



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1115 OF 2003

PATRICK ATENYA ASITIBA.....1ST PLAINTIFF

PHANICE ONDECHE ASITIBA.....2ND PLAINTIFF

- V E R S U S -

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGEMENT

1) Patrick Atenya Asitiba and Phanice Ondече Asitiba, the 1st and 2nd plaintiffs respectively in the capacities as the legal representatives of the estate of Asitiba Atenya Ayau, deceased instituted this suit vide the plaint dated 31st October, 2003. In the aforesaid plaint, the plaintiffs sought for judgment against the City Council of Nairobi, the defendant herein as follows:

- 1. Declaration that the said sale by auction of the said property by the defendant through its agents was unlawful.***
- 2. Specific restitution of the property or the value thereof.***
- 3. General damages calculated on the basis of lost rent from September 1993 to date.***
- 4. Costs of the suit.***
- 5. Interest thereon at court rates.***
- 6. Any other relief.***

The defendant resisted the plaintiffs' claim by filing the defence dated 27th November 2007.

2) When this suit came up for hearing, the plaintiffs were the only witnesses who testified. The defendant closed its case without summoning witnesses to buttress its defence. Phanice Ondече Asitiba (PW1) told this court how she and her late husband Asitiba Atenya Ayau acquired the property known as L.R no. 12062/316(V-7053) through a tenant purchase scheme promoted by the defendant. PW1 stated that their family did not live in the house but instead the same was rented out to paying tenants. PW1 further said that her late husband paid all the requisite rates and cleared the purchase price and he did not owe anything to the defendant. The 2nd plaintiff (PW1) told this court that the plaintiffs learnt that their house had been sold by the defendant when their tenant told them when they went to collect their usual rent that someone had gone to tell him that she was the new owner of the premise. This prompted the late Asitiba Atenya Ayau to make a follow up with the defendant. Patrick Atenya Asitiba (PW2), the 1st plaintiff and

the son of the late Asitiba Atenya Ayau produced before this court as an exhibit in evidence a copy of the letters of administration he had obtained over his late father's estate. PW2 also corroborated the evidence of PW1 by stating that his late father visited the defendant's offices after receiving a demand letter which had alleged that the deceased owed the defendant rate arrears which he had not cleared but upon clarification and reconciliation of records of the defendant. PW2 said that it was confirmed that indeed he did not owe any money either as a balance of the purchase price or rate arrears. PW2 further alluded that the defendant instructed its lawyers namely Meenye & Co. Advocates to withdraw both the demand letter and Nairobi R.M.C.C no. 552 of 1993 through its letter dated 29.9.1993 thus confirming the assertion that the demand letters and the suit had been erroneously filed to claim rate arrears. PW2 expressed his surprise that despite the withdrawal of instructions, the defendant's lawyers went ahead with the case without his father's knowledge and eventually the house was sold to a third party behind his father's back. PW2 further stated that his late father attempted to save the property by defending the allegations made in Nairobi R.M.C.C no. 552 of 1993, a suit filed by the defendant by obtaining temporary injunctive orders. However, the injunctive orders the deceased obtained were set aside without his knowledge and the property was erroneously sold to a third party. It is the evidence of PW2 also that the deceased unsuccessfully attempted to save his property by challenging Nairobi H.C.C.C. no. 233 of 1996, a suit filed by a second purchaser who had acquired the suit premises through a public auction. The court eventually ruled the case in favour of an innocent purchase for value without notice. PW2 stated that despite having lost the house they stayed put and continued collecting rent until the 2nd purchaser filed an action against the deceased and obtained judgment giving her vacant possession.

3) The defendant's case is based on the defendant's defence dated 27.11.2003 and filed in court on 28.11.2003 and amended on 21.2.2007. The defendant did not summon any witness to testify and neither did it file any witness statement.

4) At close of evidence, learned counsels were invited to file written submissions. I have considered both the oral and documentary evidence tendered by the plaintiffs plus the rival written submissions. In the plaint, the plaintiffs sought for judgment in their favour and against the defendant as follows:

- a. A declaration that the said sale by auction of the said property by the defendant through its agent was unlawful.**
- b. Specific restitution of the property or the value thereof.**
- c. General damages calculated on the basis of the cost rent from September, 1993 to date.**
- d. Interest thereon at court rates.**
- e. Any other relief.**

5) Arising from the pleadings, the evidence and the submissions, the following issues arose for determination:

- i. whether or not the defendant's action of selling the subject property was justified by law?**
- ii. Whether or not the plaintiffs are guilty of laches**
- iii. Whether or not the plaintiffs are entitled to the prayers sought?**

6) On the first issue as to whether or not the defendant's action of selling L.R. No. 12062/316(V.7035) was justified. It is the submission of the plaintiffs that they lost a family property which had been purchased by the late Asitiba Atenya Ayau together with his wife Phanice Ondeché Asitiba from the defendant by way of an unlawful sale to a third party through the defendant's agents without any legal justification. It is pointed out that the deceased did not owe any rates to the defendant to warrant the sale of his property. It is the submission of the defendant that the late Asitiba Atenya Ayau was served with a rate demand note dated 1st July 1993 and the plaintiffs failed to comply with the notice within 14 days as

required under Section 17(1) of the Rating Act hence the defendant was justified in proceeding to dispose of the property in the manner provided for by the Rating Act. Having considered the competing arguments, I am not persuaded by the arguments of the defendant. The plaintiffs tendered credible evidence confirming that L.R. No 12062/316 (V.7035) belonged to the late Asitiba Atenya Ayau who did not owe the defendant any rates nor purchase price to warrant the defendant sell the property in the manner it did. The defendant's action therefore was not justified in law.

7) The second issue which was left for the determination of this court is whether or not the plaintiffs are guilty of laches. It is the submission of the defendant that the plaintiffs were indolent. It was pointed out that the plaintiff was served with a rate demand note on 1.9.1993 but failed to act until when the subject property was later auctioned. The evidence tendered by the plaintiffs indicate that the actions taken by the defendant to auction the property were surreptitious and without the knowledge of the deceased. In the circumstances I am unable to find that the plaintiffs are indolent and guilty of laches.

8) The final issue relates to the remedies available to the plaintiffs. The plaintiff have sought for an order of declaration that the sale conducted by the defendant through its agent was unlawful.

9) With respect, I am persuaded that the plaintiffs are entitled to the prayer and I grant them.

10) The second prayer sought by the plaintiffs is for restitution or in the alternative the value of the property. Since the property has been bought by an innocent third party without notice, it is not possible for the court to make the order of restitution. However, the alternative order for payment for the value is available. The plaintiffs submitted a valuation report prepared by Tuliflocks Ltd dated 10th May 2016 estimating the value of the property at 12,000,000/=. The defendant did not deem it fit to file any valuation report to contradict the one supplied by the plaintiffs. I have no reason to doubt its veracity. I give the plaintiffs judgment on this head.

11) The plaintiffs have also asked for loss of rental income. The plaintiff relied on a report prepared by Luyalicom West Services dated 20.7.2016 in which the plaintiffs' projected rental income was given to guide the court. It is stated that rental income the plaintiffs lost from 1993 to August 2016 is estimated at kshs.5,275,000/=. In the evidence tendered by the 1st plaintiff, PW2 claimed that he used to assist his late father, Asitiba Atenya Ayau, to collect rent from the tenant. This witness did not tender any documentary evidence to establish this claim. Further more, the claim for loss of rental income and or mesne profits in my view is a special claim which must be specifically pleaded and proved. The schedule prepared by Luyalicom West Services is of no evidential value. In my humble view, I find the prayer for loss of rental income not proved. I decline to grant.

12) In the end, judgement is entered in favour of the plaintiffs and against the defendant as follows:

i. The sale by public auction of L.R. no. 12062/316 (V7035) by the defendant through its agent is declared unlawful.

ii. The defendant is ordered to pay the plaintiffs a sum of ksh.12,000,000/= being the estimated value of L.R. No. 12062/316(V.7035) which was unlawfully sold to innocent third parties.

iii. Costs of the suit is given to the plaintiffs.

Dated, Signed and Delivered in open court this 19th day of October, 2017.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant