



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 527 OF 2013**

**RICHMOND MACHARIA KARIUKI.....PLAINTIFF**

**=VERSUS=**

**ALEX ACHOLA OWINO.....DEFENDANT**

**JUDGMENT**

1. Through an amended plaint dated 30/4/2013, the plaintiff, **Richmond Macharia Kariuki**, sought the following reliefs against the defendant:

*a) A declaration that the suit property herein namely, Plot No. C-4-164, Kayole, belongs to the plaintiff herein.*

*b) A permanent injunction restraining the defendant, his agents, employees and/or assigns from trespassing into the suit property or in any other way interfering with the plaintiff's possession and/or ownership of the suit property namely Plot No. C-4-164 Kayole.*

*c) Any other order and/or relief that this honourable court may deem fit.*

*d) Costs of the suit.*

2. The Plaintiff's case was that vide a sale agreement dated 29/11/2000, he purchased **Plot Number C-4-164** situated in Kayole, Nairobi (**the suit property**) from the late **Rose Owino**, at Kshs.150,000. He paid her the agreed purchase price and she in turn gave her vacant possession of the suit property. Further, she executed a power of attorney in his favour, dated 29/11/2000, donating to him irrevocable power to execute necessary instruments to vest the suit property in his name. Upon acquiring the suit property, he developed rental units thereon, which he has been renting to tenants.

3. The plaintiff further contended that he enjoyed quiet possession of the suit property from the year 2000 to 2013. In April 2013, the defendant emerged with a grant of letters of administration and certificate of confirmation of grant relating to the estate of Rose Owino. Through the Area Chief, the defendant demanded possession of the suit property together with his (the plaintiff's) developments thereon. He learnt that the defendant had fraudulently procured the grant and the certificate while aware that the plaintiff was the owner of the suit property. He added that on approaching the family court which had issued the grant and the certificate of confirmation of grant, he was advised that he needed to initiate proceedings in the Environment and Land Court to resolve the ownership dispute. Consequently, he brought this suit.

4. The defendant filed a statement of defence dated 2/7/2018. His case was that the sale agreement which the plaintiff was relying on was "*done fraudulently and without the defendant's knowledge or consent.*" He added that at the commencement of this suit, he (the defendant) was in charge of the estate of the deceased, and was also in possession of the suit property. He further averred that at the time of signing the sale agreement he (the defendant) was the rightful administrator of the deceased's estate. He added that on 11/4/2013, he issued notices to tenants to vacate the suit property because he wanted to carry out renovations on the suit property and not because he wanted to access the suit property. He urged the court to dismiss the plaintiff's suit.

5. On 16/7/2019, the court set down this case for hearing on 18/5/2020. Mr Onyango (holding brief for Mr Oluoch for the defendant) was present. On 18/5/2020, neither the defendant nor his advocate attended court.

Consequently, the defendant did not tender any evidence. He nonetheless filed written submissions dated 15/4/2021 through the firm of **A.T Oluoch & Company Advocates**.

6. The plaintiff testified as PW1. He adopted his witness statements dated 8/5/2017. He produced the 10 documents contained in the bundle of documents dated 30/4/2013. In summary, his evidence was a replica of his case as summarized above. He added that upon purchasing the suit property, he discovered that there were uncleared dues at the City Council of Nairobi and he duly paid them. He further testified that on 4/4/2013, he learnt that his tenants had been served with letters demanding that rent be paid to the Area Chief's Office. His son who resided in one of the units in the suit property was summoned by the Area Chief. At that point, he learnt that the defendant was claiming to be the deceased's husband. Having been unable to evict the tenants, the defendant issued notices dated 11/4/2013, requiring the tenants to vacate the rental units. He learnt that the defendant had obtained a grant and a certificate of confirmation of grant in **Nairobi High Court Succession Cause No. 2209 of 2008; In the Matter of the Estate of Rose Adhiambo Owino**. He applied for revocation of the grant but he was advised that he needed to seek relief in

this court.

7. The plaintiff filed written submissions dated 10/5/2021 through the firm of **M/s Githui & Partners**. Counsel contended that it was trite law that where a party failed to lead evidence in support of his case, that party's pleadings remained mere unsubstantiated statements of fact and the evidence of the party who led evidence remained uncontroverted. Counsel added that the plaintiff purchased the suit property from the deceased and acquired all rights relating to the suit property. Counsel submitted that the plaintiff's right to protection of his property was secured under "Article 65" of the Constitution.

8. The defendant, through written submissions filed by his advocates, M/s AT Oluoch & Company Advocates, dated 15/4/2021, identified the following as the three issues falling for determination in this suit: (i) whether acquisition of matrimonial property without consent of one of the spouse was valid and or legal; (ii) whether revocation of the grant was legally done; and (iii) whether the "applicant" (sic) had attained the threshold to be granted a permanent injunction.

9. On whether acquisition of matrimonial property without consent of the spouse was valid or legal, counsel for the defendant submitted that the suit property was matrimonial property although it was registered in the name of Rose Adhiambo Owino (**the deceased**). Counsel contended that the deceased had no right to sell the suit property without the defendant's consent. On whether revocation of the grant was legally done, counsel submitted that revocation of a grant was guided by the provisions of **Section 76** of the Law of Succession Act, hence the court was not right in revoking/annulling the grant. Counsel added that the defendant's right to be heard in the "revocation suit" was not accorded to the defendant. Lastly, on whether the "applicant" (sic) had attained the threshold for grant of a permanent injunction, counsel submitted that **"the threshold of attaining the order for a permanent injunction is higher in that the case must be a prima facie case and that the applicant shall suffer irreparable harm. [I have reproduced the submissions verbatim]."**

10. The court has considered the parties' pleadings together with the evidence and submissions tendered. The court has also considered the relevant jurisprudence. The single issue falling for determination in this suit is, who between the plaintiff and the defendant is the rightful owner of the suit property?

11. The plaintiff tendered evidence indicating that he purchased the suit property from the late Rose Owino. He exhibited a sale agreement dated 29/11/2000 and a power of attorney of even date, both signed by the late Rose Owino. He also testified that upon purchasing the suit property, he was given vacant possession of the suit property. He enjoyed quiet and peaceful possession of the suit property until April 2013 when the defendant emerged and started laying claim to the suit property on the basis of a grant of letter of administration and certificate of confirmation relating to the estate of the late Rose Owino. He further gave evidence that upon purchasing the suit property from the deceased, he developed rental units thereon and leased them out. Further, he testified that the defendant had fraudulently procured the grant and the certificate of confirmation of grant behind his back while aware that the suit property did not form part of the estate of the deceased. The above evidence was not controverted by the defendant because the defendant elected not to cross examine the plaintiff and not to lead any controverting evidence.

12. It is trite law that where, in a contested suit, a party presents pleadings but elects not to lead evidence in support of those pleadings, the pleadings remain unsubstantiated allegations. That is the fate of the defence filed by the defendant in this suit. Put differently, the plaintiff's pleadings and evidence in this suit remain uncontroverted.

13. In his submissions dated 15/2/2021, the defendant itemized what he considered to be the three issues falling for determination in this suit. I have considered those issues. The first issue revolves around the contention that the suit property was matrimonial property. That contention was not in his statement of defence. The defendant's defence was that he was entitled to the suit property by virtue of the grant and certificate of confirmation of grant. Secondly, he never led evidence to demonstrate that the suit property was matrimonial property.

14. The second issue identified by the defendant focused on revocation of the grant. This court has not revoked any grant. If the High Court, or any other court, revoked the grant which the defendant waved at the time of laying claim to the suit property, and the defendant is dissatisfied with that revocation, this suit is not the platform on which to challenge the revocation. The issue of revocation of grant is therefore completely misplaced in the present suit.

15. The last issue which the defendant identified focusses on the threshold for a permanent injunction. He submitted that the party seeking a permanent injunction must satisfy the threshold of a prima facie case. That is misconception of the law in so far this matter falls for

determination after full trial. At the stage of rendering a final judgment after trial, the threshold to be satisfied is that of proof on a balance of probabilities.

16. For the above reasons, the court finds that the plaintiff is the lawful owner of the suit property. The court is accordingly satisfied that the plaintiff has proved his case against the defendant to the required standard. Consequently, the plaintiff's suit against the defendant succeeds in the followings terms:-

*a) It is hereby declared that the suit property in this suit, Plot No. C-4-164, Kayole, Nairobi, belongs to the plaintiff, Richmond Macharia Kariuki.*

*b) A permanent injunction is hereby issued restraining the defendant, his agents, employees and/or assigns against trespassing into the suit property or in any other way interfering with the plaintiffs quiet possession and/or ownership of the suit property, namely Plot No C-4-164, Kayole, Nairobi.*

*c) The defendant shall bear costs of this suit.*

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF OCTOBER 2021**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Mr. Kori for the Plaintiff

Court Assistant: Lucy Muthoni

**NOTE:**

*This suit was heard and a Judgment date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the Judgment virtually at Thika.*

**B M EBOSO**

**JUDGE**