



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC NO. 116 OF 2013

HALIMA KHAMALA ABDALLA.....PLAINTIFF

VERSUS

YUSUF MOHAMED BILAL.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff is a sister to the Defendant. This suit had initially been filed against the Defendant and one Abasi Wanjala Bonde who is also a brother to the Plaintiff. The suit against Abasi Wanjala Bonde was withdrawn and Abasi Wanjala Bonde also withdrew his counter claim against the Plaintiff and became a witness of the Plaintiff.

2. The dispute herein relates to LR No 36/VII/631 on which is erected a two storey flat known as B1/4A in what is now called California Estate in Nairobi (suit property). The Plaintiff and the Defendant and their mother together with other siblings had been staying on the suit property since 1969. In 1989, the suit property was transferred to the mother of the Plaintiff and the Defendant by the Nairobi City Commission.

3. Prior to the transfer of the suit property into the name of the Plaintiff and the Defendant's mother, the Plaintiff had moved out in 1975 upon her marriage. Her mother and her other siblings continued staying in the suit property until her demise in 2008. In the year 2011, the Plaintiff started demanding that the Defendant and her other siblings start paying rent to her on the ground that her mother had transferred the suit property to her in 1993. The Defendant and his brother resisted the Plaintiff's demands prompting the filing of this suit in which the Plaintiff claims the following reliefs:-

a. Vacant possession of all that property known as L.R No 36/VII/631 and all developments, buildings and/or structures thereon situated in Nairobi.

b. A permanent injunction restraining the Defendants from interfering with the Plaintiff's property being L.R No. 36/VII/631.

c. Rent arrears as from January, 2012 to date.

d. Mesne profits of the said property from 1st January, 2012 till possession is delivered up.

e. Interest on (d) and (c) thereon.

f. Costs of this suit.

g. Any other relief the Court deems fit to grant.

4. The Defendant filed an amended defence to the Plaintiff's suit and raised a counter claim in which he seeks the following reliefs:-

1. The Plaintiff's suit be dismissed with costs.

2. A declaration that the Plaintiff's title, interest or claim over LR No. 36/VII/631, I.R No 49443 has been extinguished and that the legal title vests in the Defendants who have acquired the legal and equitable title thereof by virtue of adverse

possession as tenants in common in equal shares.

3. A declaration that the Plaintiff holds the title to L.R No. 36/VII/631 IR No. 49443 in trust for and for the benefit of the Defendants as tenants in common in equal shares.

4. That the Registrar of Titles or his Successor be and is hereby ordered to cancel the existing grant and/or title over L.R. No 36/VII/631 I.R. 49443 and to register the Defendants as the joint tenants in common in equal shares of LR No. 36/VII/631 in place of the Plaintiff.

5. That the costs of this counterclaim be borne by the Plaintiff.

Plaintiff's Case

5. The Plaintiff's case is that prior to the transfer of the suit property from her mother to her name, her mother used to tell her siblings that she was going to transfer the property to her. The Plaintiff testified that she has the title to the suit property and that when the Defendant applied for succession, the suit property was not among those to be distributed. The Plaintiff further stated that the suit property was transferred to her as a gift.

6. The Plaintiff stated that she is the one who used to assist her mother to pay rates and that after her demise, she allowed her brothers to continue staying on the suit property on humanitarian grounds. In 2011, she approached her brothers to allow her collect rent from one of the flats but the brothers refused. This is what forced her to do a demand letter to them asking them to vacate or pay her rent with effect from January, 2012.

Defendant's Case

7. The Defendant testified that he has lived in the suit property since 1969 and that the first time he heard about the Plaintiff's claim to the suit property was in 2011 when he received a demand letter from an Advocate representing the Plaintiff which letter demanded payment of rent of Kshs.60,000/=. He denied being aware of any transfer of the suit property from his mother to the Plaintiff. He stated that the alleged transfer is suspect and that he has stayed in the suit premises continuously for over 12 years from the time the same is alleged to have been transferred to the Plaintiff. The Defendant states that the first time the Plaintiff tried to disturb his occupation was in 2011. He stated that he had power of attorney to deal with the properties of his mother and that it is this power of attorney which saved him when the Plaintiff sent Auctioneers to evict him from the suit premises.

Analysis and Issues for Determination

8. I have carefully gone through the evidence adduced by the Plaintiff as well as that of the Defendant. I have also gone through the submissions filed by the Plaintiff and the Defendant. The submissions have mainly touched on the issue of adverse possession. The Plaintiff submits that the Defendant has not met the threshold for adverse possession but on the other hand, the Defendant contends that he has met the threshold. Both parties have cited authorities in support of their respective positions.

9. The Defendant in his counter-claim raised the issue of the Plaintiff holding the suit property in trust for the other family members. This is a crucial issue yet no one seemed to address it in their submissions. There is no contention that the Plaintiff is now the registered owner of the suit property. The suit property was transferred to the Plaintiff on 26th November, 1993. Prior to the registration of the Plaintiff as owner of the suit property, the suit property was in the name of Mwajuma Nawire Ibrahim (Deceased) who was mother to both the Plaintiff and Defendant.

10. The issues which emerge for determination are firstly whether the Defendant has acquired the suit property through adverse possession. Secondly, is the Plaintiff holding the suit property in trust for the Defendant. Thirdly, is the Plaintiff entitled to vacant possession or any rent arrears including mesne profits and lastly, which order should be made on costs.

11. On the first issue, the evidence on record clearly shows that the first time the Defendant knew about the transfer of the suit property to the Plaintiff was in the year 2011 when the Defendant and his brother received a demand notice asking them to vacate on the ground that they have been staying in her property from March, 2008 without paying rent. It is important to note that the deceased died on 13th May, 2008 and that she was staying in the suit property with the Defendant and his brother.

12. The Defendant and his brother knew that they were staying in the deceased's property. The deceased was their mother. They had no knowledge that the suit property had been registered in the Plaintiff's name in 1993. The issue of adverse possession against the Plaintiff does not therefore arise. If indeed the suit property had been transferred to the Plaintiff exclusively, the Plaintiff would have started asking for rent from her brothers with effect from December, 1993 and not to wait until the demise of the deceased to start claiming rent.

13. On the second issue, the evidence clearly shows that the suit property was registered in the name of the deceased. The suit property was suspiciously transferred into the Plaintiff's name who started demanding rent two months to the death of the deceased. The demand for rent was from both the Defendant and his brother. When the Defendant and his brother filed a suit by way of counter-claim against the Plaintiff, the Plaintiff went and convinced one of the brothers to record a consent admitting that the suit property solely belonged to her and withdrawing his suit against her. When the consent came up in Court for adoption, the same was rejected by the Court because of its consequences to the claim by the Defendant.

14. The Defendant's brother went ahead to withdraw his claim against the Plaintiff and the Plaintiff did likewise and made him her witness. The Defendant's brother then wrote a statement supporting the Plaintiff's claim and disowning his authority which he had given to the

Defendant to pursue a claim against the Plaintiff. During cross-examination, and even in his evidence in chief PW2 Abasi Wanjala Bonde struck me as a witness who could not be believed in view of the evidence which he gave. He even pretended not to know in whose name the title was even when he had claimed that he was present in a family meeting where the deceased gave the suit property to the Plaintiff.

15. What the Plaintiff and her brother did was a conspiracy to deprive the Defendant his share in the suit property which clearly is family property. Though the Plaintiff claimed that the suit property was not listed as part of the properties which are subject of succession in respect of the estate of the deceased, there was no evidence adduced by her to show that this is the case. What the Plaintiff produced is an application for grant of letters of administration of the estate of the deceased made to the High Court. The succession cause has since been transferred to the Kadhi's Court where it is still pending.

16. There is every indication that the alleged transfer could have been procured in a manner which was not proper. This is because in the transfer in favour of the Plaintiff, the deceased thumb printed on the same. This was in 1993. Five years later, the same deceased is now said to have appended a signature to a power of attorney in favour of the Defendant. Whereas one may not say with certainty which of the two documents was genuinely executed by the deceased, the fact remains that the siblings of the deceased are trying to have the suit property to their side.

17. The question of trust is a question of evidence. I have demonstrated hereinabove that the transfer into the Plaintiff's name may not have been genuine, otherwise the Plaintiff would not have gone out of her way to woo one of her brothers to her side which cannot be believed. In the circumstances I find that the Plaintiff is holding the suit property in trust for her and her other brother including the Defendant.

18. Having found that the Plaintiff is holding the suit property for her own benefit and that of his brothers, this finding renders the third issue moot and does not require any consideration. As for the last issue, I find that since the Plaintiff and Defendant are sister and brother each shall bear their own costs.

Conclusion

19. From the above analysis it is now clear that the Plaintiff's suit fails entirely. On the other hand, I find that the Defendant has succeeded on his claim on the basis of trust. I therefore enter judgment in the counter-claim as follows:-

1. A declaration that the Plaintiff holds title to LR No 36/VII/631 IR 49443 in trust for herself and for the benefit of the Defendant including Abasi Wanjala Bonde as tenants in common in equal shares.

2. The Registrar of Titles or his successor be and is hereby ordered to cancel the existing grant and/or title over LR No 36/VII/631 IR 49443 and to register the same in the name of the Plaintiff and the Defendant including Abasi Wanjala Bonde as tenants in common in equal shares.

3. Each party in the main claim and counterclaim to bear their own costs.

Dated, Signed and delivered at Nairobi on this 27th day of August, 2019.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Halima for Plaintiff and defendant in person

Court Clerk : Hilda

E.O.OBAGA

JUDGE