



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC CAUSE NO. 253 OF 2012

LUCY NYAMBURA PETER.....PLAINTIFF

-VERSUS-

DORCAS WANJIRU.....1ST DEFENDANT

GEMMY MAINA.....2ND DEFENDANT

LUCKY SUMMER ESTATE CO. LIMITED.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiffs have filed the subject suit vide Plaint dated the 10th of May 2012, in respect of which the Plaintiff has sought the following Reliefs;

i. Declaration that the plaintiff is the owner of all that known as Plot 567/R exercised block 31/Block 4 & 24, lucky Summer estate, Nairobi.

ii. A permanent injunction restraining the Defendants or agent or anybody claiming from them, alienating, transferring the property known as Plot 567/R exercised block 31/Block 4 & 24, lucky Summer estate, Nairobi

iii. Costs of the suit

iv. Any other relief that the court may be just and expedient to grant

2. Following the filing of the suit, the Plaintiff extracted the summons to enter appearance and thereafter same were served upon the Defendants herein, who proceeded to enter appearance and file statement of defense. For clarity, the 1st Defendant herein, entered appearance on the 30th June 2016, through the law firm of M/s Solomon Mugo & Co. Advocates and thereafter filed statement of Defence on the 15th July 2016.

3. On the other hand, the 2nd Defendant entered on the 10th May 2012, but however same did not file any statement of Defense.

4. As pertains to the 3rd Defendant, same entered appearance on the 16th May 2012, and similarly despite entering appearance through the firm of M/s Kanyi Ndurumo & Co. Advocates, same did not file any statement of defense.

5. Before the subject matter was listed for hearing, the 1st Defendant herein filed a Notice of motion Application dated the 11th June 2016, in respect of which the 1st Defendant sought to strike out the plaintiff suit as against herself, on the basis that the suit did not Disclose any reasonable cause of action.

6. In support of the foregoing Application, the 1st Defendant swore an affidavit sworn on the 11th July 2016, and in respect of which the 1st Defendant stated where pertinent as hereunder;

“Paragraph 2.:That I have read the Plaint and found out that someone can make such allegation against a stranger. The Plaintiff as alleged that I am developing her Plot no. 563(R576) purportedly exercised from l.R No 31/Block 4 & 24, lucky Summer estate, Nairobi.

. Paragraph:,That I wish to state categorically that I do not own the said plot, either alone or jointly with any other person and the said allegations by the Plaintiff are totally outrageous and false.”

7. The said Application dated the 11th July 2016, does not appear to have been prosecuted. Consequently, same remains to be part and parcel of the record, without any determination thereof.

8. Following the close of pleadings, the subject matter was listed for hearing and same was ultimately heard on the 29th September 2021, when the Plaintiff herein testified as PW1 and thereafter called Peter Mbuthia Muhoro, who testified as PW2. Thereafter the Plaintiffs case was closed.

9. On the other hand, the 2nd Defendant herein, who was present in court during the hearing, chose to testify and informed the court that though initially he was represented by and advocate, he has since filed a notice to act in person.

10. The said 2nd Defendant was therefore allowed to and indeed testified as DW1 in respect of the subject matter.

11. Be that as it may, the 1st and 3rd Defendants herein did not testify. Consequently, the case on behalf of the 1st and 3rd Defendants was closed without any evidence having been adduced and/or tendered.

Evidence by the parties

Plaintiff's case

12. The Plaintiff herein testified as PW1 and informed the court that same entered into and executed a sale agreement between herself and the 2nd Defendant herein, which agreement was reduced into writing on the 9th January 2003. Besides, the Plaintiff also testified that the said agreement was duly signed by herself,, the 2nd Defendant and various witnesses.

13. It was further the Plaintiff's testimony, that following the execution of the sale Agreement, same paid to and in favor of the 2nd Defendant the entire purchase price that was agreed upon.

14. Further, the Plaintiff testified that after the payment of the purchase price, the 2nd Defendant took her (plaintiff) to the said plot which was the subject of the sale Agreement and thereby pointed out the Beacons defining the suit plot.

15. On the other hand, the Plaintiff testified that the 2nd Defendant also took her to the offices of the 3rd Defendant, who were the registered owners of the block/parcel of land, in which the suit plot was located. In this regard, the plaintiff further testified that the 3rd Defendant approved of the sale agreement between the plaintiff and the 2nd Defendant and a transfer form signaling the transfer of the suit plot to the Plaintiff, was dully executed and engrossed by all the parties, including the officials of the 3rd Defendant.

16. It was further the Plaintiff's testimony that after the execution of the transfer Instrument, the 3rd Defendant herein proceeded to and issued a certificate dated the 9th January 2003, bearing the Plaintiff's name which thus authenticated that the Plaintiff was the legitimate owner of the suit plot.

17. Nevertheless, the Plaintiff further testified that on or about the 16th April 2012, she found some persons digging trenches on the suit plot as well as depositing of building materials. In this regard, the Plaintiff testified that she endeavored to ascertain the identities of the persons who were digging the trenches, but was unable to confirm.

18. Owing to the foregoing, the Plaintiff testified that she approached the 3rd Defendant, to confirm whether same were the ones, who had sold her (Plaintiff's) the property to someone else and thereby being responsible for the offensive activities.

19. It was the Plaintiff further testimony, that when she approached the 3rd Defendant, same was noncommittal and reluctant to respond to her enquiries. Consequently, the Plaintiff formed the opinion that it was the 3rd Defendant, who was responsible for the offensive action.

20. On the other hand, the Plaintiff also testified that she also engaged the 2nd Defendant to ascertain the circumstances leading to the offensive activities but again the 2nd Defendant was also evasive.

21. In view of the foregoing, the Plaintiff testified that she was thus constrained to file and/or commence the subject suit, seeking the various reliefs, which have been enumerated at the foot of the Plaint dated the 10th May 2012.

22. The Plaintiff called one witness namely, Peter Mbuthia Muhoro, who stated that he is the husband of the Plaintiff. Other than the confirmation that he (PW2) was the husband of the Plaintiff, he essentially corroborated the Plaintiffs testimony.

The 1st Defendant's case

23. Though the 1st Defendant herein had duly entered appearance and filed a statement of defense, same however did not attend court on the scheduled hearing and thus no evidence was adduced and/or tendered on behalf of the 1st Defendant.

24. Suffice it to say, the 1st Defendant herein had sworn an affidavit on the 11th July 2016, in respect of which, same had exculpated herself from the allegations of encroachment onto and/or trespass upon the suit property.

2nd Defendant's case

25. The 2nd Defendant herein, tendered evidence before the honourable court and in essence informed the court that same was aware of the Plaintiff's claim, pertaining to and/or concerning the suit property.

26. According to the 2nd defendant, who testified as DW1, he confirmed that he was the owner of the suit plot and that on the 9th January 2003, same entered into and executed a sale agreement with the Plaintiff, whereby he transferred his rights and/or interest to the Plaintiff.

27. The 2nd Defendant further contended that upon the sale of the suit plot to the Plaintiff, he took the Plaintiff to the offices of the 3rd Defendant, who thereafter approved of the transaction, culminating into the signing of the transfer Instrument, which was signed by the Plaintiff, the 2nd Defendant and the official of the 3rd Defendant.

28. Further, the 2nd Defendant further stated that the suit property lawfully belongs to the Plaintiff and that he has not trespassed onto same and would wish that the Plaintiff be afforded quit possession thereon.

The 3rd Defendant's case

29. Though the 3rd Defendant herein duly entered appearance, same did not file any statement of defense.

30. On the other hand, the 3rd Defendant also failed to attend court on the scheduled date and same did not cross examine, either the Plaintiff or the 2nd Defendant.

Submissions

31. Following the close of the hearing, the Plaintiff herein sought for and obtained latitude to file written submissions. In this regard, the Plaintiff proceeded to and indeed filed written submissions on the 5th October 2021. For clarity, the said submissions are on record.

32. Having reviewed and evaluated, the Plaintiff and the bundle of documents filed herein as well as the testimonies tendered on behalf of the Plaintiff and the 2nd Defendant, it is my opinion that only two issues arise for determination, namely;

I. Whether the Plaintiff is the lawful and legitimate owner of the suit plot.

II. Whether the plaintiff is entitled to the reliefs sought.

Analysis and determination

Issue number 1

33. The Plaintiff tendered documents, including a sale agreement entered into and executed on the 9th January 2003, whereby the suit plot was sold unto her by the 2nd Defendant herein.

34. It is imperative to observe, that the sale agreement was reduced into writing, signed by the parties chargeable therewith and the signature to the parties thereto, were duly attested by witnesses who were present, at the time of the sale agreement.

35. Having looked at the sale agreement, I am convinced that same complied with and/or satisfied the provision of **Section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya, which provides as hereunder:**

(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

36. Having found and held that the sale agreement that had been entered into between the Plaintiff and the 2nd Defendant was lawful and thereafter the 2nd Defendant took the Plaintiff to the suit plot, culminating into the execution to execution of transfer instrument in favor of the Plaintiff, which was dully approved by the 3rd Defendant, it is my humble finding that the Plaintiff herein became the legitimate proprietor in respect to the suit plot.

37. In any event, it is also worthy to note that after the execution of the transfer instrument, which involved the Plaintiff, the 2nd & 3rd Defendants herein, the 3rd defendant proceeded to and issued a certificate, which confirmed that the Plaintiff was now the owner of the suit plot.

38. Owing to the totality of the evidence adduced and/or produced before the court, I reach the inescapable conclusion that the Plaintiff herein is the lawful owner of the suit property.

Issue number 2

39. Having arrived at the conclusion that the Plaintiff herein is the lawful and legitimate owner of the suit property, the question that then remains to be determined, is whether any third parties, the Defendants not excepted, can enter upon and/or trespass onto the suit plot.

40. In my humble view, the ownership rights, which accrue to and in favor of the Plaintiff, entitles the Plaintiff to absolute and exclusive occupation, possession and use over the suit plot.

41. In the premises, if there be any third party on the suit plot, without the permission and/or consent of the Plaintiff then such a party becomes a trespasser and the Plaintiff would thus be entitled to appropriate orders to restrain the offensive activities.

42. In support of the foregoing observation, I take guidance in the decision in the case of **David Ogutu Onda v Walter Ndede Owino [2014] eKLR**, where the court observed as hereunder;

*“Trespass has been defined as any unjustified intrusion by one person upon the land in the possession of another. See, **Zacharia Onsongo Momanyi vs. Evans Omurwa Onchagwa [2014] eKLR**. To be able to establish the tort of trespass the plaintiff had to establish his ownership of the suit property and the fact that the defendant’s occupation of the property is unjustified. The plaintiff has proved that he is registered as the proprietor of the suit property”*

43. In respect of the subject matter, the Plaintiff has established that she is the lawful proprietor over and in respect of the suit property and in the premises, the Plaintiff is entitled to quite possession and use thereof.

Final disposition

44. Having answered the two issues, which were enumerated herein before in favor of the Plaintiff, I now find and hold that the Plaintiff has proved her case on a balance of probabilities.

45. Consequently, I proceed to enter judgment in favor of the Plaintiff in accordance with prayers 1 & 2 of the Plaint, dated **10th May 2012**.

46. On the other hand, costs do follow the event and in this regard, the Plaintiff having succeeded in respect of the suit, I hereby award costs to the Plaintiff as against the 1st & 3rd Defendant only.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIRONMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant