarded for trespass or general damages but I recognize that the Defendant has breached the Plaintiff's legal rights for a very long time and I award him nominal damages of Kshs.10,000/=. I also award him the costs of the suit.

Dated and delivered at Nairobi this 15th day of July, 2004.

ALNASHIR VISRAM

JUDGE