



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 148 OF 2016

STEPHEN OLANG MISIGAH.....PLAINTIFF

VERSUS

LUSH HOME PROPERTIES LIMITED.....DEFENDANT

JUDGEMENT

Pleadings

1. The Plaintiff filed this suit vide a plaint dated 7th June 2016 and seeks the following prayers:-

- i. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that parcel of land known as Plot No 13611 and 13612/1/MN.**
- ii. A declaration that the defendant whether by itself or its servant or agents and/or otherwise howsoever are wrongfully in occupation of the property.**
- iii. An order that the defendant and all other trespassers do forthwith vacate and deliver vacant possession of the property to the plaintiff.**
- iv. An order of eviction against the defendant, its agents, servants as well as any other parties who the defendant has permitted to occupy any part of the suit properties.**
- v. A permanent injunction restraining the defendant whether by itself or its servants or agents and/or otherwise howsoever from continuing with the unlawful development/erection of the premises and or continuing in occupation of the property.**
- vi. Loss of income for the duration of trespass with interest at commercial rates.**
- vii. General damages for the trespass.**
- viii. Costs of this suit together with interest thereon at such rate and for such period of time as this Honorable Court may deem fit to grant.**
- ix. Any such other further relief as this Honorable Court may deem appropriate.**

2. The plaintiff averred that at all material times he has been the registered owner of the suit properties known as Plot No. 13611 and 13612/1/MN. That in 2016, the defendant wrongfully, illegally and unlawfully entered into, and remained on the suit properties, without permission or authorization from the plaintiff, and continues to illegally occupy and develop the suit properties, preventing the plaintiff from peaceful enjoyment of his properties. The plaintiff further claimed that the actions of trespass by the defendant has led him to suffer loss and damage, since he is deprived of economic use to the suit properties, loss of mesne profit and peaceful enjoyment of his properties and thus prays for judgment against the defendant.

3. The plaintiff served the defendant with summons to enter appearance dated 22nd June 2016 and filed an affidavit of service dated 22nd June 2016. On 17th November 2016, the firm of Njeru & Co Advocates entered appearance on behalf of the defendant, and on 16th January 2018 filed a statement of defence. The defendant pleaded that vide a sale agreement dated 6th August 2013, the defendant purchased Plot No MN/1/13610, MN/1/3611 and MN/1/13612 each at Kshs 8,500,000/= and for a total sum of Kshs 25,500,000/=, from the plaintiff. That by

virtue of paragraph 11 of the sale agreement, they took possession of the suit properties upon payment of Kshs 5,000,000/= to the plaintiff as deposit, and then commenced the development of Simba Village constituting of 54 masonettes. The defendant affirmed ownership to the suit properties, and claimed that, the plaintiff had already signed three transfers in respect of the suit properties in favour of the defendant. The defendant prayed for the suit to be dismissed with costs.

4. The defendant filed bundle of documents on 16th January 2018 that include; sale agreement dated 6th August 2012, photos and plan for Simba village, transfer for MN/1/13610, MN/1/13611 and MN/1/13612 and certificate of title for MN/1/13610. The firm of M/s Njeru & Co Advocates, made an application and was granted leave by court to cease acting for the defendant on 9th October 2018, and consequently court granted leave to the plaintiff on 15th January 2019 to serve the defendant by substituted service. The plaintiff filed three different affidavits of service on 1st November 2019, 3rd March 2020, and 5th November 2020 as proof of substituted service to the defendant.

Evidence.

5. On 5th March 2020, when the matter came up for hearing, the plaintiff was present but the defendant was absent despite being duly served. The Court upon perusal of the affidavit of service filed on 3rd March 2020 was satisfied that the defendant was duly served and the plaintiff was allowed to present his case.

6. Mr. Stephen Olang Misigah (PW1) stated that he entered into a sale agreement on 6th August 2013 with the defendant for sale of three properties MN/1/13610, 13611 and 13612 at the price of Kshs 8,500,000 for each property. That the defendant paid Kshs 5,000,000/= as deposit, and that the balance was supposed to be paid in two instalments. The first instalments of Kshs 3,000,000/= was to be paid within 30 days from the date of the agreement, and the balance Kshs 17,500,000/= was to be paid within 90 days from the date of signing of the agreement. PW1 stated that when the defendant failed to pay the instalments, he wrote to them to pay up the balance or the agreement stands cancelled and they forfeit the deposit. That he then agreed with the defendant to complete payment of Plot 13610, of which the defendant did and he executed the transfer to the defendant.

7. The plaintiff claimed that the defendant has extended their construction onto Plot Nos. 13611 and 13612 which were not transferred to the defendant for nonpayment. He made reference to Paragraph 14 of Page 25 of his bundle of documents, where the defendant admits to owing the plaintiff a debt. He also referred court to Page 34 of his statement, which show pictures of the masonettes that the defendant has built on the plots. He asked the court to order the defendant to demolish them, and also to assess the damage done on the property and award general damages. With that the plaintiff then closed his case.

Submissions

8. The plaintiff filed his submissions on 16th July 2020 and submitted that the defendant only had rights to the property known as Mainland North/1/13610 and not to Mainland North/1/13611 and Mainland North/1/13612 as the same were not transferred to them. The plaintiff also submitted that the defendant did not have permission to deal with the suit properties pending payment of their purchase price. That the actions of the defendant prior to the ruling of this court on 20th September 2017 that granted the plaintiff temporary injunction restraining the defendant from continuing with unlawful developments and occupation of the suit properties, amounted to trespass.

9. The plaintiff further submitted to court that the actions of the defendant of erecting premises on the suit properties caused him loss of income and damages, and that he has a right to action in trespass without proof of any damage as stated in the case of **Park Tower Ltd V John Mithamo Njoka & 7 Others (2014) EKLR**. The plaintiff prayed to court to grant Kshs 500,000/= for trespass since the value of the suit properties after the trespass is unknown. The plaintiff concluded by asking court to enter judgement against the defendant as prayed in the plaint.

ANALYSIS AND DETERMINATION

10. Taking the pleadings, the evidence adduced together with the submissions rendered and authorities in support, this Court is tasked to determine the following questions:

a. Whether the plaintiff is entitled to vacant possession and an order of eviction against the defendants in MN/1/13611 and MN/1/13612.

b. Whether the plaintiffs are entitled to general damages for trespass.

c. Who meets the costs of the suit?

11. On the day fixed for hearing, only the plaintiff attended and court was satisfied that the hearing notice was duly served upon the defendant and proceeded ex parte as provided by Order 12 Rule (2) (a) of the Civil Procedure Rules. Consequently, the defendant did not adduce any evidence before court for consideration. Order 14 Rule 3, states that documents not admitted shall not form part of the record.

12. This court is guided by the Court of Appeal decision in **Kenneth Nyaga Mwigye v Austin Kiguta & 2 others [2015] eKLR** where it was held that:-

‘The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit

by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.’

13. From the material on record, the plaintiff and the defendant entered into a sale agreement on 6th May 2013 for the sale of the following parcels of land; Subdivision Number 13610 (Original Number 13584/27) of Section 1 Mainland North, Subdivision Number 13611 (Original Number 13584/28) of Section 1 Mainland North and Subdivision Number 13612 (Original Number 13584/29) of Section 1 Mainland North with one Certificate of Title dated 30th April 2007. The purchase price for each plot was Kshs 8,500,000 making a total of Kshs 25,500,000/=. The mode of payment was agreed as follows; deposit of Kshs 5,000,000/= to be paid at signing of the agreement and the balance of Kshs 20,500,000/= to be paid in two folds, the first one being Kshs 3,000,000/= within 30 days from date of signing contract and the balance of Kshs 17,500,000/= to be paid within 90 days from the date of signing the agreement or completion date whichever is earlier.

14. Clause 11 of the sale agreement allowed the defendant to have possession on execution of the agreement and payment of the deposit. However the plaintiff pleaded that the defendant did not complete payment of the balance as agreed and on 7th January 2014, the plaintiff wrote to the defendant to inform them that he had cancelled the sale agreement due to their default in paying the balance of the purchase price. On 17th March 2014, the plaintiff again wrote to the defendant proposing two options, to either complete the purchase price of one plot and have it transferred to the defendant or to forfeit the deposit and have the balance refunded.

15. The first issue that this court will deal with is to determine who between the plaintiff and defendant is the owner of the suit properties. The law clearly states that a certificate of title is the conclusive evidence of proprietorship. **Section 26 of the Land Registration Act states that:-**

“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...”

16. The plaintiff has produced a Certificate of Ownership No 2928 with entry No 41 that shows a transfer of the suit properties (Subdivision 13584 Section 1/MN) to the plaintiff on 7th December 2012 and Certificate of title No. C.R 58358 issued. The next entry on the Certificate is No 42 that shows a further transfer of Subdivision No 13610/1/MN to the defendant on 17th July 2014 and Certificate of title No. C.R 63108 issued. The defendant in their statement of defence dated 15th January 2016 have pleaded that they own the suit properties since the plaintiff had already signed transfer documents in their favour. However the defendant did not tender evidence to support their defence which remains mere allegations.

17. Based on the provisions of Section 26 of the Land Registration Act and in the absence of evidence to prove the contrary, it’s conclusive that the plaintiff is still the registered owner of Subdivision Number 13611 (Original Number 13584/28) of Section 1 Mainland North and Subdivision Number 13612 (Original Number 13584/29) of Section 1 Mainland North. The defendant on the other hand is the registered owner of Plot No 13610 of Section 1 Mainland North as seen from the Certificate of Title No C.R 63108 dated 17th July 2014.

