



Crystal Investments Limited v Elme & 3 others (Environment & Land Case 110 of 2019) [2024] KEELC 567 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 110 OF 2019
AA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

CRYSTAL INVESTMENTS LIMITED PLAINTIFF

AND

YUSUF HASSAN ELME 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the 1st to 4th Defendants vide the Plaint dated 20th March 2019 and later amended on 21st July 2022 seeking to be granted the following prayers:
 - a. A declaration that all that piece of land contained in deed plan number 93986 is the property known as L.R No. 209/8298 registered under Grant I.R No. 34676.
 - b. A declaration that all that piece of land known as LR No. 209/8298 registered under Grant I.R No. 34676 contained under deed plan no 93986 belongs to Crystal Investments Limited.
 - c. An order compelling the 2nd Defendant to revoke any other titles pertaining and touching on the parcel of land contained under deed plan no 93986 being L.R 209/8298 registered as Grant I.R No. 34676.
 - d. A permanent injunction restraining the 1st Defendant, his agents and/or servants, assignees from harassing, evicting or in any other way interfere with the Plaintiff's peaceful possession of the suit property.
 - e. General Damages



- f. Special Damages Ksh. 32,550,000/-
 - g. Mesne profits
 - h. Costs of the suit
 - i. Interest
2. The Plaintiff pleaded that it is the registered owner of all the suit property which it acquired on 20th June 1980. The Plaintiff averred that it had been enjoying quiet possession of the parcel of land including using it as security charged to City Finance Limited on 6th June 1989 and which charge was discharged on 12th August 1993. It stated that the suit property had also been leased to various entities to operate various businesses.
 3. The Plaintiff impleaded that in the month of February 2014, its Property Manager received reports that the suit property had been sold by the 1st Defendant claiming to be the registered owner under title L.R No 209/8298 registered under Grant Number IR 89256. The Plaintiff stated that the purported title deed held by the 1st Defendant could only have been procured by way of fraud on the part of the Defendants which it particularized as;
 - i) causing a duplicate Title Deed to be procured by the 2nd and 3rd Defendants
 - ii) registering the duplicate Title Deed in the name of the 1st Defendant
 - iii) interfering with records of the Plaintiff's suit property
 - iv) Failure on the part of the 4th Defendant to investigate the complaints raised by the Plaintiff.
 4. The Plaintiff stated that on various occasions it tried to lease the suit property to various people and organizations but the 1st Defendant has always thwarted its efforts causing it to incur loss of rental income of Ksh.32,550,000/=.They urged the Court to grant the reliefs sought.
 5. The 2nd and 3rd Defendants filed a joint Statement of Defence dated 17th January 2020 and denied the Plaintiff's averments. They denied the allegations of fraud pleaded against the Attorney General and invited the Plaintiff to strict proof thereof. The 2nd and 3rd Defendants also stated that if at all the Plaintiff has suffered any loss or damage, the same was not occasioned by them.
 6. Hearing commenced with the Plaintiff calling Ajay Magon to support its case. Mr Ajay said that he is an authorized representative vide a company resolution dated 21.7. 2022. He adopted witness statement and bundle of documents dated July 2022 and March 2019 respectively as his evidence in support of the Plaintiff's case. The witness averred how the Plaintiff had been leasing the suit property to third parties until the year 2014 when the 1st Defendant frustrated their possession.
 7. Mr Ajay pointed to this court the attached copies of two lease documents with the Church and Capital Hill Motors Ltd who were to pay Ksh.250,000 for a lease of 5year 3 months with the total value being Kshs.15,750,000 as expected rent. Further, that the lease by CJ Maranatha Ministries was for the same amount, Kshs.250,000 for a period of 5 years totaling to Kshs.15,000,000.
 8. Also, the witness stated further that the basic rent for Regent Rapid Results Limited was Kshs.50,000 for a period of 3 years thus making the expected rent of about Kshs 1.8 M. It was stated for the Plaintiff that there was an application for planning dated 2010 in which they expressed an intention to build apartment on the suit property and even engaged a contractor for putting electricity and water but the process was thwarted by goons sent by the 1st Defendant. Mr. Ajay concluded his testimony that they



sent letters to the National Land Commission which was responded to on 13.10.2014 with a promise that they would get back to them but nothing was done necessitating the filing of this suit.

9. There was no evidence presented by all the Defendants. This means that the factual evidence presented by the Plaintiff is not controverted.

Submissions

10. The Plaintiff filed its submissions dated 13th September 2023 while the 2nd and 3rd Defendants filed joint written submissions dated 9th October 2023. The Plaintiff submitted that it has proved that it is the registered owner of the suit property registered under Grant I.R No. 34676 contained under deed plan no 93986. It relied on the provisions of section 24(a) and 26(1) of the [Land Registration Act](#).
11. Further, the Plaintiff stated that in this case there are two titles before this court, one for LR No. 209/8298 under Grant I.R No. 34676 and deed plan no 93986 in the name of Crystal Investments Limited acquired in the year 1978 and Title deed of L.R No. 209/8298 under Grant I.R No. 89256 contained under deed plan no 93986 in the name of Yusuf Hassan Elme acquired sometime in the year 2002.
12. The Plaintiff submitted that the court should take into consideration the root of the two titles as guided by the case of Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR. The Plaintiff argued that its title conforms to procedure and its root can be traced without a break in the chain thus should be upheld and a permanent injunction issued against the 1st Defendant, his agents and/or servants, assignees from harassing, evicting or in any other way interfering with the Plaintiffs Peaceful possession of the suit property.
13. While relying on the provisions of section 80 (1) of the [Land Registration Act](#) (2016), the Plaintiff submitted that the court should order for the revocation of title registered under the 1st Defendant. It also cited the case of Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & another [2010] eKLR where the Court held that it is only the Court that can cancel or amend where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration. Similarly, the Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR which agreed with the trial Court that the only institution with mandate to cancel a title to land on the basis of fraud or illegality is a court of law.
14. The Plaintiff also submitted that it claims the sum of Ksh. 32,550,000/- in terms of loss of rental income. They relied on the evidence comprised in the lease agreement dated 12th June 2013 with Capital Hill Motors Limited for a period of 5 years and 3 months, at Kshs.250,000 per month totaling to Kshs.15,750,000 and a memorandum of understanding with Regent Rapid Results Limited where the tenant was to pay rent of Ksh.50,000 for a minimum of 3 years, totalling Kshs.1,800,000. On the same note, vide a letter dated 13th November 2017, CLJ Maranatha Ministries as tenants were to pay Kshs.250,000 for a period of 5 years totaling to Kshs.15,000,000 as the expected income.
15. In their submissions, the 2nd and 3rd Defendants stated that the Plaintiff has not pleaded that the loss of income suffered was occasioned by them but by the 1st Defendant. They stated that the Plaintiff is not entitled to damages sought in the pleadings as they have not been specifically pleaded and strictly proved. It is their proposition that the Plaintiff has provided a copy of the Lease Agreement between them and Capital Hill Motors dated 12th June 2013; the Agreement has not been executed, sealed,



witnessed or registered; Ashish Magon is not a Director at the Plaintiff's company; and that the date, reasons and/or evidence for termination of the Agreement have not been provided.

16. The 2nd and 3rd Defendants further submitted that the Plaintiff has provided a copy of the Memorandum of Understanding (MOU) between them and Regent Rapid Results Limited which is not dated and neither the reasons and evidence for its termination have been provided. It is their contention that the Plaintiff has provided a copy of the letter dated 13th November 2017, demanding refund of Kshs. 1,040,000/- paid for the lease of the suit property, no copy of the lease agreement has been provided and there is no evidence of payment of the refund.
17. In support of their arguments that the Plaintiff has not strictly proved the damages claimed, the 2nd and 3rd Defendants cited numerous case laws. Among them is the case of Pyramid Hauliers Ltd v Nehemiah Kinyanjui [2021] eKLR where the Court held that a claim for special damages must not only be specifically pleaded but must also strictly proved with as much particularity as circumstances permit.
18. They also, relied on the decision by the Supreme Court of Nigeria which weighed in on the issue in Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), where Mahmud Mohammed, JSC. stated:

“I must emphasise that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.”

Analysis

19. I have carefully read the pleadings filed by the parties as well as the evidence tendered by the Plaintiff. Equally, I have considered the rival submissions rendered and now answer to the call in finding out whether the Plaintiff has proved its claim before this court. The twin issues are; whether the Plaintiff is the registered owner of the suit property, and whether it is entitled to the damages sought.
20. Section 26 of the [Land Registration Act](#), 2012 provides;
 - “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”



21. To prove ownership of the suit property, the Plaintiff produced a copy of their title No. IR 34676 contained under Deed Plan no 93986 which has not been challenged on any ground. However, the Plaintiff also produced a copy of title of the suit property registered under Grant Number IR 89256 under the 1st Defendant's name. It was on the basis of this second title, that the 1st Defendant was claiming ownership of the suit property and allegedly interfering with the Plaintiff's quiet possession of the same.

22. The 1st Defendant has not defended this suit nonetheless, the issue on competing titles should be addressed. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of *Wreck Motors Enterprises vs. The Commissioner of Lands and Others* Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:

‘Where there are two competing titles the one registered earlier is the one that takes priority’

23. The same position was held in the case of *Gitwany Investment ltd vs. Tajmal Ltd & 3 Others* (2006) eKLR where the Court held that: -

‘... the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

24. Also, I agree with the Plaintiff that the court should also look at the the root of the two titles as per case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, where Munyao J held as follows;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

25. The Plaintiff contested the 1st Defendant's title on grounds of fraud and stated that the same was unprocedurally acquired in cohort with the 2nd and 3rd Defendants. Sections 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. The law on fraud is clear as buttressed in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It



is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”(Emphasis ours)

27. The standard of proof on fraud was discussed in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR as the Court expressed itself as follows; -

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)

28. In my opinion and I so hold, that although the Plaintiff has pleaded fraud against the 2nd, 3rd and 4th Defendants it was not proved. The Plaintiff’s title over the suit property upholds over the 1st Defendant’s title however, it failed to prove involvement of the 2nd to 4th Defendants in the 1st Defendant’s acquiring the defeated title registered under his name.

29. On the second issue, the Plaintiff stated that as a result of the 1st Defendant’s actions of interfering with its quiet possession over the suit property, it incurred damages that has been sought. The 2nd and 3rd Defendants vehemently opposed the claim under the heading of special damages and they have cited a plethora of authorities to support it. The rule of the thumb is that special damages must be specifically pleaded and strictly proved. The nature of a claim for special damages as discussed by Court in *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2021] eKLR is of restitution and, where proved, it is meant to restore the claimant to the position he would have been save for the action complained of. They are those damages which are ascertainable and quantifiable at the material date or rather action date.

30. The difference between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

31. Further, in *Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003*, Kimaru, J held that:

... Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits



consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded.

32. In this case, the Plaintiff wants to be awarded special damages in the sum of Kshs.32,550,000 particularized as loss of rental income. During the hearing and in the submissions, the Plaintiff premised its claim on the lease agreement dated 12/6/2013 and an undated memorandum of understanding between it and Regent Rapid Results Ltd. Further, the Plaintiff produced two payment receipts from the City Council of Nairobi both dated 30/11/2011 of Ksh.9,000 and 4000/ each and a payment receipt to Jai Construction Company for Kshs.200,000 dated 16/9/2013.
33. These are the only calculable payments made. However, the same was made in the year 2011 and 2013 when as pleaded, the 1st Defendant's actions commenced in the year 2014. There is no evidence produced to corroborate these assertions that prior to the discovery of a parallel title in the hands of the 1st Defendant, the premises had been rented out. For instance, the Plaintiff produced a copy of discharge of charge registered on the title but failed to produce evidence of a short-term lease also registered. The Plaintiff's own evidence confirm the land was vacant as shown in the letter dated 23rd August 2013 giving them permission to clear the bushes from the Nairobi City County. It appears that as at 2014 when the 1st Defendant started the interferences, the land was in vacant state as the witness stated that the 1st Defendant did not let them put tenants on the property.
34. It did not come out from the evidence of this witness whether the interference went on post 2014. This piece of evidence was necessary to justify claiming rent for the period of the lease given at 5 years three months running from 1st June 2013. The witness did not explain why the tenant who executed the agreement on 1st of June 2013 had not taken possession by August 2013 before the 1st Defendant started the interferences. Thus, I am not persuaded, that the claim for special damages or mesne profits have been strictly proved.
35. Under the head of general damages, the Plaintiff had to go extra mile to obtain copies of title in the hands of the 1st Defendant. The 2nd to 3rd Defendants did not cancel the title despite receipt of complaint from the Plaintiffs. For the anxiety experienced by the Plaintiff over the existence of a parallel title, I shall award them a sum of Kshs 300000 payable by the 1st Defendant. For punitive damages, I award Kshs 200000 as against the 1st Defendant.
36. The upshot of the foregoing is that I enter judgement for the Plaintiff as against the 1st Defendant and grant the following orders: -
 - a. A declaration that all that piece of land contained in deed plan number 93986 is the property known as L.R No. 209/8298 registered under Grant I.R No. 34676 contained under deed plan no 93986 belongs to Crystal Investments Limited.
 - b. An order be and is hereby issued compelling the 2nd Defendant to revoke any other titles pertaining and touching on the parcel of land contained under deed plan no 93986 being L.R 209/8298 registered as Grant I.R No. 34676.
 - c. A permanent injunction be and is hereby issued restraining the 1st Defendant, his agents and/ or servants, assignees from harassing, evicting or in any other way interfere with the Plaintiff's peaceful possession of the suit property.
 - d. General Damages in the sum of Kshs 500000 to the Plaintiff payable by the 1st Defendant.
 - e. Costs of this suit be paid by the 1st Defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2024.



A. OMOLLO
JUDGE

