



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 1389 of 2004

SOUTHDOWNS DEVELOPERS LIMITED.....PLAINTIFF

-VERSUS-

HAITHAR HAJI ABDI.....1ST DEFENDANT

ABDI HAITHAR HAJI.....2ND DEFENDANT

JUDGMENT

The plaintiff filed the instant suit on 22nd December, 2004 and by its plaint dated 10th December, 2004 sought the following orders against the 1st and 2nd Defendants jointly and severally: -

- a) An order of eviction of the defendants, their servants, agents, tenants, licencees or any other person whatsoever from the plaintiff's parcel of land reference number 13154 (Original Number part of 6861/4), Nairobi.
- b) A permanent injunction restraining the defendants by themselves, their servants, agents, tenants, licencees and/or any person whatsoever from being remaining, entering in, continuing in occupation, erecting, constructing, continuing with construction of any structures whatsoever on the plaintiff's parcel of land Reference Number 13154 (Original number part of 6861/4), Nairobi.
- c) General damages for trespass.
- d) Costs of the suit with interest thereon.
- e) Any other or further relief that this Honourable Court may deem just to grant.

The 1st and 2nd defendants filed their joint statement of defence on 2nd March, 2005. However pursuant to an application by the plaintiff herein the defendant's defence was struck out by Honourable Justice Mbogholi Msagha on 28th September, 2011.

The suit was fixed for hearing (formal Proof) before me on 19th December, 2012 when Njenga Advocate appeared for the Plaintiff and Dr. Khaminwa appeared for the Defendants. As the court could not reach the matter on the day I adjourned the hearing of suit with the consent of the parties to the following day 20th December, 2012 for hearing. On the 20th December, 2012 the parties Advocates were present and the plaintiffs witness Paul Omondi Mbago testified as PW1 Mr. Mbago testified as PW1 Mr. Mbago testified that he is the principal shareholder of the plaintiff company and he adopted his witness statement dated

4th November, 2011 and filed in court as his evidence in chief.

Briefly the plaintiff's case is that the plaintiff purchased the subject parcel of land L.R. No. 13154 (Original Number part of 6861/4), Nairobi at a public auction on the 14th November, 1991. That the property which was registered in the defendant's name had been mortgaged by the defendant to Kenya National Capital Corporation Limited to secure loan facilities and when the defendant failed to pay the loan the said National Capital Corporation Limited in exercise of its statutory power of sale as a charge offered the property for sale. The Plaintiff was declared the highest bidder at the public auction and that ultimately the property was transferred to the Plaintiff on 20th July 2004. The Plaintiff produced a copy of the registered grant I.R 2574/9 of L.R No. 1315/4 which shows the endorsement of the transfer in favour of the Plaintiff as entry number 13. The copy of the grant is item No. 2 in the plaintiff's list of documents dated 4th November, 2011 and filed in court on 9th November, 2011. The plaintiff testified that the transfer was effected after the court in HCCC No. 6054 of 1991 as consolidated with Nairobi HCCC No. 1181 of 1992, Haither Haji Abdi & another vs. Southdowns Developers Ltd. In these suits the Defendants herein challenged the validity of the auction sale and after the suits were substantively heard a judgment was issued by the Hon. Justice Waki (as he then was) on 18th December, 2003 where he found and held that the auction was properly conducted and that the plaintiff was a bonafide purchaser for value purchaser for value without notice. The Honourable Judge ordered specific performance of the auction sale contract and consequently the plaintiff was registered proprietor of the suit premises.

The plaintiff testified that the defendant has failed and/or refused to yield vacant possession of the suit premises despite demands that they do so. The plaintiff contended that it has been denied the use of the suit premises, has been deprived of all the rent it would have earned from the premises and seeks damages for trespass. The plaintiff attempted to take possession but the effort was resisted by the defendant which has necessitated the plaintiff to institute this action seeking for an eviction order. In cross examination by Dr. Khaminwa the plaintiff admitted that they had in early 2012 attempted to recover possession but the defendant repulsed the attempt. The plaintiff reiterated that it brought the property at the auction and paid Kshs. 3,400,00/= for it.

The plaintiff called a 2nd witness Paul Ngugi a practising valuer who testified that he at the instructions of the plaintiff carried out a valuation of the suit property with a view to advise on the current rent of the premises. The witness stated that he assessed the current market value at Kshs. 120,000/= per month. The witness produced the valuation report (EX2) and stated that the Plaintiff paid hiring Kshs. 112,500/= for his professional services in preparing the valuation report. Mr. Mongere Advocate of Mohammed Muigai Advocate who had come on record in place of Khaminwa & Khaminwa Advocates for the defendant cross examined the witness.

The witness admitted he was not let inside the premises and his valuation is based on what he observed from outside and that there was a possibility that the decoration of the house may have deteriorated inside.

The plaintiff did not call further evidence and the parties' counsel has filed submissions and authorities in support of their positions. As there was no evidence tendered by the defendant since their defence was struck off the only issue would be whether on the basis of the evidence tendered by the plaintiff the plaintiff has established a case to entitle him to the reliefs he seeks from the court. The Defendant's Advocates have filed written submission in which the defendant impugned the credibility of the plaintiff's witness's evidence and claimed PW1's evidence was contradictory, unreliable and untrustworthy. The counsel specifically took issue with the plaintiff's application in which the plaintiff sought leave to withdraw the suit in support of which PW1 swore the affidavit in support and yet he was the same who testified in support of the plaintiff's suit. The submissions do not acknowledge that the said application was withdrawn wholly vide a notice of withdrawal dated 9th February, 2010 and hence nothing ought to be made of this application. PW1 testified before me and I assessed him to be a credible witness.

I have considered and evaluated the evidence tendered by the plaintiff, the submission and the authorities that I have been referred to by the parties and I am satisfied that indeed the plaintiff is the registered

proprietor of the suit property. The plaintiff was declared a bona fide purchaser of the suit property at the auction sale of 14th November, 1991. Honourable Justice Philip Waki (as he then was) by a judgment dated 15th October 2003 in Nairobi HCCC 6054 of 1991 as consolidated with Nairobi HCCC No. 1181 of 1992) determined that the plaintiff had properly purchased the suit property as the auction sale and directed specific performance of the auction sale agreement made on 14th November, 1991. This judgment was consequently executed as the proprietor of the Suit property in 2004. This judgment has not been set aside and the plaintiff remains the registered proprietor of the suit property and consequently is the legal owner of the suit property.

The plaintiff having been registered as the owner of the suit property the defendants could only continue occupation of the property as trespassers. It is noteworthy that the defendants attempt to challenge the auction sale did not succeed and it is my view that the defendants became trespassers in the suit property immediately the plaintiff became registered as the owner of the suit property.

The registration of the transfer in favour of the plaintiff conferred upon the plaintiff absolute and indefeasible rights of ownership of the property in terms of Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya (now repealed) which provides thus Section 23(1) ***“The certificate or title issued by the registrar of a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title to the property shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”***.

The Court of Appeal in the Case of Dr. N. K. Arap N’gok vs. Justice Moiyo Ole Keiwa & 5 others in Nairobi CA No. 60 of 1997 expressed themselves on the purport and effect of Section 23(1) of Cap 281 thus:-

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the act. It is our law and the law takes precedence over all other equitable rights of title, otherwise, the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy”.

I fully agree with this exposition of the law by the court of Appeal as regards the rights and interests of a registered owner of property. In the instant case the plaintiffs have been decreed in the earlier decision refused to by Hon. Justice Waki to be entitled to ownership of this property and to the extent they became registered as the proprietors the plaintiff became entitled to the rights conferred under Section 23(1) of Cap 281 (supra). As the registered owner the plaintiff undoubtedly became entitled to possession of its property and the continued possession of the suit property by the Defendants can only be as trespassers.

In the premises I find and hold that the defendants are trespassers in the plaintiff’s property as from the date that the transfer of the property was registered in favour of the plaintiff. The plaintiff has attempted to take possession of the suit property which attempts have been resisted by the defendants’ the defendants have equally failed to heed written demands from the plaintiff to yield vacant possession as per letter of demand dated 27th July 2004. In the premises the plaintiff was entitled to bring the instant suit seeking the eviction of the defendants to recover vacant possession of the property decreed to them.

The law ought not to operate in vain in the sense that an aggrieved party ought to obtain a remedy in the face of a wrong done to them and likewise a tortfeasor ought not to continue accruing a benefit that they otherwise are not entitled to.

Having held that the Defendants are trespassers on the plaintiff’s property I have no hesitation in holding that the plaintiff’s are entitled to the order of eviction of the defendants to enable the plaintiff recover possession of the property decreed to them and in respect of which the plaintiff is the registered owner.

As to whether the plaintiff is entitled to damages for trespass from the defendants. I would observe that the plaintiff paid for the purchase of this property way back in 1991 but did not get registered as owner until 20th July 2004 after protracted court battles in which the plaintiff emerged victorious.

The defendants even after the plaintiff became decreed as owner and was registered as owner did not yield possession but continued in possession. The defendant's possession after 20th July 2004 was as trespassers and I hold that as from the date the plaintiff became registered as owner the plaintiff would be entitled to damages for trespass.

The witness called by the plaintiff, Paul Ngugi a valuer with princple Valuer's Ltd gave evidence that he current market rent would be Kshs. 120,000/= per month. With respect I do not suppose this assessment would help the court much as it gives an assessment of the rent as at June 2012. What was the rental value in 2004 when the proerpty was registered in favour of the plaintiff? What is not kin doubt is that the plaintiff was kept out of its property since July 2004 and did not receive any rent as he would have been entitled to receive as the owner of the property.

On the quantum of damages the plaintiff's Advocates have referred me to various decisions namely:- **Chispine Maina Gaturu vs. Muya Macharia [2001] eKLR Paul Wagiita Theuri vs. Lydia Wangui Buuri [2009] eKLR and John Wachiira Wangombe vs. Charles Mugambi Wangombe & another (2009) eKLR.**

The common thread in all these decision which I have carefully reviewed is that where the court does not find the proffered damages for trespass realistic the court exercises its discretion to determine what damages would be reasonable given the circumstances. As I have observed that he valuer only gave the court the operative current rental for June 2012 which quite clearly cannot be applicable for the entitle period of trespass. The valuers assessment could equally have been faulty as he did not inspect the inside of the house. Considering the rental escalations from year to year and doing the best I can, I assess the mesne profits (general damages) for trespass at a monthly average of Kshs. 60,000/= from August 2004 to April 20123 being a total of 105 months.

I therefore award general damages in the sum of Kshs. 6,300,000/=.

In the premises and for all the reasons I have set out herein above i find and hold that the plaintiff has proved its case on a balance of probabilities and I hereby enter judgment in favour of the plaintiff against the defendants jointly and severally on the following terms: -

- a) An eviction order do issue against the defendants, their servants, agents, tenants, licencees or any other person whosever from the plaintiff parcel of land Reference Number 13154 (Original Number part of 6861/4), Nairobi.
- b) A permanent injunction restraining the defendants by themselves, their servants, agents, tenants, licencees and/or any person whosoever from being, remaining, entering in continuing in occupation, evection, constructing, continuing with the construction of any structures whatsoever on the plaintiff's parcel of land Reference Number 13154 (Original Number part of 6861/4), Nairobi.
- c) General damages in the sum of Kshs, 6,300,000/= together with interest thereon at court rates from the date of judgment.
- d) Costs of the suit together with interest thereon.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant