



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 545 OF 2013

JOHN ONSOMU KEBIRO.....PLAINTIFF

VERSUS

HELLEN KEMUNTO NYAKUNDI.....DEFENDANT

JUDGMENT

John Onsomu Kebiro, hereinafter referred to as the plaintiff has come to court against ***Hellen Kemunto Nyakundi***, hereinafter referred to as the defendant claiming that at all material times to this suit, the plaintiff was and is still the registered proprietor of all that plot known as Langas Block 11/199 (K8, K9) having purchased the same from the late Kipkoech Arap Ruto measuring 0.05 Ha or thereabouts. That both the plaintiff and the defendant were once husband and wife respectively and on or about 18.4.2001 they divorced and remained divorced to-date. That the defendant unlawfully and without any colour of right forged the plaintiff's signature alleging that the plaintiff has given her express instructions and or authority to transact and transfer the suit land without the plaintiff's consent.

On or about September 2012, the defendant unlawfully, wrongfully and illegally entered, trespassed onto the plaintiff's property known as Langas Block 11/199(K8, K9) measuring 0.05 Ha hereinafter referred to as "the suit land" and started living and collecting rent purporting to have acquired the suit land from the plaintiff without the plaintiff's authority and/or consent. Particulars of trespass on the part of the defendant are knowingly entering into the plaintiff's land without any colour of right and remaining in the suit land even after divorcing and being issued with several warnings. Moreover, remaining in the suit land and transacting business therein without licence from the plaintiff and continuously occupying the suit land without any legal justification or at all. Furthermore, putting up structures on the suit land in total disregard to the fact that the plaintiff is the legal land owner and collecting monthly rent from the tenants purporting to be the landlord. That by reason of the foregoing, the plaintiff has suffered and continue to suffer irreparable loss and damages as its operations have been obstructed by the defendant's presence and has caused nuisance to the tenants.

The plaintiff's claim against the defendant is for a declaratory order declaring that the defendant illegally occupies the suit land and thereby should be evicted forthwith. The plaintiff further claims against the defendant for permanent orders of injunction restraining the defendant and or his servants or agents from entering or restraining, or collecting rent and/or constructing or doing any other act upon the suit land. That demand and notice of intention to sue has been issued in vain. Mesne profits and general damages for trespass. Costs of this suit and interest.

In defence, the defendant denies that the defendant specifically denies the following assertions:

- (a) ***That the plaintiff has ever been the registered proprietor of land reference Langas Block 11/199 (K8, K9).***

- (b) That the plaintiff purchased land reference Langas Block 11/199 (K8, K9) from Kipkoech Arap Ruto.**
- (c) That the land measures 0.05 hectares or thereabouts.**
- (d) That the subsistence of a divorce between the plaintiff and the defendant.**
- (e) That there was any forgery involved or used to transact and or transfer the suit land.**
- (f) That the plaintiff's consent was required before any transaction on the suit land could be undertaken/executed.**
- (g) The entry of the defendant into the suit land occurred in September, 2012.**
- (h) that the defendant's entry into the suit land was unlawful, wrongful and illegal.**
- (i) That the suit land belongs to the plaintiff.**
- (j) That the plaintiff's consent was required to acquire the suit land or collect rent therefrom.**
- (k) That the plaintiff has suffered and continues to suffer loss.**
- (l) That the plaintiff is permitted to do anything on the suit land.**
- (m) That the defendant is a nuisance to the tenants.**
- (n) That demand and notice to sue has been issued.**

Without prejudice to the afore stated and in the alternative, the defendants avers that as the owner of the suit land she is entitled to enjoy the same to the exclusion of all and sundry including the plaintiff. That the defendant cannot trespass into her own land nor can she be stopped from collecting rent therefrom. That the defendant has single-handily developed the suit property and it will be unfair and unjust for the plaintiff to claim and seek the reliefs he is seeking. That without prejudice to the aforesaid and in the alternative, the defendant avers that the property is matrimonial property and she is entitled to be thereon. That the disputed parcel of land is matrimonial property and besides the defendant, the children of the marriage are entitled to the same. That the plaintiff's action are actuated by malice. That the honourable court lacks jurisdiction to deal with matrimonial disputes. That the suit is incompetent and it ought to fail. The defendant prays for dismissal of suit.

When the matter came for hearing, the plaintiff testified that he lives in U.S.A., Texas in Lewisville. He used to be a teacher and also used to work in a supermarket. He knows Hellen Kemunto Nyakundi. He met her in Lewisville and gave her one day to stay at his place before she left for Minesota. She kept on calling her in Minesota and came back in on 20th December, 1997 hence they got married thereafter he went to Lewisville in Texas. He came to Kenya with Helen in 2002 and purchased the land measuring 5/8 of an acre from Mr. Kipkoech Arap Ruto at a consideration of Kshs.170,000/=. He signed the agreement before a lawyer. He produced the Sale Agreement as Pex.2. They divorced in 18.4.2007 in Texas. He produced the drawn decrees as Pex.4.

He came to Kenya in November, 2013 and found that she had intended to sell his land by forgery documents. She wrote a letter that He gave her permission. The letter is marked as PMFI.5. He claims not to have written the letter. The letter was addressed to the Physical Planner, Wareng. It was to transfer land to Hellen. The signature in the letter did not match the chief's. The names in the land have changed. Langas Block 2/243 and Block 2/244 are his parcels of land. Block 2/244 is in Hellen's name. Block 2/243 is in his name. He produced payment receipts marked as PMFI.7 and PMFI.8.. He is not in occupation of the property. Hellen is in occupation. The original number was Block 11/199. there are

some rental rooms constructed by himself in October, 2004. He has the plans. They were done by the County Council. He produced construction plans as PMFI.9.

He has the inspection card signed by the Municipal Council – PMFI.10. He has a construction record and produce it as Pex.11(a), Pex.11(b). He completed the rooms on 20.10.2004.

After construction, he left the property in the hands of Jeremiah Onsongo, his step brother and M/s Nyakundi's daughter, Zipporah Nyongesa but they colluded and took the money for themselves from 2004 upto date.

Zipporah never accounted for the money. He has never received any income. Zipporah is enjoying his property. They collect Shs.3000/= per room. There are 37 rooms. He seeks for eviction as she is not his legal wife since they divorced in 2007.

Hellen was charged in Criminal Case No. 3823 of 2014 for forgery. The case is for hearing on 15.7.2015. He produced the charge sheet as PMFI.12.

On cross examination, he states that he met Hellen in 1997 in Denton, Texas, U.S.A. He married her in December 20, 1997. He never came to Kenya until 1999. He did not come with her. He bought the land in 2002. He would stay in the country for 3 months. In 2002, he processed her papers. When he was purchasing the property, she was estranged. They had separated but there was no decree. She signed the agreement as a witness. He left with her in 2002 but cannot remember the month. In Texas, she was not working when they got married. He purchased for her the personal effects. He purchased the effects because she was his wife. He could purchase the items and she could purchase others. Hellen did not contribute in purchasing the land. The land was never registered in his name. Both parties have houses. Hellen is occupying K8 and K9, 244 and 243.

Hellen came back in 2012 and transferred this land in her name around 2012. He has the purchasing agreements. He did the records of construction. When he was in the country, he did not leave Hellen on the land. His brother was kicked out by M/s Hellen Nyakundi's daughter. He has been told that the houses are fetching Shs.3000 per house. Hellen began living in the house on 1.9.2012. He finished construction in October, 2004. He wrote most of the contents of the books. M/s Nyakundi and her daughter earned the money. The rates for 243 are in his name. 244 in Hellen's name. The land was registered in his names in 2004. He went to the Physical Planner. The documents were for 2013. they do not get documents from lands. Langas does not have title deeds yet. They divorced in April 18, 2007. The court in Texas, during divorce court was only aware of the property in Texas and not Kenya. Shown PMFI.6. He does not know who wrote the letter. If the chief did the letter, he would complain it. The documents are forged.

He did not complain against the Attorney General because it was Hellen who forged. He was married but later divorced. He constructed most houses. The rest were constructed by his brother. The land is now Langas Block II/243 and 244. He is seeking Block No. 243. He filed this case in 2013. She did subdivision and left 243 for him but all the portions are his. He was in the U.S.A. He did not do any tactics. She used forgery.

Mr. Omusundi learned counsel for the defendant withdrew from the matter necessitating substituted service but the defendant did not attend court as scheduled.

On the 14.3.2016, the plaintiff stated further on recall that his property is Langas 2/II/199 (K8, K9). The numbers were changed to Langas Plot 2/243 and Langas 2/244. K8 and K9 was changed to 243 and 243. He produced the documents as Pex.7 and Pex.8. From that time he testified, he has been able to see the property. He has found out that 243 is in his name but 244 is forged in her name. He prays that he be given back his land. The forgery case is pending. She has jumped bail, He prays as in the plaint.

PW2, George Asael Sirimani stated that he lives in the county of Kisii and precisely in Kisii

town. He knows the plaintiff, he is his matrimonial uncle. He was once married to one Hellen Kemunto. They are not together. Currently, they are not married. They have been living in the U.S.A and have never lived at home.

The plaintiff submits that in this case, the plaintiff is the one who purchased the suit property and the defendant was only a witness in the transaction. Further, the plaintiff is registered as the sole owner of land parcel No. Langas Block 2/243 while the defendant forged the plaintiff's signature and transferred parcel No. Langas Block 2/244 to her name. The plaintiff has also been paying land rates and rent for the two parcels of land solely without the participation of the defendant hence the defendant's claim cannot stand as the suit property exclusively belongs to the plaintiff.

2. Is the suit property matrimonial property?

Section 2 of the Matrimonial Property Act, 2013 defines matrimonial property as matrimonial home meaning *“any property that is owned or leased by one or both spouses and occupied or utilized by the spouse as their family home, and include any other attached property.”*

In this case, the plaintiff and the defendant never resided in the parcel of land nor did they call it their home. The law is clear that a property does not become a matrimonial property until a spouse makes contribution and/or works towards its improvement during existence of marriage. However, although the suit property in this case was purchased during the subsistence of the marriage between the plaintiff and the defendant, it is evident that it is only the plaintiff who paid the consideration for the purchase of the same. Further, the constructions on the suit property were solely built and maintained by the plaintiff as the defendant was always in the United States of America (U.S.A.) hence did not participate whatsoever in any way in the improvement and maintenance of the said property. It is thus true that this property cannot be said to be matrimonial property. Even if it is said to be so, the dissolution of the marriage in the year 2007 means that the marital status of both parties changed and the defendant no longer has a legal basis to call herself the plaintiff's wife. It is clear from Pexh.1 that both the plaintiff and the defendant got married in a marriage ceremony under American law. Subsequently, the two parties got divorced in United States of America (U.S.A.). It is clear that the marriage is no longer in existence and worse still according to the Decree issued by the American court there was no mention of common property (matrimonial property) hence the defendant's purported claim to any matrimonial property cannot stand. Moreover, the defendant cannot raise any claim to the plaintiff's property in Kenya yet the applicable law is the American law and in which the divorce decree clearly stated that there was no common property during the dissolution of the marriage. The plaintiff in this suit has proved his case on a balance of probability. He has demonstrated that the suit property exclusively belongs to him and that his marriage to the defendant was dissolved in the year 2007. The defendant is thus, a trespasser on his property. She has been unlawfully earning rental income amounting to Kshs.120,000 per month for the last 8 years. The plaintiff's claim for mesne profits is thus for Kshs.11,520,000 (Kshs.120,000 x 12 x 8). They also pray for damages for trespass which they pray to be assessed at Kshs.1,000,000/= in view of her blatant disregard of the law by denying the plaintiff access to his property. The defendant forged the plaintiff's signature and transferred parcel No. Langas Block 2/244 to her name and she was charged with criminal offence of forgery under Criminal Case No. 3823 of 2014, a matter which is now pending in court and in fact the defendant is at large having absconded bond. The claim has thus been sufficiently proved and should be allowed. Who will bear the costs of the suit? The plaintiff prays that this suit be allowed and that the defendant, her agents, employees and/or servants be evicted from the suit property and this honourable court do compel the defendant to pay the costs of this suit as costs follow the event.

I have considered the matter and do find that the suit property was exclusively purchased by the plaintiff. There is no evidence of contribution by the defendant. Moreover, the marriage between the plaintiff and defendant is not subsisting after the decree issued by the American court.

I do grant a declaratory order declaring that the defendant illegally occupies the suit land and thereby should vacate within 30 days in default to be evicted forthwith with the assistance of the Officer Commanding Langas police station, and a permanent injunction restraining the defendant and or his servants or agents from entering or restraining, or collecting rent and/or constructing or harassing the

plaintiff or doing any other act upon the suit land. I do grant mesne profits of 10% of the value of land for 7 years to be assessed by a recognized land valuer. General Damages are assessed at ksh 300,000. Orders accordingly.

DATED AND DELIVERED AT ELDORET ON 6TH DAY OF DECEMBER, 2016.

ANTONY OMBWAYO

JUDGE