



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 651OF 2006

ABEL ONDIMU SAGINI.....PLAINTIFF

VERSUS

MERIDIAN AMSCO LIMITED.....1ST DEFENDANT

CO-OPERATIVE BANK OF KENYA.....2ND DEFENDANT

DOLPHIN AUCTIONEERS.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. In his Complaint dated 23rd November 2006 and filed on 27th November 2006, the Plaintiff sought the following reliefs:-

- a. **A permanent injunction restraining the Defendants, their servants or agents from auctioning, selling, alienating or in any other way and in any manner whatsoever dealing or interfering with the ownership of the Plaintiff's property known as L.R. No 21984/8 and 2259/6/3 which is purported to have been charged.**
- b. **A declaration that the purported charge registered in favour of the 2nd Defendant to secure funds to the 1st Defendant and all acts and dealings by the Defendants relating to L.R. No 21984/8 and 2259/6/3 are null and void.**
- c. **A declaration that L.R. No 2259/6/3 ceased to exist and the same should be cancelled by the Registrar of Titles forthwith.**
- d. **Costs of the suit.**

2. The Plaintiff's List and Bundle of Documents were dated 10th September 2012 and filed on 14th September 2012. His Supplementary List and Bundle of Documents was dated 28th February 2014 and filed on 3rd March 2014. The List and Bundle of Documents were marked Exhibit 1 and 2 respectively. He had initially filed his List of Witnesses and Witness Statements dated 28th February 2014 on 3rd March 2014. Subsequently, together with his witness, Julius Orwa K'Obado, he filed fresh Witness Statements dated 5th May 2015 on 19th May 2015. He filed his Written Submissions were dated 14th July 2015 on 4th September 2015.

3. The 2nd Defendant's Statement of Defence was dated 30th January 2008 and filed on 1st February

2008. The Plaintiff's Reply to the 2nd Defendant's Defence was dated 8th February 2008 and filed on 13th February 2008. The 2nd Defendant's List and Bundle of Documents were dated and filed on 15th November 2011 while its Witness Statement that was signed by its Recoveries Officer, Joseph Irungu was dated 19th June 2015 and filed on 22nd June 2015. Its filed its Written Submissions dated 29th September 2015 on 30th September 2015.

4. Although the 1st Defendant through the firm of M/S Onganda & Co Advocates initially participated in this matter during the hearing of several interlocutory applications, it never filed its Defence herein. The 3rd Defendant never participated at all and in fact, it did not file any papers in response to the Plaintiff's claim.

5. The hearing of this matter was concluded on 25th June 2015 when this court gave directions on the filing of the Written Submissions. However, the court was transferred before parties filed their respective written submissions. Upon the parties' written request to the Principal Judge High Court of Kenya, this court once again became seized of the matter when it was requested to write the judgment herein. The Judgment herein is therefore based on the Written Submissions by the respective parties herein.

THE PLAINTIFF'S CASE

6. It was the Plaintiff's case that he was the registered owner of the property known as L.R. No 21989/8 (hereinafter referred to as "1st the subject property") having purchased the same from one Ndoricimpa John Alfred and Ngeza Sabine for a consideration of Kshs 4,500,000/=. He took possession of the said subject property and developed the same by constructing a residential home.

7. In September 2006, the 2nd Defendant instructed the 3rd Defendant to sell the said subject property pursuant to its Statutory Power of Sale to recover a sum of Kshs 3,131,015.90. Subsequently, on 13th November 2006, the 3rd Defendant caused to be published in a local newspaper a notification of sale of property known as L.R. No 2259/6/3 (hereinafter referred to as "the 2nd subject property") but which description matched his house on all fours.

8. He pointed out that the 1st subject property had been surveyed and showed that it existed on the ground as L.R. No 21984/8 but that it appeared that L.R. No 2259/6/3 related to his property. He denied ever having taken a loan from the 2nd Defendant or knowing the Borrower of Chargor of the alleged loan.

9. On 15th April 2010, the court granted an injunction restraining the 2nd Defendant from disposing of the subject property pending the hearing and determination of the suit and also directed that the Plaintiff deposit a sum of Kshs 3,688,277.75, which he complied with on 19th April 2010.

10. He therefore prayed that the court do grant him the orders that he had sought in his Pleint.

THE 2ND DEFENDANT'S CASE

11. It was the 2nd Defendant's case that the 1st Defendant was the registered owner of the property known as L.R. No 2259/6/3 (hereinbefore referred to as "the 2nd subject property"). It stated that one Eric Thomas Osiemo offered the 2nd subject property as security for an overdraft facility in the sum of Kshs 2,500,000/=.

12. When he defaulted in the payment of the said overdraft facility, it instructed the 3rd Defendant to sell the said 2nd subject property by way of public auction pursuant to its Statutory Power of Sale to recover a sum of Kshs 3,131.015.90.

13. However, whereas the Plaintiff's parcel of land was distinct from the one it had charged, it had been

unable to dispose of the said 2nd subject property as the Plaintiff had illegally occupied the said parcel of land. It therefore urged the court to dismiss the Plaintiff's suit and allow it to auction the said 2nd subject property to enable it realise its security.

LEGAL ANALYSIS

14. The Plaintiff's version of Statement of Agreed Issues were dated 16th March 2009 and filed on 8th June 2009 while those of the 2nd Defendant were dated and filed on 15th November 2011. In his Written Submissions, the Plaintiff pointed out that the issues that were now pending for determination by this court had crystallised as follows:-

- a. **Whether or not the Plaintiff's Title Number 21984/8 and the 1st Defendant's Title Number 2259/6/3 relate to the same property.**
- b. **Whether or not the Plaintiff had legal title over the 1st Defendant's Title Number 2259/6/3 and conversely whether or not the Defendant had legal title over the Plaintiff's Title Number 21984/8.**
- c. **Was the Plaintiff entitled to the reliefs sought?**
- d. **Who should pay the costs of the suit herein?**

15. On its part, the 2nd Defendant stated that the issues that were before the court for determination were as follows:-

- a. **Whether the two titles L.R. No 21984/8 and 2259/6/3 refer to the same parcel of land?**
- b. **Whether the Plaintiff's title was acquired legally?**
- c. **Which of the two titles came first?**
- d. **Whether the Plaintiff's title was liable for cancellation by the court?**
- e. **Whether the Plaintiff was entitled to the relief sought?**

16. It was the view of the court that the determination of the following issues would resolve the dispute that had been placed before the court:-

- a. **Whether or not the Plaintiff's Title Number 21984/8 and the 1st Defendant's Title Number 2259/6/3 related to the same property.**
- b. **Whether or not the 2nd Defendant could exercise its Statutory Power of Sale over the Plaintiff's Title Number 21984/8.**
- c. **Whether or not the court could grant declarations in respect of Title Number 2259/6/3.**

17. The court therefore deemed it necessary to address the said issues under the separate heads shown hereinbelow.

I. SIMILARITY AND/OR DISTINCTION OF THE 1ST AND 2ND SUBJECT PROPERTIES

18. The Plaintiff (hereinafter referred to as PW 1") tendered in evidence a copy of the Transfer Instrument executed by Ndoricimpa John Alfred, Ngeza Sabine and himself that was dated 20th December 2004. The date of entry in the Certificate of Title showing their transfer of the 1st subject property to him was 23rd December 2004. The said entry was shown to have been registered by J.B. Kiriago 021.

19. The Certificate of Title also showed that the said Ndoricimpa John Alfred and Ngeza Sabine were the registered proprietor as Lessees for all the unexpired residue of the term of Ninety Nine (99) years from the 1st day of January 1996 of a piece of land measuring 0.6777 of a hectare of the subject property.

20. On the other hand, the 2nd Defendant also produced in evidence a copy of Title for the 2nd subject property showing that the 1st Defendant had been allocated the said 2nd subject property on 1st day of January 1998 for an unexpired term of ninety nine (99) years. The said Title was shown to have been

executed by Sammy Silas Komen Mwaita on 7th February 2003.

21. In its Written Submissions, the 2nd Defendant conceded that the two (2) parcels of land may or may not have referred to the same parcel of land, a fact that Julius Orwa K'obado (hereinafter referred to as "PW 2") confirmed. It proffered three(3) possible explanations for this scenario:-

- a. **The Plaintiff's land did not exist on the ground and he was illegally occupying the 1st Defendant's parcel of land; or**
- b. **One of the parties had been involved in the fraudulent creation of a document of title; or**
- c. **The Lands Office had made a fundamental error by giving two (2) different titles for the same parcel of land.**

22. It submitted that this issue could only be determined by the Ministry of Lands with the participation of the Director of Surveys. It shifted the burden of proof to the Plaintiff to prove that the land it was laying a claim on was his and relied on the provisions of Section 107(1), 109 and 112 of the Evidence Act Cap 80 (Laws of Kenya) and the case of Jennifer Nyambura Kamau Mbaka Nandi [2013] eKLR where the Court of Appeal emphasised that the person who alleges a fact has the burden of proving the same.

23. It was its contention that PW 2 never bothered to establish if the 2nd subject property existed on the ground despite having come across the same and in the circumstances questioned the probative value of his evidence. It also tore into the documentary evidence PW 2 adduced as the same did not have any official stamp to confirm that the same came from the departments he claimed he had obtained the same.

24. Having said so, it was the view of the court that the 2nd Defendant could not purport to argue the case of behalf of the 1st Defendant. It did not provide any evidence to the court to demonstrate that it was seized of the matters of how the 1st Defendant came to be allocated the 2nd subject property, if at all, an argument that was clearly articulated by the Plaintiff.

25. The 2nd Defendant's submissions on whether or not there was an Agreement for Sale between the Plaintiff and Ndoricimpa John Alfred and Ngeza Sabine as was envisaged under the provisions of Section 3(3) of the Law of Contract Cap 23 (Laws of Kenya) were irrelevant and immaterial in the circumstances of the case as it was not a question that was before this court for determination.

26. In any event, as was again rightly submitted by the Plaintiff, a certificate of title issued by the registrar is *prima facie* evidence that the person named therein is the proprietor and is the absolute and indefeasible owner of the land as was provided in Section 23 of the Registration of Titles Act Cap 281(Laws of Kenya) (now repealed) and replaced by Section 26 of the Land Registration Act.

27. While the court noted the Plaintiff's submissions relating to the question of which of the two (2) Instruments held by the Plaintiff and the 1st Defendant was registered first and therefore be accorded priority as was contemplated in Section 28 of the Registration of Titles Act (now repealed), none of the parties adduced evidence to prove this issue so as to assist the court in coming up with a conclusive determination of the same.

28. The Plaintiff did not enjoin the Commissioner for Lands and the 2nd Defendant did not call the Director of Surveys or an official from the Lands Office to testify in support of their respective cases, yet they were crucial and critical witnesses in this case. The court, however, noted that at the request of the 2nd Defendant, it issued Summons to the Director of Survey but he did not attend court to testify in this matter. The 2nd Defendant thus closed its case without the said Director's evidence being taken.

29. The 1st Defendant also never appeared despite having been served with a Notice for the hearing of this matter. His presence was critical in these proceedings to shed light on what really transpired.

30. Be that as it may, the court found that the only person who could at least shed some light in this

matter was PW 2 as he was an expert in the area of survey. He tendered in evidence his Survey Report which was undated but showed date of instructions from the Plaintiff's advocates as 25th February 2014. The said Report was on pp 12-32 of Plaintiff's Exhibit 2.

31. PW 2 told the court that he had been a Certified Land Surveyor since 28th May 2004 and that he had been qualified and competent to practise as a Surveyor. As at the time of adducing evidence, he told the court that he was practicing in the name and style of Juliko Geospatial Consultants and that he had thirty one (31) years of experience as a Surveyor.

32. According to his Survey Report, he had studied the Survey Plan and six (6) beacons, details which were provided in the said Report and found the same to have been in the correct positions. He said that these beacons defined a plot that was directly opposite the 1st subject property and would assist in re-locating beacons for the 1st subject property on Survey Plan Number 346/135. It was also his evidence that he used survey equipment to establish the acceptable positions of the beacons.

33. It was his further testimony that after confirming the positions of all the beacons of the 1st subject property, he found it to lie within the plot indicated in the plan representing Survey Plan Number FR 502/131. It was his contention that an analysis of this Survey Plan Number showed that the 1st subject property had been sub-divided into L.R. Numbers 21984/8/1 and 21984/8/2 but that the said sub-divisions had not been registered at the Lands Office.

34. In his conclusion, he stated as follows:-

“...From the analysis of the re-establishment, the Land Registration Number 21984/8 is correctly represented by Survey plan FR 251/86. Its subdivision that (sic) has not been registered at Nairobi Land Registry as indicated on Survey Plan FR 346/135 showing its subdivision into two portions. The two plots that resulted from the subdivision of Land Registration Number 21984/8 are fenced with a stone boundary wall. Photographs showing the main house were also taken to show the development existing within the compound...”

35. During his cross-examination, PW 2 admitted that when he was buying the map for the 1st subject property, he saw the title number of the 2nd subject property but that he was not sure whether the same existed or not. He stated that if it did exist, then the same was a mistake. He was emphatic that he had used the cadastal map to identify the 1st subject property on the ground.

36. Undoubtedly, the Survey Report by PW 2 was a highly technical document. The 2nd Defendant did not furnish the court with any contrary Survey Report or call an expert witness who would have testified to the contrary. As the 2nd Defendant did not cast any doubt as to the competence, integrity or expertise of PW 2 as a qualified Surveyor, the court had no option but to rely on his oral and documentary evidence.

37. It was evident that save for the title numbers of the said 1st and 2nd subject properties, both properties were the exact same size and shape. In fact, the Deed Plans were exactly the same. The court noted PW 2's evidence that the two (2) parcels of land were not necessarily in the same area, a position that was also advanced by the 2nd Defendant.

38. In the absence of any contrary evidence from the 1st Defendant, the court had no option but to accept the Plaintiff's evidence to the effect that the 2nd Defendant had, in giving the exact description of his property, essentially advertised his parcel of land for sale by public auction.

39. It was unimaginable that the 1st Defendant would leave its property to be auctioned by failing to defend the suit herein yet it was initially involved in the prosecution of interlocutory application herein. Its complete lack of interest and failure to fight for its property led this court to come to the conclusion that the Certificate of Title that was furnished to the court by the Plaintiff was *prima facie* evidence that

he was the absolute and indefeasible owner of the subject property that he currently resides in and that the same is not owned by the 1st Defendant.

40. Having said so, the Plaintiff's arguments that the Certificate of Title issued to the 1st Defendant ought to be cancelled as its letter of allotment was issued illegally or unprocedurally was not a decision this court could make as the evidence that was adduced by both parties on whether or not the two (2) parcels of land were one and the same was inconclusive. In any event, the Plaintiff did not provide evidence to the court to show that the 1st and 2nd subject properties were one and the same parcel of land.

41. Similarly, the court could also not make a finding that the Plaintiff had obtained the 1st subject property by fraud or illegally as had been contended by the 2nd Defendant as it did not also adduce any evidence to demonstrate the same.

42. As could be seen hereinabove, PW 2 did not address his mind to the 2nd subject property. He had stated during cross-examination that that one parcel of land could be issued with more than one (1) title if there was a mistake, a position none of the parties could confidently state to have been the case. The absence of material evidence thus denied this court an opportunity to pronounce itself as a matter of finality on whether or not the parcels of land owned by the Plaintiff and the 1st Defendant related to the same property.

43. In this regard, the court was not persuaded that it was in the best interests of this matter to issue a declaration that L.R. No 2259/6/3 ceased to exist and the same should be cancelled by the Registrar of Titles forthwith or a declaration that the purported charge registered in favour of the 2nd Defendant to secure funds to the 1st Defendant and all acts and dealings by the Defendants relating to L.R. No 2259/6/3 were null and void.

44. The court noted that this case was filed in 2006 well before the establishment of the Environmental Land Court under Article 162 (2)(b) of the Constitution of Kenya, 2010 whose mandate is to deal with disputes relating to the environment and the use and occupation of and title to land.

45. It was the view of the court that if there was any dispute between the Plaintiff and the 1st Defendant relating to the question of the occupation and title relating to the said parcels of land, which did not appear to the court to have been the case herein, then the same should be dealt with by the Environment and Land Court.

46. In the Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 13573 dated 20th September 2012, it was expressly stipulated as follows:-

“ 6. All new cases relating to the environment and occupation of, and title to land shall be filed in the nearest Environment and Land Court for hearing and determination by the said court.”

47. This was the same direction that had been contained in the Practise Direction Gazette No 1617 dated 9th February 2012 that was superseded by Gazette Notice No 13573 cited hereinabove.

48. Practise Directions on the proceedings relating to the Environment and the use and occupation of, and title to land contained in Gazette Notice No 16268 relating to the Environment and Land Court Act No 19 of 2011 dated 9th November 2012 subsequently superseded Gazette Notice No 13573 cited hereinabove. The same provided as follows:-

“ 4. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence (emphasis court) shall be transferred to the Environment and Land

Court as directed by the Chief Registrar.

49. The hearing of this matter commenced on 23rd June 2015. With the establishment of the Environment Land Court in 2011, the Plaintiff could have opted to transfer the case herein to the said court for the question of occupation and title of land for its determination. He did not do so.

50. As the issues herein cut across two (2) branches of law, one being commercial because of the Charge Instrument in question and the other being issues of land, this court could effectively pronounce itself in respect of the 1st subject property. It has therefore done so to enable it determine the question of the validity and legality of the 2nd Defendant's Statutory Notice herein.

II. STATUTORY POWER OF SALE

51. The court noted that the 2nd Defendant had advertised the sale of the 2nd subject property by way of public auction. It is also its right to exercise its statutory power of sale if a borrower or chargor defaults in repaying any monies it has advanced such a borrower or chargor.

52. PW 1 was emphatic that he never took a loan from the 2nd Defendant. He also testified that he had never charged his property to the 2nd Defendant, a fact that conceded by DW 1. DW 1 was also not certain if PW 1 ever had an account with the 2nd Defendant. He also told the court that the 2nd Defendant never visited the property to ascertain whether it was the 1st subject property or the 2nd subject property. The descriptions of the same properties were exactly the same.

53. The question this court would need to answer is, can the 2nd Defendant really exercise its Statutory Power of Sale over the 1st subject property? The exercise of any statutory power of sale must be directed towards a chargor who in the case was the 1st Defendant. There was no privity of contract between the Plaintiff and the 2nd Defendant.

54. It would create an absurdity in law if the 2nd Defendant could exercise its Statutory Power to sell the 1st subject property when its Land Reference Number or the particulars of the Plaintiff herein did not even appear in the Charge as security or chargor respectively. The Charge was clearly titled "**Charge over Title Number 2259/6/3 (Grant No L.R. 91433)**" and was in respect of the 1st Defendant herein.

55. For as long as the Plaintiff retains his Certificate of Title in respect of the 1st subject property and the fact that he never took any financial accommodation from the 2nd Defendant, it would be in the interests of justice that a permanent injunction be granted restraining the Defendants, their servants or agents from auctioning, selling, alienating or in any other way and in any manner whatsoever dealing or interfering with the ownership of the Plaintiff's property known as L.R. No 21984/8.

DISPOSITION

56. For the foregoing reasons, the upshot of this court's decision is that judgment is hereby entered in favour of the Plaintiff against the Defendants jointly and severally in the following terms:-

- a. **A permanent injunction be and is hereby issued restraining the Defendants, their servants or agents from auctioning, selling, alienating or in any other way and in any manner whatsoever dealing or interfering with the ownership of the Plaintiff's property known as L.R. No 21984/8.**
- b. **A declaration be and is hereby issued to the effect that all acts and dealings by the Defendants relating to L.R. No 21984/8 in respect of the purported charge registered in favour of the 2nd Defendant to secure funds to the 1st Defendant are null and void.**
- c. **The sum of Kshs 3,688,277.75 that was deposited by the Plaintiff in court shall be released to him forthwith.**

d. In view of the peculiar nature of this matter, each party shall bear its own costs.

57. It is so ordered.

DATED and DELIVERED at NAIROBI this 4th day of December 2015.

J. KAMAU

JUDGE