



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 199 OF 2017 (O.S.)

CLEOPHAS WANYONYI.....PLAINTIFF

VERSUS

WALTER OTIENO.....DEFENDANT

JUDGMENT

1. Proceedings herein were commenced through Originating Summons (OS) dated 11th May 2017. The following reliefs are sought in the OS:

- a) *A declaration that the plaintiffs (sic) has an interest and a right in Nakuru Municipality Block 24/1216 and that the court proceeds to determine the extent of such rights or interests and rest (sic) the same to the plaintiff.*
- b) *That the court to declare that the defendant having solely registered himself as an owner of Nakuru Municipality Block 24/1216 he was holding ½ of the property in trust of (sic) the plaintiff.*
- c) *That the court orders the defendant to pay the plaintiff mense (sic) profits of KShs 7,000/= per month from the year 2002 to date being the half rent collected by the defendant and not remitted to the plaintiff.*
- d) *In the meantime, the court directs that a temporary order of injunction be issued to restrain the defendants from dealing with, selling, transferring, disposing or in any way alienating Nakuru Municipality Block 24/1216 until the foregoing issues are determined.*
- e) *Costs of these proceedings be borne by the defendants jointly and severally.*

2. Despite being served with the OS, the defendant neither entered appearance nor filed anything in response. The OS was heard by way of viva voce evidence.

3. At the hearing, only the plaintiff testified in support of his case. He stated that on 15th November 1998 he and the defendant jointly as purchasers and one David Cheruiyot A. Bett as vendor entered into an agreement (PExb 1) pursuant to which they purchased a parcel of land known as Nakuru Municipality Block 24/1216 together with all the developments on it. The vendor handed to them the original title which was still in his name. The defendant started developing part of the plot and the plaintiff funded him to build 17 single room houses which he rented for KShs 15,000 per month. The defendant did not give him any proceeds from the rent. Instead, the defendant told the plaintiff that he was saving the funds to process the title in their joint names. The plaintiff further stated that he got the information about the amount of monthly rent from the vendor since the vendor also rented houses on the plot before the sale. As at the date of his testimony, the plot was registered in the defendant's name. The plaintiff also produced a certified copy of extract of title (PExb 2B).

4. Upon learning that the land was registered in defendant's name, the plaintiff asked the vendor if he ever signed any transfer in favour of the defendant. The vendor denied ever doing so. According to the plaintiff, the transfer in favour of the defendant was not only fraudulent but was also aimed at depriving him of his rights and share in the land despite the fact that he had contributed an equal share when it was being purchased. He therefore lodged a caution against the property (PExb 3B). All along the plaintiff knew that the defendant was holding the parcel in trust for him hence the defendant could not sell, transfer or deal with it without involving him.

5. The plaintiff's case was closed at that point. Defence case was equally closed since there was no one present to prosecute it. Parties were ordered to file and exchange submissions.

6. In the plaintiff's submissions, it is argued that the defendant holds the land in trust for the plaintiff. In that regard, the plaintiff cited the case of **Twalib Hatayan & another v Said Saggar Ahmed Al-Heidy & 5 others [2015] eKLR** and the provisions of **Section 25** of the **Land Registration Act 2012**. Regarding mesne profits, the plaintiff argued that since he was not able to how much more the defendant was

earning as rent other than the KShs 15,000 that he was told by the vendor, the court should award him KShs 7,000 as mesne profits per month from the year 2002 to the date of judgment.

7. No submissions were filed by the defendant.

8. I have considered the originating summons, the supporting affidavit, the plaintiff's oral testimony as well as the submissions. The case herein was commenced by way of Originating Summons, a procedure which is provided for by **Order 37 rules 1 to 3 of the Civil Procedure Rules** as follows:

1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

(a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;

(b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;

(c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;

(d) the payment into court of any money in the hands of the executors, administrators or trustees;

(e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;

(f) the approval of a sale, purchase, compromise or other transaction;

(g) the determination of any question arising directly out of the administration of the estate or trust.

2. Any of the persons named in rule 1 may in like manner apply for and obtain an order for

(a) the administration of the personal estate of the deceased;

(b) the administration of the real estate of the deceased;

(c) the administration of the trust.

3. A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

9. While there is no doubt that the plaintiff herein is a purchaser of immovable property and thus entitled to commence proceedings by way of Originating Summons, I was concerned that the issues raised herein touch on alleged fraud and misrepresentation and thus perhaps taking the matter beyond the scope of originating summons. In this regard, I note the wise counsel of the Court of Appeal in **Mukesh Manchand Shah & another v Priyat Shah & another [2015] eKLR** thus:

Before we consider how these provisions apply to the question before us, we need to emphasise that it is perfectly well-settled, and indeed engrained in practice as repeatedly stated by a legion of judicial authorities that unrestricted use of originating summons procedure is discouraged. It follows that the application by originating summons has never been a substitute for initiating claims involving contentious issues of facts...

10. I have agonised over whether the claim herein ought not to have been brought by way of a plaint in view of the allegations of fraud and misrepresentation which need to be particularised. Ultimately, I have reminded myself that the plaintiff's case is wholly unchallenged. In such circumstances, the court has to consider whether to insist that a litigant restarts uncontested litigation all over again in the correct form or whether the court can rise to its higher calling of dispensing justice given the particular facts and circumstances of the case before it. Ultimately, I am swayed by the statement of the Court of Appeal in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR** as follows:

... In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ..., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...

11. Guided by the above principles, I will proceed to determine the case before me notwithstanding that it is a claim which could have better been commenced and pleaded by way of plaint. I do so bearing in mind that the defendant not having defended the claim, the allegations made by the plaintiff are uncontested and all that remains for the court to do is to satisfy itself that in the totality of the circumstances a case has been made to warrant granting the reliefs sought or to warrant determining the extent of parties' rights or interests as indeed the plaintiff has prayed in the originating summons.

12. From the material placed before the court, I am persuaded that the plaintiff and the defendant as joint purchasers on one hand and with David Cheruiyot A. Bett as vendor on the other hand entered into a sale agreement dated 15th November 1998 pursuant to which the purchasers jointly bought the parcel of land known as Nakuru Municipality Block 24/1216 and paid for it fully partly in cash and partly by transferring another property to the vendor. From the certified copy of extract of title that was produced by the plaintiff, I am satisfied that the defendant is now registered as the sole proprietor of a leasehold interest in respect of the property and that such registration was done fraudulently or through misrepresentation and without the plaintiff's consent. Indeed, the certified copy of extract of title also shows that the plaintiff registered a restriction against the title on 3rd February 2017 claiming joint tenancy. The sale agreement does not state who contributed what portion of the consideration. In the absence of any evidence to the contrary, I accept the plaintiff's contention that he contributed half of the consideration and that he is therefore entitled half a share of the property as a joint proprietor. I thus find that the defendant holds half a share of the property in trust for the plaintiff. Although there is no specific prayer for cancellation of title, I believe that the court's duty to do substantive justice and to determine parties' rights in this case will not be performed without addressing the question of whether or not the plaintiff should be a registered proprietor of the suit property.

13. The plaintiff has also claimed mesne profits. Mesne profits are what a person who is a victim of wrongful occupation of his land by another receives from the aggressor. In **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR** the Court of Appeal stated:

Mesne profit is defined in section 2 of the Civil Procedure Act to mean; - "in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession". ... Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hacketh (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

"This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages."

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.

14. The plaintiff has urged the court to award mesne profits at the rate of KShs 7,000 per month from the year 2002 to the date of the judgment. The plaintiff's basis for this sum is that the vendor told him that he was collecting rent of KShs 15,000 per month from the premises prior to selling it to the purchasers. The said vendor did not testify in this matter so as to verify that claim. In the circumstances, I find a figure of KShs 2,000 per month to be reasonable in the circumstances. According to the certified copy of extract of title the defendant became registered proprietor on 10th April 2006. I will award mesne profits at KShs 2,000 per month from that date to the date of this judgment. That is a period of 157 months thus translating to KShs 314,000 as mesne profits.

15. In the end, I enter judgment against the defendant and in favour of the plaintiff as follows:

- a) It is hereby declared that the plaintiff is entitled to ½ a share of the parcel of land known as Nakuru Municipality Block 24/1216.
- b) The registration of the defendant as the sole proprietor of the leasehold interest in respect of the parcel of land known as Nakuru Municipality Block 24/1216 is hereby cancelled.
- c) The Land Registrar Nakuru is hereby ordered to issue a new certificate of lease in respect of the parcel of land known as Nakuru Municipality Block 24/1216 in the joint names of the defendant and the plaintiff.
- d) KShs 314,000 being mesne profits.
- e) Costs of this suit.

16. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Wanuma holding brief for Mrs Gathecha for the plaintiff

No appearance for the defendant

Court Assistants: Beatrice & Lotkomoi