



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE 178 OF 2011**

**JOHN KAMAU GACHINA.....PLAINTIFF**

**-VERSUS-**

**SOFIA KARAMA.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff John Kamau Gachina vide his plaint dated 22<sup>nd</sup> June 2011 sued the defendant Salima Salim Karama asking the Court to be granted the following reliefs:

- a. Possession of the suit premises.**
- b. Permanent injunction restraining the defendant from trespassing on the suit premises.**
- c. Damages for the trespass.**
- d. Costs of and incidental.**
- e. Interest on c above and at Court rates until payment in full.**
- f. Any other or further relief.**

2. In response, the defendant filed her defence and counter-claim dated 29<sup>th</sup> August 2011 denying the plaintiff's claim. In the counter-claim, the defendant pleaded that she is the rightful owner of the suit property by virtue of the irrevocable gift from her late husband. She urged the Court to dismiss the plaintiff's suit and in place issue an order that the Registrar of Titles to rectify the register for L. R No 8097 (original No 4830/6) Section 1 M.N by causing cancellation of the plaintiff as the proprietor and registering the defendant as proprietor thereof.

3. On 23<sup>rd</sup> November 2015, the plaintiff gave his oral testimony. The plaintiff testified that the defendant lives on his plot No 8097/1/MN which plot was given to him in replacement by the one sold by Athmani Darani. Mr Kamau stated that he started paying for his plot No 8095 from 1995 and finished in 1997. The witness acknowledged that the defendant is the wife of Athman. He continued that the suit plot was transferred to his name on 25<sup>th</sup> July 2004 and produced a copy of the transfer as Pex 1. Later he obtained a deed plan which he followed up its registration and also paid the outstanding rates from 1988.

4. The plaintiff stated that he reported loss of the deed plan and certificate of title as result of the 2007 – 2008 post-election violence. He was given an abstract and the loss was published in the gazette notice of 12.3.2010 for anyone claiming interest to come forward. He produced the gazette notice as Pex 2. The plaintiff stated that no one objected within the 90 day period hence he was given a provisional title on 24.6.2010 which he produced its copy as Pex 3. That he knew the defendant was claiming the land when she sued him. The plaintiff asked the Court to grant him eviction orders to remove the defendant from the suit plot and award him costs of the suit.

5. In cross-examination, the plaintiff stated that he did not mention buying plot No 8095 in his witness statement filed in Court. That he did not have a sale agreement for plot No 8095. That the defendant was living on plot No 8097 (suit plot) with her children. He admitted that on the Certificate of title, the No 5 has been overwritten with a 7. The plaintiff agreed that he found the defendant on the suit plot at the time he was purchasing it and that the defendant is still on the land. The plaintiff said he was paying rates but was not concerned with who was paying water and electricity bills. In re-examination, the witness stated he never got possession of plot No 8095 because it was sold. That the receipts for payment are in the file. That the original title did not have any eraser. That the defendant became a trespasser after the land was transferred to him. This marked the close of the plaintiff's case.

6. The defendant testified through her attorney Asha Ali Salim on 22.5.2018. Miss Asha said she is the daughter to the defendant who donated to her the powers to testify vide the Power of Attorney produced as Dex 1. The witness said she lives in Bamburi on the plot of Athman Swale Darani that was her mum's husband. That Mzee Darani passed away on 31.5.2008 as per the death certificate produced as Dex 2 while still married to her mother. This witness said Mzee Darani gave her mum the suit plot as a gift and the two developed it. The gift (*Hiba*) was reduced into writing and she produced a copy as Dex 3. She also produced a bundle of water bill receipts issued in the defendant's name in respect of plot 34 as Dex 4.

7. The witness continued that they received a notice from the plaintiff to vacate the suit plot in 2003 but they did not comply. That he sued them and the defendant counter sued in 2004. That the defendant did not process a title in her name because she knew the *Hiba* was sufficient under the Islamic law. That they have lived on the suit plot for 25 years. She asked the Court to give an order to cancel the name of the plaintiff and in its place register the defendant as the owner thereof. She also prayed for costs of the suit.

8. In cross-examination, she said the land was gifted to her mother in 1986 although the gift deed is undated. She denied that Mzee Darani sold the suit land to the plaintiff nor transferred it to him. That Mzee Darani married the defendant about 1980 – 82 and did not divorce her until his death. The witness stated the plaintiff has never lived on the suit land. This also marked the close of the defendant's case.

9. The parties filed written submissions which I have read and considered. From the evidence of both sides, each is claiming the suit land No 8097/1/MN. The plaintiff has produced a certificate of title showing registration in his name was effected on 11<sup>th</sup> May 2004. The transfer form is shown to have been executed in his favour on 11.3.2004 by Athman Swale Darani. The defendant on her part is also claiming the land by virtue of an undated *Hiba* donated to her by the same Athman Darani. According to the defendant, the donation was made in 1986.

10. The question for this Court to determine is whether the plaintiff by virtue of his registration as owner of the suit land deserves the order of eviction as against the defendant or whether the defendant is the rightful owner and therefore the registration of the plaintiff should be cancelled.

11. Under the provisions of section 24 & 25 of the Land Registration Act, registration is prima facie evidence of ownership of the land; which registration then confers rights and interest to use and occupation. The said rights can only be refused if the registration is proved to be questionable as provided under section 26 that is:

**(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.**

12. Is the title of the plaintiff questionable? The plaintiff admitted he did not purchase the title No 8097. What was sold to him was plot No 8095. He did not produce any evidence of the sale or payments for the purchase price for the said plot No 8095. The plaintiff also conceded that at the time he was buying his plot in 1995 the defendant was living on the suit title. It is the plaintiff's own evidence that he was given the suit plot in exchange as the plot No 8095 had been sold by Mzee Athman Darani. The plaintiff moved this Court to be given orders to evict the defendant already living on the land at the time it is being given to him. It is this Court's considered opinion that the burden rested on him to prove/show the documents of

**i) Purchase in respect of plot No 8095**

**ii) Proof that plot No 8095 ever existed in Mzee Darani's name.**

**iii) That it was no longer in the name of Athman Darani as at 2004 when suit plot was being transferred to him.**

**iv) The replacement agreement/note for 8097 from Athman Darani.**

13. None of the documents above was shown to the Court. The provisions of section 30 of the Registered Land Act (repealed) and now section 28 of the Land Registration Act is then called into play. The plaintiff is acquiring registration of the land into his name while well aware of the defendant's occupation of the land as a wife of Athman Darani. He testified that he knew Athman Darani had 3 wives and the defendant was one of them. He did not tell this Court whether he was told by Athman at the time of transfer that the defendant would be relocated. His registration even in the absence of the *Hiba* was subject to the rights and interests of the defendant on the land.

14. The plaintiff has put reliance on the holding in the case of **Linus Ng'ang'a Kioko & 3 others vs Town Council of Kikuyu (2012) eKLR** that "*where a party fails to call evidence in support of its case, the party's pleadings remain mere pleadings of fact.*" In my view this statement is quoted out of context since in the case before me first because both parties gave evidence in support of their pleadings and secondly the burden of proof as provided in section 107 & 108 of the Evidence Act did not just lay only on the defendant to prove her counter claim but also on the plaintiff to demonstrate that he is deserving to be granted the prayers contained in his plaint.

15. In reference to the decision of **Ernest Kipkemboi Lelei vs Jacob Kimutai & Another (2018) eKLR** where the Court held that production of title was prima facie evidence of ownership of the suit is within the law. In that case, the Court found "*there was no evidence to question the authenticity of the plaintiff's title or whether the same was acquired fraudulently or through misrepresentation.*" The contrary scenario has been presented itself in this case where the defendant pleaded that the land could not be transferred to the plaintiff since it had been given to her as a gift under the Islamic law. Further, it is not in dispute that the defendant was living on the land and the plaintiff was aware of the relationship between the defendant and the transferor which relationship could not be ignored. Lastly the plaintiff admitted during cross-examination that on the title where the No 8097 appears, the 7 appears to be overwritten on No 5. He did not explain the eraser.

16. The plaintiff gave the explanation that the original title did not have the over written numbers. The copy of that original without any

erasor was not presented in evidence. In this instance where the plaintiff's own evidence is that what he bought was plot No 8095 and not 8097 the over writing on his own documents casts question into the genuineness of the title and thus he cannot claim to be entitled to the orders he is seeking.

17. In concluding, it is my finding that the transfer of the suit land No 8097 to the plaintiff is not supported by any evidence thus not valid. Secondly even if the transfer & registration was valid, the interests of the defendant were not extinguished by reason of her occupation of the land from 1995 when the plaintiff was "*purchasing*" the plot No 8095. Consequently a trust was created in her favour which entitles her to be registered as the owner of the suit land. In light of the foregoing the plaintiff's suit fails for lack of proof within a balance of probabilities. Instead I enter judgment for the defendant as prayed in the counter claim. The Land Registrar is directed to cancel the plaintiff's title and registration as owner of plot No 8097/1/MN. In his place, the defendant shall be registered as owner and be issued with a certificate of title in her name. I also award the defendant costs of this suit.

**Dated, signed & delivered at Mombasa this 17<sup>th</sup> October 2018**

**A. OMOLLO**

**JUDGE**