



IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 659 OF 1997

HAVA ISAK SULEIMAN..... PLAINTIFF

VERSUS

ZUBEDA BHACHU..... DEFENDANT

JUDGEMENT

Coram: Mwera J

Karanja for the plaintiff

Nyang'au for defendant

Njoroge, court clerk

The decision about to follow in this fairly old case dates back to 18.3.1997 when the plaint herein was filed. In the meantime there were changes of counsel, amendment of pleadings plus interlocutory proceedings. With such history there is bound to be a slip or two or an oversight of a matter, not ever intended, when a decision is being drafted, with the best of effort.

The plaintiff averred that she was the registered proprietor of leasehold over L.R. No. NAROK/TOWHSIP/14 situated in Narok Town measuring 0.0427 ha. Then the defendant without right or authority moved onto it and commenced construction. The plaintiff's demands that she stop doing so were ignored whereupon the plaintiff has suffered loss and damage. The court was thus prayed to restrain the defendant's act, order her to vacate the plot and declare the plaintiff the rightful owner of the suit premises. The court was also asked to order demolition of the structures on the plot and to condemn the defendant in general damages, costs and interest.

A defence and counter – claim was filed on 23.4.97 and amended on 19.7.2001. Therein it was admitted that although the plaintiff was the registered owner of the said PLOT No. 14, that registration with her husband was fraudulent and in collision with the Commissioner of Lands who was brought in as a 2nd defendant in the counter – claim. That that registration therefore ought to be cancelled. The defence further admitted that she put up structures on the suit plot but in addition to already existing buildings, put up by her grandfather and/or father, dating from as far back as 1915. The defendant was the rightful proprietor of plot 14 and so did not need the plaintiff's permission to build on it. She had been in lawful possession and occupation of this plot long before the plaintiff came into the picture. Accordingly, the defendant was not a trespasser and no loss or damage had been caused to the plaintiff.

In the counter-claim it was pleaded that the defendant/plaintiff (Zubeda) was a member of the family of one Hajee Aboo Baghwanj Haji while the 1st defendant (Hava, the plaintiff in the suit) was the widow of one Isak Suleiman. It was narrated that the plaintiff's (Zubeda) fore-parents were lawfully allocated the subject plot by the relevant government officers since the colonial times into independence days. The plot was owned by Narok County Council who alone could alienate it and not the Commissioner of Lands (2nd defendant).

In 1991 or thereabout, Hava's husband, Isak Suleiman (deceased) by fraud and collusion with the 2nd defendant caused the subject **Plot No. 14** to be allocated to him and later on 23.9.91 had it registered in his name – all causing prejudice to Zubeda. That all that followed a misrepresentation by Hava's husband Isak (deceased), that **Plot No. 14** was in the domain of the 2nd defendant (The Commissioner of Lands) with authority to allocate or alienate it. Or that the plot was unalienated while it had already been alienated. That a further misrepresentation to the 2nd defendant was that the plot was vacant and/or occupied by the deceased, Isak, when it was in fact occupied by Zubeda.

Allegations against the 2nd defendant were that he conspired with the deceased, Isak, to allocate the plot to him and later purported to effect registration of a lease to the same Isak, while knowing that the plot had earlier been allocated to the plaintiff (Zubeda). The deceased could not and did not acquire any title to plot 14 and accordingly Hava could not by succession acquire the certificate of lease to it. So Zubeda prayed for a declaration that she was the lawful owner of the suit plot. Hava's acquisition thereof was unlawful, null and void; Hava's title to be revoked; a permanent injunction to issue against Hava not to deal with that property in any way; special and general damages costs and interest to be awarded.

There was an amended reply to the amended defence and an amended defence to the counter-claim.

Hava joined issues with Zubeda regarding allegations in the defence and denied any allegations of fraud. She maintained that she was the registered proprietor of **Plot 14**. That Zubeda had illegally built on the plot. That the counterclaim was defectively pleaded, so Hava was unable to address herself to the issues therein. The rest of the claims/allegations therein were denied with Zubeda put to strict proof thereof. It is not apparent as to what was amended regarding the issues but ten (10) of them were placed on record for determination.

On 12.10.10 the plaintiff (Hava) got in the witness box (PW1), and referring to her bundle (Exh P1) proceeded to state that before the court was her late husband's (Isak) certificate of lease of **Plot 14** (Exh. P1-3) and she herself succeeded to it later (Exh P1-7). She then conducted an official search of the plot on 21.05.10 showing her as the proprietor (Exh. P1 – 8). A green card to the plot (Exh P1 – 9) showed the late Isak as the proprietor. However in 1993 the defendant (Zubeda) started to build on the plot. This was stopped with an injunction in 1997 but the defendant is still there. It was denied that Isak got the suit land by fraud. In fact they had had a title to it which could not be traced after their lawyer Mr. Maini retired.

In cross examination the plaintiff could not tell from whom Isak bought this plot. Isak was related to the defendant but he had her (Hava) in the will. The defendant's father, Aboo, lived in Narok. The plaintiff knew him but she did not talk to him. Aboo had his family, including the defendant, and they all resided on this **Plot No. 14**. It was not their land, though. It belonged to Hava's husband, Isak. The plaintiff had been on the plot and noted that Zubeda was living there in the house her family built and always lived in. Asked if she knew a firm called Bawaji (or Baghwanj?) Haji & Co, PW1 said that she did not know it. Neither did she know that the Aboo Haji family had been living on the suit property since 1915.

The plaintiff told the court that she had been paying rates for the plot – a thing the defendant (Zubeda) had also been doing yet the plot was not theirs. The plaintiff did not produce rate payment receipts. On this plot is a double storey building which the defendant put up despite the court order. Aboo had a house on this plot. The plot, however, belonged to Isak. That closed the plaintiff's case.

In her defence and proof of the counter-claim, Zubeda (DW1) told the court that she was a daughter

of one Bachu Haji Aboo, son of Haji Bachu, who was a businessman at Narok. **Plot No. 14** in dispute was once **Plot No. 5**. With re-numbering it ended up as **Plot No. 164**. All 3 numbers however refer to one and the same plot. She produced a map (Exh D1-1) showing **Plot 14** (shaded). It began as plot No. 5 (Exh D1 -2) when in an agreement of 1.5.1915 Bhagwanj Haji & Co. acquired it. Then on reverse of Exh D1-2, it was shown that this plot was transferred to Haji Aboo on 21.8.16. Then on 1.4.1928 the plot was transferred to Haji Aboo & Sons by the Land Officer and both the officer and the transferee signed (all apparent on the exhibit).

The house still standing on the plot was built by her father before the defendant was born and she had photograph of it (Exh D1-49). Then she got permission to build a storey shop (also in the photograph) with commercial space, 3 shops on the ground and residences above. The defendant and her sisters were born here and still live on this plot. Their parents died there. The application to build as well as the council authority was produced (Exh D1 – 10, 11, 12). On 6.2.90 the former plot No. , **then No. 14** was confirmed by the council as one and the same plot and so she could go ahead and build the shop complex. The local council allocated that plot to the defendant on 24.6.92 (Exh D1 – 17) – **Plot 14 in BLOCK 4**. All the time she, and nobody else, has lived on this plot. It was passed down from her grandfather, to her father and then to herself. Then in another photograph (Exh D1 – 180) the court was shown the long large original building with Isak Suleiman's plot at the back. That the defendant's father Haji Aboo, paid rates on 28/7/61 (Exh D1 – 19) while she herself also paid the rates as per the receipts (Exh D1 – 20). She displayed a payment of sh. 27,000/= (Exh D1 – 4, 5) when the council gave her the plot – **Plot 164 BLOCK 4** (old plot 4) and she has been paying rates yearly. Nobody else has done that. The defendant knew Isak Suleiman Haji who was her cousin from her father's side. He owned the plot next to theirs. That family never built on the subject plot. But then Hava served Zubeda with a summons plus a court order to stop building. By that time the defendant had completed building the shop complex and tenants were in occupation. The plaintiff had no right over **plot 14** and she did not live in Narok either. She lived in Nairobi. So while the plaintiff's case ought to be dismissed the counter-claim should be allowed in the defendant's favour.

In cross – examination, the defendant said that she lives with her 3 sisters in the house on their plot which was left to them by their father Bachu Haji Aboo. The plot had been at various times given numbers, 4, 5 and 14. The old iron roofed house stood next to the new shop complex which was built some 13 years ago after due council approvals. On 26.1.90 (Exh D1 – 10) the defendant's father had requested the local council to give her the plot and that was done. When the **plot bore No. 5** it had an acreage of 2 acres but over time this was reduced to 100 ft x 50 ft on which the houses now stand.

DW1 maintained that as per her counter-claim Hava's husband, Isak defrauded her of her plot because none of it was sold to anybody. She had never seen Isak with the 2nd defendant and because Hava had sued her, the defendant had not gone to complain about her to the local council. She could not understand how the council could give a lease to Isak. It had given her the plot. She lived in the house on it and the council had given her consent to build. It did not inform the defendant that it had leased the plot to somebody else. It had even informed the Ministry of Local Government in October 1995 (Exh D1 – 12) that the defendant was the owner of **Plot. 14** and a letter of allotment should issue to her.

Philip Ole Lemeia (DW2) an elderly gentleman, 85 years old, told the court that he came to the then Narok Primary School in Narok town in 1933. He was a teacher there since 1945 and through time as a senator, an MP, a local council member and a school board member, he has lived and he owns property in Narok town.

DW2 knew the family of the defendant Zubeda, including her father Bachu Haji. Bachu's father lived in a shop in town on **Plot 14**. He has seen Narok develop. Shown Exh. D1 – 49, the photograph of the old iron house and the new shop complex, DW2 maintained that they belong to the Hajis and the defendant has always lived there with other family members. As a councillor he saw records showing the ownership of this plot. DW2 and others used to keep their money in the Haji shop and also buy things from there. Zubeda constructed the new part of the plot with the council's permission.

DW2 knew Isak Suleiman, a relative of Zubeda. He used to live in a nearby plot. His family, and

therefore that of Hava, sold that plot and moved to Nairobi. It would surprise DW2 to hear that **Plot 14** was registered in the name of Isak. He had never heard of that. The witness then went over the process of plot allocation via the Land Control Board where he was once a member. To his knowledge, Zubeda had all the proper papers to **Plot 14**. She was allowed to build on it. It was renumbered over the long period even as late as 2010. But the plot remained the same. **Plot No. 14** was **No. 5** in the 20's 30's and 40's. Then it became **No. 14** then lately **no. 160's** came along. DW2 who taught Zubeda and her siblings at a local primary school said that she has always lived in the suit premises (Exh D1 – 49). The iron roofed house was built by DW2's father who was a chief and it still stands. And he knew Isak's father, Suleiman Haji. They sold their plots known as Kiima Kiu and Saba Saba and left town. The witness, on being shown the green card (Exh P1 – 9) concluded with a remark that the entry of Isak against **Plot 14** must have been irregular because there was always an occupant there paying rates – Zubeda and her family.

In submission the plaintiff's side went over the 10 issues (above) answering them all in the positive. The plaintiff (Hava) inherited the land registered in her late husband's name (Isak) as per the green card. It was a first registration and as per Section 143 Registered Land Act, that title was indefeasible whether it was obtained by fraud or mistake (see **Ambale Vs Masolia [1986] KLR 241**). In any event there was no fraud as no evidence was led to establish that. The defendant had produced a document of 1.5.15 - a mere licence. A title was never issued to Bhagwanji Haji & Co. The same licence went to Haji Aboo on 1.4.28 – both licences were for limited periods. There was no evidence that a title ever issued to the defendant's family in order to be passed on from grandfather, to father and then the defendant. So Narok County Council could not allocate any land to Zubeda. It had already been alienated to Isaak. The defendant was thus a trespasser on Plot 14. She should be ordered to vacate it with her buildings being demolished. The plaintiff should be awarded damages by way of money (**Mesne?**) profits and the 2nd defendant being described as a department of government could not be sued in that capacity. It could not commit a fraud either. The plaintiff had thus proved her case and therefore entitled to the remedies sought with costs. The counterclaim was an afterthought which should be dismissed .

The defendant's position was that by inheritance until allocation **Plot No. 14** came from her grandfather, her father, then herself, from as far back as 1915. They built on it and have always been in occupation. Not so with the plaintiff's family. All this came from the defendant (Zubeda) with evidence of payment of rates down to DW2 an old gentleman who has lived in Narok all his life and has personal knowledge of the owners of **Plot 14**, among others. By a letter of 24.6.92 following a Narok County Council deliberations, the plot was allocated to Zubeda. This, among many other relevant correspondences/documents, attests to the defendant's ownership of this plot. The plaintiff's leasehold of 13.8.96 only followed later. It must have been by fraud particularly that the Commissioner of Lands (2nd defendant in the counter claim) duly served, did not appear to defend the claim. The plot had been alienated to the defendant by the local council as mandated by sections 144, 145 of the Local Government Act. And in any case the plaintiff did not know from whom her late husband, Isak, bought this plot from. Even in the face of section 143 of the Registered Land Act, regarding first registration, this court should delve into alleged fraud to do justice. The defendant then shot off to state that she had in the circumstances acquired title by adverse possession. This was off the mark, because right to title by adverse possession can only be litigated by way of an originating summons – not via a counter - claim which is a suit instituted by way of plaint. But it was a point worth consideration that, if this court finds that the plaintiff was the registered proprietor of **plot 14**, the defendant in occupation has an overriding interest and should thus be entitled as per the counter - claim. All the ten issues were answered in the defendant's favour.

It is not without doubt that the evidence by the defendant (Zubeda) and her witness Ole Lemeia is overwhelmingly to the effect that the Haji family has had interest in the subject land, whether by licence, inheritance, allocation and or occupation since 1915 to date. The verbal testimony and the documents tendered attest to this. Then there is evidence of annual rate payments, evidence the plaintiff did not put forth. It is also not disputed that **plot No. 14** has at various times been renumbered – **5, 4, 14, 164**.

Regarding acquisition of title, though claimed that fraud may have featured, Isak Suleiman from whom the plaintiff Hava inherited this **plot No. 14**, was issued with a leasehold over it wef 11-11-

1959. (Exh P1 – 2, 8) under the Registered Land Act (Cap 300). The lease was not signed by Isak or witnessed. The land registrar’s signature was however witnessed. The document did not bear the Entry number of the surrender by the County Council of Narok either. On her part the defendant was allocated this very plot on 24.6.92 (Exh. D1 – 17) by the local council which on 23.10.95 recommended to the Ministry of Local Government to issue her with a letter of allotment (Exh D1 – 12). The defendant was required to develop it a - thing she said she had done.

In this case then the dispute is whether the leasehold issued to Isak was valid in that it could be passed down to Hava by way of succession, or that the allocation of the subject plot to Zubeda is the better title, despite the dates of issuance or allocation.

The defendant claims that the local authority had the power and jurisdiction to allocate the plot to her. The land fell within its jurisdiction and the 2nd defendant could not have alienated the same at any time. Under the Local Government (Act Cap 265), **the Act**, the court was referred to sections 144, 145 of that Act. Under section 144 a local authority may acquire land for the purpose of any of its functions. Such acquisition can be by way of purchase, lease, exchange, gift or in accordance with the Land Acquisition Act. The many purposes and functions a local authority may engage in or effect are not of any relevance to this case and need not be gone into now. However as per section 145 of the Act where it owns or has land:

“ 145. A local authority may –

- (a)
- (f)
- (g) subject to section 144, and any other written law relating thereto
- (i)
- (ii) sell, let or dispose of any plots or subdivisions of such land and any buildings thereon; and
- (iii)
- (h) (ae)

The defendant invoked the powers donated to the County Council of Narok by the Act to maintain her claim that that the local authority allocated plot **No. 14** to her on 24.6.92 validly. She has continued to occupy it, pay rates and also develop it.

On the other hand the plaintiff (Hava) claims that the same plot was earlier leased to her late husband, Isak – on 11.11.59. Apparently the Isaks never occupied/developed this plot or paid rates for it. But that theirs being a first registration, their title is secure and indefeasible in the light of section 143 of the Registered Land Act.

“ 143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

Besides the Ambale case (above), there is ample case law on this provision of law (see also Mulewa Muhinga Vs Philis Mutiso Musyimi MKS HCCC 181/98) to the effect that a first registration cannot be cancelled, or amended even if there was fraud or mistake involved. The defendant in her counter claim, pleaded fraud and collision by the defendants, but there was scanty, if not, no evidence to prove that.

Having stated that, may it be added that for a first registration never to be affected by rectification, it must be a valid/enforceable dealing. And this court has always been of the view that that first registration is in respect if an absolute title with – one holding a title deed – not a lease, due to the rigours of adjudication, publication ending in registration. But if that be in error a lease as the case is here is in essence a contractual relationship with parties thereto having benefits, rights, duties, obligations, covenants etc to each other which can be enforced by way of specific performance or cancellation of the relationship etc. For instance the lessee could not add buildings on the plot without a local authority approval in

writing; the premises could only be used for shops, flats and offices, and the lessee could not subdivide **plot 14** without prior consent of the local authority.

In order for the lease to bind and have contractual effect on the lessor and the lessee, both were obliged to sign it. One party alone could not sign the lease and thus give effect to it to bind both parties. It would be a difficult situation indeed if the party who did not sign, defaulted in the payment of annual rent sh. 1000/= to the council or did not fulfill/comply with the special conditions some of which are reproduced above. The party who signed could not for instance go to court or any other adjudicating body to seek to enforce what the lease contained because the body against whom enforcement is being sought did not append his/her signature to the document in order to be bound. And that is what is before this court as regards the lease which the plaintiff (Hava) claims that was granted to her husband (Isak) by the County Council of Narok on 11-11-1959. While the Land Registrar signed it on behalf of the council and his signature was witnessed (the lessor), the lessee, Isack, did not sign that document. There was no witness either! Can this lease therefore pass for a valid contractual document binding the lessor and the lessee in all respects? Not to this court's mind. It was a one sided deal and without the lessor's signature, himself or his successors (Hava) cannot now seek to enjoy benefits (ownership of the leasehold – (**Plot 14**) under it. In this court's finding the subject lease was an invalid document for want of the lessee's signature. No interest was therefore acquired by Isak by virtue of this lease and none could pass to Hava by way of succession. In such state of things perhaps the defendant (Zubeda) was more than justified to suspect that the lease was not obtained in the most transparent and regular manner. More so that there is no evidence of the council having surrendered **plot No. 14**, and the same registered to be alienated. The lease did not bear an Entry No. for such surrender. But be that as it may. This suit could be dismissed at this stage, while the court finds for the defendant in her counter claim. However, there is the other way to look at this matter. Assuming that the plaintiff has a valid title (leasehold) to **plot No. 14**, which this court has found otherwise, the defendant should be seen to have proprietary right over it under section 30(g) of the Registered Land Act (RLA.)

“ 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist affect the same without their being noted on the register –

(a) (f)

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;”

The court therefore agrees with the defendant that the foregoing provision of law does not distinguish between a first and any other registration at all. She is in possession and indeed actual occupation of the plot, all flowing from her grandfather, father and allocation by the council. Apparently no inquiry was made of such a person as the defendant is and the rights were not disclosed. All along the Isaks and Haji Aboo, relatives knew each other, occupied plots and lived side by side at Narok for many years before the Isaks moved to Nairobi, it was given in evidence, after selling their Narok plots. It is apparent that both the local authority and the 2nd defendant had jurisdiction to lease plots in Narok township, the latter doing so only for and on behalf of the council over parcels of land duly surrendered.

Having considered all the above, the justice of this matter ends with the defendant being in possession and actual occupation, paying rates for **plot 14** on account of that plot having been validly allocated to her, the suit herein is dismissed with costs while the counter-claim succeeds with costs.

Judgement accordingly.

Delivered on 17.3.11

**J. W. MWERA
JUDGE**