



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 260 OF 2016

FATUMA MOHAMUD MOHAMMED MIRE.....PLAINTIFF

VERSUS

JAPHET NTEERE MWENDWA.....DEFENDANT

JUDGEMENT

BACKGROUND

The plaintiff has commenced this suit against the defendant for an order of a permanent injunction restraining him/his agents, servants or anyone acting on his behest from interfering with Plot No. 7918/75 Isiolo Township. The plaintiff is also seeking vacant possession of the said plot plus costs and interest.

In a plaint dated 17th November 2016 and filed on 5th December 2016, the plaintiff who is the widow to one Ahmed Noor Abdi Rage (deceased) stated that by an agreement dated 22/5/1990 her late husband bought the suit plot from the defendant's late father one Julius M'mwendwa M'mwithiga (deceased). The plaintiff further averred that her late husband paid the full purchase price and that the defendant's late father put her late husband into occupation and uses of the suit plot. It is also averred that beside putting her late husband into occupation of the suit property, he was also given all the necessary documents to facilitate the registration of the suit property in his favour. However the defendant's late father passed on before the transfer could be registered. The plaintiff further averred that the defendant has made attempts to disposes her and the rest of her family from the suit property.

This suit was filed contemporaneously with a Notice of Motion under certificate of urgency seeking temporary injunction orders to be issued restraining the defendant/respondent, his agents, servants or anyone acting on his behalf from interfering with the plaintiff's quiet occupation and use of the suit property pending interparties hearing.

When the same was placed before the duty court and upon consideration of the materials placed in support thereof, the court granted temporary injunction orders pending the hearing interparties on 10th January 2017. The defendant filed a statement of defence in which he denied the plaintiff's claim in its entirety and put the plaintiff to strict proof thereof.

PLAINTIFF'S CASE

The plaintiff in her viva voce evidence stated that her late husband Ahmed Noor Abdi Rage entered into a sale agreement with the defendant's late father Julius M'mwendwa in respect of Plot No. 7918/75 situated in Isiolo Township (herein referred to as the suit property) at a consideration of Ksh.600,000/=. She stated that the defendant's father was selling the suit property in order to repay bank loans and debts owed to financial institutions such as Meru Central Co-operative Union. She produced the sale agreement and numerous acknowledgement letters confirming that the defendant's father sold and indeed received payment in consideration for the suit property. The plaintiff further explained how her late husband paid the purchase price directly to the late Julius M'mwendwa (seller) or with his instructions to the institutions or the lawyers whom he owed money. These institutions include Barclays Bank and Meru Central Farmers Co-operative Union.

The numerous documentary evidence produced in court indicates that payments were made to those institutions whom the defendant's late father Julius M'mwendwa owed monies which they duly acknowledged. These letters include the one written by the General Manager, Meru Central Farmers Co-operative Union Ltd dated 18th February 1992 addressed to M/s Oraro & Rachier Advocates where they acknowledged receipt of Ksh.50,000/= and Kshs.10,000/= respectively from the firm of M/s Victor P. Gituma Advocates being settlement of the debt owed to them by Julius M'mwendwa who is the defendant's late father.

In a subsequent letter dated 19th July 1995, the said firm of Victor P. Gituma acting for both the seller and purchaser wrote to another financial institution M/s Kenya Finance Cooperation Ltd whom the defendant's late father owed money and was holding the certificate of lease in respect of the suit property asking whether they had any objection releasing the same for purposes of effecting the transfer.

DEFENDANT'S CASE

The defendant also gave sworn testimony and stated that the suit property Plot No. 7918/75 situated within Isiolo township belongs to his late father Julius M'mwendwa. Before his demise his late father was involved in a road traffic accident in 1982 and became immobilised. He stated that his late father could not go anywhere without him. He was shown the sale agreement produced as P. Exhibit No. 3 and stated that it was his first time to see it. He was not aware that his late father sold the suit property to the plaintiff's late husband. The defendant stated that he has been using the plot since 1988 to date. He has made substantial developments on the plot. The defendant also stated that he was not aware that his late father had a loan with Barclays Bank of Kenya or any other financial institution. He said that his late father and the plaintiff's late husband were close friends.

SUBMISSIONS BY THE PLAINTIFF

The plaintiff through his advocates submitted that their client has been in continued possession occupation and use of the suit property since it was handed over to her deceased husband upon purchase in 1990. He submitted that the defendant's late father was compelled to sell the suit property after execution proceedings were commenced against him in Meru PMCC No. 279 of 1986 as well as the loan obligation at Barclays Bank. The learned counsel contended that this suit is entirely about an action against trespasser who wants to advance an argument that he is son to Julius M'mwendwa M'mwithiga who is the defendant's late father. That argument he submitted does not confer him any rights to the property which was lawfully bought by the plaintiff's late husband. No cases were cited by the learned counsel.

DEFENDANT'S SUBMISSIONS

The defendant through the firm of Mukira Mbaya & Co. Advocates submitted that the claim against the defendant is time barred in that six (6) years have elapsed since the making of the alleged contract on 22/5/1990 and that more than 12 years have elapsed before bringing the action to recover land. The defendant also contends that no leave was obtained before filing this suit. The defendant further submitted that the defendant's father is the registered owner of the suit property and that section 23 of the RTA provides that a person named as registered owner is the absolute and indefeasible owner of such property except on grounds of fraud or misrepresentation.

He cited the following cases

- 1. Kampala Bottlers Ltd –Vs- Damanico (U) Ltd East Africa Law Reports [1990-1994] EA 141.**
- 2. Mukundi Wairi –Vs- Dorcas Wanjiku [2014] eKLR.**

ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their witnesses. I have also considered the documents relied by the parties and submissions by their counsels. The Plaintiffs claim against the Defendant is for a permanent injunction and eviction orders. The suit is seeking to enforce a contract entered between the Plaintiff's husband (late) Ahmed Noor Abdi Rage and the Defendant's late father Julius M'Mwendwa M'Mwithiga. A sale agreement dated 22nd May 1990 drawn by the firm of V.P Gituma Advocate was produced in evidence as P. Exhibit No. 3. The Defendant has not challenged that agreement or the signatures appearing therein as not for the consenting parties. The sale agreement stipulated how the purchase price was to be paid. The purchaser was also given vacant possession of the suit property. In a letter dated 22nd May, 1990, the late Julius M'Mwendwa M'Mwithiga who was the vendor acknowledge receipt of Kshs. 240,000/= being part payment of the purchase price. That letter was produced as P. Exhibit no. 4. In another letter dated 16th July, 1990, the vendor also acknowledged a further payment of Kshs.40,000/= towards the purchase price.

The Plaintiff also produced a prohibitory order from the Principal Magistrate's Court in Meru in PMCC No. 279/86 between Meru Central Farmers Co-operative Union and Julius Mwendwa who is the vendor in the sale agreement. The vendor and the purchaser had agreed in the sale agreement that part of the purchase price will be used towards settling the vendors debt in that case.

The purchaser Ahmed Noor Abdi Rage (deceased) was issued with receipts of payments towards the settlement of the vendors debt in that case as evidenced by numerous receipts issued by the firm of Victor P. Gituma marked P. Exhibit 7 (a) (b) (c) (d) and (e) respectively. The Plaintiff also in a letter by Meru Central Farmers Co-operative Union Ltd dated 18th February, 1992 addressed to Oraro & Rachier Advocates acknowledged receipt of Kshs.50,000/= from Victor P. Gituma Advocates being settlement of the debt owed to them by Julius Mwendwa (deceased) who is the vendor in the sale agreement dated 22nd May, 1990. That letter is produced as P. Exhibit No. 8.

The last document produced by the Plaintiff is an order raising prohibitory order which had been issued against the suit property dated 27th February, 1992. That order is also produced as P. Exhibit No. 9. All these documents produced by the plaintiff are a clear demonstration that the vendor had performed his obligation in the sale agreement. I am therefore satisfied that the Plaintiff has proved his case against the Defendant on a balance of probabilities. The Defendant has not challenged the Plaintiff's claim. He has not filed any counterclaim to the suit property. He has not shown what right or interest he has over the suit property. He has not cited any law which allows him to be in the suit property which has been sold by the owner to the Plaintiff. I find that the Defendant is a trespasser in the Plaintiff's property.

In the upshot, I enter judgment for the Plaintiff against the Defendant as follows:

- 1. An order of eviction be and is hereby issued against the Defendant, his agents, servant or anyone acting on his behalf from the Plaintiff's suit property Registration No. 7918/75 Isiolo township**
- 2. An order of permanent injunction be and is hereby issued restraining the Defendant, his agents, servants or anyone acting on his behalf from interfering with the Plaintiffs plot No. 7918/75 Isiolo township.**

3. Each party to bear his own costs.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C/A: Janet

Thangicia H/B for M. Kariuki for plaintiff

Maamu H/B for Mukira Mbaya for defendant

Plaintiff