



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1192 OF 2013

SANJAY KUMAR KANANI.....PLAINTIFF

VERSUS

NISHA SHAH.....1ST DEFENDANT

SUJAY SHAH.....2ND DEFENDANT

JUDGMENT

1. This suit was initiated via a plaint dated 13.9.2013 whereby the Plaintiff and his wife Hemakshi Sanja Kanani were claiming that they were lawful tenants in the property known as LR. No.209/4593/5BI situated along Waiyaki way.

2. They claim that on 1.7.2008, they had entered into a tenancy agreement with one Pratik Ramesh Shah (now deceased) over the suit premises of which they took possession thereof and they have been in occupation to date. They further pleaded that Pratik Ramesh Shah died on 22.8.2013 and thereafter the Defendants purported to take over the management of the suit properties and they also threatened to evict him. The Plaintiff avers that the Defendants had no legal capacity to issue eviction notice as they have no grant of letters of administration and that they have no claim over the suit premises.

3. The Plaintiff therefore prays for judgment against the Defendants:

a) An order of injunction do issue to the Defendants whether by themselves, their employees, servants or agents or otherwise howsoever from interfering with the Plaintiff's rights of use of it all that premises known as LR No. 209/4593/5BI, Waiyaki Way and to prohibit the Defendants, their servants and or agents or any of them, from any actions that would interfere with or deter the Plaintiffs right's of use of the said premises without following the proper procedure at law.

b) General Damages.

c) Costs of this suit.

d) Any further or other order as this Honourable Court may deem fit.

4. The Defendants filed a statement of defence and counter-claim dated 20.4.2020 where they have denied the claim of the Plaintiff. They aver that the 1st Defendant (Nisha Shah) is the legal owner of the suit property which she inherited from her mother to the tune of half share. Her brother apparently owned the other half share. That after the demise of her brother, she became the beneficial owner of the remaining half share. That on 16.9.2013, she issued a notice to the Plaintiff and his wife to vacate the suit premises. Thereafter, it is when she learnt that the Plaintiff had filed this suit of which she had obtained an injunction order which prevented her from exercising her rights over the suit property. That is when she started accepting rent from the Plaintiff which was Kshs. 100,000 per month. However, the Plaintiff ceased paying the said rent as from the month of May 2018.

5. The Defendants pray for the following orders in their counter-claim:

i. An order dismissing the Plaintiff's suit herein with costs to the Defendants.

ii. An order directing the Plaintiff/Defendant by Counterclaim to quit, vacate and/or deliver vacant possession of the suit property, LR. No.209/4593 to the 1st Defendant/Plaintiff by Counter-Claim within thirty (30) days of delivery of Judgment, failing which an order of eviction shall issue against the Plaintiff/Defendant by counter-claim.

iii. The sum Kshs 2,700,000 being the rental arrears outstanding on the property as at 1st April 2020 together with interests thereon at commercial rates until payment in full.

iv. Rental arrears at the rate of Kshs.100,000.00 per month for every month of default from 1st May 2020 until the date of judgment.

v. mesne profits.

vi. Costs of the suit and Counter-claim herein be borne by the Plaintiff/Defendant by Counter-claim.

vii. Any other or further relief as the Honourable court may deem fit to grant.

6. The trial proceeded on 17.11.2021. The counsel for the Plaintiff had sought to have an adjournment averring that he had filed an application to cease acting. The court had found that no such application had been filed in the physical file or in the Court's digital System (CTS). That no explanation had been given as to why the purported application had been filed close to the hearing date and there was no explanation as to why the Plaintiff was not in court. The court therefore proceeded with the hearing virtually in terms of the directions previously given by the court on 21.7.2021. Noting that the Plaintiff was absent for no good reasons, the court proceeded to dismiss the Plaintiff's case while allowing the counter-claim to proceed to hearing (**Case for the Defendant (Plaintiffs in the Counter-claim)**).

7. PW1 Nisha Shah testified that she stays in Australia at a place called Park. She adopted the statement dated 20.4.2020 as her evidence. She also produced the documents filed in the same bundle of 20.4.2020 as her exhibits 1-12. Her evidence as captured verbatim in her statement is as follows:

1) "I am the legal owner of all of that property know as L.R. No.209/4593 comprising of a residential property situated in Parklands area, within Nairobi County (hereinafter "the suit property").

