



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

CIVIL CASE NO. 137 OF 2016

AQUILLINAH NAFULA WANJALA,,,,,,,,,,,,,,,,,,,,, PLAINTIFF

= VERSUS =

JOY ADHIAMBO OMONDI

PHANICE KERUBO ONYARI.....DEFENDANTS

J U D G E M E N T

1. The plaintiff filed this suit against the two defendants for a claim over land **Bukhayo/Bugengi/4266** that she purchased from the 1st defendant. The plaintiff pleaded that a sale agreement in respect of the suit plot was executed by her and the defendant on 11th May 2016. That it was a condition of the agreement that the 1st defendant would surrender vacant possession of the suit plot to her.

2. The plaintiff continued that she became the registered owner of the sold parcel on 21st June 2016 but the 2nd defendant unlawfully delayed in vacating the suit land and remained on it as a trespasser. The plaintiff added that as a result of the defendants' action she suffered loss and damage as particularised below;

(i) Legal fees incurred in arbitration Kshs. 8,000/=

(ii) Monthly rent for alternative accommodation for plaintiff's family from June 2016 to September 2017 at Kshs.23,000/= per month

Kshs.92,000/=

(iii) Travelling expenses and incidentals Kshs.15,000/=

Grand Total Kshs.115,000/=

3. The plaintiff states that she continues to suffer loss and prayed for judgment to be entered in her favour as per amended plaint as follows;

(a) Against the defendants jointly and severally for Kshs.245,000/=

(b) Against the defendants jointly and severally for costs and interest.

4. The 2nd defendant filed a memorandum of appearance on 5th December 2016 and a defence on 28th December 2016. She pleaded that she was not aware of any sale between the plaintiff and the 1st defendant. That the suit land is registered in the name of **Margaret Mirani Omondi – deceased** so any transaction done by the 1st defendant is unprocedural and unlawful.

5. The 2nd defendant denied being a trespasser and pleaded that she is occupying the said land as a beneficiary. She put the plaintiff to strict proof. That any loss suffered by the plaintiff is a consequence of her negligence and ignorance to the facts of the law governing selling and buying of land. That the plaintiff was not blind to see that the plot had structures with people living there. She urged that the plaintiff is not entitled to the orders of eviction therefore. She asked the Court to dismiss the plaintiff's suit with costs.

6. The 1st defendant filed an appearance on 1st December 2016 but the 1st defendant filed no statement of defence. The plaintiff made a request for interlocutory judgment on 6th September 2018 against her. Thereafter the suit was set down for hearing.

7. On 19th February 2019 after the matter was fixed for hearing severally, the trial judge directed that the case proceeds to hearing in spite of the defendants' absence since they were duly served. However it did not proceed because the plaintiff needed to amend her plaint. The hearing was thus reserved for 6th November 2019. The hearing on this date still proceeded *ex parte*.

8. The plaintiff stated that the 2nd defendant is a sister-in-law of the 1st defendant who sold her the land. She presented the sale agreement as **Pex 1** as proof of purchase of the suit land. That after paying for the land, the 2nd defendant was served with notice to vacate the land but she failed to surrender vacant possession. The plaintiff opted to go for arbitration in which a hearing was fixed before Ms. Betty Maloba advocate and an agreement reached. This agreement is produced as **Pex 2**.

9. The 2nd defendant did not leave the land as per the arbitration agreement thus necessitating the filing of this suit. The plaintiff said she bought the land to settle her parents on it. Due to delay in receiving vacant possession, she paid rents and incurred other expenses on travelling from Nairobi to Busia following up on the matter. She also sought to be reimbursed for the arbitral expenses plus costs of this suit. The plaintiff produced a statement of accounts as **Pex 4**; Bus receipts as **Pex 5**; notice to vacate served on 2nd defendant as **Pex 3** and arbitral charges as **Pex 6**.

10. From the pleadings in Paragraph 8(b) of the amended plaint filed on 15th May 2019, the 2nd defendant vacated the suit property on 31st August 2017. What is pending for the Court's determination is the claim for expenses incurred amounting to Kshs.245,600/=. It is a liquidated claim for which I would have summarily entered judgment for the plaintiff. However the 2nd defendant had alleged that the loss was occasioned by the ignorance of the plaintiff so I have to consider whether or not the plaintiff has proved her case.

11. In the statement of defence filed, the 2nd defendant pleaded that the suit title was registered in the name of a deceased person so it was unlawful for the 1st defendant to transact. The plaintiff presented a certificate of search issued on 20/6/2016 which showed that the 1st defendant was registered as owner of the suit title from 12th January 2016. Thus at the time of sale to the plaintiff's in May 2016 the 1st defendant had rights over the suit land to pass on to 3rd parties.

12. Accordingly the burden shifted on the 2nd defendant to discharge that the acquisition of the land by the 1st defendant was unlawful for want of letters of administration of the estate of Margaret Mirani Omondi - deceased. The 2nd defendant did not discharge this burden neither did she come to court to defend herself that she was on the land as a beneficial owner.

13. In her witness statement, the 2nd defendant pleaded that Margaret was her mother-in-law through the son called Simon Ngobi Omondi who was working in Southern Sudan. She did not bring a counter-claim against the 1st defendant nor did her husband or her husband's brothers. She also did not present any document signed by her family that gave her permission to move on to the suit plot. Consequently the 2nd defendant's claim if any would be against the 1st defendant who sold the land and not the plaintiff.

14. The 1st defendant is also guilty of breaching the agreement executed between her and the plaintiff in that she did not surrender vacant possession. This made the plaintiff incur expenses that led to the 2nd defendant finally moving out of the land. In light of the defendants' actions, I am persuaded to hold that the plaintiff has proved her case. Accordingly, I enter judgment in her favour against the defendants jointly and severally for Kshs.245,000/= together with costs of the suit and interest at court rates from date of filing suit.

Dated, signed and delivered at BUSIA this 23rd day of January 2020.

A. OMOLLO

JUDGE