



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 50 OF 2014

MERCY NJERI MWANGI.....PLAINTIFF

VERSUS

PETER MWANGI MUCHOKI.....1ST DEFENDANT

EDWARD MWANGI MACHARIA.....2ND DEFENDANT

JUDGMENT

The plaintiff approached this court vide a plaint dated 23rd January 2014 seeking for judgment against the defendants jointly and severally for:-

- i. Half share of Plot No. 4/245A in Soweto Ex-Kabarage Resettlement Scheme (hereinafter referred to as the “suit property”).
- ii. General damages for trespass.
- iii. Lost income of Ksh. 8,300/=per month from November 2011 until the date when the ownership of half share of the suit property reverts back to the plaintiff.
- iv. Interest on (iii) at bank rates.

The plaintiff alleges that she was the legal owner of half share of the suit property. She avers that she married the 1st Defendant in December 1986 and was blessed with three children and it was during the subsistence of their marriage that they bought from the City Council of Nairobi a parcel of land in Soweto Ex Kibarage Resettlement Scheme known as Plot No. 4/245A. They constructed 11 rental houses and occupied some of them with their children and as a source of income. They, however, separated in the year 2008 and on/or about 2nd September 2010 the plaintiff and the 1st defendant agreed to subdivide and share the rent income from eleven houses which were on the suit property out of which the plaintiff used to receive rent from five (5) houses and the 1st defendant from six (6) houses and it was from this agreement that the plaintiff would receive Ksh 8,300/= monthly as total rent from five houses. She further averred that she fell into an open deep hole along the Thika Super Highway and was admitted at Kenyatta National Hospital and it was while she was admitted at the hospital that the 1st defendant fraudulently sold the suit property to the 2nd defendant. She particularized the fraud of both defendants and added that the 2nd defendant was at all times aware of the ownership of the suit property and the dispute which existed upon the same therefore he cannot benefit from the principle of innocent purchaser without notice.

After the purchase, the 2nd defendant started collecting rent from the suit land thereby causing the plaintiff to lose income of Ksh 8,300/= per month. The Plaintiff now claims her half share of the suit property, damages for trespass upon her property, loss of income amounting to Ksh 8,300/=per month from November 2011 until cessation of the illegality/trespass and costs of the suit as well as interest on the foregoing.

Despite serving the defendants with the summons to enter appearance and copies of the plaint on 26th February 2014 they did not enter appearance neither did they file their defence. The plaintiff filed her request for judgment pursuant to Order 10 Rule 6 and 9 of the Civil Procedure Rules on 3rd April 2014. This was allowed and the plaintiff proceeded to set down the suit for formal proof as provided under Order 10 Rule 9 of the Civil Procedure Rules, 2010.

During the hearing in court the plaintiff testified that she and the 1st defendant bought the suit property from the proceeds of a business she had. After purchase a certificate was issued in the name of the 1st defendant by the City Council of Nairobi. She testified further that when their marriage broke down, they filed an agreement at the Chiefs office where she was given 5 rooms while the 1st defendant took 6 rooms. She said that she used to receive Ksh 8,300/= per month from the 5 rooms. It was her testimony that when she got an accident, the suit property was sold by the 1st defendant to the 2nd defendant, who was their neighbor. She further testified having tried to stop the sale by seeking help from the government authorities but all her efforts were rendered futile as the sale did take place. She therefore requests the court to order that she do get her half share of the suit property together with the rent from November 2011 and costs of this suit.

PW2 Robert Kihara Muiruri stated that he was an elder and represented the plaintiff in her dispute with her husband and in reaching the agreement that was signed by the plaintiff and the 1st defendant. He produced the agreement that was signed at the Chief's office. He stated that a chief who was not party to the agreement between the plaintiff and the 1st defendant is the one who allowed the transfer of the suit property to the 2nd defendant and believes the problem was with the chief who allowed the transfer without notifying the plaintiff.

I have considered the pleadings and evidence of the plaintiff together with her written submissions. The issue for this court's consideration is whether the plaintiff has established her proprietary rights over half share of the suit property, whether her half share in the suit property was fraudulently sold to the 2nd defendant by the 1st defendant in complete disregard of the plaintiff's proprietary interest therein and finally whether she should be awarded the prayers that she seeks. It is the plaintiff's evidence in court that the suit property was matrimonial property and that when she and the 1st defendant parted ways, the two agreed to share the rental rooms. However unknown to her the 1st defendant sold the property to the 2nd defendant. It is her contention that the 2nd defendant being a neighbor ought to have known that the said suit property was matrimonial and that the plaintiff and 1st defendant were collecting rent from the rooms. **Section 93(3) of the Land Registration Act, No. 3 of 2012** provides for a spousal consent where one spouse seeks to dispose of property held in his or her name. It also puts the person acquiring the property under a duty to ensure that the other spouse consents to the disposition of the property. The said section states that:

“(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house:-

a. ...

b. *the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to the assignment.*

(4) *If the spouse undertaking the disposition deliberately misleads the Lender or, the assignee*

or transferee by the answers to the inquiries made in accordance with Subsection 3(a) or 3(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.”

According to this legal provision, the 2nd defendant was obliged to inquire from the plaintiff whether she consented to the transfer of her half share in the suit property to him for the transfer to be successful. He did not do so. In that case therefore, the transaction between the 1st and 2nd defendant as far as it touches on the purchase and disposal of the suit property is void for lack of consent from the plaintiff since she has proved that she was a spouse to the 1st defendant in whose name the suit property was registered.

Having found that the sale between the defendants was void, it is my finding that the 2nd defendant became a trespasser on the plaintiff's half share of the suit property. This is because the 2nd defendant took over the property without the consent of the plaintiff and without any right. The plaintiff has shown that she collected rent from the 5 rooms of the suit property and this action of the plaintiff amounted to constructive possession. She is therefore entitled to general damages. The damages in this case will be in consideration of the nature of the property and the nature of the trespass. An award of Kshs. 100,000/= would be adequate.

It is my finding that the plaintiff has proved her case on a balance of probabilities and is entitled to the prayers as follows;

- i. Half share of the suit property being Plot No 4/245A in Soweto Ex-Kabarage Resettlement Scheme.
- ii. General damages for trespass in the sum of Kshs. 100,000/=.
- iii. Lost income of Ksh. 8,300/=per month from November 2011 until payment in full.
- iv. The 2nd defendant is given 30 days from the date of this Judgment to vacate the plaintiff's half share of Plot No 4/245A in Soweto Ex-Kabarage Resettlement Scheme.
- v. Interest at court rates.

DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE