



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1474 of 2005

SHREE VISA OSHWAL COMMUNITY

NAIROBI REGISTERED TRUSTEES.....PLAINTIFFS

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANTS

JUDGMENT

The plaintiffs moved to this court vide a plaint dated 6th day of December, 2005 and filed on 8th December, 2005. the salient features of the same is that:

- The plaintiffs own the said Suitland on which a school by the name of **VISA OSHWAL PRIMARY SCHOOL** operates.
- The said school which operates its business of teaching primary school students, has been private property of Visa Oshwal Community since in our about 1954, having been built by the said communities resources through donations from the members of the community.
- The plaintiffs hold the title to the suit property issued under the Registration of Titles Act Cap. 280 Laws of Kenya under the description of LR. NO. 209/5996.
- Since its construction, the school has been under, the management of the said community through management committees since 1954.
- Since then the plaintiffs have been carrying out all work involving improvements and maintenance of the school.
- The community on its own has been employing and paying 23 teachers administrative staff as well as sub staff members. These were supplemented by 17 teachers employed and paid for by the teachers Service Commission. That without lawful authority the said defendant purported to take over the school and converted I t into a public school.
- The forceful taking of the said school has grieved the plaintiffs prompting them to move to this court seeking:-

(a) Possession of LR. NO. 209/5996

(b) Mesne profits at the rate of Shs. 1,000,000.00 per month from 1st September, 2003 until the date of possession.

(c) Interest on mesne profits at court rates.

(d) Costs of this suit.

In paragraph 10 of the plaint, it is pleaded that they aver that the value of the property is 150,000,000.00 and seek 8% of it which is about 1,000,000.00/= per month as their loss. The defence loss was struck out and the matter proceeded by way of assessment of damages. The plaintiff called one witness P.W.1 a holder of a B.A. degree in Land Economics and a Member of the Knight Frank Valuers Ltd. P.W.1 is in one of the companies' offices globally.

She recalled her firm or company was approached by the Trustees of Visa Oshwal Primary School to carry out a valuation of the said school which they did. The property was valued in 2004 at 150,000,000.00 and if the property were to be rented to day, it would go for Kshs. 800,000,000.00/= per month. It is a huge school.

The defendants participated in the assessment but did not question the report. Neither did they offer any evidence to the contrary. No submissions were filed by either side.

In the courts assessment of the facts herein, it is clear that this court has been called upon to determine on the issue of:-

- (1) possession
- (2) Mesne profits
- (3) Interest and costs.
- (4) Any other relief

On possession the plaintiffs provided a title deed to the property on the strength of which the defendants defence was struck out. Once ownership is established and there is no justification shown for the forcible taking of the property, an order for possession is inevitable. What remains for determination is the appropriate time for the taking of the possession in view of the facts that is a school. This calls for the taking over exercise to be carried out in a calm atmosphere and suggested by the plaintiff's, lawyers an order that such possession be take during the forth coming school holiday is reasonable and would be appropriate.

As for the assessment of the mesne profits, it is on record that the value of the property has been averred in paragraph 10 of the plaint as being 150,000,000.00. This has been proved by the production of the valuation report exhibit 1. There is not contrary valuation provided by the defence. The court is therefore satisfied that the value of the seized property is 150,000,000.00.

In the same paragraph 10 of the plaint there is an averment that the income lost by the plaintiff as a result of the said unlawful seizure of the school is 8% of the total value of the property which comes to Kshs. 1,000,000.00. No evidence has been adduced as to how that 8% was arrived at.

P.W.1 in her testimony produced exhibit 1 thus confirming the value of the property pleaded. She however gave an estimate of monthly income as Kshs. 800,000.00. Once again, no basis was given for this.

The mesne profits claim can comfortably fall in the category of claims called special claims. This court has judicial notice of a rule of judicial practice developed by case law that the court has judicial notice of, that, such claims must be specifically pleaded, particularized and proved.

The claim has been pleaded, particularized, but the court has difficulty with the mode of evidence adduced to prove the same. The period covered is long and the resultant loss of income is bound to be substantial. This therefore calls for caution when determining the estimated loss.

The illegal or forcible seizure of the school took place in September, 2003. That would mean that the plaintiff lost income for the following number of months.

2003- September – December – 4 months

2004 – whole - 12 months

2005 – whole - 12 months

2006 – whole - 12 months

2007 – whole - 12 months

2008 – Up to assessment and the date reserved for judgment of 15.05.08 - 4½ months.

The total number of months is 56½ months.

If this court were to allow the pleaded amount of 1,000,000.00 per month the amount would come to Kshs. 56,500,000.00. If allowed at 800,000.00 per the evidence of the P.W.1 this would give a resultant figure of Kshs. 45,300,000.00.

The amount in both cases is substantial.

It is therefore necessary for the plaintiff to tender evidence to assist the court allow the claim either at 1,000,000 per month as pleaded or 800,000.00 per evidence of P.W.1.

For this reason this claim will be severed and deferred to await evidence as stated above. The court is of the opinion that in view of the amount involved it will be too punitive to disallow the plaintiff's claims for lack of sufficient evidence. Deference and calling for further evidence will serve ends of justice to both parties.

For the reasons given the court will give interim judgment as follows:-

- (1) An order be and is hereby given that the defendant do give vacant possession of the suit premises to the plaintiff's on or before 11th August 2008.
- (2) In default of number 1 above execution to issue.
- (3) Assessment to mesne profits is deferred to another date to await availing evidence on how the figures of 1,000,000.00 as per paragraph 10 of the plaint and 800,000.00 as per the evidence of P.W.1 were arrived at.
- (4) The issue of costs and interest deferred to await a decision on number 3 above.

DATED, READ AND DELIVERED AT NAIROBI THIS 20 DAY OF JUNE 2008

R. N. NAMBUYE

JUDGE