



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
ENVIRONMENT AND LAND COURT
ELC CASE NO. 1510 OF 1997

CORNER MOTOR WORKS LIMITED.....PLAINTIFF

VERSUS

INTEX CONSTRUCTION LIMITED.....DEFENDANT

JUDGEMENT

By way of *Plaint* dated **20th June 1997**, the Plaintiffs herein have come to Court seeking for various orders, inter-alia:

- a. A Declaration that the Defendant's /title is defective in law.***
- b. A permanent injunction to restrain its agents, and/or servants from interfering with the suit premises in any manner whatsoever.***
- c. Costs of the suit.***
- d. Any other relief that this Honourable Court may deem.***

The Plaintiff in its case stated that in **1953, Messrs. Water Filtration Limited**, were granted a Temporary Occupation License over the parcel of land known as **Plot No.6** situated in **Athi River, Mavoko County**. Subsequent thereto, **Water Filtration Services Limited** transferred the same to the Plaintiff in order to facilitate the operations of the latter company and this was done with the express approval of the Commissioner of Lands.

Consequent thereto, the Plaintiff occupied the suit premises and honoured all the terms and conditions of the said grant till **24th December 1979**, when the Government of the Republic of Kenya pursuant to a directive by his Excellency the then **President Daniel Toroitich Arap Moi**, gave a directive that the Commissioner of Lands do convert all Temporary Occupation Licenses to Long Term Leases of 99 years. Vide a letter dated **21st October 1986**, the Commissioner of Lands confirmed to the Plaintiff that **Plot No.6** would be converted into a Long Term Lease and a letter of allotment would be issued to the Plaintiff upon complying with the requisite conditions.

On the strength of that directive, the Plaintiff embarked on erecting permanent structures on the suit property, inter-alia, workshop garage, stores, offices, manager's house, yard etc. expending colossal

amounts of money thereof. On **15th December 1992**, the Commissioner of lands wrote to the said title holders of the parcel of land known as **LR No.337/832, Messrs. Auto Spring Manufacturers Limited** notifying them of the government decision to convert **T.O.L Plot No.6**, which had being fully developed by the Plaintiff into a Long Term Lease and also to surrender the **Title No. IR.37639** for the said parcel of Land for necessary rectification since it had being issued erroneously, without factoring **Plot No.6** which had since being approved for conversion into a Long Term lease and being **LR No.337/2826**.

On **22nd June 1984**, the Commissioner of Lands wrote to the Plaintiff and **Messrs Auto Spring Manufacturers Limited** and copied to the Defendant instructing them to undertake the necessary survey for

Title No.IR.37639 being **LR.No.337/832**, for purposes of subdivision. The Plaintiff instructed **Messrs. Harunani & Associates** to carry out the survey, which was done and the record forwarded to the Director of Survey. As a result two plots resulted ie. **LR.No.337/2825** and **LR.No.337/2826** respectively. According to the subdivision, the Plaintiff was in occupation of **LR.No.337/2826**. The Director approved the survey vide his letter dated **8th October 1997**, calling for the Deed Plans for his signature.

However as the Plaintiff was awaiting the Deed Plans by its surveyors, the Defendant obtained Lease of Title for the entire Title **No.IR.37639** being **LR.No.337/832**, at the behest of the Plaintiff's interest in the portion of the suit property. The Defendant simultaneously commenced fencing and dumping of its industrial waste on the portion of the land occupied by the Plaintiff. The Plaintiff made complaints to the Defendant and to the Commissioner of Lands to surrender the title since it was issued erroneously to no avail.

The Defendant filed its statement of Defence on **1st July 1997**, and denied all the allegations made by the Plaintiff herein, but admitted that the **TOL plot No.6** was only a portion of the parcel of land **LR.No.337/832**, which was lawfully transferred to the Defendant on **10th December 1996** by **IR.37639/7**. It was the Defendant's contention that the land had initially been allotted to **Joroti Industries Ltd** bearing **Grant No.IR 37639** and issued on **6th June 1983**. It was the Defendant's further contention that no instructions to surrender the title of the suit land was ever received by it and did put the Plaintiff to strict proof thereof. The Defendant further averred that the suit was time barred as the title to the suit land was issued on **6th June 1983**, and therefore the suit has been caught by Limitation of Actions Act Cap 22 Laws of Kenya. It was also contended that the Plaintiff had no *locus standi* to file the suit as it has no interest and/or claim over the said land. Consequently, the Defendant urged the Court to dismiss the Plaintiff's suit with costs.

After various interlocutory applications, the hearing commenced on **16th March 2016**, wherein Plaintiff called one witness to support its case. The Defendant too called one witness to support its rival position over this matter.

The Plaintiff's Evidence

PW1 - Mr. Arun Sharma, adopted his witness statement filed on the **28th April 2014**, and stated that he was the Director of the Plaintiff Company since **1995**. It was his testimony that he had the Original letter of Transfer which was dated **11th November 1965**, over the **Plot No.6**. The Transfer was for a consideration of **Kshs.10,000/=** which was in favour of the Plaintiff Company. He testified that he erected structures on the suit premises which comprised of offices, garage, stores and a manager's house. He took possession and occupation and utilized the suit premises to make Water Filters in the Country. It was his testimony that the Plaintiff Company was incorporated for the sole purpose of preparing water filters. While in occupation in **1979**, the then President, **His Excellency Daniel Toroitich Arap Moi**, ordered that the Temporary Occupation Licenses be converted into Long Term Lease of **99 years**. His advocate wrote to the Commissioner of Lands to convert **Plot No.6** into a Long Lease as evidenced in the letter dated **12th February 1984**. A response to that letter was availed on **21st October 1986**, wherein the Commissioner of Lands granted the Plaintiff a long lease of **99 years**. Thereafter **Water Filtration**

Services Limited, his Company, received a letter dated **22nd June 1999**, from the Ministry of Lands stating that a Survey was to be done on **LR.No.337/832**. The Survey was carried out by **Messrs. Harunani & Associates** and a **Deed Plan No.170/57** dated **3rd December 1997** issued. The Director of Survey approved the Survey vide his letter dated **8th October 1997**. **Plot No.6** which he had fully developed was assigned the Number **LR.No.337/2826** and **LR.No.337/2825** was for **Auto Spring Manufacturers Limited**.

In cross-examination by **Mr. Nganga**, Counsel for the Defendant, he testified that he had the original Letter of Transfer. In **1986** the owner of **LR.No.337/832** was **Corner Works Limited**. He exhibited a letter dated **15th December 1992**, the letter was written to **Auto Spring Manufacturers Limited**. He had Deed Plan which was in respect to his portion known as **LR.No.337/2826**, and had no title in respect to **LR.No.337/2826**. The original title **LR.No.337/832** was supposed to be taken to the Commissioner of Lands to be rectified. He did not know that the title **LR.No.337/832**, was transferred to **Intex Construction Limited**. It was transferred by **Auto Spring Manufacturers Limited**.

The Defendant's Evidence

DW1 - Poran Sigh, stated that he is a Director of the Defendant Company. He adopted his witness statement dated **9th September 2014**, and relied also on the affidavit sworn by **Hardayat Sigh**, dated **20th July 1997**. He stated that he became aware of **LR.No.337/832** in **1984** when he approached the then owner with an intention to buy the property. The land had a boundary wall. They bought the land in an auction.

The owner of the land was **Auto Spring Manufacturers Limited** but initially it was in the name of **Joroti Industries Limited**. His advocate wrote to the Commissioner of Lands on **15th April 1986**. The land was **LR.No.337/832**, which had being transferred in favour of **Auto Spring Manufacturers Limited**. Their advocate sought consent to transfer from **Auto Spring Manufactures Limited** to the Defendant Company. They paid stamp duty on **the 11th December 1996**, to the tune of **Kshs.160,000/=** and was issued with a receipt in respect of **LR. No.337/832**. The transfer was issued on **18th December 1996**. He paid the Trade Licence with Mavoko County. They obtained the title documents and the consideration was **Kshs.400,000/=** before the land was transferred to the Defendant. The original title was produced as **IR.No.37639** in respect of **LR.No.337/832**, it is dated **30th January 1997** for **99 years**. He had a transfer dated **18th December 1996** from **Auto Spring Manufacturers Limited** to the Defendant Company. The property was charged to **Kenya Commercial Bank** for an amount of **Kshs.10,000,000/=** on **31st December 1996**, and the debt was paid and he obtained discharge on **24th April 2006**. The property was charged again to **Equatorial Commercial Bank** for **Kshs.16,000,000/=** on **29th October 2009**, and made a further charge of **Kshs.14,000,000/=** from the same bank and the Title is with **Equatorial Commercial Bank Limited**. They embarked on putting beacons on the land but the agent of the Plaintiff thwarted that process in the **year 1997**, and they did not pursue it further. He testified that the Plaintiff's Director had tried to sell the land to the Defendant but the negotiations collapsed.

After the close of *viva voce* evidence, parties filed their respective written submissions through their advocates which this Court has carefully read and considered. The Court has also considered the cited authorities therein and the relevant provisions of law and the Court makes the following findings:-

There is no doubt that the Plaintiffs herein have been on the suit land since **1953** wherein **Water Filtration Company** had acquired a Temporary Occupation Licence (TOL) for **plot No.6**. There is also no doubt that even with Temporary Occupation Licence, the Plaintiffs did put up permanent structures wherein they run their stores, offices and garages.

There is also no doubt that this Temporary Occupation Licence(TOL) was later converted into long term leases by the Government. The Plaintiff alleged that the said conversion was done with the directive of the then President of the Republic of Kenya, **His Excellency Daniel Toroitich Arap Moi**. Though the Plaintiff did not produce any evidence of such directive, it produced a letter dated **21st October 1986** from

the Commissioner of Lands which confirmed the Government decision to convert Temporary Occupation Licences (TOLs) into long term leases. Further, it is evident that **Auto Spring Manufacturers Ltd**, had acquired title for **LR.No.337/832** on **16th May 1990**, from **Joroti Industries** who allegedly became registered owner on **1st January 1983**. The Plaintiff alleged that this title also incorporated **plot No.6(TOL)** which the Plaintiff had occupied since **1953**.

It is evident that vide a letter dated **18th December 1992**, the Commissioner of Lands wrote to **Auto Spring Manufacturers Ltd** and notified them of the Government decision to convert Temporary

Occupation Licence **plot No.6**, which had been fully developed by the Plaintiff to a long term lease. The said **Auto Spring Manufacturers Ltd** was requested to surrender the title Deed for **LR.No.337/832 IR 37639** to the Government for necessary rectification since it had been issued erroneously without factoring the interest held by the Plaintiff in Temporary Occupation Licence **plot No.6**. There is no evidence that such surrender was ever done but it is evident that in **1996 (18th December 1996)**, the suit property **LR.No.337/832** was sold to the Defendant herein, **Intex Construction Ltd** and the said title incorporated **TOL Plot No.6**. It is also evident that the Director of Survey authorized **S. A. Harunani, Licenced Surveyor** to survey the original land parcel **No.337/832** and align the same in line with conversion of **TOL plot No.6** to long lease.

As a result, two plots were created being **3371/2825** and **LR.No.3371/2826**. The Plaintiff alleged that **plot No.6** fell on **LR.No.3371/2826** and ideally the Plaintiff was therefore supposed to have been issued with the title deed for **LR.No.3371/2826**. The surveyor's letter is dated **21st October 2000**.

However, the said registration in favour of the Plaintiff was never done because the whole parcel of land **LR.No.337/832**, had been sold to the Defendant herein. Consequently, the Plaintiff filed this suit and sought for the above stated orders against the Defendant.

The above are the undisputed issues. Since the Defendant has contested the Plaintiff's claim, the Court finds that the issue for determination are as follows:-

- i. Did the Defendant acquire LR No. 337/832 fraudulently?*
- ii. Was the Defendant a bonafide purchaser for value?*
- iii. Is the Plaintiff entitled to the prayers sought?*
- iv. Who is to pay costs of the suit?*

i) Did the Defendant acquire L.R No. 337/832 fraudulently?

From the onset, it's important to deal with the issue of Fraud and whether the same was pleaded to enable the court deal with the issue.

The Defendant in its submissions stated that Fraud was not pleaded in the Plaintiff's pleading as envisaged under Order 2 Rules 10(1) and 3(i) respectively of the Civil Procedure Rules, 2010. It is imperative to define what **fraud** is and according to **Black's Law Dictionary**,

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage

is taken of another”.

Section 2 of Registration of Titles Act Cap 281 (now repealed) also defined **“Fraud”** as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

The Court of Appeal in the case of Arthi Highway Developers Limited...Vs...West End Butchery Limited & 6 others [2015] eKLR. Stated that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford...Vs...Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence ..V.. Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy ..V.. Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

Whether there was fraud is, however, a matter of evidence. The Court has examined the Plaintiff and confirmed that the issue of fraud was pleaded and particulars were given especially in Paragraph 7 of the Plaintiff. The pleading is as follows;

“That while the Plaintiff was still processing these documents under paragraph 6 above, the Defendant fraudulently obtained a lease in respect of LR.No.337/832...”

Having settled on the above, this Court can now proceed to determine whether the Defendant acquired the title to the property fraudulently.

Fraud impugns a title. The law is typically stated in the case of **Dr. Joseph Arap Ngok... V.... Justice Moiwo Ole Keiwua & 5 others, Civil Appeal No.Nai.60 of 1997,** where this Court categorically declared that:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

From the available evidence, it was patent that the Plaintiff had made substantial developments on the land. When the Defendant was making a purchase of the same, it was prudent that they inquire who the occupants on the suit premises were before making the purchase. Further on **15th December 1992**, the

Commissioner of Lands made it known to the previous title holder that there was an interest of the Plaintiff on **LR.No.337/832**. I wish to reproduce it;

“I would like to inform you that it has been ascertained that a portion of the above-mentioned plot edged in red on the attached plan was held on temporary basis during when the above plot was being allocated as T.O.L Plot No. 6.

This portion of the T.O.L plot as you are aware had by then been developed with permanent materials and fenced all way round by the T.O.L holder... you are hereby requested to surrender the Title”

The Defendant stated that it was sold to the property by **Messrs. Auto Spring Manufacturers Limited**. How could the Defendant have ignored the fact that there were structures that were glaring on the suit property? It is clear and manifest that the Defendant was hell bent on defrauding the Plaintiff on his portion of land fraudulently.

The Commissioner of Lands informed the Plaintiff vide a letter dated **21st October 1986**, of his approval to convert **T.O.L Plot No.6** into a Long term Lease. On **15th December 1992**, he wrote to **Messrs. Auto Spring Manufacturers Limited** notifying them of the Government decision to convert the **T.O.L of Plot No.6** and instructing them to surrender the Title **IR.No.37639** for the above parcel of land for necessary rectification.

On **22nd June 1994**, the Commissioner of Lands wrote to the Plaintiff instructing them to carry out the survey attendant thereto. He approved the Survey on **8th October 1997**. The Defendant on the other hand stated that **Auto Spring Manufacturers Limited** was transferred to **LR.No.337/882**, by **Joroti Industries Limited** on **16th May 1990**, and then **Auto Spring Manufacturers Limited** in 1994 showed interest to convey the property to the Defendant Company. This was the entire **LR.No.337/832**.

From the above, it is clear that **Messrs. Auto Spring Manufacturers Limited**, were well aware of the Plaintiffs interest in the land as exhibited in the letter dated **26th April 1995**, then how could they convey a good title to the Defendant Company? This Court concurs with the findings in **Zephaniah Ngaira Angweye...V...Moses Lutomia Washaili (2013) eKLR**. Further due diligence is key component in land transaction. In the case of **Margaret Wanjiku Kamau...Vs...John Njoroge & Another (2005) eKLR**, the Court espoused the principle of buyer beware, due diligence and great caution that should be exercised when one is purchasing land. The Defendant was well aware of the Plaintiff’s interest in the land and acquired the entire title for **LR.No.337/832** without inquiring from the Plaintiff about their interest. That was a fraudulent act on the part of the Defendant.

ii) Was the Defendant a bonafide purchaser for Value?

The Court of Appeal in **Arthi Highway Developers Limited...v...West End Butchery Limited & 6 others [2015] eKLR**, pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in **Black’s law Dictionary 8th Edition as:**

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims

or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner. Snell’s Principles of Equity (supra) illustrate the issue, thus:-

“An important qualification to the basic rule is the doctrine of the purchaser without notice,

which demonstrates a fundamental distinction between legal estates and equitable interests.

The doctrine. A legal right is enforceable against any person who takes the property, whether he has notice of it or not, except where the right is overreached or is void against him for want of registration. If A sells to C land over which B has a legal right of way, C takes the land subject to B's right, although he was ignorant of the right. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law, the purchaser's conscience not being in any way affected by the equitable right. Where there is equal equity the law prevails."

It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests".

From the evidence tabled and discussed above, it is very clear that the Defendant was well aware of the Plaintiff's interest on the suit land as the structures thereon were obvious and visible. It was not a vacant parcel of land. That being the case then, the Defendant was not a bonafide purchaser for value without notice.

iii) Is the Plaintiff entitled to the prayers sought?

The Plaintiff has sought for a declaration that the Defendants title is defective in law. This Court has found and held that the Defendant acquired the suit land without taking into account the Plaintiff's interest and that it was not a bonafide purchaser for value. The Court therefore finds that the Defendant's parcel of land was acquired through misrepresentation, irregularly and/or mistake since Plaintiff's interest was ignored, and thus it can be impunged. As provided by Section 80(1) of the Land Registration Act, the Court may order the rectification of the register. It provides that:-

"Subject to sub-section (2) the Court may order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake".

It is apparent that the Defendant was aware of the Plaintiff's interest on the parcel of land by the time of its acquisition. The said acquisition was therefore done or obtained through fraud or mistake. Having found that the said title held by the Defendant is defective, then this Court proceeds to direct that the Registrar of Titles should rectify the register thereon by cancelling the title held by the Defendant and having the said title or grant **No.IR 37639** over **LR.No.337/832** rectified in accordance with the survey done by **S. N. Harunani**, a licenced land surveyor, which produced two resulting titles shown on plan **F/R 320/174** being title **No.LR.No.337/2825** and **No.337/2826**. The said title **LR.No.337/2826** should thereafter to be registered in the name of the Plaintiff herein and **LR.No.337/2825** in the name of the Defendant herein.

iv) Who is to pay costs of the suit?

Ordinarily, costs do follow the event. As provided by Section 27 of Civil Procedure Act, costs are awarded at the discretion of the Court. The Plaintiff herein is the successful litigant and since costs follow the event, the costs of the suit herein is awarded to the Plaintiff who is the successful litigant herein.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved its case on the balance of probability. Consequently, the Court allows the Plaintiff's suit in terms of prayers No.(a) and (b) with costs of the suit being awarded to the Plaintiff herein.

On any other relief, the Court finds and holds that the title **No.LR.No.337/832**, should be cancelled and rectified as per the Surveyor's Report and **LR.No.337/2826** to be registered in favour of the Plaintiff and **LR.No.337/2825** in the name of the Defendant and prayer No.(b) should read that '**a permanent**

injunction do issue to restrain the Defendant, its agents and/or servants from interfering with the Plaintiff's parcel of land which is a portion of the suit property herein and which should be registered as LR.No.337/2826."

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of February 2018.

L. GACHERU

JUDGE

In the presence of

M/S Momanyi holding brief for Mr. Nyachoti for Plaintiff

No appearance for Defendant

Lucy - Court clerk.

Court – Judgement read in open court in the presence of M/S Momanyi holding brief for Mr. Nyachoti and absence of the Defendant.

L. GACHERU

JUDGE

9/2/2018