

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 216 OF 2013

BILHA NAMALWA MADEGWA PLAINTIFF

VERSUS

JAMES MOMBO SHITANDI DEFENDANT

COUNTY COUNCIL OF KAKAMEGA DEFENDANT

COUNTY COUNCIL OF BUTERE DEFENDANT

JUDGEMENT

The plaintiff states that on 5th of September, 2007 she entered into a written agreement with the owner of L.R. NO. IMBINGA MAKUNGA MARKET PLOT NO. 12 one Robert Wanzala Omumasaba to purchase the said plot with all developments thereon at a consideration of Ksh. 450,000/= which was paid to Robert Wanzala Omumasaba as seller in full. That subsequently the plaintiff paid all required charges to the Butere/Mumias County Council where the said property is situated and duly obtained from the said council a permit of ownership/allotment letter. That to the knowledge of both the plaintiff and the defendant the previous owner of the suit property informed the defendant of change of ownership and the defendant agreed to move out of the suit property. The defendant on the other hand was a tenant of the seller on the suit premises where he used to run a bar. That the defendant then moved out of the suit premises but deliberately locked up the building where the defendant used to run a bar at the suit premises. That the defendant has to date refused to completely move out of the suit premises as the said bar building on the business premises remains locked to date despite notice. That it is the plaintiff's case that having voluntarily forfeited the suit premises the defendant has no right whatsoever on the suit premises as against the plaintiff and his locking up of the said building constitutes constructive possession of the suit premises and trespass in law. The plaintiff's claim against the defendant is for vacant possession of the suit premises. The plaintiff prays for judgment against the defendant for:-

- a) Vacant possession of L.R. NO. IMBINGA MAKUNGA MARKET PLOT NO. 12.
- b) Costs of the suit.

PW2 was a witness to the said sale agreement. the seller Robert was his father. The plaintiff states that the defendant was using the plot at the material time.

The defendant in his statement of defence denies that on 5/9/2007 or on any other date the plaintiff purchased L.R. NO. IMBINGA MAKUNGA MARKET PLOT NO. 12 from Robert Wanzala Omumasaba with the developments thereon as alleged or at all, denies that the said Robert Wanzala Omumasaba had any interest in or the locus or capacity to sell the said plot or had in law title that he could transfer, denies that the plaintiff paid the alleged or any charges to the Butere/Mumias County Council and denies that the plaintiff obtained from the said council a permit of ownership or an allotment letter and the plaintiff will be put to strict proof of his allegations. The defendant denies that Robert Wanzala Omumasaba was the owner of the above said plot at the material time, denies that he was a tenant on the suit property, denies that Robert Wanzala Omumasaba informed the defendant of the alleged change of ownership, denies that the defendant agreed or voluntarily forfeited or moved out of the suit property and denies that he locked up the premises and invites strict proof thereof from the plaintiff. The defendant avers that he purchased plot No. 13 at Makunga Market from Robert Wanzala Omumasaba in 1970 whereafter he constructed buildings on it wherein he commenced running businesses including a bar and restaurant, a hotel and a shop which businesses he continues to run to-date. That the defendant commenced payment of plot rates and rents for the said plot and Robert Wanzala Omumasaba applied for the transfer of the said plot to the defendant to the Kakamega County Council under which the plot fell which approved the said application for transfer vide minutes of a meeting held on 26th March, 1984. The defendant avers that Robert Wanzala Omumasaba's application for transfer of the said plot to the defendant having been approved and the defendant having taken exclusive possession of the said plot and having developed, occupied and used the same openly, exclusively, continuously and uninterrupted from 1970 to-date, he had no locus or interest in the said plot and had no capacity to sell, alienate or transfer the same and any agreement he may have entered into in respect of the said plot with the plaintiff was null and void *ab initio*, unlawful, unenforceable, incompetent, ill-conceived and of no legal efficacy and the alleged sale and purported transfer of the said plot to the plaintiff was erroneous, untenable and indefensible in law and it ought to be revoked and or annulled forthwith. The defendant further avers that the purported sale and transfer of plot No. 12 at Makunga market by Robert Wanzala Omumasaba to the plaintiff was fraudulent and merely intended at defeating the defendant's interest in the said plot. The defendant avers that having purchased, developed, used and or occupied the suit plot exclusively, peacefully, openly, continuously and uninterrupted from 1970 to-date, a period of 37 years with the knowledge of both the plaintiff and Robert Wanzala Omumasaba, he acquired title to the suit plot by virtue of adverse possession and the latter had no title to pass to the plaintiff whose alleged title is illegal, of no legal efficacy and is void and annullity and as such the defendant maintains that he is not a trespasser on the suit plot but rightfully in occupation as the legal owner thereof.

This court has carefully considered the case and the submissions therein. The plaintiff admits that when they bought the plot in 2007 from

one Robert Wanzala Omumasaba the defendant was already there carrying on business. She produced receipts and permit of change of user. The defendant produced documentary evidence that the plot was transferred to him way back in 1994 to 1996 (DEx 1 to 6) and he had been carrying on business there. I find that the plot was not available for sale in 2007. Be that as it may, all the original persons involved in this case are deceased and both the plaintiff and the defendant are administrators hence this court has no jurisdiction to deal with the estate of deceased persons. I find that the plaintiff has failed to prove her case on a balance of probabilities and I dismiss the same with costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE