



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 90 OF 2016

TOM ATANCHAPLAINTIFF

VERSUS

MARGARET NYANCHAMA MOSE OKIRO.....DEFENDANT

J U D G M E N T

1. The plaintiff, Tom Atancha filed the instant suit vide a plaint dated 5th April 2016 claiming that he was the registered owner of land parcel number **Central Kitutu/Daraja Mbili/1724** (hereinafter referred to as “the suit property”). He claimed the suit property was lawfully and duly registered in his name on 16th July 2008. He asserted that he was therefore by virtue of being the registered and legitimate proprietor of the suit property entitled to exclusive rights over the property to the exclusion of everybody else. The plaintiff stated the defendant had threatened acts of trespass and inter alia the plaintiff sought the following prayers.

- (i) A declaration that he was the legal owner of land parcel Central Kitutu/Daraja Mbili/1724.**
- (ii) An order of eviction of the defendant from the suit premises.**
- (iii) Permanent injunction against the defendant restraining her from in any manner interfering with the suit property.**
- (iv) General damages for trespass and/or conversion.**

2. The plaintiff simultaneously with the plaint filed under a certificate of urgency a Notice of Motion dated 5th April 2016 seeking inter alia an order of injunction and the court on considering the application ex parte on 6th April 2016 granted an interim order of injunction restraining the defendant from entering, re-entering, trespassing onto, interfering with and/or in any manner whatsoever dealing with the suit property and directed the application and the other pleadings to be served for hearing of the application inter partes on 20th April, 2016,

3. That upon being served with the plaint and the Notice of Motion by the plaintiff, the defendant filed a Memorandum of Appearance together with a statement of defence and counterclaim against the plaintiff both dated on 18th April 2016 on 19th April 2016. The defendant also filed a replying affidavit sworn by her on 18th April 2016 in opposition to the plaintiff’s Notice of Motion. The gist of her response to the application was that she was the registered proprietor of the suit property having purchased the property from one, **Ruby Anugurah Nyarangi** for the consideration of kshs. 5,000,000/= and having had the property transferred to her after the balance of the purchase price of kshs. 3,500,000/= was paid by her Banker’s Equity Bank Limited after a charge had been registered on the suit land in favour of the bank.

The defendant stated she purchased the suit property after following all due process and asserted she was the valid owner of the suit property and that any title the plaintiff may hold on the property can only be forgery, a fact which the lands office at Kisii had affirmed.

4. By the defence the defendant denied the allegations attributed to her by the plaintiff in his plaint and accused the plaintiff of being a fraudster and a crook particularizing the fraud thus under paragraph 5 of the defence:-

- (a) Uttering a false application for consent of land control board Mosochi for land parcel No. Central Kitutu/Daraja Mbili/1724.**
- (b) Uttering a false letter of consent of land control board – Mosochi dated 15th November 2007 for land parcel No. Central Kitutu/Daraja Mbili/1724.**
- (c) Uttering a false title deed No. 1325051 for land parcel Central Kitutu/Daraja Mbili/1724 purportedly issued on 16th July 2008.**
- (d) Uttering a false certificate of search dated 22nd March 2016 for land parcel Central Kitutu/Daraja Mbili/1724.**
- (e) Uttering a force green card for land parcel No. Central Kitutu/Daraja Mbili/1724.**
- (f) Uttering a false receipt for search for kshs. 520/= No. 4220148 for land parcel No. Central Kitutu/Daraja Mbili/1724 dated 21st March 2016.**
- (g) Forcefully and without any colour right occupying land parcel No. Central Kitutu/Daraja Mbili/1724 to the detriment of the defendant.**

5. By the counterclaim the defendant avers that she validly purchased the suit property from one Ruby Anugurah Nyarangi for the consideration of kshs. 5,000,000/= as per the agreement of sale prepared by the firm of Bett & Company Advocates pursuant to which she paid kshs. 1.5Million in cash and the balance of kshs. 3.5Million was advanced to her as a loan by her bankers, Equity Bank Limited on the security of the suit land. The defendant stated the plaintiff was a tenant on the suit property which comprised a main house, 5 two double rooms and 3 single rooms which were rented for kshs. 44,000/= a month. The defendant averred she has been unable to take possession of the suit premises as the plaintiff has refused to vacate and yield vacant possession to the defendant and instead has staked a claim of ownership to the suit property necessitating the counterclaim against him by the defendant. The defendant claims the plaintiff's refusal to vacate the premises is exposing her to loss and she continues to lose the rent of kshs. 44,000/= which she would otherwise have been receiving since December 2015 following the transfer of the property to her. The defendant inter alia seeks judgment on the counterclaim for inter alia the following orders:-

