



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. E 168 OF 2020

BUXSTONE LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JASWANT SINGH & BROTHERS LIMITED.....DEFENDANT/RESPONDENT

IN THE MATTER OF THE LAND ACT, 2012 SECTIONS 98(4) AND 99

AND

IN THE MATTER OF SECTIONS 5, 10 & 12 OF THE TRESPASS ACT

AND

IN THE MATTER OF AN APPLICATION BY THE PLAINTIFF /APPLICANT

FOR AN EVICTION ORDER AND AGAINST THE DEFENDANT/ RESPONDENT

FROM OF ALL THAT PIECE OF LAND KNOWN AS LR NO. 209/8365

(L.R NO.30394) SITUATE ALONG LUNGA LUNGA ROAD,

INDUSTRIAL AREA WITHIN NAIROBI CITY COUNTY.

JUDGEMENT

1. The Applicant filed an originating summons dated 6th October 2020 for determination of the following questions.

a) Whether the Plaintiff/Applicant is the bona fide purchaser of all that piece of property known as LR No. 209/8635 (I.R No.30394) along Lunga Lunga Road Industrial Area within Nairobi City County (hereinafter referred to as "the suit property") having bought the suit property at an auction on 3rd March 2020.

b) Whether the Defendant/ Respondent its servants, agents and or any person or persons claiming under or through itself are trespassers on the suit property and should hand over vacant possession of the suit property to the Plaintiff/Applicant.

c) Whether the Plaintiff/Applicant should be allowed to forcefully evict the Defendant/Respondent and take possession of the suit property.

d) Whether the Defendant/Respondent should be ordered to compensate the Plaintiff/Applicant for loss of user suffered with effect from 3rd March ,2020 until vacant possession is handed over at the rate of Kenya Shillings Two Hundred and Thirty-Five Thousand (Kshs. 235,000/) per month being the prevailing market rent of the area.

e) Whether the Defendant/Respondent should pay the costs of the suit to the Plaintiff/Applicant.

2. The Application is supported by the supporting affidavit of Praful Kumar Premchand Savla who is a director of the Applicant. He contends that on 17th February 2020 saw an advert in the Daily Nation Newspaper where Garam Investment Auctioneers were set to auction

LR No. 209/8635 on instructions of Stanbic Bank Limited. He attended the said auction which was held on 3rd March 2020. He emerged the highest bidder with a bid of Kshs.41,000,000/= .

3. He then nominated the Applicant as the purchaser. He paid Kshs.10,250,000/= being 25% of the purchase price on the day of the auction. He thereafter paid the balance of Kshs.30,750,000/= . He thereafter processed transfer and the purchased property was registered in the name of the Applicant on 10th June 2020.

4. Prior to the registration of the purchased property in the name of the Applicant, the Applicant's lawyers wrote to the Respondent's lawyer asking for possession but the Respondent did not yield up possession. The Respondent instead stationed armed goons at the purchased property which made possession impossible. It is after the Respondent refused to grant possession that the Applicant moved to court seeking determination of the questions listed in paragraph (1) hereinabove.

5. The Respondent opposed the Applicant's application based on grounds of opposition dated 25th January 2020. The Respondent contends that the application herein is contrary to section 6 of the Civil Procedure Act in that there is an ongoing suit in the Chief Magistrates Court being CMCC 1970 of 2020 **Nelmart Holdings Limited Vs Jaswant Singh & Bros Ltd & 2 Others** in which the lower court has issued an injunction restraining the defendants from evicting the Plaintiff or in any way interfering with the purchased property.

6. The Respondent further contends that the parties in this application and the parties in the lower court are the same and that to entertain this application in the face of pendency of the case in the lower court is tantamount to pitting two courts against each other. The Respondent argues that this Court lacks jurisdiction to entertain this application in view of the pending suit in the lower court.

7. Though the Respondent was granted leave to file a replying affidavit within 14 days from 27th January 2021, no replying affidavit was filed. The Respondent did not also file written submissions as directed on the same date. It is only the Applicant which filed submissions. I have gone through the submissions by the Applicant as well as the averments in the supporting affidavit to the originating summons as well as the grounds of opposition.

8. I will deal with the issues raised one after the other. On the first issue as to whether the Applicant is the bona fide purchaser at a public auction of that property known as LR No.209/8635, there is evidence that the property which the Applicant purchased had been charged to Stanbic Bank Ltd. When the Respondent defaulted in repaying the loan, the bank instructed Garam Investment Auctioneers who sold the property in a public auction on 3rd March 2020.

9. The Applicant through its director paid the 25% of purchase price on the day of auction. The balance was paid within 30 days as stipulated. The property was transferred from the chargee to the Applicant which was finally registered as owner . The sale has never been challenged anywhere. I therefore find that the Applicant was a bonafide purchaser of the property at the public auction and that the property has already been registered in the Applicant's name.

10. On the second issues as to whether the Respondent as well as those claiming under it are trespassers, I have already found that the Applicant is a bonafide purchaser of the property. The Respondent's interest in the property was at the fall of the hammer on 3rd March 2020. The Respondent and or its agents as well as those claiming under it became trespassers as from 3rd March 2020. Anyone purporting to lay claim to the purchased property on the basis of any prior engagement with the Respondent is a trespasser and ought to direct their claims to the Respondent.

11. There is no privity of contract between any person claiming under the Respondent and the Applicant. The existence of a suit in the lower court cannot be a bar to this court proceeding to determine the present originating summons. This court would have only have considered to stay this suit were the lower court competent to determine what is being claimed herein. The value of the purchased property is Kshs.41,000,000/= which is well above the monetary jurisdiction of the lower court.

12. The case in the lower court was purposely filed to ensure that the Respondent continues in possession of the purchased property. This is clear from the proceedings herein which indicate that the Respondent and the Plaintiff in the case in the lower court are working hand in hand to perpetuate the illegal trespass. There was even an attempt to enjoin the Plaintiff in the lower court case in these proceedings by filing an application on the eve of a judgement which had initially been set for delivery on 8th April 2021.

13. From the application which the court first saw after the judgement had been postponed, the Plaintiff in the lower court claims to have leased the entire property at a monthly rent of Kshs. 70,000/= with subsequent increment as per the lease document. The suit in the lower court was not based on the monthly rent but the entire purchased property which is way beyond the pecuniary jurisdiction of a Chief Magistrates Court. The Plaintiff has even sued the Applicant herein with whom there was no contract.

14. On the third issue as to whether a mandatory injunction ought to issue compelling the Respondent, its servants or agents to hand over vacant possession, I have no difficult granting the mandatory injunction. The Respondent and all those claiming under it are trespassers who ought to give vacant possession. If the Respondent, its agents or those claiming under it fail to give vacant possession within 7 days, the Applicant shall forcefully evict the Respondent and anyone claiming under it.

15. The purchased property comprises a go down which is at Lunga Lunga in Industrial Area which is a prime area. There is affidavit evidence which was not controverted that the Respondent has stationed goons who have impeded a smooth handover. The Applicant has sought compensation at the rate of Kshs.235,000/- per month . This amount is like mesne profits. I find this figure to be reasonable. I therefore grant compensation at the rate of Kshs.235,000/= per month with effect from 3rd March 2020 until vacant possession is granted.

16. All in all, I find that the Applicant's originating summons is well founded. I grant the following orders:-

a) A declaration that the Plaintiff/Applicant was the bonafide purchaser at a public Auction of all that property known as LR No.209/8635 Nairobi I R No.30394 which auction was conducted on 3rd March 2020.

b) A declaration that the Defendant/Respondent its servants, agents and or any person or person claiming under or through itself on all that property known as LR No. 209/8635 IR No. 30394 are trespassers.

c) A mandatory injunction is hereby granted compelling the Defendant/Respondent its servants , agents and or any person or persons claiming under or through itself to hand over vacant possession of all that property known as LR No.209/8365 IR No. 30394 situate at Industrial Area Nairobi within seven (7) days failing which the Plaintiff/Applicant shall forcefully evict any persons on it under supervision of the officer commanding Industrial Area Police Station (OCS) who shall ensure that there is law and order during the eviction and putting the Plaintiff/Applicant into possession .

d) The Defendant/Respondent is ordered to compensate the Plaintiff /Applicant at the rate of Kshs.235,000/= per month with effect from 3rd March 2020 until vacant possession is granted.

e) The Defendant/Respondent shall pay the costs of this suit to the Plaintiff/Applicant.

Dated, Signed and delivered at Nairobi on this 13th day of April 2021.

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Musa Juma for Plaintiff

Mr Musyoka for Mr Kihara for Defendant

M/s Kioko for M/s Mberia for proposed Defendant

Court Assistant: Okumu

E.O.OBAGA

JUDGE