2) My brother, Pratik Ramesh Shah (now deceased) and I inherited the suit property in equal shares through transmission following the demise of our mother Shanta Shah. The certificate of confirmation of Grant was issued on 29th September 1995 and was registered against the title to the suit property on 8th October 2013. I refer the court to the grant of probate at page 16; the certificate of confirmation of grant at page 17 and to entry 19 on the certificate of title at pages 18-22 all the Defendant's Bundle of documents.

3) I am not usually resident in Kenya, therefore I had let my brother, who was usually resident in Kenya to have full use of the suit property.

4) It was only around the time of my brother's demise in August 2013 that I became aware of the tenancy agreement entered into between my brother, the Plaintiff and his wife, which agreement was entered into without my involvement.

5) At all material times, I was the legal owner of 50% share of the suit property and upon the demise of my brother, I became beneficial owner and subsequently legal owner of the remaining 50% share property by transmission as I was named as the executrix and sole beneficiary under my brother's will and a grant of probate was issued to me. I refer the court to the Grant of probate at page 23; the Certificate of confirmation of grant at page 24 both of the Defendant's Bundle of documents.

6) Once I became the new owner of the entire suit property, I was therefore entitled to use and control my property as well as protection of my property rights under Article 40 of the Constitution.

7) I learnt from the Plaintiff that the last tenancy agreement entered into with my late brother lapsed on 31st May 2011. See the tenancy agreement dated 1st July 2010 and produced as document No. 1 in the Plaintiff's bundle of documents.

8) I was informed that thereafter, the Plaintiff lived on the premises on the basis of a month to month periodic tenancy that existed between my brother, the Plaintiff and his wife and that the terms of payment of rent was Kshs 100,000/- per month as at the time of my brother's death on 22nd August 2013. see the receipts for payment produced as document No. 3 in the Plaintiff's bundle of documents.

9) During my conversations with the Plaintiff and my brother in hospital just before his demise I was made aware that the Plaintiff has been running a business from the suit property despite the same being strictly residential. From the records, all rental payments to my brother were made by the Plaintiff and his wife and receipts were issued in their names. see the receipts for payment produced as document No. 3 in the Plaintiff's bundle of documents. This unauthorized use of the property made me wary of extending the Plaintiffs tenancy and was part of the reason I decided to terminate the Plaintiff's tenancy.

10) I intended to terminate the said tenancy to enable me to gain the use of my property. I verbally informed the Plaintiff and his wife of my intention and they sought for indulgence and time and promised they would find an alternative residence by 9th September 2013.

11) I wish to state that I fully intended to exercise my rights within the confines of the law and on 16th September 2013, after lapse of the grace period I had granted to the Plaintiff and his wife, I issued a Notice to vacate to the Defendant by Counter-claim and his wife, Hemakshi Sanja Kanani.

12) I am fully entitled protection of my property rights pursuant to Article 40 of the Constitution including the right to use my property as I deem fit. I intended to terminate the month to month periodic tenancy which I had just become aware was entered into

between her brother, the Plaintiff and his wife.

13) Once the time I had allowed the Plaintiff to seek an alternative residence lapsed, I formally issued a Notice to vacate dated 16th September 2013 on the Plaintiff and his wife, Hemakshi Sanjay Kanani through my advocate. The Notice was served on 17th September 2013. I notified the Plaintiff that they were expected to vacate the suit property by November 2013. I refer the Court to a copy of the letter dated 16th September 2013 at page 25 of the Defendants' Bundle of documents.

14) Subsequent to the issuance of the notice, vide a letter dated 19th September 2013, the advocates for the Plaintiff responded to the Notice to Vacate issued by my Advocates. That is the time I became aware of the existence of this suit and the injunction orders issued herein. I refer the court to a copy of the letter dated 18th September 2013 and received on 19th September 2013 and the enclosed order at page 26 of the Defendants' Bundle of documents.

15) Instead of vacating the suit property as agreed, the Plaintiff moved the court and through a deliberate concealment and misrepresentation of facts as to my ownership of the property, obtained orders of injunction. The orders obtained therefore restrained me from taking any further steps and exercising my rights over my property as intended.

16) I was forced to allow the Plaintiff and his wife to continue occupying the property and to accept the rent from them at the rate of Kshs 100,000/= as they had agreed with my deceased brother and co-owner.

17) The Plaintiff immediately started defaulting on the rental payments, i.e in October 2013 and I issued a demand for the rent through my advocates. The Plaintiff only rectified the default on the threat of distress for rent. I refer the court to a copy of the letter dated 15th October 2013 at page 28 of the Defendants' Bundle of documents.

18) The Plaintiff, in further blatant disregard of his duties as a tenant and of my rights as the Landlord, even attempted to totally lock me out of the suit property as well as the rest of my property which shares a main entrance with the suit property by changing the locks to the main gate. The Plaintiff only relented after I reported the issue to the police and wrote a demand letter to his advocates. I refer the court to a copy of the letter dated 19th December 2013 and a copy of the OB at pages 29 and 30 respectively the Defendants' Bundle of documents.

19) The Plaintiff further defaulted in making payments over the years of 2014 to 2018 and totally stopped making any payments in the month of May 2018. The amount outstanding as at May 2018 when the last payment was made was Kshs 300,000/-. The rental arrears have continued to accrue on a monthly basis from that date and as at 1st April 2020 the total amount outstanding was Kshs 2,700,000/-

20) The Plaintiff has continued to live on the suit property even after stopping the payment of rent and the amount accruing thereafter and payable as at 1st April 2020 is a total of Kshs. 2,700,000. I refer the court to a copy of the statement of account in respect of rent for the years 2014 to 2020 at page 31 of the Defendants' Bundle of documents.

21) The Plaintiff has continued taking advantage of the orders of injunction issued by this court preventing me from interfering with his occupation of the suit property to continue occupying the property without paying rent.

22) I have made repeated pleas and demands for the Plaintiff to pay the rent through my uncle who is resident in the country but the Plaintiff has failed, neglected and/or refused to make any payments to date.

23) The Plaintiff has been taking advantage of the orders of injunction issued by this court restraining me from interfering with his occupation of the suit property to occupy the property without paying the rent payable.

24) My claim from the Plaintiff is for delivery of vacant possession of the property and payment of the total amount of Kshs 2,700,000 being the arrears outstanding as at 1st April 2020, rental arrears for every month of default until delivery of judgment as well as mesne profits at a rate to be assessed by court from the date of judgment until delivery of vacant possession."

8. In her testimony in court, PW1 added that in August 2021, she learned through a phone call that the property was in danger and on 3.9.2021 the Plaintiff apparently called the uncle of PW1 informing him that some people had evicted him and his wife through a court order. PW1 therefore states that he would still want the property to be protected even if the Plaintiff was no longer on the suit land.

9. The counsel for the Plaintiff declined to cross-examine PW1 averring that he had no instructions to do so.

Determination

10. The question for determination is whether the orders sought by the Defendants in their counter-claim are merited. I have considered the pleadings of the Plaintiff whereby their claim was anchored on the tenancy agreement between themselves and Pratik Ramesh. They were also claiming that Nisha Shah has no capacity to claim the property. However, Nisha Shah has availed documents particularly the confirmed grant issued on 29.9.1995 showing that she had a 50% stake in the property. The other half was taken up by her brother Pratik Ramesh. Another grant issued on 19.4.2016 shows that the grant of probate of the written will in relation to the estate of Pratik Ramesh had been issued to his personal representative known as Nisha Sujah Shah.

11. It follows from the documents availed by PW1, that she is the lawful owner of the suit premises and she has a right to protection in terms of the provisions of **Article 40** of the **Constitution** and **Section 25** of the **Land Registration Act**.

12. Further, the Plaintiff opted to occupy the suit property even after the death of Pratik Shah. He also paid rent to Nisha for while. That being the case, then I am inclined to allow Defendants claim on rent as from June 2018.

13. To this end, I find that the Plaintiff's case in the counter-claim has been proved on a balance of probabilities. However, the court declines to grant any *mesne* profits since the court has granted the other claim on rent.

Final Orders

1) *Plaintiff's suits is dismissed with costs to the Defendants.*

2) *The Plaintiff is to give vacant possession in the event that he is still in the premises.*

3) *The Plaintiff is condemned to pay Rent arrears at Kshs. 100,000 per month from June 2018 to August 2021 (39 months amounting to Kshs. 3,900,000*

4) *The Plaintiff is condemned to pay Cost of the suit plus interests (Interest is to be computed from June 2018.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Nzuki for the Plaintiff in the Counter-Claim

Court Assistant: Eddel Barasa