



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 469 OF 2017

JACINTA NYAMBURA NDUNG'U.....PLAINTIFF

VS

ELIAS KAMANDE KANG'ETHE.....DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendant on 3/10/17 seeking an order of specific performance and costs interalia. The Plaintiffs claim is premised on an agreement of purchase of land of a portion of 1 acre of Parcel Loc.6/Munguini/903 between her deceased son and the Defendant. The Plaintiff claims that despite the Defendant receiving Kshs. 210,000/= part payment of the purchase price, has failed to transfer the said suit land to the Plaintiff.

2. In opposing the Plaintiff's claim the Defendant filed a defence and Counter Claim on 12/10/17 denying the Plaintiff's claim and stated that the Plaintiff has no locus standi to sue or sustain the claim. In his Counter Claim he sought for eviction orders as well as general damages for trespass.

The case for the Plaintiff.

3. Earlier on 5/12/17 the Defendant had written to the Deputy Registrar to enter Judgment against the Plaintiff who had failed to file defence to Counter Claim. It would appear this request was not attended to by the Deputy Registrar. There is no evidence on record that judgment in default was entered. That notwithstanding the Plaintiff's suit was dismissed on 18/1/18 for non-attendance. It was noted that the date had been fixed in Court in the presence of the Plaintiff. The Counter claim therefore proceeded for formal proof.

The Defence case.

4. The Defendant avers that the contract of sale of the suit land was between him and the Plaintiff's son, therefore the Plaintiff is not privy to the same. He denied receiving any monies from the Plaintiff save that he acknowledges receipt of Kshs. 210,000/= from one Boniface Wainaina Ndungu as part payment for the land. He states that the transaction was frustrated by the death of the purchaser. According to the Defendant the Plaintiff has occupied the portion of the suit land since 2010, a period of 8 years. That the occupation is without any permission thus it is unlawful. That she is on perpetual trespass denying him use and profit from the suit land. That he is the registered owner of the suit land.

5. The Defendant stated that he has not refunded the purchase price because the Plaintiff has not proved that she has authority to receive the money.

6. The Defendant filed written submission which I have considered in determining the matter. The undisputed facts on record are as follows;

a) The Plaintiff has sued Pursuant to an agreement which she is not a party. The agreement was between her deceased son and the Defendant. The Plaintiff does not have a grant of representation for the estate.

b) The Defendant filed defence to the claim and Counter claim. In the counter claim he wants the Plaintiff to be evicted and payment of general damages in the sum of Kshs 10,000/- per year for unlawful occupation. The Occupation is 8 years before 12/10/07.

c) Plaintiff did not file a defence to the Counter claim.

7. Is the Plaintiff's occupation authorised? The Plaintiff took possession of the land on account of an agreement for sale between the Defendant and Plaintiff's son. The Plaintiff cannot legitimately lay a claim on the agreement on account of lack of privity of contract. She was not a party and does not have any letters of grant of administration in the estate of her deceased son to empower her to act in accordance with section 82 of the Law of Succession Act which states as follows;

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

Her entry into the land is not supported by a claim of any right lawfully against the Defendant. The remedy for specific performance therefore does not lie in favour of the Plaintiff because there was no privity of contract between the Plaintiff and the Defendant and secondly as she has no locus in law to pursue the claim. The Defendant has alluded to his desire to refund the purchase price to the rightful administrator of the previous purchaser. Perhaps the plaintiff needs to take the necessary steps to actualize the gesture.

8. Is the Defendant entitled to general damages for trespass and if so how much? The Defendant has sought for eviction of the Plaintiff. In his own words and claim the alleged trespass and occupation is 8 years at date of the Counter claim. That part of the Defendants claim is not defended by the Plaintiff. It may therefore be taken as truthful. The Defendant did not lead any evidence or give a guide on assessment of damages at Kshs 10,000/= during the period the Plaintiff has been in occupation of part of the suit land. The Defendant did not seek to evict the Plaintiff as seen as the Plaintiff purported to take possession of the suit land. Perhaps it can be attributed to a concession that the Plaintiff had sought possession of the suit land on account of agreement between the Plaintiff and the Defendant's son. In this circumstances the Defendant acquiesced to the Plaintiff's occupation of part of his land. In totality the Defendant is not entitled to any general damages for trespass. The Defendant is willing to refund the money to the Plaintiff. The Plaintiffs occupation was authorized or acquiesced by the Defendant.

9. The Defendant has succeeded in litigating his Counter claim on eviction and I see no reason to deny him costs.

10. Final orders;

a) The Plaintiff to give vacant possession of the suit land to the Defendant within 60 days from the date of this judgment. In default eviction to issue in the usual manner as provided by law.

b) The Plaintiff to pay the Defendant costs for the suit and the Counter claim.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MAY, 2018.

J G KEMEI

JUDGE.