



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 517 OF 2017

SURINDERPAL SINGH SYAN.....1 ST PLAINTIFF

JASMEER SINGH SYAN2 ND PLAINTIFF

SANATKUMAR SHANTILAL TRIVEDI.....3 RD PLAINTIFF

= VERSUS=

WANYIRI KIHORO.....DEFENDANT

JUDGMENT

1. The 1st and 2nd plaintiffs contend that they are executors of the will of Ranjeet Sighn Syan who died on 13/12/2004 (**the deceased**). Together with the 3rd plaintiff, they brought this suit as **Nairobi CMCC No 1468 of 2008**. The suit was subsequently transferred to this court and designated as **Nairobi ELC Case No 517 of 2017**.

2. The deceased and the 3rd plaintiff are the registered proprietors of Land Reference Number 1/205 situated along Kayahwe Road, Nairobi (**the suit property**). The defendant was at all material times husband to one Dr Wanjiru Kihoro who is now deceased.

3. The plaintiffs' case was that in April 2001, the deceased together with the 3rd plaintiff entered into a tenancy agreement with the late Dr Wanjiru Kihoro pursuant to which they leased the suit property to Dr Wanjiru Kihoro, for a period of 2 years effective from 1/4/2001. The said tenancy lapsed by the effluxion of time on 1/4/2003 and was never formerly renewed. Following the demise of Dr Wanjiru Kihoro, the defendant who was a spouse to Dr Wanjiru Kihoro, continued to reside in the suit property without entering into a formal arrangement with the proprietors of the suit property. They contended that the defendant lived in the suit property as a trespasser following the demise of his late wife. They added that they served the defendant with a notice to vacate the suit property by 31/12/2007 but the defendant failed to vacate. They further averred that at the time of bringing this suit, the defendant had stayed in the suit property without paying the then monthly rent of Kshs 40,000 for 19 months, making a total of Kshs 760,000 in equivalent of the rent arrears.

4. Consequently, the plaintiffs sought the following orders against the defendant:

- a) **An order for eviction of the defendant from the suit premises namely LR No 1205.**
- b) **Kshs 760,000 as at 13/2008 with a monthly increment of Kshs 40,000 up to the date of eviction.**
- c) **Interest on (b) above from the date of filing suit until payment in full.**
- d) **Costs of the suit**

5. The defendant filed a defence dated 18/4/2008. He subsequently filed an amended defence and counterclaim dated 5/1/2009. The defendant admitted existence of a tenancy agreement between the proprietors and his late wife. He added that the tenancy agreement gave his late wife the option to purchase the suit property at the expiry of the two year tenancy term. He denied being a trespasser on the suit property. He contended that his late wife exercised the option to purchase the suit property and entered into a purchase agreement with the late Mr Rajee Sign Syan on his own behalf and on behalf of the 3rd defendant on 15/1/2003 and paid the purchase price of UK\$ 60,000 to the late R S Syan who signed a conveyance in favour of his late wife whereupon the interests of the deceased and the 3rd defendant in the suit property were extinguished. He added that unaware of the sale transaction, he paid rent of Kshs 667,000 to Mr R S Syan between 2003 and 2004 and Kshs 967,170 to the 1st plaintiff between 2005 and 2007. He sought a refund of the said amount.

6. Consequently, the defendant sought the following prayers in the counterclaim against the plaintiffs:

- a) **Declaration that LR No 1/205 was purchased as per the sale agreement and now belongs to the Estate of the late Dr Wanjiru**

Kihoro.

b) An order for the transfer of LR No 1/205 by the plaintiffs from the Estate of the Late Mr R S Syan and the third plaintiff to the Estate of the Late Dr Wanjiru Kihoro, and in the event of failure to do so, requisite papers to be expedited by the Court Executive Officer.(sic)

c) An order against the Estate of the Late Mr R S Syan for the refund of rental sum erroneously paid to him by the defendant, between the purchase by the Late Dr Kihoro and his subsequent demise in December 2004.

d) An order for the refund to the defendant of the rental sum paid by mistake to the first plaintiff following the demise of the late Mr R S Syan and before the subsequent discovery of the sale of the property to the Late Dr Kihoro

e) An order for costs and other relief as appropriate.

7. This suit came up for hearing before this court on 23/7/2019. The court was not satisfied with the mode of service employed in respect of hearing notice. The court directed the plaintiffs to serve a fresh hearing notice on the defendant through an advertisement in either the Daily Nation or the Standard Newspapers. The court set down the case for hearing on 5/11/2019. On 17/10/2019, the plaintiffs published a notice in the Daily Nation, addressed to the defendant, indicating that the suit was scheduled for hearing on 5/11/2019. The defendant did not, however, attend the hearing on 5/11/2019. Consequently, hearing proceeded in the absence of the defendant.

8. The 1st plaintiff testified as PW1. He stated that he was one of the executors of the will of the deceased. He adopted his witness statement which was filed on 11/9/2012 as his sworn in evidence-in-chief. His evidence was that the suit property was owned by their deceased father and the 3rd plaintiff. There was a dwelling house on the suit property. The deceased together with the 3rd plaintiff entered into a tenancy agreement with the late Dr Kihoro for a period of two years. After the death of Dr Kihoro, the defendant continued to occupy the suit premises, paying rent of Kshs 40,000 per month. On 31/12/2007, the defendant was served with a letter requiring him to vacate the suit premises. At the time of filing this suit, the defendant was in rent arrears of Kshs 760,000 being unpaid rent for 19 months. The alleged sale agreement dated 5/1/2003 and the conveyance between the plaintiff's father (the deceased), the 3rd plaintiff and the Late Dr Wanjiru Kihoro was a forgery. A forensic report revealed that the signatures were forgeries. The defendant last paid rent on 31/5/2005. The cheques that the defendant annexed to his replying affidavit were never presented to the deceased or encashed. The defendant and his late wife were allowed to stay in the suit property because the late Dr Kihoro was in a coma. There is a pending criminal case against the defendant. He produced a bundle of 9 documents.

9. The defendant did not testify or call any witnesses. He did not file written submissions.

10. The plaintiffs filed their written submissions on 3/12/2019 through the firm of Judy Thongori & Company Advocates. Counsel submitted that the tenancy between the deceased and the Late Dr Wanjiru Kihoro was not a protected tenancy. Counsel added that the suit property was jointly owned and it was impossible for the deceased to sell the suit property without involving the 3rd plaintiff. It was further submitted that the cheques purportedly issued for rent were for rent arrears. In any case, the rent allegedly paid was paid 3 years later after the alleged sale of the suit property. It was submitted that out of arrears of Kshs 800,000, the defendant only paid Kshs 472,170 in cash. It was further submitted that the alleged sale agreement was a forgery because it was not signed by the 3rd plaintiff. Lastly, it was submitted that the defendant was in rent arrears since 2008. The plaintiffs urged the court to grant the prayers sought in the plaint and dismiss the defendant's defence and counterclaim.

11. I have considered the parties' pleadings together with the evidence and submissions before court. I have also considered the relevant legal frameworks and jurisprudence on the key issues in this suit. The defendant filed an amended defence and brought a counterclaim. He did not, however, lead evidence to support his defence and counterclaim. He did not make submissions in support of his defence and counterclaim. Without saying much, in the circumstances, the counterclaim stands dismissed for lack of supporting evidence.

12. The parties in this suit did not agree on a common statement of issues. However, taking into account the pleadings, evidence and submissions before court, the following issues fall for determination in the suit: (i) Whether the late Dr Wanjiru Kihoro purchased the suit property from the deceased and the 3rd plaintiff? (ii) Whether the defendant was at all material times a trespasser on the suit property; (iii) Whether the estate of the late Ranjeet Singh Syan and the 3rd defendant are entitled to the prayers sought in the plaint against the defendant. I will make brief pronouncements on the above issues sequentially in the above order.

13. The first issue is whether the late Dr Wanjiru Kihoro purchased the suit property. The defendant contended in his statement defence and counter-claim that his late wife purchase the suit property through an agreement dated 5/1/2003. The plaintiff led evidence to show that the suit property belonged to the 3rd plaintiff and the deceased as tenants in common. Sale and conveyance of the suit property could not be validly effected by one tenant in common to the exclusion of the other tenant in common. The sale agreement and the purported conveyance which the defendant is waving at the plaintiffs are therefore nullities not capable of conveying any interest in the suit property.

14. Secondly, there is evidence that the said documents were subjected to forensic examination and were found to be forgeries. No controverting evidence was led by the defendant. In the circumstances, it is the finding of this court that there was no valid sale and/or conveyance of the suit property to the late Dr Wanjiru Kihoro. She did not therefore purchase the suit property as alleged by the defendant.

15. The second issue is whether the defendant is a trespasser on the suit property. Evidence was adduced to demonstrate that upon the demise of the late Dr Wanjiru Kihoro, the defendant continued to live in the suit premises at a monthly rent of Kshs 40,000. In 2007, the plaintiff served a notice upon the defendant requiring the defendant to vacate the suit premises on 31/12/2007. The defendant did not vacate the suit premises. He continued to stay in the suit premises without paying rent. In the circumstances, the defendant became a trespasser in the suit premises effective from 1/1/2008. The court therefore finds that the defendant has been a trespasser in the suit premises with effect from 1/1/2008.

16. The last issue is whether the estate of the late Ranjeet Singh Syan and the 3rd plaintiff are entitled to the prayers sought in the plaint. The first prayer is an order of eviction against the defendant. The court having found that the defendant is a trespasser on the suit property, the order for eviction would issue.

17. Prayer (b) relates to rent arrears and *mesne* profits as at 1/3/2008 and a further monthly sum of Kshs 40,000 until the date of eviction. There is evidence that the defendant was paying monthly rent of Kshs 40,000 prior to the date he stopped paying rent. I would therefore award the plaintiffs damages in the sum of Kshs 760,000 as at Kshs 1/3/2008. I will award them further damages of Kshs 40, 000 per month from 1/3/2008 until the date of eviction. I will grant the plea for interest and costs as set out in the disposal order.

18. In light of the above findings, I make the following disposal orders in this suit:

a) It is hereby ordered that the defendant is to be evicted from the suit premises, namely, Land Reference Number 1/205 forthwith.

b) The defendant shall pay to the 3rd plaintiff and the estate of the late Ranjeet Singh Syan damages of Kshs 760,000 with interest thereon at court rate from the date of filing this suit.

c) The defendant will further pay the 3rd plaintiff and the estate of the late Ranjeet Singh Syan damages in the sum of Kshs 40,000 per month from 1/3/2008 till the defendant vacates or is evicted from the suit property. The said sum shall attract interest at court rate from the date of judgment.

d) The defendant shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF MARCH 2020

B M EBOSO

JUDGE

In the presence of:-

Ms Lin Ng'ang'a for the plaintiffs

June Nafula-Court clerk