



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 158 OF 2019

NEEM PROPERTIES LIMITED..... PLAINTIFF/APPLICANT

-VERSUS-

WELLS FARGO LIMITED.....DEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiff filed this suit vide the plaint dated 2nd September, 2019. The plaintiff avers that it is the registered proprietor of all those parcels of land being the suit properties registered as CR.25924, Sub-division Number 3362 (original number 957/1) Section 1 Mainland North, Mombasa and CR. 25925 subdivision Number 3363 (Original Number 957/2)Section 1 Mainland North Mombasa. The properties are situated in one compound and surrounded by a boundary wall and with one main gate. The plaintiff avers that it has at all material times enjoyed peaceful, uninterrupted and exclusive occupation and possession of the two properties from 20th July 1994 when certificates of title were registered and over the years engaged in construction of buildings therein.

2. The plaintiff avers that on or about 12th June 2019 at about 10.00 a.m., seven of the defendant's security guards and two unknown male individuals accompanied by police arrived at the suit properties and proceeded to unlawfully and forcibly gain entry into the said properties took possession and occupation without the plaintiff's consent or permission. That they forcibly removed the plaintiff's employees out of the suit properties, claiming that the properties belonged to the two unknown men. The plaintiff's case is that the defendant's actions amount to trespass. The plaintiff avers that the defendant continued to deprive it of its right to access, enter, use and enjoy quiet possession of the property and gravely affecting its business operations. The plaintiff states that it is entitled to general and aggravated damages. The plaintiff avers that despite demand and notice of intention to sue being issued, including a report being made to the police, the defendant has unlawfully continued to remain on the suit properties and have failed, refused and/or ignored to give access and possession back to the plaintiff.

3. The plaintiff prays for judgment against the defendant for:

1. A declaration that the plaintiff is entitled to exclusive and impeded right of possession and occupation of those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North.

2. A declaration that the defendant, whether by themselves or their agents or agents or otherwise howsoever, are wrongfully in occupation and possession of those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North and are accordingly, trespassers on the same.

3. A declaration that the defendant, whether by themselves or their servant or agents or otherwise howsoever, are not entitled to remain on those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North.

4. A temporary injunction prohibiting, preventing or restraining the defendant whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North pending hearing and determination of this suit.

5. In the alternative to prayer 4 hereinbefore, a permanent injunction prohibiting, preventing or restraining the defendant whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise, interfering or dealing with those parcels being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North.

6. A temporary injunction restraining the defendant, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North and for the unconditional release howsoever and return of the parcels of land to the plaintiff, its employees or the plaintiff's duly authorized agents pending hearing and determination of this suit.

7. In alternative to prayer 6, a permanent injunction restraining the defendant, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North and for the unconditional release handover and return of the parcels of land to the plaintiff, its employees or the plaintiff's duly authorized agents.

8. An order evicting the defendant whether by themselves or their agents, employees servants or otherwise from those parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North.

9. An order granting vacant possession of the parcels of land being Subdivision Number 3362 (Original Number 957/1) Section I Mainland North and Subdivision number 3363 (Original Number 957/2) Section I Mainland North to plaintiff

10. An order to the Officer Commanding Station (OCS) Nyali Police Station to enforce compliance of the orders(s) granted.

11. General damages for trespass by defendant

12. Aggravated damages

13. Costs of the suit

14. Interest on (11) and (13) above for such period as the court deems fit at court rates.

15. Any such and further relief as this Honourable Court may deem fit to grant

4. The defendant was duly served with the summons to enter appearance. The defendant, through the firm of Mokaya & Onyambu Advocates filed a notice of appointment of advocate but there was no memorandum of appearance or defence filed within the stipulated time or at all. The matter therefore proceeded for hearing by way of formal proof wherein Mary Wangari Mbugua, Ahmed Salim Hemed and Mark Munge Maina testified on behalf of the plaintiff. They mainly adopted their witness statements and reiterated the contents of the plaint herein.

5. On 9th October, 2020, the plaintiff filed written submissions through the firm of Anne Wamithi and Company Advocates. The plaintiff submitted that it has proven its case to the required standard and as registered owner of the properties, is entitled to the reliefs sought. They also relied on several decisions. The Plaintiff urged the court to award it Kshs.1,55,865.55 being the minimum financial benefit made by the defendant from the said trespass and unlawful occupation and Kshs.1,000,000.00 aggravated damages plus costs of the suit.

6. I have reviewed and considered the pleadings, the evidence tendered and the submissions made. The court identifies the following issues for determination:

i. Whether the plaintiff has proved ownership of the suit properties.

ii. Whether the plaintiff is entitled to the prayers sought.

7. The plaintiff has adduced evidence showing that it is the registered owner of the suit properties. The plaintiff produced certificate of titles and official searches in its name. Nothing has been produced by the defendant to show their nature of claim over the suit properties. The documents produced by the plaintiff showing its interest as the proprietor of the suit properties is conclusive evidence as to its ownership of the said parcels of land. Section 26 of the Land Registration Act provides that:

“The certificate of title issue 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 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 grounds 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.”

8. In this case, the plaintiff's titles have not in any way been challenged by the defendant. No evidence was adduced to the extent that the said titles are invalid and the defendant did not produce any title to show ownership by the party it alleges contracted it to provide security services. Since the plaintiff's evidence was not challenged at the hearing, it is my finding that the plaintiff is the absolute proprietor of the suit properties and therefore entitled to protection as provide under the law.

9. The plaintiff's evidence is that the defendant, through its agents broke into and entered the suit properties and took possession and

occupation without the plaintiff's consent or permission. The plaintiff's attempts to take back possession and occupation failed, hence this suit. There was no justification given by the defendant for entering and taking possession and occupation of the plaintiff's properties. The evidence by the plaintiff remains uncontroverted. Article 40 of the constitution guarantees the property rights of every person and provides under Article 40 (3) that no person shall be deprived of property or any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property. The defendant having not demonstrated my lawful claim to the suit properties whatsoever, it is my finding that the defendant's actions upon the properties legally belonging to the plaintiff without its consent amount to trespass. Trespass is actionable at the instance of the person in possession and proof of ownership is prima facie proof of possession.

10. The next issue to consider is whether the plaintiff is entitled to damages on account of the defendant's trespass. The plaintiff's evidence is that the defendant was unlawfully in occupation of the suit properties from 12th June, 2019 until 20th December, 2019. The plaintiff stated that it could not access the properties where its building materials and equipment were stored and was hindered from performing its operations. No doubt the plaintiff suffered loss and damages as a result of the defendant's actions. As it were, where the plaintiff proves trespass, it is entitled to recover nominal damages even where it has not suffered any actual loss. The plaintiff has prayed for Kshs.500,000/= for each of the property the defendant trespassed upon. The plaintiff has also asked for aggravated damages to the tune of Kshs.1,000,000/=. Aggravated damages are compensatory in nature and be awarded were the defendants action is oppressive arbitrary, or unconstitutional. The plaintiff claims that the defendant's agents used abusive and explicit language, the threat of physical force by the guards using truncheons and physical force used to forcibly remove the plaintiff's employees. The court finds that the plaintiff is entitled to general and exemplary damages for trespass and awards Kshs.1,000,000. In addition the plaintiff asked for a total of Kshs.1,554, 865.55 being the alleged minimum financial benefit made by the defendant from the said trespass and unlawful occupation. There was however no evidence to support this claim. The plaintiff only based its claim on the Regulation of wages (General) (Amendment) Order 2018 Legal Notice No. 2 of 2019 in Kenya Gazette Supplement NO. 1 of the 8th January, 2019 which provides for a minimum daily way of Kshs.653.10 for day watchman and Kshs.726.55 for a night watchman in Mombasa. This claim, in my view amounts to special damages which must be specifically pleaded and proved. The plaintiff neither pleaded nor proved this claim. The court therefore finds that the said sum is not payable.

11. Having now carefully considered the available evidence and the exhibits produced, the written submissions, cited authorities, and the relevant provisions of law, the court finds that the plaintiff has proved its case on the required standard of balance of probabilities. The upshot is that the court enters judgment for the plaintiff against the defendant in terms of prayers 1, 2, 3, 5, 7, 9 and 10. In terms of prayers 11 and 12, the court awards the plaintiff general damages for trespass to the tune of Kshs.1,000,000/=. On costs of the suit, since the plaintiff is the successful litigant, it is awarded costs of the suit and interest thereon at court rates.

12. Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF MAY, 2021

.....
C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE