



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 340 OF 2015

(Formerly HCCC No. 563 of 2011)

**ANNE AYAKO ANGOTE (Suing as personal Representative of
the Estate of LUCAS ADAM ONYANGO).....PLAINTIFF**

VERSUS

MONICA NZILANI MWEU

MUNICIPAL COUNCIL OF MOMBASA.....DEFENDANTS

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 6th November 2001. An amended plaint dated 1st November, 2012 was filed on 8th November 2012 to substitute the original Plaintiff, Lucas Adams Onyango (deceased) with his personal representative and/or Administratrix of his estate, Anne Ayako Angote. The Plaintiff is seeking for judgment against the Defendants jointly and severally for:

a. A permanent injunction to restrain the Defendants whether by themselves or their servants or agents from demolishing the deceased's House NO. 210 and/or fencing, constructing, digging, or in any other manner interfering with deceased plot no. 1287 Mikindani and an order to cancel any allocation or transfer of the suit premises by the 2nd Defendant to the 1st Defendant (if any) and other relief which the court may deem fit to grant.

b. A declaration that any subsequent allocation of the plot by the 2nd Defendant is illegal and unlawful

c. Costs.

2. The Plaintiff pleaded in the said amended plaint that at all material times the deceased was the lawful owner of plot no.1287 Mikindani together with House NO. 210 standing thereon. That the deceased lawfully bought and acquired the suit premises for valuable consideration from the previous owner, one Leonard Awuor Obado Ochola since 1994. That the deceased has always and at all times since 1994 enjoyed uninterrupted ownership, possession and occupation of the suit premises until when the 1st Defendant by herself and/or her agents with the collusion of the 2nd Defendant unlawfully demolished the Houses and fenced off and dug trenches in and upon and around the suit premises. That the deceased immediately reported the 1st Defendant's unlawful acts to the 2nd Defendant who upon being satisfied with the complaint, ordered the 1st Defendant to stop any developments forthwith but the 1st Defendant ignored or neglected that directive and continued with her unlawful acts citing authority from the 2nd Defendant. The Plaintiff states that the deceased was never given any notice of repossession of the suit premises by the 2nd Defendant or in any way failed to comply with any terms or conditions thereof and that any act of interference with the suit premises by the Defendants or any other person is unlawful and bad in law. The Plaintiff prays for an injunction to restrain the Defendants and an order to cancel any allocation or transfer of the suit premises by the 2nd Defendant to first Defendant as the same is unlawful, null and void and of no legal consequence. The Plaintiff pleaded that there was a previous suit, to wit SRMCC No.4072 of 2001 involving the parties herein but which suit never proceeded to hearing on merit as the lower court lacked jurisdiction over it.

3. The Plaintiff relied on her pleadings, witness statement and documents that were filed on 31st January 2013. The Plaintiff stated that the deceased who is her late husband purchased Plot No.1287 Mikindani from one Leonard Awuor Obado Ochola on 17th February 1994 on behalf of then Mikindani Friends Club in his capacity as the Chairman of the said club. That on 8th April 1994, Leonard Awuor Obado Ochola donated an irrevocable power of attorney to the deceased in respect of the suit property effectively passing possession and ownership of the same to the deceased. That later one Patrick Wafula, one of the members of the Mikindani Friends Club sued the club in Mombasa RMCC No.5218 of 1996 claiming a sum of Kshs.39,000 whereafter the said Patrick Wafula instructed auctioneers to attach and sell the said

plot. The Plaintiff stated that since the club had disintegrated and members were no longer meeting their financial and other obligations, the deceased sought the permission of the membership to purchase the plot at the auction and later refunded the remaining members their shares in the club thereby acquiring the plot together with the housing standing thereon. That thereafter the deceased took steps to regularize the records at the Municipal council of Mombasa to reflect the changed position, but met resistance from the then Director of Housing and Social Services who appeared to favour one of his colleagues who was interested in acquiring the plot. The Plaintiff stated that the deceased then made further payments to the widow of the previous owner in completion of the purchase price.

4. The Plaintiff stated that sometime in 2001, a group of rowdy people came to the plot and started demolishing the House on the suit plot claiming that the plot had been sold to someone else. That the deceased, managed to stop the demolition and later learnt that the Defendants had concluded and purported to transfer the house to one Gloria Auma Obado who, it is stated, was a stranger to the vendor and an employee of the then Municipal Council of Mombasa. It is the plaintiff's evidence that the 1st Defendant's claim over the suit plot has no basis since the plot was lawfully sold to Mikindani Friends Club by the previous owner and later transferred to the deceased upon payment of the full purchase price. The Plaintiff produced the Agreement of Sale dated 17th February 1994; the Power of Attorney dated 8th April 1994; Power of Attorney dated 27th August 1998; Letter dated 20th August 1996; letter dated 17th May 1995; letter dated 11th January, 1995; letter dated 19th October 1998; Letter dated 23rd November 1998; Letter dated 4th October 2001; Letter dated 5th October 2001, and Certificate of Death dated 23rd June 1996; as exhibits 1 to 11 respectively.

5. In her defence and counter-claim dated 23rd November, 2015 and filed on 3rd December, 2015, the 1st Defendant denied the Plaintiff's claim. The 1st Defendant averred that she is the legal owner of the suit plot having purchased the same from one Gloria Auma Obado and Margaret Orede Awuor at a consideration of Kshs.550,000/= and that the same was transferred to her sometime in March 2000. The 1st Defendant averred that upon purchasing the said plot, the same was duly transferred to her by the 2nd Defendant upon payment of the requisite fee and that she has always paid all the land rates and outgoings in respect thereof. The 1st Defendant denied that the deceased ever enjoyed uninterrupted ownership, possession or occupation and further denied colluding with the 2nd Defendant arguing that she acquired the said plot lawfully and procedurally and that all the developments being carried out thereon are legal. The 1st Defendant states that the deceased lacked locus standi to institute this suit and that the Plaintiff had not shown any grounds and reasons sufficient for granting the orders sought.

6. In her counter claim, the 1st Defendant averred that she has suffered loss as a result of the interim injunction issued in this case as she had plans to develop the plot and had building material on it. That she has been unable to obtain income from the subject property and prays for mesne profits of Kshs.15,000 per month from the date the interim injunction was issued.

7. The 1st Defendant adopted her witness statement dated and filed on 19th February 2018. She testified that she purchased plot no. 1287 Mikindani, from Gloria Auma Obado and Margaret Orede Awuor and produced the sale agreement dated 24th November, 1998 as D.exhibit 1. That she paid the purchase price through the offices of Omwitsa & Mwacharo Advocates on 24/11/1998 and 15/3/1998 and produced the receipts marked as d.exhibits 2 and 3 and another receipt No.073837 as D.exhibits 4. The 1st Defendant stated that upon the purchase of the plot, the property was allotted to her by the 2nd Defendant and thereafter transferred to her upon payment of transfer fees. The 1st Defendant produced the receipt dated 17th March, 2000 (d.exhibits 5), Letter dated 14th March 2000 (d.exhibit 6), transfer dated 18th March 2000 (d.exhibit 7) and Letter of Allotment (d.exhibit 8). The 1st Defendant stated that she applied to the 2nd Defendant to be allowed to develop the property and was invited to a development meeting and produced the letter dated 16th March, 2000 as d.exhibit 9. That she proceeded to put building material on the ground but on 5/10/2001 received a letter dated 5th October, 2001 (d.exhibit 11) asking her to stop the development because of a complaint from the deceased (d.exhibit 10). However, vide a letter dated 9th October, 2001, the 2nd Defendant after going through the records, concluded that the plot belonged to the 1st Defendant and authorized her to proceed with the development. That the Plaintiff filed Mombasa SRMCC No. 4072 of 2001 against the 1st Defendant. The plaint was produced as d.exhibit 13. That the said suit was dismissed on 18/10/2001 for want of jurisdiction (d.exhibit 14). The 1st Defendant also produced a letter dated 8/9/1999 from the 2nd Defendant to the Plaintiff and stated that the Plaintiff is not be the owner of the suit property. The 1st Defendant added that the injunctive order obtained by the Plaintiff on 17/8/12 barring her from developing the property has been a set back and that the material which she had put on the ground have been destroyed, damaged and vandalized. The 1st Defendant produced a valuation report dated 5th October 2012 as d.exhibit 16.

8. The 2nd Defendant filed two statements of defence. However, the 2nd defendant did not call any witness or lead any evidence in support of the matters pleaded. The Plaintiff and the 1st Defendant filed written submissions. The Plaintiff's submissions were filed on 26th August 2019 while the 1st Defendant's submissions were filed on 10th September 2019.

9. I have reviewed and considered the pleadings, the evidence by the parties and the submissions made as well as the authorities relied on. Although the parties did not file any agreed issues for determination, the Plaintiff and the 1st Defendant have on their part submitted on the issues that they consider to arise for determination. The court however identifies the following issues for determination:

i. Did Leonard Awuor Obado Ochola sell the suit property to the late Lucas Adams Onyango?

ii. Whether the 1st Defendant lawfully acquired the suit property.

iii. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.

iv. Whether the 1st Defendant is entitled to the reliefs sought in the counterclaim.

v. Who bears the costs of the suit?

10. The Plaintiff had pleaded that the deceased lawfully bought the suit property for valuable consideration from the previous owner, Leonard Awuor Obado Ochola in 1994. The Plaintiff produced a sale agreement dated 17th February 1994 as exhibit 1. I have perused the said sale agreement. In the agreement, the vendor is shown as Leonard Awuor Obado Ochola. However, the purchaser is described as Lucas Adams Onyango “as Chairman of and on behalf of Mikindani Friends Club.” (Emphasis added). My understating and from the wording of the aforesaid sale agreement, the deceased, Lucas Adams Onyango entered into the said agreement in his capacity as Chairman of and on behalf of Mikindani Friends Club. There was no agreement produced by the Plaintiff showing that Lucas Adams Onyango (deceased) purchased the suit property from Leonard Awuor Obado Ochola. Further there was no agreement produced by the Plaintiff to show that the Plaintiff acquired the suit property from Mikindani Friends Club who had acquired it from the previous owner.

11. It was the Plaintiff’s evidence that Leonard Awuor Obado donated an irrevocable power of attorney to Lucas Adams Onyango (deceased) in respect of the suit property effectively passing possession and ownership of the suit plot to the deceased. The said power of attorney dated 8th April 1994 was produced as p.exhibit 2. I have perused the same and it is clear that the deceased was appointed in his capacity as Chairman of and on behalf of Mikindani Friends Club. The power donated was to enable the deceased do what the donor, Leonard Awuor Obado, could do such as to execute deeds or instruments, pay out any rates due and receive any income from the property and also to transfer the same. There is nowhere in the power of attorney indicating that Leonard Awuor Obado passed possession and ownership of the suit property to the deceased as stated by the Plaintiff. In addition, the evidence on record show that the deceased only entered into the sale agreement with Leonard Awuor Obado in his capacity as Chairman of and on behalf of Mikindani Friends Club. The deceased did not enter into the sale agreement in his personal capacity and for his own benefit. The Plaintiff did not produce any evidence to support the assertion that the deceased bought the suit property from Leonard Awuor Obado.

12. In addition, the Plaintiff stated that one of the members of Mikindani Friends Club by the name Patrick Wafula sued the said club in Mombasa RMCC No.5218 of 1996 claiming a sum of Kshs.39,000 whereafter the said member instructed auctioneers to attach and sell the suit plot. It was the Plaintiff’s evidence that since the club had disintegrated and members were no longer meeting their financial and other obligations, the deceased sought the permission of the membership to purchase the suit plot at the auction and that he later refunded the remaining members their shares thereby effectively acquiring the plot together with the house standing thereon. However, there was no evidence to support this piece of evidence by the Plaintiff. Section 107 and 109 of the Evidence Act clearly places a mandate upon a party that asserts certain existing facts to prove them. Section 107 provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In my view, the Plaintiff did not discharge the burden. Indeed, there was no evidence that the suit property was bought by the deceased Plaintiff, neither was there any evidence to show that the same was bequeathed to him by Mikindani Friends Club. In the absence of such evidence, the Plaintiff had failed to discharge her duty of proving her case to the required standard. It is therefore my finding that the Plaintiff has failed to prove her case on a balance of probabilities and is not entitled to the reliefs sought.

13. The 1st Defendant stated that she acquired the suit property from Gloria Auma Obado and Margaret Orede Awuor, the heirs of Leonard Awuor Obado through a sale agreement dated 24th November 1998. It is evident from the sale agreement (d.exhibit 1) that the consideration was Kshs.550,000/= out of which a deposit of the sum of Kshs.100,000/= was deposited with the firm of Omwitsa and Mwacharo Advocates on 24/11/1998 on account of Gloria Obado and Margaret Orede (d.exhibit 2). The 1st Defendant testified that she further paid the sum of Kshs.353,979/= through the firm of Omwitsa & Mwacharo Advocates on 15/3/2000 and produced the receipt as D.exhibit 3. The 1st Defendant further stated that on 14/3/2000, the sum of Kshs.93,021.60 was paid to the 2nd Defendant on account of Gloria Auma Obado being council rates for the period January 1998 to March 2000 (d.exhibit 4). Thereafter, the 1st Defendant paid transfer fees to the 2nd Defendant (d.exhibits 5) and on 15/3/2000 Gloria Auma Obado and Margaret Orede Awuor executed a transfer of the suit plot in favour of the 1st Defendant. The 1st Defendant testifies that she was issued with the necessary documents for the suit plot and proceeded to prepare the site with a view to carrying out development, to wit the construction of a residential house. The 1st Defendant further testified that she received a letter (d.exhibit 11) from the 2nd Defendant instructing her to stop further development pending resolution of the dispute as to the ownership of the property. Although the 2nd Defendant subsequently concluded that the plot belonged to the 1st Defendant and authorized the 1st Defendant to proceed with her development (d.exhibit 12), the Plaintiff moved to court and obtained an injunction on 17/8/20120 barring the 1st Defendant from any further development on the property pending the conclusion of this case.

14. From the material on record, I am satisfied that the 1st Defendant has proved that she lawfully acquired the suit property. In the counter-claim, the 1st Defendant is claiming mesne profits to be assessed at kshs.15,000/= per month from the date the interim injunction was issued, which is 17th August 2012. In my view, I am not satisfied that the 1st Defendant is entitled to such relief. I say so because it is the court which granted the interim injunction ostensibly to preserve the status of the suit property which was being claimed by both the Plaintiff and the 1st Defendant pending the hearing and determination. It would therefore be unfair to condemn the Plaintiff to pay the said mesne profits for the period when the dispute had not been resolved.

15. In the result, I enter judgment as follows:

- a. The Plaintiff’s case is dismissed.**
- b. The 1st Defendant has proved her case but is not entitled to the mesne profits sought.**
- c. Costs of the suit are awarded to the Defendants and the same to borne by the Plaintiff.**

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd day of January 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Cheruiyot holding brief for Mutubia for Plaintiff

Mkomba holding brief for Mrs. Umama for Defendants

Yumna Court Assistant

C.K. YANO

JUDGE