



**Scotia Holdings Limited v Ravji & another (Environment & Land Case
828 of 2016) [2022] KEELC 2425 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2425 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 828 OF 2016**

LC KOMINGOI, J

MAY 5, 2022

BETWEEN

SCOTIA HOLDINGS LIMITED PLAINTIFF

AND

PETER RAVJI 1ST DEFENDANT

LALJI DEVRAJ 2ND DEFENDANT

JUDGMENT

1. By a plaint dated July 18, 2016; the plaintiff prays for judgement against the defendant for:-
 - a. An order of declaration that the plaintiff is the sole legal and beneficial owner of the property known as Land Reference Number 11392/2 registered in Certificate of Title Number I.R xxxxx situate on lower Kabete Road, Nairobi by reason whereof it is entitled to the occupation and possession thereof as proprietor to the exclusion of defendants and any other person whatsoever.
 - b. An order of declaration that the certificate of Title Number I.R xxxx in favour of the Plaintiff is the only valid title to the suit property.
 - c. An order of permanent injunction restraining the defendants, whether acting by themselves, their servants, agents, contractors and/or any other persons whatsoever, from remaining on, reentering upon, trespassing upon, taking over, damaging, developing, transferring, charging or registering in the name of the 1st defendant or the 2nd defendant, or both defendants, any person other than the plaintiff or in any other manner howsoever interfering with the plaintiff's occupation, possession and quiet enjoyment of the property known as Land Reference Number 11392/2.



- d. An order be made requiring the officer in charge of police division (Gigiri police station) and the officer commanding station (Spring Valley Police Station) to assist in facilitating the execution of the orders herein, if and when required.
 - e. General damages for trespass against the defendants jointly and severally.
 - f. Costs of the suit against defendants, jointly and severally, and interest thereon at court rates from the date of judgement until settlement thereof in full.
 - g. Any other relief that this honourable court may deem fit and just to grant in the circumstances of the case.
2. The plaintiff's case is that it owns the property known as Land Reference Number 11392/2 pursuant to a certificate of title No. I.R xxxxx having purchased it and obtained a transfer from David Jonathan Grantham and Gary Farrant, being the duly appointed executors of the estate of Paul Bindstrup Stoffregen (deceased). It further contended that one Kent J Galvan had fraudulently claimed ownership of the suit property from the estate of Paul Bindstrup Stoffregen (deceased) and filed ELC Case NO.247 of 2011 against the executors of the said estate where he obtained interim injunction orders against the executors but the orders were set aside. It further contended that the defendants herein sought to be enjoined in the proceedings aforementioned and they also sought injunction against the executors of the estate of Paul Bindstrup Stoffregen (deceased) on grounds that they had bought the suit property but their application for injunction was dismissed on 14th January 2014 and it has never been appealed against.
 3. The plaintiff also contended that the defendants lodged a criminal complaint which led to Criminal Case Nairobi No.1110 of 2011 Republic v Kent J. Galvan involving multiple charges of forgery and obtaining money by false pretence. It added that in the case HCCC No.889 of 2010; David Jonathan Grantham & Gary Farrant v Arnold Makokha Simiyu & others filed by the executors of the estate of Paul Bindstrup Stoffregen (deceased) the court issued an order on February 11, 2011 ordering the defendants and their agents to vacate the suit property and allowed the executors to re-enter the premises and ordered the OCS Spring Valley police station to facilitate the execution of the order for the re-entry of the executors.
 4. The plaintiff stated that that on the strength of the foregoing orders of the court, the sale of the suit property to the plaintiff was completed in 2014 where after it took possession and stationed security guards to ward off trespassers. It further stated that on 26th April 2016, the defendants invaded the suit property with the assistance of uniformed police officers, evicted the plaintiff's guards and stationed their own guards on the suit property making it impossible for the plaintiff to recover possession.
 5. It also stated that it sought police intervention to enforce its rights to the property and recover occupation but the police did not offer any intervention. It contended that it recovered possession after the defendants removed their security thereon but on July 7, 2016, the defendants violently evicted them using a gang of more than 100 intruders armed with crude weapons. It contended that it is entitled to exclusive possession and occupation of the suit property to the exclusion of the defendants and any other person claiming an adverse interest thereon.

The Defendants' case

6. The defendants filed a memorandum of appearance dated August 5, 2015 through the firm of M/S Othieno & Company Advocates. They then filed the defence dated August 5, 2015. They contended that they purchased the suit property relying on Title Number I.R 59841 and they have the original



title in their possession. They further contend that the Plaintiff has no good title as the title in its possession was obtained irregularly. They particularized the alleged illegality.

The Plaintiff's evidence

7. PW1, Morrison Wayaya was the plaintiff's general manager testified on January 28, 2020. His witness statement signed on July 18, 2016 was adopted as part of his evidence. He also adopted the annexures of his affidavit in support of the application for injunction. He told the court that the plaintiff bought the suit property for Ksh.37 million from the previous owners. He produced the sale agreement dated August 21, 2009 signed by Mr. David Jonathan Grantham and Mr. Gary Farrant, as executors of the estate of Paul Bindstrup Stoffregen (Deceased). He stated that the sellers gave the plaintiff a certificate of title, transfer, grant of probate of written will, certificate of confirmation of grant and an order of the High court. He added that the plaintiff paid stamp duty being 4% of the Kshs.47million which was Kshs.1,880,000/= before the transfer was effected on August 5, 2014.
8. He told the court that the delay of the transfer was occasioned by the fact that the file in respect to the suit land was missing in the lands registry and they were informed of this through correspondences that the file could not be traced. He stated that by the time of the transaction, the plaintiff was not aware of the court case in relation to the suit property between Kent J Galvan and the Administrators of the estate, ELC 247 of 2011; which the main parties were Jonathan as the 1st defendant, and Gary as the 2nd defendant who are the administrators who sold the land to the plaintiff. He added that the defendants herein were also parties to that suit and their prayer for injunction was denied.
9. He stated that there was a criminal case against Kent J. Galvan being Criminal case 110/2011 where he was charged alongside Musembi Mutisya with count 1 being obtaining money by false pretenses and the title being relied on by the defendants herein who are the complainants in that suit is the title document referred to in the charge sheet and which is in contention.
10. When cross-examined, he stated that the Plaintiff may not have attached the receipt of payment of stamp duty but it paid 4% of the value which was Kshs.1,880,000/=. He stated that the registration number on the transfer is indicated as IR xxxxx/x while the transfer is entry No.7. He added that entry number 6 on the title refers assent by the trustees. He stated that the sale agreement was drawn by Havelock and Associates but the transfer has no endorsement by the drawer. When referred to the pending cases in this matter being ELC 247 of 2011, Criminal Case 1110 of 2011 and HCC 889 of 2010, he stated that the Plaintiff was not a party to those cases. He further stated that the Plaintiff learnt about the cases while their transaction was in progress. He stated that by 2014, there were people on the property and that at the time of registration, it was not vacant the Plaintiff had to take action to get vacant possession.
11. The defendants did not call any evidence.
12. At the close of the oral testimonies, the parties tendered final written submissions.

The Plaintiff's submissions

13. They are dated December 10, 2021. Counsel for the plaintiff framed issues for determination as follows:-
 - a. Whether the plaintiff acquired LR.No.11392/2 for valuable consideration from David J Grantham and Gary Farrant as the duly appointed executors of the estate of Paul Bindstrup Stoffregen?



- b. If so, whether the registration of the property LR.No.11392/2 in favour of the Plaintiff consequent upon purchase for value vests in the Plaintiff absolute and indefeasible rights and interests in the suit property by virtue of certificate of Title No.I.R 59846?
 - c. Whether misdescription on the part of the registry in the transfer form can affect the plaintiff's proprietary rights over the property?
 - d. Whether the defendants lodged a criminal complaint against Kent J Galvan for purported sale of the suit property to them?
 - e. Whether Kent J Galvan had any rights or interests in the suit property capable of being passed to the defendants?
 - f. Whether the defendants have any rights over the suit property?
 - g. Whether the occupation of the suit property by the defendants was lawful and if it amounted to trespass?
 - h. Whether the plaintiff is entitled to the prayers sought?
 - i. Who should bear costs of this suit?
14. It was the submission of counsel for the plaintiff that the plaintiff's evidence having not been controverted, the plaintiff's case has been proved. He put forward the case of *Robert Ngande Kathathi v Francis Kivuva Kitonde* [2020] e KLR and the case of *Trust Bank Limited v Paramount Universal Bank Limited & 2 others* Nairobi (Milimani) HCCC No.384 of 2002.
 15. He submitted that the sale agreement dated August 21, 2009 is proof that the plaintiff purchased the suit property for a consideration of Kshs.37 million and that the plaintiff's evidence was not controverted. He added that a transfer was drawn and the plaintiff paid stamp duty thus the transfer was done lawfully and pursuant to orders issued by Hon. Lady Justice Nambuye on July 11, 2010 and those issued on July 23, 2010 in Nairobi Succession Cause No.2028 of 2008; In the matter of the Estate of Paul Bindstrup Stoffregen (deceased) empowering the estate to sell and administer the proceeds of sale of the suit property.
 16. It was his submission that registration of the suit property in favour of the plaintiff vests in the plaintiff absolute and indefeasible rights and interests in the suit property. He further submitted that based on provisions of section 24, 25 and 26 of the *Land Registration Act* No.3 of 2012, the plaintiff's title is guaranteed by law having acquired the same for value and there being no fraud pleaded or proved by the defendants. He cited the case of *Caroget Investment Limited v Aster Holdings Limited & 4 others* [2019] eKLR and the case of *Margaret Njeri Wachira v Eliud Waweru Njenga* [2018] e KLR.
 17. He submitted that section 79 of the *Land Registration Act* affords the registrar the power to rectify a register of instruments and in any case the misdescription of entries pursuant to which the suit property was transferred to the plaintiff does not go to the root of the plaintiff's proprietary rights. He further submitted that the title was issued pursuant to a reconstructed deed file based on the "Deed of Indemnity" dated December 20, 2011 given by the executors of the estate of Paul Bindstrup Stoffregen (deceased) indemnifying the Government against any loss, damage or claim as a result of the creation of the skeleton file in respect of LR.No.11392/2 as the original deed file could not be traced. He added that the defendants did not adduce any evidence of alleged irregularity on the face of the title, the grant, the vesting order, the transfer and Deed of indemnity as to affect the plaintiff's proprietary rights in the suit property.



18. Counsel relied on the court of Appeal's decision in *Munyu Maina v Hiram Gatbiba Maina* [2013]eKLR to submit that in circumstances where title to property is challenged, it is not enough to waive the title without proof of its acquisition as the defendants have waived the certificate of title I.R xxxxx dated September 3, 1992 purportedly registered in the name of Kent J Galvan and the sale agreement dated May 6, 2011 which allegedly transferred proprietorship to them. He added that it was imperative on the part of the defendants to adduce evidence to demonstrate how Kent J Galvan acquired the title but they failed to and there are no records in respect of the said title at the lands registry. He pointed out that the rulings by Honourable Justice Mbogholi Msagha in Nairobi ELC No.247 of 2011:Kent J Galvan v Jonathan Grantham & others delivered on October 26, 2011 and the ruling delivered by Justice Nyamweya on January 14, 2014 in the same case found that Kent J. Galvan did not have any rights in the suit property capable of being passed to the defendants. He also pointed out that vide the letter dated September 19, 2011, the Land Registrar confirmed that prior to its sale to the plaintiff, the suit property was still registered in the name of Paul Bindstrup Stoffregen and that searches purported to have been issued by their office were forgeries as a result of which the defendants herein instituted criminal proceedings against Kent J Galvan vide criminal case No.1110 of 2011; Republic v Kent J. Galvan.
19. It was Counsel for the plaintiff's submission that the defendants' actions of illegally and unlawfully taking up possession yet they have no proprietary rights and in subsistence of court orders that prevented them from doing so amounted to trespass. He added that the defendants' actions amount to violation of the plaintiff's right to property as guaranteed under article 40 of the *Constitution* and must be met with appropriate sanctions being general damages for trespass. He urged the court to be guided by the decision in *Caroget Investment Limited*(*supra*) and to consider the fact the Plaintiff was kept off its property by use of force and the lost investment opportunities to the plaintiff.

The Defendants' written submissions.

20. They are dated February 10, 2022.Counsel for the defendant submitted that the declaration sought by the plaintiff in prayer(a) of its plaint is unnecessary since as at August 15, 2011,the defendants knew and admitted that they have no claim to legal ownership of the suit property as evidenced by the charges they lodged against the persons who purported to sell the suit property to them in Criminal Case No. 1110 of 2011 and therefore the declaration sought is unnecessary. He added that prayer (b) of the plaint reveals that the plaintiff is insecure about the validity of its title and even admitted that its title has discrepancies therefore it cannot rely on statute law to protect it.
21. He submitted the fact that the defendants do not have a claim in the suit property does not mean that the plaintiff is automatically the rightful owner of the suit property as it has to prove its title since in their defence, the defendants challenged the validity of the documents that the plaintiff has produced as proof of its ownership of the suit property.
22. It was counsel's submission that the defendants rely on the plaintiff's documents as its evidence. He further submitted that there are glaring inconsistencies in the evidence; one of them being that the transfer dated March 12, 2014 which is registered as 59846/6 whereas at page 2,the transfer is entry Number 7 and thus 59846/7.He added that the certificate of title to the suit property is a provisional title reproduced from a skeleton file and at page 1,there is a notation stating, "This document is not for transfer" which is a clear restriction and there is no explanation as to how the restriction was lifted to allow the transfer dated March 12, 2014to be registered on the title. He also pointed out that the Lands office requests the plaintiff's predecessor to produce a transfer registered as I.R 59846/4 yet on the certificate of title entry No.4 is "a file opened vide deed of indemnity".



23. He also submitted that that the provision of section 35 of the Advocates Act (cap 16 Laws of Kenya) which requires that an endorsement of the person drawing a document to be on the document itself was not complied with since the transfer in respect of the suit property is not endorsed by the drawer but instead the endorsement by Havelock Nduati Company Advocates is on the cover page. He added that the assessed stamp duty payable is not endorsed on the transfer by the collector of stamp duty, there are no stamps thereon to reflect the amount of stamp duty paid and there is no documentary evidence that stamp duty was actually paid.
24. In opposing the plaintiff's prayer for an order of injunction, counsel submitted that the plaintiff has not adduced any evidence on record to entitle it to the orders as it has not produced a valid certificate of title to prove its ownership nor produced evidenced that that it is the defendants who trespassed and invaded the suit property on April 21, 2016 and/or on July 7, 2016. He added that the defects on the Plaintiffs title until cured under section 79 of the Land Registration Act render the plaintiff's documents defective and invalid.
25. Counsel also submitted that there is no evidence on record of loss and damage caused by the defendants' occupants of the suit premises thus the plaintiff is not entitled to damages. He distinguished the case of Caroget Investment Limited (*supra*) relied on by the plaintiff from this case and stated that in the former suit, trespass lasted for 10 years, the property was valued at ksh.1.8 billion and its location and lost investment opportunities were established in evidence. He added that in this case, there was no valuation carried out, no evidence of any economic activity thereon, no pending development projects were alleged or proved and there was no evidence of any damage to the suit property. He relied on the case of Ouma v Nairobi City Council (1976-80) IKAR 375 and the case of Kenya Breweries Limited v Kiambu General Agency Limited [2000] eKLR to submit that because of the lack of evidence as to the loss and damage suffered, the Plaintiff is only entitled to nominal damages.
26. Counsel put forward the case of Karugi & another v Kabiya & 3 others to submit that the plaintiff has to prove its case whether or not the defendant gave evidence in court and whether or not the case proceeded ex parte.
27. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the plaintiff and the authorities cited. The issues for determination are:-
 - i. Whether the plaintiff acquired LR Number 11392/2 for valuable consideration from the duly appointed executors of the Estate of Paul Bindstrup Stoffregen.
 - ii. Whether the certificate of title Number IR 59846 issued in favour of the plaintiff ought to be protected under the Land Registration Act.
 - iii. Whether the defendants have any rights over the suit property.
 - iv. Is the plaintiff entitled to the reliefs sought?
 - v. Who should bear costs of this suit.
28. The defendants did not testify in this matter. However, they filed a defence and cross-examined the plaintiff. They also sought to rely on the Plaintiff's evidence to prove their case. In their submissions, they admitted that they have no claim to legal ownership of the suit property. The plaintiff argued that the plaintiff's case has been proved and evidence led having not been controverted and therefore not challenged by the defendants. In my view, the plaintiff's evidence cannot be used by the defendants since the defendants only made statements in reference to the documents in their submissions but they did not make the said statements on oath. If they wanted to rely on the plaintiff's documents, then they were obliged to call a witness to make reference to those documents on oath. Only then can the



- said statements be considered as evidence. In *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* [1978] eKLR the court cited the Australian case, *Re Williams Bros Ltd* (1928) 29 SRNSW 248, where Harvey CJ stated; “To give evidence in my opinion means to make statements on oath before a person duly authorised to administer an oath”.
29. In *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau* (2016) Eklr, the court of Appeal had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence .It stated; “We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendant’s failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified.”
30. PW1, Morrison Wayaya, the General Manager of the Plaintiff adopted his witness statement dated July 18, 2016. He told the court that the plaintiff bought the suit property for Kshs.37 million from David J. Grantham and Gary Farrant the Executors of the Estate of Paul Bindstrup Stoffregen (Deceased).
31. It is the plaintiff’s case that the suit property was transferred to the plaintiff on the August 5, 2014as per entry No 7 in the Register. The transfer was presented to the Land Registry on August 5, 2014. On the transfer is a stamp from the collector of stamp duty, a revenue stamp is affixed. This confirms that stamp duty had been paid even thought the receipts was not availed.
32. The plaintiff has also produced a grant dated December 10, 2008in the names of David Jonathan Grantham and Gury Farrant as executors of the Estate of Paul Bindstrup Stoffregen. The same was issued on December 10, 2008. The same was confirmed on November 16, 2009.
33. Theplaintiff has also produced a ruling in ELC 247 of 2011 Kent J. Galvan vs Jonathan Grantham & 2 others. In the said ruling the orders granted earlier in faovor of the plaintiff were set aside owing to material non disclosure. It is also not in dispute that the defendant herein sought to be enjoined in these proceedings by a ruling dated January 14, 2014. There is a copy of the charge sheet in CR Case No 1100 of 2011 in which Kent J. Galvan and another are charged with the offence of obtaining money by false presence contrary to section 313 of the *Penal Code*. The complainant is Patel Ravji, the 1st defendant in this case. The 1st accused Kent J. Galvan is the plaintiff in ELC 247 of 2011. From the foregoing, it is not in doubt that the plaintiff purchased the suit property for the Executors of the Estate of the Paul Bindstrup Stoffregen (Deceased) though the transfer was not endorsed by the drawer. I find that the same was duly registered. It should also be noted that the plaintiff was not a party in ELC 247 of 2011, HCCC 889 of 2010 and CR Case No 1100 of 2011.
34. I find that the plaintiff is the absolute owner of the suit property. Section 26 of the *Land Registration Act*, 2012 provides that:-
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.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

The defendant did not adduce any evidence to show that the plaintiff acquired the title to the suit property fraudulently. The error showing xxxxx/x as the instrument of transfer instead of xxxxx/x is immaterial.

35. The same can be attributed to the Registrar. I find that the misdescriptions on the entries in the Register cannot be a ground to challenge the plaintiffs proprietary interest in the suit property as they do not go to the root of the plaintiff’s proprietary rights.
36. The Deed file was reconstructed based on a Deed of Indemnity given by the Executors as the original deed file was missing at the Registry as per the Registrar’s letter dated September 19, 2011.
37. The defendant filed a statement of defence dated August 5, 2016. In paragraph 3 of the said Defence they claim that the title in the plaintiff’s favour was obtained irregularly. The particulars of irregularity are given on the said paragraph. The said particulars touch on the issue of misdescriptions in the register among other. As stated earlier they do not go to the root of the plaintiff’s title. in any case the defendant did not adduce any evidence to prove of these particulars.
38. It is their defence that the plaintiff does not have any title or any good title to the said property. Again no evidence was adduced to prove these claims . I note that the defendants are not seeking a claim over the suit property. I find that they have no rights over the suit property.
39. It should be noted that the defendants did not testify on this case. they would have been in a position to explain whether their entry to the suit property was lawful or not. They squandered this opportunity.
40. As things stand the plaintiff’s evidence is uncontroverted. The defendants illegally and unlawfully took possession of the suit property on April 21, 2016 and stationed their security guards. This amounted to trespass. I award Kshs.200,000/- Which I think is adequate to compensate the plaintiff. In the case of *Duncan Nderitu Ndegwa v Kenya Power and Lighting Company Ltd & another* [2013] e KLR it was held:

“.....Once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs.100,000/- as compensation for the infringement of the plaintiff’s right to use and enjoy the said property occasioned by the 1st and 2nd defendants trespass”

41. In conclusion, I find that the plaintiff has proved its case against the defendantson a balance of probabilities.
42. Accordingly, judgment is entered in favour of the plaintiff as against the defendants as follows:-
- a. A declaration is hereby issued that the plaintiff is the sole legal and beneficial owner of the property known as Land Reference Number 11392/2 registered in Certificate of Title Number I.R xxxxx situate on lower Kabete Road, Nairobi by reason whereof it is entitled to the occupation and possession thereof as proprietor to the exclusion of defendants and any other person whatsoever.



- b. A declaration is hereby issued that the certificate of Title Number I.R xxxxx in favour of the plaintiff is the only valid title to the suit property.
- c. An order of permanent injunction is hereby issued restraining the defendants, whether acting by themselves, their servants, agents, contractors and/or any other persons whatsoever, from remaining on, reentering upon, trespassing upon, taking over, damaging, developing, transferring, charging or registering in the name of the 1st defendant or the 2nd defendant, or both defendants, any person other than the plaintiff or in any other manner howsoever interfering with the plaintiff's occupation, possession and quiet enjoyment of the property known as Land Reference Number 11392/2.
- d. An order is hereby made requiring the officer in charge of police division (Gigiri police station) and the officer commanding station (Spring Valley Police Station) to assist in facilitating the execution of the orders herein, if and when required.
- e. General damages for trespass Kshs200,000/-
- f. Costs of the suit and interest

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 5TH DAY OF MAY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Ms Kibore for Mr. Njoroge for the Plaintiff

No appearance for the Defendants

Steve - Court Assistant

