



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 2 OF 2017

FAITH KARIMI MUCHANGI.....1ST PLAINTIFF

BRIAN BIKO MURITHI MUCHANGI.....2ND PLAINTIFF

CECIL MUTURI MUCHANGI.....3RD PLAINTIFF

VERSUS

PETER NJERU MVUNGU.....DEFENDANT

JUDGEMENT

1. By a plaint dated and filed on 13th January 2017, the 1st, 2nd and 3rd Plaintiffs (hereinafter the *Plaintiffs*) sought the following reliefs against the Defendant;

- a. A permanent injunction against the Defendant restraining him from carrying on any activities on land parcel No. Nthawa/Gitiburi/2698 and land parcel No. Nthawa/Gitiburi/2699.
- b. A permanent injunction against the Defendant evicting him from land parcel No. Nthawa/Gitiburi/2698 and land parcel No. Nthawa/Gitiburi/2699 owned by the Plaintiffs.
- c. An order compelling the Officer Commanding Siakago Police Station to aid with the eviction of the Defendant.
- d. An order of injunction stopping the Defendant, his servants or agents from harassing the Plaintiffs.
- e. Mesne profits for the occupation and use of the property.
- f. Costs of this suit.

2. The Plaintiffs pleaded that they were the registered proprietors of *Title No. Nthawa/Gitiburi/2698* (hereinafter *parcel No. 2698*) and *Title No. Nthawa/Gitiburi/2699* (hereinafter *parcel No. 2699*). The two properties shall jointly be referred to as the *suit properties*.

3. It was further pleaded that they acquired the suit properties through a process of succession as beneficiaries of the estate of the late Nick Muchangi Mvungu (hereinafter the *deceased*). The deceased was the 1st Plaintiff's husband and a brother of the Defendant.

4. The Plaintiffs contended that the Defendant had without just cause or excuse refused to vacate the suit properties and continued to benefit from a bar, a butchery, and rental units thereon without regard to the Plaintiffs' rights.

5. It was also averred that despite demand and notice of intention to sue, the Defendant had failed to make good the Plaintiffs' claim or to settle the matter out of court hence the suit.

6. The Defendant filed a statement of defence dated 2nd May 2017 in which he denied the Plaintiffs' claim in its entirety. It was denied that the Plaintiffs were the owners of the suit properties. It was pleaded that the deceased had liabilities which were to be settled from the only asset he owned which was parcel No. 2698.

7. The Defendant further stated that the developments on the suit properties were done using borrowed funds which had not been fully

repaid. It was contended that the Defendant and his siblings had repaid some of the borrowed money but that the debt had not been repaid in full.

8. The Defendant also pleaded that during his lifetime, the deceased had sold to him parcel No. 2699 for valuable consideration hence it was not part of the deceased's estate. It was further contended that the process of succession was secretly undertaken by the Plaintiffs.

9. The Defendant denied that any demand or notice of intention to sue was given and put the Plaintiffs to strict proof thereof.

10. Even though the suit was relatively recent, the court decided to accord it a hearing on priority basis because of the nature of the dispute. This was a dispute pitting the family of deceased against one of the brothers of the deceased over ownership and possession of the suit properties.

11. The suit was initially scheduled for hearing on 1st November 2017 but the hearing could not proceed partly because the parties had not complied with pre-trial procedures under **Order 11 of the Civil Procedure Rules** and partly because the Defendant's counsel was absent.

12. The suit was then stood over to 13th December 2017 for hearing but it could not proceed because the Defendant's counsel had filed an application to cease acting for the Defendant. The suit was once more adjourned to enable the court dispose of the pending application. The said application by Ms Momanyi Gichuki & Co Advocates to cease acting for the Defendant was heard and allowed on 31st January 2018. The Defendant was accorded an opportunity to engage another advocate within 3 months.

13. The suit was ultimately fixed for hearing on 17th May 2018 when the suit proceeded for hearing. The Defendant did not, however, turn up for hearing and neither did he send an advocate to represent him.

14. At the trial hereof, the 1st Plaintiff, Faith Karimi Muchangi, testified on her own behalf and on behalf of her co-plaintiffs. She adopted her witness statement dated 13th January 2018 as her testimony. She stated that the 2nd and 3rd Plaintiffs were her children. It was her case that the suit properties initially belonged to the deceased and that upon his death, they acquired the same through *Embu High Court Succession No. 37 of 2015 in the matter of Mick Muchangi Mvungu (deceased)*.

15. It was her further evidence that when the relevant grant was duly confirmed, the Plaintiffs were issued with a certificate of confirmation of grant in consequence whereof they were registered as proprietors of the suit properties. She produced copies of the certificate of confirmation of grant and copies of the title deeds for the suit properties.

16. It was the contention of the Plaintiffs that upon the burial of the deceased, the Defendant moved in and occupied the building on parcel No. 2698 which had a bar and some rental houses. That was said to be in January 2003.

17. The Plaintiffs contended that the Defendant had been collecting rent from the building at the rate of Kshs 14,000/- per month. The bar was said to be fetching rent income of Kshs 6,000/- per month, the butchery Kshs 3000 per month whereas the two rental units fetched Kshs 2500/- per month. It was, therefore, contended that the Defendant had collected a total of Kshs 910,000/- for the last 5 years which the Plaintiffs claimed.

18. The Plaintiffs denied being aware of the alleged sale of parcel No. 2699 to the Defendant. They were not aware of any pending liabilities left by the deceased or any that were secured by the suit properties. They, therefore, urged the court to grant the prayers sought in the plaint.

19. Upon conclusion of the trial, the Plaintiffs' counsel informed the court that he intended to rely entirely upon the 1st Plaintiff's evidence and that he did not wish to file any submissions. The suit was thereupon fixed for judgement on 26th July 2018.

20. The parties herein did not file an agreed statement of issues for determination. Instead, the Plaintiffs filed their own version of twenty one (21) issues for determination on 1st November 2017.

21. The court has considered the pleadings and documents filed herein as well as the evidence tendered at the trial hereof in accordance with the provisions of *Order 15 Rule 2 of the Civil Procedure Rules*. The court is of the view that the following 8 issues arise for determination in this suit;

- a. Whether the Plaintiffs are the owners and registered proprietors of the suit properties.
- b. Whether the Plaintiffs acquired the suit properties through succession proceedings secretly.
- c. Whether the Defendant had acquired parcel No. 2699 for valuable consideration from the deceased during his lifetime.
- d. Whether the deceased had any liabilities which were to be settled from his estate.
- e. Whether the developments on the suit properties were built with borrowed funds and if so, whether the loan had been repaid in full.
- f. Whether the Plaintiffs are entitled to the reliefs sought in the plaint or any one of them.

g. Whether a demand and notice of intention to sue was issued.

h. Who shall bear the costs of the suit.

22. The 1st issue relates to ownership of the suit properties. Although the Defendant denied in his defence that the Plaintiffs were the owners and registered proprietors of the suit property, there is uncontroverted evidence on record that the Plaintiffs are the registered proprietors. The copies of the certificate of confirmation of grant and title deeds for the suit properties produced by the 1st Plaintiff proved such ownership. This evidence was not challenged at the trial since the Defendant did not attend the hearing.

23. The 2nd issue was raised by the Defendant in his statement of defence whereby he alleged that the Plaintiff had acquired the suit properties through succession proceedings which were undertaken secretly. The court has considered the evidence on record on this issue. There is some evidence on record that the application for letters of administration was published in the Kenya Gazette vide Gazette Notice No. 6595 of 17th May 2013.

24. The said notice invited any interested person to lodge objections to the making of a grant within 30 days from the date of publication thereof. There was no evidence on behalf of the Defendant to demonstrate any foul play in the manner in which succession proceedings were conducted. The burden of proof on this issue lay with the Defendant under *section 107 of the Evidence Act (Cap 80)*. The court finds that the Defendant failed to establish the alleged secrecy.

25. The 3rd issue is whether the Defendant had acquired parcel No. 2699 for valuable consideration from the deceased. This issue was raised by the Defendant in his defence. It was upon the Defendant to establish the alleged purchase from the deceased. The Defendant did not attend court to adduce evidence in support of the issue. The burden of proof lay upon him and the court finds and holds that he failed to discharge the burden.

26. The 4th issue was whether the deceased had any liabilities which were to be settled from his estate. The issue originated from the Defendant's defence. Apart from the Defendant's failure to adduce evidence on the issue, the court holds that even if there were such liabilities, the issue of their existence or settlement would fall within the jurisdiction of the civil or succession court. The Environment and Land Court has no jurisdiction over such matters.

27. The 5th issue was whether the developments on the suit properties were built with borrowed funds and, if so, whether the loan had been repaid in full. This issue originated from the Defendant. He did not adduce any evidence at the trial on the issue. He did not adduce any evidence or submit on what bearing such loan would have on the Plaintiff's claim. The court is of the view that such liabilities by a deceased person would fall outside the Environment and Land Court. The succession and/or civil courts would be best suited to determine the issue.

28. The 5th issue is whether or not the Plaintiffs are entitled to the reliefs sought in the plaint. There is no doubt that the Plaintiffs have established their claim to the suit properties. They are, therefore, entitled to some reliefs. The court is inclined to grant them reliefs (a), (b), (c) and (d) of the plaint. The court notes that prayer (b) is curiously worded. It seeks a *permanent injunction* against the Defendant "evicting" him from the suit properties. An order of injunction cannot generally evict a person in wrongful occupation of property, unless it is in the nature of a mandatory injunction.

29. The only aspect of the reliefs sought which requires further consideration is prayer (c) for *mesne* profits for the Defendant's wrongful occupation and use of the suit properties. The 1st Plaintiff who testified on behalf of all the Plaintiffs claimed that the building on the suit properties was fetching a monthly rent of Kshs 14,000/- as particularized in paragraph 17 hereof. The Plaintiffs, therefore, sought Kshs 910,000/- for the 5 years the Defendant is said to have benefitted from the suit properties.

30. The court is not satisfied that the claim for Kshs 910,000 was sufficiently justified by the Plaintiffs. There was no report from a valuer or other expert on how much income the building on the suit property would fetch as rent. There was no documentary evidence on the previous rent collections before the Defendant took over the suit properties. What is on record is only a bare statement by the 1st Plaintiff on the current monthly collections. The court finds that *mesne* profits were not sufficiently proved hence no award shall be made in respect thereof.

31. The 7th issue is whether a demand and notice of intention to sue was issued. The Plaintiffs pleaded its issuance in paragraph 11 of the plaint whereas the Defendant denied the same in his defence and put the Plaintiffs to strict proof thereof. The record of proceedings shows that neither the Plaintiffs nor the Defendants adduced any evidence on the issue. Although the 1st Plaintiff testified on behalf of the Plaintiffs, she did not produce a demand and notice of intention to sue. The court, therefore, comes to the conclusion that there is no evidence on record that such notice was issued.

32. The 8th and final issue is on costs of the suit. Under **section 27 of the Civil Procedure Act (Cap 21)**, the general rule on costs is that the costs of an action are at the discretion of the court, subject to the proviso that costs shall follow the event. So, a successful litigant should be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that the Plaintiffs and the Defendant are relatives. It may not be very helpful to make an award for costs which may aggravate the already strained relations amongst them. The court is of the view that each of the parties should bear their own costs.

33. The summary of the court's findings and holdings on the issues for determination is as follows;

a. The Plaintiffs are the owners and registered proprietors of the suit properties.

b. There was no evidence that the Plaintiffs acquired the suit properties through succession proceedings secretly.

- c. There was no evidence that the Defendant acquired parcel No. 2699 for valuable consideration from the deceased during his lifetime.
- d. There was no evidence that the deceased had any liabilities to be settled from his estate. In any event, that issue was outside the jurisdiction of this court.
- e. There was no evidence that the developments on the suit properties were built with borrowed funds. In any event, the issue of such liabilities was outside the jurisdiction of this court.
- f. The Plaintiffs are entitled to all the reliefs sought in the plaint save for *mesne* profits which were not adequately proved.
- g. There was no evidence on record to demonstrate that any demand or notice of intention to sue was issued.
- h. Each of the parties to the suit shall bear their own costs.

34. The upshot of the foregoing is that the court hereby enters judgement for the Plaintiffs in the following terms only;

- a. The court hereby grants reliefs in terms of prayers (a) (b) (c) and (d) of the plaint.
- b. The claim for *mesne* profits sought in paragraph (e) is hereby declined.
- c. Each of the parties shall bear their own costs.
- d. The Defendant shall have a grace period thirty (30) days within to voluntarily vacate the suit properties in default of which eviction shall ensue strictly in accordance with the applicable law.

35. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **26TH** day of **JULY, 2018**.

In the presence of Mr. P.N. Mugo holding brief for Mr. Kamunda for the Plaintiffs and the Defendant in person.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

26.07.18