



**Rest Villa Limited v Kenya Power & Lighting Co. Ltd (Environment & Land
Case 199 of 2007) [2022] KEELC 2278 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 199 OF 2007**

MD MWANGI, J

MAY 11, 2022

BETWEEN

REST VILLA LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LTD DEFENDANT

JUDGMENT

1. This judgement is in relation to the Defendant's counter-claim only. The Plaintiff's case was dismissed way back on 31st May 2012 with costs for want of prosecution. I do note from the record that the costs have also been taxed at the sum of Kshs. 3,143,431.50. The ruling taxing the costs was delivered on 19th April 2013 and a certificate of taxation issued on 20th August 2013.
2. The Defendant in the counterclaim dated 25th August 2008 avers that it is the registered and rightful owner of the suit property L.R No. 209/11590, Nairobi having been granted the title to the same by the Commissioner of Lands under the *Registration of Titles Act* (RTA), (repealed). According to the Defendant, the suit property was originally excised from the head title, L.R No. 209/6559/R a public utility (better known as City Park) and a grant issued in favour of the City Council of Nairobi in 1932 with various special conditions. Subsequently, the Government allocated the suit property to the Defendant for the purpose of putting up a power sub-station to boost power supply in the Parklands area of Nairobi. That a title to the suit property was issued in favour of the Defendant and it has since then been in possession of the suit property.
3. The Defendant further contends that the purported sale of the suit property by the Ms. Njima Investments Limited to the Plaintiff in this suit was null and void as the said Ms. Njima Investments Limited lacked capacity to do so. The Court of Appeal had already declared that the Defendant's Title to the suit property was indefeasible. Therefore, the alleged sale was contemptuous to the court and against the Principle of Lis Pendens. Further, it was the Defendant's position that the Plaintiff had knowledge of the defect of the title of Ms. Njima Investments Limited.



4. The Defendant claims that the Plaintiff through its actions has caused it inconvenience and consequently it has not been able to use the subject property for its intended purpose; the expansion of the power supply to the Defendant's public customers. The Defendant claims damages for loss, damage and injury and further prays that the Plaintiff be restrained permanently from interfering with the Defendant's use of the suit property.
5. It is the Defendant's case that the purported conversion of the title to the suit property from RTA to *Registered Land Act*, Cap 300 (repealed) was not only unprocedural, but also out rightly unlawful. The Defendant prays for a declaration that the alleged conversion was null and void and of no legal consequence. Further, the Defendant too seeks a declaration that the resultant certificates of lease for L.R No. Nairobi/Block 37/167/168 are not valid legal documents and are null and void.
6. The Defendant also prays for a permanent injunction against the Plaintiff from interfering with its possession and occupation of the suit land and a declaration that the Defendant is the bona fide proprietor of the suit land. Further, a declaration that the alleged conversion of L.R No. 209/11590 from Cap 281 Laws of Kenya to Cap 300 Laws of Kenya is *null and void* and of no legal consequence. The Defendant also prays for damages for wrongful conversion and costs of the main suit as well as that of the Counter-claim.

The Defendant's Case

7. The matter proceeded to hearing. The Defendant called one (1) witness, Mr. Owiti Awuor, its employee and the current manager in charge of board and regulatory affairs.
8. The Witness adopted his Witness Statement dated the 27th January, 2022 as his evidence in-chief. He also produced the documents on the Defendant's List of Documents dated the 4th June, 2012 in support of the Counter-claim. The Documents on the list were marked as Defence Exhibits 1-13 in the order in which they appear on the list.

Defence To Counterclaim

9. The Plaintiff filed its Reply to Defence and Defence to Counterclaim dated 9th September, 2008 in which it denied all the allegations raised in the Counterclaim.
10. The Plaintiff contended that the allocation of the suit property to the Defendant was null and void. It was the Defendant's case that the suit property was not un-alienated land capable of being granted/ allocated to the Defendant by the Commissioner of Lands at the time that he purported to do so. The Plaintiff denied any wrongdoing on its part and maintained that the certificates of lease issued to it were valid and constituted conclusive evidence of ownership, vesting it with indefeasible title to the properties.
11. At the close of the hearing, the Defendant did not tender any submissions for consideration by the court.

Issues For Determination

12. Upon consideration of the pleadings and the evidence adduced in this matter the only issue for determination is whether the Defendant is entitled to the prayers sought in the Counterclaim.

Analysis And Determination

13. Though the Plaintiff had filed a statement of Defence to the counter-claim, it did not call any evidence during the hearing. What is the consequence of the Plaintiff's failure to call evidence?



14. Justice Odunga in the case of *Linus Nganga Kiongo & 3 others vs The Town Council of Kikuyu* (2012) eKLR, stated that the consequence of failure by a Defendant (in that case) to call evidence meant that the claims made by the Defendant in his Defence and counter claim were unsubstantiated and in those circumstances, the counter-claim had to fail.
15. A similar holding was arrived at by Lady Justice Lessit in the case of *Trust Bank Ltd & 2 others vs Paramount Universal Bank Ltd & 2 Others*. She stated that:-

“It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings.”
16. The consequence of that failure by the Plaintiff in this case to call evidence to substantiate the averments in its statement of Defence to counter-claim is that they remain mere allegations. Consequently, the evidence adduced on behalf of the Defendant is uncontroverted.
17. In determining the issue in question, I will address each prayer sought by the Defendant in its Counterclaim.
18. The first prayer for dismissal of the main suit with costs was already dispensed with and granted as prayed for.
19. I will first address the fifth prayer in which the Defendant seeks a declaration that it is still the registered and bona fide Proprietor of the suit Property(s) however, described.
20. Amongst the documents produced by the Defendant was a copy of the Grant (produced as D Exh 1) in respect of the suit property issued by the Commissioner of Lands to the Defendant. The issue of the rightful owner of the suit property herein farther was dealt with by the Court of Appeal in Civil Appeal 206 of 1998, *Njilux Motors Limited vs Kenya Power & Lighting Company Limited & Another* [2000] eKLR.
21. The Court of Appeal held that although the Title held by Njilux and KPLC were both valid having been issued by the Commissioner of Lands, the Title by KPLC was better than that which was held by Njilux. The reason for that holding being that Njilux got a Lease from Nairobi City Council which although was the first allottee, had violated the conditions set in the grant. Consequently, a subsequent Grant was issued to KPLC upon application. The Court of Appeal held that the irregularity of not recalling the earlier grant by the Commissioner of Lands for revocation as required under Section 22 (2) of the Registration of Titles Act, Cap 281 Laws of Kenya (repealed) could not deny the Defendant its rightful ownership of the suit property.
22. Shah J categorically stated that:-

“...I cannot fault the learned Judge on what he said. Once again I reiterate that the question is: who has a better title? The appellant or KP&L? The answer is obvious. Obviously, the Council took the stand it took in the superior court i.e. not challenging the grant to KP & L, because it knew that it had acted outside the terms and conditions of the grant in allotting a lease-hold interest to Mr. Njirwa. I cannot help but comment that the then Town Clerk was probably fully aware of the breaches she was committing in allotting lease-hold interest to Mr. Njirwa. There are many such allocations which are being questioned daily by members of the public. Public utility lands are being parceled out depriving residents of Nairobi of their right to enjoy such facilities.”



23. Justice P. K. Tunoi on the other hand stated that:-

“...As of now, therefore, KPLC has title. The appellant does not. The City Council of Nairobi does not complain that the Commissioner of Lands unlawfully deprived it of its land. It does not challenge the new Grant. Section 23 (1) of the Registration of Titles Act gives KPLC an absolute and indefeasible title to the suit land. Its title under the present circumstances takes precedence over all other alleged equitable or any other rights the appellant may possess over it.”

24. The Court of Appeal having held so, this court is bound by the said decision.

25. Section 24 of the [Land Registration Act](#), 2012 provides as follows: -

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

26. Section 25 (1) of the said Act further provides that: -

“the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.”

27. Additionally, Section 26 of the same Act provides that: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except

- a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

28. Section 26 above, provides that the certificate of title is to be taken as prima facie evidence that the person named therein is the proprietor of that land. Sections 24 and 25 above, in essence, do provide that it is the title holder who is entitled to the proprietary rights comprised in the subject land. The Defendant being the absolute proprietor of the suit land, it is entitled to the proprietary interests thereon.

29. Accordingly, this court’s grants the declaration that the Defendant is the Registered and bona fide Proprietor of the suit Property(s) however, described.

30. The Defendant prayed for a declaration that the Certificates of Lease for L.R No. Nairobi/ Block 37/167 and 168 are not legal documents and are null and void. The said Certificates of Lease are a product of corrupt dealings. They emanate from an illegal conversion. The City Council of Nairobi admitted to the breach of the conditions of terms. Having made a declaration that the Defendant is the



registered and bona fide Proprietor of the suit property, this court hereby makes a declaration that the Certificate of Lease for L.R No. Nairobi/ Block 37/167 and 168 registered in the name of the Plaintiff are not legal documents and are hereby declared null and void.

31. Is the Defendant entitled to a prayer for a permanent injunction? In the case of *Sammy Kemoo Arekai vs Eliakim W Olweny & another* [2021] eKLR, Mutungi J stated that;

“A permanent injunction would only issue after the rights of the contesting parties have been adjudicated and the Court has reached a final decision.”

32. The Learned Judge cited with approval the case of *Kenya Power & Lighting Co. Ltd vs Sheriff Molana Habib* (2018) eKLR where Korir J had stated that:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

33. The matter having proceeded to trial and the Defendant having proved its case on the required standards, an order of permanent injunction restraining the Plaintiff or any person claiming through it from interfering with the suit property however described is merited and is hereby granted.

34. I will now turn to the fourth prayer, a declaration that the alleged conversion of L.R No. 209/11590 from Cap 281 Laws of Kenya to Cap 300 Laws of Kenya is null and void and of no legal consequence.

35. Justice Tunoi in his determination in the *Njilux Motors Limited vs Kenya Power & Lighting Company Limited & Another*(Supra) had categorially stated that;

“the land is subject to the special conditions set out in the Grant, the most relevant to the matter before us being that:

“The land and buildings shall only be used for open space, park, sports grounds and any other municipal purposes to be approved by the Commissioner of Lands in writing.”

For undisclosed reasons and probably through corrupt practices, the City Council of Nairobi blatantly breached this special condition and caused the suit land to be allocated to the appellants for its use as a business premises for sale of motor vehicles. The breach is openly admitted.”

36. It is obvious from the foregoing that the Conversion was illegal, null and void. It is so declared.

37. The Defendant has also sought for damages for wrongful conversion in its Counterclaim. The *Black's Law Dictionary* 9th Edition defines ‘conversion’ as;

“the act of appropriating the property of another to one's benefit or to the benefit of another”

38. In the case of *John Chumia Nganga v Attorney General & another* [2019] eKLR, Justice Gacheru while dealing with a similar issue of compensation for wrongful conversion stated that;

“...The passage in Halsbury's Laws of England at Pg. 389 Para 616 on the measure of damages. The authors' state -



615. In general, damages in conversion are compensatory, their object being to repair the actual loss which the claimant suffers by reason of the conversion. This conforms to the general rule that damages in tort must (so far as money can do so) put the person whose right has been invaded in the same position as if it had been respected. Accordingly, an award of damages in conversion must operate neither by way of penalty to the Defendant nor by way of windfall to the claimant. In general, there must also be a causal connection between the act of conversion and the loss sustained, and proof of actual loss.

39. It is evident from the record that the Plaintiff was evicted from the suit property sometime back in July 2007. Although the Court of Appeal stated that the conversion was as a result of corrupt scheme, the Plaintiff was not solely to blame for it. The Defendant is currently in occupation of the suit land since 2007.
40. Further, although the Defendant accuses the Plaintiff for wrongful occupation of the suit property, at that time, both the Plaintiff and the Defendant had valid Titles. The Plaintiff could only deprive the Defendant of its rightful proprietary interest after the Court of Appeals decision in the matter. It is therefore my view that the Defendant would only entitled to nominal damages for wrongful conversion from the Plaintiff, which I award at Kshs.500,000/=.
41. Costs follow the event. I see no reason to depart from this general principal. I hereby grant the Defendant the costs of the counter-claim.

Conclusion

42. In view of the foregoing, I grant the Defendant the following orders as follows;
- a. A declaration is hereby issued declaring that the Defendant is the bona fide proprietor of the L.R No. 209/11590.
 - b. A declaration is hereby issued declaring that the Certificates of Lease for L.R No. Nairobi/ Block 37/167 and 168 are not legal documents and null and void.
 - c. A permanent injunction is hereby issued restraining the Plaintiff from interfering with the Defendant's possession and occupation of L.R No. 209/11590.
 - d. A declaration is hereby issued declaring that the alleged conversion of L.R No. 209/11590 from Cap 281 Laws of Kenya to Cap 300 Laws of Kenya is null and void and of no legal consequence.
 - e. The Defendant is hereby granted nominal damages of Kshs.500,000/-.
 - f. The Defendant is further granted costs of this counterclaim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Okeyo for the Defendant

N/A for the Plaintiff



Court Assistant: Hilda

M.D. MWANGI

JUDGE

