



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Commercial Civil Case 8 of 2009**

**ASPIRE INVESTMENTS LIMITED .....PLAINTIFF**

**VERSUS**

**GEBCONS LIMITED.....DEFENDANT**

**J U D G M E N T**

The plaintiff filed this suit on 25<sup>th</sup> February, 2009 seeking the following orders against the Defendant:-

- a) *Vacant possession of L.R. No. Mombasa.Mainland South Block V/101.*
- b) *Mesne profits for 4,080,000/- as per paragraph 9 above.*
- c) *Further accruing mesne profits at the rate of Sghs.120,000/- per month with effect from 15<sup>th</sup> February 2009 until the date of vacant possession as per paragraph 9 above.*
- d) *Interest on (b) and (c ) above at court rates.*
- e) *Any such further relief as this Honourable court may deem fit to grant.*

In the plaint, the plaintiff claims that prior to 10<sup>th</sup> July 1991

the Defendant was registered as the proprietor of the parcel of land known as Mombasa Mainland south Block v/101. That by a charge dated 11<sup>th</sup> November 1999 and registered on 11<sup>th</sup> November 1999 and further by a variation of charge dated 14<sup>th</sup> February 2003, the defendant charged the said property to the Development Bank of Kenya Limited (the charge) to secure the sum of Kshs.2,000,000/- lent to the Defendant by the said Bank plus interest and other costs. The plaintiff averred that the chargee in exercise of its power of sale under the said charge sold the said property by a public auction held on 7<sup>th</sup> September 2008 at Nairobi.

The plaintiff contends that at the said public auction it

was declared the successful purchase and has since completed the sale and the said property duly transferred and registered in favour of the plaintiff on 2<sup>nd</sup> March 2008. The plaintiff averred that despite demand made to the Defendant by the plaintiff, the Defendant has refused to give vacant possession and unlawfully continues to occupy the suit property thus occasioning the plaintiff loss and damage by denial of revenue at the rate of Kshs.120,000/- per month.

The plaintiff's claim as against the Defendant is for vacant possession of the said property. Mesne profits at the rate of Kshs.120,000/- per month with effect from 15<sup>th</sup> April 2006 up to 14<sup>th</sup> February 2009 making a total of Shs.4,080,000/- and thereafter the accruing mesne profits at the same monthly rate until the date that vacant possession is handed over. The Defendant was duly served with the summons and plaint on 6<sup>th</sup> March 2009 but failed to enter appearance and the suit went to trial in their absence having been duly served.

The plaintiff called one of its directors DW1, Njeri Kamau, to testify. She gave evidence on oath and produced the inter alia following documents in evidence:-

1. The legal Charge dated 11<sup>th</sup> November 1999 given by the Defendant to the Development Bank of Kenya Limited.
2. Variation of charge dated 14<sup>th</sup> February 2003.
3. Notification of Sale by Public auction by the Bank's auctioneers dated 28<sup>th</sup> November 2003.
4. The certificate of Sale declaring the plaintiff to be the highest bidder at a price of Shs.2,650,000/-.
5. The Transfer of the property by chargee to the plaintiff dated 23<sup>rd</sup> December 2006.
6. The Title Deed issued to the plaintiff dated 2<sup>nd</sup> March 2006.

I have considered the plaint, the testimony of D.W.1 and the exhibits.

I do find that the plaintiff is the duly registered proprietor and owner of all that property known as L.R. No. Mombasa/Mainland South Block V/101 having acquired and bought it lawfully and legally i.e. from the chargee for consideration. The plaintiff having been registered as the owner of the property, the defendant ceased to be the owner and is not entitled to be on the property without the consent licence or otherwise of the owner. Once demand was given for vacant possession, the defendant became a trespasser on the suit premises.

The plaintiff has suffered loss and damage. i.e. the loss of use and occupation of the suit premises and/or income therefrom. The plaintiff would be entitled to be compensated for the loss it has incurred. The plaintiff claims that they intended to run a business on the property. That they have lost income of Kshs.120,000/- per month.

The plaintiff however did not produce in court any proof of how the sum of Kshs.120,000/- was made up. There were no accounts, audited reports, valuations or other documentary evidence or data to prove the said loss. The amount of Kshs.4,080,000/- referred to as mesne profit would in effect be special damages. This was not specifically pleaded and particulars given. In any event the plaintiff did not prove the said specific loss and damage whether of lost profits or receivable income e.g. rent. It was the duty of the plaintiff to lead and produce evidence and particulars of the said loss which sadly it definitely incurred.

With regard to the continuing loss in terms of mesne profit, again the plaintiff did not assist the court to show how the sum of Kshs.120,000/- is made up. The court cannot just pluck a figure from the air even if it is clear and certain that some loss is being incurred. The plaintiff for instance could have shown the comparable rents for the said property to prove the minimum possible monthly loss. This was not forthcoming. However in the well established principles of valuation, reasonable rental income of a property can be determined from the valuation or market value of property. The sale herein was by public

auction at a price of Shs.2,650,000/-. If this is deemed to be the forced sale, then it is deemed to be lower than the actual market value. This is a reasonable bench-mark to start with. A property investment should make a return after 10 years. The projected rental income for such a property is  $\text{Kshs.}2,650,000 \times 12 = \text{Kshs.}22,083/- \text{ p.m.}$

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The plaintiff ought to have moved out of the property by end of 2005. The plaintiff could however only sue from date of registration on 2<sup>nd</sup> March 2006. If determinable I would grant the plaintiff the mesne profits from the date 2<sup>nd</sup> March 2006 to 30<sup>th</sup> October 2009 and thereafter until vacant possession is obtained.

The aforesaid projection are estimates. The plaintiff could have done better. However this is a court of law which recognizes the loss of the plaintiff and condemns the acts of trespass and breach of the law by the Defendant. The court can award some nominal mesne profits which is certainly provable. In the absence of the actual evidence on the comparable market rentals, I would award a nominal sum of Kshs.10,000/- per month as mesne profits. The total will come to Kshs.320,000/- made up as follows:-

2<sup>nd</sup> March 2006 to 30<sup>th</sup> October 2009 is a period of 32 months i.e.

$\text{Kshs.}10,000/- \times 32 \text{ months} = \text{Kshs.}320,000/-$ . I would award this sum as mesne profit.

As a result I do hereby enter judgment in form of the plaintiff in terms of prayer (a) – vacant possession

prayer (b) – mesne profits of Shs.320,000/-

prayer (c) – further accruing mesne profit at

the rate of 10,000/- per month with

effect from 1<sup>st</sup> November 2009 until

the date of delivery of

vacant possession and

prayer (d) – interest on (a) and (b) at court

rates.

The defendant shall pay costs of the suit to the plaintiff.

**Delivered and dated at Mombasa this 6<sup>th</sup> day of November 2009.**

**M. K. IBRAHIM**

**J U D G E**

In the presence of:

Mr. Waithera for the plaintiff.

