



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**MILIMANI LAW COURTS**  
**ELC NO. 59 OF 2011**

**B I A.....PLAINTIFF**

**=VERSUS=**

**G A & 2 OTHERS.....DEFENDANTS**

**JUDGEMENT**

**INTRODUCTION.**

1. The Plaintiff is the wife of the first defendant. The two have not been living together since 1999 when the first defendant moved out of a house at Buruburu Estate Phase 1. The house is on LR No. Nairobi/Block [...] (suit property). The first defendant had purchased the suit property on mortgage from his employer, [Particulars Withheld] Company Limited. The suit property was used as security for the amount advanced.

2. In 1999, the first defendant moved out of the suit property leaving behind the plaintiff and her children due to what he called frustration from the plaintiff. At that time the plaintiff was receiving rental income from the extensions to the main house. The first defendant was unable to service the loan and [Particulars Withheld] Company Limited threatened to sell the suit property to realize the outstanding loan. The first defendant was put under intense pressure from [Particulars Withheld] Company Limited until he decided to sell the suit property in order to repay the loan instead of the same being sold in a public auction.

3. The suit property was sold to the second and third defendants who had the same registered in their name on 18<sup>th</sup> November 2010. The second and third defendant then issued notice to the plaintiff to vacate the suit property leading the plaintiff to file the present suit in which she sought the following reliefs:-

***1. A permanent injunction restraining the defendants herein and/or the agents and/or any persons claiming under them from evicting the plaintiff from the suit premises and from interfering with the plaintiff's quiet possession to the said plot known as LR No. Nairobi/Block [...] Buru Buru phase 1.***

***2. A declaration that the Plaintiff is entitled to occupation of the suit premises against the defendants herein and that the transfer of the suit premises is fraudulent and /or null and void.***

***3. In the alternative and without prejudice, a declaration that the plaintiff is entitled to proper notice before any attempted eviction.***

***4. General damages and exemplary damages and costs of the suit.***

The second and third defendant filed a defence to the plaintiff's claim and raised a counterclaim in which they sought the following reliefs:

- a) A permanent injunction restraining the plaintiff, her servants and/ or agents from doing the following acts or any one of them , that is to say from interfering with the right of ownership and possession of the 2<sup>nd</sup> & 3<sup>rd</sup> defendants or otherwise howsoever at any other time or by collecting rental income or otherwise howsoever trespassing upon ALL THAT parcel of land known as Nairobi/Block/[...];*
- b) A mandatory injunction directed at the plaintiff to hand over to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants vacant possession of the property known as Nairobi/Block/[...];*
- c) Mesne profit at the rate of Kshs.55,000/= per month from 1<sup>st</sup> December 2010 until date of judgement;*
- d) Costs of this suit together with interest thereon at court rates.*
- e) Any further or other as this honourable court may deem fit and just to grant in the circumstances.*

5. What then followed was a series of applications one after another. The second and third defendants who had taken a mortgage to buy the suit property could not take it any more as they were servicing the loan yet they were not benefiting from the suit property as the plaintiff had refused to vacate the same. The second and third defendants were forced to sell the suit property to the interested party who had the same transferred to her on 12<sup>th</sup> March 2014.

6. This suit was finally certified ready for hearing on 7<sup>th</sup> April 2016. A hearing date could not be fixed until 16<sup>th</sup> February 2017 when the same was fixed for hearing on 27<sup>th</sup> April 2017. When the case came up for hearing on 27<sup>th</sup> April 2017, the plaintiff's advocates who had been duly served were not in court. The plaintiff too was not in court. The plaintiff's suit was dismissed for non-attendance. The second and third defendant's counter-claim was set down for hearing on 20<sup>th</sup> June 2017. On the 20<sup>th</sup> June 2017 when the case came up for hearing, the plaintiff's advocate Mr Khamati indicated that he wished to withdraw from acting for the plaintiff as he was unable to get in-touch with his client. The case was adjourned and Mr Khamati was given 7 days to file an application to cease acting for the plaintiff. The case was fixed for mention on 30<sup>th</sup> June 2017.

7. On 30<sup>th</sup> June 2017 when the case came up for mention, Mr Khamati indicated to court that he had prepared an application to cease acting for plaintiff. He was granted leave to file the same and a hearing date for the application was fixed on 19<sup>th</sup> September 2017. On 19<sup>th</sup> September 2017 Mr Khamati sent Mr Omwenga who indicated to court that Mr Khamati no longer wished to proceed with the application as he had instructions to proceed. He prayed for 21 days to enable him file documents in support of the plaintiff's case. The case was fixed for hearing on 4<sup>th</sup> December 2017.

8. On the 4<sup>th</sup> of December 2017 neither the plaintiff's advocate nor the plaintiff were in court. The hearing therefore proceeded ex-parte.

### **SECOND AND THIRD DEFENDANTS' CASE.**

9. The second and third defendant's case was stated by the third defendant Esther Waithera Karanja who adopted her statement recorded on 27<sup>th</sup> July 2011 and produced the documents filed in court on the same day. She added that she had taken a mortgage to enable her and her husband purchase the suit property. The suit property was duly transferred to them but the plaintiff has refused to give vacant possession. The plaintiff is the one collecting rent from the suit premises. The second and third defendant later sold the suit property to the interested party who is now the registered owner of the suit property.

10. The second and third defendants stated that they are entitled to mesne profits as the plaintiff has been enjoying rent from the suit premises when the plaintiff who is not entitled to it is enjoying it.

### **INTERESTED PARTY'S CASE**

11. The interested party stated that she took a mortgage to purchase the suit property which is now in her name. The interested party adopted her statement which she recorded on 11<sup>th</sup> March 2016 which was filed in court on 15<sup>th</sup> March 2016. She was registered as owner of the suit property on 12<sup>th</sup> March 2014. She found that electricity and water had been disconnected from the suit property. She had to pay the outstanding bills which were over 165,000/= . Despite all this, the plaintiff has refused to vacate the suit property. The plaintiff had denied her rental income from the suit property.

### **ANALYSIS**

12. I have gone through the documents relied upon by the second and third defendants in their counter-claim. There is no doubt that the suit property was sold by the first defendant to the second and third defendants. There is a sale agreement dated 14<sup>th</sup> September 2010. The suit property was subsequently transferred to the second and third defendants on 18<sup>th</sup> November 2010 as per the certificate of lease. The second and third defendants had taken a mortgage from Housing Finance Company. The Housing Finance Company caused a valuation of the property to be carried out in 2010 with a view to advancing the second and third defendants a loan. Rental income of the suit property was then assessed at 60,000/= .

13. Though the plaintiff had filed this suit claiming that the sale of the suit property to the second and third defendants was done fraudulently without her knowledge, affidavits she swore in the interlocutory applications herein show that she was aware. In one such affidavit sworn by her on 1<sup>st</sup> April 2011, she stated in paragraph 7 that the intention of her husband (first defendant) in looking for a buyer was to get the best price to enable him to offset the loan and give his family alternative accommodation.

14. In yet another affidavit, the plaintiff acknowledged that she was in fact receiving rental income from the suit property and that is what was keeping her going with her children as the first defendant had moved out of the house in 1999. The suit property would have been sold by [Particulars Withheld] Assurance Company Limited. The first defendant got a better deal which he would not have had had the suit property been sold in a public auction. The second and third defendants were denied their rightful ownership of the suit property which she does not bother to maintain if the external photographs of the same are anything to go by.

15. The water and electricity were disconnected and the interested party who is now the new owner had to pay over Kshs.165,000/= to have the same re-connected . Despite this, the plaintiff is not keen on giving vacant possession. Her intention seems to run down the suit property such that whoever takes over will get a shell of a house.

### **CONCLUSION.**

16. The second and third defendants who are plaintiffs in the counter-claim have been unfairly kept out of the suit premises until they had to sell the same to the interested party who is now the registered owner with effect from 12<sup>th</sup> March 2014. As at August 2010, rental income had been assessed at kshs.60,000/= per month . The second and third defendants are claiming Kshs.55,000/ per month being mesne profits. After the first defendant moved out of the suit property, the plaintiff was receiving rental income of approximately Kshs.30,000/=per month . This is clear from the first defendant's replying affidavit to the plaintiff's application for injunction sworn on 22<sup>nd</sup> March 2011. In a further affidavit sworn by the plaintiff in response to the first defendant's replying affidavit, the plaintiff conceded that the rental income is what kept them going after the first defendant moved out of the matrimonial house. This rental income was from the other houses on the suit property which were not occupied by the plaintiff. I therefore find that the second and third defendant's claim for mesne profits of **Kshs.55,000/=** per month is well founded.

17. The second and third defendants have proved their counterclaim on a balance of probabilities. I allow the same in terms of prayer **(a),(b) (c)** and **(d)**. The defendants shall also have cost of the plaintiff's suit which was dismissed.

**Dated, Signed and delivered at Nairobi on this 15<sup>th</sup> day of January, 2018.**

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Kamau for Mr Khamati for Plaintiff

Mr Mungai for 2<sup>nd</sup> and 3<sup>rd</sup> defendant and interested party and Mr Njenga for 1<sup>st</sup> defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**