



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC. CASE NO. 138 OF 2016

ARTHUR ATHANAS MOODY AWORI.....PLAINTIFF

= VERSUS =

CHARLES OMONDI.....DEFENDANT

J U D G M E N T

1. The plaintiff brought a suit against the defendant via a plaint dated 25th October 2016 praying for judgment against the defendant for;

- a) An order of eviction against the defendant, his servants, agents and all those claiming through him.**
- b) Taking of accounts for the rent and other income collected from the property by the defendant.**
- c) Damages.**
- d) Costs.**

2. The plaintiff pleaded that PAMELA MARY AWORI, the donor of the power of attorney is the registered absolute owner of a parcel of land known as SAMIA/WAKHUNGU/ODIADO/589 measuring 12.2 hectares together with all the improvements thereon. That the defendant moved into the said parcel of land and took over the buildings and rented some of the buildings to third parties without authority which action amounts to trespass.

3. On June 29, 2017, the defendant entered appearance and filed his defense. He denied the plaintiff's averments, instead claiming that on June 5, 2010, at his request, JEREMY HANNINGTON EDWARD AWORI, the registered owner's son, rented the suit premises to the defendant for a period of ten years at an agreed price of Kshs.1,200,000/=, which he paid in full. That the lease was set to expire on May 6, 2021. That the plaintiff was always aware of the aforementioned house agreement. The defendant claims that the plaintiff should not have filed this suit because he has no claims against the defendant.

4. The matter was set down for hearing on 23/2/2021 and it proceeded with the evidence of the plaintiff testifying as **PW1**. The plaintiff adopted his witness statement dated 25th October 2019 stating that the suit parcel of land was owned by his late brother HANNINGTON H.O. AWORI and upon his death, the parcel was inherited by his widow, PAMELA MARY AWORI. **PW1** continued in evidence that his late brother had developed the suit parcel by putting up buildings including a bakery. That the defendant took advantage of the absence of his late brother's family and moved into the property and started renting out the premises to unsuspecting third parties.

5. The witness went on to say that his late brother's immediate family authorized him to take legal action to evict the defendant and everyone else he had rented the premises to. According to **PW1**, the defendant must account for the illegal income he earned from the illegal use of the land. He went on to say that he doesn't know the defendant and was unaware of a lease agreement between the defendant and his nephew, Jeremy Awori. **PW1** presented the documents listed in his list as *PEX 1-4* in support of the claim.

6. During cross-examination, **PW1** stated that when he was given the power of attorney, he was told that the defendant was bringing people on to the land and collecting money from them. He also stated that the defendant had no permission to enter the property and that he chose to file the current suit rather than report to the police.

7. **PW2** Jeremy Edward Hannington Awori, who provided evidence in chief in a written statement dated 20/5/2019. He testified further that **PW1** is his uncle and he is aware that his mother gave **PW1** the power of attorney to bring this suit. He stated that he never entered into any rental agreement with the defendant and he is not a grandson of **PW1** as alleged in the defendant's statement. **PW2** asserted that the alleged rental agreement is a forgery because the defendant has never paid him anything, whether for the house or anything else. The defendant has failed to produce proof of payment of the sum of Kshs.654,000/= and subsequent monthly rent payments of Kshs.10,000/=. He stated that he rarely visits Funyula due to the nature of his job, and that his mother has never granted him power of attorney over the suit property.

8. During his cross-examination, **PW2** stated that he has never done business with the defendant. PW2 denied sending the defendant any money via Mpesa, neither on 21/11/2015 of Kshs.6,500/= nor on 21/11/2015 of Kshs.8,500/=. He also stated that he had never met the defendant alone or with the assistant chief, and he has no idea where the defendant obtained his ID Card. He also stated that he never asked the defendant to leave because he did not have any agreement with him.

9. The defendant's case was opened with the testimony of Charles Onyango Omondi giving his evidence as **DW1**. He claimed that he called Jeremy (PW2) requesting for permission to use the land after being given the number by Jacob, their caretaker. According to the defendant, PW2 advised him to get a fundi to make him a quote for the house repair whereafter another caretaker named David arrived who took the quotation to send to PW2 via email. That PW2 instructed him not to do anything in the house until he arrived because he intended to lease the property for ten years. The witness stated that he decided to sell his land to enable him get the money to renovate the building on the suit land.

10. **DW1** continued further that when PW2 came to collect the money, he decided to pay him in the presence of the area assistant chief. He stated that, while he would have preferred an advocate to witness the transaction, PW2 stated that advocates are fraudsters, so **DW1** trusted him and in 2010, he began using the house. It is his evidence that after they discussed and agreed, he gave him money in the amount of Kshs.654,000/=. That they had agreed that he would pay Kshs.1,200,000/= for the ten years and he was to use the remaining balance to renovate the house. However, he found out after 5 years that the plaintiff wanted him to leave the house. That he (the defendant) had been on the suit premises for 5 years when the plaintiff was donated to the power of attorney, so they cannot claim they were unaware he was there. He stated that he has not refused to move out but he has not used the house yet he paid money. He asked the court to assist him to get his money refunded then he will leave and get alternative premises since he had spent money on renovations and prayed for justice.

11. Under cross examination by Mr. Juma, learned counsel for the plaintiff, the defendant stated that he received the demand letter in court and did not respond to it. He didn't bother to find out who owned the land before proceeding with the transaction, but he knew the house belonged to Jeremy's parents because they were his neighbours. He had paid Jeremy Kshs.654, 000/= in cash from the sale of his land to Juma, but he had misplaced his copy of their sale agreement. That he paid the money in the presence of the assistant chief, and that the agreement came in three copies, whose contents he agreed to.

12. In further cross-examination, **DW1** stated that Hannington was already deceased at the time of the lease. He is aware that PW2 lives in Nairobi and works in a bank. That PW2 had arrived in a vehicle with the chief, and he had an agreement ready. He explained that the remaining Kshs.446,000/= would be used for repairs which repairs cost more than expected, so PW2 sent him more money via Mpesa. That the lease was set to expire in May 2021.

13. **DW2**, Richard Juma in his opening statement stated that the defendant called him as a witness to explain how he obtained the money he used to pay the rent. He claimed that the defendant sold him 1.2 acres' portion from his parcel number Samia/Wakhungu-Odiado/448. That they reached an agreement on a purchase price of Kshs.1,230,000/=. **DW2** went on to say that he had not been assigned a number for his portion because the title was still contested in court. During cross-examination, this witness stated that the assistant chief arrived in a greenish car with someone, but he does not know Jeremy personally.

14. The parties filed their written submissions which the court has looked at and considered together with the applicable law. From the evidence on record, the issues framed for determination by this court are;

a) Whether this court has the jurisdiction to determine the dispute before it.

b) Whether the plaintiff is entitled to the prayers sought in the plaint

c) Who should pay costs?

15. On the first issue, the defendant has submitted that this was the wrong forum to file the suit as the dispute revolved specifically on a landlord-tenant lease agreement making the Business Premises Rent Tribunal as the right forum for its determination. He submitted that the suit should be dismissed on this ground. The plaintiff is asking for eviction orders against the defendant from the LR. SAMIA/WAKHUNGU-ODIADO/589 and taking of accounts for the rent and other income collected from the property by the defendant. Under Section 2 of the provisions of Landlord and Tenant Act CAP 301, the controlled tenancies are those which are either not reduced in writing; or if written then runs for a period not exceeding five years. The defendant in his evidence stated that his lease was to run for a period of ten years and it was reduced into writing. Automatically their written agreement and its term ousted the jurisdiction of the Business Premises Tribunal.

16. On the question whether or not the plaintiff is entitled to the orders sought, it is not in dispute that the donor of the power of attorney is the registered owner of the suit title. The defendant admitted under cross-exam that he knew the impugned house belonged to the parents of PW2 who he alleged to have transacted with. The defendant equally admitted that he did not bother to carry out any search before signing the lease agreement. On the presumption that the defendant does not dispute that PW2 leased to him the property, that leasing was not binding on the registered owner who does not recognise the defendant. The defendant did not endeavour to demonstrate on what basis he trusted PW2 to have authority in dealing with the property that did not bear his name.

17. Further, PW2 has denied knowing the defendant entering into any lease agreement with defendant as was alleged. The plaintiff has stated that the defendant took advantage of the absence of his late brother's family and moved into the property and started collecting rent. The burden is always on the party who alleges to prove the existence of the fact they wish to rely on. PW2 denied receiving the alleged sum of Kshs.654,000 from the defendant which according to the lease agreement was to cover rent for the entire period of the lease. The plaintiff's claim is that the defendant is a trespasser on their property and he has demonstrated that the registered owner did not put the defendant into possession.

18. The defendant stated that he had been on the premises for a period of five years before this suit was filed, If at all permission was not

given then what the defendant was doing amounted to continuous trespass. The defendant's claim on the sum of money paid to Jeremy (PW2) can only be recovered from the said recipient and not the registered owner of the property. The defendant also asserted that he spent approximately Kshs.546,000 on repairs on the building in accordance with their agreement. First, the plaintiff did not authorise such repairs to be undertaken so that she is made liable for the same. Secondly, the defendant did not produce any evidence of incurring any expenditures on the stated building. Besides not calling any witness or fundi to confirm the repairs ever took place, he also failed to explain the nature of repairs carried on the impugned house. Therefore, the defendant's cry for justice to be done was unsupported with any documentary evidence.

19. Lastly, according to the defendant, the lease was for a period of ten years which period came to end on 10th May 2021. The defendant closed his case on 8th April 2021 approximately one month to the date so that even if there was a valid agreement between PW2 and the defendant, the same has been terminated by effluxion of time. Since the defendant did not bring a counter-claim, he ought to have voluntarily left after the expiry of his alleged contract without waiting for orders from this Court. On this ground also, the plaintiff's case must succeed.

20. The plaintiff has prayed that accounts be taken for the rent and other income collected from the property by the defendant. The defendant on the other hand has submitted that he used his monies to renovate the suit premises and prayed that the court counts the first five years of the transaction as being wasted away by the plaintiff and he be compensated of the same in monetary value or extension of time to utilize the premises. However, since there was no contract between the two, the plaintiff is not entitled to any accounts. He could only claim for general damages for trespass which was not proved. The defendant stated that he was served with the demand letter after this case had been filed thus making the plaintiff's right for compensation to run from the time he demanded for vacant possession. Further, the plaintiff did not elaborate on when they discovered the trespass and what they intended to put the land to use that the defendant's occupation prevented them from so doing. As a result of the omission, the plaintiff's prayer for taking of accounts and or compensation in damages fail.

21. In light of the evidence adduced, I am satisfied that the plaintiff has proved his claim against the defendant for eviction only. Accordingly, I enter judgement in his favour as follows;

a) An order of eviction does issue forthwith against the defendant, his servants, agents and all those claiming through him

b) The plaintiff is awarded costs of the suit.

DATED, SIGNED & DELIVERED AT BUSIA THIS 29TH DAY OF SEPTEMBER, 2021

A. OMOLLO

JUDGE