



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVORNMENT AND LAND COURT

CIVIL CASE NO. 546 OF 2013

NANAK HOSPITAL MANAGEMENT SERVICES PLAINTIFF

VERSUS

PRISCA WANJIKU KABERENGE the

Administrator of the

Estate of JAMLECK KABERENGE (DECEASED) DEFENDANT

J U D G M E N T

The matter for determination herein is the Originating Summons brought by the Plaintiff herein **Nanak Hospital Management Services**. The summons are against the Defendant herein **Prisca Wanjiku Kaberenge** (in her personal capacity and in her capacity as the Administrator of the Estate of **Jamleck Kaberenge Njoka**).

This Originating Summons is brought under **Order 37 Rules 3 and 4** of the *Civil Procedure Rules, Section 3A* of the *Civil Procedure Act* and all other enabling provisions of the Law.

The Plaintiff has sought for the following declarations:-

- i) A declaration that Prisca Wanjiku Kaberenge, the Administrator of the Estate of Jamleck Kaberenge Njoka (the Defendant), their agents, servants, and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendant's continued occupation of LR. No. 209/2763/19 Nairobi is unlawful and that the same constitutes illegal trespass.***
- ii) That their agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendant be evicted from the said Parcel of land being LR. No. 209/2763/19 Nairobi.***
- iii) That the Defendant do bear the costs of this application.***

The Originating Summons is based on the annexed affidavit of **Janardhan D. Patel**.

In his Supporting Affidavit, **Janardhan D. Patel** averred that he is a Director of the Plaintiff and thus authorized to swear the Affidavit. It was his averment that the Plaintiff herein, **Nanak Hospital Management Services** bought all that parcel of land known as **LR. No. 209/2763/19 Nairobi** (suit

property) in a public auction after the same had been advertised in the Standard Newspaper of 9th December 1996, by Capital Auctioneers. He further averred that the Plaintiff is at present the legal and equitable owner of the suit property as evidenced by annexures JDP1.

He also deposed that **Jamleck Kaberenge Njoka** (the Defendant's Deceased husband) who was the previous registered owner challenged the transfer of the suit property under **Misc. Application No. 264 of 1997** and the same was ultimately dismissed by the Court on 20th May 2010 as per the attached ruling in JDP1. It was further contended that after the said transfer and registration of the suit property in the names of the Plaintiff, the Plaintiff, its servants, agents and/or representatives have been unable to access the same to date and various attempts to so access have resulted in failure with various thinly veiled threats being issued against such notions.

Further, that the Plaintiff's attempts to obtain access to the aforesaid property has been frustrated by the Defendant as she occupies and continues to occupy the said property thereby making it impossible for both the Plaintiff and Interested buyers to view the same. It was therefore contended that the refusal by the Defendant herein to vacate the said property is geared towards frustrating the Plaintiff herein from realizing the fruits of his investments despite the Defendant lacking any colour of right to retain the suit property. The Plaintiff has therefore come to court to seek for a court order to evict the Defendant from the suit property.

Plaintiff urged the court to order the Defendant to give vacant possession to the Plaintiff so that the Plaintiff can realize the fruits of its investment.

The Defendant, **Prisca Wanjiku Kaberenge** has opposed this Originating Summons. She filed her Replying Affidavit and averred that her late husband had instituted **Civil Suit No. 264 of 1997** which was subsequently dismissed by the court. She further averred that she filed her Notice of Appeal wherein she sought to be allowed to appeal that decision of the court out of time. It was her contention that the application was dismissed by the court on technicality and she felt aggrieved and therefore filed a constitutional reference as per annexure PWK2. It was also contended that the said reference is yet to be heard as she was still waiting for **a three Judge bench** to be constituted to handle the same. The respondent averred that it was only fair and just that the hearing of this Originating Summons be shelved pending the hearing and determination of the Constitutional Reference.

She further deposed that the suit arose out of an illegal sale of her late husband's property by the City Council of Nairobi to the Plaintiff herein whereby no communication had been done to them for non-payment of rates amounting to Kshs. 17,000/= only and the property was valued at Kshs. 25 million. It was her contention that she came to know about the sale through a 3rd Party. She averred that she was dissatisfied with the outcome of the suit filed by her husband and has now lodged the appeal to fight the illegality. She urged the court to order the maintenance of *status quo* as she is still in occupation of her late husband's property and the Plaintiff's agents are threatening to evict her tenants. She therefore urged the court to dismiss the Originating Summons herein.

The parties herein canvassed the Originating Summons by way of written submissions. However, before the parties could file their written submissions, the Defendant filed a Preliminary Objection which was dismissed by the court on 9th May 2014. The parties therefore proceeded to file their written submissions in support and opposition of the Originating Summons.

I have now considered the rival submissions and the relevant laws and I make the following findings.

The Plaintiff has sought a declaration that the Defendant's stay on the suit property is unlawful and an illegality and should be evicted forthwith. The Defendant on her part prays for the dismissal of the Plaintiff's claim.

The matter is brought under **Order 37 Rule 3** which states that:

“A vendor or purchaser of immovable property or their representatives respectively may at any time and time take out an originating summons returnable before the Judge sitting in Chambers for determination of any question which may arise in respect of any requisition or objections or any claim for compensation or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract”.

The Plaintiff herein allegedly purchased the suit property in 1995 by way of Public auction. The suit land was registered in the name of the Plaintiff in the year 1996. The Defendant who is the legal representative of the Estate of **Jamleck Kaberege Njoka**, is in possession of the suit land. The Plaintiff has therefore never taken possession though it purchased the suit land about 16 years ago.

The Plaintiff has therefore rightly come to court as a purchaser through this Originating Summons for the Court to determine the question connected with the stated sale by public auction.

From the available evidence, there is no doubt that the suit land which is a rateable property was initially registered in the name of **Jamleck Kaberege Njoka** (now deceased). There is no doubt that **Prisca Wanjiku Kaberege** is the Administratrix of the Estate of the said **Jamleck Kaberege Njoka** (No one has disputed her capacity).

There is also no doubt that the City Council of Nairobi (now defunct) brought **Suit No. 51 of 1995** against the said **Jamleck Kaberege Njoka** (now deceased) for rate default. The suit was filed at City Court and Judgment was entered in favour of the said City Council of Nairobi and the Defendant suit land was ordered to be sold by public auction. The same was allegedly done through an advert dated 9th December 1995 by Capital Auctioneers. It is also evident that **Nanak Hospital Management Services Ltd.** purchased the suit land through the said public auction for Kshs. 3,000,000/=. There is no doubt that the Vesting Order (transfer) was registered on the title on 17th June 1996 vesting the land to **Nanak Hospital Management Services**. Further an amended vesting order was issued on 15th October 1996 vesting the said land to Nanak Hospital Management Services Ltd. The amendment done was an addition of the word **Limited** which had been left out on 17th June 1996. There is therefore no doubt that the suit land herein is now vested to **Nanak Hospital Management Services Ltd.**

There is also evidence that the said **Jamleck Kaberege Njoka** filed an application at City Court seeking for the setting aside of the Interlocutory Judgment entered in favour of the defunct City Council of Nairobi and all the consequential orders. The said application was dismissed and the court noted that the property had already been sold to the purchaser (**Nanak Hospital Management Services Ltd**).

There is no evidence that the said **Jamleck Kaberege Njoka** appealed against the said Ruling of the lower court. Since the said Ruling was never set aside, the suit land remained registered in favour of **Nanak Hospital Management Services Ltd.**

There is also evidence that **Jamleck Kaberege Njoka** further filed a **Judicial Review Application No. 264 of 1997**. The said application was canvassed at the High Court and subsequently dismissed on 20th May 2010 by Sitati J. The registration of the suit property to Nanak Hospital Management Services Ltd. was therefore not disturbed and or overturned.

What is also not in doubt is that even after the said purchase, the purchaser **Nanak Hospital Management Services Ltd**, has not taken possession of the suit property. It has alleged that the Defendant herein has failed to give vacant possession of the suit property.

In the Replying Affidavit, the Defendant has allegedly that she filed an appeal against the Ruling of the High Court at the Court of Appeal. However, there's no evidence that such appeal has been prosecuted and/or the case is active at the Court of Appeal pending hearing and determination. I would hesitate to conclude that indeed there is a pending appeal. Even if there is an appeal, no stay was granted.

It was alleged by the Plaintiff that the Defendant has been collecting rent at the suit premises denying the Plaintiff the fruits of its investment. The Defendant has also admitted that she has tenants at the suit property. The suit property is therefore in control of the Defendant though the same is registered in the name of the Plaintiff.

The Plaintiff has asked the court to issue orders declaring that the Defendant's continued stay on the suit property is illegal and unlawful and she should be evicted.

It is evident that the Plaintiff **Nanak Hospital Management Services Ltd**, purchased the suit land through a public auction on 9th December 1995. The same was vested to the said purchaser on 17th June 1996 and later through an amended vesting order dated 15th October 1996 to **Nanak Hospital Management Services Ltd**. The said **Nanak Hospital Management Services Ltd** is therefore the prima facie proprietor of the suit property. This is supported by **Section 26 (1)** of the *Land Registration Act* which states as follows:

“The Certificate of title issued by the Registrar upon Registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that property shall not be subject to challenge except”.

Nanak Hospital Management Services Ltd is the holder of certificate of title. The same is therefore *prima facie* evidence that the said **Nanak Hospital Management Services Ltd** is proprietor of the suit land and is the indefeasible and absolute owner.

If **Nanak Hospital Management Services Ltd** is the absolute and indefeasible owner of the suit property then it enjoys all the rights conferred to an absolute owner by **Sections 24 and 25** of the *Land Registration Act*. Such rights include access to the said land. **Section 24** of *Land Registration Act* reads as follows:

“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging and/or appurtenant thereto”.

Further, **Section 25 (1)** of the said Act provides that:-

“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by on order of consent, shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever and subject”.

The purchaser acquired the registration through a vesting order issued by the court. The same has not been overturned and/or set aside. The purchaser – **Nanak Hospital Management Services Ltd**, therefore enjoys all the rights of a proprietor over the suit property. As I stated earlier, access to such property is one of such rights. The Defendant continued stay to the suit land has denied the purchaser its rights to access the property that it acquired through purchase by public auction. The Defendant continued stay or possession of the suit land is therefore unlawful and illegal. The Defendant should immediately give vacant possession of the suit land to the proprietor who is **Nanak Hospital Management Services Ltd**.

The Defendant had alleged that the said sale was done fraudulent. However there was no evidence of fraud brought out and as I held earlier, the sale by public auction in 1995 was never set aside and so the transaction still holds.

The Defendant also submitted that this suit should be defeated because it was filed by **Nanak Hospital Management Service** but not **Nanak Hospital Management Services Ltd.**

I have considered the Originating Summons and indeed the Plaintiff herein is **Nanak Hospital Management Services**. However, the amended vesting order vested the suit property to **Nanak Hospital Management Services Ltd.** The certificate of title shows the suit property is vested to **Nanak Hospital Management Services**. There is the omission of the word *Limited*. I find and hold that the omission of the word Limited is not fatal to the suit and indeed **Article 159 (2) (d)** of the *Constitution 2010*, requires this court to administer justice without undue regard to procedural technicalities.

What is evident herein is that **Nanak Hospital Management Services Ltd** is the proprietor of the suit property. As the proprietor, its right to property is guaranteed by **Article 40** of the *Constitution 2010* which states:

“... Every person has the right either individually or in association with others to acquire and own property:

- a) of any description; and**
- b) in any part of Kenya.**

The Plaintiff herein did purchase the suit property and it has the right to own it and no one should arbitrarily deprive the Plaintiff of the said property or any interest or right over the said property.

Having now carefully considered the available evidence and the written submissions, the court finds that the Plaintiff has proved on a balance of probability that it acquired the suit property through a public auction. It is also the registered proprietor and has been denied access to the suit property by the Defendant. The court consequently declares that:

- (i) The Defendant herein Prisca Wanjiku Kaberenge (Administrator of the Estate of Jamleck Kaberenge Njoka), her agents, servants and/or representatives and any other party whatsoever entitled to any right under the auspices of the Defendants continued occupation of LR. No. 209/2763/19 Nairobi is unlawful and constitutes illegal trespass.**
- (ii) Further, that the Defendant, her agents, servants and/or representatives and any other party whatsoever entitled to any right under auspices of the Defendant should give vacant possession on the suit property to the Plaintiff within the next 30 days from the date of this Judgment.**
- (iii) Failure to give the said vacant possession within the above stated period, the Plaintiff will be at liberty to evict the said persons from the suit property LR. No. 209/2763/19 Nairobi.**
- (iv) The costs of this Originating Summons to be borne by the Defendant herein.**

It is so ordered.

Dated, Signed and delivered this 27th day of February, 2015.

L. GACHERU

JUDGE

In the presence of

Mr Kandeke for Plaintiff/Applicant

Mr Mutahi holding brief for Wambugu

Kariuki for Defendant.

Court Clerk: Lerionka

Court:

Judgment read in open Court in the presence of the above stated Counsels.

28 days Right of Appeal.

L. GACHERU

JUDGE