



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.195 OF 2015

BETTY ODARI.....1ST PLAINTIFF

ZIPPORAH MIDEVA MFWOGO.....2ND PLAINTIFF

VERSUS

DOROTHY LAVUSA MFWOGO.....DEFENDANT

JUDGMENT

(Claim by plaintiffs that suit property which is registered in the name of the defendant is held in trust for them; suit property was initially leased to the father of the 1st plaintiff and defendant by the Municipal Council of Nakuru; their father relinquishing the tenancy to the defendant; property then taken over by the National Housing Corporation who made an offer for tenant purchase; defendant then purchasing the property; allegation that the suit property was their father cannot hold as their father was only a tenant; documentation showing that the defendant purchased the property; no evidence that it was agreed that the family would purchase the property jointly or that the defendant would hold the property in trust; payments being made by defendant or out of proceeds of rent; no evidence that some minimal payment by a brother was sanctioned by the defendant; a soft loan by 1st plaintiff cannot be regarded as a joint purchase; suit dismissed).

1. This suit was commenced through a plaint which was filed on 7 July 2015. The 1st plaintiff and the defendant are sisters whereas the 2nd plaintiff is their mother. The case of the plaintiffs is that the father of the 1st plaintiff and 2nd defendant, and husband to the 2nd plaintiff, one Edward Mfwogo Odari (now deceased), owned the property identified as Kabachia House No. 3 situated in Nakuru County (hereinafter the suit property), having purchased it from the National Housing Corporation. It is averred that the deceased was employed by the Nakuru Municipal Council and was initially a tenant in the suit property from February 1972 when the property was owned by the Nakuru Municipal Council and the said property was later transferred to the National Housing Corporation. It is pleaded that when the deceased approached retirement, he transferred his interest in the suit property to the defendant for her to hold in trust for the rest of the family, on the basis that the defendant was also an employee of the Nakuru Municipal Council, and thus the only member of the family whose name could be used to protect the family interest. The late Edward died on 4 November 1994. It is claimed that the suit property is family property and that the family has resided on the suit property since the year 1972 and that it is the family which purchased the property from the National Housing Corporation following an offer by the Corporation for tenants to purchase the houses that they resided in. It is said that it is the family members of the late Edward who collectively contributed to pay the purchase price to the National Housing Corporation (NHC) and that the family has also been paying for the utilities. The plaintiffs have averred that the defendant has now breached the trust bestowed upon her and has started demanding rent from the family members residing on the property and purported to distress for unpaid rent. In the suit, the plaintiffs have asked for the following orders :-

(a) A declaration that the defendant's registration as the proprietor of the suit property being Kabachia House No. 3 is in trust for all the members of the family of the late Edward Mfwogo Odari.

(b) An order of permanent injunction restraining the defendant, her agents, servants and/or anybody claiming through her from interfering with the plaintiffs' and family of the Late Edward Mfwogo Odari's right of quiet enjoyment and free use of the suit property being Kabachia House No.3.

(c) Costs of the suit and interest.

(d) Any other relief that this court may deem fit and just to grant.

2. The defendant entered appearance and filed defence. In her defence she pleaded that through an agreement between herself and the NHC, entered into on 19 August 2011, she purchased the suit property at a consideration of Kshs. 1,500,000/=. She has contended that the suit

property wholly belongs to her and that she does not hold the same in trust for the plaintiffs or the family. She has denied that the plaintiffs or the family have been contributing towards the purchase of the suit property and has asserted that she has been solely paying for the property.

3. PW-1 was Betty Odari, the 1st plaintiff, and a teacher by profession. She testified that she started occupying the suit property in the year 2002 as an individual, although she had previously lived on the property with the rest of the family. She testified that her father was working for the Nakuru Municipal Council and was a tenant in the house. She indeed produced a tenancy document indicating the conditions of tenancy, issued to her late father and dated 21 June 1987. She testified that before her father died in the year 1994, he had effected a change of tenant to the defendant and she produced a letter dated 1 March 1994 to demonstrate this. She testified that what informed her father to change the tenancy to the defendant is that he was soon to retire and their mother was not eligible to take over the tenancy as she did not work for the Municipal Council but was a teacher employed by the Teachers Service Commission (TSC), yet the defendant was at the time working with the Municipal Council. She testified that this transfer of the tenancy to the defendant was so as to safeguard the interests of the family and that at the time, the defendant was residing in the suit property. She however moved out in the year 1995. She testified that upon the death of her father, her mother continued in occupation. The property continued being owned by the Municipal Council up to the year 2010 when the NHC took over its ownership alongside other such houses. The NHC then offered these houses for sale to the tenants and in respect of the suit property, the offer was made in the name of the defendant. She stated that the family sat down and agreed to purchase the house and that the family was to contribute towards the purchase price. She testified that the family did contribute towards the purchase price and she produced some 35 receipts and 24 bank slips. She stated that before the year 2015, the defendant never asked for rent despite her being in possession. It was in the year 2015 that she appointed an agent and demanded rent from her and later appointed an auctioneer to distress for rent. She stated that apart from the payments that she has made to NHC, she has also been paying for electricity which account still bears her father's name, and water, which account is in the name of her other sister by the name of Mary Adisa. As far as she is concerned, the house is a family house and she mentioned that even family functions are held here. She agreed being in rent arrears which she clarified in re-examination, to mean the monthly payments to NHC.

4. I questioned her on the purchase price and how it was paid, and she stated that the house was purchased at Kshs. 1.5 Million. The NHC needed a deposit of Kshs. 300,000/= and she stated that the defendant raised Kshs. 200,000/= and she raised Kshs. 100,000/=. She stated that the NHC required monthly payments of Kshs. 15,000/= and she testified that it was her who was paying this monthly amount to NHC. I wondered why she claimed this to be family property yet there was no apparent contribution from them, and she answered by saying that she has been making payment with the assistance of her brothers and sisters.

5. PW-2 was Alexander Odera Mfwogo, a brother to the 1st plaintiff and defendant. He testified that as their father approached retirement, he made a home in Elburgon, and thus requested for an owner occupier allowance, meaning that he had to surrender tenancy of the suit property. It is then that the tenancy changed to the name of the defendant who was an employee of the Municipal Council. He stated that when NHC made offers for purchase, they made the same to the registered tenant, in this instance the defendant. He stated that the family met and proposed to keep the house. When the offer for purchase was made, not everyone was able to chip in money for the purchase, and only the 1st plaintiff and the defendant raised money for the deposit. He stated that he and his sister Mary Adisa have made some subsequent payments to NHC although all receipts bear the name of the defendant as she is the registered purchaser. I put a few questions to him and he stated that he has made payment of Kshs. 50,000/=. Of the rest of the family, he was only aware of payments made by Mary Adisa but did not know how much she has paid.

6. With the above evidence the plaintiffs closed their case.

7. DW-1 was the defendant. She testified that her father owned the property before asking her to take it over as she resided in it and also used to work for the Municipal Council of Nakuru. He thus wrote the letter dated 1 March 1994 to the Municipal Council for them to transfer the tenancy to her. She continued paying rent until the NHC made offers for purchase of the houses to the tenants. An offer letter dated 12 August 2009 was made to her and she accepted it. The purchase price was Kshs. 1,500,000/= and one needed to deposit Kshs. 300,000/= by 31 December 2009. She had Kshs. 200,000/= and she borrowed Kshs. 100,000/= from the 1st plaintiff but they did not agree when this would be repaid as they were sisters and in good terms. She stated that the balance of the purchase price was to be paid by monthly instalments of Kshs. 17,918/= which she testified that she has been the one paying. She stated that the 1st plaintiff has also been making payments into her account as her tenant. In the year 2012, she got a notice of arrears of Kshs. 300,000/= and she called the 1st plaintiff. She (DW-1) had Kshs. 230,000/= and she took a loan of Kshs. 90,000/= to clear the arrears. She asked that she be given back her house since the 1st plaintiff has been poor in paying rent yet it is she who is servicing the loan and running the risk of defaulting in her payments to NHC.

8. Cross-examined, she denied that they were buying the property together with the 1st plaintiff and she asserted that she has refunded back the Kshs. 100,000/= that she borrowed from the 1st plaintiff. She agreed that she does not have a written tenancy agreement with the 1st plaintiff. I questioned her and she stated that the rent is Kshs. 18,000/= per month and the arrangement is that the 1st plaintiff would pay this rent into the NHC loan account. She could however not explain other payments made by her siblings her view being that they have ganged up against her.

9. With the above evidence, the defendant closed her case.

10. I invited both counsel for the plaintiffs and the defendant to file written submissions which they did. I have gone through the same and have considered them in arriving at my decision. I take the following view of the matter.

11. The core of the case of the plaintiffs is that though the suit property is registered in the name of the defendant, she holds it in trust for them and the rest of the family of the late Edward Mfwogo. It is their position that they appointed the defendant to hold the property on behalf of the family since she was the registered tenant but that they have been paying for the same. This of course is refuted by the defendant who has asserted that she is the one who purchased the property and that the family has no stake in it.

12. Having gone through the evidence, it is common ground that the suit property was previously owned by the now defunct Municipal Council of Nakuru. The evidence shows that the Municipal Council used to rent the suit property and other similar properties to its workers.

The late Edward Mfwogo was an employee of the Municipal Council and by virtue of his employment he was offered a tenancy of the suit property. It will be wrong for anybody to claim that the late Edward owned the suit property. As far as I can see, he was nothing more than a tenant of the Municipal Council of Nakuru, and he never occupied the suit property as owner but strictly as tenant. This is clear from the "Conditions of Tenancy" document which is dated 24 June 1987. From what I can gather, when the late Edward approached retirement, he desired that one of his children could benefit from the tenancy of the same house. The defendant also happened to be an employee of the Municipal Council and thus eligible to be considered as a tenant. The late Edward thus wrote the letter dated 1 March 1994 requesting that the tenancy be transferred to the defendant. It appears that thereafter the tenancy of the property remained with the defendant until the property was taken over by the NHC. The NHC then through a tenant purchase scheme offered to sell these properties to the tenants, the conditions being that the purchaser would pay a deposit of Kshs. 300,000/= and thereafter monthly payments of Kshs. 17,918/= .

13. It is the allegation of the plaintiffs that the family sat and agreed that the defendant would purchase the property but on behalf of the family. I am not persuaded by this claim. What I can see, and this is apparent from the documents, is that the NHC made offers to the existing tenants to purchase these houses. The offer to purchase in this instance was therefore made to the defendant. I have not seen any document or anything that would support the claim that the purchase of the house by the defendant was a purchase on behalf of the family. Indeed, I have no evidence of any contribution by the family towards raising the deposit ,apart from the Kshs. 100,000/= given to the defendant by the 1st plaintiff, which amount I am satisfied was nothing more than a soft loan that was to be repaid later. The fact that one borrows money to pay off a property does not make the one who loaned that money a co-owner of the said property. The one who loaned such money is only entitled to a refund and nothing more. If indeed this property was being purchased by the family, you would expect to see contributions made by the family towards raising the sum of Kshs. 300,000/= deposit of which there is absolutely no evidence.

14. I am further persuaded on a balance of probabilities, that the 1st plaintiff is nothing more than a tenant of the defendant. In as much as there is no written tenancy agreement, I am unable to place her in any other different capacity other than that of tenant. It does appear to me that because the parties are siblings, they have been operating on loose arrangements which have not been put down into writing, but that does not change the fact that the 1st plaintiff is only tenant. As mentioned by the defendant, their arrangement is for the 1st plaintiff to pay the rent into her loan account with the NHC, but even then the 1st plaintiff has been defaulting in payments, and there have been threats by the NHC to repossess the house for want of payments. I have no evidence before me that the monthly instalments paid by the 1st plaintiff, or any of the other siblings, has been made on the understanding that they would end up owning the house as a family. If that were the case, you would expect to have a more elaborate document making clear what every person's obligation is towards offsetting the monthly payments. Even if there were no document, you would expect consistent monthly contributions being made by members of the family; how else would the family own the house if they do not make contribution in the form of consistent periodical payments ? I would probably have been persuaded that there was a trust if I had seen such consistent payments being made every month or every so often by members of the family, but as I have mentioned, there is nothing of that sort before me. Moreover, the case of the plaintiffs has been presented in a manner to suggest that the 2nd plaintiff was a core player towards the purchase of the house but apart from her simply being a mother to the 1st plaintiff and defendant, I have not seen any evidence of any contribution, material or otherwise, made by her towards the purchase of the house in issue. There is also no evidence of any other money paid by other members of the family. PW-2 stated that he has made one payment and that one Mary Adisa has also made a payment. I have nothing to show that they were making payments as co-purchasers and I cannot rule out the claim by the defendant that they made the payments unsolicited as a way of ganging up against her. There was heavy weather made of the fact that some utility bills are in the name of the siblings of the defendant. To me, that does not infer ownership. An obligation to pay a bill is usually on an occupant of the house and it is not strange to find bills being continued in names of previous occupiers. The mere fact that there are some utility bills in one's name cannot by itself be taken to infer ownership by the said person.

15. I am persuaded from the evidence that the suit property is wholly owned by the defendant and she does not hold this property in trust. For sure, if there is default towards payment of the NHC loan, it is she who is going to lose the property, and the family will not suffer any loss. The obligation to make the NHC payments is on her and nobody else. She is thus perfectly entitled to appoint an agent to collect rent on her behalf and perfectly entitled to distress for rent if the same is not forthcoming. I cannot therefore fault her for proceeding to do the above, for the fact remains, and it is indeed not denied, that the 1st plaintiff who has been in occupation of the house has not been consistent in paying rent to the defendant. The 1st plaintiff must thus pay rent as informed by the defendant, and if she cannot pay the said rent, she must be ready either to suffer distress or the risk of eviction from the suit property.

16. From my above discourse, it is clear that I see no merit in the plaintiffs' case and the same is hereby dismissed with costs.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 7th day of February 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Ms. Cheruto holding brief for Mr. Akang'o for the plaintiffs.

Mr. Ochweri present for the defendant.

Court Assistant :Nelima Janepher

JUSTICE MUNYAO SILA

