



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

**CIVIL SUIT NO. 82 OF 1997**

**IRENE NGOMBO MSHINGO.....PLAINTIFF**

**VERSUS**

**MIRIAM KADOGO & 6 OTHERS.....DEFENDANTS**

**JUDGMENT**

This is yet another saga arising out of the peculiar phenomenon dubbed "house without land" in Mombasa. It is so notorious that it has virtually been accorded judicial notice. But it has to be dealt with as a matter of national policy as it flies in the face of written law. Perhaps it will be addressed in the current initiatives on review of all laws relating to land in Kenya.

This time it is a house standing on plot No 804 section II Kisauni, Soko Mjinga, Mainland North Mombasa (plot 804). The land was owned by one Salim M Jabal (Jabal) (not a party or witness) while the house was owned by the 1st defendant Miriam Kadogo alias Mariam Kadogo Naftali alias Mariam K N Abeid (Miriam). There is no dispute that Miriam was allowed by Jabal, the land owner, to construct the house in consideration of periodic land rental payments agreed between them. She has written documents to show for it. She built a five-roomed house in 1988 and rented 4 of them while she occupied one. By 1993/94 she was receiving Shs 4800 per month from renting the house.

The plaintiff in this case is Irene Ngombo Mshingo (Irene) who says she bought the house without land from Miriam on 13.12.1996. She paid the whole purchase price as agreed but Miriam had not given her vacant possession of the house by January 1997. She demanded vacant possession in writing and when it was not given she came to Court on 26.3.97 and filed suit seeking delivery of the house with vacant possession plus *mesne* profits @ 5000 per month. In the alternative she sought refund of the purchase price with interest thereon.

When Miriam was served with summons to enter appearance she filed an admission of the claim on 9.4.97 and agreed to give vacant possession. A consent judgment was then filed granting the main prayer in the plaint. It was recorded as a judgment of this Court on 16.4.97. The process of execution then began and with the help of the police, warrants of eviction issued by the Court were executed and the persons in occupation of the house were evicted in August 1997.

Before Irene could be given physical possession however, the locks affixed by the court bailiff were broken by one Fuad Salim. He, his father and two brothers claimed that they had bought the house from Miriam and that the two persons evicted therefrom, one Reuben and one Rebecca, were their tenants. They applied to be joined as co-defendants in the suit.

By consent of the parties, defendants 2 to 7 were then joined in the suit on 19.8.98. They filed their defence on 19.10.98 asserting ownership of the house. Irene amended her plaint to enjoin the new defendants and to plead for their eviction, in June 1999. An amended defence was filed by the defendants 2 – 7 on 10.9.99. Miriam also amended her defence reiterating that she had sold the house to Irene and denying any knowledge that the defendants 2-5 had any claim of ownership therein or that defendants 6 and 7 were tenants. As far as she was concerned she had handed over a vacant possession of the house to Irene through a court eviction and therefore the prayer for vacant possession did not affect her.

The parties were represented as follows:

For the plaintiff (Irene) Mr Munyinthya instructed by M/s Musinga & Co Advocates.

For the 1st defendant, Miriam: Mr Ongera instructed by M/s Ongera Andembesa & Co Advocates and for defendants 2 – 7, Mr Mwalusha instructed by M/s Y Ali & Co Advocates.

They drew up and agreed on 8 issues.

1. Did the plaintiff by an agreement dated 13<sup>th</sup> December, 1996 purchase from the first defendant a house without land standing on plot no 804/II/MN at a price of Kshs 650,000/=?
2. Did the plaintiff pay to the first defendant the full purchase price of Kshs 650,000/=?
3. Did the first defendant transfer the said house without land to the plaintiff in vacant possession?
4. Did the first defendant sell to the second, third, fourth and fifth defendant the aforesaid house at a price of Kshs 350,000/= sometimes in 1996?
5. As between the plaintiff on the one part and the second, third, fourth and fifth defendant, who is entitled to ownership of the said house?
6. The sixth and seventh defendants are they entitled to occupation of the said house?
7. Is the plaintiff entitled to any order or *mesne* profits at the rate of Kshs 5,000/= per month as against the first defendant? And if so from what date?
8. What orders should be made as to costs?

I will answer them on the basis of the evidence laid before me.

The first and second issues present no difficulty as they are neither denied by Miriam nor seriously contested by the other defendants. At any rate there was evidence on oath from Irene that she was desirous of purchasing a house in December 1996. Miriam had one to sell and showed Irene the relevant documents of ownership including building plans approved by the Municipal Council and the land owner. They went before advocates, M/S Sachdeva & Co Advocates where a written agreement for transfer was drawn and executed by both parties. The land owner also gave his consent to the transfer and executed it. The entire purchase price of Shs 650,000/= was paid out. The agreement dated 13.12.96 together with copies of cheques in payment of the purchase price and a receipt in acknowledgment from M/S Sachdeva & Co are exhibited (exhibits 1-3).

The only objection taken by learned counsel for the defendants Mr Mwakisha was that the agreement for transfer was a nullity as it was not stamped and was therefore inadmissible in evidence under section 19 of the Stamp Duty Act. I overruled the objection as I found no merit in it.

That is because the Stamp Duty Act is essentially a revenue collection Act and section 19 thereof does not affect the validity of legal documents.

The section is circumscribed and subjected to subsection 3 thereof of requiring that the Court before which such documents is intended to be produced shall ensure, pursuant to steps specified thereunder and in section 20 and 21 of the Act that the requisite duty is paid.

The document objected to is referred to as a transfer. It is neither a transfer or conveyance of movable property nor immovable property. It is not moveable because one cannot put it on a hand cart or drive it. It is not immovable because it does not go with the land. As I stated earlier it is a peculiar but understandable phenomenon. The schedule to the Stamp Duty Act has yet to find a category for it. It would perhaps fit into the general instrument referred to therein as:

"Conveyance or transfer of any kind not herein before described"

where duty payable is Shs 10.

I find on the law that the instrument does not cease to be binding *interpartes* merely because of non-payment of duty.

I answer the first and 2nd issues in the affirmative.

On the 3rd issue it is Irene's evidence that she orally agreed with Miriam that the house would be given to her with vacant possession within 28 days of the transfer. That is buttressed by an affidavit sworn by Miriam on 23.1.1997 exhibit 8. When the period expired without compliance Irene instructed M/S Sachdeva & Co to serve a demand notice on Miriam and one was forwarded on 20.1.1997 exhibit 4. She had no possession by 26.3.97 when she came to Court despite having complied with the terms of the transfer. Miriam herself does not deny that she was bound to transfer the property to Irene with vacant possession and indeed there is a consent judgment to that effect against Miriam. That judgment has not been set aside and there is evidence that the ensuing degree was executed by warrants issued on 8th July 1997, exhibit 7. The persons in occupation of the house had been brought there and were tenants of Miriam. It was her duty to remove them and hand over vacant possession of the house to Irene. She herself testified that she left the house after the sale to Irene but left the tenants there. She admitted that she personally took no active steps to evict them. Her excuse is that Irene never told her she had a problem having vacant possession of the house. There is no evidence or affidavit from the court bailiff to show what he did after executing the warrants of eviction. The evidence available is that the tenants were evicted in August 1997 and the premises were locked up. Irene does not appear to have been given possession. Soon after, the locks were broken down and the house retaken by someone claiming to be the rightful owner through Miriam.

In answer to the issue I find that it was a term of the agreement for sale of the house that the plaintiff shall have vacant possession of it but the 1<sup>st</sup> defendant did not deliver vacant possession hence this legal tassel. Issue No 4 calls for close examination of the evidence tendered by the 5<sup>th</sup> defendant Fuad Salim (Fuad). The 2nd defendant is his father while the 3<sup>rd</sup> and 4th are his brothers. But they never appeared in Court to give evidence.

Instead another brother who is not a party to the suit and lays no claim to the house gave evidence in support of Fuad. Curiously he sat in Court throughout as Fuad gave evidence and only admitted he had done so during cross examination. He testified as DW3 Ahmed Salim Ahmed (Ahmed).

It was Fuad's evidence that he was approached by Miriam on 9.7.1996 and told there was a house she was selling. He was shown documents of ownership and agreed to buy it. The following day he took her to his advocate Mr Karimbhai. An agreement was drawn up between four purchasers and Miriam. Also present was Ahmed and two other persons said by Fuad to have been Miriam's agents but whom Miriam claimed were brothers of Fuad. The agreement was however signed by Fuad and Miriam only and witnessed by the advocate. The other purchasers did not sign and the landowner whom the agreement made provisions for, did not sign. It is exhibit D1.

The purchase price stated in the agreement was Shs 350,000 which is indicated as having been paid in full

to Miriam. It is admitted in evidence by Fuad however that only Shs 300,000 was paid and the balance was withheld by him pending consent by the land owner to the agreement the land owner has not given his consent to date and therefore the balance has not been paid. Ahmed supported Fuad's evidence, although such evidence should be taken cautiously since Ahmed was in Court throughout listening to Fuad's evidence. His role according to him was to withdraw money from various joint family accounts in family for payment of the purchase price. He had only one account however to show for the withdrawals. He did not know any other details as to whether possession of the house was taken or whether there were tenants or what happened to the documents.

Only Fuad would know.

Miriam's story is however totally at variance. She never sold the house to Fuad, she said, or anyone in his family. All she did was express her interest in borrowing some money from six of them to improve her business and she was taken before an advocate to be given the money on the security of her house. She was alone. She was told to sign some document to be given the loan but after signing she was given some Shs 350,000. Soon after Fuad and his brothers took her to a house in Kisauni and robbed her of the money. Fuad took 50,000 while his brothers took 200,000. She reported the matter to police and Fuad was arrested with his brothers. He was however released mysteriously but eventually two of the brothers were charged, convicted and jailed. There was no agreement for sale of the house otherwise it would have been consented to by the landowner.

Miriam did not leave the house and continued to stay there with her tenants until after the sale to Irene in December 1996. She denied as contended by Fuad that she vacated the house and gave him possession one week after signing the agreement on 10.7.96. On this she appears to be supported by one of the tenants called by Fuad, that is DW4, Ahmed Ali who testified that Miriam left the house in December 1996 and before then she was in occupation.

There seems also to be support from evidence on record that Fuad, his father and two brothers instituted suit against Miriam on 28.8.96 before the Chief Magistrate's Court, exhibit 4 seeking to enforce the sale agreement of 10.7.96. They averred that Miriam had continued to occupy the house and they sought vacant possession and *mesne* profits. That suit was withdrawn, without assigning any reasons for such withdrawal, in the absence of Miriam's counsel on 14.5.1997. Fuad says the suit was no longer necessary because he already had vacant possession of the house and was collecting rent. All he has to show however for rent received were two receipts produced by DW4 Ahmed dated March and July 1997, exhibit D6a & 6b.

On a balance of probability on that issue I find that there was an intention by Miriam to sell the house to the family of Fuad. I further find that although some money was evidently released to her, the agreement for sale was never completed as it was neither signed by all the purchasers who were named therein but had not given any power of attorney to one of them to sign on their behalf, nor was it consented to by the owner of the land on which the house stood. In the peculiar nature of the transaction it would appear to be a necessary requirement otherwise the advocates or the parties would not have required it in the agreement. Fuad himself refused to proceed further without the signature of the landowner which he never obtained and took no other steps to obtain. Finally I find no credible evidence that full possession of the house was given to the purchaser upon the signing of the sale agreement. In all the circumstances the agreement was inchoate and was rescinded when the property was sold in December 1996 to Irene. The purchasers may seek to recover such money as they may prove to have advanced to the 1st defendant.

There is no counterclaim or claim against the 1st defendant on which an order may be made in this suit.

It follows on issue 5 that as between the plaintiff and the defendants 2 – 5 the plaintiff is entitled to ownership of the house.

Issue No 6 was abandoned since the defendants 6 and 7 vacated the house and ceased to have any further interest in the case.

On issue No 7, I have already made a finding that the property was sold with vacant possession which has not been given to the plaintiff upto date. The complications that arose after the sale had nothing to do with the plaintiff and had everything to do with the 1st defendant. She made no disclosure that there was any dispute between her and the defendants 2-5 which was pending in Court. She was aware that she still owed some money, whatever the amount acknowledged by her, to the defendants 2-5 or defendant 5 but did not pay it or offer to pay it back even after receiving full purchase price from the plaintiff in December 1996. Granted that the 1st defendant co-operated fully and did not resist the judgment entered herein which was executed in August 1997. But the delay in the plaintiff's taking vacant possession was squarely her doing and she cannot escape an order for payment of *mesne* profits between 28.2.1997 (when she undertook an oath to give vacant possession) and 17.8.97 when on the evidence execution of the eviction warrant was effected. The 1st defendant herself testified that she was receiving Shs 4800 per month from 4 rooms and an extra 1200 per month would have been payable for the 5th room.

That would make Shs 6000 per month. The defendant's evidence is similar, that the rooms were rented out as Shs 1200 per month. I find that the quantum claimed at Shs 5000 per month is reasonable. I find for the plaintiff in that sum and period as against the 1st defendant.

There is admission from the fifth defendant, Fuad, that he personally broke down the locks affixed by the court bailiff upon execution of the court order in August 1997. He said he did so pursuant to a court order authorizing him to do so. Challenged to produce the order however he produced an *ex parte* order dated 27th May 1998 (D exhibit 4) staying execution of eviction until *interparte* hearing of the application on 8.6.98.

The main application was stood over generally on 8.6.98 and a consent was then recorded for stay of execution until further orders. It would appear that the order for stay obtained *ex parte* did not disclose that the locks affixed on the premises had been broken and possession retaken without a court order for doing so.

It is clear to me therefore that Fuad took the law into his own hands when he did not await the court order for stay of execution. He kept both the plaintiff and the 1st defendant away from the property in a manner contrary to the law. He admits having collected income accruing therefrom. I order that he shall bear the *mesne* profits accruing between the period 18.8.1997 (when eviction was carried out) and 8.6.98 (when a consent order was recorded staying execution). I find for the plaintiff as against the 5<sup>th</sup> defendant only for that period at the rate of Shs 5000 per month in *mesne* profits.

The rest of the period until judgment is covered by the consent order recorded by the parties.

The plaintiff has succeeded in her suit against the defendants and so in issue number 7 she is entitled to costs against the defendants 1 and 5.

**Dated and Delivered at Mombasa this 25th day of August 2000.**

**P.N.WAKI**

**JUDGE**