



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 227 OF 2001

PHILIP K.TANUI.....PLAINTIFF

=VERSUS=

RUTH C. CHEPNGETICH & ANOTHER.....DEFENDANTS

JUDGEMENT

1. The Plaintiff brought this suit against the Defendants in which he claims the following reliefs:-

- a) An order declaring that the suit premises is the property of the Plaintiff jointly with the Defendants as tenants in common in equal shares.*
- b) An order for the production of full accounts of rentals receivable and/or received by the Defendants from the suit premises from January 1997 to date.*
- c) An order that the Plaintiff is entitled to and should be paid one third of all the rents as in prayer (b) above.*
- d) The Defendants be ordered to pay forthwith 1/3 of the rent paid so far.*
- e) An evaluation of the suit premises*
- f) An order for a permanent injunction restraining the Defendants jointly and severally from alienating allocation or in any other manner disposing of LR No.209/12919.*
- g) General damages*
- h) Costs of this suit*
- i) Any other relief*

2. The 1st Defendant is a retired civil servant who was at one time the Principal of Pangani Girls High School, Nairobi. The 2nd Defendant is also a retired civil servant who until her retirement was working at the Kenya Revenue Authority where she had been seconded from the Treasury. The subject matter of this suit is **LR No.209/12919** at Kileleshwa on which are erected two maisonettes (suit property).

3. The suit property is currently registered in the joint names of the Plaintiff and the two Defendants as tenants in common in equal shares. It is the Plaintiff's case that he and the two Defendants jointly applied for allocation of the suit property to the then president which application was duly approved. A letter of allotment was given followed by a grant after payment of the requisite fees.

4. On 16th July 1997, the Plaintiff and the Defendants signed a Memorandum of Understanding (MOU) in which it was agreed that the suit property was to be sub-divided so that two titles in the name of the Defendants could be processed on condition that the two Defendants bought off the Plaintiff's share. Despite the signing of this MOU, the Plaintiff later discovered that the Defendants had commenced the process of sub-division of the suit property without involving him hence the filing of this suit.

5. It is the 1st Defendant's case that prior to her retirement as Principal, Pangani Girls High School, she was residing in one of the maisonettes in the suit property identified as MG 776 "A" which had been reserved for occupation by Civil Servants. When the government was advised by the World Bank to sell the houses, she applied for allocation of the house she was occupying. The then president approved

the allocation. As the 1st Defendant was busy, she entrusted the Plaintiff to follow up the allocation and acquisition of title.

6. The Plaintiff, who acted as a broker within the Lands Office pursued the allocation and later sneaked in his name as one of the beneficiaries and that is how the Plaintiff's name is on the title. She testified that she made her part of the payment and that the Plaintiff did not provide any payment towards processing of title documents. She stated that the Plaintiff was only to be given a token for his role in processing the title documents. She denied that she ever signed the MOU which is said to have been signed on 16th July 1997.

7. On her part, the 2nd Defendant's case is that her husband was occupying one of the maisonettes identified as MG 776 "B". When her husband retired, she was allocated the same house as she was too a civil servant. When the government put up the civil servants houses for sale, she applied for the house where she was staying. As she was busy working, she entrusted the work of processing title to the 1st Defendant who in turn gave the task to the Plaintiff to do the same. It is the 2nd Defendant's case that the Plaintiff who was not a civil servant fraudulently processed title in his name together with the two Defendants. The 2nd Defendant argues that the Plaintiff never made any contribution towards the purchase of any of the two maisonettes and as such has no basis to lay claim to either of the two.

8. The 2nd Defendant denied ever signing the MOU dated 16th July 1997 or that the Plaintiff is entitled to any rental income. She testified that she has been residing in the maisonette and that she has not rented it out to anyone. She stated that the other Maisonette is occupied by the extended family of the 1st Defendant who resides in the United States of America.

9. I have carefully considered the Plaintiff's evidence as well as the evidence adduced by the Defendants. I have also considered the submissions by the Plaintiff as well as the submissions by the Defendants. There is no contention that the title to the suit property is currently registered in the name of the Plaintiff and the Defendants as tenants in common in equal shares. The issues which emerge for determination are firstly, whether the registration of the Plaintiff as co-owner of the suit property was obtained by fraud. Secondly whether the Plaintiff is entitled to 1/3 share of the suit property. Thirdly is the Plaintiff entitled to 1/3 of the rental income from the suit property? Lastly is the Plaintiff entitled to the prayers sought in the Plaintiff?

10. The Defendants in their evidence claimed that the registration of the Plaintiff as a co-owner of the suit property was procured through fraud. I have looked at the defence by the Defendants. It does not raise any particulars of fraud on the part of the Plaintiff. In fact contrary to the allegations of fraud which were raised in passing during the hearing, the Defendants have admitted the existence of the MOU signed on 16th July 1997 and it is one of the documents they listed in their documents in support of their case. A party is bound by his/her pleadings and departure from the pleadings cannot be allowed. See **Independent Electoral and Boundaries Commission & another Vs Stephen Mutinda Mule and 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladegi (NIG) Vs Nigeria Adereji**, JSC expressed himself as follows:-

"It is trite principle in law that parties are bound by their pleadings and that any evidence by any of the parties which does not support the averments in the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded..".

11. The Plaintiff's name was put in the title as co-owner and in a memorandum of understanding dated 16th July 1997, the Defendants recognized his right and agreed to buy him off. They cannot therefore turn around and claim that he was not entitled to a share as he was not a civil servant particularly when they have even admitted in their pleadings the existence of the MOU. The allegations of fraud therefore have no basis.

12. On whether the Plaintiff is entitled to 1/3 share of the suit property, there is no doubt that he is entitled to 1/3 of the suit property. The title clearly states that the Plaintiff together with the Defendants are tenants in common in equal shares. As the property could not be shared amongst the three, the parties entered into an MOU dated 16th July 1997. The Defendants are trying to wriggle out of the MOU without any basis. If the Defendants were serious that they did not sign the MOU, they should not have admitted it in their pleadings and should have even had their signatures subjected to forensic examination. I therefore find that the Plaintiff is entitled to 1/3 of the suit property.

13. The Plaintiff is seeking 1/3 of the rental income from the suit property. As at the filing of this claim, the Plaintiff claimed that the maisonettes were bringing in rental income of Kshs.100,000/= . There was no evidence adduced to show that this was the income in 2002 or 2003 when the Plaintiff was amended. The Plaintiff commissioned a valuer in 2006 who found that each of the maisonettes was being let out for Kshs.60,000. There was no evidence to controvert this finding. Though the Defendants claim that they are the ones residing in those two maisonettes, there is no evidence to prove that that is the case. The valuer was not allowed to access the houses during the valuation. However be that as it may, the rental income can be assessed and determined and as a co-owner, the Plaintiff has been losing out whereas the Defendants have been enjoying the benefits of the suit property. I therefore find that the Plaintiff is entitled to 1/3 share of rental income which will be assessed to be due for the period he has been deprived of the same.

14. On the analysis herein above, I find that the Plaintiff has proved his claim against the Defendants on a balance of probabilities. I enter Judgement for him against the Defendants jointly and severally as follows:-

a) A declaration that LR No 209/12919 is owned by the Plaintiff and the Defendants as tenants in common in equal shares.

b) An order for full accounts of rental receivable and/or received from the two maisonettes on LR No.209/12919 from January 1997 until settlement of the claim and further that the Plaintiff is entitled to 1/3 share from those rental income.

c) The suit property to be valued with a view to the Defendants buying off the Plaintiff by giving him 1/3 share of the value or if this is not possible, the suit property to be sold so that the three owners can have their equal share.

d) Until this matter is fully settled, the Defendants are hereby restrained from in any manner interfering with the suit property [LR No.209/12919] or disposing it unless it is towards realization of the decree herein.

e) The costs of this suit to be paid by the Defendants.

Dated, Signed and delivered at Nairobi on this 31st day of October, 2019.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Jemutai for M/s Nabenge for Plaintiff and

Mr Ngugi for Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE