



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 391 OF 2011**

**PERIS MUTHONI MBURU (Suing as the administrator**

**of the Estate of MBURU KANGATHI (Deceased).....PLAINTIFF**

**VERSUS**

**DAUDI MUTISYA.....DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendant on 4<sup>th</sup> August, 2011 seeking a declaration that all that parcel of land known as Plot No. 9 (which is a portion of L.R. No. 336/62) situated at Ruaraka Nairobi (hereinafter referred to only as “the suit property”) belongs to her absolutely; a declaration that the defendant is a trespasser on the suit property; an order of eviction of the defendant from the suit property and; a permanent injunction restraining the defendant from occupying, erecting structures on or interfering with the suit property in any say.

In her plaint dated 3<sup>rd</sup> August, 2011, the plaintiff averred that she was the administrator of the estate of one, Mburu Kangathi, deceased (hereinafter referred to only as “the deceased”). The plaintiff averred that the deceased was a shareholder of a company known as Ruaraka Sabuni Development Company Limited (hereinafter referred to only as “Rusadecol”) which owned L.R. No. 336/62 situated at Ruaraka Nairobi. The plaintiff averred that by virtue of the deceased’s shareholding in Rusadecol, he was allocated the suit property by the said company.

The plaintiff averred that on dates which were unknown to her, the defendant encroached on the suit property without her consent or authority and erected thereon several structures which he rented out. The plaintiff averred that the defendant did not have any interest in the suit property and as such his entry onto the property was without any right. The plaintiff averred that the defendant refused to vacate the suit property and to demolish the structures he had put up thereon even after being asked to do so by the area chief.

The defendant entered appearance and filed a statement of defence on 9<sup>th</sup> November, 2012. The defendant denied that he had trespassed on the suit property as claimed by the plaintiff. The defendant averred that the suit property was allocated to his mother by Rusadecol and that he had developed and used the property without any interruption for a period of over 12 years. The defendant averred that a claim if any that the plaintiff had on the suit property was unsustainable as he had been in adverse possession of the property for all those years.

At the trial, the plaintiff gave evidence and called one witness. The plaintiff told the court that she was the administrator of the estate of the deceased. She stated that the suit property was purchased by the deceased from Rusadecol and that the defendant had entered onto the property and put up a house thereon. She stated that the deceased was issued with receipts for the payments that he made for the suit property. She stated further that the deceased was not issued with a certificate of ownership for the suit property when he finished paying for the property because he became sick and bedridden and the property was subsequently occupied by the defendant. She stated that when she went to Rusadecol for the certificate of ownership, she found that the defendant had already taken the same fraudulently. She stated that attempts to resolve the dispute through the office of the area chief did not succeed. She produced as exhibits, a Grant of Letters of Administration in respect of the estate of the deceased dated 8<sup>th</sup> February, 2008, Certificate of Confirmation of the said Grant dated 13<sup>th</sup> May, 2009, a bundle of receipts issued by Rusadecol and a letter of demand dated 22<sup>nd</sup> October, 2009.

In cross-examination, the plaintiff stated that the purchase price for the suit property was Kshs.12,500/=. She stated further that if the deceased did not finish paying for the suit property, he should have been given time to pay whatever was outstanding. She stated that even if there was a balance of the purchase price to be paid to Rusadecol, she could not have made the payment because the property was already occupied by the defendant. The plaintiff’s witness was her son, Daniel Koinange Mburu (PW2). PW2 corroborated the evidence of the plaintiff that the suit property was allocated to Mburu Kangathi (deceased) by Rusadecol. PW2 stated that he started following up the issue of the suit property when the deceased was sick. He stated that the defendant entered the suit property in 1995 when the deceased was still alive but sick. He stated that when he learnt of the defendant’s encroachment, he traced the offices of Rusadecol and met one of its committee members who looked at the register and confirmed that the suit property had been allocated to the deceased. PW2 stated that when the dispute was referred to the area chief for determination, his decision after hearing both parties was that the suit property belonged to the deceased. In cross-examination, PW2 stated that he did not know when the defendant entered the suit property and that he came to know

of the defendant's occupation of the property in 1995. PW2 stated further that the certificate of ownership of the suit property was issued irregularly to the defendant's mother, Monica Kavuu Nthenge. PW2 stated further that the deceased died in 1997 after a long illness and that he did not know whether he finished paying for the suit property.

The defendant gave evidence after the close of the plaintiff's case. He did not call any witness. He told the court that the suit property was owned by his mother who purchased the same from the Rusadecol at Kshs.12,500/=. He stated that his mother who was also deceased was issued with a certificate of ownership of the suit property by Rusadecol. He produced copies of certificate of death for his mother and certificate of ownership of the suit property that was issued to his mother by Rusadecol as exhibits. The defendant also produced as exhibit, a copy of a register that contained the particulars of the payments that his mother made to Rusadecol for the suit property. The defendant stated that according to the regulations of Rusadecol, a member could not be issued with a certificate of ownership before completing payment of the purchase price for land that was allocated to him. He stated that his mother took possession of the suit property in 1987 and that he started occupying the suit property in 1992. He stated that he had constructed a house on the suit property which he was occupying. He stated that the receipts that were produced by the plaintiff showed that then deceased paid only Kshs.8,500/= of the total purchase price of Ksh.12,500/=. In cross-examination, the defendant stated that he was in school when his mother purchased the suit property in 1986 and that he was not involved in the transaction.

After the closure of the parties' respective cases, the court pointed out to the advocates for the parties that evidence from Ruaraka Sabuni Development Company Limited (Rusadecol) could have been very useful to the court in the determining the dispute between the parties. The advocates for the parties agreed with the court and undertook to find out if Rusadecol was still in existence and if it was, whether any of its officials could give evidence in the matter. The parties traced Rusadecol and the court summoned its chairman to appear in court and give evidence in the case. When the matter came up for further hearing, Rusadecol's committee member, STEPHEN NGOTHO GATERU attended court and gave evidence on behalf of Rusadecol. He told the court that the plaintiff and the defendant were known to him and that he was familiar with the suit property. He told the court that the deceased and the defendant's mother were members of Rusadecol and that their names appeared in its register. He stated that there were two (2) previous committees of Rusadecol before his committee which was the third one. He stated that the deceased and the defendant's mother according to the records held by Rusadecol made payments for the parcels of land that were allocated to them. He stated that each plot was sold at Kshs.12,500,000/= and that by the time his committee came to office, the defendant's mother had already taken possession of the suit property and had started developing the same. He stated further that according to the records held by Rusadecol, the defendant's mother, Monica Kavuu Nthenge had paid the purchase price in full while the deceased had a balance of Kshs.3,800/=. He stated that according to Rusadecol's rules, once a member finishes paying the purchase price, he is issued with a certificate of ownership. He stated that those who failed to complete payment of the purchase price were refunded monies they had paid for the plots that had been allocated to them. He confirmed that the defendant's mother was issued with a certificate of ownership for the suit property. He produced as exhibits, copies of an extract of Rusadecol's land allocation register and a certificate of ownership of the suit property that was issued to the defendant's mother. He stated that as far as Rusadecol was concerned, the defendant's mother who was issued with a certificate of ownership for the suit property was the owner of the property.

In cross-examination by the plaintiff's advocate, he stated that he did understand why the deceased and the defendant's mother made payments to Rusadecol for the same property namely, Plot No. 9. He stated that his committee was not in office when the deceased and the defendant's mother were allocated the same plot. He stated that the deceased appeared at page 118 of Rusadecol's register while the defendant's mother appeared at page 124 meaning that the deceased became a member of Rusadecol earlier than the defendant's mother. He reiterated that the deceased did not pay the purchase price in full and that he had a balance of Kshs.3,800/=. He stated that when his committee took office the suit property had already been developed by the defendant's mother. He stated that the defendant's mother was given the suit property because she had paid the purchase price in full while the deceased had a balance. In cross-examination by the defendant's advocate, he stated that it was the certificate of ownership which evidenced ownership of land and that the full purchase price of Kshs.12,500/= had to be paid before one was issued with a certificate of ownership. He stated further that the defendant's mother developed the suit property when the deceased was alive and he never protested.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed her submissions on 11<sup>th</sup> January, 2018 while the defendant filed his submissions on 26<sup>th</sup> February, 2018. I have considered the pleadings and the evidence that was tendered in support of the parties' respective cases. I have also considered the submissions by the advocates for the parties and the authorities that were cited in support thereof. The parties did not frame issues for determination by the court. From the pleadings and the evidence on record, the following in my view are the issues that arise for determination in this suit.

- 1. Whether Mburu Kangathi ("deceased") was the owner of a portion of L.R No. 336/62 known as Plot No. 9 ("the suit property").**
- 2. Whether the defendant trespassed on the suit property.**
- 3. Whether the plaintiff is entitled to the reliefs sought in the plaint.**
- 4. Who is liable for the costs of the suit?**

Whether the deceased was the owner of the suit property:

The evidence on record shows that the deceased and the defendant's mother, Monica Kavuu Nthenge were members and shareholders of Ruaraka Sabuni Development Company Limited ("Rusadecol"). The evidence on record also shows that the deceased and the defendant's mother were allocated the suit property by Rusadecol and both made payments for the same. The evidence on record shows further that the defendant is in possession of the suit property and that he has developed the same. The defendant led uncontroverted evidence that his mother took possession of the suit property in 1987. PW2 stated in his evidence that he realised in 1995 that the defendant was in possession of the suit property. This suit was filed in 2011. Even if it is assumed that the defendant entered the suit property in 1995 when PW2 claims to have noted his presence in the suit property, by the time the plaintiff came to court, the defendant had been in possession of the suit property for 16 years.

I am not satisfied that the deceased had any proprietary interest in the suit property which the plaintiff could claim in these proceedings. It was not disputed that the deceased was allocated the suit property. The allocation was however subject to the payment of Kshs. 12,500/= which was the agreed purchase price. It was not disputed that the deceased did not complete the payment of the purchase price and that a sum of Kshs. 3,800/= remained unpaid as at the time this suit was filed 25 years after the property was allocated to the deceased. I am of the view that as a result of deceased's failure to pay the full purchase price for the suit property he did not acquire any proprietary interest in the property. The allocation and partial payment for the suit property did not in my view confer upon the deceased proprietary interest in the property. On the other hand, the defendant's mother completed payment of the purchase price for the suit property and was given a certificate of ownership and possession of the property. I am of the view that even if the deceased was the first to be allocated the suit property, the interest that he had in the property could not prevail over that of the defendant's mother. A part from the consequences of the deceased's failure to pay the purchase price in full, I am also of the view that the deceased's interest in the suit property if any was extinguished by operation of law as contended by the defendant in paragraph 9 of the defence. The evidence on record shows that the plaintiff came to court more than 12 years after the accrual of the cause of action. The evidence of PW2 together with a letter dated 12<sup>th</sup> November, 1995 from Rusadecol that was produced by PW2 as P.Exh. 4 leave no doubt that the plaintiff was aware as at November, 1995 of the defendant's occupation of the suit property. The plaintiff did not come to court until 16 years later on 4<sup>th</sup> August, 2011 after the claim had become time barred and the deceased's interest in the suit property extinguished under the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Due to the foregoing, it is my finding that the deceased had no proprietary interest in the suit property as at the time this suit was instituted.

Whether the defendant trespassed on the suit property:

The defendant has established that the suit property was allocated to his mother who is deceased by Rusadecol and that his mother paid for the property and was given possession of the same. The defendant told the court that he entered the suit property and started using the same in 1992 after the death of his mother. Since the plaintiff has not established the deceased's interest in the suit property, the defendant who has established that the suit property belongs to his deceased mother on account of whose interest he is in occupation cannot be a trespasser on the suit property. I am not satisfied therefore that the defendant is a trespasser on the suit property.

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

The plaintiff has not established that the deceased had proprietary interest in the suit property and that the defendant is a trespasser thereon. The plaintiff's case against the defendant is therefore not proved and as such the plaintiff is not entitled to any of the reliefs sought in the plaint. In any event, even if the plaintiff had established that the deceased was the lawful owner of the suit property, this suit would still not have succeeded as I have mentioned above on account of time bar.

Who is liable for the costs of the suit?

The general rule is that costs follow the event. No reason has been put forward to persuade me to depart from this rule. The plaintiff has failed in her claim and must bear the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiff's suit. The same is dismissed with costs to the defendant.

**Delivered and Dated at Nairobi this 22<sup>nd</sup> day of November 2018**

**S. OKONG'O**

**JUDGE**

**Judgment read in open court in the presence of:**

**Mr. Njagi h/b for Mr. Kugua for the Plaintiff**

**No appearance for the Defendant**

**John - Court Assistant**