



Lower Hill Apartments Limited v Gravity Exporters Limited & 2 others (Environment & Land Case 95 of 2018) [2022] KEELC 2824 (KLR) (10 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2824 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 95 OF 2018**

JA MOGENI, J

MAY 10, 2022

BETWEEN

LOWER HILL APARTMENTS LIMITED PLAINTIFF

AND

GRAVITY EXPORTERS LIMITED 1ST DEFENDANT

COMMISSIONER OF DOMESTIC TAX 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 27/02/2018 the Plaintiff herein sought for Judgment against the Defendants jointly and severally for the following orders: -
 - a. An order requiring the 2nd Defendant to lift the Notification of Charge registered against the Certificate of Title in respect of Land Reference Number 209/7148/2 and pursue the tax liabilities subject of the said Notification from the 1st Defendant.
 - b. An order of specific performance requiring the 1st Defendant to execute a Transfer of Reversionary Interest in respect of Land Reference Number 209 /7148/2 in favour of the Plaintiff.
 - c. In default of execution of the said Transfer by the 1st Defendant, the Honourable Court be pleased to direct the Deputy Registrar of the High Court of Kenya to execute the Transfer of Reversionary Interest aforesaid to the Plaintiff.



- d. An order requiring the 3rd Defendant to register the said Reversionary Interest in the name of the Plaintiff and to effect such other entries in the Certificate of Title in respect of Land Reference Number 209/7148/2 as would give effect to the orders of the Court herein.
 - e. Costs of this suit and interest thereon at court rates from the date of filing suit until payment thereof in full.
 - f. Any other or further relief this Honourable Court may deem just and expedient to grant.
2. The suit is opposed. The 1st defendant entered appearance on 23/03/2018 and filed a defence dated 6/04/2018. The 2nd Defendant entered appearance on 10/05/2018 and filed a defence dated 9/05/2018. The 3rd defendant entered appearance on 28/06/2018 and filed a defence dated 27/06/2018. The suit was heard by way of written submissions and a judgment date was reserved.

Plaintiff's Case

3. The Plaintiff pleaded that the 1st Defendant is registered as proprietor as Lessee from the Government of Kenya all that piece of land known as Land Reference Number 209/7148/2 situate in the City of Nairobi in the Nairobi Area ("the suit premises") upon which is erected certain buildings consisting of 62 Flats.
4. The Plaintiff avers that by various Sub Lease Agreements, the 1st Defendant granted leases for the unexpired term of 99 years from 1/01/1968 and transferred its proprietary interest in the said Flats to various Sub-Lessees for good and valuable consideration.
5. It is their claim that the 1st Defendant incorporated the Plaintiff for purposes of managing the suit premises and holding the reversionary interest in the suit premises and each Sub-Lessee simultaneously with the execution and registration of the Sub Lease applied for and became shareholders and members of the Plaintiff.
6. They contend that the 1st Defendant's Advocates duly began to register the Sub Leases against the Title to the suit premises. That after the registration of the 59th Flat, the 2nd Defendant moved to register a Notification of Charge against the Title to the suit premises, allegedly for a liability of Kshs. 50,000,000/= owed by the 1st Defendant.
7. The Plaintiff avers that the effect of the Notification of Charge was to effectively prohibit any further registration of the Sub Leases in respect of the remaining 3 Flats as well as the transfer of reversionary interest in the suit premises until the Charge is lifted.
8. It is their contention that at the time the 1st to 59th Flats were registered, there were no encumbrances registered on the suit premises and the 59 Sub Lessees being shareholders of the Plaintiff, had no notice of an alleged tax dispute between the 1st Defendant and the 2nd Defendant. That proprietary interest in the said Flats has already passed onto 59 Sub Lessees with the other 3 remaining Sub Lessees unable to register their interest against the Title due to the aforesaid Notification of Charge.
9. It is their case that there have also been subsequent sales of some of the Flats and transfers of Leases to third parties. That some Sub-Lessees have also charged their Flats to financial institutions.
10. The Plaintiff avers that proprietary interest in the Flats by the shareholders of the Plaintiff cannot be divorced or separated from the interest in the suit premises and the 2nd Defendant's action of maintaining a charge on the title to the suit premises for the last 13 years prejudices the passing of a good title to the Plaintiff.



11. They contend that Condition 4.5 of the Sub Lease provides that the Plaintiff shall within 60 days of the registration of the Leases in respect of the said Flats purchase the Reversionary in respect of the suit premises and from the date of the Transfer of Conveyance of the said Reversionary Interest all the obligations and benefits of the 1st Defendant will vest in and be carried out by the Plaintiff.
12. The Plaintiff contends that the 1st Defendant has also refused, neglected, failed or ignored to execute the Transfer of Reversionary Interest in the suit premises in favour of the Plaintiff in breach of the Sub Lease Agreements entered into with the Sub Lessees.

Evidence by the Plaintiff

13. The Plaintiff relied on Dave Munya Mwangi's witness statement dated 26/02/2018 and produced a list and bundle of documents dated 27/2/2018 as their evidence before this court.
14. It is Dave Munya Mwangi's testimony that he is a Director of the Plaintiff Company. He confirmed that the 1st Defendant is the registered proprietor of the suit premises upon which is erected certain buildings consisting of 62 flats. That the 1st Defendant entered into various Sale Agreements, sold the said Flats and granted Sub-Leases to the purchasers for the unexpired term of 99 years from 1/01/1968. Their then Advocates managed the registration of the said Sub-Leases against the main title of the suit premises.
15. He averred that the Plaintiff was incorporated by Gravity for two purposes: holding the reversionary interest in the suit premises; and managing the suit premises.
16. He contends that the Plaintiff was a party to each of the said Sub Leases entered into with the purchasers of the said Flats. Each purchaser of a Flat on the suit premises was assigned one (1) share in the Plaintiff company and upon execution of the Sub Lease became shareholders and members of the Plaintiff Company.
17. He averred that as at 24/05/2005, the 1st Defendant's Advocates had registered Sub-Leases in respect of 59 Flats but were however disabled from registering the 3 remaining Flats, to wit, Flat No. 15, 60 and 62 as the Commissioner of Domestic Taxes registered a Notification of Charge against the Title to the suit premises for a liability of Kshs. 50,000,000.00.
18. The Plaintiff Company's Director is informed by their Advocates on record that at the time when the registration of the Sub-Leases began, there was no registered encumbrance on the Title to the suit. Proprietary interest in the said Flats had already passed onto 59 purchasers with the remaining unable to register their interests. Further to this some of the original purchasers have sold their interest in their Flats to third parties.
19. It is his case that the proprietary interest in the Flats by the shareholders of the Plaintiff Company cannot be divorced or separated from the interest in the Title to the suit premises and the Commissioner of Domestic Taxes action of charging the suit premises for the last 13 years prejudices the passing of a good title in the suit premises to the Plaintiff.
20. He submitted that the Plaintiff's interest in the suit premises is the first in time and is therefore stronger in law than the 2nd Defendant's interest. That the Commissioner of Domestic Taxes can pursue the tax liability directly from the 1st Defendant, its directors and shareholders and not pass on the liability to the Plaintiff.



21. He avers that the consequences of the 1st Defendant's refusal or neglect to settle its tax liabilities should not be visited on the Plaintiff as it is not privity to the tax liability between the 1st Defendant and the Kenya Revenue Authority.
22. It is his contention that in the Transfer of the Reversionary Interest, Condition 4.5 of the Sub Lease to which the Plaintiff is privity to, provides that the 1st Defendant shall within 60 days of the registration of the Leases in respect of the said Flats purchase the Reversionary Interest in respect of the suit premises and from the date of the Transfer of Conveyance of the said Reversionary Interest all the obligations and benefits of the 1st Defendant will vest in and be carried out by the Plaintiff.
23. It was his evidence that the 1st Defendant has without cause or justification refused, neglected failed or ignored to execute the Transfer of Reversionary Interest in the suit premises in favour of the Plaintiff in breach of the Sub Lease Agreements entered into with the purchasers.
24. From the foregoing, the Plaintiff asks that this Honourable Court grant the orders prayed in the Plaintiff.

Defendants' Case

1st Defendant

25. The 1st Defendant entered appearance on 23/03/2018 and filed a defence dated 6/04/2018 wherein they pray that the Plaintiff's suit be dismissed with costs.
26. The 1st Defendant admits that they are registered as proprietor as Lessee from the Government of Kenya of the suit property upon which is erected certain buildings consisting of 62 Flats.
27. Further, the 1st Defendant contends that by various Sub Lease Agreements, the 1st Defendant granted leases for the unexpired term of 99 years from 1/01/1968 and transferred its proprietary interest in the said Flats to various Sub-Lessees for good and valuable consideration.
28. They aver that they incorporated the Plaintiff for purposes of managing the suit premises and holding the reversionary interest in the suit premises and each Sub-Lessee simultaneously with the execution and registration of the Sub Lease applied for and became shareholders and members of the Plaintiff.
29. The 1st defendant contends that they duly began to register the Sub Leases against the Title to the suit premises from the 1st to the 59th flats. That during the registration of the 1st to the 59th flats, there were no encumbrance registered against the suit property and it was never aware of the alleged tax liability of Kshs.50,000,000/= which it allegedly owes the 2nd defendant and which led to the alleged registration of an encumbrance against the title before the last 3 flats could be registered.
30. The 1st Defendant pleaded that Proprietary interest in the said Flats had already passed to the 59 Sub Lessees with the exception of the remaining 3 flats. Further, the 1st Defendant submits that it is not aware of the subsequent sales of some of the Flats and transfer of leases to third parties as alleged by the Plaintiff.
31. The 1st defendant avers that it does not have a tax liability owing to the 2nd Defendant in the alleged amount and that the 2nd Defendant has not provided evidence to prove that there are any unpaid taxes owing to it by the 1st Defendant.
32. The 1st defendant only filed his defense. He was directed to file his list of documents and trial bundle, but he has failed to do so.



33. The 1st defendant contends that through their unfounded allegations, the 2nd Defendant has continued to impede on the Plaintiff's right to purchase the Reversionary Interest in respect of the suit premises so that all the obligations and benefits of the 1st Defendant to be vested on the Plaintiff.

2nd Defendant

34. The 2nd Defendant entered appearance on 10/05/2018 and filed a defence dated 9/05/2018 wherein they pray that the Plaintiff's suit be dismissed with costs.

35. The 2nd Defendant admits and avers that the 1st Defendant was the registered proprietor of the suit premises when the tax debt herein crystallized.

36. Further, that the 2nd Defendant avers that the 1st Defendant made Self-Assessments of taxes due and payable for the years of income 1994 to 2003 all totaling to Kshs.50,000,00/- at the time the 2nd Defendant was registering the Notification of Charge herein but did not remit the said taxes to the 2nd Defendant.

37. The 2nd Defendant contends that these taxes are due and payable to them from the 1st Defendant by dint of Section 103 of the [Income Tax Act](#) may be the subject of a charge on the land by the Commissioner to secure the taxes due and payable by the 1st Defendant.

38. The 2nd defendant avers that the 1st Defendant can only pass its proprietary interest in the suit premises subject to any and all encumbrances placed upon the suit premises by any interested person.

39. The 2nd Defendant further avers that the 1st Defendant could not transfer a better title to the Plaintiff than it had itself.

40. The 2nd Defendant contended that the Charge was placed on the Title of the property subject to the dispute herein because the title is registered in the name of the 1st Defendant.

41. It is their case that revisionary interest in the suit premises and the proprietary interest in each of the sub-leases did not extinguish the liabilities that the 1st Defendant had, more so the self-assessed tax liability for period running from 1994 to 2003. That Reversionary interest of the Suit Property could only be transferred by the 1st Defendant to the Plaintiff upon registration of the Leases on all Flats on the suit property, which transfer had not been effected at the point of the 2nd Defendant's registration of charge herein.

42. The 2nd Defendant avers that the 1st Defendant sought to defeat the 2nd Defendant's interest in the suit premises by registering the sub-leases upon learning of the tax liability pursued by the 2nd Defendant. Further, the 2nd Defendant avers that it registered a charge against the Title to protect the tax liability owed to it by the 1st Defendant.

43. The 2nd Defendant contends that the 1st Defendant owes the 2nd Defendant taxes and that pursuant to section 103(2) of the [Income Tax Act](#), it registered a charge on the Title to the suit property herein, whose interest is registered under the 1st Defendant.

44. The 2nd Defendant denies the Plaintiff's allegations that there has been subsequent sale of some of the flats and transfers of Leases to third parties.

45. They reiterate that that the 1st Defendant cannot pass good title to the Plaintiff. That the 2nd Defendant shall only lift the charge once the tax liability owed to it by the 1st Defendant is paid.



46. It is the 2nd Defendant 's case that the 1st Defendant has failed and neglected to settle its tax liability with the 2nd Defendant.
47. Lastly, the 2nd Defendant maintains that the 1st Defendant cannot pass to the Plaintiff the Revisionary Interest until the tax liability owing from the 1st Defendant is settled.

3rd Defendant

48. The 3rd Defendant entered appearance on 28/06/2018 and filed a defence dated 27/06/2018 wherein they pray that the Plaintiff's suit be struck out and/or dismissed with costs.
49. The 3rd Defendant admits that the 1st defendant is registered as the Lessee from the Government of Kenya of the suit property as the Plaintiff had attached a copy of the certificate of title showing the same.
50. The 3rd Defendant avers that the Plaintiff does not disclose any cause of action against them hence the same should be dismissed with costs. Further, the 3rd Defendant denies that the plaintiff is entitled to the prayers sought in the plaintiff.

Evidence by the Defendants

51. Both the 2nd and 3rd Defendants did not file any witness statements. They also failed to adduce any evidence in court.
52. The 1st defendant relied on Donald Kiboro Mwaura's Witness statement dated 29/09/2021 and produced a list and bundle of documents dated 6/04/2018 and 30/09/2021 as his evidence before this court.
53. Donald Kiboro Mwaura avers that he is a director of the 1st Defendant. That the 1st Defendant was a company incorporated as a special purpose vehicle for investment in residential apartments for sale. That it acquired the suit premises from National Housing Corporation (NHC) which contained an already developed residential block of apartments, but which was in a dilapidated state.
54. He avers that after the apartments were purchased by the 1st Defendant, the same were renovated and shared the units amongst the directors for them to hold for their own use or for sale. The 1st defendant had three directors at the time and two of them have since passed on leaving him as the only surviving director.
55. He contends that at the time of sale of the units, all the relevant taxes applicable at the time were paid to KRA without exception, the company ceased to be operational immediately thereafter.
56. It is his case that he became aware of the caveat registered against the title to the property on account of taxes which are allegedly owing to it from the 1st Defendant.
57. He stated that KRA has not provided any evidence to prove that there are any unpaid taxes owing to it from the 1st Defendant. Hence, it is therefore not indebted to KRA to the tune of the amount stated by KRA or any amount whatsoever and KRA should not be allowed to prevent the Plaintiff from registering the sub-leases in favour of the few apartment owners whose sub-leases are pending registration.



Plaintiff's Reply to 1st Defendant's Statement of Defence

58. The Plaintiff reiterates all the contents of the Plaintiff filed. They aver that the Flats on the suit premises are demised to the shareholders of the Plaintiff under the sublease concept and that under the sublease concept, the interest in the suit premises held by the 1st Defendant supports the various proprietary interests of the shareholders of the Plaintiff in the Flats and consequently the two interests cannot be divorced. They pray that the 1st Defendant's defence be dismissed with costs and that judgment be entered against the 1st Defendant as prayed in the Plaintiff.

Written submissions.

59. By the time of writing this judgment, only the Plaintiff and the 1st Defendant had filed submissions which I have read and considered. The Plaintiff and the 1st Defendant both filed submissions dated 9/12/2021 and 8/01/2022 respectively.

Analysis and Determination

60. I have considered the pleadings herein, the evidence and the submissions. One issue emerges for determination:

1. Whether the Plaintiff is entitled to the orders sought

Whether the Plaintiff is entitled to the orders sought

The Plaintiffs have sought for orders as laid down in the Plaintiff dated 27/02/2018. To begin with, it is imperative to note that the 2nd and 3rd Defendants failed to file their witness statements and documents contrary to Order 7 Rule 5 of the Civil Procedure Rules. Under Order 7, the 2nd and 3rd Defendants were supposed to file their defence together with witness statements and all documents they shall rely upon, but they did not do so. It is clear that Order 7 is couched on mandatory terms. It is not in doubt that though the 2nd and 3rd Defendants filed their statements of Defence, they did not give evidence in Court to support their pleadings and since pleadings are not evidence, the statement of Defence remain mere allegations. The Defendants did not give evidence and thus the allegations have not been substantiated. However, the Plaintiff still has an obligation to prove its case on the required balance of probability. See the case of *Gichinga Kibutha vs Caroline Nduku* [2018] eKLR where the Court held;

“ It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest”.

61. This therefore means that it is upon the Plaintiff to prove its case to the required standard. The 2nd and 3rd Defendants' Defence therefore remain mere allegations and the Plaintiff's evidence remains uncontroverted as against the 2nd and 3rd Defendants.



62. In the case of *Kenya Power & Lighting Co Ltd v. Rassul Nzembe Mwadzaya* [2020] eKLR the Court held that:-

“It is noteworthy that the Appellant in its amended Statement of Defence filed on 15th October 2012 denied all the allegations raised by the Respondent and attributed contributory negligence on the part of the Respondent. Although a defence was filed on behalf of the Appellant, no witness was called to prove that defence. Since no evidence was adduced in support of the defence case, the defence on record therefore remained as a mere allegation. This is the position in law and was restated in the case of Edward Muriga through Stanley Muriga...Vs...Nathaniel D. Schullter, Civil Appeal No.23 of 1997, where the Court of Appeal stated: -

“In this matter, apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

13. Further, it is trite that if no evidence is tendered to support an averment in a pleading, in this case, the defence, such averment stand as such as mere statement. Further, if there is no rebuttal of evidence by a party, that evidence remains uncontroverted.”

63. The issue for determination is whether the plaintiff is entitled to the orders sought and whether it has proved its case.

64. It is not in dispute that the 1st Defendant is registered as proprietor as Lessee from the Government of Kenya of the suit premises. From the record, the 2nd Defendant registered a notification of charge against the suit premises on 26/09/2005 due to tax amounting to Kshs. 50,000,000.00 allegedly owed to the government by the 1st Defendant. The charge was registered under Section 103 (2) of the *Income Tax Act*. The section provided as follows:

103. Security on property for unpaid tax

(1) ...

(2) If a person on whom a notice has been served under this section fails to make payment of the whole of the amount of the tax specified in the notice within thirty days of the date of the service of the notice, the Commissioner may by notice in writing direct the Registrar of Lands that the land or building, to the extent of the interest of the person therein, be the subject of security for tax of a specified amount, and the Registrar shall, without fee, register the direction as if it were an instrument of mortgage over or charge on, as the case may be, the land or buildings and thereupon that registration shall, subject to any prior mortgage or charge, operate while it subsists in all respects as a legal mortgage over or charge on the land or building to secure the amount of the tax.



65. Section 103 of the *Income Tax Act* was deleted by Section 110 of the *Tax Procedures Act*, 2015 which has equivalent provisions as reproduced below.

Section 32 (1) which provides:

32. Tax as a debt due to the State

- (1) A tax payable by a person under a tax law shall be a debt due to the Government and shall be payable to the Commissioner.

Section 40 which provides:

40. Security on property for unpaid tax

- (1) Where a taxpayer, being the owner of land or a Security on property building in Kenya, fails to pay a tax by the due date, for unpaid tax. Commissioner may direct the Land Registrar in writing that the land or building, to the extent of the taxpayer's interest in the land or building, be the subject of a security for the unpaid tax specified in the notification to the Land Registrar:

Provided that the Commissioner shall notify the taxpayer in writing of the direction within seven days from the date of the notification to the Land Registrar.

- (2) Where the Land Registrar has been notified by the Commissioner under subsection (1), the Land Registrar shall, without levying or charging a fee, register the Commissioner's direction as if it were an instrument of mortgage over, or charge on, as the case may be, the land or building of the taxpayer specified in the notice.
- (3) A registration under subsection (2) shall, subject to any prior mortgage or a charge, operate as a legal mortgage over, or charge on, the land or building of the taxpayer to secure the amount of the unpaid tax and the provisions of the *Land Registration Act* relating to the rights of the mortgagee shall apply.
- (4) The Commissioner shall, upon the payment of the whole of the amount of unpaid tax secured under this section, direct the Land Registrar in writing to cancel the direction made under subsection (2), and the Registrar shall, without levying or charging a fee, record the cancellation of the direction and the direction shall cease to apply.

66. From the record, it is both the Plaintiff's and the 1st Defendant's case that when the 1st to 59th Flats were registered, there was no encumbrance on the suit premises. The 1st Defendant denies the tax liability owed to the 2nd Defendant. Additionally, from the record, no evidence was adduced showing that the 1st Defendant had a tax liability owing to the 2nd Defendant.

67. A reading of Section 40 (1) of the *Tax Procedures Act*, 2015 shows that the 2nd Defendant is required to issue the 1st Defendant with a notice informing it to settle its tax liability and further, to notify the 1st Defendant in writing of its intention to apply to the Land Registrar for the suit premises to be the subject of security for tax within seven (7) days from the date of the notification to the Land Registrar. No controverting evidence was tendered to demonstrate that the 1st Defendant had a tax liability. No evidence was tendered that the 2nd Defendant issued the 1st Defendant with such a notice. This was also the requirement under Section 103 (2) of the *Income Tax Act* that the 2nd Defendant is relying on. Consequently, it is the finding of this Court that the notification of charge was unlawfully registered.



68. With regard to reversionary interest, Recital of Condition 4.5 of the Sub Lease at page 14 provided as follows:

“the Manager shall within sixty days after the registration of the Leases in respect of the said Flats in the Estate purchase the Reversionary Interest in respect of the said piece of land and from the date of the Transfer or Conveyance of the said Reversionary Interest all the obligations and like benefits herein contained on the part of the Lessor will vest in and be carried out by the Manager.”

69. It is clear that all the 62 flats have been sold and the sub-leases for flat 1 to 59 have been registered. Only three sub-leases are remaining to be registered. In the circumstances, there is no valid reason why the 1st Defendant should continue to hold the reversionary interest in the suit property. The Court therefore finds that it is common ground that the reversionary interest in the suit premises should be transferred to the Plaintiff, as per the terms and conditions of the sub lease, as the Plaintiff was incorporated to manage the flats. The Plaintiff is entitled to the reversionary interest and the 1st Defendant is obligated to transfer the same to the Plaintiff forthwith.

70. Consequently, the Court makes the following disposal orders:-

- a. An order be and is hereby issued requiring the 2nd Defendant to lift the Notification of Charge registered against the Certificate of Title in respect of Land Reference Number 209/7148/2 and pursue the tax liabilities subject of the said Notification from the 1st Defendant.
- b. An order of specific performance be and is hereby issued requiring the 1st Defendant to execute a Transfer of Reversionary Interest in respect of Land Reference Number 209 /7148/2 in favour of the Plaintiff.
- c. In default of execution of the said Transfer by the 1st Defendant, the Deputy Registrar of the High Court of Kenya shall execute the Transfer of Reversionary Interest aforesaid to the Plaintiff.
- d. An order be and is hereby issued requiring the 3rd Defendant to register the said Reversionary Interest in the name of the Plaintiff and to effect such other entries in the Certificate of Title in respect of Land Reference Number 209/7148/2 as would give effect to the orders of the Court herein.
- e. Each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2022.

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MOGENI J

Judgement read in virtual court in the presence of:

Ms Njoki Gachihi for Plaintiff

Ms Mwaniki for 1st Defendant

Ms Chelangat holding brief for Mr. Ibrahim Said for 2nd Defendant

No appearance 3rd Defendant



Mr. Vincent Owour - Court Assistant.

