



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 231 OF 2000

JAMILA EBRAHIM ATTARWALLA 1ST PLAINTIFF

SHEHNAZ ISSADJEE 2ND PLAINTIFF

- V E R S U S -

HUSSEIN ABDULAZIZ 1ST DEFENDANT

MARYAM HEMED 2ND DEFENDANT

JUDGMENT

1. This case was fixed for hearing on 8th October 2014 and at the request of the Plaintiff's Counsel it was confirmed by Resident Judge for hearing on that day. The request was made because one of the Plaintiffs was due to travel from United Kingdom, where she resides, to attend the hearing. Even though the Defendant's Counsel was aware of that confirmation of hearing he did not attend Court on 8th October 2014 and did not give any explanation for that failure. The 1st Defendant Hussein Abdulaziz attended Court and was denied an adjournment by the Court. The second Defendant did not attend Court. The case proceeded for hearing in the absence of his Counsel and in the absence of 2nd Defendant.

PLAINTIFF'S CASE

2. Plaintiffs' claim is for the Defendants to give vacant possession of one flat occupied by the Defendants which is situated on property **MOMBASA/BLOCK/XXXIV/106** (the suit property). On that property there is a building comprising of shops and flats. The Plaintiffs are the registered owners of the suit property.
3. To support the above claim Plaintiffs produced a Title which showed that the Plaintiffs were registered as joint proprietors of the suit property on 9th August 2000.

COURT'S DETERMINATION

4. Having received the evidence in this case I find that the issues that emerge for the Court's consideration are-
 - **Was there a family agreement between the predecessors of the Plaintiffs and Defendants**

which entitled the Defendants to occupy the suit property and offset the rent due in Bondeni property?

○ **Are the Plaintiffs entitled to vacant possession?**

5. On the first issue the 1st Defendant testified that he was raised up by Hatim Mohamedali (Deceased) and Maryam Hemed the 2nd Defendant. That the two adopted him at a young age. Although 1st Defendant did not state in Court his age, I estimate his age to be between late thirties and mid-forties.

6. He stated that Hatim was married to the 2nd Defendant. I confirm that I sighted a poorly photo copied Marriage Certificate. That Certificate seems to witness the marriage between Hatim Mohamedali (Deceased) and Maryam Binti Hemed. The marriage was registered in the year 1968. 1st Defendant stated that Hatim passed away in 1989 and left 2nd Defendant on the suit property.

7. 1st Defendant stated that there was a property in Bondeni which the late Hatim was supposed to “get” but that the late Hatim agreed with his brother Mohsin that, him, Hatim and his wife, the 2nd Defendant, would occupy a flat on the suit property and as compensation Mohsin was to receive rental income of Bondeni property. That the 2nd Defendant’s occupation of the suit property was by virtue of that agreement. 1st Defendant in justifying his occupation of the suit property stated-

“I have stayed there [the suit property] because Maryam (2nd Defendant) is like my mother. I am like her adopted son ... I have never paid rent because I was put there by Maryam I have no interest in the house (suit property). I am there because 2nd Defendant has not obtained her right.”

Ist Defendant did not elaborate on that right of 2nd Defendant.

8. The Plaintiffs denied the existence of the agreement alluded to by 1st Defendant. They both stated that the suit property was not registered in the name of Hatim and that accordingly the Defendants could not lay a claim in the flat on the suit property.

9. Having received parties evidence I find that the Defendant failed to prove on a balance of probability the existence of the agreement for him and 2nd Defendant to occupy the flat on the suit property. The Defendant’s claim is therefore unsubstantiated and it fails. The answer to the first issue is therefore in the negative.

10. On the second issue it is necessary to look what the Law says are the rights of a registered owner of land, as it is in regard to the Plaintiffs. Section 24(a) of The Land Registration Act, 2012 provides-

“24. Subject to this Act-

a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

From that provision it is clear that the Plaintiffs obtained absolute ownership of the suit property from the date they obtained registration as joint proprietors of that property.

11. Such a right of absolute ownership cannot be defeated except as provided in Act. That is what Section 25(1) provide. It states-

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

That provision is only subject to leases, charges, other encumbrances, liabilities and obligations of a trustee which does not apply to the Defendants.

12. The Defendant’s evidence did not in any way displace the Plaintiffs’ right set out in the above Sections. The Defendant’s attempt to submit that Plaintiffs are not entitled to vacant possession until they relinquish Bondeni property is not supported by any evidence. There is no evidence before Court that Bondeni property exists and if it does, in whose name is it registered in. Defendants’ evidence was no more than empty rhetoric. Perhaps, much more the Defendants did not make a counter claim.

13. Defendants by their written submissions stated that they were entitled to continue occupying the suit property because they were licensee does not also assist their case any further because a licensee does not acquire any proprietor right in land. Black’s Law Dictionary definition of a bare license is-

“A license in which no property interest passes to the licensee, who is merely not a trespasser.”

From that definition it should become clear that a license is revocable by the licensor. That indeed was the holding in the case KAMAU v KAMAU (1984)1 KLR (E & L) where it was held-

“1. License or dispensation, unless coupled with a grant, does not bind its assignors or assignees because it does not pass any interest in land.

2. A license not coupled with an interest in land is revocable unless the contract for it contains express or implied terms that it shall not be revoked.”

14. Defendants did not in my view prove they were licensee and even if they were such a license would be revocable at the instance of the Plaintiffs.

15. I do make a finding that the Defendants are trespassers on the suit property. Being trespassers they cannot assert any right on that property. In that regard a case in point is SOPHIE WANJIKU JOHN v JANE MWIHAKI KIMANI [2013]eKLR where it was stated-

“In the case of Mbira v Gachuhi 2002 1 EA Page 138 Kuloba J. held that, ‘Where there were two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then, if the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser.’”

16. Another pertinent decision is the case CECILIA WANJIKU NGANGA v FRANCIS GITAU MUNGAI [2014]eKLR where the Court

considered the decision on the rights of registered owner of land as follows-

“In the case of Michale Githinji Kimotho –Vs- Nicholas Murathe Mugo, Nairobi Civil Appeal No. 53 of 1995 the Court of Appeal held as follows-

“If the Appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the Respondent’s claim. Though the appellant had for a long time been in occupation of the suit land which

was government land before it was allocated to the Respondent, this could not have helped him in resisting the Respondent's claim where the latter is registered as owner of the land ...'

In the case of Mombasa Technical & Training Institute Vs Agnes Nyevu Charo and others, Mombasa Civil Appeal No. 282 of 2010, the Court of Appeal stated as follows:

'Regardless of the length of time the Respondents remained on the suit property, their status remained that of illegal squatters.'"

17. Although Plaintiffs had made a claim for mesne profits they did not prove it. It being in the nature of special damages needed to be specifically proved.

18. In the end I find that the Plaintiffs title deed is lawful and it entitles them to both ownership and possession of the suit property.

19. Accordingly I grant the following orders-

- a. **The Plaintiffs are granted an order of vacant possession of the flat occupied by the Defendants which is on property Mombasa/Block XXXIV/106.**
- b. **The Defendants shall within thirty (30) days from this date hereof vacate the flat on property Mombasa/Block XXXIV/106. In default leave is hereby granted to the Plaintiffs to evict both Defendants at the Defendants' costs.**
- c. **The Plaintiffs are awarded costs of this suit.**

DATED and DELIVERED at MOMBASA this 4TH day of DECEMBER, 2014.

MARY KASANGO

JUDGE