



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL CASE NO. 95 OF 2002.

MOURICE MUREITHI MWANGI.....PLAINTIFF.

VERSUS

INVIOLETA NABWIRE MAKETA.....DEFENDANT.

J U D G M E N T.

The plaintiff, **Maurice Mureithi Mwangi**, filed this suit against the defendant, **Invioleta Nabwire Makete**, on the 22nd November, 2002, praying for a declaration that the parcel of land known as **L.R. No. Ndivisi/Muchi/3078**, belongs to him and that the defendant be evicted from therein.

Further that, a permanent injunction be issued to restrain the defendant or her agents or anyone claiming under her from entering, trespassing, collecting rent or in any way dealing with the suit land.

The plaintiff also prays for the costs of the suit and interest.

It is averred in the plaint that the plaintiff is the registered owner of the suit property measuring 0.05 hectares and that the defendant without any colour of right trespassed into the suit property claiming it to be hers and has refused to vacate. That, the defendant has gone further to collect rent from tenants occupying the premises thereon without his (plaintiff's) authority and consent.

The plaintiff contends that the defendant's action are unlawful for lack of proprietary rights over the property and prays for judgment against her.

The defendant filed a statement of defence and counterclaim on the 3rd January, 2003, in which she denies the allegations made against her by the plaintiff and contends that the plaintiff's title to the property was illegally acquired. Further that, she is rightfully entitled to collect the rent accruing from the property having largely contributed towards its acquisition, mortgage repayment and development.

The defendant further denies that the plaintiff is entitled to any declaration in law and/or equity and counterclaims against him to the effect that she has been residing on the suit property for over twelve (12) years and has therefore acquired the same by adverse possession thereby giving her a better right over the property than the plaintiff. The defendant therefore claims title to the property for herself and children and prays for dismissal of the plaintiff's suit and for judgment against the plaintiff in the counterclaim together with costs.

At the hearing of the suit, the plaintiff, **Maurice Muriithi Mwangi (PW1)**, testified that he purchased the suit property on the 12th September, 2002 from **Boniface Mutuku Muinde (PW2)**, for Ksh. 250,000/=. He produced the necessary agreement (P. Exh. 2) and a title deed (P.Ex. 1) in his name.

The title deed was issued on 20th September, 2002. the plaintiff further testified that the payment for the property was not done at once but rather by payment of a loan owed to Agricultural Finance Corporation (AFC) by the vendor (PW2) which loan was repaid by the plaintiff. the payment agreement was produced (P. Ex. 3). That, the defendant was not living in the property until 1997 when she occupied one of the rooms claiming to be the wife of the vendor. There were ten (10) tenants, at the time and the plaintiff's wife Margaret Njoki was the rent collector.

The plaintiff testified that by the time the sale agreement (P. Ex. 2) was made, he had already paid the total purchase price in the sum of Ksh. 250,000/= and this was done without objection from the defendant who did not also raise an objection before the Land Control Board on the 12th September, 2002.

The plaintiff produced the necessary application for consent (P.Ex. 4) and the consent itself (P.Ex. 5). He eventually obtained the necessary title deed on the 20th September, 2002. The plaintiff indicated that the defendant and the vendor (PW2) were living as husband and wife although the vendor worked in Nairobi. That, it was only in October, 2002, when his attempt to collect the rent was objected to by the defendant.

The vendor (PW2) testified that he indeed sold the suit property to the plaintiff who was previously his tenant. That, the relevant land register showed that he was the proprietor of the property as at 1st November, 1990. That, he sold the property to the plaintiff vide the sale agreement dated 12th September, 2002 (P.EX. 2) and was paid the agreed purchase price (i.e. Ksh. 250,000/=). That, they proceeded to the Land Control Board thereafter where he (vendor) signed all necessary documents and released his title to the plaintiff.

The vendor (PW2) went on to state that he purchased the property from one Joseph Mwangi for Ksh. 25,000/= on the 11th May, 1989 and that at that time, the property was vacant. That, he deponed an affidavit on 28th May, 2003 (P. Ex. 7) confirming that he sold the property to the plaintiff. That, at the time of his buying the property, he was living with the defendant and that he was buying the property for her.

The defendant, **Invioleta Nabwere Naketa (DW1)**, testified that the plaintiff was her tenant in the suit property from 1989 to 2001. That, the property belonged to her having been purchased for her by her husband (PW2) whom she married in 1989. That, he (PW2) settled her on the property which she occupies to date. That, she was second wife to the vendor while the first wife (now deceased) lived in Makutano Gachoka. She produced the necessary marriage certificate (D. Ex. 1)

From the pleadings and the evidence adduced herein, it is apparent that no dispute arises with regard to the registration of the suit property in the name of the plaintiff. The registration was a culmination of the sale agreement (P.Ex. 2) entered between the plaintiff and the previous owner of the property (PW2) and a culmination of all the procedural requirements pertaining to the issuance of the consent of the Land Control Board.

The title deed (P.Ex. 1) was issued pursuant to the provisions of the then Registered Land Act (Cap 300 LOK).

The effect of that registration as per section 27 of the said Act was to confer to the plaintiff absolute ownership of the property together with all rights and privileges belonging or appertuant thereto.

As it were, the plaintiff acquired a title which was indefeasible save by fraud or mistake.

Herein, there was no evidence from the defendant that the registration of the property in the name of the plaintiff was done by fraud or mistake as implied by the defendant. The fact that the defendant was not consulted by the vendor prior to the sale of he property to the plaintiff was irrelevant as the proprietorship of the property at the time lay with the vendor.

In any event, the transaction passed through the Land Control Board and if there was indeed any objection by the defendant or any intention by the defendant to object to the sale, then the consent of the Land Board would not have been given.

The issuance of the Land Control Board Consent (P. Ex. 5) was a clear indication and proof that no objection was raised by anybody let alone the defendant, for the sale of the suit property to the plaintiff by the vendor (PW2). The defendant cannot therefore purport to raise the objection at this juncture by way of this suit because under the old regime of the land laws and in particular, the Registered Land Act (Cap 300 LOK), spousal rights over matrimonial property were not recognized unlike in the present Land Registration Act 2012, which would have enabled the defendant to enjoy spousal rights over matrimonial property as any land obtained by a spouse for co-ownerships and/or use of both spouses give rise to the presumption that spouses hold the land as joint tenants (see, section 93 (1) of the LRA 2012).

Under section 93 (2) of the same Act, acquisition of interest in land by a spouse through not registered as an owner is recognized if the spouse has contributed to its acquisition through labour or other productivity, upkeep and improvement of land. Such spouse is deemed to have acquired interest in the land by virtue of ownership in common of the land with the spouse in whose name the certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized.

Unfortunately for the defendant, the Land Registration Act 2012, does not apply retrospectively. Her interest over the suit property vis-a-vis the vendor (PW2) was therefore nil. She could not therefore purport to prevent exercise of proprietary rights over the property by the vendor (PW2) even if he was her husband.

The defendant's claim that she is entitled to the suit property by adverse possession would only apply if she had been in possession thereof for a period of twelve (12) years and above prior to the institution of this suit by the plaintiff in the year 2002.

The plaintiff stated that the defendant entered the suit property in 1997 but the transaction for the purchase of the property by himself commenced in the year 1995.

The vendor (PW2) indicated that the defendant started staying in the property in the year 1992, meaning that she had been there for a period of ten (10) years prior to the institution of the suit. She was still therein when the material sale transaction commenced in 1995 i.e. for a period of seven (7) years prior to the institution of this suit.

It is therefore clear from the foregoing that the doctrine of adverse possession would not apply in favour of the defendant in any circumstances. She would not be entitled to the suit property by way of adverse possession.

In the end result, the plaintiff is entitled to the orders sought in the plaint.

Judgment is therefore entered for the plaintiff against the defendant in terms of prayer (a) and (b) of the plaint together with costs of the suit.

The defendant's counterclaim is dismissed with costs and she is herein given a period of fourteen (14) days from this date hereof to vacate the suit property failure to which an eviction order shall issue forthwith.

Ordered accordingly.

[Delivered and signed this 12th day of March, 2014].

J.R. KARANJA.

JUDGE.