



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 119 OF 2012

HOTTENSIAH WANJIKU.....PLAINTIFF

=VERSUS=

MESHACK NGOMO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 6th March 2012 the plaintiff has filed the suit against the defendant seeking:-

(a) A declaration that the plaintiff is the legal and lawful owner of Plot Number 33 within the mother title number LR 209/11046 and she is entitled to exclusive and unimpeded right of indefeasible possession and that the defendant by himself his agents and/or servants or otherwise howsoever are and were wrongfully and unlawfully, in occupation of the suit premises and are accordingly trespassers on the same.

(b) An injunction restraining the defendant whether by himself his agents and/or servants, or otherwise howsoever from constructing, erecting, completing any structures and or remaining on/or continuing in occupation of the suit property.

(c) An order for eviction and/or ejection of the defendant, his agents and/or servants and/or any or any person and/or persons claiming under him until the final determination of this suit.

(d) General damages for trespass, illegal construction, and interference with the land-scape that forms the suit matter of this suit together with interest at court rates.

(e) Costs of this suit together with interest at court rates.

(f) Such further and/or other reliefs as this honourable court may deem fit and just to grant in the interests of justice in this case.

2. Upon being served with summons to enter appearance and copies of plaint, the defendant entered appearance on the 14th March 2012. He also filed a statement of defence dated 14th May 2012.

3. PW1 Hottensiah Wanjiru told the court that she bought plot numbers 15 and 16 from Kenpco Limited who were the beneficial owners of the suit property. That in 2006, the sellers told her they were selling an adjacent parcel. She then entered into a sale agreement in respect of Plot No. 33. She entered into a sale agreement with one Hussein Adan who was a director of Parkview Villas Limited. She thereafter commenced construction.

4. The defendant later put a wall around Plot No. 33. She reported the matter to chief. The chief summoned the defendant who neglected to appear. She further told the court that the defendant has continued constructing despite a court order.

5. In support of her case the plaintiff produced the following documents:-mother title of LR No. 209/11046 as exhibit P1; sale agreement dated 18th September 2006 as exhibit p2; photographs of the suit property as exhibit p3; receipts on purchase of the property as exhibit P4; sub-division maps of plot No. 33 on LR 209/11046 as exhibit P5; layout of the plot No. 33 on LR 209/11046; all the pleadings, orders and rulings made in CMCC 819 of 2007 from 18th September 2007 upto and including 6th March 2012 as exhibit P7 and building plans for the plot exhibit P8.

6. In paragraph 7 of the plaint, the plaintiff gave the particulars of loss and damage.

7. At the close of her case, the plaintiff tendered final submissions. She submitted that she is the legal owner of LR 209/11046 Plot 33 situated at Mukuru Kwa Njenga, Embakasi; that she purchased the same from Kenpco Ltd on 18th September 2006 through the director Hussein Adan for Kshs.350,000.

8. The plaintiff followed due process as required by law and purchased the property from its legal owner Kenpco Limited unlike the defendant who bought the same from a third party. The sale agreement dated 18th September 2006 is a conclusive evidence of the dealings between Hussein Adan of Kenpco Limited and the plaintiff. The defendant did not conduct due diligence on the ownership of the suit property which is evidenced by his admission that he only came to realize that Parkview Villas Ltd was the registered owners after service of injunction orders.

9. Both the plaintiff and defendant produced unregistered sale agreements. Section 36 (2) of the Land Registration Act, No. 3 of 2012 provides that:-

“Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract”.

She has put forward the cases of **Souza Figueredo vs Moorings Hotels Co. Ltd [1960] EA 962 as adopted in Ukwala Supermarket (Eldoret) Ltd vs Amritral Sojpar Shah Wholesalers Ltd ELC No. 490 of 2013 [2017] Eklr; Jones vs Lipman [1962] IWLR 832.**

10. Plot No. 33 is a subdivision of LR 209/11046 and the parent title is still registered in the name of Parkview Villas Ltd. Kencop Ltd bought a piece of LR 209/11046 which they sub divided into plots and the plaintiff bought Plot No. 15, 16 and 33. The beneficial owners passed good title to the plaintiff. The defendant is unlawfully residing on the suit property and effecting wrongful occupation. She has also put forward the cases of: **Elijah Kariuki Kuria vs Kenneth Obae ELC 532 of 2009 [2016] eKLR; Roda Gatwiri Kiriga vs Kathurima Magambo [2004] eKLR.**

11. The plaintiff has suffered loss and damage as she is unable to continue with her development and expansion plans since 2007 due to the defendant’s wrongful occupation. She is entitled to general damages for trespass. She has put forward the case of **Joyce Wairimu Karanja vs Edward Murangi Mugambi ELC 245 of 2012.**

12. The defendant, Meshack Nyomo on his part told the court that he bought the suit plot from councilor Mulili. He produced the sale agreement as exhibit P1. He told the court that the plot belonged to an outfit known as Youth for KANU 1992. He told the court that the suit plot was vacant with tall grass. He had the area cleared and commenced construction. He told the court that all along the plaintiff was constructing on her side. It was only after the defendant’s building was on first floor that the plaintiff complained that it would block her view of the flats. He was later served with a court order. He did a search at the lands registry and confirmed the whole parcel was registered in the name of Parkview villas Limited. He produced the copy of the search as exhibit D2. He also produced receipts to show that he had bought building materials as exhibit D3.

13. DW2 Mathew Ndolo, told the court that the defendant contracted him and others to prepare the suit plot for construction; that after that they did the foundation. He further told the court that they constructed upto the first floor when they were told to stop as there was a court order.

14. At the close of his case the defendant also tendered written submissions. He submitted that he purchased the suit plot from Patrick Mulili in February 2007. Patrick Mulili was then the elected area councilor working with a youth empowerment programme called the YK’92’. The defendant paid the full purchase price and he was granted possession of the suit property.

15. The plaintiff failed to call the alleged vendor or any other witness to corroborate her testimony. She failed to demonstrate that she was in possession of the suit plot. She has failed to discharge the requisite burden of proof. He put forward the case of **Mbuthia Macharia vs Annah Mutua Ndwiga & another [2017] eKLR.** The plaintiff has failed to demonstrate the connection between the vendor Hussein Adan and the registered owner of the suit plot. He has also put forward the case of **Rajan Shah T/a Rajan S Shah & Partners vs Bipin P Shah [2016] eKLR; Jennifer Nyambura Kamau vs Humphery Mbaka Nandi [2013] Eklr.**

16. Both the plaintiff and the defendant have tendered sale agreements in support of their claim. The defendant took possession of the suit plot. The plaintiff entered into an agreement with a person who had no good title. He has put forward the case of **Hubert L Martin & 2 Others vs Margaret J. Kamar & 5 Others [2016] eKLR.** The defendant has suffered loss and damages as he has been unable to complete the construction due to the pendency of this suit. He prays that the plaintiff’s suit be dismissed with costs.

17. I have considered the pleadings and the evidence of record. I have also considered the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Has the plaintiff discharged the requisite standard of proof in her claim over the suit property?

(ii) Did she have any proprietary rights over plot 33 to the exclusion of the defendant?

(iii) Who should pay costs of the suit.

18. I have seen the sale agreement dated 18th September 2006 between the plaintiff and Hussein Adan. The vendor is described therein as the lawful proprietor of unsurveyed plot no. 33 which is a sub division of LR 209/11046 Kenpco Limited. It is not clear who Hussein Aden is in respect of the suit plot. The title for LR 209/1104 is registered in the name of Parkview Villas Limited. Again it has not been demonstrated who Hussein Aden is in respect of Parkview Villas Limited. Clause 2 of the agreement provides that:

“The purchaser shall pay the vendor the whole purchase price at he execution of this agreement (receipt is hereby acknowledged by the vendor)”.

19. There is no evidence that such payment was made. The plaintiff ought to have demonstrated in what form she paid the purchase price. Whether in cash or through a cash deposit in the bank.

20. There is nothing to show that Hussein Aden was a director of Kenpco Ltd/Parkview Villas Ltd or that he was the owner of the suit plot. It is not clear under what capacity he signed the agreement. The plaintiff ought to have called the said Hussein Aden as a witness to confirm he sold the suit plot to her. In the absence of his testimony, the plaintiff’s case stands uncorroborated and or unsupported.

21. The defendant on the other hand testified that upon purchase, he cleared the area and constructed the ground floor before the plaintiff claimed that his building will block her view. He told the court that he is in actual occupation of the suit property.

22. There is no doubt that the plaintiff purchased Plot NOs 15 and 16. There is however doubt as to who whether she actually purchased Plot No. 33.

23. All in all, I find that the plaintiff has failed to prove her case on a balance of probability as against the defendant. In the case of **Mbuthia Macharia vs Anna Mutua Ndwiga & another [2017] eKLR**. The Court of Appeal held that:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists”

24. I am guided by the above authority. I find that the plaintiff has failed to prove her case and the suit is dismissed with costs to the defendant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 27TH day of JUNE 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant