



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1108 OF 2014

REUBEN NG'ANG'A WAMBURA.....PLAINTIFF

VERSUS

DANIEL KIARIE KIBATHI.....DEFENDANT

JUDGMENT

Introduction

This dispute revolves around the ownership of all that parcel of land known as L.R No. Dagoretti/Mutuini/T.402(hereinafter referred to as “the suit property”). The plaintiff’s claim against the defendant is set out in his re-amended plaint dated 5th October, 2006 and filed in court on 11th October, 2006. The plaintiff has averred that at all material times he was the registered owner of the suit property on which he had erected residential houses. He has averred that on or about the year 2001 the defendant wrongfully and unlawfully trespassed onto the suit property and occupied the same. He has averred further that the defendant has unlawfully occupied the residential houses on the suit property and has failed to account for the rent collected therefrom. The plaintiff has averred that the defendant has also refused to pay rates in respect of the suit property together with electricity and water bills. He has averred that on or about the year 1991 the defendant wrongfully registered a caution against the title of the suit property. The plaintiff has averred that as a consequence the foregoing, he has suffered loss and damage. The plaintiff has sought judgment against the defendant for:

- a) Eviction of the defendant, his family, agents and/or servants or those claiming under him from L.R No. Dagoretti/Mutuini/T.402
- b) Removal of the caution lodged by the defendant against the title, L.R No. Dagoretti/Mutuini/T.402
- c) Mesne profits and an order for the defendant to settle all the outstanding rates, electricity and water bills up to the date of judgment and giving possession of the suit property to the plaintiff.
- d) Cost and interest and any other relief the court deems fit to grant

The defendant entered appearance and filed amended statement of defence on 25th October, 2006. In his defence, the defendant has denied the plaintiff’s claim in its entirety. The defendant has averred that the plaintiff sold to him the suit property at Kshs. 300,000/-in1982. The defendant has averred that after taking possession of the suit property, he constructed a permanent residential building thereon where he has resided for the last 23 years without any interruption from the plaintiff. The defendant has averred that the plaintiff’s interest in the suit property has been extinguished by operation of law and has urged the court to dismiss the suit with the cost.

The Plaintiff case:

At the trial, the plaintiff (PW1) testified as follows. The defendant is his brother. He is the owner of the suit property on which he constructed eight double rooms and three additional rooms together with a toilet. In 1983, he invited the defendant to stay with him on the suit property as the defendant was married and had nowhere to stay with his wife. In 1984, he left the defendant on the suit property as a caretaker and moved to Taveta then to Oloitoktok. When he moved out, the rooms on the suit property were occupied by tenants. He had taken a loan from Agricultural Finance Corporation (AFC) and had told the defendant to be collecting rent and depositing the same with AFC towards the loan repayment which the defendant failed to do. Due to default, he fell into arrears in his loan repayment to AFC as a consequence of which the suit property was sold by public auction to recover the outstanding loan amount. The suit property was sold on 24th May, 1991 at Kshs. 113,0000/- .He told the court that he defendant was in possession of the property at the time it was auctioned. He stated that after 10 years from the time the property was sold by AFC, he learnt that the person who had purchased the suit property, one, Edward Muruu wanted to sell it and he managed to purchase back the property from him in 2001. Edward Muruu had not transferred the suit property to his name at the time they entered into the purchase back agreement with him on 9th January, 2001. He purchased back the suit property at Kshs. 220,000/-of

which a sum of Kshs. 150,000/- was paid upon the execution of the agreement and the balance of Kshs. 70,000 was paid on 30th January, 2001.

In his further testimony, the plaintiff stated as follows. The title deed for the suit property was kept with AFC who handed over the same to Edward Muruu when he purchased the property. Edward Muruu gave him the said title deed on 11th June, 2001. The defendant did not make any contribution when he purchased back the suit property. The defendant had not put up any building on the suit property and that he was still collecting rent from the tenants on the suit property. The rent payable was Kshs. 1800/- per double. Edward Muruu from whom he purchased the suit property died on 18th August, 2012. He produced the documents in his list of documents dated 13th June 2011 as P-Exhibit 1, the acknowledgment of payment dated 7th June, 2001 as P-Exhibit 2 and a copy of the death certificate dated 18th April, 2013 as P-Exhibit 3. He denied having sold the suit property to the defendant on 28th January, 1982.

In cross-examination, the plaintiff stated as follows. He was aware of the defendant's claim that he had sold the suit property to him. AFC had sold the suit property in 1991. He used to pay the loan but he did not have his statements of account with AFC. He had agreed orally with the defendant to be depositing rent in his AFC account monthly. He did not however give the defendant the details of the amount he was to deposit.

The houses on the suit property had tenants. He used not to give the tenants receipts. The suit property was auctioned on 24th May 1991 and he bought it back in 2001. He did not know Edward Muruu before he (Edward Muruu) sold back the suit property to him. He did not know why Edward Muruu did not transfer the suit property to his name. He could not remember that Edward Muruu had sued him and the defendant in 1992 over the suit property. He did not sign the affidavit sworn on 3rd January, 1994 that was filed in HCCC No.696 of 1992 (OS). He did not also sign the witness statement that was filed herein on 21st April, 2011 and the verifying affidavit sworn on 20th September, 2006 that was attached to the draft re-amended plaint.

He denied that Edward Muruu had sued him. He stated that he saw the replying affidavit dated 3rd January, 1994 for the first time in court. He stated further that he did not sell the suit property to the defendant. He denied signing the agreement for sale dated 28th January, 1982. He admitted that he did not report the forgery of his signature to the police. He stated that he was running a business of a club together with the defendant in 1980's while the defendant was working in a clothing manufacturing factory in Thika. He told the court that the charge that had been registered against the title of the suit property in favour of AFC was discharged when he bought back the property from Edward Muruu. He stated that when Edward Muruu purchased the suit property, AFC gave him the original title deed together with the transfer. He told the court that he was not aware that Edward Muruu was unable to register the said transfer because of the caution that had been registered by the defendant against the title of the suit property. He stated that he had put up the buildings on the suit property between 1971 and 1974 and that the defendant installed electricity on the suit property in 1984 after he had left the premises. He stated that they had agreed that the defendant would install electricity on the property and also repay the loan. He admitted that he had other parcels of land.

In re-examination, the plaintiff reiterated that he did not sign the agreement for sale dated 28th January, 1982 and the affidavit sworn on 3rd January 1994. He stated that although the defendant had installed electricity on the suit property, he was not the owner of the property as he was supposed to install electricity using the rent he was to collect from the property. He stated that he was not involved in the registration of a caution on the title of the suit property.

The plaintiff's witness, Peter Ndungu Njoroge (PW2) testified as follows. The plaintiff and the defendant were known to him. He was familiar with the dispute between the parties. In 1971, one, Joel Njenga Nganga informed him that he had a plot for sale and asked him to look for a buyer. He got the plaintiff who was interested in the property. The plaintiff purchased the property and put up there on a semi-permanent building comprising of 8 rooms for rental. The plaintiff also put up a bar on the suit property. The defendant was still in school at the time. When the defendant finished school, the plaintiff brought him to stay on the suit property. He later heard that the defendant was claiming ownership of the suit property. He told court that the semi-permanent buildings on the suit property were put up by the plaintiff and that there were no new buildings on the suit property. He stated that he had not seen the agreement for sale of the suit property between the defendant and the plaintiff and that he was not present when the said agreement was signed. He stated that he was seeing the purported agreement for sale dated 28th January 1982 for the first time. He stated that although his name was on the document, he knew nothing about it. He stated that he did not sign the document neither did he write his name on it. He denied that he was present when the plaintiff purportedly sold the suit property to the defendant.

In cross examination, PW2 denied that he was a liar paid by the plaintiff to give false evidence in court. He told the court that there were no permanent houses on the suit property and that he had known the parties herein for a long time. He stated it was not necessary for the parties to involve him in their issues and that he was not aware if they had agreed on the sale of the suit property. He told court that if he had seen the sale agreement earlier, he would have reported the issue of the forgery of his signature to the police. He stated that he was present when the plaintiff bought the suit property from the person he introduced him to and that he was not aware of what happened after the plaintiff had purchased the suit property or of the existence of a third party who had claimed ownership of the suit property apart from the defendant. He told court that the bar that had been put up on the suit property was no longer operating and that he was not aware that the defendant was employed after finishing school. He admitted that the defendant was the one in occupation of the suit property.

The Defendant's case:

In his testimony, the defendant (DW1) adopted his sworn statement dated 25th May, 2011 as his evidence in chief. He stated further as follows. The plaintiff is his elder brother. The plaintiff did not lodge a complaint with the police about the alleged forgery of his signature in the agreement dated 28th January, 1982 (D.Exh.1). He stated that in Nairobi HCCC 696 of 1992, Edward Muruu sued the plaintiff and him over the caution he had registered on the title of the suit property after it was sold to Edward Muruu by AFC. He stated that he was in occupation of the suit property because the same was sold to him by the plaintiff. He stated that the plaintiff did not inform him that the property had been charged to AFC. He stated that the plaintiff had admitted in the affidavit that was filed in Nairobi HCCC 696 of 1992 that there was a loan to be paid to AFC and that he had sold the suit property to him for Kshs. 300,000/-. He stated that the said affidavit was prepared by Mwangi Chege & Co. advocates who was representing both of them and was duly signed by the plaintiff.

The defendant stated that the plaintiff did not complain that his signature on the said affidavit was forged neither did he lodge a complaint against the advocate who prepared the said affidavit with Law Society of Kenya. He stated that the payment of Kshs.7300/ that he made to AFC on 23rd May, 1991 was for the purposes of stopping the sale of the suit property and that he would not have made that payment if he had not invested on the suit property. He told court that he paid Kshs. 80/-for electricity to be connected to the suit property and that the plaintiff had promised that he would give him the title deed for the suit property after he had finished paying the loan due to AFC which promise he did not keep. He stated that he was not involved in the negotiations between Edward Muruu and the plaintiff over the suit property and that the plaintiff's specimen signature was similar to the plaintiff's signatures on the agreement dated 28th January, 1982 and the affidavit sworn on 3rd January, 1994. He produced the sale agreement dated 28th January, 1982, the plaintiff's specimen signatures, the documents in his list of documents dated 25th May, 2011 and the documents in his further list of documents dated 21st June, 2011 as exhibits.

In cross-examination the defendant stated as follows. The plaintiff sold to him the suit property in 1982. When he finished school in 1973, he was employed at Thika Clothing Mills where he was earning a salary of Kshs. 1000/- per month. He paid to the plaintiff Kshs. 80,000/- in the presence of his two brothers one of whom is deceased and while the other is disturbed mentally. The agreement for sale between him and the plaintiff was prepared by Mwangi Chege & Co. advocates. The said advocates did not tell him why their name was not put on the agreement and why they neither witnessed nor stamped the agreement. He stated that the first agreement between him and the plaintiff was made in 1982 in presence of his brothers and it was written in a book and that it was the same agreement that was formalized on 28th January, 1982. He told court that the person who bought the suit property from AFC had sued the plaintiff and him over the caution he had lodged on the title of the suit property. He stated that he had occupied the suit property since 1982 and that he did not know that the property was charged to AFC. He stated that he was using the rent from the suit property for his own purposes because the property had been sold to him. He stated that after registering a caution against the title of the suit property, he went to the Company Secretary of AFC to try to save the property.

He stated that with a view to stop the transfer of the property to the auction purchaser, he asked the Land Control Board not to approve the transaction. He stated that while he was looking for money to repay the loan the suit property was sold. He stated that the outstanding loan amount was about Kshs. 76,000/- and that Edward Muruu did not enter the suit property. He stated that he did not know if Edward Muruu was given the title deed for the suit property and whether he wanted to sell the property. He stated that he did not know if Edward Muruu and the plaintiff entered into an agreement for sale. He stated that the plaintiff used to live on the suit property and that he moved 2 km away. He stated that he was not aware that the suit property had been sold by AFC. He told the court that he purchased the suit property at Kshs. 300,000/- of which he paid to the plaintiff Kshs. 80,000/- and cleared the balance in the year 1984. He testified that he used to record the payments he was making to the plaintiff in a triplicate book which became unnecessary after the plaintiff executed the affidavit aforesaid acknowledging receipt of the payment that he had made.

In re-examination, the defendant stated that he paid the purchase price to the plaintiff in full and that in the affidavit referred to above, the plaintiff had admitted receipt of Kshs. 280,000/-. He stated that he paid Kshs. 20,000/- subsequently. He stated further that he was not involved in the agreement between the plaintiff and Edward Muruu. He stated that the title deed for the suit property was with the plaintiff and that the plaintiff had repaid the loan. He denied that he was supposed to use the rent collected from the suit property to repay the loan. He stated that the payments that he used to make were recorded in a book and that it was an informal arrangement that was formalized through the agreement for sale dated 28th January, 1982.

The Submissions:

The plaintiff filed written submission on 7th September, 2017. The plaintiff submitted that the issues arising for determination in this suit are whether there was a valid agreement for sale between the plaintiff and the defendant and whether the plaintiff is entitled to an order for vacant possession. The plaintiff referred to section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya and submitted that the defendant did not produce evidence showing that he bought the suit property from the plaintiff. The plaintiff submitted that he is entitled to vacant possession of the suit property as he is the owner thereof. He submitted that the defendant lost the benefit of the suit property when it was auctioned. He submitted that the defendant who was collecting rent on his behalf failed to repay the loan that was due to AFC. In support of his submissions, the plaintiff relied on the cases of Joel Kipchirchir Kitur vs. David Kimutai Langat & Another [2006] eKLR and Gladys Wanjiru Kirubi vs. John Kangethe Kibe [2005] eKLR.

The defendant filed submission on 28th September 2017. The defendant submitted on three issues namely, the sustainability of the suit, the effect of the agreement for sale and replying affidavit which the plaintiff had signed and whether the plaintiff can deviate from his own pleadings. The defendant referred to section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and submitted that this suit was filed in 2005 seeking to remove a caution that was registered in the year 1991 and the eviction of the defendant who had been in occupation of the suit property since 1984. The defendant submitted that the plaintiff's suit is incompetent in law. In support of this submission, the defendant relied on the cases of Haron Onyancha vs. National Police Service Commission & Another [2017] eKLR and Mehta Vs Shah [1965] E.A 321.

The defendant submitted that it was incumbent upon the plaintiff to prove that the agreement for sale and the affidavit aforesaid were forgeries. He submitted that in absence of such proof, the court must rely on the evidence that was adduced by the defendant. In support of this submission, the defendant referred to the case of Jeremiah Wanyiri Wambua Vs Geoffrey Wiagwa Wanjoya [2016] eKLR.

The defendant submitted further that the plaintiff had departed from his pleadings contrary to the provisions of Order 2 Rule 6 of the Civil Procedure Rules. The defendant submitted that whereas in his plaint, the plaintiff had pleaded that the defendant had trespassed on the suit property in 2001, in his witness statement, the plaintiff stated that he allowed the defendant to occupy the suit property as his caretaker. The defendant submitted that a party is bound by his pleadings. In support of this submission, the defendant referred to the case of James Githua Karongo vs. Margret Kirigo Karongo [2017] eKLR.

Analysis and Determination:

The parties did not agree on the issues for determination by the court. From the pleadings and the evidence that was tendered by the parties, the following in my view are the issues that arise for determination in this suit:

1. Whether the defendant is a trespasser on the suit property?
2. Whether the plaintiff's suit is time barred?
3. Whether the plaintiff is entitled to the reliefs sought?

The first issue:

From the material on record, I am satisfied that the plaintiff is the lawful owner of the suit property. It was not disputed that the plaintiff is and was at all material times the registered proprietor of the suit property. The plaintiff produced in evidence a copy of the land certificate for the suit property in his name dated 19th January, 1972. It was also not disputed that the suit property was at all material times charged to Agricultural Finance Corporation (AFC) to secure a loan that was advanced by the said corporation to the plaintiff. It was also common ground that the plaintiff defaulted in the loan repayment as a consequence of which the suit property was sold by AFC through public auction to one, Edward Mubui Muruu on 24th May, 1991. Although, the defendant termed the agreement for sale between the plaintiff and Edward Mubui Muruu as fraudulent, I am satisfied that the plaintiff purchased back the suit property from Edward Mubui Muruu on 9th January, 2001 after which on 5th June, 2001, AFC discharged the charge that had been registered against the title of the suit property.

In his defence, the defendant had contended that he purchased the suit property from the plaintiff on 28th January, 1982 at Kshs.300,000/=. The defendant produced in evidence a copy of an agreement for sale dated 28th January, 1982 which he claimed to have entered into with the Plaintiff. In his evidence in chief, the defendant claimed that the plaintiff did not inform him that the suit property was charged to AFC when he sold the property to him. The defendant claimed at the same time that the plaintiff had promised to issue him with a title deed for the suit property once he (the defendant) had finished paying the loan that was due to AFC. The defendant claimed that the plaintiff did not give him the title deed for the suit property even after he finished paying the said loan.

In cross-examination, the defendant admitted that the agreement for sale between him and the plaintiff dated 28th January, 1982 was prepared when they had a court case namely, Nairobi HCCC No. 696 of 1992 in which they were sued by Edward Mubui Muruu who sought an order for the removal of the caution that the defendant had registered against the title of the suit property on 6th June, 1991 after the property was sold by public auction on 24th May, 1991. The defendant stated as follows with regard to the agreement for sale dated 28th January, 1982 that was allegedly entered into between him and the Plaintiff;

“This agreement was prepared during the case. We formalized the earlier agreement which was in a book.”

The agreement dated 28th January, 1982 provided that the plaintiff was to obtain consent of the Land Control Board with respect to the transaction. There is no evidence that such consent was obtained. Apart from the contested admission in the said agreement for sale and in the affidavit that is said to have been signed by the plaintiff and filed in Nairobi HCCC No. 696 of 1992 (O.S) to save the suit property from being transferred to the auction purchaser, no other evidence was placed before the court in proof of the payment of the alleged purchase price of Kshs.300,000/= by the defendant to the plaintiff. From the totality of the evidence on record, it is my finding that the purported agreement for sale between the plaintiff and the defendant was a sham and a smokescreen that was intended solely to defeat the rights of Edward Mubui Muruu who had purchased the suit property at a public auction that was conducted by AFC. There is no way the plaintiff could have entered into a valid agreement for sale of the suit property with the defendant while the property remained charged to AFC. Furthermore, the suit property was at the material time an agricultural land and its sale required consent of the Land Control Board. Since no consent was obtained, the purported agreement for sale became null and void for all intents and purposes after the expiry of six (6) months from 28th January, 1982.

I am persuaded by the plaintiff's evidence that he permitted the defendant who is his younger brother to occupy the suit property. The defendant was therefore a licensee in the suit property who was obliged to deliver possession of the property at any time when demanded by the plaintiff. There is no evidence that the defendant put up any new buildings on the suit property in addition to the buildings that the plaintiff testified to have constructed on the suit property in his evidence in chief. In his application dated 9th July, 2012 seeking the striking out of this suit for want of jurisdiction, the defendant had annexed to the supporting affidavit, a valuation report on the suit property by Shelter (M) Valuers Limited dated 5th July, 2012. In the report, the valuer stated that the suit property was developed with two (2) semi-permanent houses, a pit latrine and a chicken house which were valued at Kshs.500,000/=. The description of the semi-permanent houses on the suit property matches the evidence that was given by the plaintiff on the developments he had undertaken on the suit property. In his replying affidavit sworn on 3rd January, 1994 that was filed in Nairobi HCCC No. 696 of 1992 (O.S) (see page 9 of D.Exh. 3), the defendant had alleged at paragraph 6 that he had built a permanent house on the suit property comprising of 8 flats. The same allegation is contained in his witness statement. The alleged permanent house is not mentioned in the valuation report I have referred to above.

As I have stated earlier, the defendant as a licensee on the suit property was duty bound to deliver possession of the property upon demand by the plaintiff. The plaintiff pleaded that he had demanded possession of the suit property from the defendant and that the defendant had declined to vacate the property. That averment was not expressly denied by the defendant in his statement of defence. Having held that the defendant had no interest in the suit property save for a license that was terminated when a demand for possession was made, I am in agreement with the plaintiff that the defendant is a trespasser on the suit property.

The second issue:

I am not satisfied that the plaintiff's suit is time barred for the following reasons. First, the defendant occupied the suit property with the consent of the plaintiff. The limitation period could not therefore run against the plaintiff until the consent was revoked. The consent was revoked in the year 2005 when the plaintiff demanded possession of the suit property and subsequently filed this suit when possession was not given. Secondly, the plaintiff lost his proprietary interest in the suit property on 24th May, 1991 when the property was sold by public auction by AFC in exercise of its statutory power of sale. The plaintiff did not regain his proprietary interest in the property until the year 2001 when he purchased the property back from the auction purchaser, Edward Mubui Muruu. I am of the view that for the purposes of Limitation of Actions, the running of time in favour of the defendant against the plaintiff was interrupted by the sale of the suit property on 24th May, 1991 and that the time started running a fresh in 2001 when the plaintiff purchased back the suit property. For those reasons, the defendant's time bar plea must fail.

The third issue:

From my findings above, I am satisfied that the plaintiff has proved his claim against the defendant on a balance of probabilities and as such he is entitled to the prayers sought in the re-amended plaint dated 5th October, 2006. With regard to the prayer for mesne profits, the plaintiff did not place sufficient material before the court on the basis of which the court could assess the amount payable. I decline to make any award under that prayer. I am however satisfied that a case has been made out for the defendant to pay all utility bills save for rates before vacating the suit property.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendant in terms of prayers (a) and (b) of the re-amended plaint dated 5th October, 2006. With regard to prayer (c), the defendant shall settle all water and electricity bills incurred until he delivers vacant possession of the suit property to the plaintiff. The defendant shall vacate and deliver to the plaintiff possession of all that parcel of land known as L.R No. Dagoretti/Mutuini/T.402 within one hundred and twenty (120) days from the date hereof in default of which, the plaintiff shall be at liberty to apply for his forceful eviction from the suit property. The defendant shall also remove the caution registered against the title of the suit property within the same period failure to which the land registrar shall remove the said caution without any reference to the defendant. In view of the relationship between the parties, each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 11th Day of May 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mrs. Gulenywa for the Plaintiff

Mr. Wachira for the Defendant

Catherine Court Assistant