



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 68 OF 2013**

**RODGERS KINDIA KAIBUNGA.....PLAINTIFF**

**-VERSUS-**

**ESTHER KYELL.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff herein Rodgers Kindia Kaibunga sued Esther Kyeli seeking for vacant possession over suit premises on plot No. 1468 (original 597/14) North of Mtwapa and an order of permanent injunction to issue against the defendant and or her agents from trespassing or occupying the suit plot. The plaintiff also prayed for costs of the suit.
2. The plaintiff's claim is premised on the fact that he purchased the plot together with all the development therein. The plaintiff pleaded that before purchasing the plot, he spoke to the defendant who told him that she had no beneficial interest in the said property because she knew the history and circumstances under which the seller had acquired the property.
3. The defendant has denied the claim vide her statement of defence dated 15<sup>th</sup> May 2013. She pleaded that the plaintiff is not entitled to the orders sought as she is not aware of any registration or transfer having been carried on the said plot on which she lives with her grandchildren. That if any transaction took place, the same was fraudulent and has no legal effect. The defendant also pleaded that this suit is res judicata and an abuse of the Court process. She urged the Court to dismiss the suit with costs.
4. The plaintiff called evidence of two witnesses. Antony Grahame Sim testified as PW 1. Mr Sim stated that he first came to Kenya in 1981 as a visitor and continued visiting until December 2001. PW 1 said he married Naomi Kyeli and in 1997 he bought the suit property. That he would send Naomi money to build their first plot but instead she bought the suit property. PW 1 said he sent Kshs 2.5 Million and when he came in September 1997, the house was not fully built but Naomi had disappeared. He decided to send money to the contractor who finished the building in January 1998. PW 1 continued that they lived in the house for 6 months before he moved out after Naomi attacked him twice.
5. That the plot was never transferred from the owner. PW 1 said he later met Lucy Muthoni who he managed to have the property registered in her name before his wife died. That after Naomi died, her mother (the defendant) came to live in the suit house. PW 1 said he allowed the defendant to live in it for a while until he sold it to the plaintiff. PW 1 denied that he ever took care of Naomi's children as Naomi had only disclosed having one child. PW 1 said the defendant is illegally occupying the suit house.
6. In cross – examination, PW 1 said they used to live in rented houses before this house was built. That he did not have evidence of money that he sent to Naomi. That the original sale agreement had Naomi's name. That Naomi's other children were living in Nairobi with their grandfather. That the suit property was not family property. That Naomi had refused to sign documents to register the property in their joint names. That Loice asked the defendant several times to vacate the house but she refused. That ownership of the property between PW 1 & Loice is on 50%: 50%. Loice also passed on in 2014. That before the plaintiff approached him, he did not know the house had been sold. PW 1 said he is entitled to 50% of the property. He denied the sale to Rodgers was fraudulent.
7. The plaintiff testified as PW 2. He testified that he bought the suit property sometimes in 2008. That the property was registered in the name of Loice but it was owned by PW 1. The plaintiff said he was taken to see the property and met the defendant in the process. PW 2 further states that the defendant confirmed to him that the property belonged to PW 1 and Naomi, and that the defendant had no problem in Antony selling the same. PW 2 continued that the defendant told him she would move back to Nairobi once the property was sold and sorting out any issues with Antony (PW 1).
8. PW 2 proceeded to produce the original title deed, stamp duty declaration form, rates receipts, pay in slip for stamp duty as Pex 1, 2 &3. PW 2 has denied that the transfer to him was fraudulent as he followed due process and that he did due diligence before buying the property. PW 2 said he paid Loice Muthoni Kshs 500,000= and was to pay the balance on receipt of vacant possession. He urged the Court to give

him vacant possession.

9. In cross – examination, PW 2 said he knew Loice & Antony in about 2007 when they visited a bar he operates in Malindi. That he was introduced as a buyer when he visited the suit premises where he also met Esther. That he visited the suit property several times. That the defendant's interest was not captured in the sale agreement. That when he bought the land, there was no objection. A consent of the land board was obtained. That the title deed was registered in the name of Loice in 2004. PW 2 said all procedures were followed. This marked the close of the plaintiff's case.

10. The defendant relied only on her evidence. She testified on 28<sup>th</sup> May 2018. She said she does small business of selling vegetables. The defendant states that in November 2006 Loice went to the house and informed her that she had sold the house. Loice brought for her Kshs 100,000= as her inheritance which she declined to receive. That before November 2006, the plaintiff had visited the house stating that they were viewing the house as they had been told it is on sale.

11. The defendant continued that after burial of Naomi, Loice had told her it is Naomi who had built the house. One month later, she received a letter from PW 1 asking her to vacate the house but she did not move out. DW 1's evidence continued that Loice returned accompanied with PW 1 & PW 2 that they discuss but they did not agree on anything. That it is after they left that she was served with Court documents. DW 1 says she cannot vacate because she is living with Naomi's children. She asked the Court to dismiss the case because at the time Naomi died, PW 1 had not divorced her.

12. In cross – examination, the defendant said that before 2004 she was living with her husband in Nairobi. She came to Mtwapa because her daughter was unwell. That PW 1 is the one who built the house. The defendant said she had not taken out letters of administration on the estate of Naomi. That she did not take any steps stopping PW 1 from selling the house. That Naomi & Anthony did not sire any child. DW 1 said that it is true Anthony bought the plot and built the house. In re – examination, DW 1 said she did not know what Anthony wanted to give her. That Loice had offered Kshs 100000= . That PW 1 only recognised Esther amongst Naomi's children. DW 1 did not have a title but said she has lived in the house since 2004. That she did not have capacity to take care of Naomi's children without the house. This also marked the close of defendant's case.

13. The parties filed written submissions. The plaintiff submitted that he has proved his claim that he lawfully bought the suit premises from Loice Muthoni in 2008. That the defendant's refusal to vacate the suit premises is unlawful. The plaintiff also submitted that the suit property never formed part of the estate of Naomi – deceased therefore not subject to probate administration proceedings. The plaintiff also submitted that the claim for adverse possession must fail as the defendant came to live on the suit premises on invitation of the deceased. The plaintiff submits that the defendant has not denied that Anthony Grahame was the owner of the suit property thus Anthony could properly deal & transact with 3<sup>rd</sup> parties. He urged the Court to allow his claim.

14. The defendant on her part submitted that the suit property belonged to PW 1 and her late daughter as joint owners. She did not therefore understand how Loice Muthoni secured registration of the title documents in her name. That if PW 1 allowed Loice to obtain the registration in her name then the same was done fraudulently to defraud her and her grandchildren. The defendant also submitted that there was no valid transfer between Loice and the plaintiff since the transfer document was not produced. That the plaintiff is not entitled to possession on an incomplete transaction (balance not paid).

15. The defendant also claimed that she is entitled to the property by way of adverse possession since she has been staying in the house from the year 2004 to date. That her occupation was recognised by Anthony Grahame (page 4 paragraph 5 of the submissions) and Loice Muthoni therefore she was not a trespasser. She relied on the case law of inter alia **Jefwa Nyale Kithi vs Surgrabai Mulla Civil Case No 151 of 2003**. The defendant also submitted this suit is only meant to deprive them of their livelihood. She urged the Court to dismiss the case with costs as Loice could not pass a valid title to the plaintiff.

16. From the evidence adduced, it is not in dispute that Anthony Grahame Sim (PW 1) was married to Naomi – deceased who was the defendant's daughter. From the evidence of PW 1, the suit property was bought during the subsistence of his marriage to Naomi. PW 1 stated that he sent money for the purchase of the plot and the building of the house. However he could not secure registration in his name because the late Naomi informed him that the land being agricultural could not be registered in a foreigner's name. PW 1 also said that the late Naomi was hostile to having the property being registered in their joint names. PW 1 opted to secure the transfer into Loice Muthoni's name with whom he was now living with.

17. The suit property was thus transferred to Loice's name on 30<sup>th</sup> December 2004 (as evidenced by PW 1). Naomi died on 10<sup>th</sup> January 2005 implying the transfer to Loice's name was done during the lifetime of Naomi albeit it appears she was already ailing as her mother had come to take care of her. The question for my determination is whether Loice Muthoni had a valid title to pass on to the plaintiff.

18. The defendant in cross – examination admitted that the suit property was bought and developed by Antony Grahame Sim. Antony Grahame Sim stated that he sent money to Naomi to buy the suit plot. Later he also sent money for building the house and in December 1997 when he came to inspect the works, the house was not complete. PW 1 continued that he directly engaged the contractor to complete building the house and he paid for the works. The defendant on her part was relying on what she says she was told by Loice in 2005 that the house belonged to Naomi. However the defendant failed short of telling this Court what Naomi did that would enable her (Naomi) to contribute for the purchase of the plot and or building of the house.

19. Given that the defendant came to live with Naomi before her demise and on account that she was able to access the marriage certificate, nothing would have stopped her from asking for the agreement used in buying the land and or being told by Naomi how she was able to contribute for building of the house. The defendant's admission that the plot was bought by PW 1 thus corroborates the evidence of PW 1.

20. PW 1 stated further that because Naomi had refused to co-operate to have the property registered in their joint names, he opted to register it in Loice's name. It means the suit property was transferred into Loice's name with PW 1's consent. The defendant was made aware of

this transfer because she admits that Loice confirmed to her of the intention to sell in December 2005. The defendant stated further that subsequent to the visit by Loice, the plaintiff and some two people came to view the house telling her of the process that they wanted to purchase it.

21. In spite of receiving this information, the defendant did not sue neither Loice nor Antony Grahame to claim Naomi's interest if at all. Loice died in 2014 after the filing of this suit therefore she could not come to Court to explain how she transferred the property to her name. In any event, the process of transfer of the property to Loice's name has been aptly explained by the evidence of PW 1. For this reason, Loice's title not having been challenged in her lifetime by the defendant even after being made aware of the same and the intended sale to the plaintiff. I find the allegation of fraud on her title being raised now to be done too late in the day. Therefore it is my considered opinion that Loice's title not having been vitiated, she had a valid title to pass on to the plaintiff.

22. Is the defendant entitled to the suit property by virtue of adverse possession? The defendant said she went to live with Naomi while she was sick. Naomi passed on on 10<sup>th</sup> January 2005. The defendant's adverse rights if any would run from January 2005. This suit was filed on 23<sup>rd</sup> April 2013 which is about 8 years 4 months from January 2005. The 12 years period had not expired for a claim of adverse possession to crystallise. Notwithstanding this, the defendant in her own evidence stated that her stay in the suit house was with the consent of Antony Grahame. When they wanted to sell the house to the plaintiff, the defendant stated that Loice, Anthony and Rodgers visited her in 2007 – 2008 for a discussion though an agreement was not reached. The sale went on and a transfer registered in favour of the plaintiff. This means the occupation of the defendant did not deter the registered owner then to put the house to use for the purpose they intended it for. The claim for adverse possession cannot thus hold.

23. In conclusion, the defendant having been made aware of the sale between Loice and the plaintiff before the transfer and not having registered her interest and or Naomi's interest over the same is precluded by law under section 24, 25 and 26 of the Land Registration Act and section 34 of the Evidence Act under estopped to deny the plaintiff occupation of the suit premises. Whether there is a balance outstanding is not within her mandate to refuse surrendering vacant possession as she was not part of the transaction. The plaintiff has explained that the balance was to be paid after he obtained vacant possession.

24. In the result, I find that the plaintiff has proved his case within the required standards. I enter judgement for him in terms of prayer (a) and (b) of the plaint. The defendant is given 3 months from the date of delivery of this judgement to give vacant possession of the suit premises plot No 1468 (original 597/14) North of Mtwapa. In default, the plaintiff is at liberty to evict her using lawful means. Each party to meet their costs of the suit.

**Dated, signed & delivered at Mombasa this 15<sup>th</sup> February 2019**

**A. OMOLLO**

**JUDGE**