



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO. 179 OF 2016**

**MARTIN OOKO OTIENO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MARGARET ALUOCH MAJIWA..DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. By a plaint dated 30<sup>th</sup> June 2016, the plaintiff Martin Ooke Otieno sued the defendant Obare Majiwa seeking to be granted the following reliefs:

**(a) A permanent injunction restraining the defendant, his servant or agents from dealing with, disposing off, selling, collecting rent, trespassing, intruding, damaging and or interfering in any manner or with the existing premises on plot No 23, Sosiani Shopping Centre.**

**(b) A declaration that the plaintiff Martin Ooko Otieno is the owner of Swahili house situate at Sosiani Shopping Centre and known as plot No. 23.**

**(c) Eviction of the Defendant from the said house on plot No. 23. Sosiani Shopping Centre.**

**(d) Costs of suit.**

2. On his part, the defendant contested the plaintiff's claim vide his defence dated 14<sup>th</sup> July 2016 and put the plaintiff to strict proof. The defendant also made a counter – claim stating that the suit plot No 23 forms part of the estate of his father the late Ogola Majiwa. That Margaret Majiwa could not pass any title to the plaintiff without consent of the family. Consequently the defendant asked the Court to allow his prayers in the counter – claim that:

**(a) A Mandatory Injunction directed to the Plaintiff restraining him from selling, alienating, disposing, collecting rents from the tenants within the disputed property and or in any way interfering with its use and management.**

**(b) A declaration that the suit property being the nineteen roomed house is still part of the Estate of the late OGOLA MAJIWA OBARE.**

**(c) Costs and interest of the suit.**

3. After pleadings closed, the parties called their respective witnesses to support their claim. The plaintiff called a total of five (5) witnesses while the defendant called two witnesses. Each of the witnesses adopted their statements filed and on record. PW 1 was Clement Wasike Wephukhulu the area clan elder. He told the Court of receiving information of the sale of the suit property between the plaintiff and Margaret Majiwa. That the person to receive rent after the sale is the plaintiff. PW 1 stated that Margaret – deceased had 3 houses of which she also sold another house to Bw Wainaina. The witness also stated that the late Ogola shared his properties to his family members before he died. That mzee Majiwa had given this witness a copy of his “will” to keep for him. That after the death of Margaret, the defendant forced himself into the suit property.

4. In cross – examination PW 1 stated that he did not summon the family of Ogola Majiwa after his death to read out the “will” to them. This “will” also did not appoint an executor. PW 1 admitted not being a witness in the sale agreement. That members of the other houses have also sold their parcels allocated to them because it was their entitlements. In re – examination, the witness said there is no dispute over the sale made by the defendant & Margaret to one Thomas Arati.

5. PW 2 is Margaret Auma Adoyo who said that she is a sister to Margaret Majiwa – deceased. PW 2 confirmed that the plaintiff purchased the suit property from the late Margaret. She was not present when the agreement was drawn but she said she witnessed her sister receive part of the payment. She also said that Margaret had showed her a will giving her authority to sell the suit plot.
6. Brian Omondi testified as PW 3. He was an employee of the plaintiff living and selling water at the suit premises. PW 3 stated that on 10<sup>th</sup> June 2016, the defendant went to the suit premises and started beating him. The defendant also ordered him to vacate the premises. He reported the incident to the plaintiff and to Nyalı police where he was also issued with a P3 form.
7. The plaintiff testified as PW 4. He said he brought this suit because the defendant started disturbing him after he purchased the suit plot. That he purchased the suit plot on 8<sup>th</sup> October 2015 for Kshs 850,000 and the agreement was reduced into writing. That after taking over the property, he built two more rooms to make them 19. PW 4 continued that the defendant chased away PW 3 & PW 5 from the suit property after the death of Margaret in March 2016. He asked the Court to allow his prayers contained in the plaint. He produced the documents annexed to his list as exhibits in this case. The defendant’s advocate only contested the production of the “will”.
8. In cross – examination, PW 4 stated that he heard about the sale of this house from his step mother who went to the same church as Margaret. That Margaret showed her a “will” & a marriage certificate. That PW 4 knew Maxwel (PW 5) when Margaret called him during the sale and introduced him to the plaintiff. That he only met the defendant when he went to collect rent at the suit premises and found he had changed the tenants and was demanding rent from the new ones.
9. PW 5 was Maxwell Onyango Kanyendwe. He said he lives in Mtongwe. PW 5 confirmed that Margaret sold the suit plot to the plaintiff. He was a witness to the agreement. PW 5 said Ogola Majiwa had 4 wives. That each of Ogola’s children had been given houses some at Mnazi moja and sisi kwa sisi. PW 5 stated that Margaret was given 3 houses all of which she had sold at the time of her death. According to PW 5, Margaret had capacity to sell the suit house to anyone including the plaintiff.
10. In cross – examination, PW 5 stated that Margaret is her aunt. That he did not have the original “will” as it is Margaret who had it. That the house given to Teodora Ogola was sold by Margaret and the defendant without involving other family members. On 30.9.2014, Margaret sold another plot to Anthony Shahenza. He was not a party to this agreement. In re – examination, PW 5 stated that the plot does not have a title because it is on a house without land ownership. This marked close of the plaintiff’s case.
11. The defendant testified as DW 1. He said that Margaret Majiwa is his step mother. He does not know the plaintiff. His father was Ogola Majiwa who died on 15.6.2002. DW 1 said he has never heard that his father had a “will” and only saw it in Court. He was not aware of any sale conducted between the plaintiff and Margaret. That the suit land was family land was being administered by Margaret. That his father owned 7 houses 3 of which have been sold and 4 were still within the family management. He admits selling a plot to Thomas Arati vide the agreement of 19.10.2015. That they have commenced the process of taking out letters of administration of his late father.
12. In cross – examination, DW 1 concedes PW 5 lived with the late Margaret. He denied the sale to the plaintiff and denied getting to the suit property by force. DW 1 said he used to live in the house at Kisumu Ndogo which he sold for Kshs 2 Million. That no one has complained about this sale. That Margaret also sold a house to Anthony & Okwach. DW 1 conceed when they did these sales, they both did not have letters of administration of their father’s estate. He was not paying ground rent in respect to the suit property. He is unaware of any demand notice issued in respect of ground rent.
13. DW 2 is Irene Akinyi. She adopted her statement filed before Court. She is a sister to the defendant DW 2 said her father died when she was 8 years old. She lived with Margaret from the time she was 2 years old until Margaret died. That she had never seen her father’s “will”. She was also not aware of the sale of the suit plot to the plaintiff. She denied the defendant took over the suit property by force.
14. In cross – examination, DW 2 confirmed that that clan elder for this area is mzee Wasike (PW 1). That she did not complete form four as Margaret sent her away in 2013. In 2015, she was not living with Margaret. She denied beating and chasing away PW 3. That DW 1 came to live on the suit plot after the funeral of Margaret. This marked the close of the defendant’s case.
15. Parties filed written submissions which I have read. The defendant submits that Margaret Majiwa could not sell and pass title to the plaintiff as no letters of administration had been taken in respect of the estate of the late Ogola Majiwa. In support of this submission he cited the Court of Appeal case of **Elly Odhiambo Onyuka vs Ayub Odhiambo Migwala C. A No 81 of 2002** which discussed the import of the provisions of section 45 of the Law of Succession Act and section 8 of the Land Control Act, Cap 302.
16. The plaintiff on his part submits that Margaret had capacity to sell him the Swahili houses which he describes as chattels and not immovable property. Secondly the plaintiff submits that the defendant having himself sold a part of his father’s property without a grant cannot use the shield of absence of letters of administration to void the plaintiff’s sale. That Margaret had capacity to sell the suit houses on account of the “will” and the defendant cannot feign ignorance of the said “will” after the death of Margaret. The plaintiff therefore urges the Court to find in his favour and dismiss the counter – claim with costs.
17. From the evidence adduced by the plaintiff, I am satisfied that he has proved that he purchased the Swahili house consisting of 17 rooms from Margaret Aluoch Majiwa on 8<sup>th</sup> October 2015. He has established this fact by producing the sale agreement as well as calling the oral evidence of PW 1, PW 2, PW 3 & PW 5 who all confirmed that the sale took place. The plaintiff was immediately put in possession and he added two rooms to the existing ones. However trouble began after Margaret’s burial in March 2016 as the defendant then came and took over possession from the plaintiff and or his representative.
18. The defendant has denied taking over possession by force. I hold a different view from the defendant on how he took over possession. From the evidence adduced, it is clear he was not living in the suit premises before the demise of Margaret. He also admits by his own evidence that it is Margaret who lived in the suit property while he was living in Mnazi Moja/Sosiani. It is DW 2 who once lived with the late Margaret before she was sent away in 2013. It is shown by the evidence that the plaintiff was put in possession between October 2015 -

March 2016. However in March 2016, the scenario changed as the defendant came and chased away the plaintiff's representative and or dispossessed the plaintiff of the suit premises and took control of the same without the consent of the plaintiff. That dispossession was not done in peace. Further he did not serve the plaintiff with any notice to vacate before he took over. The inference left to be drawn is that he took over possession by force as possession not voluntarily given or obtained in accordance with the law is equivalent to use of force.

19. The remaining question for determination is whether Margaret Majiwa had capacity to sell and transfer the Swahili house to the plaintiff. The defendant averred the properties belonged to his late father Ogola Majiwa. There is no dispute that the letters of administration of the estate of Ogola Majiwa – deceased have not been issued/taken out. Did the suit property constitute part of Ogola's estate? From the evidence adduced, there is no document that has been shown to this Court that the suit property belonged to Ogola Majiwa.

20. It is the plaintiff who tried to show that the property belonged to Ogola Majiwa by making reference to a "will" dated 8<sup>th</sup> October 2001 stating that this plot was amongst those given to Margaret Majiwa from Ogola's properties. The plaintiff stated that he proceeded to purchase the suit property on account of this "will" and the marriage certificate which Margaret showed to him. The defendant objected to the production of this "will". Since the plaintiff did not pursue its production, the same is deemed as not forming part of the evidence adduced. Besides the "will", the plaintiff called witnesses who are related to Margaret and who all stated that the house had been given to Margaret (PW 1, PW 2 and PW 5). The suit property was solely being used and enjoyed by the late Margaret in her lifetime. Therefore it can be implied she owned it and was thus entitled to sell it and had capacity to sell. The sale to the plaintiff can be treated as valid under the doctrine of innocent purchaser for value without notice.

21. The plaintiff having discharged the burden of capacity of Margaret to sell the suit Swahili house, the burden in my view was shifted to the defendant to show contrary evidence but which he failed to discharge. He did not demonstrate by evidence that the house was his father's for it to comprise part of the estate. DW 2's evidence favours of the plaintiff's case. She said that she lived with the deceased Margaret in the suit house from the time she was two years old. As at 2002, she was 8 years old meaning she was born around 1994. The evidence of all the witnesses is that Margaret lived in impugned premises as early as 1994 or from 1996 and continued to live therein after the death of her husband in 2002 until 2015 when she sold the property. All these time neither the defendant nor his siblings had come forth to claim this house as belonging to their father. Any person doing due diligence can only infer this to mean that this was a known property to Margaret whether given by "will" or otherwise. I do not see how the defence of section 45 of Cap 160 can be used to nullify the transaction between Margaret and the plaintiff in the circumstances of this case. In my view, the Swahili house had it not been sold during the lifetime of Margaret would have formed part of the estate of Margaret Majiwa and not her husband's estate.

22. In light of the foregoing, I find that the sale between the plaintiff was valid and the plaintiff is entitled to enjoy the fruits of his toil/investment. Further in regard to the defendant's counter – claim, the same does not lie for two reasons. First he does not hold letters of administration of his father's estate to bring a suit in that behalf. Secondly, I have found that the property was owned by Margaret who has since sold her interest the same not constituting part of the estate of Ogola Majiwa.

23. Consequently based on my findings above, I forthwith dismiss the defendant's counter – claim. The plaintiff's claim is allowed as prayed in the plaint. The defendant, his representatives or agents are hereby restrained permanently from interfering with the plaintiff's user and occupation of the suit premises. On this note, the defendant and her sister Irene Akinyi (DW 2) are hereby given 30 days to vacate the rooms they are personally occupying. In default, the plaintiff is at liberty to cause their eviction using laid down procedures under the law. The costs of the suit is awarded to the plaintiff.

**Dated, signed & delivered at Mombasa this 29<sup>th</sup> June 2018**

**A. OMOLLO**

**JUDGE**