



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 463 OF 2008

WESTWARD PROPERTIES LIMITED.....PLAINTIFF

VERSUS

CHEZER INVESTMENTS LIMITED.....DEFENDANT

RULING

1. The plaintiff's application dated 6th July 2015 seeks the setting aside of the orders made on 11th October 2012, so that the suit may be reinstated.
2. It is the plaintiff's desire to have the suit heard on its merits.
3. It is the plaintiff's further request that the suit, if it is reinstated, be transferred to the Environment and Land Court for hearing and determination.
4. According to the plaintiff, it had never expressed any wish or intention to withdraw the suit. Therefore, when its advocates withdrew the suit, they are said to have acted without the instructions of the plaintiff.
5. The plaintiff holds the view that it was just and equitable to set aside the order through which the suit was withdrawn, to enable the suit be heard and determined on its merits.
6. The subject matter of the suit is land. The plaintiff's primary complaint was that the defendant who are the registered proprietors of the land neighbouring the suit property, had encroached upon the plaintiff's land. Therefore, the plaintiff wanted the court to order the Director of Survey to conduct appropriate investigations, with a view to ascertaining whether or not the defendant had encroached upon the plaintiff's property.
7. The plaintiff's case was that the defendant had encroached upon the plaintiff's property by an area of 0.3037 acres.
8. If the investigations by the Director of Survey verified the accuracy of the plaintiff's claim, the plaintiff wants the court to order that the present boundary between the parties be rectified, by moving it to its proper location.
9. In answer to the claim, the defendant lodged both a Defence and a Counter-claim.
10. First, the defendant denied the plaintiff's claim of ownership of the suit property **L.R. No. 209/1231**.

11. Secondly, the defendant denied the dimensions, abutments and boundaries that were delineated in the Survey Plan No. 188317.
12. Thirdly, the defendant asserted that its property, L.R. No. 209/2574, was not adjacent to the suit property. I understand the defendant to be saying that it would therefore not have been able to encroach upon the suit property.
13. In any event, the defendant believed that the plaintiff cannot have acquired any valid title to the suit property because the person from whom the plaintiff purchased it, had acquired it illegally.
14. Furthermore, the defendant had been in continuous occupation of the land in question for a period exceeding 12 years. Therefore, the defendant put forward a counter-claim for a declaration that it had become entitled to an order that it be registered as the proprietor of L.R. No. 209/12231 or the part thereof which the defendant had been in occupation of.
15. It does appear that the land in question had subsequently been compulsorily acquired by the Government of Kenya. That fact appears to have weighed heavily in the mind of the learned advocate for the plaintiff, when he decided to withdraw the suit.
16. However, the plaintiff categorically states that his instructions were not sought on the issue as to whether or not the suit ought to be withdrawn.
17. At the material time, the plaintiff was unwell, and he was receiving medical attention in the United Kingdom.
18. Whilst the suit was withdrawn on 11th October 2012, the plaintiff was still in the dark about that development, by September 2014. That is evidenced by the letter dated 10th September 2014 when Mr. Brian D'Souza wrote to Mr. Luseno of Majanja Luseno & Company Advocates.
19. The learned advocate did not revert to the plaintiff, prompting the plaintiff to instruct another advocate, with a view to establishing the status of this case. The said advocate perused the court file, and discovered that the suit had been withdrawn on 11th October 2012.
20. Obviously, the plaintiff could not have taken any steps to have the suit reinstated before it had any information that the suit had been withdrawn. That explains the delay between the date of the withdrawal of the suit and the date when the plaintiff applied for its reinstatement.
21. Mr. Luseno, as the advocate for the plaintiff, did have ostensible authority to take action for and on behalf of the plaintiff. Such ostensible authority would, on a *prima facie* basis, empower the advocate to compromise the suit.
22. However, in this case, it has been shown that the action of compromising the suit was completely inconsistent with the intentions of the plaintiff.
23. Mr. Jogdish Patel, who is a director of the defendant, deponed thus;

“12 (c) All material facts were known to the parties, who consented to withdrawing the matter in terms so clear and unequivocal as to leave no room for any possibility of mistake or misrepresentation”.
24. Whilst an advocate has the ostensible authority of his client, in this case, the plaintiff has expressly stated that it was unaware of what his advocate did. Therefore, it is inaccurate to assert, as the defendant has done, that all material facts were known to the parties.
25. It is possible that the plaintiff could have recourse against its previous advocates. However, that fact

alone cannot be a bar to the plaintiff seeking to set aside the orders made on 11th October 2012.

26. In the circumstances prevailing in this case, I find that the compulsory acquisition of the land in issue did not frustrate the claims by the plaintiff.

27. Whether or not said the compulsory acquisition can be reversed is not the only issue. There would also be the question regarding the person who was entitled to receive the money which the Government of Kenya paid in respect to the land in question.

28. I find that neither of the parties would be prejudiced if the case was re-opened. If anything, a proper determination of the matters in issue would be extremely beneficial to both parties.

29. The plaintiff's ailing Managing Director would not be left feeling cheated out of a property which he believes, belonged to the plaintiff.

30. And the defendant would have an opportunity to demonstrate that its claim to the said land was legitimate.

31. The defendant has submitted that the orders made on 11th October 2012 cannot be set aside except if the plaintiff demonstrated that there were grounds for rescinding or varying a contract between the parties.

32. It is true that a consent judgement or order may only be set aside for fraud, collusion, mistake, misrepresentation or such other reason as would enable the court to set aside an agreement.

33. In this case, the record does not reflect a consent judgement or order.

34. Secondly, and in any event, I have found sufficient reason to warrant the setting aside of the order of the withdrawal of the suit.

35. Accordingly, the order for the withdrawal of the suit is set aside; and the suit is reinstated.

36. Following the earlier withdrawal of the suit, the defendant also withdrew its counter-claim.

37. In my considered view, the defendant need not be required to bring a separate application for the reinstatement of the Counter-claim. The interests of justice demand that the Defence and Counter-claim also be reinstated. It is only by so doing that the parties will have been placed at par, in the eyes of the guardians of justice. A reinstatement of the plaintiff's claim, whilst the counter-claim remained shut out would not be consistent with justice.

38. In the result, I do also, *suo moto*, set aside the orders for the withdrawal of the Counter-claim. In effect, the Defence and the Counter-claim are also reinstated.

39. Meanwhile, the plaintiff will, nonetheless, bear its costs of the application dated 6th July 2015. I so order because the defendant cannot be said to bear any responsibility for the actions of the plaintiff's advocates when the suit was withdrawn. In other words, the application at hand was precipitated by the advocates who were then acting for the plaintiff.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of March 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Mueki for Ongoya for the Plaintiff

Ochieng for the Defendant

Collins Odhiambo – Court clerk.