



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 483 OF 1996

IBRAHIM M. MLAMBA 1ST PLAINTIFF

CHRISTINA M. MLAMBA 2ND PLAINTIFF

VERSUS

HIRJI VIRPAL SHAH 1ST DEFENDANT

VALLEY ROAD PLAZA 2ND DEFENDANT

JUDGMENT

The Plaintiffs in this case Ibrahim Mathias Mlamba and Christina Mighuho Mlamba, were prior to 28th February 1996, the registered owners of property known as MOMBASA/BLOCK XXVI/133 situate at Kizingo, Mombasa Island. They charged the property to the First Defendant Hirji Virpal Shah to secure a loan of KSh.1.5 million. The loan was not fully paid and the property was sold by public auction on 28th February 1996 to the second Defendant Valley Road Plaza Ltd. The Plaintiffs disputed the sale and filed this suit against First and Second Defendants in which the plaintiffs prayed to judgment against the Defendants for:-

- “(a) A declaration that the exercise of 1 st defendant’s (chargee’s power of sale was tainted with illegal ity, done in bad faith and without due regard to the Plaintiffs (Chargors’) interests.*
- (b) A declaration that the subsequent sale of the Plaintiff’s property to the 2 nd Defendant together with all subsequent steps taken pursuant thereto are null and v oid or*
- (c) In the alternative and without prejudice to prayer*
- (b), the 1 st defendant to pay General Damages equivalent to the valuation by Maina Chege & Co. Valuers dated 23.02.96.*
- (d) A permanent injunction restraining both the 1 st and 2nd Defendants by themselves, their agents or servants or howsoever from dealing in any manner all that property known as MOMBASA/BLOCK XXVI/133.*
- (e) A declaration that it was illegal for the 1 st defendant to charge interest, him not being a bank, a financial institution or an interest charging money lending entity as by law recognised.*
- (f) Costs of and incidental to this suit.*

(g) Interest thereon at court rates.

(h) Any further relief that this honourable court may deem fit to grant.”

First Defendant filed statement of Defence only but 2nd Defendant filed Defence and counter-claim. In its defence and counter-claim, the second Defendant stated that it was a stranger to the allegation in the Plaint as far as the same related to a dispute between the Plaintiffs and the First Defendant. It was the highest bidder at a public auction held on 28th February 1996 and bought the subject property for KSh.6,200,000/-. It followed all procedures required i.e. paid deposit as was required and paid the full amount as was required all within the time required and the property was duly transferred to it as an innocent purchaser of the suit property at a public auction without notice of any dispute between the plaintiffs and First Defendant. It further stated that the Plaintiffs have wrongfully failed to hand over possession of the suit property to it after it had purchased the same property and had been registered the proprietor of the same property. The 2nd Defendant then referred to another suit between first Defendant and Plaintiff on the same subject property. In the counter claim, the 2nd Defendant reiterated what was in the parts of the statement of Defence and claimed KSh.1,550,000 as mesne profits from 28th February 1996, the date a which it purchased the property to 30th September 1998 at the rate of KSh.50,000/- per month and claimed further mesne profits at the same rate to the date the Plaintiffs would hand over vacant possession of the suit property. It also claimed vacant possession of the suit property from the Plaintiff and sought judgment on the counter-claim as follows:

“1. That the Plaintiffs’ suit herein against it be dismissed with costs.

2. That the Plaintiff be required to hand over possession of the suit property to the second Defendant.

3. For judgment against the Plaintiff jointly and severally in the sum of KSh.1,550,000/ - as stated in paragraph 15 above.

4. For judgment against the plaintiffs jointly and severally for further damages or mesne profits at the rate of KSh.50,000/ - per month from 1 st October 1998 until possession o f the suit property is given to the second Defendant.

5. For interest at the Commercial Bank lending rate on the sum of KSh.1,550,000/ - from the date hereof until judgment.

6. For further interest at the commercial Bank lending rate on the judgment amount fro m the date of the judgment until payment.

7. For costs of and incidental to this suit.

8. For any other or further relief which this humble court may deem fit to grant.”

The 2nd Defendant’s statement of Defence and counter-claim was dated 2nd October 1998 and was filed into the court on the same day. On 13th October 1998, the Plaintiffs filed Reply to 2nd Defendant’s Defence and Defence to counter claim in which they repeated the contents of the Reply to Defence, and denied being indebted to the 2nd Defendant in the amount claimed in the counter-claim and put the 2nd Defendant to strict proof of the claim. Plaintiffs also denied the 2nd Defendant’s claim to vacant possession of the suit property from the Plaintiffs.

When the entire suit came up for hearing on 14th November 2002, the Plaintiffs, were absent and for reasons recorded both on 13th November 2002 and on 14th November 2002, the Plaintiffs’ suit was dismissed for want of prosecution. Costs of the main suit was awarded to the Defendants. The second Defendant proceeded with its counter-claim against the Plaintiffs. This judgment is only on the 2nd Defendant’s counter-claim. Second Defendant called two witnesses on its counter claim. These were its Managing Director Ismail Jamal and George Dan Kiliru.

Ismail Jamal stated in his evidence that the 2nd Defendant is a limited liability company. The second Defendant bought the suit property at auction on 28th February 1996. He is the person who attended the auction. He bought it for KSh.6,200,000. The first deposit of KSh.1,050,000 was paid and later full payment was made and the property was transferred to the 2nd Defendant. He produced as Exh. D1 the original transfer. After transfer the 2nd Defendant secured a new certificate which he produced as Exh. D 2. The Plaintiffs continued to stay on the property. First Defendant then took action to have vacant possession in 1997 but that matter is still pending and the Plaintiffs are still on the suit property upto the time of hearing the suit. The total price the 2nd Defendant paid for the property including stamp duty, purchase price, arrears to Municipal Council for rates registration fee and certificate of lease plus postage etc amounted to KSh.6,497,200/- and he produced bundle of the same as Exh.D3. He said he was claiming mesne profits at KSh.50,000/- till vacant possession. The total rentals amounts to KSh.2,770,000/- i.e. the rent he would have received upto end of the month of November 2002. He deposits his money in the bank for interest and the total interest he would have earned would have been KSh.6,659,590. He produced a document on the working of interest. He also claims possession of the suit property and costs.

The second Defendant's witness was George Dan Kiliru a property valuer. He prepared valuation report with regard to the suit property. He produced it as Exh.D.5. He valued rentals from 1st March 1996 to November 2002. The property would have fetched grand total rental of KSh.2,770,000.

I have considered the evidence adduced on the counter claim. The Defence that the Plaintiff filed against the counter-claim was a repeat of the Reply to Defence of the 2nd Defendant. Their reply was composed of denials of the allegations in the 2nd Defendant's statement of Defence and counterclaim. It was in my opinion no defence at all. Counter-claim must be treated for all purposes as a suit on its own and Defence to it should be clear and precise even if it is in the main body of the Reply to Defence in general. If the defence is a mere denial as was here then it falls into the category of cases covered by the principles in the case of **MAGUNGA GENERAL STORES VS. PEPSCO DISTRIBUTORS LIMITED (1986)2 KAR 89** in which the Court of Appeal stated:

"2. A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence or otherwise, that there is good defence."

In this case as far as the 2nd Defendant is concerned, it alleged having bought the suit property at a public auction and stated that it was a bona fide purchaser for a consideration without notice. It gave full statement on what it paid for the property and maintained that it complied with all the auctioneer's orders. No allegation was made against it of any conspiracy or connivance with First Defendant to deprive the Plaintiffs of the suit property. Despite all that, the defence to counter claim was a mere denial. Further the evidence it has given before me has not been challenged in any way. I am satisfied that the 2nd Defendant is the owner of the suit property having bought it at public auction on 28.2.1996. He has documents of title for it and none has challenged the same before the court by way of any evidence.

It says the Plaintiffs here continued to be on the suit property notwithstanding that it is the rightful owner of the suit property. I find that the plaintiffs possession of the suit property is unlawful as they had had no right to the property from 28.2.96. I do find that the 2nd Defendant is entitled to vacant possession of the suit property and I do order the Plaintiffs to hand over the suit property to the 2nd Defendant forthwith. The Plaintiff claims KSh.2,770,000 being grand total rental income it would have been entitled had it taken possession of the property as from 28th February 1996. Its witness George Dan Kiliru has given evidence on the same and has produced a document showing the calculations upto 30th November 2002. That evidence has not been disputed. It seems to me fair account. I do accept it. I thus allow Grand Total rental income to be paid to the 2nd Defendant by the Plaintiff from 1st March 1996 to 30th November 2002 at KSh.2,770,000. I note that the calculations show that rent in November is assessed at KSh.30,000/-- per month and not KSh.50,000 p.m. as claimed.

The 2nd Defendant claims interest on KSh.6,497,200/- and says it amounts to KSh.6,659,590. I do not think this claim is proper. It did invest money into the suit property and he could only claim rent from the same suit property as the income for which it had made the investment. If it is granted interest as well

on the same money then he will have been paid twice. Since I have allowed interest and as the amount of KSh.6,497,200 is still there in form of the property which belongs to it and continues to belong to it I cannot allow this claim as well as rent on the same property. Rental income will be the “interest” it will earn from the investment. I disallow that claim of KSh.6,659,590 as it is not proper. No reasons for claiming interest on rent at commercial rates have been advanced. I will grant it at court rates.

In conclusion, there shall be judgment for 2nd Defendant against the Plaintiffs as follows:

- (a) The Plaintiffs are ordered to give vacant possession to the 2nd Defendant of the suit property namely MOMBASA/BLOCK XXVI/133 with immediate effect.
- (b) The Plaintiffs to pay to the 2nd Defendant KSh.2,770,000 being mesne profits from 1st March 1996 to 30th November 2002.
- (c) The Plaintiff to pay to the 2nd Defendant KSh.30,000 per month as mesne profits from 1st December 2002 till the possession of the suit property is handed over to the 2nd Defendant.
- (d) Interest on mesne profits will be allowed at court rates from the date the suit was filed to the date of judgment.
- (e) Further interest on mesne profits at court rates upto the date of full payment.
- (f) Costs of the counter-claim to be granted to the 2nd Defendant and interest on such costs at court rates.

Judgment accordingly.

Dated and delivered at Mombasa this 17th Day of December 2002.

J.W. ONYANGO OTIENO

JUDGE