REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 112 OF 2015

GREENSPAN INVESTMENT LIMITED.....APPELLANT

-V E R S U S –

BENEDICTA GATWIRI MBOROGA.....1ST RESPONDENT

NAHASHON MWORIA IKAMATI.....2ND RESPONDENT

(Being an appeal from the judgement of Hon. R.A Oganyo (Mrs) A.G

Senior Principal Magistrate delivered on 6th March, 2015

in Nairobi CMCC No. 6211 of 2006)

JUDGEMENT

1) Benedicta Gatwiri Mboroga and Nahashon Mworia Ikamati the 1st and 2nd respondents herein respectively ,filed a suit against Greenspan Investment Limited, the appellant herein vide the plaint dated 15th December 2011 seeking for

> ***i. A mandatory injunction directing the appellant to repair replace, fix and connect the roof & floor, kitchen, sink, slap master's room toilet sealing cover solar system and or DSTV's cable in maisonette No.147 on Nairobi/Block 82/8959.***
>
> ***ii. Loss and damages incurred.***
>
> ***iii. Costs and interest***

2) The appellant filed its defence dated 7th May, 2014 denying the respondents claim.

3) The dispute between the parties emanated from a sale agreement made on the 19th of January 2011, and a lease on the said suit property made on 20th April 2011.

4) The suit was heard on various dates and in the end, Hon. R.A Onganyo, the learned trial magistrate found merit in the respondents claim and granted the order of mandatory injunction as prayed and ksh. 30000/- per month for loss of user since July 2011.

5) Aggrieved, the appellant preferred this appeal and put forward the following grounds in its memorandum of appeal.

> ***1. That the learned magistrate erred in law and in fact in allowing the plaintiffs claim for repairs of the defects identified on house No.147 on LR. No. 82/8758 on the basis of a report made outside the contractual period of six months.***
>
> ***2. The learned magistrate erred in law and fact in failing to take into consideration repairs undertaken by the appellant immediately upon notification of defects in November 2011 and prior to the Valuation report , the basis of which the trial court has ordered and directed the appellant to carry out repairs.***
>
> ***3. That the learned magistrate erred in law and in fact in directing the appellant to carry out repairs not sought for in the plaint filed on 15th December, 2011.***
>
> ***4. That the learned magistrate erred in law and in fact in allowing the plaintiffs claim for loss of use of the suit property contrary to the plaintiffs evidence of occupation and use of the suit property by the plaintiffs relatives and or representatives since July, 2011.***
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> ***5. That the learned magistrate erred in law and in fact in allowing the claim for loss of use of the suit property at the rate of ksh.30,000 per month without any factual or legal basis.***
>
> ***6. That the learned magistrate erred in law and in fact in failing to give reasons for the award of loss of use of the suit property to the plaintiffs at a rate of ksh.30,000/- per month from July 2011.***
>
> ***7. That the learned magistrate erred in law and in fact in disregarding the appellants defence of the unauthorized change of user of the suit property from single residential to cyber café.***
>
> ***8. That the trail magistrate erred in law and in fact in failing to take into consideration that time and use of the suit property has led to considerable wear and tear of the suit property.***
>
> ***9. That the trial magistrate erred in law and in fact in entering judgment against the appellant despite the plaintiffs failure to establish their case on a balance of probabilities.***

6) The above mentioned grounds may be summarized into two main grounds namely:

> *i. whether or not the trial magistrate erred in law and in fact in granting the mandatory injunction for the repairs to be done (grounds 1,2,3, and 9)*
>
> *ii. whether or not the trial magistrate erred in law and in fact in allowing the prayer for loss of use of the suit property at the rate of ksh.30,000/- per month (grounds 4,5,6,7,8,and 9)*

7) When the appeal came up for hearing, learned counsels recorded a consent to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the respondents written submissions, the appellants not having filed its submissions.

8) The first ground of appeal is whether or not the trial magistrate erred in law and in fact in granting the order of mandatory injunction for repair, replacement, fixing and connection of the items listed in the plaint.

9) The respondents submit that they bought the suit property house and found defects immediately upon occupancy and informed the appellant as per clause 5.2 of the sale agreement. The appellant rectified the defects, but upon the respondents inspection after the repairs had been done, they found out that the repairs done were below standard and were shoddy because low quality materials and poor workmanship had been used, yet the appellant wanted the respondents to ensure that the repairs had been properly done.

The respondents state that they declined to sign and that is what led to filing of the suit.

10. The respondents also submit that the valuers contracted to ascertain the nature of repairs done by the consent of the parties before the trial court, further confirmed the fact that the repairs were not properly done and that the valuers discovered other defects which had not been included in the complaints report to the appellant by the respondents for repairs.

The respondent submits that the trial magistrate finding under this head were well founded.

11. This court has re-evaluated the evidence on record and it is apparent that the parties executed a sale agreement. Clause 5.2 of the agreement executed by the parties stated inter alia that the purchasers' in this case, the respondents upon occupation of the house, had 6 months within which to inform the vendor in this case, the appellant, of any defects that needed repairs. Nahashon Mworia Ikamati, PW1 stated that the respondents noted some defects in the house bought from the appellant and through the law firm of Ongweso and Company Advocates, wrote to the appellants vide the letter dated 12th September, 2011 to inform them of the repairs to be done. After the repairs were done, there were still some defects like water leaking, DSTV not connected and the solar system was not in a working condition.PW1 stated that the respondents were still being asked by the appellants to acknowledge that repairs had been done well, but the respondents could not sign the document confirming the completion of the said repairs satisfactorily.

12. Shrish Liladhar Shar, DW1, the managing director of the appellant, stated that the 6 month period to report the defects is true per the lease agreement. The appellant further claimed that the respondents were using the premises for commercial business and that is the reason why it was exposed to excessive wear and tear unlike if it would have been used for residential purposes only. DW1 stated that they received the letter of complaint after the lapse of 6 months, which means that time had lapsed but it decided to effect the repairs out of good will. On the issue of commercial versus residential use, PW1 stated that they attempted to start a cyber café but the city council denied them a permit and they stopped.

13. The evidence presented before the trial court show that the letter to the appellant detailing the repairs to be done was lodged within the time frame of 6 months as per clause 5.2 of the lease agreement. The defects complained of as per the aforesaid letter included: a leaking roof, loose tiles, leaking kitchen sink and tap, leaking of the master bedroom toilet, broken ceiling cover, shedding floor, defective solar system and unconnected DSTV cable. I do find that the letter of complaint was filed within the time frame agreed by the parties. There is no doubt that the defects pointed out existed in the premises.

14. The second ground of appeal is whether or not the trial magistrate erred in law and in fact in allowing the prayer for loss of use of the suit property at the rate of ksh.30,000/- per month.

15. The respondents submit that since they occupied the house in July, 2011, the house had been in uninhabitable condition due to the aforestated defects. If the house was in good shape, they would have rented the house for ksh 65,000/- per month. This means that the respondents have been losing from not using the house due to the poor workmanship that was undertaken by the appellants and they are therefore entitled to loss of use at the rate that was awarded by the trial magistrate.

16. The respondents pleaded for loss of user and the PW1 stated that if the house was in a good condition, then houses around the estate where their house was located drew a monthly rent of ksh 65,000/. They could have earned that much, but could not due to the house being inhabitable for tenancy. The trial magistrate exercised her discretion and allowed loss of user at ksh 30,000/- per month from July 2011.

17. On loss of user, the respondents merely gave general estimates of the rent charged in the neighbourhood. There was no credible evidence from a valuer or commercial agent to ascertain the anticipated rental income. I find the evidence tendered to be insufficient. The learned chief magistrate gave ksh.30,000/= per month ass loss of user. There was no justification for the award. I find merit on this ground.

18. The appeal partially succeeds. The order directing the appellant to pay loss of user is set aside. The

order for mandatory injunction made by the trial court is upheld.

Costs of the appeal is given to the appellant.

Dated, Signed and Delivered in open court this 9th day of March, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents