



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 30 OF 2017**

**ELIZABETH WANJIKU NJOKA (Suing as the legal representative of**

**Alice Kahaki (Deceased) ..... PLAINTIFF**

**VERSUS**

**OLIVER YACHAMA MATECHE**

**Trading as MKENYA GARAGE..... 1<sup>ST</sup> DEFENDANT**

**SHARIFF OTIENO Trading as**

**SHARIFF'S UNIQUE AUTOWORKS..... 2<sup>ND</sup> DEFENDANT**

**MARK KIPTOO..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By plaint dated 6<sup>th</sup> February 2017, the plaintiff averred that she was appointed the legal representative of Alice Kahaki, her deceased mother in Nakuru HC Succession Cause No. 16 of 1984. That by virtue of being the deceased's legal representative, she became the registered owner of the parcel of land known as Nakuru Municipality/Block 2/531. She further averred that the defendants trespassed into the suit property in November 2014 and started operating open-air garages thereon. She stated that the defendants claimed to be on the suit property as tenants of her brother, Joseph Njuguna but as far as she was concerned, they were trespassers. That despite her demands for vacant possession of the suit property, the defendants refused to comply.

2. The plaintiff therefore sought judgment against the defendants for:

- i. A declaration that the Defendants are trespassers of the suit property i.e. Nakuru Municipality/Block 2/531.*
- ii. An order that the Defendants give, to the Plaintiff, vacant possession of the said Nakuru Municipality/Block 2/531.*
- iii. A permanent injunction restraining the Defendants, by themselves, their agents, servants, employees and or any person, whosoever, acting under their instructions from entering into or being on the said Nakuru Municipality/Block 2/531.*
- iv. General damages/mesne profits for losses incurred from 1<sup>st</sup> January, 2017, until the date they give the Plaintiff vacant possession of the same.*
- v. Costs of the suit.*
- vi. Interests on (iv) and (v) above.*

3. The defendants filed a joint statement of defence in which they admitted operating open-air garages on the suit property. They added that they entered into a lease agreement on 28<sup>th</sup> September 2014 with the estate of the plaintiff's deceased father and that the plaintiff's deceased father was the owner of the suit property. They added that they enjoy a controlled tenancy under the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**, that the plaintiff had been receiving rent from them and that the plaintiff cannot obtain possession without following the law. They denied the plaintiff's other allegations and urged the court to dismiss the suit with costs.

4. Elizabeth Wanjiku Njoka, the plaintiff, testified as the sole witness in support of her case. She adopted her witness statement dated 6<sup>th</sup> February 2017 as her evidence in chief. She stated that she is the legal representative of the estate of her late mother, Alice Kahaki Njoka, who passed away on 25<sup>th</sup> August, 1983. That she obtained grant of representation in Nakuru High Court Succession Cause No. 16 of 1984 and that she brought this suit against the defendants who she stated hold assets of the deceased and that her intention is to gather up the entire estate so as to distribute it among all the heirs. She stated that the Commissioner of Lands issued to the deceased a letter of offer in respect of the suit property on 12<sup>th</sup> January 1983, that the deceased complied with the terms of the offer and that as at the date of her death she was entitled to be issued with a title in respect of the suit property. She produced copies of the documents annexed to her list of documents dated 6<sup>th</sup> February 2017 as exhibits.

5. She further stated that prior to 15<sup>th</sup> June 2016 when she obtained letters of administration in respect of her late mother's estate, her late father Philip Njoka Kamau was the administrator of the estate. That she became the administrator after the grant to her father was revoked and that she did not know if the grant to her father had been confirmed. She nevertheless conceded that the grant to her father may have been confirmed by the time she applied for grant. She added that grant had not yet been confirmed and that there is pending in court another matter being HC Misc. Application No. 33 of 2016 which is a cause for separation of her father's and her mother's estates and that until that matter is determined, it is impossible to tell what belonged to her father's estate and what belonged to her mother's estate.

6. Ms Njoka further stated that she obtained the suit property by transmission pursuant to the grant issued to her and that she holds it as an administrator. That her late father had a will and that the executor of the will is Juma Kiplenge. That Juma Kiplenge obtained grant of probate of her late father's will and that the suit property is listed as item number 41 in the will. That the grant of probate was issued on 19<sup>th</sup> November 2013 prior to her grant and that it is yet to be confirmed owing to the pending HC Misc. Applic. No. 33 of 2016. She further stated that she accepted about KShs 80,000 from her brother Joseph Njuguna Njoka, being part of rent collected from the 1<sup>st</sup> defendant during the period December 2014 to December 2016. She also agreed that the defendants' tenancies are governed by the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act**.

7. The plaintiff's case was then closed.

8. Oliver Yachama Mateche, the 1<sup>st</sup> defendant, testified next as DW1. He adopted his witness statement dated 27<sup>th</sup> March 2017 as his evidence in chief. He stated that he is a tenant on the suit property where he owns an open-air garage and that he sublet portions of the suit property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. That he entered into a lease agreement with Mr J N Njoka on behalf of the estate of the late P N Njoka on 28<sup>th</sup> September 2014 and that he has paid all his rents. He added that the plaintiff has received part of the rent and that she should not seek possession without giving of termination of the tenancy. He produced copies of documents in the defendants' list of documents dated 29<sup>th</sup> March 2017 as exhibits. Mr Mateche further stated that he does not have any other interest on the property besides being a tenant and that the plaintiff had not given him any formal notice to vacate.

9. Next to testify was Joseph Njuguna Njoka, DW2. He adopted his witness statement dated 27<sup>th</sup> March 2017 as his evidence in chief and stated that the plaintiff is his younger sister. That the 1<sup>st</sup> defendant is a tenant on the suit property pursuant to agreement dated 28<sup>th</sup> September 2014 which he signed. That grant of probate of the will of his father D N Njoka was issued to Juma Kiplenge on 19<sup>th</sup> November 2013 and that the suit property was bequeathed in the will to Lucy Wanjiru. He added that the succession matter in which probate was granted has not been finalized because the plaintiff herein is challenging the will.

10. Mr Njoka testified further that he had not issued to the 1<sup>st</sup> defendant any statutory notice to vacate the suit property. That the 1<sup>st</sup> defendant pays to him rent of KShs 40,000 which he then distributes equally to the seven children of Alice Kahaki. That the plaintiff received her share until 7<sup>th</sup> November 2016 when she stopped. He added that the 1<sup>st</sup> defendant is not a trespasser and that when Juma Kiplenge obtained grant of probate in 2013, he accompanied Mr Kiplenge to the suit property and they found that residents were using it as dumping area. That he asked Mr Kiplenge who allowed him to find a way of salvaging the property and that was how the 1<sup>st</sup> defendant got involved.

11. He added that he and 6 others are beneficiaries of the estate of Alice Kahaki Njoka and that the suit property belongs to the late Alice Kahaki Njoka. That the plaintiff is a child of Philip Njoka Kamau and a beneficiary of his estate in respect of which grant of probate was issued to Juma Kiplenge on 19<sup>th</sup> November 2013 in Nakuru HC Succession Cause No. 497 of 2013, which cause is pending in court and the grant is yet to be confirmed.

12. The last defence witness was Juma Kiplenge, an advocate of the High Court of Kenya practising in Nakuru. He confirmed that he is the executor of the will of the late Philip Njoka Kamau, that he obtained grant of probate of the will on 19<sup>th</sup> November 2013 in HC Succ. Cause No. 497 of 2013, that the succession cause was still pending with ongoing litigation as at the date of his testimony and that the suit property is one of the assets listed in the will. He added that there were several proceedings in court touching on the suit property and that the title had been challenged in the main succession cause.

13. He testified further that after obtaining the grant, he consulted the family of the late Philip Njoka Kamau which comprised of five houses and a vast estate. That he summoned the family to a meeting at which Joseph Njuguna Njoka was chosen by the family as a representative to help him administer the estate. That he then instructed Joseph Njuguna Njoka to lease the suit property in 2014 and to collect rent from all the properties and pay workers and overheads. That Joseph Njuguna Njoka was required to file accounts in the main succession cause and to bank all rent into two accounts. That the whole family including the plaintiff share would then share the rent.

14. Mr Kiplenge further stated that the suit property forms part of the estate of the late Philip Njoka Kamau and that it is the subject of litigation. That the lease with the 1<sup>st</sup> defendant was made pursuant to his oral and written instructions and that he was aware that the 1<sup>st</sup> defendant had sublet to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He added that the defendants bring to the estate a combined rent of about KShs 40,000 and that the family sits as the five houses and decide how the estate income is to be shared, based on needs. That he is usually briefed every

month by Joseph Njuguna Njoka on the needs then he gives instructions on disbursements and that neither him nor the plaintiff herein have terminated the tenancy of the 1<sup>st</sup> defendant.

15. Defence case was thereby closed.

16. Thereafter, parties filed and exchanged written submissions. The plaintiff filed submissions as well as list of authorities dated 3<sup>rd</sup> March 2021, the defendants responded with their submissions dated 12<sup>th</sup> March 2021 and the plaintiff filed submissions in reply as well as supplementary list of authorities dated 15<sup>th</sup> April 2021. I have duly taken note of all the submissions and authorities cited.

17. It was argued for the plaintiff that by virtue of the certificate of lease issued to her, she is the absolute proprietor of the suit property with exclusive rights thereto. Citing **Sections 25 to 27 of the Land Registration Act**, it was argued that the suit property is the plaintiff's personal property and that her title is indefeasible. It was further argued that the agreement dated 28<sup>th</sup> September 2014 pursuant to which the defendants entered the suit property amounted to intermeddling since Joseph Njuguna Njoka was only a beneficiary of the estate without any grant of representation and that the executor of the will of the late Philip Njoka Kamau could not lawfully delegate his powers as was purported in the agreement. Among others, **Section 45 of the Law of Succession Act** and the case of **In re Estate of Haji Mohamed (Deceased) [2016] eKLR** were cited. It was also argued that the defendants did not deny the allegations of trespass and that the plaintiff is therefore entitled to an award of KShs 500,000 as compensation for the tort of trespass to land and KShs 5,000,000 being general damages/mesne profits. In conclusion, the plaintiff urged the court to grant her judgment as per her pleadings.

18. For the defendants, it was argued that they are validly on the premises pursuant to a tenancy agreement between them and the estate of the late Philip Njoka Kamau, that their tenancy is protected pursuant to the **Landlord and Tenant (Shops, Hotels and Catering Establishments) Act** and that having received and used her portion of the rent collected from them the plaintiff is estopped from claiming that they are trespassers. That in the circumstances the plaintiff is not entitled to mesne profits or general damages. Together with other cases, the defendants relied on **Benerdette Magoma Nyakabaria v Bonareri Asiago & 3 others [2016] eKLR** and **Fredrick Korir v Soin United Women Group (Sued through Eunice Towett, Jane Mwolomet, Lucio Chebocho [2018] eKLR**. The defendants therefore urged the court to dismiss the plaintiff's case with costs.

19. I have considered the parties' respective pleadings, evidence, submissions and authorities. The issues that emerge for determination are whether the plaintiff is the owner of the suit property, whether the defendants have trespassed on the suit property and whether the reliefs sought should issue.

20. There is no dispute that pursuant to certificate of lease dated 5<sup>th</sup> December 2016, the plaintiff is registered as proprietor of the suit property "as an administrator to the Githunguri estate of Alice Njoka". She conceded during her testimony that her grant is yet to be confirmed. A reading of the title document leaves no doubt in my mind that her proprietorship is simply as administrator of the estate. Her claims in her submissions that the suit property belongs to her personally have no basis in fact or law. If anything, she stated in her testimony that she filed this suit with an intention of gathering up the entire estate of Alice Njoka so as to distribute it among all the heirs.

21. There is a further consideration regarding ownership of the suit property herein: By the plaintiff's own admission during her testimony, the issue of which estate between the estate of the late Philip Njoka Kamau and the estate of the late Alice Kahaki Njoka owns the suit property is pending determination in HC Misc. Applic. No. 33 of 2016. Indeed, the executor of the will of the late Philip Njoka Kamau who testified as DW3 contended that the suit property belongs to the estate of the late Philip Njoka Kamau. It is apparent that the administration of both estates is a live, contentious and disputed matter in court.

22. Although the plaintiff is currently registered as proprietor of the suit property "as an administrator to the Githunguri estate of Alice Njoka", her proprietorship is transient and subject to the succession proceedings. That is the spirit of **Section 26 (1) of the Land Registration Act** which provides which provides:

***The certificate of title issued by the Registrar upon registration, ... or transmission ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate...*** [Emphasis supplied]

23. The land registrar has endorsed in the certificate of lease that the plaintiff's proprietorship is "as an administrator to the Githunguri estate of Alice Njoka". If it turns out that the suit property is not part of the estate of the late Alice Kahaki Njoka or if the plaintiff ceases to be an administrator of the estate, then she will have no proprietorship interest or role in the management or control of the suit property.

24. Thus, the answer to the first issue for determination is that the suit property belongs to the relevant estate and its absolute proprietorship will be determined in the succession proceedings once confirmation of grant is issued.

25. Have the defendants trespassed onto the suit property? The plaintiff has not persuaded me that the defendants have committed any trespass. It is not in dispute that the defendants are on the suit premises pursuant to an agreement entered into on 28<sup>th</sup> September 2014, between them and Mr Joseph Njuguna Njoka. Both Mr Joseph Njuguna Njoka and the executor of the will of the late Philip Njoka Kamau maintain that the agreement was entered into on behalf of the estate of the late Philip Njoka Kamau. The plaintiff on the other hand sees Mr Joseph Njuguna Njoka as an intermeddler and the defendants as trespassers. I further note that the plaintiff obtained grant of letters of administration in respect of the estate of the late Alice Kahaki Njoka on 23<sup>rd</sup> June 2016. The plaintiff admitted that the defendants entered the suit property in the year 2014, two years before she became administrator and that even as she was seeking grant, she was aware that the 1<sup>st</sup> defendant was in the property and was paying rent.

26. The validity of the actions of both Mr Joseph Njuguna Njoka and the executor of the will of the late Philip Njoka Kamau as regards the agreement entered into on 28<sup>th</sup> September 2014 and whether Mr Joseph Njuguna Njoka is an intermeddler are matters to be determined by

the family court pursuant to the **Law of Succession Act**. It suffices for purposes of these proceedings to note that the existence of the agreement and payment of rent by the defendants are not disputed.

27. In view of the foregoing discourse, I am not persuaded that the reliefs sought by the plaintiff should issue to her. The family and respective estates should resolve the underlying succession disputes in the appropriate court, pursuant to the **Law of Succession Act**.

28. In the result, I dismiss the plaintiff's suit. The defendants are on the suit property pursuant to an agreement made with the blessings of an administrator of one of the estates. The dispute herein is an offshoot of disputes within the estates. In the circumstances, I order that each party bears own costs of this suit.

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of June 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Nduta Kamau holding brief for Mr Munyori for the plaintiff

Ms Wangari holding brief for Mr Waiganjo for the defendants

Court Assistants: B. Jelimo & J. Lotkomo