- (a) Rent at kshs. 44,000/= from the month of December 2015 to the time the defendant shall render vacant possession of the suit premises.**
- (b) Mesne profits.**
- (c) Punitive damages.**
- (d) A declaration that the defendant is the rightful and/or registered owner of the suit property.**
- (e) An order of eviction of the plaintiff from the suit property.**

6. The plaintiff did not file a reply to the defendant's defence and did not file any statement of defence to

the defendant's counterclaim. As it became apparent to the court, that both parties were claiming ownership of the suit property, the court in lieu of hearing the interlocutory application for injunction by the plaintiff directed the parties to observe and maintain the status quo and to prepare the suit for hearing on merits and in the meantime directed the Directorate of Criminal Investigations (CID) to investigate the authenticity of the separate titles held by both the plaintiff and the defendant on the same suit property.

7. The matter was fixed for hearing before me on 5th December 2016. The plaintiff testified that he purchased the property for a consideration of kshs. 1,950,000/= from **Ruby Anugurah Nyarangi** vide and agreement dated 4th April 2007 (**PEx1**). The plaintiff stated that the suit property was following completion of the sale transaction transferred and registered in his name on 19th December 2007 though he was issued with a title deed on 16th July 2008 as per copy of title included in the plaintiff's bundle of documents (**PEx2**). The plaintiff produced a copy of certificate of official search dated 22nd March 2016 (**PEx3**) and land board consent to transfer dated 15th November 2007 (**PEx4**). He stated he has occupied the suit property since 2008 to date and denied having been a tenant of **Ruby Anugurah Nyarangi** in the suit property. The plaintiff further denied knowing the defendant and claimed that he only met her in February 2016 when she came to the premises and wanted to take possession claiming the suit premises were owned by her.

8. The plaintiff denied the allegations by the defendant that he was unlawfully occupying the suit premises. The plaintiff disputed the authenticity of the title dated 2nd November 2015 on the same property held by the defendant claiming that his title was earlier in time. The plaintiff also refuted the letter by the Land Registrar dated 13th April 2016 included in the defendant's bundle that stated the title held by him was fraudulent. The plaintiff further denied the property could fetch rent of kshs. 44,000/= claiming that it could perhaps fetch kshs. 25,000/= if let out. In cross examination the plaintiff stated that he had made a statement with the police on 4th April 2016 where he indicated he had bought a restaurant from **Ruby Anugurah Nyarangi**. He further stated **Ruby Nyarangi** had not signed the application to the land control board. The witness admitted he had not exhibited a copy of the transfer from **Ruby Anugurah** to himself and sought for time to avail the documents that he had not exhibited. The defendant did not object. The court stood down the witness to enable him to avail a copy of the transfer, stamp duty payment and abstract of title (green card) in regard to the suit property. The court adjourned the matter for further hearing on 6th February 2017.

9. On 6th February 2017 the plaintiff did not attend court and neither had he filed the supplementary documents as directed by the court. As the plaintiff's counsel Mr. Oguttu Mboya indicated the plaintiff was indisposed the court adjourned the further hearing to 20th February 2017 to afford the plaintiff the opportunity to present his further evidence.

10. On 20th February 2017 not only did the plaintiff fail to attend court but his advocates on the same day filed an application dated 17th February 2017 to be allowed to cease to act for the plaintiff on account of lack of instructions. The court allowed the application and as the plaintiff had not filed the supplementary documents as directed by the court and the plaintiff was himself absent to prosecute this case, the court made an order dismissing the plaintiff's case with costs as against the defendant and permitted the defendant to prosecute her counterclaim ex parte which at any rate the plaintiff had not filed any defence to.

11. The defendant in her testimony narrated how she got to purchase the suit property **Central Kitutu/Daraja Mbili/1724** from one **Ruby Anugurah Nyarangi**. She explained, she got information that the said Ruby Nyarangi had a property she wished to sell at Kisii from Bishop Alfayo Omesha Omangi who testified as DW2. That the Bishop took her and she saw the plot and she likened it and later she met the seller, the said Ruby Anugurah Nyarangi discussed and agreed to buy the plot at the consideration of kshs. 5,000,000/=. They entered into an agreement whereby she paid the sum of kshs. 500,000/= cash and the sum of kshs. 1,000,000/= through a bank transfer (RTGS). The balance of kshs. 3,500,000/= was paid by her bank M/s Equity Bank Ltd who had taken a charge over the suit property. The defendant stated due process was followed in the purchase transaction, and she was eventually

registered as the owner of the suit property and was issued with a title deed.

12. The defendant explained that before the bank advanced 3,500,000/= they had carried out a valuation of the property. The plaintiff was then a tenant in the main house on the suit property and he allowed the valuers to carry out the valuation. After the seller was paid the balance of the purchase price by the bank she handed over the property to the defendant. The plaintiff requested the defendant for a period of about 1 ½ months in January, 2016 to enable him and the family to vacate the premises, a request that the defendant acceded to. The defendant, however, stated that the plaintiff later refused to vacate the premises and instead stated he was the owner of the property and warned the defendant never to set foot on the property. It is at this point that the defendant reported the matter to the police who after carrying out investigations found that the title he was holding was a forgery and gave a report to that effect included in the plaintiff's bundle of documents. Consequently, resulting from the investigations carried out by the police, the plaintiff has been charged before the Kisii Chief Magistrate's court with various criminal offences including forcible detainer of the suit property.

13. The defendant testified that the plaintiff has unlawfully refused to yield vacant possession of the suit premises and that apart from denying her rental income of kshs. 44,000/= the defendant continues to suffer loss and damage as she has to service her mortgage entirely from her other sources of income at the rate of kshs. 85,000/= per month for as long as the plaintiff is in occupation of the suit property. The defendant further relied on her witness statement and all the documents attached to her bundle of documents. The defendant's bundle of documents set out in the defendant's list of documents dated 18th April 2016 were collectively admitted in evidence as "DEx1 – 15".

14. DW2 Bishop Alfayo Omesa Omangi testified in support of the defendant's counterclaim. He testified that **Ruby Anugurah Nyarangi** was her sister in law and that she resides in the USA and that he used to collect rent on her behalf from her tenants on the suit property. He testified that in August 2015 his sister in law **Ruby Anugurah Nyarangi** came to Kenya and she informed him she wanted to sell her property at Daraja Mbili. DW2 showed the plot to the defendant and she was interested in buying the same. The seller and the buyer met and discussed and DW1, the defendant herein, agreed to buy the property and that following completion of the process of sale the property was transferred to the defendant. The plaintiff however refused to vacate the suit property claiming he had bought the property from Ruby Anugurah Nyarangi. The witness stated that it was not true as the property had been sold to the defendant and he was a witness.

15. As earlier stated in this judgment the plaintiff's case against the defendant was dismissed with costs for want of prosecution. However I wish to make a comment on some aspect of the evidence adduced by the plaintiff before he made himself unavailable for further evidence. The plaintiff produced a title deed allegedly issued to him on 16th July 2008 as "PEx2". The title is stated to be issued under "**The Land Registration Act (No. 3 of 2012, Section 108) following the repeal of the Registered Land Act (Chapter 300 Laws of Kenya)**". The body of the title is in the following terms:-

"This is to certify that Tom Atancha ID/No. 10927546 of P. O Box 35 Kisii is now registered as the absolute proprietor of the land comprised in the above mentioned title, subject to the entries in the register relating to the land and to such overriding interests set out in section 28 of the Land Registration Act (No. 3 of 2012) as may for the time being subsist and affect the land."

16. To the extent that the plaintiff presents the title as having been registered on 16th July 2008 it obviously cannot be factual or truthful. The Land Registration Act, No. 3 of 2012 was enacted in 2012 and became operational on 2nd May 2012. It is not possible therefore that the plaintiff could have been registered and issued a title under an Act of Parliament that had not as yet been enacted. No further evidence would be needed to show that "PEx2" was in fact manufactured and was a forgery. I so hold and declare the title to be invalid and null and void. The same should be cancelled and/or destroyed for being a nullity.

17. As regards the counterclaim I have reviewed the evidence of DW1 and DW2 and the documents

tendered in evidence by the defendant and I am satisfied that the defendant did actually purchase land parcel **Central Kitutu/Daraja Mbili/1724** from Ruby Anugurah Nyarangi who was the registered owner. It is not disputed that Ruby Anugurah Nyarangi was registered owner of the suit property on 21st March 2003 as per copy of title **“PEX1”**. The defendant entered into an agreement of sale with the said Ruby Anugurah Nyarangi to purchase the property on 11th September 2015 and paid the agreed consideration of kshs. 5,000,000/=. A formal transfer was executed between the parties and registered on 2nd November 2015 and the defendant was issued with a title deed for the property. A charge in favour of Equity Bank Ltd was registered against the property to secure kshs. 3.5Million which the defendant needed to complete payment of the purchase price.

18. A copy of official search dated 19th November 2015 confirms the defendant to be the registered owner of the suit property and confirms the charge in favour of Equity Bank Limited. Equally an abstract of title (green card) certified by the land registrar confirms vide entry No. 9 that the defendant is the registered owner. Entry No. 11 notes the charge in favour of Equity Bank Ltd. Under entry No. 7 the plaintiff is shown to have registered a caution on 18th August 2015 claiming a purchaser’s interest but the caution was removed vide entry No. 8 made on 6th October 2015 pursuant to a court order. The land registrar, Kisii County responding to a letter from the CID dated on 12th April 2016 on 13th April 2016 wrote as follows:-

“This is to confirm that a title issued to one Tom Atancha in the year 2007/2008 does not originate from my office and that the signature appended thereon does not meet the ones which earlier belonged to a known land registrar Mr. Owuor.

The title deed is a work of a fraudster. Title deed is being held by the Bank for loan purposes and as such cannot be claimed to be in possession of anybody again. This plot belongs to Margaret Nyanchama Mose Okiro of ID/No. 9976871 of P. O Box 2181, Kisii. Copy of register supporting the same is hereby attached for further verification. Other related documents in favour of Tom Atancha does not belong to my office.”

19. Considering the totality of all the evidence in support of the counterclaim which has not been contravened, I am satisfied and hold that the defendant has proved her counterclaim on a balance of probability. The defendant in the reliefs sought vide the counterclaim has claimed rent at kshs. 44,000/= per month from December, 2015. I will only observe that although the defendant and DW2 stated the plaintiff was a tenant of the previous owner, there was no evidence of the actual rent that he was paying tendered. In the premises, I cannot hold he was paying a rent of kshs. 44,000/= per month. It cannot nonetheless be denied that the defendant has been kept out of her property and has been denied the use of it. The court is also alive to the fact that the defendant is paying a monthly mortgage to service the loan for a property that she has been denied use of by the plaintiff. Undoubtedly if she was letting the property it would have gone some way in assisting her to service the mortgage. The valuer who carried out the valuation on behalf of the bank estimated the maintainable rental value of the property at kshs. 46,000/= per month. I consider this to be a reasonable sum to award the defendant on account of mesne profits. I find no basis for awarding any punitive damages and I decline to make such award.

20. The upshot is that I dismiss the plaintiff’s suit against the defendant with costs to the defendant. I further enter judgment on the counterclaim in favour of the defendant as against the plaintiff on the following terms:-

(1) It is hereby declared that the defendant is the lawful registered owner of land parcel number Central Kitutu/Daraja Mbili/1724.

(2) The plaintiff, Tom Atancha is hereby ordered to vacate the suit premises within 7 days of being served with the decree herein failing which an order for his forcible eviction to issue on application by the defendant.

(3) A permanent injunction be and is hereby issued restraining the plaintiff either by himself,

agents, servants and/or anyone claiming under him from entering, re-entering, trespassing onto, interfering with and/or in any manner whatsoever dealing with land parcel number Central Kitutu/Daraja Mbili/1724.

(4) The defendant is hereby awarded mesne profits as against the plaintiff in the sum of kshs. 46,000/= per month from December 2015 upto and including the month of March 2017 and/or until when he delivers vacant possession of the premises.

(5) Costs of the counterclaim are awarded to the defendant.

Judgment dated, signed and delivered at Kisii this 24th day of March, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

Meroka for the defendant

Milcent Court assistant

J. M. MUTUNGI

JUDGE