



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 145 OF 2014**

**MARGARET IMINZA LUYAYI.....PLAINTIFF**

**VERSUS**

**MOSES OPUDO MUDAKA.....DEFENDANT**

**JUDGMENT**

1. Proceedings herein were commenced through plaint filed on 3<sup>rd</sup> June 2014 and in which the plaintiff averred that she is the proprietor of the parcel of land known as Plot Number Block 14/Unsurveyed Manyani Estate (the suit property) having purchased it at a consideration of KShs 150,000. That she invited the defendant around the year 2009 to live with her on the suit property as her boyfriend but when the relationship broke down, the defendant refused to vacate. She therefore sought judgment against the defendant for:

***(i) An order of vacant possession of Plot Number Block 14/Unsurveyed Manyani Estate and damages for trespass.***

***(ii) Permanent injunction restraining the defendant from trespassing onto and remaining on or in any other manner whatsoever interfering with the plaintiff's use of Plot Number Block 14/Unsurveyed Manyani Estate.***

***(iii) Costs of the suit.***

***(iv) Any other relief this honourable court may deem fit to grant in the circumstances.***

2. The defendant filed defence in which he stated that he cohabited with the plaintiff as husband and wife since the year 1995 and that during the subsistence of the marriage he gave the plaintiff a sum of KShs 150,000 to purchase the suit property. That they both agreed that upon completion of the purchase the land was to be transferred to the joint names of the plaintiff and the defendant. That a matrimonial home was constructed on the suit property and that the plaintiff only contributed towards plastering of the bedroom, sitting room, kitchen and the store. That this suit was actuated by malice, greed and bad faith and that it discloses no cause of action.

3. At the hearing, the plaintiff testified as PW1 and called the vendor who testified as PW2. The plaintiff stated that the defendant refused to vacate from her house located on parcel of land known as Block 14/Unsurveyed Manyani Estate. She added that she bought the plot from her brother John Luyayi at a consideration of KShs 150, 000 which she paid in instalments. She produced a sale agreement between her and the vendor dated 12<sup>th</sup> November 2008 as well as an allotment letter dated 18<sup>th</sup> September 1998 which had been issued to the vendor by the Municipal Council of Nakuru. She paid clearance fees of KShs 2,000 and was issued with a receipt No. 130862 dated 26<sup>th</sup> November 2008. Subsequently, the said council issued to her a clearance certificate dated 9<sup>th</sup> December 2008. She also paid KShs 5, 000 being plot transfer fees on 25<sup>th</sup> November 2008 and the plot was transferred to her on 15<sup>th</sup> December 2008. The council entered her name in its records as the rate payer. She produced copies of rates demands, rates payment receipts issued by the council in her name and clearance certificate.

4. She further testified that she started developing the plot in the year 2009. In that regard, she submitted building plans to the council for approval. Approval was granted. She then obtained a check off loan from Family Finance Bank and another loan from CFC Stanbic. All these loans helped her to finance the construction. She produced statements of account from both banks. She added that the construction was not complete as at the time of her testimony but the house was habitable. She moved into the house in August 2010. She stated that the defendant gave her any money to purchase the plot nor did he contribute anything towards the construction of the house.

5. Regarding family matters, she stated that she is married to Reuben Mudimu. They were separated in 1998 but are not divorced. Their marriage was celebrated on 19<sup>th</sup> October 1985 at Salvation Army Church Thika. She produced a certificate of marriage dated 19<sup>th</sup> October 1985. They were blessed with four (4) children in two sets of twins. The first set were Emma Mudora and Doreen Mudora and were born on 23<sup>rd</sup> August 1986. The second set of twins were Caroline Engefu and Sylvia Mwenderani and were born on 12<sup>th</sup> March 1992. She produced the respective birth certificates.

6. She added that the defendant was her man friend. They met in the year 2007 but never married each other. She denied that she lived with the defendant as husband and wife. She also stated that the defendant being her man friend moved into the house in August 2010 on her invitation. He is still in the house. He started threatening the plaintiff with death, thus leading to her move out on 2<sup>nd</sup> January 2013.

7. John Mwangala Luyayi testified as PW2. He stated that he sold the suit property to the plaintiff only and that she paid for it herself. The sale agreement was prepared after conclusion of payment of the entire purchase price by the plaintiff.

8. Plaintiff's case was closed at that point.

9. Defence case then opened with the defendant testifying as DW1. He stated that the plaintiff is his wife and that the two of them lived as husband and wife in the suit property. That in the year 2008, when his retirement was due the next year, his children told him that there was a plot on sale and that he should buy it to save on having to pay rent after retirement. He went to see the plot with the children. He agreed that they buy the plot and construct a house on it. The owner of the plot was called John Mwangala Luyayi. A sale agreement was signed as between DW1 and the seller. The agreed on purchase price was KShs 150, 000 which was paid in instalments. The first instalment was KShs 40, 000 which DW1 paid cash out of my pocket while the plaintiff took a loan to pay the balance. In turn, DW1 repaid the loan at KShs 4, 400 per month. All the documents about the repayment were with the plaintiff who he trusted as a wife and who he used to give money to go and pay the installments. He took a top up loan of KShs 1,200, 000 from Stima Sacco to enable him and the plaintiff construct. He produced a statement from Stima Sacco as an exhibit. He applied for connection of electricity in his own name. Since he was employed by Kenya Power & Lighting, he sought to benefit from a reduced rate that the said company was charging its staff in respect consumption of electricity.

10. He further stated that he started construction of the house at the end of 2008. He gave the money for construction to the plaintiff as his wife while his son assisted her in doing purchases and supervising the works. They finished construction and entered the house as a family. He added that the suit property belongs to him and that they lived there with plaintiff until January 2013 when the plaintiff abandoned him in the house. Under cross-examination, he stated that the sale agreement was in his name but he did not have it in court. As regards the bundle of construction receipts which he had produced, he admitted that they could not add up to even KShs 5, 000.

11. Next on the witness stand was Noyce Mudaka Opudo, DW2. He is the defendant's son. He stated that they lived with the plaintiff for 10 years and that he does not know whose name the suit property is registered in. Defence case was thereby closed.

12. Upon conclusion of oral testimonies, parties filed and exchanged written submissions. I have carefully considered the pleadings, evidence and submissions herein. The twin issues that emerge for determination are: Who is the owner of the suit property and the developments thereon? Whether the plaintiff is entitled to the reliefs sought.

13. The plaintiff's case is that she bought the suit property from her brother John Luyayi at a consideration of KShs 150, 000. She produced a sale agreement dated 12<sup>th</sup> November 2008 to support this contention. A perusal of the agreement confirms that the purchaser therein is the plaintiff and the property purchased is the suit property herein. The defendant also claimed that he bought the suit property from the same vendor, at the same purchase price and that there was a written sale agreement between him and the vendor. He did not however produce the said agreement. It's also important to note that the vendor testified as PW2 and stated that he sold the suit property to the plaintiff and not the defendant. I therefore find and hold that the plaintiff was the purchaser of the suit property.

14. There is no dispute that a two bedroom house was constructed on the suit property. The question once again is: who funded the construction? Both parties claim that they funded the construction. The defendant contends that he borrowed a sum of KShs 1, 200, 000 from Stima Sacco which he applied to the construction. He produced a bundle of receipts which he claimed were in respect of materials that he bought during the construction. Upon cross examination, he admitted that those receipts do not add up to even KShs 5, 000. Simply put, I am unable to see any evidence showing that the defendant funded the construction. In such circumstances, it goes without saying that the plaintiff being the owner of the suit property, must be taken in the absence of acceptable evidence to the contrary, as the one who funded the construction on her own plot.

15. It was argued on behalf of the defendant that the parties were husband and wife and that the defendant had thereby acquired an interest in the suit property. The plaintiff produced a marriage certificate indicating that she got married to one Reuben Mudimu on 19<sup>th</sup> October 1985 at Salvation Army Church Thika. There is no evidence of dissolution of the said marriage. It is that not possible that the plaintiff would have contracted another marriage during pendency of the said marriage. In the absence of proof of marriage, the defendant cannot stake a spousal claim to the suit property. In the end, I find that the plaintiff is the owner of the suit property and the developments thereon. That resolves the first issue for determination.

16. The plaintiff seeks judgment against the defendant for an order of vacant possession in respect of the suit property, damages for trespass and a permanent injunction restraining the defendant from trespassing onto and remaining on or in any other manner whatsoever interfering with her use of the suit property. Let's look at the aspect of trespass first. Simply put, trespass is wrongful entry into another's property. Ingredients of the tort of trespass were discussed by the Court of Appeal in M'Kiria M'Mukanya & another v Gilbert Kabere M'Mbijiwe [1984] eKLR as follows:

*This tort is a violation of the right of possession and [the plaintiff] must prove he ... had the right to immediate and exclusive possession ... which is different from ownership. ... He does not have to prove damage. ... [The defendants are] ... liable for trespass if [the plaintiff] has the right to possess and they intentionally entered his plot even though they honestly believed the land was their own and they had a right of entry on it or they did so under an inevitable mistake of law or fact. .*

17. The plaintiff herself stated that she invited the defendant around the year 2009 to live with her on the suit property as her boyfriend or in her words, man friend. Consequently, the defendant entered the suit property at her invitation and with her consent. There was no wrongful entry or violation of her right of possession. The claim for damages for trespass thus fails.

18. The defendant himself stated in his testimony that he lived with the plaintiff in the suit property until January 2013. He remains in the property. In the circumstances the plaintiff is entitled to an order of vacant possession as well as a permanent injunction. Regarding costs, I note that the parties have had a close personal relationship. So as not to create further friction between them, each party should bear own costs.

19. In view of the foregoing, I make the following orders:

(i) I order the defendant to vacate from Plot Number Block 14/Unsurveyed Manyani Estate within 21 (twenty one) days from the date of delivery of this judgment. In default, the plaintiff shall be at liberty to evict him.

(ii) I grant a permanent injunction restraining the defendant from trespassing onto and remaining on or in any other manner whatsoever interfering with the plaintiff's use of Plot Number Block 14/Unsurveyed Manyani Estate.

(iii) Each party to bear own costs of the suit.

20. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of June 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Wangari holding brief for Mr Orina for the plaintiff

Ms Chepngetich for the defendant

Court Assistants: Beatrice & Lotkomo