



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 629 OF 2016

THOMAS OPIYO & 123 OTHERS.....PLAINTIFFS

VERSUS

TELEPOSTA PENSION SCHEME REGISTERD TRUSTEES.....DEFENDANT

JUDGMENT

The plaintiffs brought this suit on 10th June, 2016 seeking the following reliefs;

1. A declaration that the plaintiffs are entitled to first priority to purchase the houses erected on Plot Numbers Nairobi/Block 55/175, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251 (hereinafter referred to as "the suit properties").
2. A permanent injunction restraining the Defendant whether by itself or through its agents or servants from interfering with the plaintiffs' peaceful occupation of the suit properties.
3. An order directing the defendant upon its decision to sell the suit properties to initiate the purchase and sale by the plaintiffs as first priority purchasers and to execute all transfer documents to the plaintiffs or their nominees failure of which the court do direct the Deputy Registrar of this court to execute the transfer documents.
4. Costs of the suit and interest thereon.

The plaintiffs' case against the defendant:

The plaintiffs case as set out in their plaint dated 8th June, 2016 is as follows: The plaintiffs are former employees of Telkom Kenya Limited and Postal Corporation of Kenya and in that capacity they were members of the defendant. At all material times, the plaintiffs were the occupants of the suit properties which were owned by the defendant. The suit properties are subdivisions of all that parcel of land known as L.R No. 209/12554. The plaintiffs as former employees of the defendant(sic) were entitled to be given priority to purchase the suit properties. The plaintiffs were allocated the suit properties through various letters of allotment by virtue of their employment with the defendant(sic). The defendant's employees who were in occupation of the suit properties were to be given first priority to purchase the suit properties according to the said letters of allotment. While the plaintiffs were in the employment of the defendant(sic) and in occupation of the suit properties, the housing allowance that was due to the plaintiffs were being deducted on account of rent for the said properties. The defendant had intimated that it would offer the suit properties to the plaintiffs to purchase. The plaintiffs in expectation of the said offer sought funds to purchase the said properties.

Sometimes in 2008 while the plaintiffs were in negotiations with the defendant to purchase the suit properties, the defendant abandoned the negotiations and purported to condemn the suit properties as unfit for human occupation and expressed intention of demolishing the same. At the same time, the defendant allegedly offered the suit properties for sale to third parties in breach of the agreement that the defendant had entered into with the plaintiffs that the defendant would give the plaintiffs first priority to purchase the said properties. The plaintiffs have averred that their dreams to own and live on the suit properties would come to naught if the court does not intervene. The plaintiffs have averred that they have financial capability to purchase the suit properties from the defendant if given opportunity.

The defendant's case:

The defendant filed a statement of defence on 16th August, 2016. The defendant denied that the plaintiffs are former employees of Telkom Kenya and Postal Corporation of Kenya. The defendant averred that the plaintiff's suit is frivolous, vexatious and amounts to an abuse of the

court process for various reasons. The defendant contended that Thomas Opiyo had no authority to file a suit on behalf of the other unnamed 123 plaintiffs. The defendant averred further that the plaintiffs' suit is *res judicata* a similar suit by the same plaintiffs namely, ELC No. 1348 of 2013 having been dismissed by the court. On the merit of the claim, the defendant averred as follows: The suit properties are subdivisions of a parcel of land known as Plot No. 211/PT(B) that comprised of old dilapidated residential units that were vested on the defendant by the Government of the Republic of Kenya through Legal Notice No. 154 published in Kenya Gazette Supplement No. 59 of 5th November, 1999. The suit properties were vested upon the defendant to enable the defendant to discharge pension liabilities to the persons who were entitled to receive pension from Kenya Posts & Telecommunication Corporation (hereinafter referred to as "KPTC" where the context so permits), Postal Corporation of Kenya, Telkom Kenya Limited and Communications Commission of Kenya as at 30th June, 1999. Prior to the vesting of the suit properties upon the defendant, the same were owned by KPTC. KPTC was wound up in 1998 leading to the establishment of Postal Corporation of Kenya, Telkom Kenya Limited, Communications Commission of Kenya and the defendant. Since the defendant was underfunded, the suit properties were vested upon the defendant to enable the defendant to either collect rent therefrom or to dispose of the same by way of sale so that it could meet its funding shortfall.

The suit properties were condemned and as such the defendant did not and has never entered into any tenancy agreement with anybody in respect thereof neither has it collected any rent from the persons who are in unlawful occupation of the same. In 2008, the defendant sold the suit properties to third parties and has received the sale proceeds. The defendant is obliged under the agreements it entered into with the said third parties to give vacant possession of the suit properties. The defendant issued several notices to the occupants of the suit properties to vacate the same but they refused to do so even after time was extended to allow them vacate the same.

The defendant denied that the plaintiffs were occupying the suit properties lawfully and that they were former employees of the defendant. The defendant denied further that the plaintiffs were entitled to first priority to purchase the suit properties and that the properties were allocated to them by virtue of their position or employment with the defendant. The defendant averred that the plaintiffs were at all material times aware that the suit properties were condemned and that the defendant had sold the same to third parties. The defendant denied that it breached any agreement with the plaintiffs on the sale of the suit properties. The defendant urged the court to dismiss or strike out the plaintiff's suit with costs.

The plaintiffs' evidence:

Thomas Opiyo (PW1) gave evidence as the plaintiffs' first witness. PW1 adopted his witness statement dated 12th March, 2017 as his evidence in chief. PW1 produced the documents attached to his affidavit sworn on 8th June, 2016 in support of the plaintiffs' application of the same date as PExh. 1 to 5 and the documents attached to plaintiffs' further list of documents dated 12th May, 2017 as PExh. 6 to 12. PW1 stated that he was staying on one of the suit properties owned by the defendant. He was a rent paying tenant on the premises. He paid rent up to 2002 when he received a letter to the effect that the house that he was occupying had been condemned as unfit for occupation and that he should vacate the same. Upon receipt of the said letter, he wrote to the defendant on behalf of the other plaintiffs who were residents of the estate where the suit properties are situated to be allowed to continue staying on the suit properties and paying rent. PW1 stated that he did not receive a response to that letter. He stated that the defendant wrote to him on 30th August, 2002 inquiring whether the plaintiffs were in a position to purchase the suit properties. He stated that through this letter, the defendant gave the plaintiffs opportunity to purchase the suit properties. He stated that he wrote back to the defendant and informed it that National Co-operative Housing Union (NACHU) had agreed to assist the plaintiffs to get finance to purchase the suit properties once the plaintiffs were issued with offer letters. He stated that the defendant responded through a letter dated 19th November, 2002 in which the defendant sought further information from the plaintiffs. PW1 stated that he wrote back on 3rd December, 2003 requesting for a consultative meeting with the defendant but the defendant did not respond to this letter. He stated that on 22nd January, 2007, he wrote to the defendant requesting for letters of offer to purchase the suit properties.

He stated that the defendant did not issue offer letters to the plaintiffs as requested. He stated that the plaintiffs were instead served with notices through the newspapers to vacate the suit properties. The first notice was dated 10th October, 2013 and the second one 27th May, 2016. PW1 stated that the suit properties were in good condition. He stated that the same were not unfit for human habitation as had been claimed by the defendant. He stated that the plaintiffs had not received notices from the County Government of Nairobi that that houses on the suit properties had been condemned as unfit for human habitation.

PW1 stated that the claim that the suit properties had been condemned was an excuse by the defendant to obtain possession of the suit properties so that it could sell the same to third parties. He stated that the people who purchased the suit properties knew that the same were occupied by the plaintiffs. He stated that the plaintiffs should be given opportunity to purchase the suit properties. He stated that the plaintiffs had a right to purchase the suit properties and were able to do so. He urged the court to grant the reliefs sought by the plaintiffs in the plaint.

In cross-examination, PW1 admitted that he had never been an employee of the defendant and that the defendant did not allocate to the plaintiffs the suit properties. PW1 admitted further that he did not have any documentary evidence showing that the plaintiffs were entitled to be given priority in the purchase of the suit properties. PW1 admitted further that the plaintiffs had agreed to vacate the suit properties. PW1 admitted further that the plaintiffs had not paid any rent to the defendant and that they had been issued with notices to vacate the suit properties. PW1 stated that he was aware that the suit properties had been sold. He contended however that the sale was carried out secretly and that the plaintiffs were not given opportunity to purchase the suit properties.

On re-examination, PW1 stated that the fact that he was a former employee of Telkom Kenya Limited entitled him to be given first priority to purchase the suit properties. On examination by the court, PW1 stated that the plaintiffs had not paid rent for 17 years and that they were waiting to be given offer letters by the defendant to purchase the suit properties. PW1 stated further that in case the defendant had sold the properties occupied by the plaintiffs, the plaintiffs could be offered the properties that had not been sold.

The plaintiffs' second witness was Joseph Gideon Oyola (PW2). PW2 adopted his witness statement dated 12th May, 2017 as his evidence in chief. PW2 stated that he had occupied one of the suit properties since 1984 and that the property was in good condition. He stated that the plaintiffs were ready to pay rent for the suit properties and that they had formed two associations to help them raise funds to purchase the suit properties. He stated that the plaintiffs had a meeting with the defendant and they were given assurance that they would be given first priority

to purchase the suit properties. He stated that when the suit properties were being sold the plaintiffs were not given first priority to purchase the same.

On cross-examination, PW2 stated that the promise that they would be given first priority to purchase the suit properties was given to the plaintiffs by a Mr. Tanui who was an employee of Telkom Kenya Limited and not by the defendant. PW2 stated that he had not come across any document giving the plaintiffs priority right to purchase the suit properties. He stated that their case was based on the fact that some of their colleagues who occupied other premises owned by the defendant were given first priority to purchase the said premises.

The defendant's evidence:

The defendant called Peter Kipyegon Rotich (DW1) as its sole witness. DW1 told the court that he was the administrator and trust secretary of the defendant. DW1 adopted his witness statement dated 11th May, 2017 as his evidence in chief. DW1 also produced the documents attached to the defendant's list and bundle of documents dated 11th May, 2017 as DExh. 1 to 22. DW1 stated further as follows: The defendant came into existence on 1st July, 1999. The defendant was established to provide pension benefits to the former employees of KPTC and other institutions which came up thereafter such as Telkom Kenya Limited. DW1 stated that the defendant was a closed pension scheme that was not open to new members. He stated that the affairs of the defendant were regulated by a trust deed and rules made thereunder. He stated that it is these documents that regulated how the defendant dealt with its assets. DW1 stated that there was no provision in the defendant's trust deed or rules giving the defendant power to give priority to any person to purchase the defendant's assets. He stated that the suit properties were vested on the defendant to enable the defendant to raise funds to pay pension dues to the defendant's members and their beneficiaries. He stated that the defendant did not give the plaintiffs priority right to purchase the suit properties. He stated that the defendant had never given any tenant priority to purchase any of the defendant's properties. He stated that the suit properties were advertised for sale in the newspapers and 30 of the properties had been sold. He stated that the properties were sold as plots. He stated that there were only 16 plots remaining. He stated that third parties who purchased the suit properties were seeking vacant possession from the defendant. He urged the court to dismiss the plaintiffs suit.

On cross-examination, DW1 stated that the defendant had never entered into negotiations with the plaintiffs regarding purchase of the suit properties. DW1 stated that the defendant started selling the suit properties in 2006 or thereabouts and that the defendant did not deny the plaintiffs opportunity to purchase the suit properties. DW1 stated that the suit properties were advertised for sale and the plaintiffs had the opportunity to purchase the same like everybody else. He stated that the properties were not being sold as houses but as plots. DW1 stated that the defendant did not accept rent that was offered by the plaintiffs because the houses that were occupied by the plaintiffs had been condemned as unfit for human habitation.

Submissions:

The plaintiffs' submissions:

The plaintiffs filed their submissions on 3rd March, 2021. The plaintiffs submitted that they were at all material times assured by their employer Telkom Kenya Limited that they would be given priority to purchase the suit properties. The plaintiffs submitted that Telkom Kenya Limited wrote to them to the effect that the suit properties would be advertised for sale and that members of the defendant would be given first priority to purchase the same before the same were offered to the public. The plaintiffs submitted further that the defendant produced no evidence showing that the suit properties were condemned. The plaintiffs submitted that they had established from the correspondence exchanged with the defendant and their former employer that they were entitled to be given priority to purchase the suit properties. The plaintiffs submitted further that being members of the defendant, they had legitimate expectation that the defendant would act in their best interest by giving them priority to purchase of the suit properties. The plaintiffs submitted that the defendant violated their right to legitimate expectation by acting to the contrary. The plaintiffs submitted further that the defendant had discriminated against them. The plaintiffs submitted that the sale of the suit properties was not advertised and that they only came to know of the same after filing this suit.

The defendant's submissions:

The defendant submitted that the defendant never created any legitimate expectation in the plaintiffs that they would be given first priority to purchase the suit properties. The defendant submitted that at no time did the defendant represent to the plaintiffs that the houses on the suit properties were on sale. The defendant submitted that the plaintiffs were at all material times aware that the said houses were condemned. The defendant submitted that the plaintiffs' employer informed the plaintiffs that the houses were not fit for human occupation and asked the plaintiffs to look for alternative premises to move to. The defendant submitted further that in their own letter dated 20th August, 2002, the plaintiffs expressed interest in buying "condemned area land". The defendant submitted that the plaintiffs were aware that there was no house for sale and none was offered to them. The defendant submitted that no legitimate expectation was created by the defendant to warrant the plaintiff's assumption that they would be given first priority to purchase the suit properties.

In conclusion, the defendant submitted that the plaintiffs had not proved their case against the defendant and as such the plaintiffs were not entitled to the reliefs sought in the plaint. The defendant submitted that there was no link or connection between the purported letters of allotment that were issued to the plaintiffs by their employers and the right to be given first priority to purchase the suit properties which the plaintiffs have come to court to enforce. The defendant reiterated that the plaintiffs were informed by their employer that the houses on the suit properties had been condemned as not fit for human habitation and the same were never offered by the defendant to the plaintiffs for sale. The defendant submitted that the plaintiffs did not establish any contractual basis for the priority right that they were seeking to enforce. The defendant cited section 107 of the Evidence Act, Chapter 80 Laws of Kenya and submitted that the burden of proof was on the plaintiffs to prove that they had a right to be given priority to purchase the suit properties. The defendant submitted that the plaintiffs did not discharge this burden. The defendant submitted that the plaintiffs' case was not proved.

Determination:

The parties did not agree on the issues for determination by the court. Each party framed its own issues. From the pleadings the main issues arising for determination in this suit are as follows;

1. Whether the plaintiffs were entitled to be given first priority to purchase the suit properties.
2. Whether the plaintiffs are entitled to the reliefs sought in the plaint.
3. Who is liable for the costs of the suit?

I have considered the evidence tendered by the parties on the foregoing issues. In their plaint dated 8th June, 2016, the plaintiffs have sought as their main relief, a declaration that they are entitled to be given first priority to purchase the houses on Plot Numbers Nairobi/Block 55/175, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251 (the suit properties). As rightly pointed out by the defendant, the burden was on the plaintiffs to prove that they have a right to be given first priority to purchase the suit properties. From the evidence on record, the plaintiffs took possession of the suit properties by virtue of their employment either with Kenya Posts and Telecommunications Corporation, Postal Corporation of Kenya or Telkom Kenya Limited. In 2002, the plaintiffs were notified by their employers that the houses that they were occupying on the suit properties had been condemned as not fit for human habitation. The plaintiffs were informed that with effect from 1st July, 2002 they were going to be paid a house allowance that was previously being deducted and remitted to the defendant as rent for the condemned houses which allowance they were asked to use in seeking alternative accommodation. The plaintiffs did not move out of the suit properties as they had been asked to do by their employers and despite the fact that they were not paying any rent for the same. The services of the plaintiffs were terminated by Telkom Kenya Limited and Postal Corporation of Kenya between 2006 and 2008 for various reasons but majorly on account of restructuring. The plaintiffs remained in possession of the suit properties despite the termination of their services.

The suit properties were owned by Kenya Posts and Telecommunications Corporation. After it was wound up following the restructuring in the telecommunication sector by the Government, the suit properties were transferred to the defendant through Legal Notice No. 154 published in the Special Issue of Kenya Gazette Supplement No. 59 of 5th November 1999. The plaintiffs admitted in evidence that none of them is an employee of the defendant and that possession of the suit properties were not given to them by the defendant. The plaintiffs admitted further that they have not paid rent to the defendant and as such there is no land lord and tenant relationship between the plaintiffs and the defendant in respect of the suit properties.

The plaintiffs did not produce in evidence any agreement between the plaintiffs and the defendant authorizing their continued occupation of the suit properties which in their own admission belong to the defendant. It is common ground that the defendant expressed an intention to sell the suit properties and that the plaintiffs expressed interest in purchasing the same. From the evidence on record, the plaintiffs and the defendant exchanged some correspondence on the issue but no agreement was reached between the parties regarding the sale of the suit properties to the plaintiffs. The plaintiffs produced no such agreement in evidence. In their submissions, the plaintiffs contended that the correspondence that they exchanged with the defendant constituted an agreement. I am not persuaded by that submission. None of the correspondence placed before the court could be deemed as an offer to sell or an acceptance of an offer. The defendant led evidence that they have sold most of the suit properties to third parties.

The plaintiffs who have claimed that they were entitled to be given first priority to purchase the suit properties have not laid before the court any basis in support of that claim. The plaintiffs have not exhibited any agreement between them and the defendant which entitled them to such right. The plaintiffs have exhibited the letters through which they were allocated the houses on the suit properties and their termination letters none of which contain any undertaking either by their former employers or the defendant to accord them first priority to purchase the suit properties. In their submission, the plaintiffs claimed that they had a legitimate expectation that they would be given first priority to purchase the suit properties. I am in agreement with the submissions by the defendant that the plaintiffs did not place any evidence before the court showing that the defendant created such expectation in the plaintiffs. I am in agreement with the defendant that there is overwhelming evidence on record that as early as 2002, the plaintiffs were aware that the houses on the suit properties were not on sale. This information was given to them not only by their employers but also by the defendant. In their own correspondence with the defendant, the plaintiffs expressed interest in "BUYING the condemned area(land)." With full knowledge that the houses had been condemned as not fit for human occupation and the same having not been offered to them for sale, I am unable to see any basis on which the plaintiffs could have expectation that they would be given first priority to purchase the houses on the suit properties. If the plaintiffs had any such expectation, the same in my view was not legitimate. In the absence of any evidence that the defendant had undertaken to give the plaintiffs first priority to purchase the suit properties, it is my finding that the plaintiffs have no right to be given first priority to purchase the suit properties.

The plaintiffs whole case was based on the fact that they had a right to be given first priority to purchase the suit properties. In view of my finding that the plaintiffs have not established such right, the plaintiffs' case is not proved and as such the plaintiffs are not entitled to any of the reliefs sought in the plaint dated 8th June, 2016.

On the issue of costs, under section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, costs of and incidental to a suit is at the discretion of the court. The plaintiffs have not succeeded in their claim against the defendant. No reason has been put forward that would justify denying the defendant its costs of the suit. The defendant shall have the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiffs' claim. The suit is dismissed with costs to the defendant.

DELIVERED AND DATED AT NAIROBI THIS 14TH DAY OF DECEMBER 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Opola h/b for Ms. Nduta for the Plaintiffs

Ms. Mathenge for the Defendant

Ms. Betsy-Court Assistant