



**Levi v Zahrya & another (Environment & Land Case 460 of 2010)
[2016] KEHC 6362 (KLR) (11 March 2016) (Judgment)**

Shalom Levi v Karny Zahrya & another [2016] eKLR

Neutral citation: [2016] KEHC 6362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ENVIRONMENT & LAND CASE 460 OF 2010
AA OMOLLO, J
MARCH 11, 2016**

BETWEEN

SHALOM LEVI PLAINTIFF

AND

KARNY ZAHRYA 1ST DEFENDANT

ROSE WANJA MUREGE 2ND DEFENDANT

JUDGMENT

1. The plaintiff filed his case on 16.12.2010 against the defendants over parcel of land L.R No MN/1/9930 (referred to herein as the “suit property”). This property was held jointly in common by the defendants on one hand and Nagar Yiehel on the other hand. The plaintiff purchased the half (½) share owned by Nagar Yiehel in the suit property.
2. The plaintiff in his plaint asked for the following ;
 - (a) An order to compel the Defendants by themselves and or their servants and agents to have that piece or parcel of land known as L.R No. MN/1/9930 into two equal parcels of land one belonging to the Defendants and the other to the Plaintiff and that the Defendants and the plaintiff be registered as owners of their separate parcels.
 - (b) General damages for refusing the Plaintiff access to and use of the said land since November, 2009.
 - (c) Costs of and incidental to this suit.
 - (d) Further or other relief that this Honourable Court may deem fit to grant.



3. The suit is defended by a joint statement of defence filed in Court on 3rd February 2011. The defendants denied that the suit property had been transferred to the plaintiff as their consent was not obtained. They also stated in paragraph 6 of the defence that one Nagar Yiehel had not paid their expenses incurred in constructing a boundary wall, well and water tank as was agreed on the suit property. They asked for the dismissal of the plaintiff's suit.
4. After parties had filed their documents and statements of agreed issues, the matter proceeded to hearing. The plaintiff's evidence was taken before Tuiyot J. on 10th September 2012. The plaintiff an Israel national told Court that he bought the suit land in June 2005. He said he had a title deed but could not access the land. That the land is jointly owned by himself 50% share and the defendants jointly 50%.
5. PW 1 stated that he bought the share of Nagar Yiehel at Kshs 500,000= . He produced the sale agreement as Pex 1, transfer form – Pex 2 and gazette notice dated 13.11.2009 as Pex 3. After the gazette notice, a provisional title was issued. PW 1 states that he has never accessed the property from the day of transfer access has been denied by the defendants.
6. The witness continued that the defendants do not recognize him as a co – owner. He wants to build his share of the property. PW 1 said that the defendants wanted payment for the boundary wall and the well. That Mr Nagar told him he had contributed for the developments. PW 1 said Mr Nagar had offered the defendants to buy his share which offer they did not take. He has tried unsuccessfully to approach the 1st defendant through mutual friends as the defendants want to control everything. After the attempts, he issued a demand letter through a lawyer. He sought orders as per plaint.
7. PW 1 said Mr Nagar sought consents of the defendants before selling to him. Further the defendants have been using the land to do block selling business hence his claim for damages. In cross-examination, he said he knew 50% belonged to the defendants. That he met the 1st defendant in Israel but he never consulted the 2nd defendant on this sale. He knew 1st defendant refused to give consent without giving any reason.
8. PW 2 is Nagar Yehiel also an Israeli. He admitted selling his share to the plaintiff. PW 2 stated that the purchase transaction between the 1st defendant and himself took place in Israel. That after signing the agreement, he never saw the title or the transfer form. He asked for the title many times but the 1st defendant told him the papers were with his wife (2nd defendant) in Kenya. When he approached the 2nd defendant, she said the documents were kept in the bank.
9. PW 2 testified that eventually he was told the title deed was lost. He continued that he asked the 1st defendant to purchase his share but the 1st defendant replied that he had no money. That the 1st defendant knew he was looking for a buyer but did not object. When the plaintiff was buying, PW 2 says the 1st defendant was informed.
10. PW 1 signed the transfer. He has not been on the property for 9 – 10 years but was aware of the well and later the wall built. He said that paid the 1st defendant some money in Israel. PW 2 stated that the 1st defendant never asked his permission when he constructed his house. That the plot had been bought for business to build rental houses for sale. He denied owing the defendants any money as he paid costs for digging the well, fencing and transfer fees. He was surprised the 2nd defendant's name was included in the title deed.
11. During cross-examination, he admitted he did not consult the 2nd defendant as he didn't deem it necessary. He did not have a written offer made to sell his share to the 1st defendant. He saw the original title the first time when it was showed to him in Court. He denied the averment that the 1st defendant



- was holding the title because of money PW 2 owed him. He stated that he contributed U.S \$ 250 for the well and \$ 1000 for the wall which he paid to the 1st defendant. This was not reduced into writing and no receipt issued as they were close. As far as he knew, the property was bought between him and the 1st defendant only.
12. I did hear the defence evidence which commenced on 18th February 2015. The 1st defendant testified as DW 1. He lives in Israel but has a house in Serena – Shanzu on Plot No MN/1/9930 (the suit property). DW 1 stated that they share the property with Rose Wanja and Nagar Yiehel. He knew the plaintiff as he was introduced to him by a friend who had gone to his house for coffee.
 13. That during the coffee date, the plaintiff asked him what he was doing with the extra plot to which he replied that it belonged to a friend. DW 1 continued that the plaintiff went back to Israel, investigated who the owner was and bought it behind his back. That PW 2 kept telling him he was going to build but never told him his intention to sell at all.
 14. He said he had custody of the original title and only learnt about the provisional title when this case began when a copy was filed with the plaintiff's documents. He averred that the process used to acquire the title was not legal. He has built a house on his share of the plot. He admitted Mr Nagar paid him \$ 350 but he was demanding \$ 4000 for the gate, water tank and wall. DW 1 continued that if given priority he can buy Nagar's share. He admitted that he has not let the plaintiff into the plot because he does not know him as per the contract they had.
 15. In cross-examination, he said they bought the suit plot with PW 2 as partners while they were in Israel. At the time, PW 2 did not know Rose' interest as she was not in the agreement. He denied refusing to show PW 2 the original title and denied refusing to buy. He had not sued Nagar for the money for the past 8 years. DW 1 stated Mr Nagar gave him consent to build his house.
 16. He admitted that Mr Nagar had informed him of the sale to the plaintiff. He has no problem with the plaintiff's half share but wanted to be paid for his expenses. He said he only made bricks on the other half to build his house before the transfer was done to the plaintiff. In Re – examination, he stated that they share the 50% with Rose. That PW 2 did not give him any offer. And that he was not sued to produce the original title.
 17. The 2nd defendant is the wife to 1st defendant. She said she is the one who identified the suit property before it was bought. The property was transferred into their names on 18.11.2002 and since then she has been in custody of the original title which she produced a copy in Court. She testified that she learnt of the allegation of lost title in 2010 through the gazette notice. That she was never consulted in the sale to the plaintiff.
 18. DW continues that she attempted to put a caveat on the title unsuccessfully. She did write to the registrar on 13.9.2010 vide her letter produced as Dex 4. It is her evidence that she has denied the plaintiff access to the suit property because he was never a partner and she was not consulted when the property was sold to him. The witness continued that she wrote complaining the transfer and issuance of provisional title was fraudulent as they were never informed or involved.
 19. She confirmed the developments undertaken on the suit plot as stated by DW 1. The total cost they were claiming from Nagar is half of Kshs 1,200,000. She produced the demand letter for the same as Dex 5. She also stated that they were never offered this property and if offered they would buy. She urged the Court to cancel the 2nd title and give them an opportunity to buy Mr Yiehel's share.
 20. In cross-examination, she said she did not sign the sale agreement because it was drawn in Israel while she was in Kenya. PW 2 was lastly on the property in 2002 – 03 when they began fencing. She was



not aware her husband was informed of Nagar's intention to sell but was aware Nagar introduced the plaintiff to her husband in Israel. She is not claiming the other half and said if Mr Levi (the plaintiff) pays what is owing, he can occupy his portion.

21. Parties filed their respective submissions which I have read and will make references to in the body of this judgement as is necessary. Before the hearing, parties filed framed issues. In the issues framed and from the pleadings and evidence on record, I adopt the following issues as arising for my determination ;
 - a) Whether consent of both defendants was required before the sale of the suit property to the plaintiff.
 - b) If failure to obtain consent (a) above invalidated the transaction between the plaintiff and Mr Nagar.
 - c) If the answer to (b) above is positive, whether the plaintiff is entitled to the orders sought.
 - d) Is the plaintiff entitled to an award under the heading of general damages.
22. On the face of the documents produced by both parties and from the evidence on record, it is not in dispute that the property was bought on a 50 : 50 basis between Nagar Yiehel and the 1st defendant. Later during the transfer process, the 1st defendant included the name of the 2nd defendant in his half (½) share of the suit property. The land in dispute was registered under the Registration of Titles Act CAP 281 (repealed). Mr Nagar sold his share to the plaintiff.
23. The defendants admitted they have never allowed the plaintiff to access the ½ share of Mr Nagar irrespective that it was sold to him. The defendants are unhappy first that they were never informed of the sale as required by law. Secondly that Mr Nagar had never paid all outstanding costs in terms of expenses incurred in building the boundary wall, the gate, well and water tank and lastly that they were denied an opportunity to buy.
24. PW 2 stated that he informed the 1st defendant while they were in Israel of his intention to sell but the 1st defendant did not express any interest. Later he informed him of the transaction between him and the plaintiff. PW 2 admitted the 2nd defendant was not informed because he did not know her name was in the title. The defendants submitted that the repealed law (CAP 281) is silent on lands owned in the form of tenancy in common but stated that the Transfer of Property Act 1882 (repealed) had a provision under section 44 that required consent of a co – owner to be obtained before undertaking any transaction on the title. Besides reliance on the provisions of the Transfer of Property Act, he also cited the case laws of Farmers Ltd vs Onemus Weru and 4 others (2013) eKLR and Hemed K. Hemed vs Fatuma Sheikh Abdalla (2014) eKLR.
25. The plaintiff on his part submitted the Registration of Titles Act Cap 281 (repealed) did not have any requirement for consent of co – owners. Further that since the provisions under this Act was in contradistinction with Cap 300 then one cannot apply the substance of the common law and that the cases cited by the defendants refer to lands registered under the Registered Land Act Cap 300 (repealed) and not lands registered under the Registration of Titles Act (repealed).
26. I have considered the provisions of Cap 281 as regards consent of co-owners. It is rightly admitted by the submissions of both the plaintiff and the defendant that the Act does not say consent of a co-owner must be obtained before sale by any of the co-owners.
27. The defendants did not lay any basis why they invited the provisions of the question. I also agree with the plaintiff's submission that the case law cited made reference to land registered under CAP 300 and not CAP 281.



28. Besides the absence of statutory provisions, requiring consent the evidence on record reveals that the 1st defendant was aware of the plaintiff's interest in this property before the sale. The 1st defendant said that the plaintiff was introduced to him through a mutual friend when they had coffee in his house. He said the plaintiff thereafter investigated where Mr Nagar was in Israel and got to buy the land. PW 2 informed the 1st defendant that he had sold his share in suit property.
29. The defendants stated that PW 2 had never made them an offer to sell as he kept saying he would build. Neither did the defendants give evidence to say that at any time they had offered to purchase Mr Yiehel's share in the land. PW 2 was sickly and the 1st defendant was aware of this. When they sent the demand letter for the sums of money which they averred was owed to them, they never mentioned any interest in buying. In fact from the defendants' own evidence, they said that once the expenses owed on account of building of the wall, two gates, well and water tank they have no problem with the plaintiff accessing the land. My answer to the first question is that consent of the defendants was not mandatory. But even if it was required, the 1st defendant was notified.
30. Since the consent was not required as provided, here was no other ground raised by the defendants to invalidate the transaction between the plaintiff and Mr Nagar. The issue of lack of consent of the Commissioner of lands was not pleaded in the defence filed on record, did not arise in the evidence of the defence witness and thus cannot be brought up in the submissions. It is trite law that parties are bound by their pleadings. The submission on this heading has no foundation to support it and therefore I shall not dig into the matter.
31. The defendants stated that the transfer and issuance of provisional title deed to the plaintiff was fraudulent. From my analyses of the evidence adduced, it is obvious the relationship between the defendants and MR Nagar (PW 2) had broken down at some point. Mr Nagar said he asked for the title deed from the defendants to which the defendants gave various answer i.e it is kept by the 2nd defendant, it is in the bank and lastly that the title was lost. The defendants however denied Mr Nagar asked them for the title.
32. This Court however chooses to believe Mr Nagar's version because first MR Nagar having informed the 1st defendant that he had sold the share to the plaintiff could not fail to request for the original title deed. Secondly, the defendants showed their unhappiness at this transaction by their refusal to allow the plaintiff access the suit property even after carrying out a search at the lands office to reveal the plaintiff had acquired registration of the 50% share of the co-owner. With that kind of malice, there was nothing on the way of the defendants to allege the title was lost just to frustrate Mr Nagar and the plaintiff from gaining access to the property.
33. Was the issuance fraudulent ? I do not think so. The loss was reported to the police, the land registrar put out a gazette notice No 12089 (produced as Pex 3) and since no objection was raised, a provisional title was issued. The issuance of the provisional title did also not prejudice the defendants as their ½ share in the suit property remained intact. In any event section 22 (4) (b) allowed for issuance of two separate titles for the co-owners.
34. Further to paragraph 33 above, it is only proper in the circumstances of this case to allow prayer (a) of the plaint for each of the parties to hold their separate titles and not tenants in common as the relationship remains sour. Holding one joint title would hinder either of the parties to do whatever they will with their share of the land as per rights bestowed on chain in law.
35. The defendants made some claim in their defence about monies that is owing from Mr Nagar to them and now the plaintiff having taken over Mr Nagar's share should pay. The 2nd defendant was specific that they were claiming half of Kshs 1.2 Million. The defendants did not file a counter – claim for these



monies neither did they produce receipt on the exact costings during the hearing. Mr Nagar stated that he had given money to the 1st defendant. However since such a prayer was not presented to the Court, I am unable to grant the defendants any orders as re – reimbursements.

36. Lastly the plaintiff prayed for general damages. The transfer was registered in favour of the plaintiff on 4th November 2009. Since then he has been denied access into the suit premises. He testified the defendants admitted manufacture such bricks but said only to use to build their house and not for sale. The manufacture of the bricks was done without the consent of Mr Nagar or the plaintiff. One wonders why the defendants would use Mr Nagar's portion without consenting him but deemed it necessary that they be consented when he is selling.
37. In their submission to support the claim for award of damages, the plaintiff relied on the case of Adrian Gilbert Muteshi vs William Ruto & 4 others(2013) eKLR where the Court awarded the plaintiff damages for having been denied access to his land and the land having been put for use for other purposes. The defendants on their part stated that they were not entitled to recognize the plaintiff for lack of their consent and the manner in which the transfer was done. It is heir view that up till now, the plaintiff is not entitled to the 50% share in the land.
38. Having found that the consent of the defendants was not necessary, that line of submission does not hold. I find that the plaintiff is entitled to damages on account of intentional denial of access and the defendants manufacturing bricks on his portion without his or consent. I assess the damages payable at Kshs Seven Hundred Thousand (Kshs 7,000,000) with interest at Court rates from the date of this judgement till payment in full.
39. Costs follow the events and the plaintiff having succeeded is entitled to the costs which are incurred legal expenses as a result of the defendants unlawful action.

JUDGEMENT DATED AND DELIVERED AT MOMBASA THIS 11TH DAY OF MARCH 2016.

A. OMOLLO

JUDGE

