



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ENVIRONMENT AND LAND CASE NO. 33 OF 2016

JULIUS LUTUKAI WAMALWA.....PLAINTIFF

VERSUS

ALICE NABUTOLA.....DEFENDANT

JUDGMENT

[1]. The Plaintiff **LUTUKAI WAMALWA** brought this suit against the defendant **ALICE NABUTOLA** and wants this court to order that the defendant be evicted from $\frac{1}{4}$ of an acre of land known as Plot No. 70 situate at Namaondo village.

[2]. The plaintiffs case is that he paid a total of Kshs.180,000/= to one Isaac Martin Wamalwa the owner. He avers that the defendant who was living on the suit land was not mentioned as a friend, wife or relative of the said Isaac martin Wamalwa the vendor and that the defendant never signed anywhere as a witness or an interested party during the sale transaction. He avers that the defendant has illegally continued to occupy the said plot hindering the plaintiff's occupation and development of the said plot.

[3]. The plaintiff produced an agreement for sale signed by the said Isaac Wamalwa and himself, two copies of the notices to the defendant to vacate the said plot dated 19.5.2006 and 10.7.2007 and a chiefs letter/notice to vacate the suit parcel of 2006.

[4]. The defendant filed her statement of defence and averred that she is the wife of Isaac Martin Wamalwa. That she has been his wife since 1977, a period of over 15 years. She stated that, as man and wife they purchased the said land. That they purchased the land in two phases firstly a $\frac{1}{4}$ and later the other quarter. That her said husband disposed off the first quarter without her knowledge and when she realized what he was doing, problems started. Later, when he wanted to sell the present portion, she reported to OCS Kimilili police station and DO 1 Chwele who wrote to her husband warning him against selling the plot but despite the warning he still sold to the plaintiff herein without her knowledge. Thereafter, the plaintiff came and destroyed her crops. She said that she reported to the police and to Mukuyuni ward Agricultural officer who assessed the loss at Kshs.30,375/=. The defendant produced a letter dated 30.7.08 from Kimilili police station to the defendant showing that the defendant was wanted for the offence of threatening, a letter from the chiefs office to her dated 28.09.08 to discuss a matter of domestic dispute, an agreement dated 14.05.2005 whereby martin Wamalwa had to refund Kshs.15,440/= and to subdivide the land and household goods. Also included was a letter dated 7th October, 2011 from the District Officer Chwele to Isaac Martin Wamalwa entitled Land Dispute Namaondo West plot where the D.O directed the said Wamalwa to stop any sale and/or transfer of the said plot until the dispute pending between the defendant and Mr. Wamalwa is resolved. She also

produced letters dated 17.4.13 and 6th April, 2016.

[5]. The plaintiff herein called Mr. Isaac Martin Wamalwa who said that he bought the land for Kshs. 4,000/=. He said that in 2008 the defendant came to lease a house and that she lived there upto 2004 when he sold the land to the plaintiff. He produced no receipts to show the defendant was a tenant.

[6]. The question for determination here is the capacity of the defendant in the suit land. Was she a tenant or a wife of the vendor Martin Wamalwa?

[7]. There is no dispute, that when the plaintiff herein entered into an agreement for sale with one Isaac Martin Wamalwa on 28th May 2011, the defendant was on the suit land. Infact, in his evidence Mr. Wamalwa said he was told that she was a tenant. It is interesting to note that he never insisted on the vendor giving him vacant possession of the land, particularly when he was paying the entire purchase price.

[8]. The letters produced by the defendant show that the defendant and Martin Wamalwa the vendor herein had a dispute as early as 30.07.2008. In the summons from the police of that date showed that the said Martin Wamalwa was wanted for the offence of threatening. Further on the 28.7.08 the office of the chief Chwele summoned the defendant to his office to discuss domestic matters. On 14.5.08 there is an agreement between Martin Wamalwa and the defendant herein to divide the land and to share Kshs.15,440/=, to return the roofing sheets and to buy beddings, four sufurias 8 cups and 8 plates. Finally on 7.10.2011 there is a letter from the District Officer Chwele to Isaac Martin Wamalwa through the chief Chwele directing him to stop any sale and/or transfer of the Namaondo West plot (the suit land) pending the determination of the land dispute aforesaid with his partner the defendant herein.

[9]. There is absolutely no doubt in my mind that The said Isaac Martin Wamalwa was living with the defendant as his partner. There were various disputes as evidenced by the letters aforesaid centering on the plot at Namaondo market. There is also no doubt that the defendant has lived on that plot since 2008 Three years prior to the agreement for sale that was entered between the plaintiff and Isaac Martin Wamalwa. Indeed, when the plaintiff purchased this land the defendant was living on the said land and had food crops therein. There was no certificate of lease and/or title produced by any of the parties of plot No. 77 Chwele. It is therefore not possible to know whether it is a leasehold and if so, what remainder of the said lease is left prior to its expiry. We also do not know what remainder was bought by the purchaser. It is also not possible to know who owns the same between the said Isaac Martin Wamalwa and the defendant herein. It is also not possible to know whether we are dealing with a piece of land capable of being alienated or not. It might as well be trust land under the County Government since it is in a village market. All we know is that, the defendant lives on the said ¼ of an acre in Namaondo village.

[10]. I find that the said defendant had from the evidence on record, a relationship with the said Isaac Martin Wamalwa, that the relationship became sour and the said Wamalwa entered into an agreement for sale with the plaintiff to sell the said ¼ an acre to the plaintiff while the defendant was still living on the said plot without involving her. Under the circumstances, I am not able to grant the plaintiff the eviction he seeks. I am not convinced and/or satisfied that he has made out a case and shown the interest he purported to buy. The vendor too did not establish to me the interest he sold to the plaintiff. It might as well be that the defendant is illegally and/or legally squatting on Government land on plot no. 77 Chwele otherwise called Namaondo market.

The end result is that the plaintiffs case is dismissed with costs to the defendant.

Judgment read in open court before the parties.

Dated, signed and delivered on 8th November, 2016.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistant - Joy

Plaintiff - Present

Defendant - Present