



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 158 OF 2011

MERCY WAMBOI NJOROGE.....PLAINTIFF

VERSUS

FRANCIS BABU MWANGI.....1ST DEFENDANT

JAMES M. MURIITHI T/A EVASIJAME AUCTIONEERS....2ND DEFENDANT

JUDGMENT

The Plaintiff brought this suit against the Defendants on 12th April, 2011 seeking the following reliefs:

- (a) A permanent injunction to restrain the defendants from levying distress, selling, alienating, charging, mortgaging and/or in anyway dealing with all that parcel of land known as Plot No. 49, Huruma Estate, Nairobi and/or interfering with the plaintiff's peaceful occupation, ownership or evicting the plaintiff from the said property pending the hearing and determination of Nairobi Civil Appeal No. 352 of 2010 and Nairobi ELC No. 102 of 2010;
- (b) A declaration that the sale of Plot No. 40, Huruma Estate, Nairobi (hereinafter referred to as "the suit property") to the 1st defendant was illegal, null and void;
- (c) A declaration that the distress for rent levied by the 2nd defendant was illegal and untenable in law as there was no tenant and landlord relationship between the plaintiff and the 1st defendant.

In her plaint dated 11th April, 2011, the plaintiff averred that on or about 10th March, 2010, she filed a suit against her husband, Josphat Mwangi Nduti (herein after referred to only as "Nduti") in Nairobi ELC No. 102 of 2010 seeking among other reliefs, a permanent injunction restraining him from selling, alienating, charging, mortgaging and/or in any way dealing with the suit property and/or interfering with her peaceful occupation, ownership or evicting her from the said parcel of land; a declaration that she was the owner of the suit property and a mandatory injunction compelling her said husband to transfer and surrender any title document in respect of the suit property to her. The plaintiff averred that together with the plaint, she filed an application for a temporary injunction pending the hearing and determination of the suit.

The plaintiff averred that on 9th July, 2010 the said application for injunction was dismissed and being aggrieved with the said decision, she lodged an appeal against the same in the Court of Appeal in Nairobi Court of Appeal Civil Appeal No. 352 of 2010 which is still pending hearing and determination. The plaintiff averred that on 15th May, 2011, the 1st defendant served her with a rent demand notice and on 29th May, 2011, the 2nd defendant served her with a proclamation of attachment of her household goods for recovery of rent although she was not a tenant on the suit property. The plaintiff averred that the purported distress was malicious and illegal. The plaintiff averred that the 2nd defendant had since then subjected her to continuous harassment and intimidation to force her out of the suit property.

The plaintiff's claim was defended by the 1st defendant through a statement of defence filed on 10th August, 2011. The 1st defendant denied the plaintiff's claim in its entirety. The 1st defendant averred that he purchased the suit property for value in good faith on 28th November, 2011 from Nduti. The 1st defendant averred that the sale of the suit property by Nduti to him was lawful and proper in that the same took place after the plaintiff failed in her attempts to stop the sale in Nairobi ELC No. 102 of 2010. The 1st defendant averred that the plaintiff had no proprietary interest in the suit property and that the existence of ELC No. 102 of 2010 between the plaintiff and Nduti did not confer any rights upon the plaintiff in respect of the suit property. The 1st defendant averred that the plaintiff's suit is bad in law in that the same was filed while ELC No. 102 of 2010 over the same subject matter was in existence. The 1st defendant counter-claimed against the plaintiff for mesne profits from 28th January, 2011 at the rate equivalent to the rent collected from the tenants on the suit property and an order of

eviction.

At the hearing of the suit, the plaintiff gave evidence and called two (2) of her children as witnesses. The plaintiff told the court that she met Nduti in 1979 and in the same year they entered into a customary marriage. The plaintiff stated that after getting married to Nduti, they purchased the suit property together in 1982. The plaintiff stated that the suit property was supposed to be their matrimonial home. She stated that they purchased land and then put up a residential house on it which they occupied as their matrimonial home. She stated that they moved to the suit property in 1985 and lived together thereon with Nduti until 1997 when Nduti relocated to Muranga. She stated that she did not relocate to Muranga because she was working. The plaintiff told the court that she was the one in occupation of the suit property. She stated that she sued the defendants because they came to the suit property and levied distress against her claiming that she was a tenant on the suit property. She stated that her goods were removed from the suit property but were later returned. She stated that she lost a lot of items during the purported distress for rent.

The plaintiff's first witness was her daughter, Lucy Wanjiru Mwangi (PW 2). PW 2 told the court that the plaintiff was her mother while Nduti was her father. PW 2 told the court that she lived on the suit property with the plaintiff from 1985 when she was one (1) year old until she got married and moved out to live with her husband in 2011. She told the court that it was the plaintiff who was in occupation of the suit property and that it is the suit property that she knew as their home as they had not lived anywhere else. The second witness was the plaintiff's son, Daniel Nduti Mwangi (PW 3). PW 3 also told the court that the plaintiff was his mother while Nduti was his father. He told the court that he had lived on the suit property with the plaintiff since he was born and that they were not paying rent for the premises.

The 1st defendant gave evidence and called Nduti as his witness. In his evidence, the 1st defendant stated as follows. He was the owner of the suit property. He purchased the suit property from Nduti in 2011 at a consideration of Kshs.1.9 million. After paying the purchase price in full, Nduti gave him a power of attorney to enable him process the title for the suit property with the Nairobi City Council. The said power of attorney was accepted by the Nairobi City Council which issued him with an allotment card in respect of the suit property. He had been paying land rent and rates for the suit property since he purchased the same. He had not taken possession of the suit property because when he attempted to do so, he was accused of trespass by the plaintiff. The suit property had a building comprising of ten (10) rooms nine (9) of which were occupied by tenants. The tenants occupying the suit property were paying rent to the plaintiff. The plaintiff prevented him from taking possession of the suit property. The plaintiff was receiving rent of about Kshs.20,000/= per month from the suit property. Each room on the suit property brings in about Kshs.3500/= per month. The plaintiff was ordered on 20/3/2013 to deposit the rent from the suit property in an interest earning joint account in the names of the advocates on record for the parties. The plaintiff was depositing only Kshs.4,000/= per month into the said account.

The 1st defendant stated further that the plaintiff was not in occupation of the suit property as she was staying at Kamae, Membley Estate. He stated that it was PW 3 who was occupying two (2) rooms on the suit property which he used from time to time. The 1st defendant stated that the case that the plaintiff had brought against Nduti was determined in favour of Nduti who was allowed to deal with the suit property as he deemed fit. He stated that the court order that was made in favour of Nduti in that case has not been set aside. The 1st defendant urged the court to make an order for the eviction of the plaintiff and her tenants from the suit property. He also prayed for damages and costs of the suit. The 1st defendant produced as exhibits copies of, the sale agreement dated 28th January, 2011, special power of attorney dated 28th January, 2011, Land Allocation Card issued by City Council of Nairobi, receipts for ground rent and rates payments made to the City Council of Nairobi, a ruling made on 9th July, 2010 in ELC No. 102 of 2010, an order issued 13th July, 2010 in the same case, an application for injunction that was filed by the plaintiff in ELC No. 102 of 2010 and a replying affidavit that was filed by Nduti in opposition to the same.

The 1st defendant's witness as I mentioned earlier was, Josphat Mwangi Nduti (DW 2). DW2 told the court that he sold the suit property to the 1st defendant and gave him all the necessary documents to enable him process the title for the property with the Nairobi City Council. DW 2 stated that the 1st defendant had been prevented from taking possession of the suit property by the plaintiff. He denied that the plaintiff was his wife. He stated that the plaintiff was his tenant on the suit property and that she entered the suit property in that capacity. DW 2 told the court that he was not sure whether PW 2 and PW 3 were his children with the plaintiff. He stated that it was the plaintiff who could confirm the father of the two being their mother. He stated that the plaintiff claimed that he was the father of her children because she wanted him to marry her. He stated that the plaintiff had no right to prevent him from selling the suit property. He stated that he purchased the suit property from one, Bernard Ngari Mwita in 1982. He produced the agreement for sale that he entered into with the said Bernard Ngari Mwita and the assignment that was executed by the seller in his favour as exhibits. He stated that what he purchased was a plot and that he put up ten (10) rooms thereon subsequently. He stated that he was staying at Eastleigh and that he left Nairobi in 1997 for Muranga. He told the court that he was living in Eastleigh with his children and house servant while his wives were staying at Muranga. He stated that he had never lived together with the plaintiff as husband and wife. He stated that he used to extend assistance to the plaintiff because the plaintiff and he were from the same area. He reiterated that the plaintiff was occupying the suit property as a tenant and that she used to pay rent to him until 1997 when he left Nairobi to settle at Muranga. He stated that the plaintiff had no valid claim over the suit property. He stated that he had earlier attempted to sell the suit property to one, John Irungu Macharia but the sale did not go through because John Irungu Macharia did not manage to pay the purchase price.

After the close of evidence the parties were directed to make closing submission in writing. The 1st defendant filed his submissions on 3rd November, 2017 while the plaintiff did not file submissions even after being given ample time to do so. I have considered the pleadings, the evidence on record and the closing submissions by 1st defendant. The following in my view are the issues arising for determination in this suit:

- (1) Whether the sale of the suit property by Nduti to the 1st defendant was illegal;**
- (2) Whether the plaintiff has any proprietary interest in the suit property;**
- (3) Whether the plaintiff is a trespasser on the suit property;**

- (4) Whether the distress for rent that was levied against the plaintiff by the 2nd defendant was illegal;**
- (5) Whether the plaintiff is entitled to the reliefs sought in the plaint;**
- (6) Whether the 1st defendant is entitled to the reliefs sought in the counter-claim;**
- (7) Who is liable for the costs of the suit.**

Whether the plaintiff has any proprietary interest in the suit property and whether the sale of the suit property by Nduti to the 1st defendant was illegal;

It is not in disputed that the suit property was at all material times owned by Nduti. Nduti gave evidence in this suit as DW 2 and told the court how he acquired the suit property from the original owner, Bernard Ngari Muita in 1982. He produced in evidence a copy of the agreement for sale dated 5th February, 1982(D Exh. 9) between him and the said Bernard Ngari Muita and a copy of the assignment dated 25th February, 2002 (D Exh. 10) through which the said Bernard Ngari Muita assigned the suit property to him with the consent of the City Council of Nairobi. The plaintiff has contended that she had sued Nduti in ELC No. 102 of 2010 for a declaration that Nduti held the suit property in trust for her and for an order compelling Nduti to transfer the suit property to her. In ELC No. 102 of 2010, the plaintiff had contended that Nduti was her husband and that they had acquired and developed the suit property together as their matrimonial home. It is on account of the foregoing that she claimed that the suit property was registered in the name of Nduti to hold in trust for her. The plaintiff has contended that ELC No. 102 of 2010 between her and Nduti is still pending hearing and determination. The plaintiff has also contended that she had also filed an appeal in the Court of Appeal against the decision that was made by the court in ELC on her interlocutory application that was dismissed which appeal is also pending.

It is not clear to this court why the plaintiff decided to bring his suit separately against the defendants herein while the suit that she had filed against Nduti (ELC No. 102 of 2010) to establish her interest in the suit property was pending. The plaintiff should have simply joined the defendants herein in that suit. The issues as to whether the plaintiff is the wife of Nduti, whether they purchased the suit property together and whether Nduti held the suit property in trust for her cannot be determined in this suit because Nduti is not a party to the suit. This court cannot make a finding on the marital status of the plaintiff and Nduti in a suit in which Nduti is not a party. The same applies to the issues as to whether the plaintiff and Nduti acquired the suit property together. These issues could only be determined in ELC No. 102 of 2010.

I wish to state that even if I was to determine the issues I have raised above, I would have determined the same against the plaintiff. Apart from her testimony that was disputed by Nduti, the plaintiff placed no evidence before the court in proof of her alleged marriage to Nduti who claimed that she was only a girlfriend. Even more important, no evidence was placed before the court to establish that the plaintiff acquired the suit property together with Nduti or that she contributed to the acquisition of the property or development or improvement of the same. The plaintiff did not make any attempt to prove any of these facts that would have formed a basis for her claim against the 1st defendant herein. I am in agreement with the 1st defendant that the fact that the plaintiff has filed a case against Nduti for a declaration that she is the owner of the suit property does not confer upon her any proprietary interest in the suit property.

I am satisfied on the evidence before me that the suit property was at all material times owned by Nduti and that on 28th January, 2011 he sold the property to the 1st defendant at a consideration of Kshs.1.9 million. I am not convinced that as at the time Nduti sold the suit property to the 1st defendant, the plaintiff had any proprietary interest in the property. I therefore find nothing unlawful or illegal in the sale of the suit property by Nduti to the 1st defendant. Arising from the foregoing, it is my finding that the plaintiff has and had no proprietary interest in the suit property that was lawfully sold by Nduti to the 1st defendant.

Whether the plaintiff is a trespasser on the suit property;

It is not clear from the evidence before the court as to the circumstances under which the plaintiff entered the suit property. The plaintiff claimed that she entered the suit property as Nduti's wife while Nduti in his evidence told the court that the Plaintiff entered the suit property as a rent paying tenant. Whatever the case, the suit property no longer belongs to Nduti. The suit property was purchased by the 1st defendant from Nduti on 28th January, 2011 for valuable consideration. The plaintiff did not refute the 1st defendant's claim that he had demanded possession of the suit property from the plaintiff and that the demand met resistance. Since the plaintiff is neither a tenant nor a licensee of the 1st defendant on the suit property, her status therein can only be that of a trespasser. It is the finding of this court therefore that the plaintiff is a trespasser on the suit property.

Whether the distress that was levied against the plaintiff by the 2nd defendant was legal;

It was not disputed that the plaintiff was not a tenant of the 1st defendant on the suit property. If there was any tenancy, the same was between the plaintiff and Nduti. Such tenancy was also no established. In the absence of landlord and tenant relationship between the plaintiff and the 1st defendant, the 1st defendant could not levy a lawful distress against the plaintiff. A distress for rent does not lie against a trespasser. In the circumstances, I am in agreement with the plaintiff that the distress for rent that was levied against her by the defendants was unlawful.

Whether the plaintiff is entitled to the reliefs sought in the plaint;

The plaintiff having failed to establish any proprietary interest in the suit property, she is not entitled to the reliefs sought save for a declaration that the distress that was levied against her was unlawful.

Whether the 1st defendant is entitled to the reliefs sought in the counter-claim:

The 1st defendant has established that he is the owner of the suit property and that the plaintiff has no right to occupy the same. The 1st is therefore entitled to an order for possession and mesne profits for loss user of the suit property.

Who is liable for the costs of the suit?

Costs normally follow the event. No good reason has been put forward to persuade me to depart from this well settled principle on costs. I will however not condemn the plaintiff to pay all the costs since the court has held that distress against her was unlawful and as such she was entitled to bring the suit to stop the illegal distress.

Conclusion:

In conclusion, I hereby enter judgment for the 1st defendant against the plaintiff as follows:

1. The plaintiff's suit is dismissed save as aforesaid with each party bearing its own costs;
2. An order for vacant possession of Plot No. 49, Huruma Estate, Nairobi (the suit property);
3. The plaintiff, her servants or agents or those claiming Plot No. 49, Huruma Estate, Nairobi through her shall vacate and hand over possession of the said property to the 1st defendant within sixty (60) days from the date hereof failure to which warrants of eviction shall issue for their forceful eviction from the property.
4. The plaintiff shall pay to the 1st defendant mesne profits at the rate of Kshs.4,000/= per month from 1st April, 2011 until payment in full together with interest at court rate from the date hereof. In this regard, the rent that was being deposited in the joint account in the names of the advocates for the parties herein shall be released to the 1st defendant forthwith and shall be deducted from the amount payable by the plaintiff under this order.
5. The plaintiff shall pay to the 1st defendant the costs of the counterclaim.

Delivered and Dated at Nairobi this 25th day of October 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

No appearance for the Plaintiff

Ms. Adunya h/b for Mrs. Waitere for the 1st Defendant

No appearance for the 2nd Defendant

Catherine - Court Assistant