



REPUBLIC OF KENYA

Kangethe v Arara & Another

High Court, at Nairobi June 12, 1985

O’Kubasu J

Civil Suit No 570 of 1985

Cases

No cases referred to. Statutes

Order XXXVI rule 5 of the Civil Procedure Rules

June 12, 1985, O’Kubasu J delivered the following Judgment.

This matter comes before this court by way originating summons under Order XXXVI rule 5 of the Civil Procedure Rules. The orders being sought are as follows:

- (a) A declaration that Mr Harrison Muturi Kangethe is the lawful owner of House No D 100 Phase I Umoja Estate.
- (b) A declaration/order as to whether or not the said Harrison Muturi Kangethe should receive rents on the said House No 100 Umoja from the month of April 1984 to the time of hearing of this application inclusive, at Kshs 1,000 per month. The said rents to be paid by one Josian O Owuor.
- (c) An order for distress for rent on the said Premises, that is House No. D 100 Phase 1 Umoja Estate in default.
- (d) An order for eviction of the said Josian O Owuor from the said premises.
- (e) Costs of this application together with interest thereon to be paid by the said “ J B Arara and Josian O Owour”

In support of this application there are affidavits by Mr Harrison Muturi Kangethe and John Muga. In his affidavit Harrison Muturi Kangethe depones:

1. That I’m the registered owner of house No D 100 Phase I Umoja Estate.
2. That I bought the said House from one H John Muga Ogungu On the 11th day of April, 1984.
3. That the purchase price of the House was Kshs 70,000 which has already been paid in full.

4. That at the time there was a tenant therein by the name Josian O Owour.
5. That after the said transaction of sale I as the purchaser and Mr John Muga as the seller retained a firm of Advocates M/s C K Ngibuini Advocates with instructions to write to the Tenant informing him about the change of ownership of House No D 100 Umoja Estate.
6. That on April 24,1984 the said advocate wrote to the tenant informing him about the change of ownership (Enclosed herein is a Photostat copy of the said letter.)
7. That the Tenant however refused to pay me rents as his new landlord saying that the house belonged to a Mr J B Arara and not to me.
8. That immediately on being told this I filed a suit on June 15, 1984 at the Rent Restriction Tribunal (tribunal case No 502/84) for recovery of rents and vacant possession.
9. That during the hearing, the chairman of the Rent Restriction Tribunal observed after hearing only one witness that there was a dispute as to the ownership of House No D 100 Umoja Estate.
10. That the house had in the meantime been transferred in to my own name on October 1,1984.
11. That I therefore filed this application herein for determination of the owner and the other prayers thereof.
12. That what is stated herein is true to the best of my knowledge, information and belief.”

And in his affidavit Mr John Muga depones:

1. That I had been the registered owner of House No D 100 Umoja Estate Nairobi up to October 1, 1984.
2. That Mr Josian O Owour was my tenant before I sold the House.
3. That I sold the House to one Mr Harrison Muturi Kangethe on April 11, 1984 and I had it transferred into his name on October 1, 1984.
4. That immediately after the sale I informed my said Tenant about the change of ownership from myself to Mr Harrison Kangethe.
5. That the tenant however refused to pay rents to his new landlord claiming that a Mr J B Arara, who was my agent for Rent collection only was the landlord.
6. That Mr J B Arara was only an agent and he has never been the owner of the said house
7. That what is herein stated is true to the best of my knowledge, information and belief”.

There was then a replying affidavit sworn by Mr J B Arara. Since I have reproduced the contents of the two supporting affidavits it is only fair that the affidavit of Mr Arara be set out in full so that we may be in a position to appreciate what is at stake. In this replying affidavit Mr Arara depones:

1. “That I work for Nairobi City Council
2. That I have read the affidavit purportedly sworn by John Muga and Harrison Muturi Kangethe on the February 21 1985 and I have understood their contents.

3. That in answer to the said affidavit I wish to state as follows:

4. That I knew Mr Muga when he was a waiter at Hilton Hotel. I used to visit, Mr Muga told me that he had been allocated a house at Umoja but he was unable to pay for it and he had lost it therefore he requested me to assist him to get another house.

5. That I then took him to Shapley Barret & Co Advocates, where he swore an affidavit a true photostat copy of which is annexed hereto marked "JBAI". That I personally handed over the said affidavit to Mr Yusuf, Project Director of Nairobi City Council on November 2, 1977.

6. That on November 5, 1977. Mr Yusuf personally handed to me a reallocation letter in favour of Mr John C M Ogunga. Annexed hereto is a true Photostat of the said letter marked "JBA2". The original is still in my possession.

7. That I approached Mr Muga to go and pay for the house in accordance with the letter of reallocation but he was unable to raise the amount required. He therefore requested me to pay him Kshs 3,000 for the house but I was unable to transfer the house in my name because the conditions of the Council are that no transfer can be effected until the loan has been repaid in full.

8. That I therefore paid Mr Muga the Kshs 3,000 and I personally paid for the deposit and took possession of the house which I let to one Lillian Musula thereafter I let it to Joseph Onyango."

This is an interesting case in which the subject of dispute is House No D 100 Umoja Estate. According to the documents produced in evidence this house was allocated to John Muga Ogungu who then sold it to Harrison Muturi Kangethe. As far as the City Council was concerned the house was allocated to Mr Ogungu. This state of affairs is being challenged by Mr Arara who claims that this house was actually his and that he was merely using Ogungu's name. If indeed Mr Arara intended to use Mr Ogungu's name in acquiring this house then he took a great risk since all the documents clearly shows that the house belonged to Mr Ogungu who later sold it to Mr Kangethe using proper channels. Mr Arara told this court that he did not qualify to be allocated a house at Umoja Estate. In order to acquire a house he chose to use Mr Ogungu who qualified to be allocated a house at Umoja Estate.

I have considered what Mr Arara and his witnesses stated and without wishing to jeopardise Mr Arara's chances of recovering whatever he thinks is his entitlement from Mr Ogungu I would say that I will confine myself to declaring who is the owner of the house. All the documents relating to this house show that this house was allocated to Mr Ogungu. There was nothing illegal about this allocation. Mr Ogungu then sold this house to Mr Kangethe. Again there nothing illegal about this sale transaction which means Ogungu was in position to pass a good title to Mr Kangethe and he did so.

Mr Arara on the other hand has stated that the house was his and that he paid the deposit and the monthly instalments. He put in tenants and he was collecting rent. But there was nothing in writing to show that this house was his. Indeed we had Mr Opondo and Mr P Singh who testified that when they were approached by Mr Arara he talked of his house at Umoja. As far as these two witnesses were concerned this house belonged to Mr Arara. It is unfortunate for Mr Arara not to be in a position to produce any documentary evidence to challenge what Mr Ogungu and Mr Kangethe have told this court. According to Mr Arara he paid Kshs 3,000 to Mr Ogungu as goodwill and that was all. But Mr Ogungu testified that Mr Arara was a close friend who assisted him (Ogungu) acquire this house. When being cross-examined by Mr Nguli this is what Mr Arara said:

"I agree that the transaction between me and Mr Ogungu was a very serious matter as it involved property. I agree that a matter of this magnitude could not have been agreed upon verbally"

And on further cross-examination Mr Arara said:

“I work with City Council. I had never seen this agreement (Exhibit 4) between Mr Ogungu and Mr Kangethe and it relates to House No D 100. I am not challenging this document. I was not aware of this deal.”

Indeed Mr Arara finds himself in a difficult situation. He works with the City Commission. He knows the regulations governing transactions of this nature. He now accepts that Mr Ogungu sold this house to Mr Kangethe. Of course, Kangethe was not aware of Mr Arara's claim over this house. All the documents clearly indicated that the house had been allocated to Mr Ogungu. When Mr Kangethe decided to buy the house he did so with the knowledge of the City Commission. So Mr Kangethe acquired title to this house. He was a bona fide purchaser without notice. His title is protected. I am saying this because it would appear that there might have been some loose arrangements between Mr Arara and Mr Ogungu regarding this house. I would not wish to go into details in this judgment since my concern is to declare who is the lawful owner of this house in dispute. If Mr Arara gave some money to Me Ogungu then that money may be recovered in the normal way. I am avoiding to condemn any of the parties to this suit since in my view the dispute between Mr Arara and Mr Ogungu will have to be dealt with and finally determined in a separate suit. It will be upon Mr Arara to prove to the satisfaction of the court that for all his losses incurred as a direct consequence of this allocation and sale of this house it is upon Mr Ogungu to compensate him.

In view of the foregoing I find that this house in dispute was allocated to Mr Ogungu who then sold it to Mr Kangethe. I therefore declare that Mr Harrison Muturi Kangethe is the lawful owner of House No D 100 Phase 1 Umoja Estate. I also declare that the said Harrison Muturi Kangethe is entitled to receive rent on the said house from the month of April 1994 to date and the said rent is payable by one Josian Owour. I declare to grant prayers (c) and (d). Costs of this application awarded to Harrison Muturi Kangethe payable by J B Arara. Order accordingly.