



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 687 of 2002

GEORGE MWAI MBURU.....PLAINTIFF

VERSUS

1. MARY WAMAITHA KAITANY

2. NAIROBI CITY COUNCIL.....DEFENDANTS

J U D G M E N T

1. When the Plaintiff originally filed this suit by plaint dated 23rd April 2007 he sought protection of the court as a protected tenant of the 1st Defendant under the **Landlord and Tenant (Shops, Hotels & Catering Establishments) Act, Cap 301**. He subsequently amended his plaint and his new claim was for specific performance of a contract of sale of land.

2. The Plaintiff further amended his plaint, and his main claim became one for a declaration that he is entitled to the two suit plots of land by virtue of a letter of allotment issued to him by the 2nd Defendant on 12th November 2002.

3. Amended pleadings refer back to the date of the original pleading. The Plaintiff's claim therefore which will be adjudicated upon in this judgment is as pleaded in his **re-amended plaint dated 1st and filed on 2nd March 2007**.

4. The Plaintiffs case as pleaded in that re-amended plaint is as follows -

(i) That by a lease agreement dated 17th March 1997 the Plaintiff took from the 1st Defendant a 5-year lease on the premises known as **Plots B1 and B2, along Kombo Munyiri Road, Nairobi** (hereinafter called the **suit premises**), the same to terminate on 30th April 2002.

(ii) That about January 2001, during currency of the lease, the 1st Defendant agreed to sell to the Plaintiff the suit premises for a consideration of KShs 3 million pursuant to which the Plaintiff paid to the 1st Defendant on diverse dates a total of KShs 714,500/00 towards the purchase price.

(iii) That it was agreed and understood that the balance of the purchase price was to be financed by a loan that was to be advanced to the Plaintiff by his bankers upon security of the title documents to the suit premises, which documents the 1st Defendant "was obliged to make available".

- (iv) That despite repeated requests to avail the title documents in order to complete the transaction the 1st Defendant was “unable” to avail the documents.
- (v) That on the basis of negotiations and agreement aforesaid, and on representations made by the 1st Defendant, the Plaintiff undertook developments on the suit premises comprising two commercial blocks, ablution block and “other temporary structures”.
- (vi) That, further, the Plaintiff connected 3-phase electricity supply to the premises, water and sewer services.
- (vii) That all the aforesaid improvements were valued at KShs 2,845,000/00.
- (viii) That the 1st Defendant subsequently (by letter dated 28th January 2002) breached the sale agreement by giving the Plaintiff notice to remove the improvements. Particulars of breach are pleaded.
- (ix) That the Plaintiff subsequently found that the 1st Defendant had acted fraudulently in that she “(did) not appear” to be owner of the suit premises. Particulars of the alleged fraud are pleaded.
- (x) That on a follow-up with the 2nd Defendant it was confirmed that the suit premises were available for allocation.
- (xi) That the Plaintiff was then issued with a letter of allotment on 12th November 2002 in respect of the two suit plots “therein described as **Plots Nos. 6 and 7 at Gikomba Light Industrial Area**”.
- (xii) That the said Plots Nos. 6 and 7 referred to in the aforesaid letter of allotment are the same plots as Plots Nos. B1 and B2 in the 1st Defendant’s pleadings, and are the same plots the Plaintiff “has been occupying and has extensively developed”.
- (xiii) That following the allotment to himself the Plaintiff became entitled to the suit premises as owner with all rights and privileges pertaining to such ownership.
- (xiv) That further, and by the same allocation to the Plaintiff “any claims of ownership of the suit premises by the 1st Defendant were invalidated, and the proprietary rights over the suit premises became vested in the Plaintiff who is now entitled to occupy (them) as owner thereof and without any interference from the Defendants”.
- (xv) That in any event the allocation of the suit premises to the 1st Defendant by the 2nd Defendant was “procured fraudulently...through her late husband who was a senior employee of the 2nd Defendant...and therefore void”. Particulars of fraud are pleaded.

5. The reliefs sought by the Plaintiff are -

- (i) A declaration that he is entitled to “ownership rights over the suit premises by virtue of the letter of allotment issued to him by the 2nd Defendant on 12th November 2002.
- (ii) A declaration that the purported allotments of the suit premises to one Hezron K Kipkosgei of 12th May 1992 and to the 1st Defendant of 27th October 1992 were irregular, illegal, null and void.
- (iii) An order that the said allotments and the agreement for lease of 25th November 1997 between the Defendants be cancelled.
- (iv) An injunction, jointly and severally, from demolishing the Plaintiff’s buildings and improvements, or interfering with the Plaintiff’s quiet enjoyment of the suit premises.

(v) Costs of the suit.

6. The 1st Defendant filed **amended defence and counterclaim dated 13th March 2007** (the original defence and counterclaim was dated 6th May 2002).

7. The 1st Defendant pleaded as follows –

(i) The lease dated 17th March 1997 between her and the Plaintiff was for five years and seven months, from 1st October 1996 to 30th April 2002.

(ii) The 1st Defendant offered to sell to the Plaintiff, not both plots, and not for KShs 3 million as alleged, but only one of the two plots, Plot No. B1 (also known as **Plot No. 209/12069**) for the consideration of KShs 4 million. The 1st Defendant denied specifically that the second plot comprising the suit premises, Plot No. B2 (also known as **Plot No 209/12070**) was offered for sale to the Plaintiff.

(iii) Receipt of KShs 714,000/00 towards the purchase price was admitted. But the mode or source of payment of the balance of the purchase or production of title documents as pleaded by Plaintiff were denied.

(iv) The purchase price of KShs 4 million for the one plot was payable within three months, and necessary title document were to me made available only upon receipt of the full purchase price.

(v) In light of the Plaintiff's inability to pay the full purchase price within the agreed time the 1st Defendant rescinded the contract of sale and applied the sum received "to the outstanding rent account", more particularly as set out in paragraph 8 of the amended defence and counterclaim.

(vi) The suit premises had been leased to the Plaintiff "as an open yard with no permanent development", except that the Plaintiff was authorized to "put up a security wall approved by the relevant authority and connect power and water supplies to the premises at his own cost". Erection of permanent structures was specifically prohibited.

(vii) It was denied that the subsequent negotiations for sale authorized erection of any permanent structures. The pleaded value of the structures is denied.

(viii) Breach of the sale agreement (which was never reduced into writing) was denied.

8. In regard to the claimed allocation of the suit premises to the Plaintiff the 1st Defendant pleaded –

(i) The two plots were not available for allocation to the Plaintiff or to any other person on 12th November 2002 or at all after 25th November 1997 when the 1st Defendant was formally granted leases over each plot by the 2nd Defendant.

(ii) The purported allocation of the two plots to the Plaintiff was thus null and void and cannot invalidate the 1st Defendant's allocation of the plots to her.

(iii) The allocations and the leases to the 1st Defendant were not acquired fraudulently as alleged.

(iv) The alleged allocation of the suit plots to the Plaintiff was itself fraudulent and was procured during pendency of this suit.

9. At paragraph 19A of the amended defence and counterclaim, the 1st Defendant gave notice that in the event that the court upheld the allocation of the suit plots to the Plaintiff, she would look to the 2nd Defendant for full compensation.

10. The 1st Defendant counterclaimed as follows –

(i) For a declaration that the Plaintiff's continued occupation of the suit plots after 30th April 2002 is unlawful and constitutes trespass.

(ii) An order for vacant possession.

(iii) *Mesne* profits at KShs 30,000/00 per month from 1st May 2002 until delivery of vacant possession.

(iv) General damages.

(v) Costs and interest.

11. The 2nd Defendant filed a **re-amended defence dated 15th March 2007** (the amended defence is dated 27th February 2006 and the original defence 24th May 2002).

12. The 2nd Defendant pleaded, *inter alia*, -

(i) That the purported allotment of the suit plots to the Plaintiff is invalid and contrary to law, the same not being available for allotment to him.

(ii) That Plots Nos. 6 and 7 pleaded by the Plaintiff are non-existent.

(iii) That the particulars of fraud alleged against the 2nd Defendant are denied.

(iv) That the 2nd Defendant issued notice to the 1st Defendant as registered owner of the suit plots in enforcement of its by-laws by requiring removal of illegal structures.

13. The Plaintiff testified as PW1 and called one witness, BENSON NDEGWA GICHOHI (PW2). The 1st Defendant testified as DW1. She did not call any other witness. The 2nd Defendant did not call any witness. I have considered the testimonies of the three witnesses who testified, and the documents admitted in evidence. I have also considered the written submissions filed on behalf of the Plaintiff and the 1st Defendant (none were filed for the 2nd Defendant). The Plaintiff's submissions were filed on 3rd April 2009 while those of the 1st Defendant were filed on 8th May 2009.

14. It appears to me that the following are the main issues to be decided in this case –

(i) Was there in fact and in law allocation of Plots B1 and B2 to the 1st Defendant?

(ii) Was there in fact and in law allocation of Plots 6 and 7 to the Plaintiff.

(iii) Are Plots 6 and 7 the same as Plots B1 and B2 on the ground?

(iv) If there was allocation of Plots 6 and 7 to the Plaintiff, did those allocations cancel the allocations to the 1st Defendant of Plots B1 and B2?

(v) Is the Plaintiff entitled to the reliefs sought?

(vi) Is the 1st Defendant entitled to the reliefs sought?

15. Was there in fact and in law allocation of Plots B1 and B2 to the 1st Defendant? Plot No. B1 was allocated to the 1st Defendant's late husband, Hezron K. Kipkoskei, by a letter of allotment dated 12th May 1992. Upon his death the 1st Defendant became the legal representative of his estate. She succeeded

her late husband in title of that plot.

16. Plot No B2 was allocated directly to the 1st Defendant by a letter of allotment dated 27th October 1992.

17. The 2nd Defendant subsequently executed in favour of the 1st Defendant agreements for lease in respect of both plots. There may have been delay in the 1st Defendant's deceased husband accepting the offer, just as there may have been delay in the 1st Defendant accepting the allocation to her of the second plot. But the 2nd Defendant has not complained about this. It's subsequent conduct in processing and executing the lease agreements was a tacit waiver of any consequences that could have attended the delay in accepting the allocation. The Plaintiff's own papers show that there was similar delay on his part. What is good for the goose surely is good for the gander!

18. I am satisfied in fact and in law on a balance of probability based upon the evidence before the court that Plots Nos. B1 and B2 were duly allocated to the 1st Defendant. These plots could therefore not have been subsequently available for allocation to the Plaintiff. They cannot be the same plots as Plots Nos. 6 and 7 that the Plaintiff says were allocated to him. Plots Nos. 6 and 7 appear to have been fictitious allocations and in all probability do not exist.

19. It must be noted that the Plaintiff got his alleged allocation during the pendency of this case. That was many, many years after the 1st Defendant got her allocation and took possession. The Plaintiff started off as the 1st Defendant's tenant in the two plots. He took a lease for a definite term of 5 years and 7 months. It expired. He then offered to purchase one of the two plots from the 1st Defendant but was unable to raise the purchase price, having paid less than one-third of the agreed purchase price. Finally, while the suit was pending, he challenged the 1st Defendant's allocation of the plots and claimed that they had been allocated to him. The Plaintiff's conduct was nothing but an attempt at fraudulently taking what belonged to the 1st Defendant.

20. The suit plots, originally un-surveyed, were surveyed and they became respectively **L.R. Nos. 209/12069 and 209/12070**. The plots that the Plaintiff says were allocated to him, Plot Nos. 6 and 7 were at the time of hearing of the suit, as yet un-surveyed. They cannot have been the same plots as Plots B1 (L.R. 209/12069) and B2 (L.R. 209/12070). I find, on a balance of probability upon the material before the court, that Plots B1 and B2 (L.R. 209/12069) and B2 (L.R. 209/12070) were not the same on the ground as the Plots 6 and 7, Kombo Munyiri Road, that the Plaintiff claims were allocated to him.

21. Allocation of Plots 6 and 7 to the Plaintiff therefore could not have cancelled the allocations to the 1st Defendant of Plots B1 and B2 as they were not, and could not have been the same plots.

22. There is sufficient documentary proof before the court, particularly a letter dated 28th May 2001 addressed by the 2nd Defendant to the Commissioner of Lands, that Plots B1 and B2 were duly surveyed and given the new numbers, L.R. 209/12069 and L.R. 209/12070. This letter also confirmed the lease agreements made between the 1st and 2nd Defendants on 25th November 1997, and that the 1st Defendant paid all dues required of her. The Director of Surveys confirmed the survey vide a letter dated 31st January 2002 and issued Deed Plans for the two plots. Subsequent demands for rates from the 2nd Defendant bore the new surveyed numbers of the two plots. The Plaintiff has not produced a similar paper trail for the plots allegedly allocated to him.

23. In the circumstances the Plaintiff has failed to prove his case on a balance of probabilities, and the same is dismissed with costs to the Defendants.

24. What about the 1st Defendant's counterclaim? I have already found that the two suit plots belong to the 1st Defendant. The lease with the Plaintiff by which the latter took possession expired by effluxion of time. There was no renewal of the lease. He was unable to purchase one of the plots as agreed with the

1st Defendant. Instead, the Plaintiff sought to take away the two plots from the 1st Defendant.

25. The Plaintiff's continued possession and occupation of the suit plots after his lease with the 1st Defendant terminated by effluxion of time on 30th April 2002 constituted a violation of the 1st Defendant's proprietary rights. It was trespass. The 1st Defendant is entitled to an order of vacant possession forthwith and I so order. The lease had been granted with the condition that the Plaintiff should not erect any permanent structures. If he indeed erected permanent structures it was at his own peril and cost. The perimeter wall that he was authorized to construct was to be at his own cost.

26. The 1st Defendant is also entitled to *mesne* profits as claimed, and I award the same, together with the costs of the counterclaim. It is so ordered.

27. The delay in the preparation of this judgment and the attendant distress to the parties is deeply regretted. It was caused by my poor state of health the last few years. But I thank God that I have now fully regained my health.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 9TH DAY OF OCTOBER, 2012.

H.P.G. WAWERU
JUDGE