



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 163 OF 2015**

**GRACE WANJIRU MWANGI.....PLAINTIFF**

**=VERSUS=**

**WILSON CHEGE.....DEFENDANT**

**JUDGMENT**

**Background:**

This suit was filed by the plaintiff against the defendant at the Chief Magistrates Court at Nairobi on 19<sup>th</sup> May, 2006. In her plaint dated 17<sup>th</sup> May, 2006, the plaintiff averred that she was the owner of Plot No. 33 within a larger parcel of land known as L.R. No. 14589 situated in Embakasi, Nairobi (hereinafter referred to as “the suit property”). The plaintiff averred that on 7<sup>th</sup> May, 2006, the defendant deposited some timber off-cuts on the suit property and started constructing a fence around the same. The plaintiff averred that the defendant’s conduct aforesaid was unlawful. The plaintiff sought a declaration that she was the owner of the suit property, a permanent injunction restraining the defendant from entering, remaining on, carrying out any construction or in any other manner whatsoever interfering with the suit property and costs of the suit.

The defendant entered appearance and filed a statement of defence and a counter-claim against the plaintiff on 23<sup>rd</sup> August, 2006. The defendant denied that the plaintiff was the owner of the suit property. The defendant contended that he was the owner of the suit property which was formerly known as Plot No. 88 and which was situated at Makuru Kwa Njenga. The defendant averred that he had been in possession of the suit property since 15<sup>th</sup> August, 2002 when he purchased the same from one Billah Wario (deceased) at a consideration of Kshs.210,000/= inclusive of transfer fees. The defendant averred that Billah Wario was an official of Kwame – Kwale Mukuru Embakasi Youth Project (hereinafter referred to as “Kwame Youth Project”). The defendant averred that on 17<sup>th</sup> July, 2005 one, Zackary Kinyua Kigondu and Ibrahim Adan acting as agents of Kwame Investments Company Limited maliciously demolished a fence that he had put up around the suit property and threatened him with violence unless he moved out of the suit property and renounced his claim over the same.

The defendant averred that on 5<sup>th</sup> February, 2006 and 24<sup>th</sup> July, 2006 his fence was again demolished by the plaintiff’s agents or people acting on behalf of the said Kwame Investments Limited. The defendant averred that as a consequence of the plaintiff’s unlawful activities aforesaid, he had suffered loss and damage. By way of a counter-claim, the defendant sought judgment against the plaintiff for special, general, exemplary and aggravated damages, a declaration that the plaintiff’s claim was untenable in law, a permanent injunction restraining the plaintiff from assuming title or ownership of the suit property and from interfering, entering, trespassing or in any way interfering with his quiet possession of the suit property. The defendant also sought an order compelling the plaintiff to hand over to the defendant vacant possession of the suit property.

The plaintiff filed a reply and defence to counter-claim on 7<sup>th</sup> September, 2006 in which she joined issued with the defendant in his defence. In her defence to the counter-claim, the plaintiff denied that the defendant was the owner of the suit property and that the defendant had been in possession of the property. The plaintiff averred that if the defendant had made any payment to Billah Wario on account of the suit property, it was open to the defendant to seek a refund of the said payment as he had been conned. The plaintiff averred that when she bought the suit property, the same was vacant. The plaintiff averred further that the suit property did not belong to Billah Wario or Kwame Youth Project. The plaintiff averred that any agreement the defendant had entered into with the two had no relevance. The plaintiff reiterated that she was the lawful owner of the suit property and that she was in lawful possession thereof. The plaintiff averred that the defendant’s counter-claim was misconceived and incompetent to the extent that it was directed against persons who were not parties to the suit.

On 24<sup>th</sup> September, 2009, the plaintiff withdrew the suit against the defendant with costs while the same was still in the lower court. On 6<sup>th</sup> March, 2012, the lower court suit was transferred to this court for hearing and determination on an application by the defendant. Since the plaintiff’s suit had been withdrawn, what was transferred to this court was the defendant’s counter-claim.

At the trial, the defendant gave evidence and called two (2) witnesses while the plaintiff gave evidence and called one (1) witness. I have considered the pleadings and the evidence on record. The issues arising for determination in this suit in my view are the following: -

1. Whether the defendant is the lawful proprietor of the suit property.
2. Whether the defendant is entitled to the reliefs sought in the counter-claim.
3. Who is liable for the costs of the counter-claim?

Whether the defendant is the lawful owner of the suit property:

I am not satisfied from the evidence placed before the court that the defendant is the lawful owner of the suit property. The defendant claimed to have purchased the suit property from one, Billah Wario, deceased on 15<sup>th</sup> August, 2002 at a consideration of Kshs.210,000/=. A copy of what was purported to be an agreement for sale between the defendant and the said Billah Wario dated 15<sup>th</sup> August, 2002 referred to Plot No. 88 situated at Mukuru Kwa Njenga. The purported agreement was not signed by the defendant. The defendant also produced a certificate of ownership issued to him by Kwame Youth Project. The defendant led evidence that he was informed by Billah Wario, deceased that after resurvey, Plot No. 88 was given a new land reference No. 33. The defendant claimed that Billah Wario and PW 2 were officials of Kwame Youth Project. The defendant did not place any evidence before the court showing that either Billah Wario or Kwame Youth Project from which he claimed to have acquired the suit property owned the property. The defendant claimed that Kwame Youth Project changed its name to Kwame Investments Limited which owned the suit property. No evidence was placed before the court to support that contention. In the absence of any evidence that either Billah Wario or Kwame Youth Project owned the suit property, the only conclusion which the court can make is that they had no proprietorship interest which they could transfer to the defendant. The defendant did not therefore acquire any right legal or equitable in the suit property.

I am not satisfied therefore that the defendant is the lawful owner of the suit property. The evidence placed before the court shows that the property is owned by the plaintiff. The plaintiff has demonstrated that she acquired the suit property from the then registered owner thereof, Kwame Investments Limited for valuable consideration and that she was issued with a title in respect thereof. The plaintiff produced in evidence among others, a title for L. R No. 24884/51 issued on 23<sup>rd</sup> March, 2012 in her favour under the Registration of Titles Act, Chapter 281 Laws of Kenya after a survey of what was known as Plot No. 33. The defendant did not place any evidence before the court showing that the plaintiff acquired the suit property fraudulently.

Due to the foregoing, it is my finding that the defendant is not the lawful owner of the suit property.

Whether the defendant is entitled to the reliefs sought in the counter-claim:

As stated earlier, the defendant sought several reliefs against the plaintiff by way of a counter-claim. The first relief sought was damages. Having held that the defendant is not the lawful owner of the suit property, he has no right to claim damages against the plaintiff who holds a valid title over the property. No basis of whatsoever nature has been laid for the various heads of damages sought. The defendant had also sought a declaration that the plaintiff's claim against him was misguided and untenable. As I have mentioned earlier in this judgment, the plaintiff withdrew her claim against the defendant. In the circumstances, this prayer is not available to the defendant. The defendant had also sought injunction to restrain the plaintiff from interfering with the defendant's quiet possession of the suit property. The defendant has failed to establish his interest in the suit property. This court cannot restrain the plaintiff who is the registered owner of the suit property from dealing with the same. In the circumstances, the injunction sought is also not available to the defendant. The last relief sought was for vacant possession. As I have already held above, the defendant has not established his claim over the suit property. That being the case, there is no basis for the eviction order sought.

On the issue of costs, the defendant has failed in his counter-claim and as such is liable to pay the costs thereof. I have noted however that the defendant was awarded costs of the plaintiff's suit which was withdrawn which costs the defendant has not pursued. In the circumstances, I will award the plaintiff the costs of the counter-claim but the same shall only become recoverable in the event that the plaintiff had paid the costs which were awarded to the defendant herein on the withdrawal of the plaintiff's suit or if the same was not paid, if the defendant pursues the recovery of the same.

Conclusion:

In conclusion, I have found no merit in the defendant's counter-claim. The same is dismissed with costs recoverable as stated earlier in the judgment.

**Delivered and Dated at Nairobi this 26<sup>th</sup> day of September 2019**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

Mr. Osoro h/b for Mr. Nyambane for the Plaintiff

Ms. Njoroge h/b for Mr. Gichigi for the Defendant

