



REPUBLIC OF KENYA



**Marete v Mwidau & another (Environment & Land Case 224 of 2021)
[2024] KEELC 1638 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 224 OF 2021**

**NA MATHEKA, J
MARCH 20, 2024**

BETWEEN

JANE GAKII MARETE PLAINTIFF

AND

AHMED ABDALLA MWIDAU 1ST DEFENDANT

PRIME BANK LIMITED 2ND DEFENDANT

JUDGMENT

1. Plaintiff states that the 1st Defendant is the Registered owner of all that parcel of Land known as Subdivision No. 2544 (Original No. 1508/5) of Section I Mainland North situate at Nyali within Mombasa County (hereinafter the "suit Property"). The Plaintiff states that at all material times this suit property is mortgaged/ Charged with the 2nd Defendant over financial facilities advanced to the 1st Defendant. The Plaintiff states on or about 4th June, 1998 the 1st Defendant sold the said parcel of Land to the Plaintiff at an agreed purchase price of which Kshs. 1,300,000/= which purchase price the Plaintiff duly paid out to the 1st Defendant. The Plaintiff states that the 1st Defendant was to Discharge the suit property using the sale proceeds received from the Plaintiff and thereafter transfer the property to the Plaintiff but instead he took up the said sale proceeds and disappeared never to be seen and without Discharging the suit property as agreed. The Plaintiff states that she has been in occupation of the suit property from the year 1998 when she paid out the agreed purchase price to the 1st Defendant up to date and that she has carried out several improvements on the Property with approvals from the Local Authorities. The Plaintiff further state that she over time made several offers to the 2nd Defendant to Discharge the suit property and release the Original Title to the Plaintiff upon payment of all the accrued debts on account of the 1st Defendant on the mortgage of the suit property but the 2nd Defendant has failed to accede and comply with the Plaintiff's requests.



2. The Plaintiff states that the Defendants through their agents, servants and/or employees have illegally and without authority descended on the suit property with threats of evicting the Plaintiff from the suit property and pulled down several structures of the Plaintiff on the suit Property. The Plaintiff states that she stands to suffer irreparable loss in her long term investment on the suit property if the Defendants are not stopped from carrying out their issued threats. The Plaintiff's suit against the Defendants is for a declaration that the suit property belongs to the Plaintiff, an order for transfer of the Property into the Plaintiff's name and the purchaser and for a permanent injunction restraining the Defendants either by themselves, their servants and/or agents from interfering with the Plaintiff's quiet possession of the suit property.
3. This court has considered the evidence and the submissions therein. The plaintiff averred that she entered into an agreement of sale with the 1st defendant on 4th June 1998 for the purchase of LR No. 2544/I/MN for a consideration of Kshs 1,300,000/=. The plaintiff maintained that it was agreed with the 1st defendant that the purchase price would be paid to the 2nd defendant to settle the charge. After which the 1st defendant would ensure the title is discharged and the same transferred into her name. In particular, Clause 12 of the agreement stated;

“ That the title deed is now at the bank where it was lodged as security and the vendor has to retrieve the same from there on completion of payment of the purchase price immediately in default of which the vendor shall pay and/or forfeit the sum of Kshs 1,000,000/= as liquidated sum.”
4. The 1st defendant denied executing the agreement of sale dated 4th June 1998 for the sale of the suit property as claimed by the plaintiff. He contended that he had charged the suit property to the 2nd defendant and as such could not enter into an agreement of sale over the suit property. He contended that the plaintiff had taken possession of the suit property against his will and urged the court to order the plaintiff to give him vacant possession. The 2nd defendant maintained he was a stranger to the alleged agreement of sale between the plaintiff and the 1st defendant. The plaintiff has admitted in her pleadings as well as during her cross examination that she was aware that the suit property was subject to a charge in favour of the bank.
5. The Certificate of Postal Search dated 17th March 2022 indicated that LR No. 2544/I/MN was registered in the name of Ahmed Abdalla Mwidau, with an encumbrance in the form of a charge dated 9th April 1996 to Prime Bank for Kshs 950,000/=. Section 25(1) of the [Land Registration Act](#) 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.” [own emphasis]
6. This provision makes the rights of any proprietor subject to any charges registered against the property in question. It is not in dispute that before the sale agreement of 4th June 1998, the 1st defendant had executed a legal charge in favour of the bank on 9th April 1996 over LR No. 2544/I/MN. Having charged the suit property, it was mandatory upon the 1st defendant to seek and obtain written consent from the bank before entering into a sale agreement of a charged property. No evidence has been placed before this court where the consent to transfer, assign or part with the suit property, was sought



from the bank by the 1st defendant. The plaintiff was well aware that the suit property was charged, but they proceeded to enter into a purported sale agreement with the 1st defendant. The plaintiff maintained that she paid a deposit of Kshs 1,000,000/= and Kshs 300,000/= as cash in the presence of an advocate by the name of Ms. Jane Abuotha. The 1st defendant has denied ever receiving any money from the plaintiff for the purchase of the suit property, more so the plaintiff did not demonstrate to court evidence in the form of a receipt of acknowledgement that she paid the purchase price to the 1st defendant in the form of cash.

7. The plaintiff admitted to being aware of the fact that the suit property was charged to the 2nd defendant. On cross-examination by Mr. Ondego counsel for the 2nd defendant, she attested that she was informed by the 1st defendant that the bank had agreed to the offsetting of the loan with the proceeds of the sale agreement. However, no evidence was placed before the court as to the written consent obtained from the bank before the agreement between the plaintiff and 1st defendant. The plaintiff maintained that she has always been ready to offset the arrears to the bank, however, the bank has distanced itself from the agreement between the plaintiff and 1st defendant. The bank's manager Mr. Altaf Anwarli clarified on re-examination that the plaintiff was not a customer of the bank and hence the bank could not accept her offers of offsetting the charge.
8. The plaintiff cannot enforce the agreement she had with the 1st defendant against the 2nd defendant, who was not a party to the agreement. For the agreement to be enforceable against the 2nd defendant, the plaintiff had to demonstrate to the court that the bank gave consent to the sale of the charged suit property. Without the written consent of the bank, the agreement was invalid and cannot be enforced against the 2nd defendant, who is a stranger to the agreement. Further to that, the plaintiff had no registered interest in the suit property and cannot defeat the bank's rights a charge whose rights are duly registered against the title. In *Paul Gatete Wangai & 13 others v Capital Realty Ltd & another* [2020] eKLR it was held that;

“Although the Plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank's interest as Chargee. A charge is an overriding interest within the meaning of section 28(g) of the *Land Registration Act*, which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property... The Plaintiffs must have been aware that the suit property was charged, and that for any sale to be valid, the Chargee was required to give its consent. All the Plaintiffs were required to do was to conduct an official search on the suit property, and insist on the consent of the Chargee before committing their money. They seem to have missed this crucial step, which is a basic requirement in this kind of transactions.”

9. This court's finding is that any beneficial interest that the plaintiff may claim to have over the suit property is subordinate to the 2nd defendant's interest as a chargee.
10. Now the court turns to the 1st defendant's counterclaim dated 5th September 2023. The 1st defendant maintained that the plaintiff had illegally and forcefully taken possession of the suit property and has since refused to give vacant possession. The 1st defendant denied ever entering or executing any sale agreement of the suit property with the plaintiff and urged the court to evict her from the suit property. The 1st defendant in his testimony maintained that though he knows the plaintiff as his neighbor in Nyali, he never entered into a sale agreement with her over the suit property as the property was already charged to the 2nd defendant. The 1st defendant maintained that the signature on the sale agreement was not his and denied receiving any purchase price from the plaintiff, or the advocate who prepared



the agreement. The 1st defendant also denied ever asking the plaintiff to offset the charge with the bank on his behalf or instructing the bank to receive any payments on his behalf. He claimed that he has tried to develop the suit property, but his efforts to evict the plaintiff and the structures she has constructed has been fruitless.

11. The evidence before the court points to the conclusion that there was no binding contract between the plaintiff and the 1st defendant that could be enforced by the equitable remedy of specific performance. The agreement was voidable from its inception as the same was entered concerning a charged property without consent from the bank. Further to that, the plaintiff cannot recover the purchase price, she claimed to have paid to one Jane Aboudha Advocate who acted for both parties. The plaintiff never called the advocate to testify that cash was paid to her by the plaintiff and that the same was received by the 1st defendant. There is no documentary evidence produced that indicated that the 1st defendant received Kshs 1,300,000/= from the advocate or the plaintiff as purchase price of the suit property. Without evidence of payment made, the plaintiff cannot even recover from the 1st defendant the purchase price as debt.
12. The plaintiff has never acted in good faith, she has litigated over the suit property despite being aware that she has no good title to the charged suit property. She instituted Mombasa ELC No. 296 of 2016 against the 1st defendant for registration as the registered owner of the suit property by adverse possession, and the suit was struck out on 30th September 2019. She is well aware that the bank had an overriding interest in the suit property and took advantage of the 1st defendant's absence in the country to continue benefiting from the suit property.
13. The plaintiff was a trespasser from the time she entered into a voidable agreement with the 1st defendant. As such, the respondent is entitled to compensation for the period the plaintiff has been in occupation of the suit property. The law is that trespass to land is actionable per se (without proof of any damage) for the court to award damages. I do note that the 1st defendant did not claim damages for trespass and therefore there is no amount to guide the court in assessing general damages for trespass. The plaintiff has however admitted to erecting some rental apartments on the suit property, which is a clear indication that the plaintiff deprived the 1st defendant of the use of the suit property. The court has no doubt that the plaintiff neither sought nor obtained the consent of the 1st defendant to develop the suit property. The plaintiff's actions on the suit property are unlawful and the 1st respondent is entitled to compensation. No evidence was adduced as to the state of suit property after the trespass and it thus becomes difficult to assess general damages for trespass. However, the 1st defendant produced a Valuation report dated 29th March 2022 that valued the suit property at an open market value of Kshs 22,000,000/=. I award the respondent a nominal figure of Kshs. 500,000/- plus interest from the date of this judgment until payment in full as general damages for trespass.
14. In conclusion, the plaintiff's plaint dated 3rd November 2021 fails and is dismissed, while the 1st defendant's counterclaim dated 5th September 2023 is allowed. The plaintiff shall bear the costs of the 1st and 2nd defendants' costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

