



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 52 OF 2008

MARY NYATHIRA KANG'ETHE.....PLAINTIFF

VERSUS

FREDRICK WAIREGI KARURI.....DEFENDANT

JUDGMENT

BACKGROUND

1. By an undated Plaintiff filed herein on 21st July 2008 as amended on 7th June 2009, Mary Nyathira Kang'ethe (the Plaintiff) prays for Judgment to be entered against Fredrick Wairegi Karuri (the Defendant) as follows:-

a) An order for mandatory injunction to issue to restrain the Defendant by himself, his servants and/or agents from alienating, disposing, transferring and/or in any way dealing and/or conducting any transaction in respect of the suit property to wit, Plot No. 2642(Original No. 1657/2) Section III MN measuring 0.3035 Ha, situated within Kikambala in Kilifi District;

b) A declaration that by virtue of an existing trust, the Defendant could not be registered as the owner of(the suit property) without the consent of the Plaintiff and thus held it in trust pursuant to the trust created;

c) A mandatory order to issue as against the Defendant to execute a transfer of the suit property to the Plaintiff and in default the same be executed by the Deputy Registrar of this Honourable Court;

d) General damages for wrongful dispossession;

e) Any other relief that the Court might find fit to issue in favour of the Plaintiff.

2. The Plaintiff gives the basis of those prayers in the Plaintiff as the fact that she is the Administrator of the Estate of the late Robert Bosco Mbugua Kang'ethe who was the owner of the suit property having purchased the same from one Dhahabu Chai on 9th October 1982.

3. The Plaintiff avers that the Deed Plan for the said piece of land had been given to the Defendant to hold as lien to guarantee the refund of certain debts owing from her husband the said Robert Bosco Mbugua Kang'ethe(Deceased). The Plaintiff asserts that upon the death of the deceased and contrary to the agreement between the parties, the Defendant refused to remit the Deed Plan and proceeded to cause the land to be registered in his name in purported set-off of the debts owing.

4. The Plaintiff further accuses the Defendant of proceeding to fence off the suitland which comprises part of the Plaintiff's matrimonial home and thereby blocking her access to her house situated within the home. The Plaintiff further asserts that the registration of the Defendant as the owner of the suit property was fraudulent and unlawful as at the time, the suitland was still under the administration of the Public Trustee.

5. But in his Statement of Defence and Counterclaim dated 20th August 2008 as amended and filed herein on 14th October 2009, the Defendant denies that the Plaintiff is the Administrator of the Estate of Robert Bosco Mbugua Kang'ethe and/or that the deceased was the proprietor of the said parcel of land.

6. The Defendant further asserts that he is the registered owner of the suitland and avers that his property is not Plot No. 2642/III/MN as described by the Plaintiff. The Defendant further asserts that his registration is a first one and that the same cannot be challenged even if obtained through fraud. He however denies that he obtained registration of the said property fraudulently as alleged or at all.

7. The Defendant avers that contrary to the Plaintiff's claims, it is the Plaintiff who sometimes in July 1994 or thereabouts trespassed onto his property and without his permission or approval started putting up a permanent structure thereon. The Defendant avers that as a result of the Plaintiff's invasion during which she vandalized and destroyed his property, the Defendant has suffered massive loss and damages.

8. Accordingly and by way of a Counterclaim, the Defendant prays for Judgment against the Plaintiff for:-

a) A mandatory injunction to compel the Plaintiff, her relatives, agents, servants and/or any other persons acting on her authority or instructions to give vacant possession of the suit property and to demolish the house constructed thereon and to remove all the materials failing which the houses be demolished and removed at her cost;

b) An order of permanent injunction restraining the persons mentioned in (a) above from trespassing upon and/or dealing or interfering in any way with the suit property;

c) General damages for loss of use of land from 19th July 1994 and interests thereon at Court rates; and.

d) Costs of this suit and interest thereon at Court rates.

The Plaintiff's Case

9. At the trial herein, the Plaintiff called two witnesses in support of her case.

10. PW1- Mary Nyathira Kang'ethe is the Plaintiff herein. She told the Court that the suit property previously belonged to her husband Robert Bosco Mbugua Kang'ethe who passed away on 9th January 2001. PW1 told the Court she obtained a Grant of Letters of Administration ad Litem for her husband's estate in 2007.

11. PW1 testified that her husband and four other people had bought the suit property from one Chai Dhahabu on 9th October 1982. The Defendant was among the four people. The Vendor had in turn acquired the land from one Sheilla Norton.

12. PW1 testified that after her husband's death, the Defendant started claiming a sum of Kshs 80,000/- which he said her husband owed him. The Defendant even wrote a letter dated 2nd July 1997 demanding payment.

13. PW1 told the Court that later on, Deed Plans for the suit property were prepared and given to the Defendant. The Defendant then wrote to the Plaintiff telling her the property had changed hands. That was on 7th December 2006 and the Plaintiff came to learn that the Defendant had paid himself with the land. PW1 however told the Court that her husband had not told her about any debts.

14. PW1 further told the Court that at one point, the Defendant caused her to be charged in a Criminal Case at the Kilifi Magistrates Court on account that she had trespassed on his land. PW1 was later acquitted.

15. During cross-examination, PW1 told the Court that she was residing in Njoro, Nakuru when her husband bought the land in Kikambala. PW1 told the Court that her husband used to stay in a hotel before he bought the land. She was however unsure of the size and did not know that the Sale Agreement indicated that her husband bought Plot No. 306 which is one acre and not the one she claims.

16. When shown a Deed Plan for Plot No. 2642/III/MN, PW1 confirmed that it was issued in 1994 when her husband was still alive. PW1 further told the Court that the Defendant was one of the original four people including her husband who had purchased land from Dhahabu Chai. Her husband and the Defendant were jointly running a Bar business on the land.

17. PW2-Jackson Kang'ethe Mbugua is a son of the Plaintiff. He told the Court that the Defendant is their neighbour in Kikambala where they stay in adjacent plots. He told the Court the suit property belonged to his father who passed away in 2000.

The Defence Case

18. The Defendant (DW1) testified as the sole witness in his case. He told the Court that he is the proprietor of Plot No. 2642 and that he had bought the same from Dhahabu Chai. He did not know where the Plaintiff's parcel of land is located.

19. DW1 told the Court that the Deed Plan for the suit property was produced on 19th July 1994 and that at the time, the Plaintiff's husband was still alive. The said husband never claimed the land and DW1 told the Court he first heard of this complaint in 2008. DW1 told the Court that the Plaintiff's husband bought land that was curved from an original Plot No. 306 while his parcel was curved from Plot No. 427/III/MN.

20. DW1 further told the Court that when they were preparing to bury the Plaintiff's husband, he allowed her to stay on the suit property and that she thereafter built a permanent house on it. Before the matter came to Court, DW1 wrote to the Plaintiff on 12th November 2010 demanding that she vacates the land. She declined.

21. DW1 further testified that they had initially come together as four partners including the Plaintiff's husband and contributed money to start a business. At some point however they decided to dissolve the business and DW1 decided to write to the Plaintiff's husband to pay his debts. DW1 told the Court they did not however take the land in exchange for payment for the debt as claimed by the Plaintiff.

22. During cross examination, DW1 admitted that he wrote the letters dated 19th January 2001 and 7th February 2006 to the Plaintiff's family. He told the Court the land was previously owned by Sheilla Norton and that Dhahabu Chai who sold the land to him was one of the 35 beneficiaries of Sheilla Norton's property.

23. DW1 told the Court that the beneficiaries had filed an Originating Summons in Court claiming the land. He had bought two Plots from Dhahabu Chai and by the time the Originating Summons was decided, Dhahabu had passed away.

24. DW1 confirmed that he had no evidence to show he had demanded payment of any debts from the Plaintiff's husband when he was still alive. He conceded further that he had made a Criminal Complaint against the Plaintiff and asserted that they were found guilty and were placed on probation.

Analysis and Determination

25. The Plaintiff herein is the Administrator of the Estate of Robert Bosco Mbugua Kang'ethe who passed away on 9th January 2001. It is the Plaintiff's case that prior to his death, her husband had sometime on or about 9th October 1982 purchased the suit property from one Dhahabu Chai.

26. It was the Plaintiff's case that the Deed Plans for the suit property were given in trust to the Defendant to hold as Lien to guarantee the refund of certain debts owed by the deceased to the Defendant. It is the Plaintiff's case that in breach of the said trust, the Defendant obtained the registration of his name as the proprietor of the suit property by means of fraud and misrepresentation. It was further her case that the Defendant knew of the existence of the trust but proceeded to so register himself in purported set-off of the alleged debts owed to him by the Plaintiff's husband.

27. Accordingly the Plaintiff craves an order of mandatory injunction to restrain the Defendant from dealing with the suit property, a declaration that by virtue of the trust, the Defendant could not be registered as the proprietor of the suit property without the Plaintiff's consent and an order therefore compelling the Defendant to execute a transfer of the suit property to the Plaintiff. In addition, the Plaintiff also prays for general damages for wrongful dispossession of the suit property.

28. The Defendant however vehemently denied the Plaintiff's claim herein. Contrary to the position taken by the Plaintiff, the Defendant contended that he is the one who had indeed bought the suit property from the said Dhahabu Chai. He asserted that his was an indefeasible first registration and denied obtaining the said registration fraudulently and or in a manner that was unlawful.

29. In support of her case, the Plaintiff produced as her Exhibit No. 3 the Sale Agreement dated 9th October 1982 executed between her husband and the late Robert Kang'ethe and the said Dhahabu Chai as Vendor. A perusal of the Agreement reveals that the Parcel of land sold for Kshs 10,000/- was described therein as Plot No. 306-Section III Mainland North, Kilifi District measuring One Metric Acre and being the portion on the Western Side along the Main road.

30. There were four witnesses named in the Sale Agreement which further reveals that Mr. Kang'ethe paid a deposit of Kshs 5,000/- and that a further payment of Kshs 5,000/- was to be made on receipt by Mr. Kang'ethe of the title deed for the portion of the stated land. It would however appear that as at 9th January 2001 when the Plaintiff's husband died at the age of 54 years, he was yet to receive the title deed.

31. While claiming that he had also bought the self-same suit property from the said Dhahabu Chai, the Defendant did not however produce any Sale Agreement executed between himself and the said Vendor in Court. In his pleadings filed herein, the Defendant asserts that sometime in 1994, the Plaintiff invaded the suit property and started the construction of a permanent house thereon despite his protests.

32. In his testimony before this Court however, the Defendant told the Court that he was in business with the Plaintiff's husband and that when the said husband died, he allowed the Plaintiff to temporarily stay on the suitland as they planned for the burial. The Defendant testified that it was then that the Plaintiff took advantage of his generosity and started constructing a permanent house on the land where she resides to-date.

33. From the material placed before me, the Plaintiff's husband died on 9th January 2001 and if the testimony of the Defendant and not his pleadings were to be believed, that would mean that the Plaintiff entered the suit premises some seven years later than what he states in the Defence.

34. After failing to produce the Sale Agreement and other documents through which he purportedly acquired the suit property and getting really mixed up on the date when the Plaintiff first entered the suit property, the Defendant chose to cling on the description of the suit property as the one thing that would demonstrate that the parcel of land belonged to himself and that the Plaintiff did not know what she was talking about.

35. While the Plaintiff had initially referred to the suit property as Plot No. 306 Section III Mainland North, by the amended Plaint dated 6th June 2009, that reference was changed to Plot No. 2642 (Original No. 1657/2) Section III MN. That is the very same parcel of land claimed by the Defendant and wherein the Plaintiff is said to reside to-date. Indeed even though the Defendant asserts in his pleadings that Plot No. 306/III/MN is not the same as Plot No. 2642/III/MN, it was evident in their testimony before me that both the Plaintiff and the Defendant were well aware that the property in dispute was the very same one whose separate portions they both occupy on the ground.

36. From the material placed before me, it was evident that prior to his death, the Plaintiff's husband joined the Defendant and two other persons to run a joint business enterprise known as Karibuni Bush Bar in Kikambala. It was also evident to me that as at the time they ran the business, the Partners were aware that the Plaintiff's husband had purchased the suit property from the said Dhahabu Chai.

37. That was the reason that some ten days after the Plaintiff's husband died, the Defendant and the three surviving Partners wrote to the Plaintiff and her family on 19th January 2001 as follows:-

“The Family (Beneficiaries)

The late Robert Kang'ethe

P.O. Box 505

Njoro

Dear Beneficiaries-Family

RE: Accrued Dues in Karibuni Bush Bar & Restaurant Investment Until 1997 Totalling Kshs 628,192.00

We take this chance after our mutual discussion this morning pertaining to the money owed to the three partners in Karibuni Bush Bar Investment namely

(1) Fred Karuri (the Defendant herein)

(2) Readon Muyela

(3) Nzuki Kilonzo

Please refer to certified accountant's computation dated 2nd July 1997 which was served to the late Robert and his subsequent reply to our demand for dissolution of the partnership and payment with interest to the parties concerned.

With due respect the amount demanded has subsequently risen for three years since 1997 which we do not want to claim. We have also agreed to waive Kshs 50,000/- from the total amount demanded as our contribution towards Robert funeral arrangement.

We are happy to note your willingness as a family to have this money paid. As observed two options are open to you and us to settle this problem-

(1) To surrender the undeveloped front Plot overlooking the bar to the three partners.

(2) Provide formula on how to repay in cash the balance of Kshs 578,192/-

Please note that the plot from which Robert operated is still under the Seller's name Dhahabu Chai and under caveat for non-payment of the total cash price agreed upon by both parties. This we wish to follow-up to go to the proper Robert beneficiaries.

Dhahabu Chai's family demand Kshs 120,000/- to be paid to them before they can effect the transfer.

We hope to receive positive response from you and peaceful burial for Bother Robert.”

38. During his cross-examination herein, the Defendant conceded writing the said letter to the Plaintiff. He further conceded that as a follow up to that letter he wrote another hand-written letter to the Plaintiff and her son(PW2) on 7th December 2006 as follows:

“RE: Damping (sic) of Garbage and Construction Materials Plot Nos. 2642/III/MN

Please refer to our letter dated 19th January 2001, enclosed. This undeveloped Portion of Plot 2642/III/MN does not belong to the late Robert Kang'ethe. It changed hands due to a demand of Kshs 628,192/- plus interest which was not settled by the family. That is now a different registered Plot. If in doubt consult the undersigned for guidance. Tell those people to remove all the stuff before we sue them for trespass on private property.

Signed

Fredrick W. Karuri”

39. The above two letters are a clear demonstration in my view of the ill-intentions the Defendant had about his former partner's property. While he conceded that there was nothing to demonstrate that he had ever demanded the payment of the alleged debt when his partner was alive, some ten days after his death and before he could be buried, they chose to blackmail his family with a demand to either pay the purported debt or to part with the suitland.

40. That perfectly explains why the Defendant could not produce the Sale Agreement or any other document showing how he had acquired

the suit property. In his shameless effort to acquire the suit property, by whichever means necessary, he would stop at nothing. He knew he had been secretly registered as the owner of the suit land some eleven months before he wrote the second letter to the Plaintiff and he would use the fraudulently acquired title the following year to cause the Plaintiff and her son to be charged in ***Kilifi SRM's Criminal Case No. 1205 of 2007*** with the Criminal Offence of malicious damage to property contrary to Section 339(1) of the Criminal Procedure Code.

41. What emerges from the evidence is that the Plaintiff's husband bought the land from Dhahabu Chai. The fact of that purchase was not denied even by the Defendant who was his Partner at the time. All that the Defendant purported to dispute herein was the number of the parcel of land bought by the Plaintiff's husband. From his letter dated 19th January 2001, it is evident he knew the Plot the Plaintiff's husband bought was "the undeveloped front overlooking the (Karibuni Bush) Bar" which they operated jointly with the Plaintiff's husband.

42. From that first letter, he knew the suitland remained in the name of the seller-Dhahabu Chai who was also deceased by the time and the purpose of his second letter written some five years later on 7th December 2006 was only to let the Plaintiff know that he had succeeded in his scheme to acquire the land.

43. The tone as set out so elaborately in those letters was completely at variance with his testimony before this Court that he had purchased the property from the said Dhahabu Chai. There is no way that the Defendant could have purchased the suit property from Dhahabu Chai when he was busy black mailing the Plaintiff to surrender the land to them shortly after the husband died.

44. If the Plaintiff's husband had not owned the land, there would have been no reason for the Defendant to write the letter dated 19th January 2001 giving the Plaintiff's and her family the option to surrender the same in settlement of the alleged debt.

45. In the premises, I am satisfied that the Plaintiff has proved her case on a balance of probabilities. I did not find any merit whatsoever in the Defendant's Counterclaim and the same is hereby dismissed.

46. Judgment is accordingly entered for the Plaintiff as prayed in the Amended Plaint dated 7th June 2009.

47. The Plaintiff shall have the costs of her suit and of the Counterclaim.

Dated, signed and delivered at Malindi this 17th day of June, 2020.

J.O. OLOLA

JUDGE