



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 146 OF 1999

ORBIT CHEMICAL INDUSTRIES LIMITED.....PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. **ORBIT CHEMICAL INDUSTRIES LIMITED**, referred to as Orbit has brought this action against **National Bank of Kenya Limited**, referred to as NBK in respect to the transaction, between the two, in the sale and purchase of property **LR No 12425** (the property). This is a large piece of land within Nairobi which is 38.54 hectares. It is what is commonly referred to as **'Mukuru Kwa Njenga'**.

2. The transaction began with NBK's advertisement of invitation of tenders to purchase the property. Tenders were to reach NBK by 18th December 1985 at 12.00 Noon. Orbit were successful in tendering for the property when it offered Ksh 10,009,000. The property's sale was subject to the Land Control Act, Cap 302. That is, Orbit was required to obtain Land Control Board's consent to purchase the property. After being petitioned President Moi, in exercise of his powers under section 24 of Cap 302 and by legal notice No 280 of the Kenya Gazette of 21st November 1986, exempted the transaction from the provisions of Cap 302. That exemption of obtaining Land Control Board consent paved the way for orbit to be registered as the owner of the property. That registration was effected on 10th March 1987. That is when a series of woes befell Orbit.

3. It is on record that Orbit wrote to its advocates by letter dated 7th May 1987 as follows:

"We....wish to advise you that there are squatters on the land. Kindly therefore advise Hamilton Harrison & Mathews of the same."

4. It is also on record that Orbit's advocate by letter dated 10th June 1987 wrote to Hamilton Harrison & Mathews Advocates bringing to that firm's attention that Orbit was entitled to vacant possession of the property. By that letter the advocate stated that if NBK was unable to give Orbit vacant possession they could refund Orbit the purchase price plus interest.

5. By Kenya Gazette Supplement No. 3 President Moi published Legal Notice No. 119. This was done on 8th May 1987. By that Gazette Notice the President revoked the exemption given by Legal Notice No 280 of 1986.

6. That revocation set off a flurry of actions. One such action was that on 22nd October 1987 the Registrar of Titles lodged a caveat on the property claiming interest under section 65 of the Registered Titles Act (now repealed). Orbit's reaction was to file a miscellaneous suit No 364 of 1992 seeking judicial review order of mandamus to compel the Registrar to remove the caveat. It is not clear how that action was concluded.

7. NBK on its part filed a suit HCCC No 3463 of 1992 against orbit seeking declaration that the revocation by the president, of the exemption, had the effect of rendering the transfer of the property to Orbit null and void. Although Orbit filed its defence it did not counter claim for vacant possession in that suit.

8. It does seem that Orbit continued to pursue the cancellation of the revocation of the exemption by the president because by Legal Notice No. 65 of 5th June 1998 the president revoked/cancelled the revocation order of 8th May 1987 and re active the exemption given earlier on.

9. On that occurring NBK withdrew its case against Orbit on 21st July 1998.

10. Orbit stated that despite the revocation of the Legal Notice by the president and the withdrawal of the case by NBK it was not possible to

gain access of the property because of the presence of squatters thereon.

11. Orbit by this action has pleaded that NBK delayed in giving vacant possession of the property. That despite withdraw of its suit NBK had failed to heed to Orbit's request for vacant possession. Orbit also plead that NBK induced it to enter and to complete the contract and pay the purchase price while representing that if Orbit performed its obligation it would hand over vacant possession of the property. As a consequence of that representation Orbit amongst other things obtained change of user from agriculture to industrial, of the property.

12. Orbit by this action seeks prayers:

i. For specific performance for delivery of vacant possession;

ii. For Ksh 3,489,850 per month being the loss of income or rent or profit for August 1998 to date of vacant possession; and in the alternative.

iii. General damages.

13. NBK denied the claim and pleaded that vacant possession was given to Orbit.

ANALYSIS

14. There are two preliminary issues that must be determined first before the court determines whether NBK did hand over vacant possession of the property. Those issue are:

(a) Is Orbit's suit *res judicata* or is it caught by doctrine of estoppel; and

(b) Is Orbit's suit time barred.

15. If the answer to all the two issues above is in the negative the court will proceed to determine the issue whether NBK did hand over vacant possession.

16. The facts of this case fail the test of what is called *res judicata*. This is because NBK's argument is that Orbit's case is *res judicata* because it sued the Attorney General, in HCCC No 876 of 2004. The test of what is *res judicata* was discussed in the Court of Appeal in the case Julius Muthoka Ndolo v Park Towers Limited & 2 Others (2019) eKLR where the court had this to say.

"This doctrine has been applied in a number of cases including; Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

(a) the matter must be 'directly and substantially' in issue in the two suits,

(b) the parties must be the same or parties under whom any of them claim, litigating under the same title; and

(c) the matter must have been finally decided in the previous suit."

See also the Uhuru Highway Development Limited case (supra).

17. Looking at what was discussed in the above case Julius Muthoka (*supra*) it becomes clear that the parties in this case are different to those in HCCC 876 of 2004. In HCCC 876 of 2006 the plaintiff is Orbit and the defendant is the Attorney General. It follows that this case is not *res judicata*.

18. NBK argued that the claim in this matter is however the same as was in HCCC 876 of 2004. NBK drew the court's attention to the prayers in HCCC 876 of 2004 which I reproduce here:

"(a) A declaration that the Registrar of Lands had not right in law to enter and register a caveat over L.R. No. 12425 and that the Registrar's conduct in entering and registering a caveat over LR.No. 12425 was null and void and was a taking of private property without following the laid down procedures and without compensation contrary to section 75 of the Kenya Constitution and Land Acquisition Act Cap 295 Laws of Kenya.

(b) Loss of income rent or mesne profit at the rate of Ksh 3,489,550 per month from the date of the registration of caveat until the date of its removal.

(c) General damages for trespass over L.R.No. 12425

(d) Removal of the caveat and squarters from L.R. No. 12425 and delivery of vacant possession of LR. 12425 to the plaintiff.

(e) Interest on prayers (b) and (c) above."

19. Orbit's grievance in that case filed against the Attorney General is that as a consequence of the Registrar registering the caveat squatters entered the property which resulted to its loss and damage set out above.

20. In this present case Orbit pleaded:

“To date the plaintiff is unable to take possession and utilise the said land as stated above because the land is occupied by squatters who have refused to vacate and threatened to destroy the plaintiff's property in the event the plaintiff attempts to take possession of the said land. By reason of the matters aforesaid the plaintiff has suffered loss and continues to suffer loss and damage.”

It is after that plea that Orbit set out the loss and damage it suffered.

21. HCCC 876 of 2004 was heard and a Ruling was delivered in favour of Orbit, against the Attorney General. Orbit by that Ruling was awarded Ksh 6,015,113,000.00. That Ruling was delivered on 12th October 2012. That Ruling was set aside by an appeal, on 22nd March 2019 resulting in the suit being referred back to the High Court for hearing of the formal proof, because interlocutory judgment had been entered against the Attorney General.

22. I am inclined to agree with the submissions of NBK that Orbit's suit is caught by the doctrine of estoppel which was discussed in the case **George Kamau Kimani & 4 Others v The County Government of Trans Nzoia & another (2016) eKLR** thus:

“16. In Trade Bank Limited V L Z Engineering Construction Limited [2001] E.A.266, this Court, adopting the definition of issue estoppel in Halsbury's Laws of England (4th edition) at page 861 stated:

“An estoppel which has come to be known as Issue Estoppel may arise where a plea of res-judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law”.

17. The principle of res judicata is intended to bring finality in litigation. The learned authors of MULLA, Code of Civil Procedure, 18th edition [2012] at page 293 states as follows:

“The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be re-opened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly or at a later stage. The principle is rooted to the rationale that issues decided may not be re-opened and has little to do with the merit of the decision”.

23. Orbit brings the present action contending that NBK breached the contract which resulted in squatters occupying the property and consequently Orbit is unable to gain access and has therefore suffered loss and damage. It is important to note, and the witness of Orbit did confirm that the expert evidence relied upon in this case to prove loss and damage is the same expert evidence which was relied upon in HCCC 876 of 2004.

24. Undoubtedly Orbit does seek to litigate the same issues in this matter as well as in HCCC 876 of 2004, albeit that in this case the allegation is that NBK breached the contract leading to invasion by squatters on the property. Orbit is estopped from raising the same issue in both these suits.

25. I will cite an old case namely **The Rev Oswald Joseph Reichel and Rev. John Richard Magrath (1889) 16 App. Cas 665**, because it speaks to what I am face with, as follows:

“My Lords, I think it would be a scandal to the administration of Justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the court had decided in a separate action.

I believe there must be an inherent jurisdiction in every court of justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed”

26. Is this suit time barred. My answer is in the positive. Orbit's claim here is for breach of contract. It was a term in the agreement of sale that NBK would transfer the property with vacant possession. The agreement of sale was dated 7th July 1986. The property was transferred to Orbit on 10th March 1987. Orbit from May 1987 was aware that there were squatters on the property. It even instructed its advocate to write to NBK's advocates to raise that issue with them. Orbit did not bring this case, alleging breach of contract until 1999, 12 years after the breach.

27. Orbit found refuge by stating that the suit is not time barred because section 7 of the Limitation of Action Act Cap 22 provides action in

land should be filed within 12 years. That submission however goes contrary to the pleading in the plaint. It is clear by the pleading, hereof, that the claim before court is of breach of contract which ought to have been filed within six years as provided under section 4 (1) (a) of Cap 22.

28. I find and hold that the Orbit's claim is time barred by virtue of section 4(1) (a). It is apt to say "A plaint which is barred by Limitation is a plaint barred by Law". See **Iga v Makerere University (1972) E.A.** page 65.

29. See also the case **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR** where it states:

24. It is common ground that the cause of action in this matter was based on contract and that **section 4** of the **Limitation of Actions Act** prohibits suits filed after the end of six years from the date on which the cause of action accrued. As **Potter, JA** observed in the case of **Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)**:

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in **Divecon vs Samani (1995-1998) EA 48** stated as follows:-

"....to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „,„the wording of section 4 (1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked?."

30. Having found in the positive for two of the above issues it follows that I need not proceed to consider whether Orbit was granted vacant possession. But if I had to decide that issue I would have found that NBK failed to give orbit vacant possession as per the contract.

31. Before concluding this judgment I need to say that I noted on 2nd December 2004 Justice Emukule in this case gave an order as follows:

"That leave be and hereby granted to solvent Kenya Limited to take over the above suit continue with the suit as plaintiff against National Bank Limited"

32. As far as I can tell that order still subsists. Does that mean that the plaintiff is Solvent Kenya Limited and not Orbit. The learned advocates did not enlighten me on that but instead they proceeded as though Orbit was still the plaintiff.³³ What order should I make on costs? I find that indeed the culmination of the problems Orbit faced, in respect to the transaction, was NBK's failure to give vacant possession. Indeed it did seem to me that there was never an intention to give orbit vacant possession. NBK's intention, it seems, was to abandon Orbit and to leave it struggle with the removal of squatters who seemed to have been on the property, even as NBK sold the property to Orbit. NBK is not therefore deserving in costs of this suit even though the suit will fail.

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CONCLUSION

34. I hereby dismiss the plaintiff's suit with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March 2020.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant