



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 44 OF 2016

PETER MWITHALII M'TURUCIU.....PLAINTIFF

VERSUS

LUCY KAIDA & SALIM OMAR.....DEFENDANTS

JUDGMENT

BACKGROUND

1. By his Plaint dated and filed herein on 4th March 2016, Peter Mwithali M'turucio (the Plaintiff) prays for Judgment against the two Defendants-Lucy Kaida and Salim Omar for:-

i. A permanent injunction restraining the 1st Defendant from selling and/or transferring the house without land situate on Plot No. 95/96 Malindi within Barani and known as Atlanta Shop;

ii. A declaration that by virtue of the rules in *Muthembwa –vs- Muthembwa (2002)1, EACA, 186 and Stack –vs- Dowden (2007)2 ALL ER, 929, the Plaintiff acquired interest on the suit property and no sale can take place without his consent and that he should be given priority for any sale taking into account of all improvements undertaken by him;*

iii. Costs of this suit; and

iv. Interests on (iii) above at Court rates.

2. Those prayers arise from the Plaintiffs contention that in or about 1996, he entered into a tenancy agreement with the 1st Defendant for letting of the shop known as Atlanta Shop erected on Plot No. 95/96 Malindi on a land tenure system known as house without land. The agreement was verbal and rent was agreed at Kshs 6,000/- per month.

3. The Plaintiff avers that at the time of entering into the agreement, the suit property was in a dilapidated state and not tenable. He was therefore compelled to carry out extensive renovations to the shop; and has now brought it into a tenable state with a serious increment in the value thereof.

4. The Plaintiff accuses the 1st Defendant of thereafter secretly colluding with the 2nd Defendant and with an intention of defeating the Plaintiff's interest, causing a sale agreement to be executed wherein the 1st Defendant has purported to sell the said shop to the 2nd Defendant. It is the Plaintiff's case that he had by virtue of the extensive improvements carried out by himself become a Co-owner of the suit property and the 1st Defendant became a trustee holding the same upon herself and the Plaintiff in equal share and could not sell the same without his consent or taking into account those improvements, or giving the Plaintiff the first priority of purchase.

5. But in a Statement of Defence filed herein on 11th May 2016 the Defendants deny the assertions made by the Plaintiff. While conceding that the Plaintiff entered into the suit property some years back, they aver that he failed to pay rent as agreed and/or to negotiate an increment and with the passage of time, the Plaintiff came to be in arrears of rent amounting to Kshs 648,000/-.

6. The Defendants assert that the Plaintiff then resolved to sell the suit property following the death of her husband one Joseph M'Itibua M'anaya with the first offer going to the Plaintiff and another tenant by the name Samuel Marunga. None of them however made a reasonable offer and the 1st Defendant and her children as the beneficiaries of the estate of the late Joseph M'Itibua Manaya subsequently sold the property to the 2nd Defendant.

The Plaintiff's Case

7. At the trial herein, the Plaintiff testified as the sole witness in his case.

8. The Plaintiff told the Court that he started doing business in Malindi way back in 1985. At some point in time he got leased a house which used to belong to Joseph M'Itibua, the 1st Defendant's husband. That house was however made of mud and was in a bad state.

9. The Plaintiff testified that given the condition of the house, they agreed verbally with the 1st Defendant's husband that he could repair the house and use it for business. The Plaintiff then took over the house, dug pit latrines and constructed a modern toilet thereon. Thereafter, he put in eight permanent doors and plastered the floor. He also painted the house, removed the mud-ceiling and replaced it with a cardboard ceiling before removing the makuti thatch and replacing the same with iron sheets.

10. The Plaintiff told the Court that he carried out the repairs with the full knowledge and supervision of the 1st Defendant's husband. The house is currently in a good condition and can now fetch Kshs 5 Million if sold in the open market.

11. The Plaintiff testified that when Joseph died in 2005, the 1st Defendant as his wife took over the estate. Subsequently, sometime in 2014, the 1st Defendant who resides in Meru tried to sell the house to someone. She did not try to sell the house to the Plaintiff who was then still occupying the house with another tenant.

12. During cross-examination, the Plaintiff reiterated that he only had a verbal agreement with the 1st Defendant's husband and he had no document to show that they had agreed on the repairs. He further conceded that he had no pictures or anything else to show the condition of the house when he took up the tenancy in 1986. He further told the Court that he had filed Malindi CMCC No. 5 of 2015 against the Defendants but it had been struck out on technicalities.

The Defence Case

13. The Defendants called two witnesses in support of their case.

14. DW1-Salim Mohamed Omar is the 2nd Defendant herein. He told the Court that he bought the suit property from the 1st Defendant and her family on 19th December 2014. He had come to know about the house from an agent known as Mohamed Abuu (DW2). He testified that the said agent and the 1st Defendant told him that the 1st Defendant's family was facing frustrations in collecting rent from the Plaintiff after the 1st Defendant's husband passed away.

15. DW1 further testified that the duo told him that they had tried to sell the property to the Plaintiff and another tenant known as Samuel Marunga but they did not buy it. He then visited the owners of the land in Mombasa to confirm if they would approve of changes in ownership of the property which was built on the land. The owners had no objection and DW1 settled the outstanding rent of Kshs 126,000/- due to them and was issued with a receipt.

16. DW1 told the Court that he thereafter paid a sum of Kshs 2,050,000/- to the 1st Defendant to purchase the property. He asserted that the Plaintiff was only a tenant on the property and had no basis in lodging this claim against himself.

17. DW1 told the Court that the 1st Defendant who resides in Meru had filed documents in Court appointing him as her attorney after she filed her own Statement dated 5th December 2016 in Court.

18. On cross-examination, DW1 testified that they had agreed with the 1st Defendant on a purchase price of Kshs 4.5 Million. He conceded that he was not there when the 1st Defendant purportedly offered the Plaintiff the first choice to buy the suit property and told the Court that he did not know much about the history of the house.

19. DW1 further told the Court that the house in question is still made of mud to-date but it has iron sheets on the roof and not a makuti-thatch. DW1 did not know who put up the iron sheets roofing. It also had a cemented floor. DW1 told the Court that the physical structure of the house was not worth the Kshs 4.5 Million but he agreed to buy the same as it is located in a strategic area.

20. DW2-Mohamed Abubakar alias Abuu was the agent who had been approached by the 1st Defendant to sell the house. He told the Court that the 1st Defendant approached her sometime in October 2014 to do so telling him the Plaintiff had declined to pay rent after it was increased and to buy the house when it was offered to him.

21. DW2 told the Court that the house comprises of two shops, one ran by the Plaintiff and another ran by one Samuel Marunga. DW2 told the Court that he visited Mombasa to see the owners of the land and when he got their approval, he first offered the house to the Plaintiff for a sum of Kshs 5 Million. The Plaintiff lamented to DW2 that he had been in occupation for a very long time and had accrued a lot of goodwill and he needed to be compensated therefor.

22. DW2 also met the other tenant separately but he also declined to buy stating he did not have the capacity to do so. Thereafter the 1st Defendant authorized DW2 to look for other buyers and it was then that he met the 2nd Defendant and they settled on a figure of Kshs 4.5 Million.

23. DW3 told the Court that some money was paid to the 1st Defendant when they executed a Sale Agreement with the 2nd Defendant on 19th December 2014. The balance was to be paid as soon as the Plaintiff and the other tenant gave vacant possession of the premises.

24. During cross-examination, DW2 told the Court that he offered to sell the Plaintiff verbally and there was nothing in writing. He further told the Court that he had known the Plaintiff for a long time as they were neighbours.

25. DW2 further conceded that the 2nd Defendant is his son and that he was aware the Plaintiff had been in the house for long. He further told the Court that prior to the death of the 1st Defendant's husband, the house used to be made of makuti but some improvement had since been made thereon.

Analysis and Determination

26. I have perused and considered the pleadings filed herein, the oral testimony of the witnesses as well as the material evidence produced herein. I have equally perused and considered the written submissions and authorities that were placed before me by the Learned Advocates for the Parties.

27. The Plaintiff herein prays for an order of a permanent injunction restraining the 1st Defendant from selling and/or transferring the suit property-a building erected on plot No. 95/96 Malindi. The Plaintiff also asserts that by virtue of the decision ***in Muthembwa –vs Muthembwa (2002) 1 EACA 186***, he has become a co-owner of the suit property as a result of the improvements he has made thereof and that accordingly, the 1st Defendant holds the suit property in trust for him.

28. It was not disputed that the Plaintiff entered the suit premises some time in the year 1996 courtesy of a verbal agreement that they had with the 1st Defendant's husband the late Joseph M'Itibua Managa. Under the said Agreement, the Plaintiff was required to pay a monthly rent in the sum of Kshs 6,000/- to the deceased and to use the suit premises as a shop.

