



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 301 OF 2014

ROSH MOTORS LIMITED.....PLAINTIFF

VERSUS

ABDULRAHMAN KASSIM JEFFER.....1ST DEFENDANT

ABDULRISAK OMAR HAJI.....2ND DEFENDANT

MIRRIAM KASSIM SAID.....3RD DEFENDANT

MARY SYEVUTHA PETER.....4TH DEFENDANT

COMMISSIONER FOR LANDS.....5TH DEFENDANT

THE HON ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

I. PRELIMINARIES

1. Approximately over ten (10) years ago, the Plaintiff did institute this suit vide a Complaint dated 23rd February, 2011 and filed on 25th February, 2011 against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants. The Plaintiff also filed a verifying affidavit dated 24th February, 2011, list of documents, List of witnesses and their statements and other documents on the agreed issues in relation to this case. In accordance with the requirements and dictates of the Provisions of Order 11 of the Civil Procedure Rules, 2010 on Case Management.

II. THE PLAINTIFF'S CASE

2. From the filed Complaint, the Plaintiff seeks against the Defendants for the following orders, jointly and severally:-

(a) A declaration that the Plaintiff is a bona fide purchaser for value without notice and the rightful legal owner of property known as Land Reference No. Mombasa/Block XIX/315.

(b) A declaration that the Plaintiff's ownership, title and possession of the said suit property cannot be subject to challenge by the 1st, 2nd and 3rd Defendants.

(c) In the alternatives to prayers (a) and (b) above, the Plaintiff to fully indemnified by the 4th, 5th and 6th Defendant's Honorable court holds that the Plaintiff does not have a good title.

(d) Permanent injunction orders to prevent the 1st, 2nd and 3rd Defendants their agents and any person claiming under them from interfering with the suit property in any way.

(e) A declaration to the effect that the police have no legal power to interfere with the Plaintiff's quiet and peaceful occupation of the suit property.

(f) Costs of this suit plus interest thereof.

(g) Any other relief as this Honorable Court may deem fair and just.

On 6th October, 2021, the suit proceeded on for full trial, for both the Plaintiff and the Defence and closed.

4. EXAMINATION IN CHIEF OF PW1 - MOHAMED TARIQ JAVED SWORN AND STATED IN ENGLISH

PW – 1 testified that he was a businessman and a Director of Rosh Motors Limited – the Plaintiff's Company a holder of Uganda Work Permit bearing No. 630204105 where he operated from. He produced a copy of the work permit as Plaintiff Exhibit – 1. He stated that on 16th March he swore a witness statement which he produced and had it adopted as his evidence in this court. It was marked as Plaintiff Exhibit – 2. He also produced the list of documents filed in court on 20th March, 2021 which included:-

- (a) Sale agreement dated 26th May, 2020.
- (b) Official Search/Result dated 26th May, 2010
- (c) Transfer of lease dated 29th July 2010
- (d) The Certificate of lease for Land Reference No. Mombasa/Block XIX/315 registered in the names of the Plaintiffs.
- (e) Letter for application of consent from Muturi Gakuo and Kibara Advocates dated 16th July 2010 and Letter of consent from the District Land Officer Mombasa dated – 22nd July, 2010 – all produced and marked as Plaintiff Exhibits 3 (a), (b), (c), (d), (e) and (f). He pointed out to court Entries Nos. 7 and 8 of the original Certificate of Lease.

5. PW-1 held that in order to diversify their market and business, they decided to venture in to the Republic of Kenya where they incorporated the Company – Rosh Motors Limited the Plaintiff herein. He explained that as a business strategy they decided to acquire a show room for their motor vehicle dealership. From there, they engaged the assistance of their long time Clearing Agent one Mr. Evans Ochieng of Tohel Motors who was based at Mombasa, to look for a strategic place particularly at Mombasa where they would carry out their business going forward. In the month of May, 2010 Mr. Ochieng had succeeded in locating a suitable parcel of land and he informed the Plaintiff's Directions whom he knew well. Subsequently, PW-1 averred that they were introduced to the lady owner – Ms. Mary Syevutha Peter the 4th Defendant herein who confirmed to them that the suit property was legally hers and that she was willing and ready to sell it off to them.

6. Pursuant to that, PW-1 said, they engaged an Advocate - M/s. Ananda Advocate who professionally conducted due diligence and handled the sale of the suit land transaction on their behalf.

On 26.5.2010 it was his testimony that their Advocate conducted an official search and from it –it indicated that the land belonged to M/s. Mary Syevutha Peter and it had no encumbrances. He stated that on their behalf their Advocate negotiated the terms of sale with the vendor's Advocate – M/s Muturi Gakuo Advocate and settled for a sum of Kenya Shillings Twenty Eight Million five hundred (KShs. 28,500,000/=) as the purchase price. He testified that they accepted the said terms and by July 2010 they had completed the sale transaction and took vacant possession of the suit property.

- where they kept their Motor vehicles they imported for sale. PW-1 testified that everything sailed through smoothly until in the month of October 2010, when his Co-director Mr. Khan and him received some court summons to attend court on 1st November, 2010, in Civil Appeal No. 115 of 2010. Upon presenting it to their Advocates, they were advised to be enjoined in the said suit as interested parties. PW-1 informed court that it was based on that case that they came to learn that there were other persons being the 1st, 2nd and 3rd Defendants in this instant case who were purporting and claiming legal ownership of the suit property.

7. According to PW-1, eventually they were enjoined in the said suit. They defended their position, whereby they clearly stated and submitted evidence to the effect that they bought the suit land genuinely after undertaking all the procedures for property acquisition as provided for in law. He stated that they were informed by their Advocates that the said suit related to an appeal between the 1st, 2nd and 3rd Defendants and the 4th Defendants. He stated that their Advocates informed them the Appeal was on issues regarding rental monies deposited in court and therefore it was not a proper suit on determination of the ownership of the suit property.

Hence, he said that it was based on the advise of their Advocates that they decided to institute this instant case hereof through the law firm of M/s. Gikandi & Company Advocates in order to properly protect their proprietary rights and interest. He stated that they had never heard of any dispute or issues on the ownership of the suit land at the time they were acquiring it. He stressed that they were honest businessmen who invested their hard earned money and injected huge amount of capital in all their businesses they embarked on. Therefore, in conclusion of his examination in chief he prayed to be granted the prayers they sought in their filed Plaint with costs. That was all.

8. On Cross examination of PW-1 by Mr. Mark Mwanzia Advocate for the 4th Defendant.

It was the testimony of PW-1 that they conducted an official search before buying the suit property and it was fine. He stated that the search showed that the land was for many hectares. After they purchased it they took possession. There was no objection. He held that there was no signboard on it stating that the land was not for sale. He stated that before they bought it they instructed their Advocates to undertake due diligence on the property and that the exercise indicated that the suit property was clear of any encumbrances. He stated that after that they moved in and started their business without any problems at all. That was all

On cross examination of the PW-1 by M/s. Waswa Advocate for the 5th and 6th Defendants. PW – 1 testified that he was the one who signed the transfer documents in the year 2010 as shown in – Plaintiff Exhibit – 3 (b) dated 29th July, 2010. He informed court that the purchase price was a sum of Kenya Shillings Twenty Eight Million Five Hundred Thousand (KShs. 28,500,000/=) and which he confirmed was paid up in full to the Vendor the 4th Defendant herein. Currently, PW-1 said they were in possession of the suit property.

9. He held that they were in court because someone had sued them claiming the ownership to the suit property and also to be granted the prayers in the Plaintiff. He testified that no one had ever brought them any documents on the contrary on the ownership of the property. It was the testimony of PW-1 that they were only receiving verbal threats from some people being the 1st, 2nd and 3rd Defendants herein. He explained they sued the Land Registrar as it was the custodian of land Records for this area and as the Defendants were alleging that the transfer of the land was acquired by fraudulent means and this bothered the Plaintiffs. His evidence was that they had also reported the matter to the police. He affirmed that the 1st, 2nd and 3rd Defendants had never issued them with any notice to vacate from the suit land.

He said upon receiving the verbal threats by the 1st, 2nd and 3rd Defendants they went to check the records at the Land Registry and found them to be intact. That was all. There was no re-examination by the Advocate for the Plaintiff.

Examination in chief by PW-2 Evans Ochieng Mzee – Sworn and testified in English

10. PW-2 testified that he was a resident of Mombasa. He was a citizen of Kenya and a holder of the National Identity card bearing numbers 8015209 a copy of which was marked as Plaintiff Exhibit 4. He recalled signing a witness statement on 20th March, 2012 and which he wished to produce and adopt as his evidence in this case which was marked as Plaintiff Exhibit – 5.

He said he knew a company trading in the names and style of Rosh Motors Limited. Additionally, he also knew Mr. Mohamed Tariq Jared and Mr. Dawood Khan as the Directors to this Company since the year 1995. They were based in Uganda. He was their clearing agent whom he pointed out in court. He knew the suit property being situated near the Moi Avenue at Mombasa township on the way towards the Kenya Ports Authority (KPA). He had been requested by the Director to get them land for their business. He informed court that he identified a friend called Dennis who knew of someone selling land right behind Marshalls.

11. The Director saw the land and agreed on the terms of sale with the 4th Defendant, the owner of the land. He then introduced them to Messrs. Ananda Advocate. According to PW-2 by this time, there was no complaint as there was already an ongoing business on the land. He stated that eventually the transaction was completed smoothly and the Plaintiff was issued with an original Certificate of Lease. According to PW2 it became the duly registered new owners to the suit land. He said he knew the Plaintiff dealt on sale of Motor vehicles and they decided to file the case. They were the legal owners of the suit land. He testified that he knew the Plaintiffs were receiving verbal threats from the 1st, 2nd and 3rd Defendants ostensibly over the ownership of the suit land. That is all.

12. On Cross Examination of PW-2 by Mr. Mark Mwanzia Advocate for the 4th Defendant.

PW-2 testified that he met the Vendor right at the suit property. He informed court that he introduced her to the Directors the intended purchasers. An official search was conducted and a consent issued by the Land Control Board. He held that the stamp duty was paid. As far as he was concerned the sale was successful and he was able to see the sale transaction documents from the Advocate Ananda and they were all authentic and genuine. That is all. There was neither cross examination nor re-examination by the Advocates on record.

II. THE DEFENCE CASE

13. In view of the absence and non-attendance by the 1st, 2nd and 3rd Defendants their Defences and Counter Claim were dismissed with costs under the provision of Orders 12(1) and 17 Rule 1 (1) (2) and 2 (1), (2) and (3) of the Civil Procedure Rules for want of prosecution despite having been properly served. The 4th Defendant indicated they would not be calling any witnesses and only filed their written submissions. At the same time, the Plaintiff withdrew their claim against the 5th and 6th Defendants based in the evidence adduced by the witness with no orders to costs. To this effect a consent between the Plaintiff and the Advocate for the 5th and 6th Defendants was duly entered and adopted by court as its order accordingly.

III. SUBMISSIONS

14. Upon the close of both the Plaintiff and the 4th Defendant's case on 6th October, 2021, the Honorable Court directed the parties to file their written submissions accordingly. Subsequently on 10.11.2020 the Plaintiff and the 4th Defendant did oblige accordingly and judgment dated was reserved for 18th January, 2022.

A. THE PLAINTIFF'S SUBMISSIONS

15. On 1st November, 2020, the Law firm of Messrs. Gikandi and Company Advocates for the Plaintiff filed their written submissions dated 29th October, 2021. The Learned Counsel that during the trial no party disputed the genuineness of the certificate of search produced by the Plaintiff as an exhibit. According to them, it meant that on 26th May, 2010 the suit property was registered in the name of the 4th Defendant who had legal capacity and power to sell and transfer the said suit property to the Plaintiff.

16. The Learned Counsel averred that the Plaintiff and the 4th Defendant herein then entered into a lawful agreement for sale of the suit property. Upon completion of all the necessary procedure the Certificate of Lease for the suit property was registered in the names of the Plaintiff on 29th July, 2010. They submitted that on the ground there was no presence of the 1st, 2nd and 3rd Defendants at least in a way that

would have raised a red flag in the eyes of the Plaintiffs. They opined that the Plaintiff moved onto the suit property and only came to learn of the dispute regarding the aforesaid three Defendants in October, 2010.

17. The Learned Counsel argued that the Plaintiff were bona fide purchasers for value without notice. The Plaintiff paid money for a title good at law. They produced the title deed and in the absence of evidence in rebuttal as to the genuineness of the said certificate of title, therefore there was no justification for this court to interfere with the same. To buttress their argument on this point, they cited the cases of **Fletcher –Versus- Peek Cobe and Bruce Joseph Bockle –versus- Coquero Limited (2014) eKLR**. They noted that on 6th October, 2021, the 1st, 2nd and 3rd Defendants, Defence and Counter Claim were dismissed with costs by the Honorable court for want of attendance and prosecution. Therefore the Plaintiff's claim in this suit was wholly undefended as the 4th, 5th and 6th Defendants never opposed any part of the Plaintiff's case and its claim thereof.

In any case, eventually the Plaintiff withdrew its case against the 4th, 5th and 6th Defendants all together based on the evidence adduced in court by its witnesses.

18. For these reasons the Learned Counsel urged this Honorable court to grant the prayers sought in the Plaint against the 1st, 2nd and 3rd Defendants with costs. That was all.

B. THE SUBMISSIONS BY THE 4TH DEFENDANT

19. On 9th November, 2021 the firm of Messrs. Mutisya Mwanzia and Ondeng Advocates for the 4th Defendant filed their written submissions. The Learned Counsel submitted and held to the fact that from its written submissions dated 29th October 2021 at Paragraph 14, the Plaintiff withdrew their claim against the 4th Defendant. In the given circumstances, the 4th Defendant **only addressed the** issue of costs entitled to them. They argued that from the time the Plaintiff instituted its suit in the year 2014, the 4th Defendant had defended the matter upto the closing of its Defence whereby in the long run the Plaintiff at the submissions level as stated herein came to acknowledge that it had no claim against the 4th Defendant. For this reason they argued that the 4th Defendant was entitled to an award of costs to be borne by the Plaintiff. To buttress their contention on this point, they relied on the case of **Jasbir Singh Rai & 3 Others –versus Tarlochan Singh Rai & 4 Others (2014) eKLR**. That was all.

IV. ANALYSIS AND DETERMINATION

21. I have keenly read and assessed all the filed pleadings by the parties the evidence adduced by all the summoned witnesses by the Plaintiff, the well-articulated written submissions by the Plaintiffs and 4th Defendant the cited authorities based on the principles of “**Stare decisis**” the decided court precedents and the relevant provisions of the law.

In order to arrive at an informed, just and fair judgment onto this matter, I have framed the following four (4) salient issues for consideration:- These are:-

- a) Whether the Plaintiff is entitled to the ownership and hence the absolute and registered indefeasible title, interest and right to the suit property?*
- b) Whether the Parties are entitled to the prayers sought?*
- c) Whether the 4th Defendant is entitled to costs having defended the case upto its closure?*
- d) Who will bear the costs of the suit?*

ISSUE No. (a) Whether the Plaintiff is entitled to the ownership and hence the absolute and registered indefeasible title, interest and right to the suit property?

22. Before embarking on a detailed analysis of the case leading to delivering the final judgment, its significant that I first and foremost expound on the brief facts to the case. From the filed pleadings, It is not in dispute that prior to July 2010 the suit property was registered in the names of the 4th Defendant. She had a good title, right and interest over the suit land. Upon executing a sale agreement terms and conditions stipulated thereof on 26th May, 2010 between the 4th Defendant and the Plaintiff the suit land was duly transferred to the Plaintiff at a consideration of a sum of Kenya Shillings Twenty Eight Million Five Hundred (Kshs. 28,500,000/=). The Plaintiff an incorporated company deals with the sale of imported motor vehicle. In the spirit of expanding its market and business for that matter, the Plaintiff felt it needful to acquire a yard in the Republic of Kenya and in particular at Mombasa for this purpose.

All this time there were neither any encumbrances nor any known dispute over the ownership to the suit land. They even took possession and started conducting business from there. However, for some reason not clear to this Honorable Court suddenly the 1st, 2nd and 3rd Defendants started hallowing verbal threat to the Plaintiffs ostensibly also making claims to the suit land. As a result, and out of immense pressure, agony and trauma meted on them by the Defendants the Plaintiff reported the matter to the police and also decided to institute the instant civil case and sought for the prayers stated out in the Plaint. Unfortunately, the 1st, 2nd and 3rd Defendants failed to participate in this suit and from records despite having been properly served accordingly.

23. Now, having elaborately stated out the facts, let the Honorable Court proceed on the issues under this sub-heading. As indicated by the Plaintiff in its written submissions, the filed pleadings and the testimony tendered during the trial on the 6th October, 2021 no party disputed the genuineness of the Certificate of Searches produced and marked as Plaintiff Exhibit – 3 (a). The searches are records kept at the Lands

Office. Clearly from all the records obtained from the land registry it meant that on 26th May, 2010 the suit property was legally registered in the names of the 4th Defendant. She was the absolute and legally registered proprietor to the suit property with indefeasible title, interest and rights over it under the then provisions of Sections 27 and 28 of the Registered Land Act Cap. 300 (now repealed). Unless it was proved that the said Certificate of Lease had been made by mistake, omission or fraud to call for its verification and/or cancellation under the provisions of Section 143 (1) and (2) of the Registered Land Act Cap 300 and currently under Section 26(1) of the Land Registration Act of 2012, the title held by the 4th Defendant is deemed by law to be good title. Therefore, this Honorable Court is fully satisfied that the title by the 4th Defendant is good in equity.

24. It's for that reason that the Honorable Court concludes that the 4th Defendant had the legal capacity to transact with the Plaintiff as they did. The title was well protected under the Provisions of Section 75(1) of the former Constitution of Kenya and Article 40(1) (2) of the Constitution of Kenya of 2010 accordingly.

On this aspect I have been overly pleased by the citation by the Learned Counsel for the Plaintiff in the authority of "Fletcher –Versus- Peck Case (Supra) where, Marshall J. had this to say:-

"If a suit be brought to set aside a conveyance obtained by fraud and the fraud be clearly proved, the conveyance will be set aside as between the parties but the rights of third person who are purchasers without notice, for a valuable consideration cannot be disregarded. Titles, which according to every legal test are perfect, are acquired with that confidence which is inspired by the opinion that the purchase is safe. If there by, any concealed defect arising from the conduct of those who had held the property long before he acquired it of which he had no notice that concealed defect cannot be set up against him"

This Honorable Court reiterates that taking that the 4th Defendant had good title, considerably she was capable and competent to sell it and transfer the said suit property to the Plaintiff. As a result, the 4th Defendant and the Plaintiff legitimately duly entered into a sale agreement on 29th July, 2010 terms and conditions stipulated thereof for the sale of the suit property.

Upon conducting due diligence and finding that there was no encumbrance registered on the suit land, and indeed the 1st, 2nd and 3rd Defendants were not present on the land nor registered anywhere, the Plaintiff upon completion of the sale transaction took vacant possession. They became the bona fide purchasers for value without notice. None of these evidence was rebutted by the 1st, 2nd and 3rd Defendants or any other person whatsoever.

Therefore, based on these submissions, this Honorable Court is fully satisfied that the Plaintiff has proved its case on the preponderance of probability, and by that fact, the answer to the query under this sub-heading is affirmative.

ISSUE No. b) Whether the Parties are entitled to the prayers sought?

25. Having critically dealt with the issues as aforesaid, this Honorable Court is of the strong opinion that the Plaintiff is legitimately and properly entitled to the Prayers sought in the Plaintiff.

Furthermore on 6th October, 2021, this court did order that the Defence and the Counter Claim filed by the 1st, 2nd and 3rd Defendant be dismissed by dint of Order 12(1) and 17 Rule (1) and (2) for want of prosecution and non-attendance with costs. In essence, the claim by the Plaintiff in the Plaintiff went unchallenged and uncontroverted.

Additionally, on the same day the Plaintiff and the Learned Counsel for the 5th and 6th Defendants M/s. Waswa Advocate by consent agreed to have the suit against the 5th and 6th Defendants withdrawn based on the evidence adduced by the Plaintiff's witnesses. The consent was adopted as an order of this Court.

Through, its filed written submissions dated 29th October, 2021 at Paragraph 14, of the said submission the Plaintiff offered to withdraw its claim against the 4th Defendant. Hence, under this sub-heading the answer is also affirmative.

Issue (c) Whether the 4th Defendant is entitled to costs having defended the case upto its closure?

26. Under this sub-heading, this Honorable Court is compelled to rely on the provisions of Section 27(1) of the Civil Procedure Act Cap 21 whereby Cost follow events. According to the Black Law Dictionary, it defines the term "Costs" to mean "***the expenses of litigation prosecution or other legal transaction especially those allowed in favour of one party against the other***".

In this case the events are the results of the Plaintiff's case. Ideally, the Plaintiff has succeeded in its case. Nonetheless the 4th Defendant has been fervently active and fully participated in this case from its inception to the end without failure. They filed a Defence and other relevant documents pertaining to the Defence of this case.

On 6th October, 2021 they fully participated in the matter upto its closure. Its only while filing its written submissions that the Plaintiff decided and rightfully so, to withdraw its case against the 4th Defendant according to it based on the evidence tendered by the Plaintiff's witness. It is for this reason, therefore the Honorable Court is fully convinced that the 4th Defendant has really labored and hence in the process garnered genuine expectations and desires in this matter. It's only fair just and equity to conclude that the 4th Defendants are entitled to costs of the suit to be borne by the Plaintiff accordingly.

Be that as it may, the total costs of the suit is to be borne by the 1st, 2nd and 3rd Defendants herein.

IV. DETERMINATION

27. The upshot of all this is that, this court holds that the Plaintiff has successfully managed to prove its case against the 1st, 2nd and 3rd Defendants severally and jointly on merit. For avoidance of doubt, I enter judgment in favour of the Plaintiff as follows:-

- a) **THAT** a declaration that the Plaintiff as the bona fide purchaser for value without notice hence is the absolute and legal owner to all property known as Land Reference No. MOMBASA.BLOCK XIX/315 with all the indefeasible right, title interest vested on it by law.
- b) **THAT** a declaration that the Plaintiff's indefeasible ownership, title and possession of the said suit property will and/or cannot be challenged by any persons and/or legal entity including the 1st, 2nd and 3rd Defendants herein.
- c) **THAT** the 4th, 5th and 6th Defendants be and are hereby fully indemnified and/or exonerated from any claim the Plaintiff had in its pleadings.
- d) **THAT** permanent injunction orders to prevent any person and/or legal entity including the 1st, 2nd and 3rd Defendants their agents, servants and/or personal assigns from claiming and/or interfering with Plaintiff's suit property be and is hereby granted.
- e) **THAT** the 4th Defendant be and is hereby awarded costs of the suit to be borne by the Plaintiff.
- f) **THAT** the 1st, 2nd and 3rd Defendants to bear the costs of the entire suit to the Plaintiff hereof.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 18TH .DAY OF JANUARY 2022.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

IN THE PRESENCE OF:-

M/S. YUMNA HASSAN – THE COURT ASSISTANT

M/S. RANDA HOLDING BRIEF FOR MR. GIKANDI ADVOCATE FOR THE PLAINTIFF

NO APPEARANCE FOR THE 1ST DEFENDANT

NO APPEARANCE FOR THE 2ND DEFENDANT

NO APPEARANCE FOR THE 3RD DEFENDANT

MR. MARK MWANZIA ADVOCATE FOR THE 4TH DEFENDANT

M/S. WASWA ADVOCATE FOR THE 5TH AND 6TH DEFENDANT