



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 285 OF 2010

(CONSOLIDATED WITH CIVIL CASE NO. 289 OF 2009)

VELOS ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

PARAGON ELECTRONICS LIMITED.....DEFENDANT

J U D G M E N T

INTRODUCTION

1. There are two suits before the Court which were consolidated. The first one is Civil Case No. 289 of 2009 and the second one is Civil Case No. 285 of 2010.

Civil Case No. 289 of 2009

2. In HCCC No. 289 of 2009, Velos Enterprises Limited as the Plaintiff sued Paragon Electronics Limited for Kshs. 3,112,491 being service charge allegedly owed to it, an order for vacant possession of the office Block known as Block 1C and mesne profits from 10th May, 2009 until date of handing possession.

THE PLAINTIFF'S CASE

3. Velos enterprises brought the claim by way of a Plaint dated 22nd April 2009 and filed on 27th April 2009. The Plaint was subsequently amended on 28th May 2009 and filed on 29th May, 2009.

4. The Plaintiff averred that at all material times, it was the registered lessee of LR No. 290/16027, the suit property herein in which it erected certain blocks of buildings. The Plaintiff by way of a sublease dated 9th May, 2007 and registered as I.R No. 1022763 on 24th July, 2008 leased to the Defendant the office Block known as Block 1C together with the right to make use of 17 saloon car parking slots upon the terms and conditions particularized in the said sublease. In the said sublease the Defendant was to pay monthly in advance a service charge of Kshs. 125,000/=.

5. It is the Plaintiff's case that the Defendant in breach of the terms of the sublease failed, refused and/or neglected to pay the service charge which as at 9th February, 2009 had accrued to Kshs. 3, 112, 491.00. Therefore, the Plaintiff's claim against the Defendant is for the said sum of Kshs. 3,112,491/=.

6. It was further the Plaintiff's case that during the subsistence of the lease, the Defendant carried out certain activities, as detailed at paragraph 9 (a) to (c) of the Amended defence, which activities were in breach of the sublease. The Plaintiff contends that despite serving the Defendant with a notice specifying the non-payment of service charge and breach of the terms of the sublease requiring it to remedy the same, the Defendant did not comply within the requisite 3 months or at all. Therefore, according to the Plaintiff, pursuant to clause 3(i) of the Sublease, the same had terminated absolutely and they are entitled to re-enter upon the suit premises.

DEFENDANT'S CASE

7. In response to the claim, Paragon Electronics, the Defendant herein, filed the Defence dated 18th May 2009 which it subsequently amended on 11th June 2009 and filed on 12th June 2009. The Defendant denied the Plaintiff's allegations that they had refused to pay service charge. The Defendant averred that from the year 2007, they had severally put the Plaintiff on notice that they would suspend payment of service charge for various reasons among them that there had been several break-ins and burglaries to their premises. The other reasons are as detailed at paragraphs 4 and 5 of the Amended Defence. The Defendant further denied having breached the sublease agreement as alleged by the Plaintiff.

8. In view of the foregoing, the Defendant urged the Court to dismiss the Plaintiff's case with costs.

Civil Case No. 285 of 2010

9. The second one is Civil Case No. 285 of 2010 in which Paragon Electronics Limited as the Plaintiff has sued Velos Enterprises Limited for, inter alia, an order for specific performance directing the Defendant to issue a separate title for L.R No. 209/16027 in its favour in accordance with the sale agreement dated 23rd August, 2006. The Plaintiff brought the claim by way of a Plaint dated 30th April, 2010 and filed on 5th May, 2010. The Plaintiff, Paragon Electronics Limited made an oral amendment to its Plaint on **9th October, 2014** to amend prayer (b) by deleting general damages and inserting mesne profits. The Plaintiff sought for mesne profits from the date it vacated the suit premises until Vacant possession.

10. In response to the Plaintiff's claim, the Defendant filed its Statement of Defence dated 22nd November, 2011 on 24th November, 2011.

THE PLAINTIFF'S CASE

11. The Plaintiff avers that on or about 23rd August, 2006 it entered into a sale agreement with the Defendant under which the Defendant was the vendor and the Plaintiff the purchaser. Under the said sale agreement, the Defendant sold to the Plaintiff a leasehold interest in the property known as Land Reference Number 209/16027 (herein the suit property) for Kshs. 56,500,000/=.

12. It was stipulated at clause 2 of the said agreement that the Defendant would hand over possession of the premises as per the draft lease which the Plaintiff's advocate was to hold in escrow until the separate title of the said portion is issued. The Plaintiff therefore emphasizes that under the agreement, the Defendant was under a clear and unequivocal obligation to ensure that a separate title is issued.

13. It is the Plaintiff's case that in breach of the said agreement, the Defendant has failed and/or refused to issue or cause to be issued a separate title as per its obligations under the agreement. The said breach has not been remedied to date. The Plaintiff avers that it performed its part of the agreement fully and paid the purchase price, receipt of which has been acknowledged by the Defendant.

14. The Plaintiff's claim is therefore for an order of specific performance of the said sale agreement. During the hearing of the case Counsel for the Plaintiff sought to amend prayer (b) of the Plaint to delete damages and insert mesne profits from the period commencing when the Plaintiff vacated the suit premises up to the period the Plaintiff will acquire possession of the suit premises. The Defendant had no objection and the Court allowed the amendment.

DEFENDANT'S CASE

15. In its Defence dated 22nd November, 2011 the Defendant admitted that there was an agreement between the Plaintiff and the Defendant for sale of a leasehold interest in the suit premises. It is however the Defendant's contention that the said agreement is not in issue since the parties by consent found that the same could not be performed and abandoned it. The Defendant avers that they abandoned the agreement because the suit property could not be subdivided as per the agreement and separate titles issued, circumstances which were beyond its control.

16. As a result of the foregoing circumstances, it is the Defendant's assertion that on **9th May, 2007** it entered into a sublease agreement with the Plaintiff over the said suit premises. The Defendant's case is that the Plaintiff has continually been in breach of the terms of the said sublease agreement, hence the suit in HCCC No. 289 of 2009.

17. The Defendant therefore prayed that the Plaintiff's suit be dismissed with costs.

THE HEARING

18. The parties agreed that proceedings of the consolidated suit would take place in Civil Case No. 289 of 2009. Therefore, for purposes of this Judgment Velos Enterprises is the Plaintiff while Paragon Electronics Limited is the Defendant.

19. The Plaintiff called one witness to testify in support of its case. PW1, **Ramesh Sheth** introduced himself as the director of Velos Enterprises Limited. He testified that the Plaintiff was the developer and proprietor of plot No. 209/16027, the suit property herein. The suit property was subdivided into five plots and the Plaintiff started development on all plots. The property is called Gateway Park and the blocks therein are named A,B,C,D and E. It was his testimony that the Plaintiff's intention was to sell the blocks.

20. He testified that through a sale agreement dated **23rd August, 2006** the Plaintiff sold to the Defendant Block C. The purchase price was **Kshs. 56, 500,000/=** which the Defendant paid in full. Thereafter, the Plaintiff and the Defendant executed a sublease on 9th May, 2007 which sublease was registered on 24th July, 2008. According to the sublease as indicated under Clause ii (A) the Defendant was to pay Kshs. 125,000/= as service charge. It was PW 1's testimony that the Defendant paid the service charge only twice and stopped. The Plaintiff's director further explained that vide a letter dated 9th February 2009, the Plaintiff's managing agent Knight Frank wrote to the Defendant demanding for payment of Kshs. 3,112,491/= being the outstanding service charge as at that date. However, according, to PW 1 the Defendant failed to heed to the demand. Subsequently, the Plaintiff's advocates on record formally demanded the outstanding service charge but the Defendant still did not pay. It was the testimony of PW 1 that the Defendant through its advocates indicated that they would not pay the outstanding service charge as their premises had been broken into and that there was no audit reports. According to PW 1, audit reports were not a pre-condition for payment of service charge. The Plaintiff's director told the court that vide a ruling dated **5th May, 2011** this Court found that the service charge was due to the Plaintiff.

21. PW 1 testified that the Defendant made alterations to the suit premises without leave of the Plaintiff and that they put up a bill board without consulting the Plaintiff or obtaining the County Council's approval. He contended that at clause (IX) of the sublease agreement, the Defendant was prohibited from making any structural alterations to the premises without the consent of the Plaintiff. It was his testimony that the City Council demanded that the alterations be demolished which the Defendant has not done to date. He further testified that the Plaintiff had not been able to give titles to the properties because of delays at the Lands registry.

22. Upon cross examination, PW 1 confirmed that the Defendant purchased Block 1C for Kshs. 56,500,000/=. He testified that the sublease was to be held on escrow until a title was ready. He further confirmed that there were five office blocks in the suit property. He explained that Zuku (Wananchi

Group Limited) had a lease of five (5) years and six months and occupied Block 1E. Zuku paid a service charge of Kshs. 125,000/= per month which was a similar amount to what the Defendant was to pay. He stated that Zuku did not pay any purchase price but that they had just rented the premises. He further testified that the Plaintiff was to give a separate title of the portion sold to the Defendant which was not the position with Zuku who was just a tenant. Further on the issue of service charge, it was his testimony that if a person ceased to be a tenant, they did not need to pay service charge.

23. . PW 1 told the Court that he was not prepared to give the Defendant a separate title but that if he gave the title, the Defendant would get their own security, water meter, electricity etc. Though he did not give reasons, it was his testimony that it was not possible to have a separate issued to various blocks purchased. The Court was referred to pages 73 and 74 of the Defendant's list of documents in which the Defendant's lawyer wrote to the Plaintiff asking for the separate title and in response, the Plaintiff's lawyer indicated that the subdivision was not possible. It was however PW 1's testimony that he was not sure whether subdivision was possible and that he did not know on what basis his lawyer concluded that subdivision was not possible. He further reiterated that he was willing to consider the subdivision and give the Defendant a separate title only that his co-directors were opposed to the same and were only willing to give a lease.

24. On re- examination, PW 1 testified that the Plaintiff agreed to sell a portion of its property to the Defendant on leasehold. He further testified that the sublease was to be held in escrow until a separate title of the said portion was issued. In a contradicting turn of events, it was his testimony that he did not promise the Defendant a separate title but a sublease. In his view, the registered sublease was a valid title in itself as the Defendant had used it to borrow Kshs. 75,000,000 from a Bank which accepted the same as a valid title.

25. The Defendant called six witnesses to testify in support of its case.

26. DW1, was **Bulent Gulbahar** one of the directors of the Defendant Company. He adopted his witness statement filed on **28th February, 2014** as his evidence. He also stated that he would rely on the Defendant's list of documents filed on even date and the further bundle filed on **22nd October, 2014** as exhibits in support of the Defendant's case. He testified that the Defendant was buying a leasehold interest in Block C for the purchase price of Kshs. 56,500,000/=. He further testified that there was to be a sublease pending the subdivision and availability of the title. It was his testimony that the Plaintiff's advocate acknowledged receipt of the substantial part of the purchase price (Kshs. 56,000,000/=) and that the balance was also paid as can be seen at page 27 of the Defendant's bundle of documents.

27. The Court was referred to page 74 of the Defendant's bundle of documents which was a letter from the Plaintiff's advocate indicating that subdivision was not possible and that there was no provision for a separate title. It was DW 1's testimony that this allegation was not factually correct as subdivision was possible. The Defendant's advocate asked the Plaintiff's advocate about the possibility of subdivision but there was no response. It was further his testimony that the City Council of Nairobi had advised that subdivision was possible subject to stated procedural requirements. (*see page 79 of the Defendant's bundle of documents*). He also testified that his consultants confirmed that the subdivision of the property was possible. DW 1 therefore urged the Court to order the Plaintiff to issue the Defendant with a title in respect of the sub-lease.

28. It was DW 1's testimony that the sub-lease was to govern the relationship between the Plaintiff and the Defendant for 6 to 9 months before the title was to be issued. According to the sublease, the Defendant agreed to pay a service charge of Kshs. 125,000/= in relation to Block C which it occupied. DW 1 testified that the amount of the service charge was to be computed annually and be certified by the Lessor's (Plaintiff) auditors as provided for under Clause D of the sublease. Further, under Clause E of the said sublease, the lessor was to notify the lessee within three months after the expiration of each financial year of any amounts due for service charge after giving credit for all monies already paid by lessee as service charge. It was DW 1's testimony that the Defendant got possession of the premises in September 2006 and vacated in 2010 but during that time they never received any certified computation of the service charge by the Plaintiff's auditors as required under the sublease. The Plaintiff's managing

company wide the letter dated **15th April, 2008** at page 68 of the Defendant's bundle had promised to avail audited accounts but according to DW 1 the agent did not avail the said accounts.

29. With regard to the payments of the service charge, it was DW 1's testimony that the Defendant paid service charge of Kshs. 543,750/= for the first four months from September 2006. In 2007, the Defendant paid Kshs. 997, 501/= then from there they stopped paying. The reasons for stopping the payment as stated by DW 1 are as follows. There was an incidence of theft in the Defendant's premises and the Defendant suspected the security company hired by the Plaintiff to be responsible. However, the said security denied that they were liable which position aggrieved the Defendant as security services were among the services they paid for under the service charge. The Defendant also complained of a number of defects in their premises.

30. DW 1 additionally told the court that, since the Defendant had failed to pay the service charge, the Plaintiff disconnected water and electricity and blocked the sewer line by pouring concrete on the sewer lines. As a result, the Defendant could not use the premises and they vacated in the year 2010. Prior to vacating the premises, the Plaintiff had already filed a case against the Defendant to claim the outstanding service charge. DW 1 testified that in a summary Judgment this Court awarded the Plaintiff the sum of the service charge and the Defendant's goods in the basement of the premises were attached. It was his testimony that the goods were auctioned but that to date the Plaintiff has never given them an account of the sale. DW 1 approximated the value of the auctioned goods at Kshs. 35,000,000/=.

31. DW 1 also testified that he consulted Topmark Valuers Limited to find out how much the Defendant lost if he were to lease out the premises. They came up with a figure of Kshs. 56, 526,000 running from February 2010 to October 2014. According to DW 1 this was to run until the Defendant obtained vacant possession. DW 1 therefore testified that the Defendant was requesting for the aforesaid figure in addition to specific performance. He also testified that the Defendant was seeking for mesne profits and damages to the premises.

32. On cross examination, DW 1 confirmed that the Defendant made a purchase for a separate title. However, the Defendant signed the sublease to protect the relationship between the parties pending the issuance of Title. It was DW 1's assertion that the Defendant was buying Block C for the remainder of the 99 years in the head lease. He further stated that the Defendant purchased a leasehold interest in the Block. He confirmed that he used the sublease to borrow USD 1,000,000/=.

33. DW 1 went ahead to testify that the Defendant was not happy with the ruling of the Court awarding the Plaintiff the service charge arrears and leading to the auction of their property worth Kshs. 35,000,000/=. He however indicated that the Defendant did not appeal against the said ruling.

34. On re-examination, DW 1 reiterated that the Defendant took a loan of USD 1,000,000. He clarified that the security for the said loan was Block C. He further clarified that what had been registered in the Defendant's favour was a lease and not a sublease. (*See page 72 of the Defendant's bundle of documents*). He testified that the bill board erected by the Defendant was on top of its premises and that the City Council had no issue with the same.

35. On cross-examination by the Court, DW 1 testified that they could not use the premises as the Defendant had blocked power, water and the sewer line. At this juncture, the Court ordered for a site visit of the premises to be conducted on **22nd April, 2015**. This was for purposes of ascertaining the Defendant's allegations that the Plaintiff had blocked the aforesaid amenities.

36. On the material day of the visit, the Court was able to ascertain the allegations by the Defendant that the sewerage had been blocked and that the water meter and electricity connection to the Defendant's premises had been disconnected. The Court also noted that the Defendant's premises had suffered serious damage on the walls, electricity installations, ceilings and office partitions after the auction which was carried out by Ndegwa Auctioneers on behalf of the Plaintiff. In conclusion, the Court noted that the said premises were vacant and in an inhabitable condition.

37. DW 2 was **Richard Omwela**, an advocate of the High Court and a partner at Hamilton, Harrison and Matthews. He informed the Court that he had acted for the Defendant as regards the disputed premises. He fully adopted his witness statement dated **27th February, 2014** as his evidence.

38. It was his testimony that prior to the sale agreement, the Plaintiff's director and the Defendant's director together with their advocates, DW 2 included, met to discuss the terms of the agreement. At the meeting, the parties agreed on the purchase price and the details of subdivision. He testified that the sale agreement was subject to subdivision which was to be done in order to create a separate title for the Defendant. This was captured at clause (c) of the agreement. He further testified that the sublease was to be held in escrow until a separate title was issued. He told the Court that it was commercial practice to hold a sublease in escrow until a transaction was complete.

39. On re-examination, DW 2 testified that a registered sublease could be used for purposes of borrowing and therefore could serve as a security for a loan. It was his testimony that once registered, a sublease was as good as a title.

40. On cross-examination by the Court, DW 2 noted that there were some inconsistencies in the sale agreement and in the sublease which appeared to be against the intention of the parties as expressed in the negotiations.

41. DW 3 was **John Koyier Barreh**, who introduced himself as a director of Urban Planning. He adopted his witness statement dated **21st October, 2014** as his evidence. He testified that he had received a letter dated **24th January, 2012** seeking his opinion on the possibility subdivision to excise subplot 1C. He responded through his letter dated 30th January, 2012 indicating that subdivision of L.R No. 209/16027 was possible subject to certain conditions as indicated in the said letter. It was his testimony that a subdivision of the suit property had been submitted to the Council by the owner of the property which subdivision was approved.

42. Stephen Barasi, an employee of Paragon Electronics Limited, the Defendant herein, gave evidence as DW 4. His evidence was brief and he essentially confirmed that the sewer line of the Defendant's premises was blocked using concrete as a result of which the Defendant could no longer use the premises.

43. The last Defendant's witness, DW 5 was **Kevin Ayodi**, an employee of the Defendant. He adopted his witness statement dated 27th February, 2014 as his evidence. His evidence was brief as well. He testified that his employer, the Defendant bought the suit premises, Block 1C. He further testified that on 8th May, 2012 he noticed that one of the doors to the Defendant's premises had been broken and removed.

ANALYSIS

44. I have carefully considered the pleadings herein as well as both Counsel's written submissions in light of all the evidence and adopt them where they coincide with this judgment. On the foregoing, the parties set out a number of issues for determination. However upon examination of the said issues, I find that the same can be summarized as follows:-

a. Whether according to the sale agreement dated 23rd August, 2006 the Defendant (Paragon Limited) was to be issued with a separate title for Block C;

b. Whether the Plaintiff (Velos Enterprises Limited) is entitled to service charge from the Defendant (Paragon Electronics Limited) to the tune of Kshs. 3,112,491/=;

c. Whether the Defendant (Paragon Electronics Limited) is entitled to mesne profits;

d. Whether the Plaintiff (Velos enterprises Limited) is entitled to mesne profits and vacant possession;

Whether according to the sale agreement dated 23rd August, 2006 the Defendant (Paragon Limited) was to be issued with a separate title for Block C;

45. The Plaintiff contends against the argument that it was supposed to issue a separate title to the Defendant. In its submissions, which were not quite in convergence with PW 1's testimony, the Plaintiff submitted that it sold a leasehold interest to the Defendant under a sale agreement which was executed simultaneously with the sub lease agreement. It further submitted that the sale agreement provided for the signing of a sublease and not a transfer of a separate title.

46. The Parties herein do not dispute that they entered into a sublease agreement after the sale agreement. It also appears that the parties are in agreement that the sublease was to be held in escrow until a separate title was issued. Pw 1 testified as much. It was also testified on behalf of the Defendant that the sublease was to protect the relationship between the parties awaiting the issuance of a separate title. The sublease might have brought some confusion as to the relationship between the Plaintiff and the Defendant with regard to the suit premises. However, it never changed the fact that the Defendant purchased the suit premises and paid the purchase price for it in full. It is also plain that the Defendant was awaiting a separate title for Block C and PW 1 admitted that the intention was to issue the Defendant with a separate title.

47. It was also the Plaintiff's submission that it was not going to be possible to issue a separate title to the Defendant because it was not easy to excise a road for Block C. However, during the hearing it turns out PW 1 was not sure whether or not the suit property could be subdivided. On the other hand, DW 3 a director of urban planning testified that the subdivision of the suit property was possible subject to certain conditions as indicated in a letter from the City Council. It was his testimony that a subdivision of the suit property had been submitted to the Council by the owner of the property which subdivision was approved. Therefore, the Plaintiff's case that a separate title cannot issue because subdivision is not possible cannot stand.

48. It is evident that the objective of the sale agreement between the parties was to ensure that the Defendant would obtain a separate title for the premises it purchased. It is clear beyond peradventure that the Defendant was purchasing the said premises from the Plaintiff. Even PW 1 conceded to this fact in his testimony. It was clear from his evidence that the Defendant purchased the premises and fully paid the purchase price of **Kshs. 56.5 million**. PW 1 went ahead to admit that the intention was to give the Defendant a separate title after payment of the purchase price and completion of subdivision. The only problem was that his co-directors were now not willing to issue a separate title. The refusal of the Co-directors to co-operate in issuance of a separate title at this point is of no benefit to the Plaintiff. The Court is only obliged to consider the sale agreement, the intention of the parties therein and whether both parties have fulfilled part of their bargain. In other words, this Court is called upon to enforce the contract between the parties and not to rewrite the same.

49. On cross examination, PW 1 was categorical when he stated and I quote:-

"...I was to give a separate title of the portion sold to the Defendant. This was not the position with Zuku group since they did not purchase the property and were just tenants..."

From PW 1's testimony above, it is clear that the Plaintiff's intention was to issue a separate title to the Defendant who had paid a purchase price for Block 1C.

50. Given the foregoing evidence, it is clear that the Defendant purchased Block 1C and is entitled to the title therein.

Whether the Plaintiff (Velos Enterprises Limited) is entitled to service charge from the Defendant (Paragon Electronics Limited) to the tune of Kshs. 3,112,491/=

51. The Plaintiff's contention is that under the Sub-lease dated 9th May, 2007, the Defendant was to pay monthly service of Kshs. 125,000/=. However, the Defendant failed to pay the service charge and

accumulated an arrears of Kshs. 3,112,491/=. It is the Plaintiff's submission that in HCCC No. 289 of 2009 the Court made a decision in their favour for the arrears of Kshs. 3,112,491/= which amounted to Kshs. 4,715,192 as the decretal amount including interest.

52. The Defendant admitted that they had stopped or failed to pay service charge at some point for the reason that they were dissatisfied with the Plaintiff's services and also that the Plaintiff failed to provide annual audited reports for payment of service charge.

53. It is not in dispute that the Court granted the Plaintiff in HCCC No. 289 of 2009 the sum of **Kshs. 3,112,491/-** being the outstanding service charge. The Ruling was not appealed from and in fact, the Plaintiff went ahead to execute the same through its appointed auctioneers. Therefore, the issue of the outstanding service charge was dispensed with and this Court has no mandate to reopen the same by making another decision. Besides, the Defendant cannot be heard to complain of payment of the service charge yet they executed the sublease agreement which provided for payment of service charge.

Whether the Defendant (Paragon Electronics Limited) is entitled to mesne profits

54. The Defendant, Paragon Limited prayed for mesne profits from the date it vacated the suit premises until vacant possession. The Defendant submitted that it was requesting for Judgment in the sum of Kshs. 64,772,000/= as at 31st May, 2015 and an additional sum of Kshs. 1,178,000/= for each month as from 1st June, 2015 until the suit premises were handed over to it. The Defendant relied on a valuation report from Topmark valuers, which report indicated that the monthly rent for the suit premises was **Kshs. 1,178,000/=**. (see the Defendant's supplementary list of documents dated 21st October, 2014).

55. The Plaintiff's rebuttal to the Defendant's claim for mesne profits is that the Defendant chose to sleep on its rights and failed to take remedies to enjoy its rights and continue staying in the premises.

56. What are mesne profits? The **Black's Law Dictionary 9th Edition** defines mesne profits as: - "*the profits of an estate received by a tenant in wrongful possession between (2) two dates.*" The **Concise Oxford English Dictionary 12th Edition** defines mesne profits as: - "*the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord.*"

57. From the above definition it is clear that mesne profits can only be claimed where there was a Landlord-tenant relationship. In addition these are profits received by a tenant in wrongful possession and recoverable by the landlord. In the case herein, the Court has not established a landlord-tenant relationship between the Plaintiff and the Defendant. The Court already established that the Defendant purchased the suit premises from the Plaintiff. Even if there was a landlord-tenant relationship now that the parties had executed a sublease, the Defendant was not a landlord. Furthermore, the Plaintiff was not a tenant and was not in possession or wrongful possession of the said suit premises at any given time. It therefore appears that the prayer for mesne profits is untenable. Perhaps this prayer could have been more tenable if it remained prayer for general damages, rather than mesne profits.

58. I think the proper cause of action for the Defendant remains in damages for wrongful eviction, wastage and damages including damages for loss of rent. It is clear to this court that the Plaintiff by its acts of blocking the sewerage, cutting off electricity and water and causing damages through its auctioneers occasioned damages to the Defendant which cannot be left unpaid. No person shall be given the liberty to destroy and to plunder and get away with it. The damages which the Plaintiff caused to the Defendant are recoverable even if not in this suit. The Defendant is entitled to quantify that damage from the time of the blockade of the sewerage to the date of this ruling, and to recover the same in a suit filed separately if the time limitation is not yet exhausted. The Report by Topmark Valuers should therefore be used in proof of that claim, except that for the purposes of this judgment this court shall take the monthly rent of the suit premises to be Kshs.1,178,000/= as per the said valuation. This amount shall be payable from the date of this Ruling until the Plaintiff provides the Defendants with a separate title as determined hereunder.

59. It must also be noted that once the Plaintiff blocked the sewerage and cut off electricity and water, the

Defendant had no obligation to mitigate its loss since any action by the Defendant to unblock the sewerage would probably have led to quarrel or a fight and would have amounted to an act of war. The Plaintiff cannot escape the natural consequences of its unlawful actions in driving the Defendant from the suit premises. The premises were bought by the Defendant and fully paid for. Unfortunately, the Defendant did not in this suit seek to prove this claim, and instead amended the Plaintiff to seek mesne profits. As I have stated, mesne profits is not the remedy. The remedy for the Defendant remains in damages, and since this was not claimed or prayed for, the Defendant is at liberty commence a fresh suit for the same.

60. With regard to the issue of vacant possession, the Defendant did not pray for the same in its Plaintiff but this is implied and will automatically follow the order of specific performance requiring the Plaintiff to issue the Defendant with a separate title for the suit premises, Block 1C. On that note the Plaintiff should ensure that the concrete mix poured into the sewer line is removed and also reconnect electricity and water as they already recovered the outstanding service charge due to them.

Whether the Plaintiff (Velos enterprises Limited) is entitled to mesne profits and vacant possession;

61. The Plaintiff had prayed for an order for vacant possession of the office Block known as Block 1C, the suit property herein as well as mesne profits from 10th May, 2009 until date of handing over possession.

62. However, it appears the Plaintiff may have abandoned these prayers. The Plaintiff did not adduce any evidence to support its prayer for mesne profits. It did not submit on the said issue as well. With regard to vacant possession, the same cannot be granted to the Plaintiff as the Court has already established that the Defendant had purchased the suit premises and is entitled to a separate title for the same.

DISPOSITION

63. In view of the foregoing, it is evident that the Plaintiff has failed to prove its case on a balance of probabilities with regard to an order for vacant possession and mesne profits and his cause of action must therefore fail. Prayer (a) being judgment for **Kshs. 3,112,491/=** was already granted vide a ruling of this Court (*Hon. Justice Muga Apondi (as he then was)*).

64. On the other hand, the Defendant has failed to prove its case as regards mesne profits. However, the Defendant is entitled to an order of specific performance as prayed for. The Court therefore makes the following orders:-

a. The Defendant (Paragon Electronics Limited) is hereby granted an order of specific performance directing the Plaintiff to cause a separate title to be issued in favour of the Defendant for all that property known as LR No. 209/16027 or the suit property, in accordance with the sale agreement dated 23rd August, 2006.

b. The Specific performance should be effected within thirty (30) days from the date of this Judgment.

c. Pending the Specific Performance to be done as per prayer (a) above, the Plaintiff (Velos Enterprises Limited) shall pay to the Defendant (Paragon Electronics Limited) a sum of Kshs.1,178,000/= per month being the value of the lost rent until the said Specific Performance is actualized and a separate title is issued to the Plaintiff as per this Judgment.

d. Cost herein assessed at 70% and awarded to the Defendant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

M/s Nyagah holding brief for Ngatia for the Defendant

Teresia – Court Clerk