



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1074 OF 2015

ANDREW MWANGI CHUI

t/a MARIANI AUTO NURSERY.....PLAINTIFF

VERSUS

LEONARD NJOROGE KARIUKI.....DEFENDANT

JUDGMENT

This suit was commenced by way of a Plaint dated and filed on 3rd March 2009 in which the Plaintiff sought for Judgment to be entered against the Defendant as follows:

- a) Spent.
- b) A declaration that the purported agreement for sale is null and void for all intents and purposes.
- c) An eviction order to remove the Defendant from the suit property.
- d) Mesne profits as may be assessed by the honourable court.
- e) Costs of this suit.
- f) Interest on (d) and (e) at court rates

The Pleadings

In the Plaint, the Plaintiff stated that he is the lawful owner of that parcel of land known as unsurveyed part of Land Reference Number 209/9608 situate at Kariobangi South along Outering Road, Nairobi measuring about 0.8094 hectares (herein referred to as the “suit property”). He further stated that on or around 7th October 1999, he entered into a Sale Agreement with the Defendant for the sale of the suit property which stipulated the mode and manner of paying the purchase price but that the Sale Agreement fell through owing to the Defendant’s conduct. He stated further that it was an express condition of the Sale Agreement that after paying the Deposit of the purchase price, the Defendant would make monthly installments from the date of execution of the Sale Agreement until payment in full. He added that the Defendant only paid partly leaving an outstanding balance of the purchase price to date. He further stated that it was at that time over 9 years since the Sale Agreement was executed yet the Defendant had failed and/or neglected to honour his part of the bargain thereby rendering it impossible to complete the sale within a reasonable time. He further stated that he had learnt that the Defendant was in the process of letting out the suit property to third parties without his knowledge or consent despite knowing well that the suit property had not passed to him. He added that this action had occasioned him irreparable loss and damage as the suit property was at the time of a higher value than the one at which he sold it to the Defendant and he wanted to put it to his own use. He further stated that under the Sale Agreement, the Defendant was allowed to take possession of the suit property not as owner thereof but as a licensee until completion and that the Defendant has no right to lease the same to third parties without his knowledge or consent.

The Defendant entered appearance in this suit through his advocate on 18th March 2009 but did not file any defence. The Plaintiff filed a Request for Judgment dated and filed on 29th April 2015 which was granted by the court and the matter was listed for formal proof.

The Evidence

The Formal Proof proceeded on 19th January 2017 when the Plaintiff, Andrew Mwangi Chui gave his evidence as the sole witness. He told the court that he is the owner of the suit property. As proof of that assertion, the Plaintiff produced before court his Lease dated 6th February

2013 between the City Council of Nairobi (as it then was) and himself. He further stated that he leased out the suit property to the Defendant in the year 1999 at a rent of Kshs. 60,000/- per month. He further testified that after two years, the Defendant told him that he wishes to purchase the suit property from him. The Plaintiff told the court that he agreed to sell the suit property to the Defendant and they executed a Sale Agreement to this effect but that after paying the agreed installments for 7 months, the Defendant stopped making the agreed payments. The Plaintiff told the court that all this while, the Defendant remained in possession of the suit property and does so till to date. On that note, he requested the court to issue an eviction order against the Defendant and he also requested to be paid by the Defendant *mesne* profits at the rate of Kshs. 60,000/- per month from 2009 to date. He also sought for his costs for this suit to be borne by the Defendant.

Issues for Determination

The following are the issues that arise in this suit for determination:

- a) Whether the Plaintiff is the lawful owner of the suit property.
- b) Whether to issue a declaration that the purported agreement for sale is null and void for all intents and purposes.
- c) Whether to issue an eviction order to remove the Defendant from the suit property.
- d) Whether to order the Defendant to pay the Plaintiff *mesne* profits as assessed by the honourable court.
- e) Determine who is to bear the costs of this suit.
- f) Whether to grant the Plaintiff interest on (d) and (e) at court rates.

Analysis and Determination

- a) Whether the Plaintiff is the lawful owner of the suit property.

The Plaintiff claimed ownership of the suit property and as proof of that claim, he produced to this court his Lease dated 6th February 2013 between the City Council of Nairobi (as it then was) and himself. The position of the holder of a title deed over a parcel of land is well stated in **Section 26(1)** of the **Land Registration Act** which provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner , ... and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The Plaintiff's Lease in respect of the suit property has not been challenged on any of the grounds enumerated in the above legal provision. That being the case, this court finds that the Plaintiff is indeed the registered owner of the suit property.

- b) Whether to issue a declaration that the purported agreement for sale is null and void for all intents and purposes.

I have had opportunity to look at the Sale Agreement dated 7th October 1999 between the Plaintiff and the Defendant which the Plaintiff produced to this court as part of his bundle of documents. The Plaintiff does not deny that he signed that Sale Agreement. The Defendant has, of course, not given his version of the transaction between him and the Plaintiff as he neither filed a defence nor appeared in court. This Sale Agreement is very clear on the terms of the sale of the suit property that transpired between the two parties. It clearly stipulates the purchase price agreed upon and the mode of payments. It further acknowledges that the Defendant was in possession of the suit property at the time it was entered into and that he was to continue as such until the sale was completed. The Sale Agreement cannot, therefore, be deemed to be null and void for all intents and purposes as the Plaintiff seeks. In fact, the Sale Agreement is valid and clearly sets out the agreement between the parties on the sale of the suit property. Further, I add that the Sale Agreement is not prejudicial to the interests of the Plaintiff.

- c) Whether to issue an eviction order to remove the Defendant from the suit property.

With the above finding that the Plaintiff is the duly registered proprietor of the suit property, it follows that the Plaintiff has the rights over the suit property as set out in **section 24(a)** of the **Land Registration Act** which provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

I find that the Plaintiff is entitled to have exclusive use and possession of the suit property to the exclusion of the Defendant. I therefore issue an order of eviction of the Defendant from the suit property with immediate effect.

- d) Whether to order the Defendant to pay the Plaintiff *mesne* profits as assessed by the honourable court.

The Plaintiff has requested the court to grant his *mesne* profits calculated at the rate of Kshs. 60,000/- per month from the year 2009 until payment. I find this request to be perfectly in order having regard to the fact that the Defendant was paying the Plaintiff rent of the same amount for leasing the suit property in the year 1999. That being the case, this court orders that the Defendant do pay the Plaintiff *mesne* profits for his use of the suit property for the period from 1st January 2009 until the date of his eviction out of the suit property.

e) Determine who is to bear the costs of this suit.

The costs of this suit are awarded to the Plaintiff.

f) Whether to grant the Plaintiff interest on (d) and (e) at court rates.

The Plaintiff is entitled to impose interest at court rates on the calculated *mesne* profits and his costs of this suit until the same are paid in full.

Judgment is therefore entered in favour of the Plaintiff as stipulated above.

SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 17TH DAY OF OCTOBER 2018.

MARY GITUMBI

JUDGE

DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI THIS 23RD DAY OF OCTOBER 2018.

B. M. EBOSO

JUDGE