



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL SUIT NO. 17 OF 2018

(Formerly Kakamega ELC No. 62 of 2018)

PAMELA IMBUKA NJARO.....1ST PLAINTIFF

FRANCIS BOGE NJARO.....2ND PLAINTIFF

VERSUS

JOSEPH VUTITA NJARO.....1ST DEFENDANT

MOLYN CREDIT LIMITED.....2ND DEFENDANT

KENNEDY K SHIKUKU t/a

SHIKONI AUCTIONEERS.....3RD DEFENDANT

KENNETH NANDI VITISIA.....4TH DEFENDANT

JUDGMENT

1. The 1st plaintiff is the wife of the 1st defendant, while the 2nd plaintiff is a brother of the 1st defendant. The 2nd defendant is a limited liability company in the business of money-lending, while the 3rd defendant is a licensed auctioneer, and the 4th defendant is an adult of sound mind.

2. The dispute in this suit turns on a property known as S. Maragoli/Kegoye/1316, which is registered in the name of the 1st defendant. He borrowed money from the 2nd defendant, and offered the said property as security, and a charge was created by the 2nd defendant over the same. The 1st defendant subsequently defaulted in his obligations to the 2nd defendant, culminating in the said property being sold at a public auction carried out by the 3rd defendant, where the property was bought by the 4th defendant. The suit is principally at the behest of the 1st plaintiff, who argues that Maragoli/Kegoye/1316 was matrimonial property, which ought not have been charged without her consent, and to that extent the charge was a nullity and the sale based on it was illegal. She seeks declarations and injunctions. It would also appear that there is a claim by the 2nd plaintiff that the said land was ancestral, and was held by the 1st defendant in trust for the rest of his siblings.

3. The 2nd and 3rd defendants appeared and filed defence on 26th March 2014. They contest the claim that Maragoli/Kegoye/1316 was ancestral land held in trust, arguing that no such trust was disclosed and asserting that the said property was registered in the name of the 1st defendant. They aver that the issue of trust was being raised specifically to scuttle and defeat the 2nd defendant's rights under the charge, which had been duly executed by the plaintiff and the 1st defendant. They further aver that the 1st plaintiff had been aware of the matter all along.

4. The 4th defendant filed his defence on 10th March 2015. He avers that he bought the property legitimately at a public auction without notice of any existing interest, and thereafter the property was transferred to his name by the 2nd defendant. He asserts that due process was followed. He asserts that he is the registered proprietor of the property, and counterclaims for the eviction of the 1st plaintiff from the suit property and for mesne profits.

5. The suit was disposed of by way of *viva voce* evidence.

6. The oral hearing commenced on 3rd July 2019. The 1st plaintiff, Pamela Imbuka Njaro, was the first to take the stand. She testified that she saw a notice affixed to a pole announcing sale of Maragoli/Kegoye/1316 by public auction. When she went home, she searched amongst her husband's documents and stumbled on a charge over that property, by the 2nd defendant to secure a loan he had obtained from the 2nd defendant. She described the land as ancestral and a matrimonial land. She stated that she wanted the property to revert back to the family. During cross-examination, she claimed that Maragoli/Kegoye/1316 belonged to the five sons of her father-in-law, but she could not explain how the property was registered in the name of the 1st defendant. She said she was not aware that the 1st defendant had taken a loan. She said that she was aware that sometime in 2013, her mother-in-law was unwell, but she did not know who took care of her medical bills. She conceded that the title document for Maragoli/Kegoye/1316 was in the name of the 1st defendant. She also conceded that the charge document had been registered at the lands office. She denied that she appeared before an advocate to sign the charge document, and asserted that if the same bore her signature then the same was a forgery. She then again stated that she could not recall whether she signed a spousal consent. During cross-examination she said that she did not give spousal consent for the creation of the charge over the property.

7. The 2nd plaintiff followed. He testified that Maragoli/Kegoye/1316 belonged to his father, but then he gave it to the 2nd defendant on their behalf, who then used fraud to get himself registered as proprietor. He stated that he discovered that he had been so registered when the process of disposing of it by public auction began. He said the 1st defendant did not grab it from their father, for it was their father who transferred it to him, but the 1st defendant was meant to distribute it to the rest of the sons. He testified that the deceased had also transferred other parcels of land to the other sons. He said he could not tell whether the plaintiff and the 1st defendant had agreed to take a loan.

8. The 1st defendant took the witness stand on 25th September 2019. He denied that he had registered himself fraudulently as proprietor of Maragoli/Kegoye/1316. He said that their father described to distribute his land, and he gave him Maragoli/Kegoye/1316, which was to be held by him, so that he could later distribute it to his siblings. He said that he had no interest to make it his, as he knew it belonged to all of them. He said that he did not involve the plaintiff when he took the loan, as he had been advised that there was no need to involve her. He also did not involve his brothers in the matter. He stated that he took the loan to get money to take his mother to hospital, and since his brothers were not working the responsibility fell squarely on him. He said he offered the land as security, but he did not understand what would happen to it in case of default. He denied having a conspiracy with the plaintiff. He stated that he had not repaid the loan to the 2nd defendant, saying that he intended to settle the debt. He said that the plaintiff did not sign any papers to support the loan application, neither did he inform her that he was taking the loan. He stated that after he got the loan money he bought a lorry with it. He stated that he was not aware that the plaintiff signed the charge before an advocate.

9. The 4th defendant testified next. He explained how he became aware of the planned sale of the subject property by public auction, had his agents bid at the auction, he was the highest bidder and he bought the property. He paid the purchase price and the same was transferred to his name following the laid down process.

10. At the close of the oral hearing, the parties filed written submissions. I have read through them and taken note of the arguments made.

11. The main plank of the 1st plaintiff's case is that Maragoli/Kegoye/1316 was ancestral land and her matrimonial home. It is alleged to be ancestral land on the basis that the late father of the 2nd plaintiff and the 1st defendant had transferred it to the 1st defendant to hold in trust for his siblings, with a view to later distributing it to them. From the material that I have before me, I do not have any basis for finding that Maragoli/Kegoye/1316 was ancestral land or was held in trust. At the time the late father of the two parties was transferring it to the 1st defendant, he had also transferred various other parcels of land to all his sons.

12. On the matter of it being matrimonial property, the 1st plaintiff claims that their home is on that property. She also said that she and the 1st defendant had two matrimonial homes. So, if it was intended to be land that the 2nd defendant held in trust for his brothers, on account of it being ancestral land, how can be that it was also the matrimonial home for the 1st plaintiff and the 1st defendant? Why would they, when they had land elsewhere which belonged to them, establish a matrimonial home, on property in which they only had beneficial interest. I do not think that the 1st plaintiff is justified to assert that Maragoli/Kegoye/1316 was both ancestral land as well as matrimonial property. The two cannot possibly coexist. I believe the allegation that the same is matrimonial property has more to do with the fact that it was registered in the name of the 1st defendant, her husband, than anything else.

13. Then the 1st plaintiff and the 1st defendant claim that the plaintiff was not aware that the 1st defendant was taking a loan with the 2nd defendant. Yet the documents that the 1st defendant signed to charge the property, include an affidavit of consent of spouse, which the 1st plaintiff executed on 19th February 2013, before an advocate. She asserted that she did not sign any such document and that if there was a document, lodged with the 2nd defendant, bearing her signature then the same was a forgery. I find that very hard to believe. It was the 1st defendant who approached the 2nd defendant to borrow money from it. It was he who offered Maragoli/Kegoye/1316 as security. I do not believe that thereafter the 2nd defendant, went about manufacturing false documents to support the charge. For the money to be released to the 2nd defendant the 1st defendant must have done everything that was required of him to perfect the charge, including procuring the 1st plaintiff to execute the spousal consent. If indeed the 1st plaintiff did not execute that spousal consent, nothing stopped her from getting handwriting and document examiners to forensically examine the signature to assess its authenticity. It is curious that her story, and that of her co-plaintiff, dovetail with that of the 1st defendant. The 1st defendant claims the property was ancestral, and that the 1st plaintiff did not sign the spousal consent, and that he did not even know that by offering Maragoli/Kegoye/1316 as security a charge would be created and the property exposed to public sale in default of repayment of the loan. He is a school teacher of many years standing, he cannot be that ignorant, and his story, and that of the plaintiffs, should be taken with a pinch of salt.

14. The other issue is with respect to whether the sale of the subject was done against orders of the court. At the oral hearing the plaintiffs made no effort to demonstrate that court orders were obtained to restrain sale, and after the same were obtained, they were served on the 2nd and 3rd defendants. For the court to assess whether or not the sale was in disobedience of court orders, it was incumbent upon the plaintiffs to demonstrate at the oral hearing that orders were obtained to restrain sale, those orders were served on the persons who were bound to obey them, and that those persons, nevertheless disregarded the said orders. The plaintiffs did not lead any such evidence.

15. The plaintiffs also seek declarations that the sale was illegal or secretive for lack of proper notices. Again, the plaintiffs did not lead any evidence on the matter of the notices. It was incumbent upon them, as the plaintiffs, to demonstrate that the 2nd defendant did not follow the law. The 1st defendant was the principal beneficiary of the moneys loaned, he feigned ignorance of the existence of the charge, saying he was not aware that it had been created, and was not even aware of the consequences of default. He did not address himself to the matter of the notices, yet he should have been the most interested person in ensuring that due process was done before the sale was carried out.

16. Overall, I am not persuaded that the plaintiffs have made out a case for the orders that they seek in their plaint.

17. The 4th defendant has counterclaimed for eviction of the plaintiffs and for mesne profits. I doubt whether I have any jurisdiction to grant such orders. The right to evict a party from land is tied up with the ownership of the land and the right to use and occupy it. These are matters that the High Court has no jurisdiction over, by virtue of Article 162(2) and 165(5) of the Constitution, and the provisions of the Environment and Land Court Act, No. 19 of 2011, the Land Registration Act, No. 3 of 2012, and the Land Act, No. 6 of 2012. The Land Act carries elaborate provisions on unlawful occupation of land and removal of persons who are in such unlawful occupation. These provisions are in sections 152A to 152I of the Land Act. It involves issuance of notices and proceedings in court.

18. For avoidance of doubt, the said provisions state as follows:

“152A. Prohibition to unlawful occupation of land

A person shall not unlawfully occupy private, community or public land.

152B. Evictions to be undertaken in accordance with the Act

An unlawful occupant of private, community or public land shall be evicted in accordance with this Act.

152C. ...

152D. ...

152E. Eviction Notice to unlawful occupiers of private land

(1) if, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.

(2) the notice under subsection (1) shall—

(a) be in writing and in a national and official language;

(b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;

(c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and

(d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

152F. Application to Court for relief

(1) Any person or persons served with a notice in terms of sections 152C, 152D and 152E may apply to Court for relief against the notice.

(2) The Court, after considering the matters set out in sections 152C, 152D and 152E, may—

(a) confirm the notice and order the person to vacate;

(b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;

(c) suspend the operation of the notice for any period which the court shall determine; or

(d) order for compensation.

152G. Mandatory procedures during eviction

(1) Notwithstanding any provisions to the contrary in this Act or in any other written law, all evictions shall be carried out in strict accordance with the following procedures —

(a) be preceded by the proper identification of those taking part in the eviction or demolitions;

(b) be preceded by the presentation of the formal authorizations for the action;

(c) where groups of people are involved, government officials or their representatives to be present during an eviction;

(d) be carried out in a manner that respects the dignity, right to life and security of those affected;

(e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;

(f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction; (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;

(h) respect the principles of necessity and proportionality during the use of force; and

(i) give the affected persons the first priority to demolish and salvage their property.

(2) The Cabinet Secretary shall prescribe regulations to give effect to this section.

152H. Disposal of property left after eviction

The competent officer of the Commission or County Government, community owning a registered community land or owner of private land shall at least seven days from the date of the eviction, remove or cause to be removed or disposed by public auction, any unclaimed property that was left behind after an eviction from private, community or public land.

152I. Demolition of unauthorized structures

Where the erection of any building or execution of any works has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building or works, within such period as may be specified in the order.”

19. Both the Land Act and the Land Registration Act are specific that reference to court in the two statutes means the Environment and Land Court. That provision is in section 2 in both statutes. See also section 101 of the Land Registration Act and section 150 of the Land Act. That would mean that a private property owner who seeks relief under section 157F of the Land Act, should seek such relief from the Environment and Land Court, and not from the High Court. The counterclaim is about illegal occupation of private land. The 4th defendant should, therefore, have moved the Environment and Land Court in terms of section 157F for the removal of the 1st plaintiff and the 1st defendant from Maragoli/Kegoye/1316.

20. The same would apply to the mesne profits. The said relief is available to a private owner of property which is illegally occupied and utilized by another. Mesne profits relate to loss of benefits due to such illegal occupation, which would have otherwise accrued to the owner. It boils down to title, use and occupation of property. I have no jurisdiction to venture into those territories.

21. Overall, it is my finding that the plaintiff's suit and the 4th defendant's counterclaim have no merit and are hereby dismissed with costs. Any party aggrieved by these orders has the liberty to move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W MUSYOKA

JUDGE