



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 151 of 2011

STRAMAN E. A. LIMITED.....PLAINTIFF

-VERSUS-

CITY COUNCIL OF NAIROBI.....DEFENDANT

JUDGMENT

The plaintiff by way of plaint dated 7th April 2011 and filed on the same date seeks the following orders:

- (i) An injunction be issued to restrain the defendant by itself, its servants and/or agents from alienating occupying, using, abusing, developing, transforming and/or from in any manner whatsoever or howsoever dealing with and/or interfering with all that parcel of land/property known as land Reference Number 209/11148 Rangwe Road, Industrial Area Nairobi.
- (ii) The Defendant be ordered to demolish and/or pull down all the structures on the suit premises and evict all third parties therein and thereby render vacant possession of land reference number 209/11148 Kangwe road, Industrial Area to the plaintiff free from any occupation within a period of thirty (30) days from the date of this honourable courts orders and/or on such a date as the honourable court may determine.
- (iii) Damages for loss of business at the rate of Kenya shillings one hundred and five thousand (Kshs. 105,000/=) per day from 22nd June 2010 until payment in full.
- (iv) General damages.
- (v) Mesne profits from June 2010 until payment in full.
- (vi) Costs and interest
- (vii) Any other relief that this court may deem necessary o grant in the circumstances of this matter.

The plaintiff simultaneously with the plaint filed a notice of motion application seeking a restraining (injunctive) order and a mandatory injunction compelling the defendant to demolish all the structures on the suit land and eviction of all third party persons on the suit property. The Honourable Lady Justice Okwengu (as she then was) heard the interlocutory application and granted the restraining order but declined to grant an order for mandatory injunction and in doing so held as follows “... ***the applicant has not demonstrated its allegations that the respondent is the one who has allowed the 3rd parties to enter into the suit property or that it has allowed the 3rd parties to build illegal structures on the suit property. I concur with the advocate for the respondent that the applicant must directly pursue the***

third parties who are on the suit property”.

The plaintiff failed to take the cue and amend the plaint to enjoin the 3rd parties to the suit and proceeded to obtain an interlocutory judgment against the defendant who had failed to file a defence and as a consequent application by the defendant to set aside the interlocutory judgment was declined by the court on 6th November, 2012 the plaintiff set the suit down for formal proof on 12th February, 2013 when the matter was listed before me and as I could not owing to the court’s workload on the day reach it I adjourned the formal proof hearing to 7th March, 2013 when the plaintiff presented two witnesses who testified before me.

PW1 Zakayo Karimi a director of the plaintiff Company testified and adopted his witness statement made on 7th April, 2011 and a further witness statement made on 29th February, 2012 as his evidence in chief. The witness testified that the plaintiff responded to an advertisement that had been put out for the sale of the suit property by public auction at the instance of the defendant and that the plaintiff purchased the suit property at the auction and a transfer of the property was effected in favour of the plaintiff on 21st December, 2009. A copy the transfer dated 11th December, 2009 is included in the plaintiff’s bundle of documents produced as exhibits in the case.

The plaintiff testified that they intended to develop a parking lot for tankers in the suit plot but were prevented to do so owing to the plot being occupied by Squatters/trespassers. The witness testified that the understanding before the plaintiff purchased the property was that the property would be sold in vacant possession and that after purchase of the property the plaintiff claims they requested the defendant to get rid of the intruders/squatters to no avail. The plaintiff claims that he has suffered loss and damage for loss of user of the property for the intended purpose and by a letter from its advocates dated 28th March, 2011 the plaintiff projected they were incurring a loss of Kshs. 3,150,000 per month.

PW2 Erastus Thoronjo, a business consultant testified that the plaintiff instructed him to advise on the appropriate and feasible use of the suit property. The witness stated that he did an analysis and carried out research on the plot use and prepared a financial analysis based on the use of the plot as a parking lot for tankers and prepared a report that the witness produced as Exhibit 2 in the case. According to the witness the projected income would be Kshs. 62,000/= per day aggregating Kshs. 1,922,000/= per month on the parking slots.

After the close of the evidence the plaintiffs advocate filed written submissions which I have reviewed and considered.

The plaintiff under paragraph 5 of the plaint has pleaded as follows:-

5. “It was a salient term of the auction sale in paragraph 4 above, that the suit premises were to be given to the plaintiff with vacant possession and free from any encumbrances”

From the evidence given by the plaintiff it is not clear how this became a term of the auction sale. To the contrary the terms of the sale as per the advertisement carried in the Kenya Times Newspaper of April 8th 2009 annexed to the plaintiff’s supporting affidavit to the Notice of Motion dated 7th April, 2011 “ZK2a” were as follows:-

- 1. All interested purchasers are required to view the property and verify the details for themselves as these are not warranted by the Auctioneer or the City Council of Nairobi.**
- 2. The highest bidder shall pay at the fall of the hammer a deposit of 25% to the auctioneer by CASH OR BANKERS CHEQUE and balance within 15 days.**
- 3. The sale is subject to reserve price or such any overriding interest as may exist against the property.**

4. Conditions are available on request at our office and viewing of the property can be done on prior arrangements.

The plaintiff has not tendered any evidence to show that the defendant agreed to other terms and/or varied the above terms. Vacant possession was such a fundamental term such that the parties ought to have expressly agreed on the same. In the event and since this transaction related to a disposition of an interest in land under the provisions of Section 3(3) of the Law of Contract Act Cap 23 laws of Kenya such agreement needed to be in writing and signed by all parties to it and their signatures duly attested.

Section 3(3) of the Law of contract Act provides as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a)The contract upon which the suit is found:-

(i) Is in writing,

(ii) Is signed by all the parties thereto; an d

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”.

The plaintiff has not exhibited any contract of sale relating to the sale by public auction and in my view cannot properly found this suit on any alleged terms of sale without exhibiting a contract that satisfied the requirements of the above cited Section 3(3) of the law of contract Act Cap 23 laws of Kenya: As the purchaser the plaintiff must have reviewed and inspected the property before purchasing and if there were any occupiers or squatters the plaintiff should have obtained a written commitment from the defendant that the sale will be on vacant possession basis.

The plaintiff's case is further complicated by the fact that the transfer of the property was actually effected and the plaintiff now has the proprietary interest. The 3rd parties who are in occupation and/or possession of the plaintiffs property are not there as agents of the defendant or with the permission of the defendant. It is on the basis of this reality that Honourable lady Justice Okwengu declined to grant a mandatory injunction against the defendant and agreed with defendants advocate that he plaintiff ought to deal with the 3rd parties directly. I, like Honourable Justice Okwengu take the same view that, indeed the 3rd parties would be directly affected prejudicially were the court to issue an order compelling their removal from the suit property. That would be sanctioning their eviction without them being accorded an opportunity to be heard. The rules of natural justice would not permit a court of justice to proceed in such a manner.

The 3rd parties may have illegal and unapproved structures on the suit property and the defendant may in exercise of its mandate under Section 30 to 32 of the physical planning Act serve an enforcement Notice on the occupiers but that does not create an obligation on the part of the defendant to demolish the structures and to remove the 3rd parties from the plaintiff's land in the manner the plaintiff prays in the plaint.

In the result and for the reasons that I have given above, I find and hold that the plaintiff's suit against the defendant is misconceived and does not disclose any cause of action against the defendant. I order the same struck out.

I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF MAY 2013.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant