



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 716 OF 2012
YOSE MUSELA BIDALI
(Suing as the legal representative
of LIHASI BIDALI(deceased)).....PLAINTIFF
VERSUS
MANAKAMU AGENCIES LIMITED ALIAS
DAVID KARITHI MACHARIA &
NAMAN KAILIBI MEME
T/A MANAKAMU AGENCIES.....DEFENDANTS

JUDGMENT

The plaintiff is the legal representative of LIHASI BIDALI, deceased (hereinafter referred to as “the deceased”). At all material times, the deceased was and still is the registered owner of all that parcel of land known as L.R. 209/118/77, Kolobot Road, Nairobi (hereinafter referred to as “the suit property”). The deceased whose lease had expired acquired a new lease in respect of the suit property on 6th September 2011 for a term of 50 years with effect from 1st January 2002. The deceased suffered stroke and died of cardiopulmonary arrest at Coptic Hospital on 21st July 2012 at the age of 83 years. He was buried on 28th July 2012. The family of the deceased prepared an elaborate funeral programme for the occasion which had his photograph on the first page.

The plaintiff brought this suit against the defendants on 17th October 2012 through a plaint of the same date. The plaintiff amended the plaint on 6th November 2012. In his amended plaint dated 5th November 2012, the Plaintiff averred that at all material times, the deceased who was the registered owner of the suit property had leased the same out to tenants. The plaintiff averred that part of the suit property was occupied by the deceased’s licensees. The plaintiff averred that on 30th September 2012, he received a letter from a law firm purporting to be acting for the defendants demanding that all persons who were occupying the suit property should vacate the property with immediate effect. The plaintiff averred that the tenants and licensees of the deceased who were in occupation of the suit property were in imminent danger of being evicted therefrom by the defendants who had declined to withdraw their claim over the suit property even after a demand was made upon them to do so. The plaintiff sought the following reliefs against the defendants:-

- a. A permanent injunction restraining the defendants or any person acting on their behalf from

howsoever trespassing, evicting, entering upon, remaining, erecting any structures on, alienating, taking over or harassing the plaintiff and/or his licensees or tenants or interfering with their occupation of the suit property.

b. A declaration that the suit property is owned by the deceased and any purported transfer of the same to the defendants or any of them or any other person is null and void.

c. An order to rectify, correct and reinstate the name of the deceased as the registered proprietor of the suit property.

d. Costs of the suit together with interest thereon.

e. Any other or further relief as the court may deem fit and just to grant.

The defendants entered appearance and filed a defence and counter-claim on 28th November 2012. The defendants averred that their correct names are Naaman Kailibi Meme and David Kariithi Macharia t/a Manakamu Agencies. The defendants admitted that the deceased was the registered owner of the suit property. The defendants averred however that the deceased sold and transferred the suit property to them on 3rd August 2012. The defendants averred that the deceased who was of sound mind and health appeared in person at their advocates' office and executed the necessary documents. The deceased thereafter handed over to them the completion documents after being paid the purchase price in full. The defendants averred that the persons referred to by the plaintiff as his tenants and licensees are trespassers on the suit property as they are occupying the property without the defendants' permission. In their counter-claim, the defendants reiterated the contents of their defence and averred that they were the legal owners of the suit property having purchased the same from the deceased at a consideration of Kshs.22,000,000/-. The defendants sought judgment against the plaintiff for, a permanent injunction to restrain the plaintiff from dealing in any manner whatsoever, alienating, and or disposing of the suit property, an order validating the agreement for sale between the defendants and the deceased and the transfer that was executed in their favour by the deceased, a declaration that the suit property is owned by, Naaman Kailibi Meme and David Kariithi Macharia t/a Manakamu Agencies and in the alternative, a refund of the full purchase price.

The hearing of the suit commenced before Mutungi J. on 21st July 2015 when the Land Registrar, Chelimo S. Maina (PW1) gave evidence and produced in court a copy of the land registry deed file and correspondence file. PW1 confirmed that the deceased's lease over the suit property was renewed and he was granted a new lease for a term of 50 years with effect from 1st January 2002. On 16th May 2016, the parties agreed that the hearing of the suit does proceed from where it reached before Mutungi J. On 28th November 2016, the court fixed the matter for further hearing on 31st January 2017 in the presence of the advocates for both parties. When the suit came up for hearing on 31st January 2017, the advocate for the defendants did not appear. When the matter was called out in the morning of that day, Mr. Mituga, advocate appeared and sought adjournment of the matter on the ground that Mrs. M Ligunya who was appearing for the defendants was engaged in the Court of Appeal. The application was opposed by the plaintiff's advocate Mr. Kirimi. The court placed the matter aside until noon to give Mrs. Ligunya time to finish the matter which she was said to be prosecuting in the Court of Appeal.

When the matter was called out again at 12.30pm, neither Mr. Mituga who had held brief for Mrs. Ligunya nor Mrs. Ligunya were in court. The defendants also did not appear. The court having found no reason to justify the adjournment of the matter allowed the plaintiff's advocate to proceed with the hearing.

The next to give evidence was the plaintiff, Yose Musela Bidali (PW2). The plaintiff stated as follows in his evidence. The suit was brought by him on behalf of the estate of the deceased pursuant to a Limited Grant of Letters of Administration which was issued to him on 4th October 2012. He sued the defendants because they had made attempts to dispossess the estate of the deceased of the suit property. The defendants had claimed to be the owners of the suit property. The defendants had in their possession a

purported agreement for sale and an instrument of transfer to support their claim. The deceased did not sell the suit property. He took copies of the alleged agreement for sale and instrument of transfer which were in the possession of the defendants to a document examiner, Mr. Nyanjwa. Mr. Nyanjwa confirmed that the signatures in the two documents that were purported to be those of the deceased were not the deceased's signatures and as such were forgeries. He reported the matter to the police and after investigations Naaman Kailibi Meme and David Kariithi Macharia, the defendants herein were arrested and charged at Kibera Laws Court. The Land Registrar who purportedly registered the transfer of the suit property in favour of the defendants, Mr. Peter Nganga Mburu, swore an affidavit denying having participated in the alleged registration. Mr. Peter Nganga Mburu had also testified in the Kibera Law Court Criminal case which was still ongoing denying that he registered the alleged transfer. He came to realize that all was not well with the suit property when he received a letter written by Ruthugua & Associates Advocates dated 28th September 2012 asking the tenants occupying the suit property to vacate the same. There was an exchange correspondence between the said firm and his advocates on record. Attempts to trace the firm of Ruthugua & Associates Advocates at the physical address they had given in their letter and through the Law Society of Kenya did not bear fruit. The defendants did not manage to evict the tenants occupying the suit property. He urged the court to grant the prayers sought in the plaint.

On the defendants' counter-claim, he stated that the deceased did not receive any money from the defendants. On examination by the court, the plaintiff stated that the suit property was still registered in the name of the deceased. He stated that the photograph which the defendants had attached to the purported transfer in their favour was lifted from the deceased's obituary. He produced as exhibits, copies of, the Limited Grant of Letters of Administration dated 4th October 2012, the land registry file relating to the suit property, a search on the title of the suit property, the report of the Forensic Document Examiner, Antipas Nyanjwa, affidavit of Peter Nganga Mburu sworn on 19th November 2012, letter of demand dated 28th September 2012 from the firm of Ruthugua & Associates Advocates and warrants of arrest against, Rodgers Ruthugua, Naaman Kailibi Meme and David Kariithi Macharia.

After the close of the plaintiff's case, the plaintiff's advocate, Mr. Kirimi informed the court that he did not wish to make closing submissions. He told the court that he wished to rely entirely on the evidence on record and urged the court to enter judgment for the plaintiff against the defendants as prayed in the plaint. He also urged the court to dismiss the defendant's counter-claim.

The only issue which arises for determination in this suit is the ownership of the suit property. What I need to determine is whether it is the estate of the deceased or the defendants who own the suit property. The title in respect of the suit property was issued under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). Section 23(1) of the Registration of Titles Act provides as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

1. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject:

a. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and

b. To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting on the register unless the contrary is expressed in the register.

I am satisfied from the evidence on record that the deceased was the registered owner of the suit property. The plaintiff produced in evidence among others, a copy of Grant No. I.R 136511 dated 10th June 2011 in respect of the suit property and official Search on the register of the suit property dated 29th June 2015 which showed that the deceased was the registered owner of the suit property having been registered as such on 6th September 2011. The search did not reveal any other entry in the register of the suit property after 6th September 2011. The suit was defended by the defendants but they failed to appear in court to tender evidence in their defence and in proof of their counter-claim.

Although the defendants had contended in their statement of defence and counter-claim that they were the lawful owners of the suit property, they placed no evidence before the court in support of that contention. The evidence that was tendered in court by the plaintiff was therefore not controverted by the defendants. The evidence that was produced by the plaintiff and PW1 to the effect that the suit property was registered in the name of the deceased as the owner thereof was not contested. The evidence that was led to the effect that the purported agreement for sale between the defendants and the deceased and the purported instrument of transfer that was allegedly executed by the deceased in favour of the defendants were all forgeries was not challenged. The plaintiff's testimony that the defendants through their advocates served the occupants of the suit property with a notice to vacate the property was also not challenged. The plaintiff having proved the deceased's ownership of the suit property and the defendants' threat to evict the plaintiff from the property, the burden shifted to the defendants to justify their claim over the said property.

In the absence of any evidence from the defendants, the only conclusion this court can make is that the defendants have no lawful claim over the suit property and that their demand for vacant possession of the same was unjustified. The defendants' threat to evict the plaintiff and his tenants from the suit property in the circumstances was unlawful. For the foregoing reasons, I am satisfied that the plaintiff has proved his claim against the defendants and that he is entitled to the prayers sought in the plaint save for prayer (c) which is not necessary as the property is still in the name of the deceased. On the other hand, the defendants' counter-claim is not proved and is not for granting.

I therefore enter judgment for the plaintiff against the defendants jointly and severally in terms of prayers (a) and (b) in the amended plaint dated 5th November 2012. The defendants' counter-claim is dismissed. The plaintiff shall have the costs of the suit and the counter-claim.

Delivered and Signed at Nairobi this 15th day of September, 2017.

S.OKONG'O

JUDGE

Judgement read in open court in the presence of:

Ms. Oswera h/b for Ms. Kirimi for the Plaintiff

Ms. Kimani h/b for Ms. Ligunya for the Defendants

Catherine Court Assistant