



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 751 of 2017**

**SAMCO HOLDINGS LTD T/A EKA HOTEL.....PLAINTIFF**

**VERSUS**

**PATRICK NYAMWEYA.....DEFENDANT**

**JUDGMENT**

**Background**

1. By a Complaint dated 11<sup>th</sup> December, 2017, the Plaintiff instituted this suit against the Defendant seeking for the following reliefs;

*i. An order of declaration that the Plaintiff is the sole legal and beneficial owner of the property known as L.R No 209/14067 measuring in area 0.9003 hectares or thereabouts situate on St James Road, off Mombasa Road, Nairobi, pursuant to Grant No. I.R 119254, by reason whereof it is entitled to the occupation and possession thereof as proprietor to the exclusion of the Defendant and any other person whatsoever.*

*ii. An order of permanent injunction restraining the Defendant, whether acting by himself, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, construction on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with the Plaintiffs quiet enjoyment, possession and proprietorship rights of that property known as L.R No 209/14067 contained in Grant No I.R 119254 situate on St James Road, off Mombasa Road, Nairobi.*

*iii. An order be made requiring the Officer in Charge of Police Division (Langata Police Division) OCPD and the Officer in Charge of Station (Langata Police Station) to assist in facilitating the execution of the orders herein, if and when required.*

*iv. General damages for trespass against the Defendant.*

*v. Costs of the suit against the Defendant and interest thereon at court rates from the date of Judgment until settlement thereon in full.*

*vi. Any other relief that this Honourable Court may deem fit and just to grant in the circumstances of the case.*

2. In the Complaint, the Plaintiff averred that it is the registered proprietor of L.R No 209/14067 contained in Grant No I.R 119254 measuring approximately 0.9003 hectares situate on St James Road, off Mombasa Road, Nairobi (*hereinafter the suit property*) having purchased the same for valuable consideration from Rock Development Limited, which had purchased the property from the initial allottee thereof, Uchumi Trust Limited.

3. It was averred by the Plaintiff that prior to the purchase of the suit property, the Plaintiff, through its counsel, conducted intensive and thorough due diligence which included obtaining an official search in February and March, 2017 and that the searches affirmed Rock Development Limited's proprietorship of the suit property.

4. The Plaintiff averred that the Plaintiff further engaged surveying consultants whom they furnished with a copy of the Grant and the Deed Plan No.232641 and who, in a report dated 14<sup>th</sup> March, 2017, confirmed that the title documents received from Rock Development Limited matched in every aspect with the survey records held at the office of the Director of Surveys. According to the Plaintiff, it also obtained documentation showing that all the ground rent and rates had been paid in respect of the suit property.

5. It was averred in the Plaintiff that upon confirmation that all documents in respect of the suit property were in order, the Plaintiff and Rock Development Limited entered into an agreement for the sale of the suit property dated 22<sup>nd</sup> March, 2017 for the sum of Kshs 335,000,000; that pursuant to the terms of the sale, the Plaintiff paid the initial deposit of Kshs 35,000,000 being 10% percent of the purchase price and thereafter paid the balance; that after completion of the purchase price, the Plaintiff's counsel received all the completion documents including the original Grant and the duly executed transfer and that the Plaintiff paid the requisite stamp duty being the sum of Kshs 14,000,040.

6. The Plaintiff finally averred in the Plaintiff that the Transfer was stamped and registered on the 3<sup>rd</sup> August, 2017; that the Plaintiff thereafter took possession of the suit property and remains in possession to date and that the above notwithstanding, on 8<sup>th</sup> December, 2017, the Defendant through use of force, unlawfully and illegally entered into the suit property, destroyed the gate and purported to install his own gate on the suit property.

7. The Defendant filed a Defence on 19<sup>th</sup> February, 2018, in which he denied the allegations set out in the Plaintiff. The Defendant averred that the property adjacent to the Plaintiff's hotel is not the suit property as alleged and that the duly registered proprietor of the parcel of land known as L.R 209/11822(Grant No 57090) is Innfield Investments Limited in which he is a Director.

8. It was averred by the Defendant that the said Innfield Investments Limited purchased the suit property from Uchumi Trust Limited, its initial owners, in 1999 and has never parted with possession thereof; that Innfield Investments Limited has the original documents in its possession issued by the relevant authorities and that the Defendant has not violated the Plaintiff's proprietorship rights at all.

### **The Plaintiff's case**

9. The matter proceeded for hearing on 7<sup>th</sup> October, 2021. PW1 was the Managing Director of the Plaintiff. He adopted his witness statement dated 11<sup>th</sup> December, 2017 as his evidence in chief and produced in evidence documents.

10. It was the evidence of PW1 that that the Plaintiff is the proprietor of Eka Hotel and the suit property is adjacent to the Hotel; that sometimes in 2017, Rock Developments Limited approached the Plaintiff indicating its intention to sell the suit property; that being interested in purchasing the property, the Plaintiff undertook due diligence which included conducting two official searches at the Registrar of Titles, one by itself and the other through its counsel and that both searches confirmed Rock Development Limited's proprietorship of the suit property.

11. According to PW1, the Plaintiff further engaged surveying consultants who confirmed that the title documents received from the proprietor matched in every particular respect with the documents held at the office of the Director of Surveys; that further, the Plaintiff obtained documents affirming that all relevant land rates and rents had been paid.

12. According to PW1, after the due diligence revealed satisfactory results, the Plaintiff executed an agreement for sale with Rock Development Limited dated 22<sup>nd</sup> March, 2017 through which it purchased the suit property for the sum of Kshs 335,000,000 and that after completion of the purchase price, the vendors' counsel forwarded to the Plaintiff the completion documents including the original Grant, the duly executed Transfer and the Rent and Rates Clearance Certificates.

13. It was the evidence of PW1 that the Plaintiff paid stamp duty of Kshs 14,000,000; that the transfer was registered on 3<sup>rd</sup> August, 2017 in favour of the Plaintiff and that the Plaintiff took possession of the suit property on 1<sup>st</sup> September, 2017.

14. It was PW1's testimony that sometime on 8<sup>th</sup> December, 2017, the Defendant, aided by armed intruders, forcefully entered the suit property, pulled down the gate and purported to install their own gate; that a report was made at Langata Police Station and that the Defendant is currently facing criminal charges instituted against him by the state with respect to the suit property, which charges include, forgery of documents, forging signatures of land officers, uttering false documents and malicious damage to property. According to PW1, the Defendant had filed ELC No. 748 of 2017 claiming ownership of the suit property, which suit was dismissed.

15. PW2 was the Plaintiff's Finance Manager. PW2 adopted his witness statement dated 29<sup>th</sup> May, 2019 as his evidence in chief. He produced in evidence the supplementary list of documents dated 22<sup>nd</sup> May, 2019. According to PW2, the Plaintiff is the proprietor of the suit property having acquired the same from Rock Development Limited and that the Plaintiff acquired the suit property with the intention of setting up an expansive modern restaurant and a health club comprised of a restaurant, a gym and spa, jogging trail and walking trail.

16. It was the evidence of PW2 that the Plaintiff sought and was granted approvals by the National Construction Authority to develop the suit property; that the project was to begin immediately upon approval and was to be undertaken within a period of 1 year (2018) and that the Plaintiff expected returns from the development in terms of the Financial Projections in the adduced report. Despite being notified of the hearing date, the Defendant did not testify.

### **Submissions**

17. The Plaintiff's counsel submitted that the Defendant's case consists of mere allegations as no evidence, documentary or otherwise, has been led in support of his case. Reliance was placed on the case of **Robert Ngande Kathathi vs Francis Kivuva Kitonde [2020] eKLR** where Odunga J, drawing from numerous authorities, reiterated that averments in the pleadings are not evidence and where a party fails to call evidence to substantiate its case, the pleadings remain mere statements.

18. Counsel submitted that the totality of the oral and documentary evidence by the Plaintiff leads to the inevitable conclusion that the Plaintiff is the legitimate owner of the suit property; that the Plaintiff carried out thorough due diligence before buying the suit property and

that the Plaintiff is the registered proprietor of the suit land.

19. It was submitted by the Plaintiff's counsel that the Defendant is alleging ownership of the suit property by virtue of Grant No I.R 57090 which grant was cancelled at the behest of the then registered owners, Uchumi Trust Limited, in order to exclude a portion of land that had encroached on the Southern By-pass; that the said property was then re-surveyed and the grant surrendered to the government and that other than the grant which was annexed on the Defendant's Replying Affidavit which was surrendered and cancelled, no other evidence has been led with respect to the acquisition of the suit property.

20. The Plaintiff's counsel finally submitted that investigations carried out on the propriety of the Grant held by the Defendant concluded that the same was fraudulent; that the Director of Public Prosecutions initiated criminal proceedings against the Defendant which are ongoing in **Milimani Criminal Case No 1733 of 2019: Republic vs Patrick Omami Nyamweya** and that further, a suit filed by the Defendant being **ELC Case No 748 of 2017: Innfield Investments Limited vs EKA Hotel** was dismissed for failure to comply with court directions.

21. According to counsel, the Defendant's conduct in this suit has been wanting, having failed to comply with pre-trial procedures and attend the hearing; that as the registered proprietor of the suit property, the Plaintiff's title is protected by virtue of **Section 26** of the **Land Registration Act** and that the aforesaid title is guaranteed by law as no fraud has been pleaded or proved by the Defendant with respect to its acquisition.

22. With respect to the Plaintiffs' entitlement to general damages, counsel submitted that the Plaintiff has approved drawings for a commercial development on the suit property and the projected income from the developments are estimated at Kshs 18,947,317, Kshs 49,713/763 and Kshs 116,234,507 respectively for the years 2019, 2020 and 2021.

23. Counsel submitted that the Plaintiff spent substantial sums in acquiring the property having purchased it for Kshs 335,000,000, paid stamp duty of Kshs 14,000,000 and paid the relevant rent and rates. Counsel placed reliance on the case of **Caroget Investment Limited vs Aster Holdings Limited (2019) eKLR**, where the Court of Appeal upheld the award of damages of Kshs 100,000,000 granted by the ELC against a trespasser where the learned judge had considered, among other things, the value of the property and the fact that the owner had been kept off his property for over 10 years thus denying them the chance to develop the same.

#### **Analysis and Determination**

24. The Plaintiff instituted this suit against the Defendant seeking, *inter-alia*, for a declaration that it is the sole legal owner of L.R 209/14067 (*suit property*), a permanent injunctive order and general damages for trespass. The Defendant vide his defence denied the Plaintiff's assertions claiming that the suit property belongs to Innfield Investment Limited in which he is a Director.

25. Despite filing his defence, the Defendant did not file any documents nor participate in the hearing. It is trite that pleadings are not evidence and the legal position has always been that in the absence of evidence, the pleadings of a party remain mere allegations. This position was recently reaffirmed by the Court of Appeal in the case of **Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau [2016] eKLR** where the learned judges held as follows:

*“First and foremost, there can be no quarrel with the statements...that averments by the parties do not constitute evidence. Madan, JA (as he then was) made this abundantly clear in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 when he stated:*

*“The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence...As stated in the definition of “evidence” in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven... The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”*

26. The above notwithstanding, the burden on the Plaintiff to prove its case remains the same and that burden of proof is in no way lessened because the Defendant did not adduce any evidence. In this respect, the Court of Appeal in the above cited **Charterhouse Bank Limited case** (*supra*) stated as follows:

*“The suggestion, however, implicit..... that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct... While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities. The Evidence Act is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”*

27. It is the Plaintiffs' contention, through PW1, that it bought the suit property from Rock Development Limited; that prior to the purchase, it carried out extensive due diligence which confirmed that all the documentation from Rock Development Limited were genuine and that after payment of the full purchase price and all other relevant fees, the suit property was duly registered in its names.

28. PW1 produced documentation showing the pre-purchase diligence that was conducted by the Plaintiff, including the certificates of official searches, the survey report from Chalan Associates, copies of the rates and rental payments by Rock Development Limited and

evidence showing how the Plaintiff acquired the suit property from Rock Development Limited.

29. The evidence that was adduced by the Plaintiff to confirm that it followed the due process in the acquisition of the suit property included the Sale Agreement dated 22<sup>nd</sup> March, 2017, evidence of payment of the purchase price, payment slip for stamp duty and Grant No. I.R 119254 for L.R 209/14067 confirming that the property was initially allocated to Uchumi Trust Limited who transferred it to Rock Development Limited vide a transfer on 29th December, 2009.

30. The uncontroverted evidence shows that there was a subsequent transfer of the suit property from Rock Development Limited to the Plaintiff which was registered on 3<sup>rd</sup> August, 2017 in favour of the Plaintiff. That being the case, the Plaintiff is entitled to protection under sections 24, 25 and 26 of the Land Registration Act, 2012.

31. Flowing from the above legal provisions and having regard to the evidence adduced, the court finds that the Plaintiff has proved on a balance of probabilities that it is the legal and beneficial proprietor of the suit property and is entitled to legal protection.

32. The Plaintiff has pleaded that it is entitled to damages for trespass. Trespass has been defined by the 10<sup>th</sup> Edition of Black's Law Dictionary as;

***“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”***

33. In *Halsbury Laws of England 4th Edition, Vol 45 at para 26, 1503*, the authors have discussed the issue of damages in respect of trespass as follows:

***“(a) If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.***

***(b) If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.***

***(c) Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.”***

34. The legal position with respect to trespass to land is that the same is actionable per se. This means that once it has been established that Trespass occurred, the person against whom the trespass was committed is entitled to damages. This position was affirmed by the Court of Appeal in *Kenya Power & Lighting Company Limited vs Fleetwood Enterprises Limited [2017] eKLR* where it was held;

***“Trespass is proved as in this case, the affected party such as the respondent need not prove that it suffered any damages or loss as a result so as to be awarded damages. The court is under the circumstances bound to award damages, of course, depending on the facts of each case.”***

35. In the instance case, the Plaintiff, through PW2, testified that prior to the Defendant's trespass, plans were on course to construct a modern restaurant and that the Plaintiff in that regard sought and received approval from the National Construction Authority and that it was contemplated that the construction would be completed within one year after which operations would begin.

36. PW2 produced in evidence a copy of the approved plan and a report showing the financial projections the restaurant would have generated to be Kshs 18,947,317, Kshs 49,713/763 and Kshs 116,234,507 respectively for the years 2019, 2020 and 2021. In determining the amount of general damages for trespass, the trial court in the case of *Aster Holdings Limited vs City Council of Nairobi & 4 others [2017] eKLR* considered among others the size, value and location of the property as well as the duration that the rightful proprietor had been kept off the land. These considerations were upheld by the Court of Appeal in the *Caroget Investment Limited v Aster Holdings Limited & 4 others (supra)* case.

37. Taking into account all the circumstances of this case including the value of the land, the anticipated use and financial projections, and the duration that the Plaintiff has been kept away from the property after the Defendant installed its gate, the court opines that an award of general damages for trespass in the sum of Kshs. 10,000,000 would be adequate compensation to the Plaintiff for the loss suffered as a result of the Defendant's act of trespass.

38. For those reasons, the Plaintiff's claim is allowed as follows:

**a) A declaration be and is hereby issued declaring that the Plaintiff is the absolute proprietor of L.R No 209/14067 contained in Grant I.R 119254 situate on St James Road, off Mombasa Road, Nairobi.**

**b) An order of permanent injunction be and is hereby issued restraining the Defendant, whether acting by himself, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with the Plaintiff's quiet enjoyment, possession and proprietorship rights of that property known as L.R No 209/14067 contained in Grant No I.R 119254 situate on St James Road, off Mombasa Road, Nairobi.**

**c) Judgement is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 10,000,000 being general damages**

for trespass.

d) An order be and is hereby given directing the Defendant to deliver vacant possession of the suit property to the Plaintiff forthwith failure to which eviction orders to issue.

e) The Defendant to pay the costs of the suit.

Dated, signed and delivered virtually in Nairobi this 17<sup>th</sup> day of March, 2022.

**O. A. Angote**

**Judge**

**In the Presence of;**

Mrs Kibore for Njoroge for the Plaintiff

No appearance for the Defendant

Court Assistant - Okumu