



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 554 OF 2013

KAREN NYAMOITA MAGARA.....PLAINTIFF

VERSUS

KEVIN OMBASA.....1ST DEFENDANT

HELLEN NYAMBEKI OMBASA.....2ND DEFENDANT

COUNTERCLAIM

KEVIN OMBASA.....1ST PLAINTIFF

HELLEN NYAMBEKI OMBASA.....2ND PLAINTIFF

VERSUS

KAREN NYAMOITA MAGARA.....DEFENDANT

JUDGMENT

By an amended Plaintiff dated the 20th January, 2015, the Plaintiff prays for judgment against the Defendants jointly and severally for:

- a. An order of permanent order of injunction restraining the defendants from encroaching upon, trespassing onto, occupying or constructing a building or developing all or any portion of the Plaintiff's properties known and referred to as plots No. 108 and 127 situate at Utawala within Nairobi County.
- b. An order of eviction.
- c. Costs of this suit.
- d. Any other relief this court deems fit.

The Defendants filed their Defences and Counterclaim where they denied the averments in the Plaintiff except the descriptive. They aver that they have not been licensees on plots No. 108 and 127 hereinafter referred to as 'suit plots' which were under Urutagwo Mwiruti Women Group. They insist the suit plots were sold to the 2nd Defendant by the Plaintiff on 25th September, 2007 for Kshs. 400,000/=. The Defendants deny being trespassers and contend that after purchase, they commenced developments on the suit plots and it is the Plaintiff's actions, which are calculated to defraud them. They deny the allegations of fraud contained in the Plaintiff particularly executing a forged Sale Agreement; forging documents; getting an advocate to attest to a forged Sale Agreement; forging the Plaintiff's signature; converting money lent into a purchase price; and backdating to bolster fraud. They insist the Plaintiff has no ownership rights over the suit plots.

The Defendants (Plaintiffs in the Counterclaim) sought for the following prayers against the Plaintiff (Defendant in the Counterclaim):

- a) A declaration that the 1st and 2nd Plaintiffs are the sole owners of plot No. 108 and 127 Urutagwo Mwiruti Women Group exercised from LR No. 6845/ 183.
- b) A refund of Kenya Shillings Two Hundred Thousand (Kshs. 200,000) being purchase price of plot No. 127 Urutagwo Mwiruti Women Group.

c) Interest on (b) above at 18% p.a with effect from September, 2007 till payment in full.

d) Costs of the suit.

e) Any other relief the court may deem fit and just to grant.

The Plaintiff filed a Defence to the Counterclaim where she denied the averments therein except for the descriptive. She contended that she was the bona fide purchaser of the suit plots having purchased the same from Urutagwo Mwiruti Women Group. She avers that she purchased the suit plots in 1998, took possession and commenced construction of a perimeter wall as well as putting up permanent structures constituting of five rooms. She states that in 2008 the 1st Defendant who is her nephew approached her to reside on the suit land on terms which did not constitute payment of rent or transfer. Further, she permitted the 1st Defendant to reside thereon and the 2nd Defendant hence remained a licensee on the suit plots. She claims the 2nd Defendant commenced developing the suit plots by erecting a house thereon without any reasonable cause or basis.

The matter proceeded for hearing where the Plaintiff called one witness while the Defendants also had one witness.

Evidence of the Plaintiff

The Plaintiff as PW1 contended that she is the bona fide owner of the suit plots, which she purchased from Urutagwo Mwiruti Women Group at a total of Kshs. 80,000/=. She explained that she first paid Kshs. 40,000, then Kshs. 30,000 but the balance of Kshs. 10,000 was paid by her elder sister Eunice Nyanchoka. She denies selling the suit plots to the Defendants, disputes the Sale Agreement and denies signing it. She insists the Defendants have trespassed on her land and are mere licensees thereon. She admits receiving a friendly loan of Kshs. 400,000 from the 1st Defendant which she is yet to pay. She further admits allowing the 1st Defendant to occupy the suit plots from 2008 but claims they have erected structures thereon without her permission. She reiterates that the Defendants have fraudulently proceeded to obtain the two plots. It was her testimony that in 2013 her elder sister informed her that the 1st Defendant was erecting permanent structures on the suit plots and she reported matter to Embakasi Police Station. She confirms that the Urutagwo Mwiruti Women Group issued her with a Share Certificate for plot No. 108 only although after her sister had finished paying the Kshs. 10,000 on the second plot, they promised to process titles in her name. She disputes the Sale Agreement dated the 7th January 2015 between the 1st Defendant and Urutagwo Mwiruti Women Group for purchase of plot 127 and insists the same was not available for sale since she owned it. She also disputes the Sale Agreement dated the 25th September, 2007 between herself and the 2nd Defendant and claims it is a fraud as it was for sale of the two plots. It was her testimony that the 1st Defendant requested her for the Share Certificate so as to process electricity. She wanted the Defendants to move out of the suit plots but they refused and wanted to use the money lent to her by the 1st Defendant, as purchase price. She produced a receipt and an undated letter from Urutagwo Mwiruti Women Group; Share Certificate for plot. 108 and demand letter to Kelvin Ombasa as her exhibits.

Evidence of the Defendants

The Defendants claim to be proprietors of the suit plots. It was DW1's testimony that she entered into a Sale Agreement with the Plaintiff to purchase the two plots while the 1st Defendant paid the purchase price of kshs. 400,000. DW1 explained that initially they had purchased the two plots from the Plaintiff but Urutagwo Mwiruti Women Group threatened to evict them from plot 127 claiming the Plaintiff did not pay for the same. This led to the 1st Defendant entering into a Sale Agreement with Urutagwo Mwiruti Women Group for purchasing the said plot for Kshs. 700,000. She contended that they have developed the suit plots. She insisted that the 1st Defendant paid the Plaintiff Kshs. 400,000/=. Further, that when the Plaintiff sold to them plot 127 she did not have a Share Certificate for the same but promised to furnish the same later on.. She admitted having a Share Certificate for plot 108, which she got through their sister Eunice Nyanchoka. It was DW1's testimony that they entered into a Sale Agreement on 25th September, 2007 with the Plaintiff who produced her ID after which they all signed the said Agreement in the presence of a lawyer. She denied forging any documents to acquire suit plots. She produced the Sale Agreements dated 25th September, 2007 and 7th January, 2015 respectively; Ownership Certificate for Plot No. 108 in the name of the Plaintiff; Barclays Bank Deposit Slip for Kshs. 400,000; KCB Account Transfer Slip for Kshs.700,000; and Ownership Certificate for Plot No. 127 in the name of 1st Defendant as her exhibits.

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

Analysis and Determination

Upon consideration of the pleadings filed herein including hearing testimonies of the witnesses as well as examining the parties' exhibits, the following are the issues for determination:

- Whether the Plaintiff is the proprietor of plots 108 and 127
- Whether the Defendants purchased the two plots
- Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
- Whether the Defendants are entitled to the orders sought in the counterclaim.

As to whether the Plaintiff is the proprietor of plots 108 and 127

The Plaintiff claims to have purchased the two plots from Urutagwo Mwiruti Women Group at a total of Kshs. 80,000/=. She explained that she first paid Kshs. 40,000, then Kshs. 30,000 but the balance of Kshs. 10,000 was paid by her elder sister Eunice Nyanchoka. The Plaintiff

produced a copy of a Share Certificate for plot 108 in her name and the receipt for Kshs. 10,000 issued by Urutagwo Mwiruti Women Group. Despite the Plaintiff claiming ownership of plot 127, she never produced any documents to prove her claim except for the receipt of Kshs. 10,000 and an undated handwritten letter from Urutagwo Mwiruti Women Group. PW1 insisted she had purchased the said plot no. 127 from Urutagwo Mwiruti Women Group but was not issued with a Share Certificate in her name. It was her testimony that the said Women Group promised to process her titles after finalizing the payment of Kshs. 10,000. She submitted that the Defendants had fraudulently forged documents to take the two plots from her. She relied on the authorities of **Thomas Kibiru Gathumbi Vs Jamia Mosque (2017) eKLR**; **Margaret Wangui Vs Virginia Warigia Kihato & anor (2016) eKLR**; **Sophie Wanjiku John Vs Jane Mwihaki Kimani (2013) eKLR** and **Mike Maina Kamau Vs Attorney General (2017) eKLR** to buttress her arguments on the ownership of the two plots. The Defendants opposed the Plaintiff's assertions that they fraudulently acquired the suit plots and relied on the **R. G. Patel v. Lalji Makanji [1957] EA 314** and **Koinange & 13 others Vs Koinange (1986) KLR 23** to support their averments.

Section 107 of the Evidence Act provides that:’ **(1) 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 exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

The Plaintiff never brought representatives from Urutagwo Mwiruti Women Group to prove that she had paid for plot No. 127. She furnished court with a receipt for Kshs. 10,000 and an undated handwritten letter from Urutagwo Mwiruti Women Group indicating she owns plot 127 and 106. She claimed her sister Eunice Nyanchoka paid the balance of Kshs. 10,000 on her behalf and Urutagwo Mwiruti Women Group promised to process the titles but never brought the sister nor representatives from the said Women Group to prove this claim. In the receipt dated 6th June, 2004, it indicates Share Contribution for plot 127 (LR 6845 /183A). If indeed she was the proprietor of plot No. 127, she would have had a Share Certificate to that effect from the said Urutagwo Mwiruti Women Group. Further, if indeed the Plaintiff owned plot. 127 as claimed, then why would Urutagwo Mwiruti Women Group proceed to enter into a Sale Agreement with the 1st Defendant in 2015, receive purchase price from him and issue him with a Share Certificate. These were issues, which would have been best clarified by the said Plaintiff. In relying on the legal provisions cited above, I hold that the burden of proof was upon the Plaintiff to prove she had purchased the two plots. However, from the evidence adduced including documents presented, she could only prove ownership of plot No. 108 and not 127. In the circumstances, I can only decipher that the Plaintiff was proprietor of plot. 108 but not 127 as claimed.

As to whether the Defendants purchased the two plots.

The Defendants claimed to have purchased the two plots and developed them. It was DW1's testimony that she entered into a Sale Agreement with the Plaintiff dated the 25th September, 2007 to purchase the two plots but it is the 1st Defendant who paid the Kshs. 400,000 purchase price by depositing the said monies in the Plaintiff's bank account. The Defendants produced a Barclays Bank cash pay in slip dated the 16th November, 2007 as exhibit to prove the payment. The Plaintiff disputed that the Kshs. 400,000 amount was purchase price and insisted it was a friendly loan from her nephew, which she was yet to repay. It was PW1's testimony that she allowed her nephew to occupy the suit plots in 2008 after her sister Eunice Nyanchoka had moved therefrom. It was DW1's testimony that she entered into a Sale Agreement with the Plaintiff to purchase plot 108 and 127 after which they executed the said Agreement before a lawyer. Further, that the Share Certificate for the said land was given to her by their sister Eunice Nyanchoka. The Plaintiff explained that she gave the Share Certificate to the 1st Defendant as he wanted to install electricity. She contended that the Defendants had commenced developing the two plots but declined to stop when she asked them to do so. She denied appearing before a lawyer to execute the Sale Agreement with the 2nd Defendant but admitted the ID annexed to the agreement was hers. She claimed the Defendants had fraudulently gotten registered on the suit plots but on being asked whether she reported the same to the Police, she confirmed she had not done so. DW1 further stated in court that the 1st Defendant entered into a Sale Agreement with the Urutagwo Mwiruti Women Group to purchase plot 127 for Kshs. 700,000 and produced a Sale Agreement and Certificate of ownership to that effect. She explained that initially they had purchased the two plots from the Plaintiff but Urutagwo Mwiruti Women Group threatened to evict them from plot 127 claiming the Plaintiff did not pay for the same. This led to the 1st Defendant executing the said Sale Agreement with Urutagwo Mwiruti Women Group for purchasing plot 127. She insisted that the 1st Defendant paid to the Plaintiff Kshs. 400,000/= for purchase of the two plots as she was campaigning. She denied forging any documents. In the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

In relying on this decision, I find that it was incumbent upon the Plaintiff to call representatives from Urutagwo Mwiruti Women Group to come to court to confirm her averments that she was indeed the proprietor of plot 127 which had been fraudulently registered in the name of the 1st Defendant but she failed to do so. The Plaintiff further never enjoined the said Women Group to this suit to confirm how the 1st Defendant purchased plot. 127. From PW1 and DW1's averments, I find that there is a correlation between the signing of the Sale Agreement between Plaintiff and 2nd Defendant on 25th September, 2007; depositing of the Kshs. 400,000 in the Plaintiff's account by the 1st Defendant in November, 2007 as well as the Defendants entry into the suit plots in 2008. To my mind, I believe that the Plaintiff allowed the Defendants to enter into the suit plots in 2008 after receiving the consideration of Kshs. 400,000 and that is why she is yet to repay the said funds to date. As I have alluded to above, the burden of proof was upon the Plaintiff to prove fraud on the part of the Defendants which she has failed to do. In the circumstances and since the Defendants produced a Sale Agreement as well as Certificate of Ownership of plot 127, I find that the 1st Defendant is indeed the proprietor of plot 127. As for plot 108, I note there was a Sale Agreement executed between the Plaintiff and the 2nd Defendant. From the evidence adduced, I find that the Plaintiff was indeed paid for both the plots but she now wants to turn around. I note the Defendants with permission of the Plaintiff took possession of the two plots in 2008 and developed them. Since equity follows the law, I am of the view that the Plaintiff cannot claim both the plot as well as the monies she was paid towards its purchase. It is against the foregoing that I hold that the two plots were indeed purchased by the Defendants.

In the circumstances, I find that the Plaintiff is not entitled to the orders sought in the Plaintiff.

As to whether the Defendants are entitled to the orders sought in the counterclaim. The Defendants have sought for various orders in the Counterclaim including a declaration that the 1st and 2nd Plaintiffs are the sole owners of plot No. 108 and 127 Urutagwo Mwiruti Women

Group exercised from LR No. 6845/ 183.; a refund of Kenya Shillings Two Hundred Thousand (Kshs. 200,000) being purchase price of plot No. 127 Urutagwo Mwiruti Women Group; Interest on (b) above at 18% p.a with effect from September, 2007 till payment in full and Costs of the suit.

Since I have already held that the Defendants are the owners of plot 108 and 127, I will proceed to deal with their claim for a refund of Kshs. 200,000. In the Sale Agreement dated the 25th September, 2007 between the Plaintiff and the 2nd Defendant, each plot was costing Kshs. 200,000. However, it later emerged that the Plaintiff only owned one plot when Urutagwo Mwiruti Women Group entered into a fresh Sale Agreement with the 1st Defendant for purchase of plot 127. It is only just and equitable that the Defendants are entitled to their refund of Kshs. 200,000, which was the purchase price paid for plot. 127 since they had to purchase the said plot from Urutagwo Mwiruti Women Group and pay Kshs. 700,000 on 12th January 2015 as evidenced by the KCB transfer slip which was produced as an exhibit.

It is against the foregoing that I proceed to dismiss the Plaintiff's suit in its entirety and enter judgment for the Defendants in respect of the counterclaim.

I proceed to make the following orders:

- i. A declaration be and is hereby entered that the 1st and 2nd Plaintiffs **KEVIN OMBASA and HELLEN NYAMBEKI OMBASA** are the sole owners of plot No. 108 and 127 Urutagwo Mwiruti Women Group exercised from LR No. 6845/ 183.
- ii. The 1st and 2nd Plaintiffs **KEVIN OMBASA and HELLEN NYAMBEKI OMBASA** are entitled to refund of Kenya Shillings Two Hundred Thousand (Kshs. 200,000) being purchase price of plot No. 127 Urutagwo Mwiruti Women Group from the defendant **KAREN NYAMOITA MAGARA** within 90 days from the date hereof.
- iii. Interest on (ii) above at court rates with effect from 12th January, 2015 until payment in full.
- iv. Costs of the counterclaim are awarded to the Plaintiffs **KEVIN OMBASA and HELLEN NYAMBEKI OMBASA**

Dated signed and delivered in open court at Kajiado this 31st day of July, 2019

CHRISTINE OCHIENG

JUDGE