29. According to the Plaintiff however, when he took over the property, the same was in a seriously dilapidated state and was not tenable. He was therefore compelled to carry out extensive renovations to what he came to call as "the Atlanta Shop". The Plaintiff told the Court that he carried out the repairs with the full knowledge and the supervision of the 1st Defendant's husband who was his good friend.

30. The Plaintiff further told the Court that the 1st Defendant's husband with whom they had the arrangement passed away sometime in the year 2005. As at that time he had carried out serious repairs that ensured that the suit property was in a tenable state and could now fetch a sum of Kshs 5 Million if sold in the open market.

31. Sometimes in late 2014, the Plaintiff came to learn that the 1st Defendant was in the process of selling and transferring the suit property to a third party. It is his case that at the material time he had been in occupation of the said Atlanta Shop for a long period of time, had accrued a lot of good will therefor and had not been compensated for the value of his investments thereon. As a result he instituted this suit for an injunction and for a declaration of his rights as against the Defendants.

32. The 1st Defendant as the Administrator of the Estate of the late Joseph M'Itibua did not deny entering into a sale Agreement to dispose of the suit property to the 2nd Defendant. It is however the Defence case that the Plaintiff did not make the alleged or any renovations and that he is not entitled to any of the orders sought herein.

33. As it were the agreement between the Plaintiff and the 1st Defendant's husband on the use of the suit premises was oral. Even after the late Joseph M'Itibua passed away on 11th June 2005, no formal agreement was executed between his wife-the 1st Defendant and the Plaintiff herein.

34. According to the Plaintiff the house he rented from the 1st Defendant's husband was dilapidated and in a poor and untenable condition. That is how they came to agree with the deceased that he should repair the same. The Plaintiff did not however produce any evidence of the dilapidated condition of the suit premises when he took them over or any agreement he may have had with the deceased to repair the same. Nor does he state the role if any played by his Co-tenant Samuel Marunga in the alleged improvements done to the house.

35. It was in fact telling that while he purported to have put in eight permanent doors, plastered the floor and changed both the ceiling and the roof, the Plaintiff did not produce a single receipt or document in evidence of the purchase of the materials used and/or any indication that the repairs and improvements were done.

36. In the resultant scenario, it was difficult indeed to conclude that the Plaintiff made the alleged or any improvements to the suit premises. It is trite law that he who alleges must prove. Accordingly, given the 1st Defendant's denial that any improvements were made to the suit premises, I think it was incumbent that the Plaintiff not only proves that the same were not only made but that they were made with the concurrence and/or prior consent of the deceased and/or the 1st Defendant.

37. As a tenant, the Plaintiff was under no obligation whatsoever to make any improvements to the suit property beyond the usual obligations of a tenant to maintain the premises in a tenable condition. Where the Plaintiff chose on his own to go beyond the ordinary call of duty to make the premises more comfortable to himself in the absence of any authority from the owners of the premises, he can only have himself to blame.

38. Similarly, nothing was placed before me to demonstrate that the 1st Defendant and/or her deceased husband had agreed with the Plaintiff that any improvement made by the Plaintiff on the demised premises would result in a beneficial interest in the premises beyond the

possession he already had subject to payment of the agreed rent.

39. And while the Plaintiff claims to have acquired an interest in the demised premises by virtue of the rules in *Muthembwa –vs- Muthembwa(2002)1 EACA 186*, it was clear to me that the circumstances herein were completely different. In the cited case, the parties who were both in gainful employment had lived together as husband and wife for a period of time and had children. When confronted with the issue of how to share the matrimonial property, the Court had no difficulty in finding that there was a rebuttable presumption of an equal contribution to the acquisition of their matrimonial properties.

40. In the matter before me, there was nothing to suggest that there was any joint proprietorship or proprietorship in common between the 1st Defendant and the Plaintiff over the suit premises. I could not find anywhere in law or in fact from which to infer that any improvements carried out by the Plaintiff on the suit premises would precipitate a trust in his favour. In that regard, I did not think it was open for this Court to impute or create a bargain for the parties which they did not intend at the inception of their relationship.

41. In the premises, I did not find any merit in the Plaintiff's case. The same is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 6th day of February, 2020.

J.O. OLOLA

JUDGE