



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 1399 OF 2016

(FORMERLY CIVIL CASE 412 of 2011)

BRENDA CHERONO RONO.....PLAINTIFF

VERSUS

NATHANIEL MAKIADI AMENYA.....1ST DEFENDANT

ELIZABETH CHEPNGENO RONO.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the 1st Defendant vide a Plaint dated 23rd September, 2011 seeking for the following orders:

- i. An order for the Defendant to deliver vacant possession of the premises on L.R No Nairobi Block 69/117/61 to the Plaintiff.***
- ii. Mesne profits at the rate of Kshs 30,000 per month from 1st May, 2011 until delivery of vacant possession.***
- iii. Costs of the suit.***

2. It is the Plaintiff's case that she is the registered proprietor of all that property known as L.R No. Nairobi Block 69/117/61 (*herein the suit property*) having purchased the same from Elizabeth Chepngeno Rono vide a sale agreement dated 8th December, 2010; that she purchased the property at Kshs 3,500,000 which was financed through a mortgage by Chase Bank Limited for which she makes monthly payments of Kshs 26,677.75 and that after the mortgage and transfer were registered in her favour, she duly issued notices to the Defendant to vacate the house.

3. The Plaintiff averred in the Plaint that the Defendant has refused to yield possession of the suit property occasioning her loss and damages as she has not only been denied the use of her property but continues to pay rent and service the mortgage.

4. The 1st Defendant filed a Defence and Counter-claim dated 13th October, 2011, against the Plaintiff and Elizabeth Chepngeno Rono as the 2nd Defendant. In the counter claim, the 1st Defendant is seeking *inter alia* a declaration that he is entitled to remain in possession of the suit property.

5. It is the 1st Defendant's case that sometimes in 2005, he entered into an agreement with the 2nd Defendant for the purchase of the suit property; that the suit property had been offered for sale by Teleposta Pension Scheme to its staff members and that pursuant to the agreement between himself and the 2nd Defendant, the 2nd Defendant was to take up the offer by Teleposta Pension Scheme on his behalf.

6. The 1st Defendant averred that on his part, he was to pay the deposit required by the Teleposta Scheme, pay all the conveyancing and legal charges and obtain a loan in the name of the 2nd Defendant to finance the balance of the purchase price and service the same, pay all the outstanding rent and outgoings, renovate the property to make it habitable and assume vacant possession of the property.

7. According to the 1st Defendant, he complied with all the aforesaid terms and had commenced payments of the mortgage installments; that in breach of the Agreement, the 2nd Defendant, in collusion with the Plaintiff, secretly paid off the loan and sold the property to the Plaintiff who charged it to Chase Bank Limited and that pursuant to the 2nd Defendant's breach, he incurred a loss of Kshs. 1,656,200. The 1st Defendant averred that he is ready and willing to vacate the suit premises upon settlement of his claim by the Plaintiff and the 2nd Defendant.

8. The 2nd Defendant filed a Defence to the Counter-claim and denied the allegations of fraud or collusion with the Plaintiff. The 2nd Defendant averred that she did not enter into an agreement for the sale of the suit property with the 1st Defendant as alleged or at all; that she allowed the 1st Defendant to occupy the suit premises and service the monthly mortgage installments of Kshs. 20,000 to Savings and Loan Kenya Limited in lieu of payment of rent and that the sum of 667,000 advanced to her by the 1st Defendant and the said loan enabled her pay the deposit for the suit property.

9. According to the 2nd Defendant, it was a term of the Agreement that when she intended to sell the property, the 1st Defendant would be given the first option to purchase it in which case the amount of Kshs 667,000 advanced to him would constitute part of the purchase price; that he was unable to purchase the property when the opportunity arose and that in a meeting held in September 2010 between herself and the 1st Defendant, it was agreed that she would refund the advanced sums to him and proceed with the intended sale of the property.

10. The 2nd Defendant averred that sometime in December, 2010, she repaid the sum of Kshs 456,000 to the 1st Defendant via a bankers cheque; that the sum of Kshs 148,038 was used to pay the default charges accrued at Savings and Loan Kenya limited for the months of March, April, June, September, October, November and December, 2010 and that she is not liable for the sum of Kshs. 1,656,200 as pleaded by the 1st Defendant.

The Plaintiff's case

11. The matter proceeded for hearing on 23rd September, 2021. The Plaintiff, PW1, adopted her witness statement dated 23rd September, 2011 as her evidence in chief. It was the evidence of PW1 that she purchased the suit property from Elizabeth Chepngeno Rono, the 2nd Defendant for the sum of Kshs 3,500,000; that the purchase was financed through a mortgage by Chase Bank Limited and that the transfer of the suit property into her names and charge were registered on 10th May, 2011.

12. PW1 testified that she was issued with a title for the land; that after acquiring ownership of the suit property, she issued the Defendant with notices to vacate the property which he refused to comply with and that she is suffering great financial constraints as a result of servicing the mortgage and paying rent.

13. During cross-examination, PW 1 confirmed that Elizabeth Chepng'eno, the 2nd Defendant, is her mother; that the 1st Defendant is a family friend who was residing in the suit property at the time she bought it and that the suit property had an encumbrance with Savings and Loan Kenya Limited for Kshs 1,080,000 which Chase Bank paid off and gave the 2nd Defendant the balance.

14. PW1 informed the court that the 1st Defendant was repaying the loan to Saving & Loan Kenya Limited in lieu of rent; that she did not know how much the 1st Defendant paid to Saving & Loan Kenya Ltd and that she took over the loan because the 1st Defendant was delaying in his payments and the 2nd Defendant was being penalized.

15. During re-examination, PW1 reiterated that the 2nd Defendant was the owner of the property and that the property would not have been discharged if the amount had not been paid.

16. PW 2 was Elizabeth Chepngeno Rono, the 2nd Defendant. PW2 adopted her witness statement filed on 23rd September, 2011 in which she stated that sometimes in 2005, Teleposta Scheme offered its members, including herself, its residential flats in South B for purchase at Kshs 1,200,000 and that as she had insufficient funds, she approached the Defendant who agreed to loan her Kshs 667,000 to enable her make a deposit for the suit property.

17. It was the evidence of PW2 that Savings & Loan Kenya Limited financed the purchase of the suit property; that it was agreed that the 1st Defendant in lieu of rent would service the mortgage in installments of Kshs 20,000 and that she verbally agreed with the 1st Defendant that she would grant him the first option to purchase the house in the event she was selling the house, in which case the loan advanced to her by the 1st Defendant would be treated as part of the purchase price.

18. According to PW2, she also agreed with the 1st Defendant that if he was unable to purchase the property, she would refund him the money advanced to her; that when she communicated her intention to sell the property, the Defendant was unable to buy it; that she decided to sell the property in September, 2010 to the Plaintiff and that she duly refunded him the advanced sums.

19. In cross-examination, PW2 stated that she bought the suit property at Kshs 1,200,000; that she took a loan of Kshs 1,080,000/= from Savings & Loan Kenya Limited to cover the purchase price; that the money paid to her by the 1st Defendant was not commission but payments to Savings & Kenya Limited in lieu of rent; that the Defendant occupied the house in May, 2006 and that she refunded him the sum of Kshs 604,000 as follows: Kshs 456,000 via a Bankers Cheque and Kshs 148,038 was set off from the rent that was due and owing.

The Defence case

20. The 1st Defendant, DW1, adopted his witness statement filed on 13th October, 2011. DW1 informed the court that he met the 2nd Defendant sometimes in 2005 and she informed him that her employer was disposing off the suit property to its employees; that as he was not an employee, it was agreed that the 2nd Defendant would take up the offer and he (DW1) would make the necessary payments and that pursuant to an oral agreement, it was agreed that he would pay a deposit of Kshs 120,000 to Teleposta and pay her a commission for facilitating the agreement.

21. DW1 stated that he was to make further payments of all conveyancing and legal fees, clear outstanding liabilities, renovate the premises,

pay all mortgage installments and take possession of the premises and that upon payment of all the fees aforesaid, the 2nd Defendant was to transfer the suit property to him which she later declined to do.

22. It was the evidence of DW1 that out of the sum of Kshs 2,112,200 which he incurred, the 2nd Defendant repaid him the sum of Kshs 456,000 and the balance of Kshs 1,656,200/- remains outstanding; that he has declined to yield possession of the property until he is compensated and that all the agreements between himself and the 2nd Defendant were verbal.

23. In cross examination, DW1 stated that he moved into the suit property in the year 2006; that he is not a tenant and the suit property is not in his name; that he is not seeking to be reimbursed the monies paid; that the property belongs to him having paid off the mortgage, the legal and conveyancing fees and that he renovated the house.

Submissions

24. The Plaintiff's advocate submitted that it is undisputed that the Plaintiff is the registered proprietor of the suit property; that the Plaintiff's title is protected by virtue of **Sections 24(a) and 26** of the **Land Registration Act** and that a registered proprietor's title is indefeasible as held by the courts in ***Soti Masai vs Peninah Kibet & 2 Others [2017] EKL*** and ***Rachael Njango Mwangi (Suing as the personal representative of the Estate of Mwangi Kabaiku (Deceased) vs Hannah Wanjiru Kiniti & another [2020] eKLR***.

25. It was the Plaintiff's advocate's submission that a claim to property cannot be founded on a promise; that a claim for mesne profits is founded on **Section 2** of the **Civil Procedure Act** and **Order 21 Rule 13** of the **Civil Procedure Rules** and arises where a party is unlawfully deprived of their property as posited by the Court of Appeal in ***Attorney General vs Halal Meat Products Limited [2016] eKLR*** and that the Plaintiff has proved that the Defendant is in unlawful occupation of the suit property and has obtained an advantage therefrom.

26. Counsel submitted that the 1st Defendant's objection to the production of the assessment report a day before the hearing is unfounded as they had not objected to the same during the pre-trial conference nor at the time of filing the agreed list of issues; that **section 35(1) (b)** of the **Evidence Act** allows a party to omit calling the maker of the document if the attendance of a witness can't be procured without inordinate delay and that in any event, the court is empowered by **Section 21 Rule 13(1)** of the **Civil Procedure Rules** to order an inquiry into mesne profits.

27. Counsel for the 1st Defendant submitted that the evidence presented shows that the Defendant was not paying rent as alleged by the Plaintiff but was paying for the mortgage; that the 1st Defendant was to have the suit property transferred to him upon repayment of the loan; that it was unfeasible that the 2nd Defendant would borrow Kshs 667,000 when she only needed Kshs 120,000 as deposit and that there would be no need for the 1st Defendant to pay rent when the 2nd Defendant owed him money.

28. Counsel submitted that the 1st Defendant has made payments amounting to Kshs 960,000 and spent Kshs 281,000 on renovations; that the 2nd Defendant refunded the sum of Kshs 456,000 and retained the amounts paid to her by the 1st Defendant and that there is no evidence to show that the 1st Defendant was given the first option to purchase the property.

Analysis and Determination

29. It is not in dispute that the Plaintiff is the registered proprietor of all that property known as L.R No Nairobi/ Block 69/117/61 (suit property) having been so registered on 10th May, 2011 and the 1st Defendant is currently occupying the suit property.

30. The Plaintiff's case is that she is the registered owner of the suit property having purchased the same vide a Sale Agreement dated 8th December, 2010; that the 1st Defendant is in unlawful occupation of the suit property and that despite having been issued with a notice to vacate the suit premises, he has refused to yield possession of the same to her.

31. The Plaintiff adduced in evidence copies of the demand letter and notices to vacate the suit property issued to the 1st Defendant, the Title Deed in her name, the Transfer of Lease dated 12th March, 2011, the Sale Agreement dated 8th December, 2010, the Charge dated 8th April, 2011 by the Plaintiff to Chase Bank and the Charge dated 24th November, 2006 by the 2nd Defendant to Savings and Loan Kenya Limited.

32. On his part, the 1st Defendant has sought in the counter claim for a declaration that he is entitled to possession of the suit property. It is his assertion that he entered into a verbal agreement to purchase the suit property from the 2nd Defendant (whom he joined in the counter-claim as the 2nd Defendant); that the property was being offered for sale by Teleposta pension scheme to its employees and that as he was not an employee of Teleposta, it was agreed that the 2nd Defendant, who was an employee of Teleposta would acquire the property on his behalf.

33. According to the 1st Defendant, pursuant to the aforesaid oral agreement, he duly paid the mortgage, the legal and conveyance fees, renovated the house and paid all the related sums; that despite the foregoing, the 2nd Defendant refused to transfer the property to him and opted to sell it to the Plaintiff and that he incurred costs to the tune of Kshs 1,656,200 which he claims from the Defendants.

34. The Defendant adduced in evidence bank statements, bankers cheques, bank slips and receipts detailing his payments to the 2nd Defendant and a letter dated 4th August, 2011 addressed to the 2nd Defendant.

35. The evidence adduced in this court shows that the Plaintiff is the registered proprietor of the suit property having being so registered on the 10th May, 2011. The Plaintiff's title was issued under the **Sectional Properties Act, No. 21 of 1987 (now repealed)**.

36. The effect of registration of a person as the proprietor of a leasehold interest under the **Sectional Properties Act** was provided for under **section 5(5)** of the Act as follows:

“Notwithstanding any other written law, as soon as a sectional plan is registered under this Act, the title to a unit comprised in a sectional plan shall, with effect from the date of the registration of the sectional plan, be deemed to be issued under the Registered Land Act.”

37. The **Registered Land Act, Cap 300** (now repealed) provided in **Section 27** as follows:

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

38. Under **Section 28** of the repealed **Registered Land Act**, the rights acquired by a proprietor were only subject to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, or the overriding interests that were provided in **Section 30** of the said Act.

39. The 1st Defendant contends that the Plaintiff colluded with the 2nd Defendant in the Counter-claim to defraud him of the suit property. According to the Plaintiff, the 2nd Defendant sold the suit property to the Plaintiff knowing that he had purchased the property from the 2nd Defendant and was paying the mortgage advanced to her by Barclays Bank.

40. It is trite that whoever alleges fraud must prove it. **Sections 107, 108** and **109** of the **Evidence Act** are instructive and provide as follows:

“107. (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

“108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

41. The requisite standard of proof for fraud was set out by the former Court of Appeal of Eastern Africa in the case of **R. G. Patel vs Lalji Makanji (1957) E.A. 314**, where the court stated thus;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

42. The 1st Defendant did not produce any evidence with respect to the allegations of fraud against the Plaintiff nor indeed any misrepresentation by the Plaintiff in the purchase and subsequent registration of the suit property. To the contrary, the evidence produced in court shows that by the time the 2nd Defendant sold the suit property to the 1st Defendant, she was the registered owner of the land.

43. In any event, the 1st Defendant’s claim to the suit property, being founded on an oral agreement, is contrary to **Section 3 (3) of the Law of Contract Act, Cap 23** which provides as follows:

“(3) 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 founded—

(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.”

44. To the extent that the 1st Defendant admitted that the agreement in respect of the suit property was oral, and the same was not attested, this court finds that the 1st Defendant has not proved that he indeed purchased the suit property from the 2nd Defendant. If any money was paid by the 1st Defendant for the said land, then his only recourse in law is for the sum paid and not the land. The 1st Defendant should therefore give vacant possession of the suit property to the Plaintiff.

45. The Plaintiff has prayed for an order of mesne profits at the rate of Kshs. 30,000 per month from 1st May, 2011 until delivery of vacant possession. **Section 2 of the Civil Procedure Act** defines *mesne profits* as follows:

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

46. **Order 21 Rule 13** of the **Civil Procedure Rules** provides as follows:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-

(a) for the possession of the property;

(b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;

(c) directing an inquiry as to rent or mesne profits from the institution of such suit until-

(i) the delivery of possession to the decree-holder;

(ii) the relinquishment of possession by the judgment- debtor with notice to the decree-holder through the court; or

(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

47. From the above reading of the law and as posited by the Court of Appeal in the case of ***Attorney General vs Halal Meat Products Limited(supra)***, mesne profits are profits accrued during the time the rightful owner was excluded from his land. A claim for mesne profits, being one in the nature of special damages, must be specifically pleaded and proved. This position was affirmed by the Court of Appeal in the case of ***Peter Mwangi Mbutia & Another vs Samow Edin Osman [2014] eKLR*** where the court held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

48. Whereas there is no dispute with regards to the period of occupation of the suit property by the 1st Defendant, no evidence was adduced with respect to the pleaded amount. That being the case, there is no basis upon which the court can make an order for mesne profits.

49. The Plaintiff implores the court to use the discretion granted to it under **Order 21 Rule 13(1)** of the **Civil Procedure Rules** to order an inquiry into the mesne profits in the event there is insufficient evidence of the same. The court is not convinced that this constitutes a proper exercise of its discretion in this regard. Having failed to comply with the ordinary rules of evidence with respect to the production of the valuation report to show the payable mesne profits, the court cannot order for an inquiry into the payable mesne profits.

50. The Defendant has sought for a refund from the 1st Defendant of the expenses he incurred in the purchase of the suit property. According to the 1st Defendant, the amount that he seeks is Kshs 1,656,200/- comprised of Loan Repayments of Kshs 960,000/-, amounts paid to or incurred on behalf of the 2nd Defendant being Kshs 871,000/- and renovations at Kshs 281,000/-. In support, the 1st Defendant produced the mortgage loan account ledger, the banking slips and receipts.

51. Indeed, and admittedly so, the 1st Defendant paid some monies to the 2nd Defendant. In her evidence, the 2nd Defendant admitted having been paid Kshs. Kshs 667,000/- as at the time she purchased the suit property. However, in respect to the monthly payments that the 1st Defendant paid to her loan account, it was the evidence of PW2 that the said amount was paid in lieu of the monthly rent.

52. The issue of whether the monthly payments that the 1st Defendant was making was in respect of the purchase price or the rent was not proved by either party. However, considering that the sale agreement between the Plaintiff and the 1st Defendant is unenforceable, the only conclusion that this court can arrive at is that the said payment was in lieu of rent.

53. The 2nd Defendant informed the court that out of the Kshs. 667,000/- that the 1st Defendant paid her, she has so far refunded Kshs

456,000/-. According to the 2nd Defendant, the balance of the money went into offsetting the rent that was due and owing to the 1st Defendant. However, the 2nd Defendant and the Plaintiff did not prove the payable rent, neither did they inform the court the amount of money that the 1st Defendant used to pay directly to the loan account, which should be used to offset the loan.

54. Considering that none of the parties was candid on the payable rent and the amount of money that the 1st Defendant paid to the 2nd Defendant's loan account, the just order to make is for Ksh 211,000/-, the 2nd Defendant having admitted that she repaid Kshs. 456, 000/- out of Kshs. 667,000/-.

55. In the circumstances, the court finds that the Plaintiff has proved her case on a balance of probabilities, and 1st Defendant's Counter claim for a refund succeeds partially. The court therefore makes the following orders:

a) The 1st Defendant be and is hereby directed to give vacant possession of parcel of land known as Nairobi Block 69/117/61 to the Plaintiff within 90 days from the date hereof, failure of which he should be evicted.

b) The 2nd Defendant to refund the 1st Defendant Kshs. 211,000/-.

c) Interest on the above amount to be paid with interest at court rates from the date when the suit was first filed until payment in full.

d) Each party to bear his/her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD MARCH, 2022

O. A. Angote

Judge

In the presence of:

Sande Mamba for the Plaintiff

Mr. Kimani for the Defendants

Court Assistant - Okumu