



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO 433 OF 2017

PRIVATE DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

REBECCA NGONYO.....1ST DEFENDANT

SAMUEL KAMAU MACHARIA.....2ND DEFENDANT

AND

JACKSON NJENGA NJOROGE.....INTERESTED PARTY

JUDGMENT

(Claim being over ownership and possession of certain land; suit land having been charged and sold by chargee through a public auction in 1998; the plaintiff claiming that she has leased the land from the chargor and seeking restraining orders; parallel suit by purchaser to have possession of the suit land; no evidence tendered by either chargor or plaintiff to support why they should be on the land; evidence showing that the land was sold through a public auction; purchaser entitled to both title and possession of the suit land; chargee directed to transfer land to purchaser; chargor and lessee of chargor declared to have no interest in the land; orders for vacant possession given and in default they be forcibly evicted)

1. The dispute herein relates to the ownership of the title and right to possession of the land parcel Nakuru Municipality Block 4/46. This land used to be owned by Lucy Mwihaki Macharia (Lucy Mwihaki), who charged the same to Royal Credit Limited. Royal Credit Limited, as chargee, moved to sell the property in the year 1992 or thereabouts, which resulted in Lucy Mwihaki, filing the case Nairobi HCCC No. 3443 of 1992 against Royal Credit Limited aiming to stop the intended sale by chargee. The sale of the property was stopped through orders of injunction issued in the said case, but which appear to have lapsed, paving way for the sale of the property in the year 1998.

2. The property was sold by auction and purchased by Jackson Njenga Njoroge (Mr. Njenga) on 20 November 1998. The title was however not transferred to Mr. Njenga owing, it is said, to difficulties accessing the land parcel file in the Lands Registry and expiry of the lease. However, Mr. Njenga sought to have possession of the suit land which led to the filing of several other suits.

3. In the year 2005, Lucy Mwihaki filed the suit *Nairobi HCCC No. 694 of 2005* against Royal Credit Limited. In that suit she sought orders to have an injunction restraining the defendant from selling the suit land or rectifying the register by discharging the charge. She also asked for a cancellation of the charge. In the same year 2005, Private Development Company, filed the suit *Nakuru CMCC No. 2125 of 2005, Private Development Company vs Rebecca Ngonyo & Samuel Kamau Macharia*, seeking to stop the two defendants from interfering with their possession of the property. This suit was however withdrawn on 14 August 2006, but soon thereafter, on 11 October 2006, Private Development Limited filed a more or less similar suit, being Nairobi HCCC No. 1082 of 2006 against Rebecca Ngonyo and S.K Macharia again seeking to stop them from interfering with their possession of the land and damages against them for loss that they said they incurred owing to this interference. Around the same time, Mr. Njenga, the purchaser of the property at the auction, sought to have possession of the suit land and filed the case Nakuru CMCC No.2019 of 2006, against Private Development Company so that the latter may vacate the suit premises.

4. On 12 February 2013, Ouko J (as he then was) directed the consolidation of the suits, Nairobi HCCC No. 3443 of 1992, Nairobi HCCC No. 1082 of 2006, Nakuru CMCC No. 2019 of 2006, and Nakuru CMCC No. 2125 of 2005 and further directed that Lucy Mwihaki, be treated as co-plaintiff in the suit Nairobi HCCC No. 1082 of 2006 (which had by then been transferred to Nakuru and given the number Nakuru HCCC No. 167 of 2009). Despite this order of consolidation, it will be recalled that the suit Nakuru CMCC No. 2125 of 2006 had been withdrawn on 14 August 2006. The suit Nairobi HCCC No. 3443 of 1992 was dismissed for want of prosecution on 20 June 2001, a fact pleaded by Lucy Mwihaki, in her plaint in the suit Nairobi HCCC No. 694 of 2005. That left the suits Nairobi HCCC No. 1082 of 2006, Nakuru CMCC No. 2019 of 2006, and Nairobi HCCC No. 694 of 2005. The suit Nairobi HCCC No. 694 of 2005 was dismissed on 3 May 2017, leaving only two suits, that is the original Nairobi HCCC No. 1082 of 2006 and Nakuru CMCC No. 2019 of 2006.

5. As I stated earlier, in the case originally filed as Nairobi HCCC No. 1082 of 2006, Private Development Company Limited and Lucy Mwhiki (enjoined as 2nd plaintiff), sought orders to have Rebecca Ngonyo and Samuel Kamau Macharia (S.K Macharia), restrained from taking possession of the suit property. They also sought damages in the sum of Kshs. 720,000/= for loss they say Private Development Company suffered when the two moved to take possession, and aggravated damages of Kshs. 240,000/= per month from November 2005. In the case filed as Nakuru CMCC No. 2019 of 2006, Jackson Njenga Njoroge, the purchaser at the auction, has sued Private Development Company Limited so that they may be permanently enjoined from occupying or collecting rent or interfering with the suit property. Those are basically the issues that are subject for determination. The two cases were transferred to the Environment and Land Court and registered as Nakuru ELC No. 433 of 2017. Apart from the principal parties, there are two interested parties, one being Jackson Njenga Njoroge, who really should not be described as interested party as he is a substantive plaintiff in the case originally filed as Nakuru CMCC No. 2019 of 2006, and Jackson Gicharu Gichohi. His interest, according to the application that led to his inclusion in the suit, is that he leased the suit land from Mr. Njenga. I have also seen from the pleadings that for all intents and purposes, Rebecca Ngonyo has been an agent of S.K Macharia.

6. There were numerous applications which delayed the hearing of this suit and I indeed directed that some pending applications be stayed so that this matter may be heard once and for all. I held a pre-trial conference on a couple of occasions resting with the mention of 1 October 2018, when the case was fixed for hearing on 20 November 2018. On the eve of the hearing date, an application was presented by Lucy Mwhiki, seeking to amend the plaint in Nairobi HCCC No. 3442 of 1992. I directed that the application be served and stated that I would give directions on it the following day. On the hearing day, Mr. Bizimana, learned counsel for Lucy Mwhiki, pressed that I ought to first hear the application for amendment before proceeding to hear the case. I disallowed this argument and in fact proceeded to summarily dismiss the application to amend, for the simple reason that the suit Nairobi HCCC No. 3443 of 1992 was dismissed on 21 November 2001, and therefore there could not be any such plaint to amend. I directed the hearing of the matter to proceed.

7. There was no representative from Private Development Company Limited and Lucy Mwhiki herself was absent. I asked Ms. Ngugi, learned counsel holding brief for Mrs. Mukira for Private Development Company Limited, and Mr. Bizimana, for Lucy Mwhiki, whether their clients had any evidence to offer. Ms. Ngugi, stated that Mrs. Mukira no longer had instructions and Mr. Bizimana stated that they have no witness. Given that position, I directed that the case of the plaintiffs, Private Development Company Limited and Lucy Mwhiki, be closed without any evidence being presented. I then adjourned briefly so that we may proceed with the case for the defence.

8. On resumption, both Ms. Ngugi and Mr. Bizimana were absent and they never attended the defence hearing.

9. In his evidence, Mr. S.K Macharia, adopted his witness statement as his evidence and produced his bundle of documents as his documentary evidence. He also gave brief oral evidence to the effect that Royal Credit Limited, of which he is a director, did order the sale of the suit property by way of public auction after the borrower had defaulted. The property was purchased by Mr. Njenga. However, they could not transfer the property to him as the land file disappeared and later the lease expired in the year 2012. He had to pursue the renewal of the lease, which was allowed, and the lease was renewed with the last entries being intact, that is with Lucy Mwhiki as proprietor but encumbered by the charge to Royal Credit Limited. He is yet to transfer the property to Mr. Njenga owing to these complications. Mr. Njenga also relied on his witness statement and bundle of documents. He did add that he purchased the suit property on 20 November 2011, after seeing an advertisement for a public auction by M/s Nguru Auctioneers. He was declared the highest bidder at Kshs. 2.7 Million.

10. Mr. Caleb Sunguti, the District Land Registrar, in Nakuru, did also give evidence. He stated that the suit property was charged, but its lease expired in the year 2012. The lease was then renewed with the previous entries being intact. It did transpire that Lucy Mwhiki had obtained a parallel lease but this was not supported by any documentation, and according to him, that is not a good lease.

11. Counsel left it to court to make a judgment and I have considered the pleadings and evidence tendered.

12. It is clear to me that the suit land was previously owned by Lucy Mwhiki. She charged it to Royal Credit Limited for some financial facilities. There was default and the property was sold through a public auction that was held on 20 November 1998, with Mr. Njenga being declared the purchaser. This sale has never been set aside and by virtue thereof, it follows that the rightful owner of the suit land is Mr. Njenga. The interest of Lucy Mwhiki, got extinguished once the property was sold to Mr. Njenga and unless that sale is revoked by court, Lucy Mwhiki has no further interest in the property. It cannot therefore be that Private Development can have any right to be on the suit property. They claim in their pleadings that they have leased the property from Lucy Mwhiki, but I have already pointed out that Lucy Mwhiki's interest got extinguished once the property was sold to Mr. Njenga. Indeed, Private Development and Lucy Mwhiki, have not tendered any evidence to state why they should still be allowed to keep possession of this property and I am not persuaded that they have any right over the same.

13. The title is yet to be transferred to Jackson Njenga, but there is nothing to bar the transfer by chargee, to the said Jackson Njenga, or to his nominee. Indeed, I direct that this be effected forthwith. As purchaser, Mr. Njenga is entitled to the title and to the possession of the suit land to the exclusion of all others.

14. There is not really much more to say in this case, given that the evidence of the defendants is not controverted and I now make the following final orders :-

(a) That it is hereby declared that Jackson Njenga Njoroge did properly purchase the land parcel Nakuru/ Municipality Block 4/46 at the public auction conducted on 20 November 1998.

(b) That Royal Credit Company Limited, are directed to effect the transfer by chargee, of the title to the land parcel Nakuru/Municipality Block 4/46 to Jackson Njenga Njoroge, or to his nominee as he may elect, in the usual manner.

(c) That it hereby declared that Lucy Mwhiki Macharia and Private Development Company Limited have no known interest in law in the land parcel Nakuru Municipality Block 4/46 and they and/or their servants/agents must vacate the said premises within 14 days of today, and in default, they be forcibly evicted.

(d) That the entire claim by Private Development Company and Lucy Mwihaki Macharia is hereby dismissed with costs.

(e) That the said Private Development Company and Lucy Mwihaki Macharia, shall jointly and/or severally pay the costs of these consolidated suits.

15. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 15th day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Bizimana Alex present for the 2nd plaintiff and holding brief for M/s Nyongesa Makhanu & Co. for the 1st plaintiff.

Mr. Karanja Munyori present for the 2nd defendant and holding brief for Mr. Orange for 1st interested party.

Rebecca Ngonyo - 1st defendant acting in person- Absent

James Gicharu Gichuru -2nd interested party- present

Court Assistant: Lotkomoi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU