



REPUBLIC OF KENYA



**Mburu v Kunga & another (Environment & Land Case 133 of 2019)
[2023] KEELC 21296 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 133 OF 2019
JG KEMEI, J
NOVEMBER 2, 2023**

BETWEEN

ANTHONY NJOROGE MBURU PLAINTIFF

AND

BERYL AKOTH KUNGA 1ST DEFENDANT

BENSON METHO 2ND DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiff filed suit against the Defendants on the 5/8/2019 seeking the following orders;
 - a. An eviction order be and is hereby issued against the Defendants, their family members, their agents, servants and or anybody else claiming under them and deliver vacant possession of land parcel No. Ruiru Kiu 3/1138.
 - b. The eviction order be executed by the Court Bailiff and the Officer Commanding Kahawa Sukari Police Station does provide security to the Court Bailiff while evicting the Defendants from and parcel No. Ruiru Kiu Block 3/1138 and give vacant possession to the Plaintiff.
 - c. The Defendants do pay mesne profits at the rates of Kshs. 50,000/- per month from 1st July 2019 until they give vacant possession of the land parcel No. Ruiru Kiu Block 3/1138 to the Plaintiff.
 - d. Costs and interest of the suit.
 - e. Any other and/or such other relief as the Court may deem just and fit to grant.
2. The Plaintiff avers that he is the registered owner of the suit land having purchased the same in 2007 at the cost of Kshs. 650,000/- from Kinyua Mureithi. Subsequently he commissioned an architect to



prepare the buildings plans for the construction of a residential house where the bill of quantities was assessed at Kshs. 5,324,000/-. The construction started in earnest in 2008 and moved into a section of the house that was ready for occupation in 2011 (after three years).

3. The Plaintiff states that the 1st Defendant, then his girlfriend, voluntarily contributed a sum of Kshs 1.8 Million which sum was utilized in the interior finishing and furnishing of the house. The relationship broke down and the Plaintiff moved out of the house in the month of July 2012. That in 2014 the 1st Defendant allowed the 2nd Defendant into the house after they got married instead of vacating his house. That the house can fetch Kshs 50,000/- monthly rental and valued at Kshs 30 Million. That the Defendant's actions have deprived him quiet possession and enjoyment of the property together with a loss of rental income of Kshs 50,000/-.
4. The Defendants denied the claim of the Plaintiff vide their statement of defence and counterclaim dated the 16/9/2019 and filed on the 16/9/2019.
5. The 1st Plaintiff admitted that the Plaintiff had purchased the land and commenced construction when they met in 2010. However, that the project had stalled due to lack of funds. That the Plaintiff approached the 1st Defendant to buy the suit land to raise money to offset a loan he owed to Caroline Mumbi Kangata, the previous girlfriend. The property was valued at Kshs 2.0 Million which the 1st Defendant paid in two installments of Kshs. 200,000/- in cash and RTGS in the sum of Kshs 1.8 Million. That the 1st Defendant later moved into the unfinished structure and has over the years improved the property which is now valued at Kshs. 28 Million on account that she had purchased the same and the Plaintiff had relinquished his interest in the property. That the Plaintiff never raised any objection to the improvements. That he is estopped from claiming the land as she has a right to live in the said property with her husband because the property belongs to her. She denied any rental income in favour of the Plaintiff.
6. She accused the Plaintiff of fraudulently registering the land in his name despite the existence of her lawful and legitimate beneficial legal and equitable interest in the property. That she lodged a caution against the title in 2012 which caution was removed without her knowledge.
7. In her counterclaim she sought the following orders;
 - a. An order directed at the District Land Registrar Ruiru to cancel the certificate of lease for the suit land now in the name of the Plaintiff forthwith.
 - b. An order directed at the District Land Registrar Ruiru to issue a Certificate of Lease for the suit land in the name of the 1st Defendant forthwith.
 - c. Costs of the counterclaim.

The hearing

8. PW1 - Anthony Njoroge Mburu relied on his witness statement dated the 1/8/2019 in evidence in chief. He produced documents marked as PEX No 1-14 in support of his claim.
9. The witness stated that he met the 1st Defendant in 2009 when she worked with a bank as a relationship manager. That she was one of the managers managing a staff loan facility that had been arranged by his employer for its employees the Plaintiff included. He had gone to the bank to borrow a loan for his building project. That a relationship blossomed between the two as from the month of December, 2009.



10. That the 1st Defendant lent him Kshs 1.8 Million to complete the house on the 16/5/2011 to make it habitable in readiness of the birth of their baby. That he used the money to purchase the floor and roof tiles making the house 90% complete with some rooms upstairs, the master bedroom bathtubs and the balcony being habitable. That the kitchen, doors and downstairs rooms were incomplete. That they moved into the house in that state of completion.
11. He refuted the claim that he sold the land to the Defendant nor the receipt of the sum of Kshs. 200,000/-. That she later refused to accept the refund of the sum received. That the caution on the title was removed by the Land Register with notice to the 1st Defendant. That the title was registered in his name on 29/8/2012 and the title was issued on the 4/6/2019 due to the presence of the caution lodged by the 1st Defendant on the 28/9/2012. The caution was removed on the 4/6/2019.
12. He stated that because of differences with the 1st Defendant he lived in the house for a period of close to 6 months upto July of 2012. Upon being registered owner of the land in 2019 he sent a demand note on the 14/6/19 to vacate the property to the Defendants
13. Shown the emails between the parties, the witness stated that they had agreed to the refund of the sum of Kshs 1.8 Million and a reimbursement agreement drafted but the 1st Defendant refused even after incorporating her terms in the agreement. The witness refuted ever selling the suit land to the 1st Defendant.
14. PW2- Robert Mugendi Mbuba introduced himself as the Land Registrar Ruiru and produced the documents in respect of the suit land title marked PEX 15.
15. In cross the witness stated that the caution was lodged on the 28/9/2012. He explained to the Court the process of removal of caution as provided for under Section 73(3) of the [Land Registration Act](#) and therefore lawful. That he took all the necessary steps required in law in the removal of the caution. That the land owner wrote to the land registrar to remove the caution in 2019. In receipt of the letter the land registrar wrote to the cautioner on the 4/4/2019. That a second letter was sent to the 1st Defendant on the 8/5/2019 leading to the removal on the 4/6/2019
16. DW1 - Beryl Akoth testified and relied on her witness statement dated the 28/8/2019 in evidence in chief. She produced documents in support of her case marked as DEX 1-4.
17. She stated that she purchased the property for Kshs. 2 Million from the Plaintiff in two installments; Kshs. 200,000/- in cash and Kshs. 1.8 Million through RTGS. That the reason she was purchasing the property is because their relationship had broken down. That in 2011 the suit land had not been registered in the name of the Plaintiff.
18. That in October 2011 she moved into the house. The Plaintiff infrequently lived in the house but for a short period.
19. On the reimbursement agreement, she stated that the Plaintiff wanted to refund the money to her in 2012 on account that he had changed his mind from selling the property. That she gave a counter proposal but the Plaintiff went mute until 2019 when he filed the instant suit. That since October 2011 the Plaintiff did not carry out any improvements on the house. That she developed the house believing that it was hers.
20. She stated that she did not receive any notice on the removal of caution.
21. The witness under cross examination stated that the Plaintiff borrowed the money from her to pay his off his past girlfriend which she did in 2011. That she has not presented any evidence to support the payment of the Kshs. 200,000/- cash to the Plaintiff although the Plaintiff has never denied the same.



That he had no authority from the Plaintiff to develop the property but as a contributor and occupier of the house she completed the house because she lived there with her child. That she did not take any inventory before embarking on developing the house. With respect to the various receipts she adduced in evidence, she stated that there is no indication where the materials were used in the house. That she has not filed any valuation report on the status of the house before the Court.

22. DW2 - Mitchell Amani Onyango Aguko stated that he lives in the same estate with the 1st Defendant. That though he did not adduce any photos of the house he has visited it severally and knows it is a 3 - bedroom house though he does not have the details of the registration of the house.
23. DW3 - Edwin Kenga Karwanda stated that he visited the house when it was incomplete with rooms upstairs that were habitable at the time. That currently the house is complete. He too did not know the registration details of the house in question.
24. With that parties concluded the hearing and filed written submissions which I have read and considered.

Analysis and determination

25. The key issues for determination are;
 - a. Who is the registered owner of the suit land?
 - b. Whether the 1st Defendant acquired any equitable legal interest in the suit land/ was there a sale of the property between the Plaintiff and the 1st Defendant.
 - c. Is the 1st Defendant entitled to orders sought in the counterclaim?
 - d. Is the Plaintiff entitled to eviction orders?
 - e. Is the Plaintiff entitled to mesne profits?
 - f. Costs.
26. The Plaintiff's case is that he is the registered owner of the suit land. That the 1st Defendant lent him some Kshs. 1.8 Million towards the construction of the house. That the 1st Defendant has refused to accept the refund of the monies and that he has come to Court to seek eviction orders against the Defendants to vacate his property.
27. The 1st Defendant on the other hand says she purchased the suit land from the Plaintiff in 2011 at the sum of Kshs 2.0 Million which she paid in two instalments. That at the time of purchase the Plaintiff required money to pay off his past girlfriend with whom he had sired a baby and had broken up. That at the time the bank in which the 1st Defendant worked found the Plaintiff unqualified to take a loan and he offered the 1st Defendant to purchase the property which she readily accepted. In any event the two were already love birds and she was expecting his child.
28. It is not in dispute that the land is registered in the name of the Plaintiff. According to the copy of the green card he became registered on the 29/8/2012 and a title issued on the 4/6/2019.
29. Did the 1st Defendant acquire any interest in the land? The Plaintiff refuted the 1st Defendants claim that she purchased the land for the sum of Kshs 2 Million. It is his case that he received the sum of Kshs. 1.8 Million as a soft loan towards the construction of the house. The 1st Defendant states that she acquired the suit land for Kshs. 2.0 Million.



30. Sale and purchase of land in Kenya is governed by statute. Section 3 (3) of the *Law of Contract Act* states as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

- (a) The contract upon which the suit is found-
 - (i) Is in writing
 - (ii) Is signed by all the parties thereto; and
- (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

31. The above provision is provided for under Section 38 of the *Land Registration Act* which is couched in similar wordings.

32. The 1st Defendant failed to adduce any agreement of sale for the purchase of the property. She stated in evidence that the Plaintiff did not cooperate to have the same drawn by his lawyer. The 1st Defendant introduced herself as a banker and someone who ought to have known that for any sale of land to be valued, a sale agreement was critical. Her reason for not adducing the agreement is unbelievable.

33. Further the Court has been shown the draft reimbursement agreement in which the Plaintiff had proposed to refund the sums of money received from the 1st Defendant. The sums are defined as contribution towards the construction of the house. It would appear that the 1st Defendant demanded that additional clauses be added to the agreement which included a refund immediately, in default she be allowed to purchase the land and the monies advanced to the Plaintiff would be treated as a deposit for the sale, adequate time being given to her to raise the balance and that a valuation be carried out.

34. When the reimbursement agreement fell through around the 11/6/2012 she immediately embarked on the filing of caution on the 28/9/12. In the statutory declaration she stated that she made a payment to the Plaintiff on the 16/5/2011 towards the construction of a home situate on the suit land. In the green card the caution was lodged as entry No. 3 on 29/8/2012 claiming a licensee's interest. In the two scenarios nowhere did the 1st Defendant state that she had purchased the suit land. If indeed she was a purchaser nothing would have prevented her from lodging a caution claiming a purchaser's interest. The obvious answer is because she was not a purchaser.

35. The Court takes note that this is the first time the issue of sale is being discussed. Further the 1st Defendant led evidence that ;

“The Plaintiff borrowed monies from me to pay off his girlfriend. I gave him the money in two tranches; Kshs. 200,000/- in cash and Kshs 1.8 Million through RTGS”

36. The evidence of the 1st Defendant is two faced; in one instance the money was for contribution for the construction of the house, in another it was purchase monies for the suit land and in another one a soft loan to bail out the Plaintiff to enable him pay off an old girlfriend.

37. Evidence was led by the Plaintiff that by the time they moved into the house the construction was 90% complete. The Court has been shown copies of receipts for the finishing of the master bed rooms



and other areas of 2012. The 1st Defendant led evidence that she moved into the structure which was bare. That she put effort to complete the construction of the house starting with the master bedroom and some conveniences to make the house habitable. The Court notes that the receipts for material purchases adduced in evidence are from 2015 and not 2011 as alleged by the 1st Defendant. It is not disputed that the Defendants got married in 2015 and it is after this that some materials were purchased. It is doubtful whether the said materials were deployed in the house. No evidence was led in support.

38. The Court finds that there was no sale of land between the Plaintiff and the 1st Defendant.

Whether the 1st Defendant is entitled to the orders sought in the Counterclaim

39. Having held that there was no agreement of sale the suit land to the 1st Defendant the issue is answered in the negative. The reason is the 1st Defendant did not acquire any interest in the suit land (equitable or otherwise) capable of founding an order of specific performance in the form of transfer of the land to the 1st Defendant. If any monies were paid by 1st Defendant, the 1st Defendant is not without a remedy. I say no more.

Whether the Plaintiff is entitled to the orders of eviction.

40. The Court has found that the suit land belongs to the Plaintiff. It has also made a finding that the 1st Defendant did not prove that she acquired any interest in the property.

41. The occupation of the Defendants on the Plaintiff's suit land has been considered as unauthorized and therefore should vacate the suit land.

42. At paragraph 1733 of the Black's Law Dictionary, 10th Edition trespass is defined as:-

“ An unjustifiable entry by one person upon the land in possession of another.”

43. The Court having found that the Defendants occupation of the suit land is unauthorized, the Court finds that the Plaintiff is entitled to the orders of eviction.

Mesne profits

44. Mesne profits are special damages in nature and the rule is that they must be pleaded and proved in evidence. The Court finds that this orders cannot be granted as the Plaintiff failed to adduce evidence in support.

Costs

45. Costs follow the event and in this case the Plaintiff has succeeded in his case and I see no reasons to deny him costs.

46. Final orders and disposal;

- a. The 1st Defendant's counterclaim fails.
- b. The suit of the Plaintiff succeeds and I enter Judgement in terms of (a), (b) & (d) of the Plaintiff.
- c. The Defendants be and are hereby ordered to vacate the suit land within a period of six (6) months in default eviction orders shall ensue in line with prayer No. (b).
- d. Mesne profits is disallowed.



e. Costs shall be in favour of the Plaintiff in the Plaint and the counterclaim.

47. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Waithra Mwangi for Plaintiff

Ogutu for 1st and 2nd Defendants

Court Assistant – Lilian

