



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1227 OF 2013

HESBON K. LIMISI.....PLAINTIFF

=VERSUS=

DELILAH ACHIENG MATHEWS.....1ST DEFENDANT

ARGWINGS KODHEK OCHIELY.....2ND DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....3RD DEFENDANT

JUDGMENT

1. By a plaint dated 11th November 2013, the plaintiff has sued the defendant for orders:-

(a) A declaration that the sale agreement entered into between the 1st defendant and the 2nd defendant for the purchase and sale of Flat F Block MF 32, Madaraka estate, Nairobi within LR NO. 25980 on 10th May 2013 is an illegality and is null and void by virtue of the prior existence of the agreement dated 22nd February 2010 between the plaintiff and 1st defendant.

(b) An order directing the 3rd defendant to effect a transfer in the register of Flat no. F situated on Block No. MF32 in Madaraka estate, Nairobi within LR No. 25980 to the plaintiff's name for which the deputy registrar of the high court should be ordered to execute the said transfer on behalf of the 1st defendant if need be.

(c) An order for the rendering of vacant possession of the said Flat No. F situated on Bloc No. MF 32 Madaraka estate Nairobi, within LR No. 25980 to the plaintiff.

(d) An order for the payment of mesne profits at the rate of Kshs.30,000/- per month together with the commensurate periodic, expected rent increments overtime till the rendering of vacant possession of the said house no. F situated on Bloc No. MF 32 in Madaraka estate, Nairobi within LR No. 25980 to the plaintiff.

(e) An order for general damages for trespass on the suit premises.

(f) Exemplary and punitive damages.

(g) Interest on prayer (d), (e) and (f) from the date of filing of this suit till payment in full.

(h) Costs of the suit.

2. Upon being served with copies of plaint and summons to enter appearance the 1st defendant entered appearance and filed a statement of defence dated 24th October 2013.

3. The 2nd defendant also entered appearance on 29th October 2013 and filed a statement of defence dated 20th November 2013. The 3rd defendant was sued by virtue of being the custodian of land records in the Republic of Kenya. He neither entered appearance nor filed a defence.

4. It is the plaintiff's case that he entered into an agreement with the 1st defendant to purchase Flat NO. F situated on Block No. MF 32 in

Madaraka Estate within LR No. 25980 at a consideration of Kshs.4.4 Million which was formalized by a sale agreement dated 22nd February 2010. It was further agreed that the 1st defendant would pursue the National Housing Corporation for a lease which would effectively be transferred on the plaintiff's name. After the plaintiff completed payment, he entered into possession, subsequently entered into a tenancy agreement with the 1st defendant at monthly rent of Kshs.30,000/-

5. The 1st defendant in her defence dated 24th October 2013 and in her testimony in court admitted that she sold the suit apartment to the plaintiff. It is her evidence that she had agreed to refund Kshs.5.5 million to the 2nd defendant so that she could surrender the title to the plaintiff.

6. The 2nd defendant maintains that he is a purchaser for value having paid the full purchase price to the 1st defendant. Subsequently, the 1st defendant executed a transfer in his favour with consent from National Housing Corporation, the head lessor.

7. PW1, Hesborn K. Limisi told the court that he entered into a sale agreement with the 1st defendant for the purchase of an apartment MF 32 Door F Madaraka estate. He paid Kshs. 2.1 million. The total purchase price was Kshs.4.4 million. He took possession of the house by 14th June 2010. He entered into a tenancy agreement with the 1st defendant at a monthly rent of Kshs.30,000/- which she paid without fail. He was surprised to learn in September 2013 that a third party was in the house. Upon inquiring from the 1st defendant he learnt that she had borrowed money from the 2nd defendant, which she was to refund. She claimed the agreement between her and the 2nd defendant was just a security for the debt. He then decided to institute this suit.

8. In support of his case he relied on the documents in the list of documents. They were produced as exhibit P1 to P31 respectively. His contention is that the 1st defendant had no house to sell to the 2nd defendant.

9. The 1st defendant, Delilah Achieng Mathews, on her part told the court since the plaintiff bought the house first, she was willing to transfer it to him. She relied entirely on her statement of defence and the witness statement.

10. The 2nd defendant, DW2, Argwings Kodhek Ochiely told the court that he saw an advertisement in the Standard Newspaper for sale of a house in Madaraka Estate for Kshs. 6.3 million. He called the number provided and spoke to Mark Okoth (DW1). They met on 20th October 2012 at Madaraka Shopping Centre and he (Mark) led him to the suit apartment. There he met the 1st defendant, who confirmed that she was selling the house. They agreed at a purchase price of Kshs. 5.5 million. He paid the full purchase price upon confirming from the National Housing Corporation that the 1st defendant owned the house. He paid the full purchase price and the 1st defendant effected transfer on his favour. He was however unable to register the transfer as the plaintiff also claimed to be the owner. He relied on his witness statement and the documents in his list which were produced as exhibits D2-D16 respectively.

11. He denied that he conspired with the 1st defendant to defraud the plaintiff of the said house. He also denied that he lent the 1st defendant any money but that he bought the house. He prays that the plaintiff's suit be dismissed.

12. The 2nd defendant (DW3), called two witnesses, DW2 John Mark Okoth, a real estate agent told the court that the 1st defendant, informed him that she was selling the house. She confirmed she had all the documents. On 16th October 2012 he placed an advertisement on the Standard Newspaper. DW2 became interested and he introduced him to the 1st defendant. He said thereafter he was paid his commission. He produced a copy of the advertisement as exhibit D1. He said he was not aware that the house was being claimed by someone else.

13. DW4 Pamela Atieno, a legal assistant with National Housing Corporation produced the records for the suit apartment. She told the court that National Housing Corporation approved the sale between the 1st defendant and 2nd defendant. She further told the court that the 2nd defendant pays rates and he is the recognized owner. She told the court that the plaintiff's name does not appear on their records. She further told the court that the house is still registered in the 1st defendant's name.

14. I have considered the pleadings, the evidence on record, the written submissions made on behalf of the respective parties and the authorities cited. The issues for determination are:-

i. Whether the plaintiff, subsequent to the sale agreement dated 22nd February 2010 between himself and the 1st defendant, took possession of the suit premises and entered into a tenancy agreement between himself and the 1st defendant.

ii. Whether the sale agreement between the 1st defendant and 2nd defendant is a nullity, illegal and a fraud.

iii. Is the plaintiff entitled to the reliefs sought?

iv. Who should bear costs?

15. DW1, when cross examined by the plaintiff's counsel told the court that she did not have to notify National Housing Corporation that she had sold the house to the plaintiff. DW4 Pamela Atieno, a legal assistant with National Housing Corporation was cross examined on this issue by the plaintiff's counsel. She told the court that the 1st defendant was free to sell the house to whoever she wished. DW4 also confirmed that house is still in the 1st defendant's name. It appears to me that National Housing Corporation cannot decline a consent once it is sought.

16. It is not in doubt that the plaintiff has demonstrated that he entered into a sale agreement with the 1st defendant on 22nd February 2010 for

the purchase of the apartment for Kshs. 4.4 million, which he paid. Thereafter the 1st defendant executed a transfer in his favour and allowed him to take possession of the suit apartment. Subsequently thereto, the 1st defendant made a request to remain in the apartment and accordingly, he signed a tenancy agreement with her dated 14th June 2013 for rental sum of Kshs.30,000/- per month. This evidence was not challenged by the 1st defendant or the 2nd defendant. In the case of **Lawrence P Mukeri Mungai (Attorney of Francis Mwoki Mwaaura and AG & Others [2017] eKLR**. The Court of Appeal stated thus:-

“.....the 2nd respondent was allegedly issued with a title deed for the same property in 1996. A property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first one in time prevails, see *Gitway Investment Ltd vs Laymal Ltd & 3 Others 2006 eKLR*”

I am guided by the above authority.

17. In the instant suit, it should be noted that the plaintiff's sale agreement was the first in time. The 2nd defendant entered into a sale agreement with the 1st defendant much after the plaintiff had purchased the suit property. There was no notification from the 1st defendant that she wished to rescind the contract. In her defence she does not deny that she sold the apartment to the plaintiff.

18. It is on record that a third party is in occupation of the suit apartment. The said third party was put in occupation by the 2nd defendant upon executing the subsequent sale agreement with the 1st defendant. Having found that the plaintiff is entitled to the suit apartment the 1st defendant and by extension the third party in occupation are trespassers on the suit apartment. I find that the plaintiff is entitled to general damages for trespass. In the case of **Philip Ayaya Aluchio vs Chrispinus Ngayo [2014] eKLR J Obaga** stated:-

“.....the issue which arises is as to what is the measure of such damage. It has been stated that the measure of damages for trespass is the difference in the value of the plaintiffs' property immediately before and immediately after the trespass or the cost of restoration whichever is less. (See *Hostler vs Greenpark Development Co. 986 W 2d 500 (No Ct App. 1999)*). The plaintiff herein did not adduce any evidence as to the state of his property before and after trespass.....however I find that the plaintiff is entitled to

general damages for trespass. I award a nominal sum of Kshs.100,000 as general damage for trespass. The cost will go to restoration of the suit land to its former state”.

I am guided by the above authority.

19. The suit apartment herein is let out at a monthly rent of Kshs.30,000/-. I award Kshs. 300,000/- , general damages for trespass which I think is reasonable.

20. The upshot of the matter is that, I find that the plaintiff has proved his case on a balance of probabilities. I enter judgment in his favour as against the defendants as follows:-

(a) A declaration is hereby issued that the sale agreement entered into between the 1st defendant and the 2nd defendant for the purchase and sale of Flat F Block MF 32, Madaraka estate, Nairobi within LR NO. 25980 on 10th May 2013 is an illegality and is null and void by virtue of the prior existence of the agreement dated 22nd February 2010 between the plaintiff and 1st defendant.

(b) An order is hereby issued directing the 3rd defendant to effect a transfer in the register of Flat no. F situated on Block No. MF32 in Madaraka estate, Nairobi within LR No. 25980 to the plaintiff's name for which the deputy registrar of the high court should be ordered to execute the said transfer on behalf of the 1st defendant if need be.

(c) An order is hereby issued for rendering of vacant possession of the said Flat No. F situated on Bloc No. MF 32 Madaraka estate Nairobi, within LR No. 25980 to the plaintiff.

(d) An order for the payment of mesne profits at the rate of Kshs.30,000/- per month till the rendering of vacant possession of the said house no. F situated on Bloc No. MF 32 in Madaraka estate, Nairobi within LR No. 25980 to the plaintiff.

(e) General damages for trespass on the suit premises of Kshs.300,000/-

(f) Interest on prayer (d), (e) and (f) from the date of judgment till payment in full.

(g) Costs of the suit.

It is so ordered.

Dated, signed and delivered in Nairobi on this 6th day of February 2020.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Sumba advocate for the Plaintiff

1st defendant present in person

Ms Otieno for Mr. Kiplagat advocate for the 2nd defendant

Kajuju - Court Assistant