



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS)**

**CIVIL CASE 2755-OF 1939**

**REGINA MININI MUSYOKA .....**  
**.....PLAINTIFF**

**VERSUS**

**PAUL KARENJU WAMBUGU**  
**.....DEFENDANT**

**JUDGEMENT**

REGINA MUHIKI MUSYOKA (to be referred to in this judgement as "the plaintiff") instituted this suit through Miss ABIDA ALI ADVOCATE against PAUL KARENJU WAMBUGU (to be referred to as "the defendant") through a plaint drawn and filed on ten 26th June 1989 but amended on 19th March 1996,

In the original plaint the plaintiff pleaded that BERNARD WILLIAM MUSYOKA (to be referred to as "the deceased husband") was >her legal husband and co-allottee of plot No. 3 - 110 Nairobi City Commission, Mathare North Project (to be referred to as "the suit property") which was allotted to them in 1985 by the Nairobi city Commission (to be referred to as "the City Commission). The terms and conditions of offer by the City Commission., duly signed by the Plaintiff and her deceased husband upon allotment in 1985 required

that the suit property would not be assigned, transferred or sublet for the first five years from the date of allotment, and that since that allotment the plaintiff and her family constructed semi permanent houses both for occupation by the plaintiff and her family and for rental purposes,

The plaintiff further pleads that on or about, the 13th June 1989 the defendant presented to her a court order, issued in the Resident Magistrate's Court Civil Case No. 122 of 1989 PAUL WAMBUGU VS BERNARD WILLIAM MUSYOKA and the defendant attempted both to evict the plaintiff and her family and to demolish structures on the suit property. The defendant did so for having purported to have bought this suit property from the deceased husband in 1983 for the sum of Kshs. 3,000/=. The plaintiff pleaded that she was a party to that sale transaction, if any.

Reasons wherefore the plaintiff sought judgement to be entered for her against the defendant in the following terms:-

- (a) a declaration that the purported sale of the suit property to the defendant is null and void.
- (b) an injunction do issue restraining the defendant, his servants and/or agents or howsoever otherwise from evicting the plaintiff, her family and tenants from the suit property and tenants from the suit property and from demolishing the structures thereon, and otherwise from preventing the plaintiff or in anyway interfering with the peaceful enjoyment of the suit property
- (c) an order that the City Commission do reinstate the names of

The plaintiff and the deceased husband as the owners of the suit property,

- (d) damages
- (e) Costs of this suit
- (f) such other in further relief as this court may deem proper in the circumstances.

In the amended plaint, the plaintiff further pleaded that her deceased husband was at all material times and until his death, of unsound mind and had no capacity to transact any business on his own, a fact well known to the defendant and that, on diverse dates unknown to the plaintiff, the defendant knowing of her deceased husband's incapacity to transact business woed him to sell to him the suit property.

In support of the averments in the plaint, the plaintiff gave evidence and called one witness DR, FREDRICK RICHARD OWITI (PW 2),

In her evidence the plaintiff testified that, she and her deceased husband were jointly allotted with the suit property by the City Commission and a letter of allotment was issued to them.

The Plaintiff was unable to and did tend the original Allotment letter to this court. Under cross examination by Mr, Sharma, the plaintiff said that the original letter of allotment was in possession of the advocates. They did not remove it from their brief to show to both the defendant and the court. In the result the original letter of allotment of the suit property to the plaintiff that her deceased husband has been kept away from the court,

Presented to the court, and marked for identification only (PE-MFI-1) is a copy of that letter of allotment, Though the plaintiff told the court that she and the deceased husband signed it; she contradicted that evidence under cross examination when she told the court:

"I have only shown to the court a copy of the allotment letter marked PE-MFI-1, They bear the plot number. The people have signed the 1st page, I have not signed anywhere else., and not even on page 3 of TERMS AND CONDITIONS OF OFFER, I cannot tell whether my husband signed it is not as he was mentally sick, I signed the letter of allotment at Dandora., Housing Department of Nairobi City Council are supposed to be with my advocates," A close scrutiny of page 3 of the Terms and Conditions of offer reveals that the allottee signed it in the presence of somebody, When the plaintiff stated in her evidence before court that she did not sign that page, and that the deceased husband did not also sign it, then I must ask myself whether or not the plaintiff is being truthful,

Another glaring contradiction in her evidence relates to the

date of the alleged joint allocation of the suit property to them. In her evidence in-chief in fact it was at the beginning of her evidence, the plaintiff had this to say:-

"PW 1: REGINA MUNINI MUSYOKA

I am the plaintiff and the wife to Bernard William Musyoka. On 4th November 1986 I was not allocated with any plot but I recall to have been allocated with one in 1983, This was Plot No, 110 situated at Mathare North in Nairobi, if:

The copy of the letter of allotment marked PE-MF1-1 is actually dated the 4th November 1986 whereby the plaintiff and the deceased husband accepted that allotment. Therefore her evidence in court completely contradicts the contents of the letter of allotment, Hence the significance of production of the original letter of allotment. Failure to tender that original letter of allotment as an exhibit, and as part of her evidence, has given me of concern, i The Plaintiff then went further to tell the court that there! were conditions attached to the letter of allotment which she and! the deceased husband were given, presumably to obey. They were told not to sell that plot, suit property, or change the names into other persons i.e. not to assign, transfer or sell the suit property to anybody. Since then they built temporary structures on the said suit property, The plaintiff said, however, that her deceased husband breached those conditions by purporting to sell the suit property, without her consent, to the defendant. As a result of that alleged sale, she said, the defendant, attempted to evict her and her family from the suit property, hence this case she said that, any sale of the suit property was illegal for two reasons, first because he never told or consulted with her, Secondly, because he was also either sick or drunk, I recorded the plaintiff to be saying in her evidence in-chief on this point as follows:-"The defendant has never come to tell me that this plot has been sold to him. The defendant attempted to evict me from the plot way back in 1989= He claimed that the plot had been sold to him by my husband. My husband never told me that he had intended to sell this plot to anybody because he was always sick. My husband died on 29th May 1995, I know that my husband used to drink but I cannot tell whether he died due to drunkenness. he died in Mathare Mental Hospital Nairobi, He started having mental problems since 1967 and he was in and out of the said hospital until his death,"

DR. FREDRICK RICHARD OWITI (PW 2) gave evidence on the mental status of the plaintiff's deceased husband, Dr. Owiti is a holder of Bachelor of Medicine (MB) and Bachelor of Surgery (Ch, B) Nairobi University 1978, He holds a Masters Degree in Psychiatry (MRC. Psyc) United Kingdom 1984 and in a lecturer at the University of Nairobi and works at both Kenyatta National Hospital and Mathari Hospital, He first saw the plaintiff's deceased husband at Mathari Hospital on 12th May 1994 when he was taken there by the plaintiff and admitted with the Maximum Security Unit, Inflammatory ward. The deceased husband's condition was bad. He could not walk without . being supported, he was confused and disoriented in time and place, Dr, Owiti said that he was also told by the

Plaintiff that the deceased husband drunk alcohol excessively and in the process damaged his liver. The signs of the liver damage and his confusion or loss of memory suggested that he was suffering from a psychological complication known as KORSAKOFFI PSYCHOSIS or KORSAKOFF DIME??TIA, whose main symptoms are loss of memory, either long or short, term, and confirmation of ,speech, Such a person would be considered of unsound mind, Dr. Owiti ventured to say that, in that mental state, the deceased husband would not have been in a position to contract or enter into any contracts, He required legal protection of his property, Dr, Owiti tendered into evidence his first report on the plaintiff's deceased husband as Exhibit No. 3 dated 30th May 1994, A second report is dated 6th February 1996 and he tendered it into evidence as Exhibit No, 4, In the first medical report dated 30th May 1994 (Exhibit 3)

plaintiff's deceased husband: "TO WHOM IT MAY CONCERN BERNARD WILLIAM MUSYOKA

The above named has been under? my case since May 1994, Mr., Musyoka suffers from mental disorder of the type KORSAROFFS - Wernicke's encephalopathy. This is a dementing condition secondary to excessive alcohol abuse. The main symptoms are poor memory, lack of judgement and Confabulations.

For instance, on the day of his admission, he was not orientated for place and time. Asked who the President of Kenya was, he said he only knew "Mzee Jomo Kenyatta". I believe this is the kind of person that would require court protection as is stipulated in the Mental Health Act 1989, I understand he has a court case pending. Presently he is not fit to plead and he is still undergoing treatment at the above hospital as Civil later. Yours faithfully BR, F.R, OWITI

CONSULTANT PSYCHIATRIST"

second medical report of the 6th February 1996 Dr. owiti wrote

TO WHOM IT MAY CONCERN

RE; BERNARD WILLIAM MUSYOKA

I understand from the above named person's wife. REGINA

MUNINI MUSYOKA. That her husband died in May 1995.

The late Musyoka was under my care and died while still

on our records as an out-patient,

OPINION

The late MUSYOKA was suffering from chronic alcoholism

with multiple secondary effects e.g. Korsakoff's

psychosis, a kind of dementing condition, and deranged

liver enzymes, For Mr., Musyoka to develop KORSAKOFF it

was an indication that his drinking had been a problem

Long before 1994,

Therefore any transaction he carried out two years before

May 1994 should not be taken as valid. Please see my

letter of 30,5,94,

Yours faithfully

DR. F,R, OWITI

CONSULTANT PSYCHIATRIST" Under, cross examination Dr. owiti conceded that the plaintiff's deceased husband had these symptoms for the past two years prior to the 12th May 1994 and any transaction he may have entered into during those two years would not be valid.

It is therefore the plaintiff's case, supported by Dr. Owiti that the deceased husband was sick in the mind due to excessive alcohol two years before 1994, This would be as from 1992, Elsewhere in cross examination the plaintiff did tell the court that she first took her deceased husband to Mathari Hospital in 1984 where he would stay in hospital for about two weeks and would be discharged, he had been

admitted at Mathari Hospital on three such occasions.

It is therefore reasonable to infer that the plaintiff's deceased husband's alcoholism deteriorated much as from 1992 to 1994, leading to his death in the month of May 1995, Before 1992 he was drinking heavily but would only be admitted into hospital on and off,

As against those pleadings and evidence, the defendant filed his amended defence on the 13th August 1997, In paragraph 3 of That, defence,, the defendant denied that the suit property was alcohol to the plaintiff, he averred that the suit property was originally allotted to the Plaintiff's deceased husband who then sold it to him. Thereafter Nairobi Resident Magistrate gave orders in Civil Suit (Sheria House No, 5832 of 1986 and 122 of 1989, vesting the suit property into the defendant and ordering eviction of the plaintiff's deceased husband there from. The defendant further averred that the plaintiff's deceased husband held the legal and beneficial title to the suit land and was capable and did sell it to the defendant, The defendant denied the incapacity of the plaintiff's deceased husband to transact, business because the transaction was subsequently reduced into writing and signed in the presence of an advocate of the High Court of Kenya, it was witnessed by independent witnesses and the plaintiff was a party to it,

In support of his pleadings., the defendant gave evidence and said that, the plaintiffs deceased husband sold the suit property to him in 1982 through a sale agreement which was also signed by the plaintiff. He tendered that sale agreement with evidence as Defence Exhibit No, 1 dated 8,12,1982,

I have seen and scrutinised this document. It is in original and the defendant identified his signature and that of Bernard William Musyoka on it. The sale price was Kshs.3000/=, The defendant stated in the said agreement that, he paid Shs,1500 upon signing of this agreement, leaving a balance of Shs,1500/= to be paid later,The defendant said that he made a further payment of Shs.400/ = on 26th April 1983 to the plaintiff's deceased husband,- which receipt he acknowledged by signing acknowledgement receipt tendered into evidence as Defence Exhibit No, 2, The defendant told the court, that the plaintiff too signed this acknowledgement receipt and he showed to court her signature, appearing just below that of her deceased husband, There is the first, entry on Defence exhibit 2 which reads;-

"DATE; 26,4,83: PLOT NO, 3 - 110

MINI Bernard William Musyoka ID/No 4427695/67 wa

George Village and I Mrs Musyoka Id No, 442770/69

nimechukua form No, 4046 zone Y12B ili kuitika jina

kisha nimrudishiya mwenyewe Pail Karenju,

Sahihi B. Musyoka

Sahihi Regini Munini" It is not clear what this entry was supposed to prove, I find, however, entries made therein distorted. The names of Mrs. Musyoka seem to have been added later but I am not so sure. It is sage not to rely on this entry, I go hold.

The defendant further told the court that he paid another Kshs,1000/= to the plaintiff's deceased husband on 11th May 1983 in front of his advocate and he was given a receipt, which he tendered into evidence as Exhibit. No, 3, I have examined this exhibit and it is recorded that it is the final installment in respect of sale of the suit property. This payment was witnessed

By Mr. S, Sharma advocate not Mr., V, Sharma who is representing the defendant in these proceedings,

The defendant then went to register the suit property in his name and was told to pay a total of Kshs.35,181 as contained in a demand letter dated 7th April 1988 and tendered into evidence as exhibit No, 4, This letter is addressed to the plaintiff's deceased husband because the transfer from him to the

defendant had not been effected, The defendant made the following payments to Nairobi City Council on 5.4,1998 and was issued with receipts; as follows;-0

(a) Ground Rents - 1985 - 1988 Shs.480/=

Receipt no. 892478 Exhibit 5A.

(b) Survey fees, legal fees and road maintenance fee Shs,5810 and receipt No, 892477 of C /4/88 issued Exhibit. 5B,

(c) Rates 1985 - 1988 Shs, 1165/60 Receipt No, 892479 dated 5/4/88 issued and tendered with Evidence Exhibit 5C,

(d) Principal outstanding Sum Shs, 22,644/75 and receipt No, 137950 of 5/4/88 issued Exhibit 5D.

(e) Interest in lieu of Notice Shs,481,20 Receipt No. 137,951 of 5/4/1988 issued (E x 5 e ) ,

(f) Arrears to 29,2,88 of Shs,4,600/= Receipt No, 137952 of 5/4/88 issued (Ex, 5f),

The defendant then asked the plaintiff 's deceased husband to

effect the transfer of the suit property to the names but the deceased husband refused. Consequently the defendant, filed a suit at Sheria House, being Resident Magistrate's Court at Nairobi CIVIL

CASE NO, 5832 OF 1986 PAUL KARENJU WAMBUGU VS BERNARD WILLIAM MUSYOKA. A copy of the plaint is that suit is annexed to the replying affidavit of the defendant in support of his grounds of objection filed on 25th July 1989 to a chamber summons dated 26th June 1989, I will reproduce that plaint in this judgement. It reads:-

IN THE RESIDENT MAGISTRATE'S COURT

AT NAIROBI

CIVIL SUIT 5832 OF 1986

PAUL KARENJU WAMBUGU .....PLAINTIFF

VERSUS

VERSUSBERNARD WILLIAM MUSYOKA..... ,,,,,,,,,,,,,, DEFENDANT

PLAINT

1, The plaintiff is a male adult, For the purpose of this suit the plaintiff's address is care of VISHNU SHARMA, Advocate, Central Building, Moi Avenue P.O. Box 59957 Nairobi,

2, The defendant is an adult male. The summons will be served through the plaintiff's advocate's office,

3, By an agreement made in writing between the plaintiff and the defendant on 7th day of January 1983, the defendant agreed to sell and transfer all the right, title and interest of the defendant in plot number Y12B George Village, Mathare Valley, Nairobi to the plaintiff for a total sum (purchase price) of Kshs,3,000/= ),

4 The plaintiff pursuant to the said written agreement paid to the defendant the total purchase price of

Kshs.3,000/=),

5. Subsequently the title number of the said plot was converted to and/or re-designated as plot No, 3-110 MATHARE VILLAGE, NAIROBI,

6. The defendant has now refused to transfer the said plot to the plaintiff.

7. The plaintiff has also delivered had placed on the said plot 6 lorries of stones for construction of a building, The defendant, without any authority, cause or reason whatsoever, removed the said stones from the site and the plaintiff claims from the defendant a sum of Kshs.7,200/=.

8. Notwithstanding repeated demands for payment and notice of intention to she having been given the defendant has refused, failed and/or neglected to settle the liability,

9. The cause of action arose within the jurisdiction of this Honorable Court,

REASONS WHEREFORE the plaintiff prays for judgement

against the defendant for:-

(a) Specific performance by the defendant of his contract to transfer the said plot No, 3-110 Mathare Valley Nairobi to 'the plaintiff.

(b) Kshs,7200/=

(c) Costs of this suit

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(d) Interest on (b) and (c) at court rates,

(e) Any other further or alternative relief that this Honorable Court may deem fit to grant.

Dated at Nairobi this 2nd day of December, 1986,

VISHNU SHARMA

ADVOCATE FOR THE PLAINTIFF"

Apparently, judgement was entered for the plaintiff in that suit, (now the defendant in this court). For an order was issued by the Resident Magistrate Mr., W,M, Muiruri on 8th June 1987 in that suit, .which now the defendant has presented to this court as his exhibit 6, The Resident Magistrate made the following orders in that suit,-

"IT IS ORDERED:-

1, That land parcel No. 3-110 Mathare Village be and is hereby vested in the plaintiff,

2, THAT the Senior Executive Officer of this court is hereby authorized to sign the transfer papers of the land parcel No, 3-110 Mathare Village and to convey and execute on behalf of the above defendant,- the transfer of the said parcel with the name of the plaintiff,

3, That Nairobi City Commission do enter on its records that the said parcel 3-110 Mathare Village is owned by the Plaintiff/deed holder,

GIVEN under my hand and the seal of this court at Nairobi this 8th day of June 1987,

Issued on this            day of June, 1987,

W.M. MUIRURI RESIDENT MAGISTRATE

No appeal to this court against the decision of the Magistrate in that suit or against the orders of the 8th June 1987 made by Mr, Muiruri was ever filed. The plaintiff's advocate's reference to it in submissions was to the effect that I am not bound by the decision of the Magistrate, It is not a question whether this court is or is not bound by the decisions of the subordinate-courts, The legal position is that a competent court, acting within its proper jurisdiction, has vested the suit property into the defendant and that decision has not been challenged in an appeal and overturned. It is still a valid court order. In fact the court, through its Executive Officer signed the Transfer of the suit property from the plaintiff's deceased husband's names to the defendant, A copy of that Transfer was presented to court as defence Exhibit No, 7, The transfer was effected on 11th October 1988, The defendant then proceeded to draw an assignment, pursuant to the decision of the court in that suit and the court order of 8th August 1988, whereupon the CITY COMMISSION transferred the suit property to the defendant,

It was so registered on 25th October 1988, A copy of that Transfer was' presented to court as Defence Exhibit No, 8, Stamp duty was duly paid by the defendant. The suit property was then given new reference numbers being No, 830110,

It is the defendant's case through out, that the suit property was never allocated jointly to the plaintiff and her deceased husband but to the deceased husband only. The defendant presented to court the original letter addressed by the Director of Housing Development - City Commission to the defendant's advocates as Defence Exhibit 10, It reads:-

"VISHNU SHARMA

ADVOCATE

P.O. BOX 59957

Dear Sir, i

RE; PLOT NO, 3-110 MATHARE NORTH SCHEME NAIROBI HCCC NO, 27 55 OF 1989  
REGINA MUNINI MUSYOKA VS WAMBUGU KARENJU

Thank you for your letter VS/8906/43 of 10th July

1989, The above quoted plot No, 3-110 Mathare

North site and service scheme was allocated to MR,

BERNARD WILLIAM MUSYOKA on 20th August 1985,

Yours faithfully,

H.K, MUGO

DIRECTOR OF HOUSING DEVELOPMENT"

After obtaining that confirmation, the defendant filed another suit against the plaintiff's deceased husband in the Resident Magistrate's Court at Nairobi Civil Suit No, 122 of 1989,

In that suit, the defendant (plaintiff in that suit) pleaded that the defendant (now plaintiff's deceased husband) sold and transferred the suit, property to him on 7th January, 1983, the subject matter of Civil Suit No, 5832 of 1986 wherein the court signed the transfer documents in respect of the suit property; that since 7th January 1983 the plaintiff's deceased husband has wrongfully held on to the possession of the suit property and has thus trespassed and still does so; that by reason of those matter the defendant has been deprived of its use and enjoyment to the said suit property and her suffered loss. Reasons wherefore he prayed for possession of the suit property,

On the 10th March 1989 Ag, Senior Resident Magistrate Mrs, H.M. Okwengu gave the prayers or order sought which the defendant has presented to court as his defence exhibit 11, It reads;-

IT IS ORDERED

1, THAT the defendant do vacate the suit premises known as plot NO, 3-110 Mathare Village, Nairobi and handover vacant, possession to the defendant within 14 days from the date of service of this order failing which the defendant to be evicted from the premises",

It was therefore at this stage that the plaintiff instituted this suit and obtained an injunction., restraining her eviction from the suit, property pending the outcome of this judgement.

The plaintiff did not,, and has not, apparently challenged the court decisions in RMCC 5832 of 1986 and RMCC No, 122 of 1989

Either by way of appeal or review, As a direct of those two suits., the legal position is that the suit property has already been declared the property of the defendant, and has been registered in the defendant's name.

Faced with this, legal situation. the plaintiff, through her advocate's submissions, has invited this court not to rely on the decisions in RMCC 5832 of 1986 and RMCC122 of 1989 because this court is not bound by them.

In my view the issue of ownership of the suit, property came up for determination in RMCC No, 5832 of 1986 as per the pleadings in That suit. This was the sole reason for my reproduction, in this judgement, of the plaint in that suit. The pleadings at paragraph 3 thereof are quite clear and so in the prayer for specific performance of the contract. The order of the court was and is also clear. It vested land parcel No, 3-110 Mathare Village, the suit property, in the plaintiff in that suit, who is the present defendant. That having been done, the suit property became the property of the defendant. The plaintiff now is Estopped from claiming ownership of the same property through a second or subsequent suit under the express provisions of S, 7 of the Civil Procedure Act (Res Judicata), which reads:-

"7. No court shall try any suit or issue in which the matter directly and subsequently in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent-raised, and has been heard and finally decided by such court,"

The legal fact was pleaded by the defendant at paragraph 3 of the AMENDED DEFENCE filed on 13th August 1997, though not in the wording of Section 7 of the Civil Procedure Act.

The upshot of this is that the plaintiff's suit is incompetent and bad in, law by the operation of Section 7 of

the Civil Procedure Act.

Where a plaintiff is precluded by rules from instituting a 'further suit in respect of any particular cause of action, (Section 8 of the Civil Procedure Act).

Consequently, even under this section, this suit would also be incompetent and bad in law.

Even assuming that Sections 7 and 8 of the civil Procedure Act were inapplicable, I hold, from the recorded evidence before me that the plaintiff has not sufficiently proved her claim on the balance of probabilities. The defendant, through his evidence and documents proved, has proved to my satisfaction that he bought the suit property from the plaintiff's deceased husband, to whom the suit, property had originally been allotted to by the City Commission,

The defendant may have been alcoholic, he may have died from alcohol poisoning in May 1995, there is however no proof that on the 8th December, 1982 when he entered with a sale agreement Defence Exhibit. I and received further money from the defendant on 26th April 1983 and 11th May 1983 (Defence Exhibits 2 and 3 respectively) he was of unsound mind by reason of alcohol. Dr, owiti never told the court that in 1982 and 1983 the plaintiff's deceased husband was of unsound mind.

He admitted that alcoholism is a progressive illness which most likely runs chronically. This means that a person starts of when he is quite a normal person. He then becomes addicted to alcohol and, ends up drinking heavily unabated. Then eventually the situation deteriorates and he dies from it.

Dr. Owiti told the court that the deceased husband had the Symptoms of insanity for the past two years from 12th May 1994, Before then he had been admitted into Mathare Hospital on and off.

Consequently I cannot, on that evidence, hold that on 8th December, 1982, 26th April 1983 and 11th May 1983 the plaintiff's husband was of unsound mind and incapable legally of entering into

contractual obligations.

For these reasons the plaintiff has failed to prove this case on the required standard and I accordingly dismiss it with costs to the defendant,

There is a counter claim filed by the defendant, he has Pleaded that, pursuant to the written agreement of sale dated the 7th January 1983, the completion date of the transfer of the suit Plot was March 1983 and that he should have been put in possession on the 7th January 1983, He thus claims mesne profit from 7th January 1983 possession of the suit property is given to him,

in his evidence before me, the defendant quantified this claim. He said he is seeking for Shs,300,000/= based on an annual 18750/= for 16 years from 7th January 1983. He did not state in his evidence in-chief why he based his claim on Kshs,18,750/= per annum. He also did not. call any evidence to support this claim.

Mesne profits are special damages which must both be pleaded and proved, As there is no such proof, this counterclaim fails and it is hereby dismissed.

It is so ordered.

Dated and delivered this 14th February 2000 a.m.

A.G.A, ETYANG JUDGE

dated and delivered this 14th day of February 2000 in the presence of V. Sharma for the Defendant who is present, Miss ojoo holding brief for Miss Ali for the plaintiff who is also present.

Hellen Wanja - court clerk in attendance

A.G.A. ETYANG

JUDGE 14.2.2000

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. -2755 OF 1989

REGINA MUNINI MUSYOKA..... PLAINTIFF

VERSUS PAUL KAREN JU WAMBUGU..... DEFENDANT

R U L I N G

On the 14th February, 2000 I delivered my judgement in this suit and my decision was that Plot No.3-100 MATHARE NORTH SCHEME (to be referred hereinafter as "the suit property") had been vested into the ownership of PAUL WAMBUGU KARENJU (to be referred to as the defendant") through a court order issued by Mr. W. M. Muiruri on 8th June, 1987 in R.M.C.C. No.5832 of 1986 Sheria House, Nairobi. That Court order was presented to this court during the trial as defence exhibit No.6.

It was further my decision that the suit was transferred to the defendant through a transfer duly signed by the Executive Officer of the Resident Magistrate's Court, Sheria House, Nairobi pursuant to another Court order issued in RMCC No.122 of 1989. A copy of that transfer was presented to court as a defence exhibit No. 7.

Subsequent to that, an Assignment was drawn up and registered on the 25th October, 1988 by the Nairobi City Commission in favour of the defendant. A copy of that Assignment was presented to Court as defence exhibit No.8. It was therefore my decision that the direct consequence of that registration was that the suit property was legally- vested into the defendant on that 25th October, 1988.

As that legal transfer and subsequent registration of the suit property in favour of the defendant has never been invalidated by a superior court order, both transfer and registration are deemed to be duly valid and legal.

In the substantive suit REGINA MUNINI MUSYOKA (hereinafter to be referred to as "the plaintiff") sought for a declaration that the sale of the suit property to the defendant by her husband BERNARD WILLIAM MUSYOKA (to be referred to as "the deceased") was null and void because (a) the suit property had been allotted to her and the deceased jointly and she had not been consulted by the deceased; (b) the deceased, at the time when he purported to enter into the contractual transaction with the defendant had become of unsound mind by reason of alcoholism or drunkenness. After due consideration of the evidence before me, I rejected the Plaintiff's prayer and dismissed her suit and confirmed the defendant to be the legal owner of the suit property.

The direct legal consequence of my decision was that the defendant became entitled to vacant possession of the suit property and would be entitled to an order of eviction against the plaintiff from the suit property. The plaintiff is, as of now,, in possession and occupation of the suit property and would be entitled to an order of eviction against the plaintiff from the suit property.

The plaintiff is, as of now, in possession and occupation of the suit property.

The plaintiff has now come back to court in this Notice of Motion dated 6th March, 2000 filed under order 41 Rule 4 of the Civil Procedure Rules, seeking an order of stay of execution of my said judgement, pending the hearing and determination of an appeal. There are five grounds in this motion. There is also supporting affidavit of the plaintiff which Miss Barbara Ojoo Advocate has relied on in her submissions.

Miss Ojoo's first ground is that the plaintiff, being dissatisfied with my judgment, intends to appeal against the whole of the said decision. Miss Ojoo did not make any submissions in support of that ground. In any case there was nothing else to submit.

Miss Ojoo submitted that the plaintiff had already filed a Notice of Appeal and is now in the process of compiling the record of Appeal. What she did not state is that, for purposes of this Notice of Motion, and pursuant to the provisions of order 41 Rule 4 (4) of the Civil Procedure Rules, an appeal to the Court of Appeal is deemed to have been filed when, under the rules of that court, Notice of Appeal has been given. I believe Mr Sharma has no quarrel with that.

Miss Ojoo's third ground is that there has been no delay on the plaintiff's part in pursuing the intended Appeal. Again, the court and Mr Sharma have no quarrel with that. I will record the court's appreciation in the speedy filing of the Notice of Appeal

Soon after my judgement was delivered.

Miss Ojoo's fourth ground in support of this motion is probably the most important one. This is that the plaintiff is likely to suffer irreparable loss and damage if the stay of execution is not granted. She submitted that, indeed if the plaintiff is not granted a further stay of execution, her case would lack any meaning.

Miss Ojoo's submission, taken to its logical conclusion, is that the plaintiff has an arguable appeal "which will be rendered nugatory unless a stay of execution is ordered. Miss Ojoo in fact did submit that the plaintiff will take up the legal point in the Appeal that she was not a party to the earlier suits between the deceased and the defendant and she would therefore not be bound by the court orders issued in those suits, in which the defendant was found to be the owner of the suit property. Mr Sharma, on the other hand, has submitted that the plaintiff does not have an arguable appeal.

The effect of my decision on the application of the doctrine of Res Judicata was that the plaintiff, litigating as the wife of the deceased, would be litigating under the same title as the deceased in this suit and would therefore be stopped from doing so by the operations of Sections 7 and 8 of the Civil Procedure Act. Whether I was right or wrong on the interpretation of both fact and the law placed before me is irrelevant for purposes of this application.

The criteria for the exercise of the discretion to order a Stay of execution of a decree are different in the High Court and the Court of Appeal. Different considerations apply in these two courts.

In the Court of Appeal, the test as laid down by that court in many rulings, is whether an applicant has an arguable appeal which would be rendered nugatory unless a stay is ordered. This test follows the provisions of Rule 5(2) of the Court of Appeal Rules and also is common sense. Whether an appeal is arguable or not is for the Court of Appeal to decide and not the Court whose decision is appealed against.

in the High Court, exercising its original jurisdiction, the test whether to order a stay of execution or not is whether an applicant has satisfied the following three conditions:-

(a) That the Applicant may suffer substantial loss unless the order of stay is made;

(b) that the applicant has made the application for stay without unreasonable delay; and

(c) that the applicant has given such security)- as the court may order, for the due performance of the decree or order which may ultimately be binding on him.

The issue for my determination is whether or not the plaintiff has satisfied these three points. I have already dealt with the issue of delay and have stated herein that this application has been filed expeditiously.

On the issue of security Miss Ojoo has submitted that the plaintiff's offer is a pledge that she will not dispose off the Suit *property* during the pendency of the appeal. But with due respect to Miss Ojoo, the plaintiff's pledge does not amount to anything. Any attempt by the plaintiff to dispose off this property in whatever manner would be null and void because she has no title in the suit property. It does not belong to her.

Fortunately for the plaintiff, the defendant has informed the court, through Mr Sharma, that he does not intend to evict the plaintiff from his property but on condition that the monthly rent of Shs.4,800 collected from the suit property by the plaintiff be deposited into an interest earning account with Barclays Bank of Kenya Ltd. Moi Avenue Nairobi in the joint names of both advocates.

In a replying affidavit filed by the defendant on 9th March, 2000, which has not been rebutted by the Plaintiff, it has been shown that the suit property is composed of six rooms and each room is being rented out by the plaintiff for Shs.800. Miss Ojoo has submitted that the plaintiff is a vegetable hawker earning Shs.100 net daily (Shs.3,000 per month) and that this sum is just enough to take care of her family. Miss Ojoo also submitted that the defendant's counterclaim had been dismissed for lack of evidence in support.

I have just stated hereinabove that the suit property was registered in the name of the defendant in 25th October. 1988. Since then the plaintiff remained in occupation. Between the 25th October, 1988 and date of my judgement on 14th February, 2000 there was no evidence adduced by the defendant to show that he lost mesne profits in the sum of Shs.18,750 per annum. The defendant does not Wish to pursue that claim.

The defendant, has however, put before me, through his affidavit which has not been rebutted, that the plaintiff is collecting Shs.800 per room per month and it is his wish that, from the date of this judgement, that money be paid to him. In my view this is a reasonable request and I will allow it. If the plaintiff finds that she cannot raise this money, then she can hand over vacant possession of those rooms to the defendant for which she cannot raise the KShs.800. If it is her wish to occupy all the rooms then she must pay Shs.4,800 as prayed for by the defendant. I will give the order of stay of execution subject to the payment of that rent.

The following are now the orders of this court:

(a) There be an order of stay of the judgement of this court given on 14th February, 2000 on condition that a monthly rent of KShs.4,800 from 14th February, 2000 is deposited by the plaintiff in an interest earning bank account with Barclays Bank of Kenya Ltd. Moi Avenue Nairobi in the joint names of VISHNU SHARMA Advocate and ALI & ASSOCIATES Advocates.

(b) Costs of this application be paid by the plaintiff to the defendant. !

It is so ordered.

Dated this 16th March, 2000.

A. G. A - ETYANG ' JUDGE

16.3.20Q0

Delivered in the presence of Mr Sharma for Defendant and Miss Ojoo for the Plaintiff. Both Regina Munini (plaintiff) and Paul Karenju Wambugu (Defendant) are in attendance. Miss Helen Wanja Court Clerk in attendance as well.

A - G \_ A. ETYANG ' JUDGE

16.3.2000