



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 370 OF 2010

JOHN WANDURI NJOROGEPLAINTIFF

VERSUS

ESTHER WANGUI NGUGI.....1ST DEFENDANT

CYRUS NJOROGE MWANGI.....2ND DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit revolves around the question of beneficial ownership of an unsurveyed and untitled piece of land designated by the defunct City Council of Nairobi as **Plot Number B-94, Sector II Innercore, Umoja (the suit property)**. The suit property was initially allocated by the City Council of Nairobi to a Mr Derrick Choto in 1978. It is alleged that the suit property was subsequently repossessed and re-allocated to Cyrus Njoroge Mwangi (**the 2nd defendant**) in 2002. Records from the Nairobi City County Government indicate that at some point, the suit property was again repossessed but subsequently re-allocated to the same allottee Cyrus Njoroge Mwangi [2nd defendant]. According to the said Records, Cyrus Njoroge Mwangi is still reflected as the owner of the property. The Plaintiff and the 1st defendant lay parallel claims of ownership over the suit property.

2. Through a plaint dated 30/7//2010 and subsequently amended on 16/12/2011, the plaintiff, John Wanduri Njoroge, sought the following reliefs against the defendants:

i. A permanent injunction restraining the defendants by themselves their servants and/or agents or through any other person or authority from interfering with the plaintiff's quiet user or in any manner dealing with the suit land being Plot Number B 94, Umoja Innercore Sector II.

ii. An order that the 1st defendant be evicted from the suit land being Plot Number B 94, Umoja Innercore Sector II.

iii. General damages against the 1st defendant for unlawful occupation.

iv. Costs of the suit and interest thereon.

v. Any other relief deemed just and expedient by the Honourable Court.

Plaintiff's Case

3. The plaintiff's case is contained in the amended plaint dated 16/12/2011, the witness statement dated 24/11/2011 which he adopted during his testimony, his oral evidence as PW1, and his written submissions dated 30/11/2020.

4. In summary, the plaintiff's case was that he saw an advertisement in the Daily Nation Newspaper for sale of the suit property. He called the mobile phone number provided in the Newspaper. One Mr Karanja, an agent of the 2nd defendant, picked the phone. The said Mr Karanja showed him the suit property and introduced him to the 2nd defendant. The 2nd defendant gave him a letter dated 28/7/2009, addressed to the Director of Housing and Development in the City Council of Nairobi, authorizing the plaintiff to conduct a search on the suit property. He conducted a search and confirmed that the 2nd defendant was the owner of the suit property. On 3/8/2009, he signed a sale agreement with the 2nd defendant, pursuant to which he purchased the suit property from the 2nd defendant. He paid to the 2nd defendant the agreed purchase price of Kshs 1,200,000. He obtained a beacon certificate from the Council's Survey Department. The 2nd defendant executed and gave him a special power of attorney. The 2nd defendant also gave him a deed of assignment purportedly issued by the Council. Further, the 2nd defendant gave him a lease purportedly issued by the Council. However, both the deed of assignment and the lease had not been executed by the Council.

5. The plaintiff further contended that on or about 12/4/2010, he visited the Council's Offices in Umoja to pay rates. While there, he learnt that an agent of the 1st defendant sought to obtain a search relating to the suit property, with the intention of purchasing it. He contacted the 2nd defendant and they reported the matter to the police at Buruburu Police Station. The 1st defendant was subsequently called to the Police Station where she recorded a statement. On 25/7/2010, he was informed by a lady in the neighbourhood that a fence had been erected around the suit property. He established that the 1st defendant was the one who had erected the fence. As at the time of initiating this suit, the 1st defendant was carrying on construction works on the suit property. When he tried to reach out to the 2nd defendant, the 2nd defendant became evasive and could not be reached to shed light on the matter. Consequently, he brought this suit against the two defendants.

6. The plaintiff produced 22 exhibits, among them, the sale agreement dated 3/8/2009, the Power of Attorney dated 20/1/2010, copy of the banker's cheque issued to the 2nd defendant, the unexecuted deed of assignment, and the unexecuted lease. Also produced was a copy of an affidavit purportedly sworn by the 2nd defendant during these proceedings but not tendered by the 2nd defendant as his evidence in these proceedings. The affidavit was purportedly sworn by the 2nd defendant on 18/8/2010, about 18 days after the plaintiff had initiated this suit against the two defendants.

1st Defendant's Case

7. The 1st defendant filed a statement of defence dated 3/2/2012. She contested the plaintiff's claim. She testified as DW1. Further, she led evidence by John Mwangi Thaa, a surveyor working in the Nairobi City County Government's site and Service Scheme Office at Dandora, who testified as DW2. Lastly, he filed witness submissions dated 17/12/2019.

8. In summary, her case was that she purchased the suit property from the 2nd defendant on 2/7/2009 at Kshs 1,200,000. She signed a sale agreement with the 2nd defendant on the same day. She withdrew cash money and paid the 2nd defendant in the Chambers of M/s D M Mungai Advocates. The 2nd defendant acknowledged receipt of full purchase price through a formal acknowledgment in the written and signed agreement. The 2nd defendant subsequently executed and gave her a special power of attorney. Subsequent to that, she paid to the Council all requisite transfer fees and she was issued with a clearance certificate. She was given possession of the suit property by the 2nd defendant upon payment of purchase price.

9. The 1st defendant added that having sold the suit property to her on 2/7/2009, and having given her possession of the suit property, the 2nd defendant did not have any right to subsequently sell the same property to the plaintiff on 3/8/2009. She contended that the purported subsequent sale to the plaintiff was a fraud by the plaintiff and the 2nd defendant. She itemized various particulars of fraud.

10. The 1st defendant admitted being called to the Council's Site and Service Scheme Offices at Umoja where it was established that the plaintiff had been defrauded by the 2nd defendant. At that point, the Council advised that the fraud be reported to the Police. She added that the Police investigated the matter and established that the plaintiff had been defrauded by the 2nd defendant. The 1st defendant urged the court to dismiss the plaintiff's suit.

11. The 1st defendant produced 14 documents, among them a sale agreement dated 2/7/2009 in which the 2nd defendant acknowledged receipt of the purchase price of Kshs 1,200,000 from the 1st defendant, a power of attorney, cash withdrawal slip for Kshs 1,200,000 dated 2/7/2009, City Council receipts, and letter dated 31/3/2010 written to the Council requesting the Council to transfer the suit property to the 1st defendant.

12. The 2nd defendant did not enter appearance and did not put forth a defence.

Analysis and Determination

13. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant law and jurisprudence. The single issue to be determined in this Judgment is, who between the plaintiff and the 1st defendant is the rightful beneficial owner of the suit property, Plot Number B-94, Sector II, Umoja Innercore?

14. The author of this dispute is one Cyrus Njoroge Mwangi (the 2nd defendant). It does emerge from the evidence led by the plaintiff and the 1st defendant that Mr Mwangi sold the suit property to the 1st defendant on 2/7/2009 and acknowledged receipt of full purchase price of Kshs 1,200,000 from the 1st defendant on the same day. The 1st defendant produced a cash withdrawal slip indicating that she withdrew Kshs 1,200,000 in cash on 2/7/2009. The 2nd defendant proceeded to give the 1st defendant vacant possession of the suit property upon receiving the agreed purchase price. A month after that, on 3/8/2009, he similarly executed a sale agreement with the plaintiff and received a similar amount of money [Kshs 1,200,000] from the plaintiff as purchase price.

15. It does further emerge from the evidence on record that when the plaintiff realized that the 1st defendant was asserting ownership rights over the suit property, he engaged the Police who, regrettably, did not provide a solution to his problem. His attempts to get the 2nd defendant to resolve the matter did not bear fruits because the 2nd defendant became evasive, prompting him (the plaintiff) to initiate this suit against the two defendants.

16. Evidence by the witness from the Nairobi City County Government's Dandora Site and Service Scheme (DW2) indicates that the 2nd defendant was at all material times the allottee of the suit property. On 31/3/2010, the 2nd defendant wrote to the City Council of Nairobi's Dandora Site and Service Scheme Directorate, confirming that he had sold the suit property to the 1st defendant and requesting the Directorate to transfer the suit property to the 2nd defendant. The letter reads thus:

“Dear Sir,

RE; CONSENT OF TRANSFER PLOT NO B94- SECTION 2

UMOJA INNERCORE

I Cyrus Njoroge Mwangi , I have sold the above mentioned Plot to Esther Wangui Ngugi – ID No [...] of P. O. Box 96 Thika and I have no claim for whatsoever.

Hence, I would highly appreciate if the same can be transferred to her.

Yours faithfully

CYRUS NJOROGE MWANGI

17. Regrettably, the 2nd defendant who was the author of this dispute, and the author of the apparent fraud, did not bother to file a defence or lead evidence in this suit. He left the two investors from whom he had collected purchase prices to fight the present legal battle on their own.

18. With the above evidence, there is no basis for concluding that the plaintiff has proved a case on a balance of probabilities against the 1st defendant. The 1st defendant had already purchased the suit property from the 2nd defendant and had already been given vacant possession of the suit property by the 2nd defendant by the time the 2nd defendant purported to fraudulently sell the same property to the plaintiff. In the circumstances, the reliefs available to the plaintiff are a claim for refund of the purchase price and a claim for damages, both against the culprit. That culprit is the 2nd defendant. Regrettably, the plaintiff did not pray for those reliefs against the 2nd defendant in the amended plaint dated 16/12/2011. In the absence of specific prayers, those reliefs cannot be granted to the plaintiff in this Judgment.

19. The plaintiff relied on the affidavit purportedly sworn by the 2nd defendant on 18/8/2010. This suit was in existence at the time the plaintiff purported to procure the said affidavit from the 2nd defendant. In my view, if the 2nd defendant were a truthful person, he would have come to court, put forth his pleadings and witness statement, and led evidence relating to the rival assertions of the plaintiff and the 1st defendant. The logical inference the court makes from his conduct is that he defrauded the plaintiff and did not want to expose himself by participating in these proceedings.

20. Consequently, my finding on the single issue in this suit is that the 1st defendant is the rightful beneficial owner of the suit property, Plot Number B-94, Sector II Umoja Innercore, having purchased it from the 2nd defendant on 2/7/2009. It is my further finding that the 2nd defendant defrauded the plaintiff by purporting to sell the same property to him a month after he had sold and given the suit property to the 1st defendant. However, because the plaintiff did not pray for appropriate reliefs against the 2nd defendant, the court will not grant him the relevant reliefs on the platform of this suit. He will be at liberty to pursue the culprit as he deems appropriate.

21. In the end, the plaintiff's suit fails wholly as against the 1st defendant.

The 2nd defendant, as the author of the fraud culminating into this dispute, will bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Shivugu for the Plaintiff

Court Assistant: June Nafula