18. The plaintiff averred that the defendant breached the sale agreement when they failed to pay up the balance within the timeframe agreed upon, and that their possession of the suit properties amounts to trespass. From the sale agreement, the final installment of Kshs 17,500,000/= was to be paid within 90 days from 6th August 2013 which was the day of execution. The defendant should therefore have completed payments by 14th November 2013. The first notice sent out by the plaintiff to the defendant on 7th January 2014 gave a 10 days’ notice, more than a month after the lapse of the completion date. The last letter sent out to the defendant was done so four months after the lapse of the completion date. I am of the view that the 4 months lapse after the completion date constituted unreasonable delay and the three letters sent out to the defendant were sufficient notice. In my considered view, the said agreement was validly terminated and the plaintiff was entitled to vacant possession.

19. Clause 12 of the sale agreement states that ‘time shall be of essence’. This phrase has been defined in the case of **Elijah Mbatha V Madivest Company Limited (2018)EKLR** where it was held that:-

“Where a contract states that “time is of the essence”, it means that performance of the contract by one party at or within the period specified in the contract is necessary to enable that party to require performance by the other party. Failure to act within the time required constitutes a breach of the contract.”

20. Whereas agreement of sale as signed by the plaintiff and defendant did not provide for termination clause, however clause 3 of the sale agreement states that the sale is subject to the Law Society Conditions of Sale 1989 (now repealed). **Clause 6 (b) of the Conditions states that:-**

“If the contract becomes void or is rescinded, the purchaser shall; Forthwith deliver up possession of the property to the vendor; and Apply any insurance money received by him in respect of the property in making good any loss or damage to the property or otherwise account for the same to the satisfaction of the vendor.”

21. The sale agreement allowed the defendant to take possession of the suit properties after payment of deposit and execution of the

agreement. However the agreement was later rescinded for non-payment of the balance of the purchase price. The defendant was therefore in the suit properties illegally after the contract was rescinded. Trespass is described in **Section 3 of the Trespass Act** as an act where, **any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.** In **CLERK & LINDSEL ON TORTS 16th EDITION, paragraph 23 - 01**, it is stated that:-

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues”.

22. The defendant’s continued occupation on the suit properties from the day the agreement was rescinded is no doubt unauthorized and remains trespass to date. It is trite law that trespass to land is actionable per se (without proof of any damage). In the case of **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR J.M Mutungi J. stated:-**

“I agree with the learned Judges that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique facts and circumstances of each case. ...”

23. In the instant case, the plaintiff testified that the structures constructed on the suit property has caused him loss of income as he is unable to sell them to interested parties. The plaintiff did not tender evidence that would guide court to determine the monetary loss suffered as a result of the defendant’s trespass. Nevertheless this court has found the defendant to be in trespass on the plaintiff’s land and has damaged the same by constructing unauthorized structures thereon. The plaintiff having failed to prove actual loss or provide to court the value of the suit properties before and after the trespass, the Court has no figures to guide in making an award for loss of income, and will only grant a nominal award for general damages.

24. This court associates itself with the findings of Cheronon J, in the case of **Hassan Mohammed Haji v Mohamed Keynan & another [2019] eKLR**, where court granted a nominal award for general damages, and stated this:-

“Granted that Trespass is actionable per se, the Court has noted that the Plaintiff has claimed a sum of Ksh. 1,000,000/= annually to guide the Court in assessing general damages for trespass. The Court would have expected the Plaintiff to obtain the actual benefits accrued by the defendants from the from the suit land for the duration of the trespass. He alleges that the defendants have erected semi-permanent structures in the property. There is no evidence as to any form of activity undertaken by the defendants in the suit property. Such information would have represented the opportunity cost of the deprivation of the use of land by the Defendant continued occupation. None was provided. That notwithstanding taking that into consideration and noting the duration of the trespass and the size of the land, this Court is inclined to award a figure being a nominal award of general damages.”

25. In awarding damages for trespass the court had this to say in **Eliud Njoroge Gachiri v Stephen Kamau Ng’ang’a [2018] eKLR:-**

“As for damages in trespass being an actionable wrong, the court considers a sum of Kshs 100,000/- annually from 2015 and similar amount annually or a part thereof until vacant possession is delivered to the Plaintiff would be sufficient for the continuity of the illegal occupation of the suit land and erected structures thereon by the Defendant.”

26. The upshot is that the Plaintiff has proved his case on a balance of probabilities and I enter judgment in his favour and make the following orders:

i. A permanent injunction be and is hereby issued restraining the defendant whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation and constructing structures on Subdivision Number 13611/1/MN and Subdivision Number 13612/1/MN.

ii. The defendant be and are hereby ordered to vacate and deliver vacant possession of the suit properties, Subdivision Number 13611/1/MN and Subdivision Number 13612/1/MN to the plaintiff within 60 days from the date of service of the decree herein upon them.

iii. In default of compliance with (b) above as aforesaid the plaintiff shall be entitled to an order of eviction for the forcible removal of the defendant, their agents and/or servants from Subdivision Number 13611/1/MN and Subdivision Number 13612/1/MN and the demolition of the structures thereon.

iv. The plaintiff is awarded Kshs. 1,000,000/= as general damages for trespass together with interest at court rates from the date of judgment until payment in full.

v. Costs of the suit are awarded to the plaintiff to be borne by the defendant.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 24th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE