



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 633 OF 2014

BHANUMATI ISHWARLAL GHADIALY.....PLAINTIFF

VERSUS

THOMAS MASEKI MAERA.....1ST DEFENDANT

COMMISSIONER OF LANDS.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff claims that she purchased land reference number 209/2239 (original number 137/39) Nairobi, (“the Suit Property”) with Amritlal Tulsidas Dharamshi Ghadialy. The Suit Property was held as a lease for 99 years from 1/12/1902 subject to payment of annual rent and had a permanent residential building erected on it comprising a single floor house. She claimed that Amritlal Tulsidas Dharamshi Ghadialy, who was an advocate practicing in Nyeri applied sometime in 1999 for extension of the lease over the Suit Property but the application could not be traced in the land registry because the file was missing. She claimed that on 7/3/2014, the National Land Commission (NLC) invited landowners holding expired leases or leases that were about to expire to apply for renewal or extension of their leases. Having complied with the terms and conditions of the lease including payment of land rent and rates, the Plaintiffs forwarded another application for renewal of the lease over the Suit Property.

2. The Plaintiff was notified by a relative that the 1st Defendant in the company of a group of people, trespassed onto and demolished the building erected on the Suit Property on 4/1/2014. The Plaintiff came to learn later that the Commissioner of Lands had purported to allocate L.R. No. 209/2239 to the 1st Defendant on 16/8/2011 without any advertisement in the Kenya Gazette. The Plaintiff claimed that the transfer of the Suit Property to the 1st Defendant was fraudulent and intended to deprive her of her property without compensation. She faulted the 1st and 2nd Defendants for changing the property’s land reference number from L.R. No. 209/2239 to L.R. No. 209/20173 and the deed plan number from 30082 to 326787 and secretly issuing a grant over the Suit Property to the 1st Defendant.

3. In the plaint filed on 22/5/2014, the Plaintiff seeks a declaration that she is still the registered owner of L.R. No. 209/2239 and that the conversion of this parcel of land to L.R. No. 209/20173 was illegal and void. She also seeks a declaration that the grant in respect of L.R. No. 209/20173 by the 2nd Defendant to the 1st Defendant was unlawful and should be cancelled by the Registrar of Titles. She also seeks a mandatory injunction directing the 1st Defendant to vacate the Suit Property within 14 days of the date the court order is made, and a permanent injunction to restrict the 1st Defendant from dealing with the Suit Property.

4. The 1st Defendant filed his defence on 23/10/2018 denying the Plaintiff’s claim and averred that he could not be a trespasser on his own land. He averred that there was no evidence of the Plaintiff’s application for the extension of the lease over the Suit Property. He stated that the demolition that he carried out on L.R. No. 209/20173 was lawful. He further averred that he applied to be allocated L.R. No. 209/2239 whose lease had expired and which had reverted back to the Government and that the Commissioner of Lands issued a title over this land to him after he paid the requisite charges. He maintained that he was legally allocated L.R. No. 209/20173 by the 2nd Defendant and that the value of this land had appreciated and stood at Kshs. 80,000,000/=. The 2nd Defendant filed a defence on 28/10/2014 denying the Plaintiff’s claim.

5. Sanjay Isverlal Ghadialy gave evidence for the Plaintiff. He lives in London with his mother, who is the Plaintiff in this case. His father died in 1969. He stated that he had his mother’s authority to prosecute this case due to the fact that she is elderly and sickly. His mother, Amritlal Tulsidas Dharamshi Ghadialy and Narendra Sidney Ghadialy as administrators of his late father’s estate, jointly purchased the Suit Property from Manibhai Ishwarbhai Patel on 10/4/1971. After acquiring the Suit Property, his family relocated to London leaving some relatives residing on the single floor house constructed on the Suit Property.

6. His family received communication from a relative residing in Nairobi on 6/1/2014 that a group of unknown people had gone to the Suit property on 3/1/2012 at about 12.30 in the company of people wearing police uniform and evicted their relative from the Suit Property claiming that it now belonged to strangers. The family which was residing in the house moved out and went to look for alternative accommodation. The property was demolished on 4/1/2014 and secured by iron sheets on the front and the back. Sanjay came to Kenya on

19/1/2014 and visited the Suit Property. He found guards seated outside the Suit Property. He went to the Directorate of Criminal Investigations to report the matter on 30/1/2014 and was asked to present his ownership documents at the Land Fraud Unit of the Directorate. He produced copies of the documents including the title document and the power of attorney.

7. On cross examination, he conceded that the lease expired in 2002 but maintained that he believed that his uncle who was an advocate in Nyeri applied for extension of the lease. He did not have proof of the application for extension. He did not know the law relating to expired leases. He stated that between 2000 and 2014 they had tenants living in the Suit Property. He had not attended any hearings conducted by NLC.

8. The 1st Defendant gave evidence. He stated that he applied to the Commissioner of Lands on 30/9/2010 to be allocated plot number 209/2239 situated along Keekorok Road in Nairobi and that he carried out searches at the Ministry of Lands and Nairobi City Council and confirmed that the initial lease over the Suit Property which had been issued for 99 years from 1903 expired in 2002. He stated that the Commissioner of Lands approved his application and issued him with grant number I.R. 131366 for L. R. No. 209/20173 and that he had been paying rent and rates to date for this property whose value exceeded Kshs. 80,000,000/=.

9. He claimed that the City Council of Nairobi directed him to repair and paint the premises to the standards required by the Council. He visited the suit premises and found a Mr. Khimji Patel living in the house. When Mr. Patel refused to vacate the premises he went to the Business Premises Rent Tribunal (BPRT) to terminate the tenancy and was issued a notice dated 9/11/2011. When the tenant persisted in refusing to vacate the Suit Property, he filed **ELC No. 330 of 2012** against Khimji Patel and upon determination of the case, the court granted orders compelling the tenant to vacate the Suit Property.

10. He produced copies of the application he made for allocation of the Suit Property dated 30/9/2010 and the letter of allotment in respect of L.R. No. 209/2239 dated 15/2/2011, which demanded payment of Kshs. 256,418/=. The letter of allotment stated that the Government would not accept any liability in the event of prior commitment or otherwise. He produced a copy of the banker's cheque dated 24/2/2011 together with the receipt issued by the lands office on 7/3/2011. He also produced a copy of the letter 24/2/2011 vide which he accepted the offer of allotment of the Suit Property.

11. The rent clearance certificate issued to the 1st Defendant on behalf of the Commissioner of Lands shows that he had paid the rent in respect of L.R. No. 209/20173 up to 31/12/2012. He produced a copy of the notice from the City Council of Nairobi dated 13/10/2011 requiring him to make certain improvements on the structure on the Suit Property. He also produced a copy of the letter dated 15/9/2011 which the City Council of Nairobi wrote to him giving him authority to carry out painting and repair of the wall, floor and windows on plot number 209/20173 Keekorok Road.

12. The copy of the landlord's notice to terminate the lease that he produced showed that he sought to terminate the lease in order to comply with the City Council's requirements to repair and renovate the premises. He also produced a copy of the letter from Rombo and Company Advocates addressed to the BPRT seeking to establish if the tenant, Mr. Khimji Patel had responded to the notice to terminate the tenancy over the Suit Property. The court order issued in **ELC No. 330 of 2012** on 4/11/2013 gave Mr. Khimji Patel 30 days to vacate the suit premises failing which he would be evicted. The 1st Defendant produced documents showing the payments of rent and land rates he made on account of L.R. No. 209/20173.

13. On cross examination, the 1st Defendant stated that he got the land reference number of the Suit Property from the Ministry of Lands. He then changed and stated that he got the land details from the Nairobi City Council. On further prodding, he stated that he got the land reference number from someone whose name he could not recall. He further stated that he consulted a lawyer who advised him that the lease had expired and that it was therefore available for allocation by the Government. He confirmed that he did not enter into any lease over the Suit Property with Mr. Khimji Patel.

14. Parties filed submissions which the court has considered. The issue for determination is whether the court should grant the orders sought in the plaint. The dispute revolves around the validity of the title held by the 1st Defendant over the Suit Property. The 2nd Defendant submitted that the Plaintiff had failed to prove her case since no evidence of the application for extension of the lease was produced in court. The 2nd Defendant relied on Sections 3, 7 and 12 of the Government's Land Act. Further, that the Plaintiff had failed to prove fraud or collusion between the Defendants and contended that the Plaintiff should have joined the NLC as a party to this suit.

15. The 1st Defendant relied on Section 9 of the Land Act in urging that private land may be converted to public land after the expiry of a lease. The 1st Defendant maintained that once the Plaintiff's lease expired, the Commissioner of Lands was at liberty to allocate the land to any deserving applicant following the laid down procedures. The 1st Defendant challenged the power of attorney relied on by the Plaintiff's witness on the basis that it was registered after the Plaintiff's witness had recorded his statement. The court notes that the statement in question was recorded by the witness at the Directorate of Criminal Investigations after the house on the Suit Property was demolished.

16. The Plaintiff submitted that she had a legitimate expectation that the lease would be renewed or extended in her favour. She relied on the case of **Kenya Industrial Estates Limited v Ann Chepsiror and 5 others [2015] eKLR** on the procedure for renewal of expired leases for town plots under the Government Lands Act. In that case, the court stated that a former holder of a government leasehold title who had complied with the terms of the lease had a legitimate expectation that such a lease would be renewed to him by the Commissioner of Lands.

17. The Plaintiff challenged the manner in which the 1st Defendant obtained the grant over the Suit Property. The 1st Defendant gave contradictory responses on how he learnt of the expiry of the Plaintiff's lease over the Suit Property. He did not produce copies of the searches he claimed he carried out on the Suit Property before applying for allocation of the plot. He did not lead evidence to show how the land reference number for the suit land changed from L.R. No. 209/2239 with deed plan number 30082 to L.R. No. 209/20173 with deed plan number 326787. This could only have come about if the land had been resurveyed but no evidence of a survey having been carried out was led by the 1st Defendant. The letter of allotment issued to the 1st Defendant bore L.R. No. 209/2239. It is not known how the land details changed thereafter.

18. It is not clear why the 1st Defendant lodged the notice of the landlord's intention to terminate or alter the terms of the tenancy with the BPRT yet Mr. Khimji Patel was not his tenant.

19. It was not shown that the Plaintiff failed to comply with the terms of the lease which would have disentitled her to an extension of her expired lease over the Suit Property. She had a legitimate expectation that her lease over the Suit Property would be extended when it expired. It would be expected that the application for extension of the lease over the Suit Property which she claims her brother in law who is an advocate in Nyeri made, should have been in the lands file. There is a possibility that that application for renewal of the lease may have been withheld by the lands officials who informed the 1st Defendant of the expiry of the Plaintiff's lease over the Suit Property and who prompted him to apply for allocation of the suit premises. The same lands officials must have played a key role in having the land reference and deed plan number of the Suit Property changed.

20. The Plaintiff has proved her case on a balance of probabilities. The court grants prayers a, b, c, d, e, f and g of the plaint dated 21/5/2014.

21. The court declines to award the Plaintiff general damages because no evidence was adduced on the value of the Plaintiff's structure that was on the Suit Property which was demolished. The Plaintiff is awarded the costs of this suit to be borne by the 1st Defendant.

Dated and delivered at Nairobi this 2nd day of July 2019

K.BOR

JUDGE

In the presence of: -

Mr. Ong'anda Junior for the 1st Defendant

Ms. A. Nyakora for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff