



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 8 OF 2007

JOSPHAT KAZUNGU ZIRO (Suing through CHRISTINE

ZIRO MWATELA (Vide Power of Attorney).....PLAINTIFF

VERSUS

JOHNSON KAVIHA THOYA.....DEFENDANT

AND

HOUSING FINANCE COMPANY OF KENYA LIMITED...THIRD PARTY

JUDGMENT

Background

1. Messrs Housing Finance Company of Kenya Ltd (now the Third Party) initially filed this suit as the Plaintiff against Johnson Kaviha Thoya (the Defendant) vide a Plaint dated and filed on 13th February 2007 praying for: -

- a. Vacant possession of LR No. 3950 (Original M/4/64) Malindi;**
- b. Costs of the suit; and**
- c. Any other relief the Court may deem expedient.**

2. Those prayers were based on the then Plaintiff's contention that on 15th December 1995, it had executed a mortgage with the Defendant against the said LR No. 3950 Malindi under which it advanced a financial facility to the Defendant in the sum of Kshs 421,180/-. The then Plaintiff (now Third Party) accused the Defendant of neglecting and/or refusing to service the loan as a result whereof the facility accumulated an outstanding balance of Kshs 4,498,562.15/- as at 31st December 2005.

3. Apparently on the basis of the outstanding balance the Third Party proceeded shortly after the institution of this suit to exercise its statutory power of sale upon which the suit property was sold and transferred to Joseph Kazungu Ziro Mwatela (the Plaintiff). Subsequently and by an application dated 2nd June 2009, the Third Party sought leave to substitute its own name from the pleadings and to amend the Plaint to reflect the newly registered owner of the property as the Plaintiff herein.

4. That application was allowed and by an Amended Plaint dated 9th October 2009 as filed herein on 17th November 2009, Josephat Kazungu Ziro (the Plaintiff) now prays for Judgment against the Defendant for: -

- a. An order to be issued compelling the Defendant whether by himself, his agents, servants and any other persons authorized by the Defendant to forthwith vacate the property known as LR No. 3950 (Original M/4/64);**
- b. A permanent (order of) injunction restraining the Defendant by himself, agents or servants and any other persons from encroaching, constructing upon or otherwise dealing in any other way with the suit property;**
- c. An eviction order (to) be issued against the Defendant to vacate the suit property;**

d. Damages for loss of rent as pleaded in Paragraph 5; and

e. Such other further relief which this Honourable Court may deem fit to grant.

5. Those prayers arise from the Plaintiff's contention that he is the registered proprietor of the said LR No. 3950 (Original No. M/4/64) Malindi (the suit property) by virtue of an indenture dated 20th February 2007. It is the Plaintiff's case that ever since it purchased the property, the Defendant has wrongfully remained in possession thereof and continues to trespass thereon.

6. The Plaintiff avers that by virtue of the Defendant's trespass and wrongful occupation of the suitland, the Plaintiff has been deprived of the use and enjoyment thereof and has lost rent at the sum of Kshs 15,000/- effective 21st February 2007 when the Indenture was registered.

7. After the amendment however, the Defendant still brought back the initial Plaintiff by filing herein a Third Party Notice on 15th June 2012 where the Defendant claims from the Third Party the following: -

1. Full indemnity for any loss, damage or injury that the Defendant might incur as a result of any Judgment that the Plaintiff might obtain against the Defendant in the suit herein in view of the fact that no statutory notice was ever issued (as) required by law.

2. In the alternative, a declaration that the Third party had no right to exercise its Statutory Power of Sale under Section 69 of the Indian Transfer of Property Act 1882 in the manner in which it did or the said Statutory Power of Sale was not properly or regularly exercised and that as such no proper title was transferred to the Plaintiff by the exercise thereof.

8. By its Defence dated 2nd August 2012 but filed herein on 6th August 2012, the Third Party avers that it executed a Mortgage against the suit property in which it advanced the Defendant a loan facility to the tune of Kshs 421,180/-. The Third Party once again accuses the Defendant of neglecting and/or refusing to pay the principal sum and interest as a result whereof the facility accrued an outstanding balance of Kshs 4,498,562.15/-.

9. The Third Party asserts that it did issue the stipulated notice to the Defendant after which it exercised its statutory right of sale in conformity to all the existing rules and procedures. Accordingly, the Third party denies that the Defendant is entitled to any indemnity for any loss, damage or injury that the Defendant may claim arising from the exercise of its statutory power of sale.

10. By an Amended Statement of Defence and Counterclaim dated 28th May 2015 as filed herein on 25th June 2015, the Defendant denies being in default of any amounts due as per the mortgage executed between himself and the Third Party. Accordingly, he avers that the Third Party had any right to exercise any statutory power of sale over the suit property as stated or at all.

11. In the alternative, the Defendant avers that his non-performance of the Mortgage agreement was as a result of frustration and acts not foreseen or within his control.

12. By way of the Counterclaim, the Defendant avers that he constructed a house on the suitland and that he continued to diligently and faithfully pay the sums due until sometime in 1999 when the Third Party illegally increased the interest rate contrary to the terms of the mortgage agreement. He accuses the Third Party of proceeding sometime in the year 2007 to illegally and fraudulently sell his property vide a private treaty without notice.

13. For the said reasons, the Defendant prays for: -

a. A declaration that the (Defendant) is the rightful owner of the suit property;

b. An order that the sale of the said property was void and an order directing any transfers made subsequent to the said mortgage disposal or otherwise dealing (with the same) cancelled and set aside and a mandatory order of injunction directing that the same do revert to the Defendant;

c. General damages for breach of contract/trust;

d. An order directing the Respondent (sic) to pay an amount of money as may be found due to the Claimant by dint of the difference between the lawful interest and the illegal interest charged considering the principal sum; and

e. Costs together with interest from the date of breach.

The Plaintiff's Case

14. The Plaintiff herein called a total of two witnesses. Neither the Defendant nor the Third Party called any oral testimony at the trial herein.

15. PW1- Christine Ziro Mwatela is a sister of the Plaintiff and a donee of a power of attorney from the Plaintiff. She told the Court her brother purchased the suit property which comprises of residential premises from the Third Party by virtue of an Indenture prepared on 20th February 2007.

16. PW1 testified that since 2007, the brother has never moved to occupy the house as the Defendant has refused to vacate the same. PW1 further told the Court the premises were meant for rental and that his brother has lost rent in the sum of Kshs 15,000/- per month ever since he bought the property.

17. On cross-examination, PW1 told the Court his brother had seen the property being advertised for sale in the Daily Nation Newspaper by the Third Party. The sale was subsequently conducted at the Third Party's offices at Nairobi. PW1 told the Court she was present and that she did witness as his brother executed the Indenture. His brother bought the house for the sum of Kshs 2.5 Million.

18. PW2- Paul Wambua is a Valuer and a member of the Institute of Surveyors of Kenya (ISK). He told the Court he practices as Paul Wambua Valuers and that he was tasked by the Plaintiff to carry out a Valuation and advise on the fair open market rent for the suit property from February 2007 to June 2010. PW1 told the Court he carried out the valuation and that the Valuation Report dated 30th April 2011 was filed in Court on 9th May 2011. The same shows the rent due was Kshs 1,037,500/-.

19. On cross-examination, PW2 conceded that he personally never visited the premises and that instead, he had sent his assistant. He further told the Court they had been informed that the tenants would be hostile and so the assistant carried out an observation of the premises from some 16 metres away. He was however able to compare the rent in the neighbourhood before arriving at the conclusions made in the Report.

Analysis and Determination

20. I have given full consideration to the pleadings filed herein, the testimonies of the Plaintiff's two witnesses as well as the evidence adduced at the trial. I have equally perused the submissions filed by the Learned Advocates for both the Plaintiff and the Third Party. The Defendant neither called any witness nor filed any submissions.

21. The Plaintiff prays for an order compelling the Defendant to vacate the suit property and for a permanent injunction order restraining the Defendant from encroaching upon or otherwise dealing with the suit property. The Plaintiff also claims rent from the Plaintiff in the sum of Kshs 15,000/- per month from February 2007 until such a time that the Defendant shall deliver vacant possession.

22. The circumstances leading to the proceedings herein were rather straight forward from the material placed before me. Sometimes in the year 1995, the Defendant herein approached the Third Party for a mortgage facility to be secured by his parcel of land known as LR No. 3950 (Original Number M4/64) Malindi measuring approximately 0.0450 Ha. Subsequently, on or about 15th December 1995 the Defendant and the Third Party duly executed a Mortgage agreement wherein the Third Party agreed to advance the sum of Kshs 421,180/- on certain terms and conditions specified in the agreement.

23. Apparently, the Defendant was unable to service the loan regularly as envisaged and the account fell in arrears. In his pleadings filed herein, the Defendant asserts that he diligently and faithfully serviced the loan until sometime in 1999 when the Third Party illegally increased the interest rate contrary to the terms of the Mortgage agreement.

24. According to the Third Party, the Defendant's account had as at 31st December 2005 outstanding arrears in the sum of Kshs 4,498,562/-. Thereafter on 13th February 2007, the Third Party instituted these present proceedings as the Plaintiff seeking orders of vacant possession of the suit premises against the Defendant on account of alleged breach of the mortgage agreement.

25. Some seven (7) days after instituting the suit, the Third Party sold the suit property to the current Plaintiff. Some two years later, the Third Party vide an application filed herein on 8th June 2009 sought to remove itself from the proceedings by substituting its name as the Plaintiff with that of the current Plaintiff who had become the registered proprietor of the suit property vide an Indenture by Charge registered on 21st February 2007.

26. By the Amended Plaintiff filed herein on 17th November 2009, the Plaintiff accuses the Defendant of failing to vacate the suit property ever since he bought the same and urges the Court to compel the Defendant to vacate the property and to compensate him the lost rent in the sum of Kshs 15,000/- per month effective February 2007.

27. In support of his case, the Plaintiff produced a copy of the Mortgage agreement between the Defendant and the Third Party dated 15th December 1995. A perusal thereof reveals that in the event of default in payment of the monthly instalments, Clause 8 (i) thereof expressly allowed the Third Party to exercise its Statutory power of sale as conferred by the Indian Transfer of Property Act, 1882.

28. In further support of his case, the Plaintiff produced copies of Statutory notices sent by registered post to the Defendant dated 20th February 2004 and 22nd June 2006 respectively. Both notices sent to the Defendant's address as indicated in the Mortgage agreement gave the Defendant notice to fully settle his mortgage account with the Third Party within three (3) months of the issuance thereof. There was no evidence that the Defendant ever complied therewith.

29. The Defendant neither testified nor provided any evidence of what may have been irregular with the exercise of the statutory power of sale by the Third Party. In the circumstances herein it was clear to me that the suit property had been duly transferred to the Plaintiff and the Defendant no longer has any proprietary right over the suit property that is capable of being enforced by this Court.

30. Even though the Defendant claims that he is still in possession of the property, his equity of redemption was extinguished once the Plaintiff executed the Indenture with the Third Party in the exercise of its statutory power of sale and his only remedy pursuant to Section 69 (b) of the ITPA lies in filing a suit for damages and not in hanging on to the suit property.

31. The Plaintiff has also urged this Court to compensate him for lost rent from the suit premises- which he placed at Kshs 15,000/- per

month. That figure is based on the estimates placed before the Court by the Plaintiff's Valuer Paul Wambua (PW2). I have looked at the figures contained in PW2's Valuation Report dated 30th April 2011 as filed herein on 9th May 2011. That Report had a number of limiting conditions. PW2 himself conceded that they were unable due to hostilities to access the suit premises at the time of valuation.

32. While the Report places the rent at Kshs 18,500/- per month for the year 2007, I note that the Plaintiff himself does not rely thereon and has instead claimed a figure of Kshs 15,000/- per month. Taking all the circumstances into consideration, an award of Kshs 10,000/- per month effective March 2007 would in my view be an adequate compensation for the Plaintiff as damages payable until such a time that the Defendant shall vacate the suit property.

33. Otherwise and for the avoidance of doubt, I did not find any merit in the Defendant's Counterclaim. On the contrary, I am persuaded that the Plaintiff has proved his case on a balance of probabilities.

34. Accordingly, and save for Prayer 'd' for which I award the sum of Kshs 10,000/- per month, Judgment is hereby entered for the Plaintiff as prayed in the Amended Plaint dated 9th October 2009 and filed herein on 17th November 2009.

35. The Defendant has 45 days from today to vacate the premises failure to which he shall forthwith be evicted therefrom.

36. The Plaintiff shall have both the costs of his suit and of the Defendant's Counterclaim.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF JULY, 2021

J.O. OLOLA

JUDGE