



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 47 OF 2015

(FORMERLY KERUGOYA ELC CASE NO. 219 OF 2014)

LUCY MARIGU KARUNGU.....PLAINTIFF

VERSUS

PATRICK MAINA S. GITU.....DEFENDANT

JUDGEMENT

1. By a plaint dated 22nd July 2011 the Plaintiff sought the following reliefs against the Defendant;
 - a. An order of eviction of the Defendant from all that parcel of land being *Plot No. 1112/870/Majengo Site Embu* and removal of all structures thereto.
 - b. *Mesne profits*.
 - c. Costs of the suit.
2. The Plaintiff pleaded in the plaint that she was the legal representative of the estate of John Karungu (hereinafter called *Karungu*) who was at all material times the beneficial owner of a plot described as Plot No. 1112/870 Majengo Site Embu (hereinafter called the *suit property*). The said Karungu had been allocated the suit property by the defunct Municipal Council of Embu.
3. It was further pleaded that the Defendant had wrongfully encroached upon the suit property and erected a storey building thereon from which he was collecting rent from the tenants in occupation.
4. The Plaintiff contended that Karungu had never sold the suit property to the Defendant hence the Defendant was a trespasser who should be evicted.
5. By a written statement of defence dated and filed on 21st September 2011, the Defendant denied the Plaintiff's claim. He pleaded that he had legally bought the suit property which was previously known as Plot No. 60 in Embu Township from Karungu vide a sale agreement dated 2nd June 1989. The Defendant confirmed that he had constructed a storey building at a cost of KShs 8 million. It was further pleaded that the Plaintiff was well aware of his purchase of the suit property from Karungu.
6. The record shows that the Plaintiff testified before the Hon Justice Boaz Olao on 9th March 2016. She adopted her witness statement dated 22nd July 2011 as her sworn evidence. Her statement simply reiterated the contents of her plaint. Her case was that her late husband, Karungu, was the rightful owner of the suit property and that the Defendant was merely a trespasser. She also informed the court that she discovered the Defendant's occupation in 1996 and not in 2011 as indicated in her earlier witness statement.
7. During cross-examination, the Plaintiff stated that when she visited the suit property in 1996, she found a 3-storey building thereon. She did not ask the Defendant why he had constructed the building thereon. Later on, the Defendant informed her that he had bought the suit property from Karungu.
8. The Plaintiff also called her brother, Willie Mwaniki Njeru, who testified on her behalf as PW 2. He confirmed the existence of the 3-storey building on the suit property consisting of 12 units and that it was rented out to tenants who were paying rent at the monthly rate of KShs 6000/- per unit.
9. When the suit proceeded for further hearing on 5th March 2018 before me, the Plaintiff called a registered valuer, Moses Mureithi Njuguna, who testified as PW 3. He confirmed having prepared a valuation report of the suit property at the instance of the Plaintiff in

2014. He produced the valuation report dated 26th May 2014.

10. The 1st Defendant's evidence was to the effect that the suit property originally belonged to Karungu who then sold it to one Elias Kanambiu (hereinafter called *kanampiu*). It was Kanambiu who later on sold the suit property to him in the presence of Karungu who had not yet transferred ownership to Kanambiu. The Defendant produced a copy of a sale agreement made in 1989 between Kanambiu and himself. The purchase price was indicated as Kshs 55,000/-.

11. It was the Defendant's further evidence that upon purchase he took possession of the suit property and constructed a 4-storey building for rental purposes. The building was completed at around 1990. It was his further evidence that he was the one who cleared the outstanding arrears for the suit property with the National Housing Corporation but the property had never been transferred into his name.

12. During cross-examination, the Defendant stated that he was never notified of the filing of the succession proceedings in respect of the estate of the late Karungu. He also stated that Karungu did not seek to recover the suit property between 1989 and 1995 whilst he was alive.

13. The Defendant called Elias Kanambiu who testified on his behalf as DW 2. He adopted his witness statement dated 21st September 2011 as his sworn testimony. It was his evidence that he bought the suit property from the late Karungu. He stated that he knew Karungu well since he used to work with him. It was his evidence that he is the one who later on sold the suit property to the Defendant. It was his further evidence that when he sold the suit property to the Defendant the late Karungu was present. It was Karungu who accompanied him to the site to show the Defendant the suit property. It was also his evidence that at the time the Defendant acquired the suit property, it was still in the name of Karungu.

14. Upon conclusion of the hearing on 28th May 2018 the parties were given 60 days within which to file and exchange written submissions and the suit was fixed for judgement on 15th November 2018. By the time of preparation of the judgement, however, only the Defendant had filed written submissions.

15. The court has considered the pleadings on record, the written witness statements, the oral evidence of the parties as well as the documents filed by the parties. The court has noted that the parties did not file an agreed statement of issues for determination. The Plaintiff opted to file her own statement of issues whereas there is no indication on record of the Defendant having filed any statement of issues.

16. The court is of the opinion that the following issues arise for determination in this suit;

- a. Whether the suit property rightfully belongs to the Plaintiff or the Defendant.
- b. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- c. Who shall bear the costs of the suit.

17. The court has considered all the material evidence on record on the 1st issue. There is no dispute that the late Karungu was allocated the suit property by the defunct Municipal Council of Embu. The real bone of contention is whether Karungu ever sold the suit property to Kanambiu or anyone else. Whereas the Plaintiff contended that Karungu never sold the suit property, the court is satisfied that the suit property was first sold to Kanambiu who in turn sold it to the Defendant.

18. The court believes the Defendant and his witness that Karungu was aware of the subsequent sale to the Defendant and that he was present when the sale agreement dated 2nd June 1989 between the Defendant and Kanambiu was made at the offices of M/S Njiru & Co Advocates which drew and witnessed the sale agreement. The said agreement acknowledged that the suit property was still in the name of Karungu. He did not have to sign it since he was not made a party to the sale agreement. He had already sold it earlier on to Kanambiu.

19. The first reason why the court believes the Defendant's case is that the 4-storey building was constructed on the suit property during the lifetime of Karungu. He did not seek to recover the suit property from the Defendant. There was no evidence on record that he notified the Plaintiff or the authorities that the Defendant was trying to deprive him of the suit property. On the contrary, there is some evidence on record to the effect that Karungu actively participated in directing where the Defendant's buildings material were to be deposited during the construction of the storey building.

20. The 2nd reason why the court is satisfied that the Defendant had acquired the suit property through purchase was the payment he made to the National Housing Corporation in 2011 to clear the arrears for the suit property. It would be quite strange for person to clear plot arrears of Kshs 86,357.00 in respect of property in which he had no interest. It could not be said, as suggested by the Plaintiff, that the payment was made in order to facilitate the grabbing of the suit property. It must be remembered that the payment was made in 2011 long after the Defendant has completed construction of the storey building.

21. The 2nd issue is whether or not the Plaintiff is entitled to the reliefs sought in the plaint. As the court has already found, the Plaintiff has failed to prove her claim over the suit property. The court has found that Karungu had already sold the suit property during his lifetime. It was not, therefore, part of his estate upon his death. The Plaintiff may have been mistaken on the ownership of the suit property at the time of filing succession proceedings. However, such a mistake cannot confer upon her proprietary interest over property which was not part of the estate of Karungu. The answer to the 2nd issue is, therefore, in the negative.

22. The 3rd issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should, therefore, be awarded costs of the action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In

the instant suit, there is no good reason why the successful party should not be awarded costs of the suit.

23. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove her case to the required standard. The Plaintiff's suit is consequently dismissed with costs to the Defendant.

24. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **15th** day of **NOVEMBER, 2018**.

In the presence of the Defendant in person and in the absence of the Plaintiff.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

15.11.18