



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC CASE NO. 174 OF 2018

(Formerly Nairobi HCCC No. 893 of 2009)

GRACE WANGARI NDIKIMI T/A RUARAKA

TECHNICAL TRAINING INSTITUTE.....PLAINTIFF

VERSUS

RICCARDO LIZZIER.....DEFENDANT

JUDGMENT

By an Amended Plaint dated the 24th May, 2012 the Plaintiff prays for judgment against the Defendant for:

- a) The sum of Kshs. 921, 500/= being money in cash advanced, value of goods supplied to the Defendant and services rendered.
- b) A declaration that the Defendant by his conduct is estopped from claiming possession of the portion of aforesaid parcel of land known as No. 15314/6 and part of land parcel No. 15314/3. Until the Plaintiff recovers the construction and material costs absolutely.
- c) In the alternative the Plaintiff claims against the Defendant the full value of the development on land parcel No. 15314/6 and part of land parcel No. 15314/3 and materials supplied for Kshs. 16, 921, 500/= built on the Defendant's land on representations aforesaid.
- d) A permanent injunction restraining the Defendant from evicting or in any way interfering with Plaintiff's quiet possession and enjoyment of the suit premises until the Plaintiff fully recovers the cost of development and materials.
- e) Interest on (a) and (c) above.
- f) An account of all rent credited on the Plaintiff's account.
- g) Any other relief that the court might deem fit to grant.
- h) Costs of this suit.

The Defendant filed a Defence including a Counterclaim dated the 27th July, 2012 where he admitted the descriptive paragraphs in the Plaint. He stated that he agreed with John Ndikimi (deceased) to allow him use part of the suit premises without making improvements thereon but he breached the said agreement and developed part of the said premises without his authority while he was away in Italy. He insisted he did not authorize developments on the suit premises and they are not worth Kshs. 16, 000,000 as claimed. Further, that upon protest they agreed that the Plaintiff would utilize the suit premises between 2003 and 2008 to recover costs of improvements thereon from the agreed monthly rent of Kshs. 50,000/=. He claims the Defendant assessed the costs of improvement at Kshs. 1 million while the Plaintiff assessed costs of improvements at Kshs. 1, 955, 000/= at completion in the year 2003. He contends that the Notice to vacate issued to the Plaintiff was lawful in that the value of the improvement of the premises converted into rent was fully utilized by 23rd October, 2008. Further, that upon utilization of the improvements on the premises, the Plaintiff became a trespasser and the Defendant is entitled to vacant possession of the premises. He denies the particulars of improvement and the value of Kshs. 16, 000,000/=. He further denies particulars on advance of money, building materials and provisions of service worth Kshs. 921, 500/=. He reiterates that the Plaintiff has been in possession of premises by virtue of the court injunction which has been vacated. He prayed that the suit be dismissed with costs and judgement be entered

on his behalf in respect of the Counterclaim where he has sought for the following orders against the Plaintiff:

- i) An order directing the Plaintiff to give vacant possession of LR No. 15314/6 and LR No. 15314/3 to the Defendant forthwith in default an eviction order to issue and be enforced by authorized Court bailiff and/or Auctioneer.
- ii) Costs of this suit and counterclaim.
- iii) Any other or further relief deemed apt and fitting.

The Plaintiff filed a Reply to Defence and Counterclaim where she denied all the allegations and averred that they had an agreement to develop the suit premises and to utilize the cost of development, and this was done in the full knowledge of the Defendant. She reiterated her claim and insisted the value of the construction is worth Kshs. 16, 000, 000/=. She confirmed that together with John Ndikimi, they were supposed to utilize the suit premises without paying rent until the recovery of the construction therein but denied that she was only to utilize the premises between 2003 and 2008 only. She insisted the cost of the construction and materials supplied have not been fully recovered. Further, that the value of the improvements and materials supplied being Kshs. 16, 921,500/= has not been recovered. She denied being a trespasser in the suit premises and insisted she was residing therein based on the representation by the Defendant that the rent payable was to be credited to the value of the improvements and materials supplied. Further, she had developed the suit premises based on the consent from the Defendant. She stated that the Defendant's claim for vacant possession of the suit premises is premature and aimed at unjustly enriching him. Further, that the Defendant had failed to give her truthful accounts for rent and improvements she had made thereon.

The matter proceeded for hearing where the Plaintiff called four witnesses while the Defendant had one witness.

Evidence of the Plaintiff

The Plaintiff's husband John Ndikimi entered into an oral agreement with the Defendant who allowed him to use the suit premises to establish an institution to benefit the community. The deceased and the Plaintiff proceeded to establish Ruaraka Technical Training Institute by constructing thereon. In 2003, the Defendant served the Plaintiff with various notices to vacate the suit premises or pay rent. There was an agreement that the rent would be utilized to offset the cost of materials and construction. The Plaintiff further supplied the Defendant with construction materials worth Kshs. 921, 500/= which was yet to be paid. The value of the Plaintiff's development was assessed at Kshs. 16, 000,000/=. Further, the Plaintiff insisted she is not a trespasser as they entered into an oral agreement with the Defendant after which they took possession. She was yet to move out of the suit premises unless the amount equal to the value of the suit land was offset against what the Defendant owed her.

Evidence of the Defendant

The Defendant admitted entering into an oral agreement with the Plaintiff's spouse to utilize the suit premises and denied granting consent to the Plaintiff to construct buildings thereon. He contended that the value of the improvements was only Kshs. 1 million in 2008 and that the Plaintiff had never paid him rent despite accepting to do so. Further that the Plaintiff is a trespasser and should vacate the suit premises and pay him rent. He denied that the Plaintiff supplied construction materials worth Kshs. 921, 500/= and disputed the valuation report indicating the buildings the Plaintiff constructed were worth Kshs. 16, 000,000/=.

Both the Plaintiff and Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the pleadings, exhibits, testimonies and submissions filed in respect of the suit herein, the following are the issues for determination:

- Whether the Plaintiff supplied building materials to the Defendant amounting to Kshs. 921,500.
- Whether the Plaintiff developed the suit premises to the value of Kshs. 16, 000,000 and was supposed to offset the same against the rent.
- Whether the Defendant is entitled to vacant possession of the suit premises
- Who should bear the costs of the suit

As to whether the Plaintiff supplied building materials to the Defendant amounting to Kshs. 921,500. It was the Plaintiff's contention that she supplied building materials amounting to Kshs. 921,500 to the Defendant but he never paid for the same. It was PW2's testimony that building materials were delivered in a lorry and a delivery note issued to that effect. She stated that the Defendant had a file in his office, which he would verify, sign for and stamp. DW1 confirmed in court that he was aware the Plaintiff was supplying building materials to the Defendant but did not know the value of the said materials. Further, that there was a balance of materials yet to be paid for. PW1 produced statement of accounts for supply of materials amounting to Kshs. 921, 500 as exhibit '6' which were not controverted by the Defendant's witness. From a perusal of the statement of accounts, I note the figure of Kshs. 921, 500 is actually acknowledged by IVREA GROUP KENYA and signed off. I hence have no reason to doubt the Plaintiff's averments that she supplied building materials to the Defendant which he acknowledged but never paid for. In the circumstances, I find that the Plaintiff supplied building materials amounting to Kshs. 921, 500 to the Defendant which he was yet to pay for.

As to whether the Plaintiff developed the suit premises to the value of Kshs. 16, 000,000 and was supposed to offset the same against the rent. It was PW2's averment that the Defendant allowed her late husband to enter the suit land in 2000 and construct the Ruaraka Technical Training Institute thereon, which was supposed to be for communal benefit. PW2 insisted her late husband constructed on the suit premises

and the Defendant was well aware of the same and allowed them to enjoy peaceful occupation of the same. Further, that the Defendant wanted to charge them rent after her husband's demise. DW1 confirmed in court that it was only in 2007 when the Defendant informed the plaintiff that he would charge her rent of Kshs. 50,000 per month which she has refused to pay to date. PW2 stated that the Defendant issued them with notices to vacate the suit premises but they declined to do so since the Defendant owed them so much money. They insisted they were utilizing the suit premises and they agreed to offset rent against the cost of developments and building materials supplied. PW3 who is a registered Valuer produced a Valuation Report dated the 26th February, 2012 and said he had been instructed by the Plaintiff to value the suit premises and developments she had made. He stated that the value of the developments by the Plaintiff amounted to Kshs. 16,000,000/= which figure the Defendant disputes. DW1 stated in court that as at 2008, they had valued the developments the Plaintiff had made at Kshs. 1,000,000/=. However, by dint of section 107 of the Evidence Act, the burden of proof was upon him to produce the said valuation report or a fresh one to confirm this averment. From the Valuation Report it is clear from the photographs that there are several buildings on the suit land. I note the Defendant did not furnish court with a valuation report to controvert the Plaintiff's valuation. It is in the circumstances, that I am compelled to rely on the Valuation Report and hold that the value of the developments the Plaintiff had made on the suit land to amount to Kshs. 16,000,000/=.

As to whether the Defendant is entitled to vacant possession of the suit premises.

It is not disputed that the Defendant is the duly registered owner of the suit premises. The Plaintiff confirmed that the Defendant had wanted her to vacate the suit premises from 2003 and vide a letter dated the 23rd October, 2008, he gave her seven (7) days notice to vacate. Further, that the Defendant had started demanding rent from the Plaintiff but she declined to pay the same to date. From the evidence in court, it emerged the Plaintiff has been operating on the suit premises from 2000 to date, which is 19 years to be precise. The Defendant is seeking vacant possession of the suit premises but the Plaintiff insists she has to exhaust the cost of development and building materials she had supplied to the Defendant before she can move out of the suit premises. I note in the Plaintiff's evidence, she never disputed that the Defendant had wanted her to pay rent for the suit premises amounting to Kshs. 50,000 per month from 2003. The Plaintiff insists the Defendant is estopped from demanding the premises, since by his previous representation and through an oral agreement he allowed her deceased husband to establish a college for the community benefit and they were not supposed to pay rent. I note the said Oral Agreement was between the Defendant and the deceased and not the Plaintiff. Further, it is not clear whether in the said Oral Agreement the Plaintiff was supposed to move into the suit premises and reside thereon with her family as she has done once the husband was deceased.

Black's Law Dictionary 10th Edition defines a licensee as follows: ' **One to whom a license: Someone who has official permission to do something. Someone who has permission to enter or use another's premises, but only for one's purposes and not for the occupier's benefit.** '

From the Plaintiff's averments and in reference to this definition, the court deems her to be a licensee. Since the agreement was between the deceased and the Defendant, I opine that the Plaintiff who has been utilizing the suit premises and residing thereon, and as a licensee, it is only just and equitable for the Defendant to be compensated for the said use. The Plaintiff has claimed that for the Defendant to seek vacant possession it amounts to unjust enrichment and relied on the cases of **Samuel Kamau Macharia V Kenya Commercial Bank & Anor (2003) eKLR** and **Ephantus Kaguongo Ndei t/a Ndei & Co V Mathira Dairy Men's Cooperative Society Limited (1982) eKLR** to support this argument. The Defendant insists the Notice to vacate issued to the Plaintiff dated the 23rd October, 2003 was clear evidence that the late Riccardo Lizzier wanted the Plaintiff out of the suit land. He had relied on the case of **Serah Njeri Mwobi V John Kimani Civil Appeal 314 of 2009 and insists Riccardo Lizzier** did not waive his rights and therefore the estoppel by conduct claimed by the Plaintiff should fail.

Black's Law Dictionary 10th Edition defines unjust enrichment as follows: ' **The retention of a benefit conferred by another, who offered no compensation, in circumstances where compensation is reasonably expected. A benefit obtained for another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.** '

From the parties evidence it has emerged that the Plaintiff has been utilizing the premises for free and declined to pay rent from 2003 to date despite the same being demanded from her. In my view, I do not find the Defendant's acts amount to unjust enrichment and neither should he be estopped for demanding vacant possession of the suit premises. I opine that the Defendant is entitled to receive rent from the Plaintiff from the time he demanded for it but not before. Equity demands that he would come to Equity must come with clean hands, I note the Plaintiff is demanding around Kshs. 16 million from the Defendant but does not want to pay for the use of the premises. From the demand letter dated the 23rd October, 2008 issued by the defendant's lawyer to the Plaintiff, it indicated the Plaintiff had occupied the suit premises from 15th August, 2003 on the understanding that she would construct thereon but recover the costs of the construction and not pay rent. From this letter it is evident, the Plaintiff has been residing on the suit premises from 15th August, 2003 without payment of rent. The Plaintiff never furnished court with any evidence to show she had paid any rent to the Defendant for the use of the premises. In the circumstances, I find that the Defendant is indeed entitled to vacant possession once he has offset the rent owed by the Plaintiff against the costs of materials supplied to it as well as the value of the Plaintiff's developments. Further, that since the Plaintiff runs a technical institution in the said premises and also resides therein with her family, it is only just and equitable if she paid rent for the use of the said premises from 15th August, 2003 when she entered therein so as to offset the cost of her developments.

As to who should bear the costs of the suit.

I note the Plaintiff's late husband and the Defendant were good friends culminating in the Defendant allowing the deceased to establish an institution within the suit premises. Further, that issues arose after the deceased demise but the Plaintiff and her family have continued to utilize the suit premises and declined to pay rent to date. The Plaintiff insists she can only move out once she has been refunded the costs of the buildings on the suit land and the materials supplied to the Defendant. Justice Kuloba's (as he then was) in his book: **Judicial Hints on Civil Procedure** 2nd edition at page 99 in discussing the issue of 'costs' and 'event' had this to say:

"The words "the event" mean the result of all the proceedings to the litigation. The event is the result of entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it

may mean the “events” of separate issues in an action. Thus the expression “the costs shall follow the event” means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part.’

In the case of **ORIX OIL (KENYA) LIMITED v PAUL KABEU & 2 OTHER** [2014] eKLR where the court stated:

‘...the court should have been guided by the law that costs follow the event, and the Plaintiffs being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs.’

In the current circumstances and being persuaded with the citation as well as the decision above, I direct that each party do bear their own costs.

It is against the foregoing that I proceed to enter judgement in the following terms:

- a) The Defendant be and is hereby directed to refund to the Plaintiff Kshs. 921, 500/= being money owed for value of goods supplied to him.
- b) The Defendant be and is hereby directed to refund to the Plaintiff Kshs. 16, 000,000 being the value of the buildings constructed on land parcel numbers LR No. 15314/6 and LR No. 15314/3
- c) The Plaintiff be and is hereby directed to pay the Defendant all the pending rent charged at Kshs. 50,000 per month from 15th August, 2003 when she first entered the suit land to date until payment in full.
- d) A permanent injunction be and is hereby issued restraining the Defendant from evicting or in any way interfering with Plaintiff’s quiet possession and enjoyment of the suit premises until (a), (b) and (c) are settled.
- e) Upon settlement of (a) (b) and (c) above, an order be and is hereby issued directing the Plaintiff to give vacant possession of LR No. 15314/6 and LR No. 15314/3 to the Defendant forthwith in default an eviction order do issue and be enforced by authorized Court bailiff and/or Auctioneer.
- f) Each party do bear their own costs

Dated signed and delivered in open court at Kajiado this 22nd day of May, 2019

CHRISTINE OCHIENG

JUDGE