



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 53 OF 2020

PREMIER DAFFODIL LIMITED.....PLAINTIFF

VERSUS

SPEEDBIRD TRAVEL AND SAFARIS LIMITED.....DEFENDANT

JUDGEMENT

1. This dispute relates to ownership of land reference number 209/11348 situated in Embakasi Nairobi (“the Suit Property”), which the Plaintiff claims to have purchased from Wrigley Company (East Africa) Limited for Kshs 309,200,000/= vide an agreement of sale dated 19/2/2016. The Plaintiff claimed that from the time the Suit Property was transferred to it, it had actual occupation of the land and enjoyed quiet possession until 31/1/2020 when the Defendant illegally invaded the land. The Plaintiff filed suit on 10/3/2020 seeking a declaration that it was the *bona fide* owner of the suit Property and an injunction to restrain the Defendant from trespassing onto the Suit Property and interfering with the Plaintiff’s possession of the land. It further sought damages for unlawful trespass and interference with its possession of the Suit Property as well as costs for the suit and interest.

2. The Defendant filed its defence and counterclaim in which it averred that the Plaintiff’s purported title over the Suit Property was fraudulent, forged, fake and void and that it had reported the matter to the Director of Criminal Investigations (DCI) who was investigating the Plaintiff’s title. The Defendant averred that the Suit Property was initially owned by Tui Limited which sold and transferred the land and all its shares to the Defendant in 2005. The Defendant counterclaimed for a declaration to the effect that it was the *bona fide* owner of the Suit Property and an order to evict the Plaintiff from the Suit Property. It also sought general damages for the Plaintiff’s unlawful trespass and interference with its possession of the Suit Property, as well as costs and interest.

3. The case was heard on 23/2/2021. The Plaintiff called two witnesses. Betty Atieno, an advocate of the High Court of Kenya who is also a Registrar of Titles working with the Ministry of Lands and Physical Planning gave evidence. She produced various documents relating to the Suit Property whose IR number she gave as 52612. She stated that the Suit Property was originally owned by the Wrigley Company (East Africa) Limited. She produced a copy of the transfer of the Suit Property registered on 6/9/2016 in favour of Daffodil Developers Limited. She stated that the rent clearance certificate for 2016 and the consent to transfer the Suit Property to Daffodil Developers Limited Daffodil Developers Limited dated 1/7/2016 were attached to the transfer documents lodged at the lands office. She confirmed that the application for registration of the transfer bore the official stamp of the Ministry dated 6/9/2016, while the transfer to Daffodil Developers Limited bore the date of 30/8/2016. She added that the booking number 573 appearing on the application for registration was affixed on the face of the transfer document. She added that the Collector of Stamp Duty endorsed the transfer dated 30/8/2016 with the valuation stamp of Kshs. 440,000,000/=.

4. Further, she stated that the Plaintiff applied to change its name from Daffodil Developers Limited to Premier Daffodil Limited, which was done on 3/7/2019. She produced a copy of the title over the Suit Property reflecting the changed name. She pointed out that under the special conditions for the grant of the Suit Property, the land was to be used for inoffensive light industrial purposes with auxiliary offices and stores. She testified that the deed plan annexed to the Plaintiff’s title over the suit land indicated that L.R. No. 209/10601 was the land neighbouring the Suit Property and indicated the correspondence file number as 126178 at the top right margin.

5. Regarding the title held by the Defendant over the suit land, Ms. Atieno stated that it reflected Vanguard Agencies (East Africa) Limited as the initial registered proprietor and bore a stamp dated 23/5/1991 which was non-existent in the official records kept at the Ministry of Lands. She pointed out that the Defendant’s title did not reflect the correspondence file number compared to the copy held at the Lands Office records. Further, that the special condition on the Defendant’s title read that the land would only be used for residential purposes. She pointed out that the deed plan attached to the title held by the Defendant did not bear the file correspondence number and that it described the neighbouring parcel of land as L.R. No. 209/106.

6. She stated that the records held by the Ministry of Lands showed the Plaintiff as the registered owner of the Suit Property and that the documents the Defendant relied on did not form part of the lands records. She produced a copy of the book register which showed that presentation number 801 dated 6/8/2009 reflected in the Defendant’s title related to a power of attorney and not the transfer as indicated on

the Defendant's title. She maintained that the transfer documents in favour of the Defendant did not exist in the records held at the Lands Office.

7. Regarding the letter dated 10/6/2020 which the Defendant relied on as being authored by her, she clarified that the signature appearing on that letter was not hers. She added that the letter was vague in its reference to all documents originating from that office. In addition, she stated that the official records did not reflect the manual and online searches which the Defendant relied on, which would confirm that such searches were lodged and acted upon at the lands office. She termed the letter dated 10/6/2020 which the Defendant relied on as a forgery and maintained that that letter did not emanate from the Ministry of Lands and Physical Planning.

8. On the Defendant's letter dated 15/6/2020, Ms. Atieno pointed out that even though the letter was addressed to the Ministry of Lands, it did not bear the Ministry's official receipt stamp. She clarified that all letters addressed to the Ministry of Lands are officially stamped with the date on which they are received. She denied that the signature appearing on the letter dated 24/6/2020 was hers, while pointing out that the letter made reference to both correspondence and deed files records which was an error because correspondence files are never checked to confirm ownership of title. Further, that matters relating to correspondence files were handled by land administration officers and not the Land Registrar. She concluded that according to the official records held at the lands office there were no documents evidencing the transfer from Vanguard Agencies (East Africa) Limited to Tui Limited nor were there documents in respect of the transfer of the suit land from Tui Limited to the Defendant.

9. On cross examination, Ms. Atieno stated that she had been a Land Registrar for 15 years in Nairobi. She clarified that a deed file had a register, office title together with all the documents registered against that parcel of land. She had come to court with the deed file in respect of the Suit Property whose IR number she gave as 52612. She confirmed that the deed file contained the title over the Suit Property, a transfer registered as entry number 2 to Daffodil Developers Limited on 6/9/2016. The first entry on the title bore the name of Wrigley (East Africa) Company Limited and was registered on 23/5/1991. The third entry which was registered on 3/7/2019 reflected the change of the proprietor's name to Premier Daffodil Limited.

10. She clarified that the franked stamp appearing on the Defendant's title did not originate from the Ministry of Lands and that they had one standard machine for franking. She could tell by looking at the stamps that the Defendant's title was fake. Ms. Atieno stated that she was familiar with her colleagues' handwritings and signatures owing to the length of time that she had worked with them at the Ministry of Lands. She added that deed plans were usually assigned IR Numbers which were running numbers and that the correspondence file number is endorsed on the deed plan or on the title if it is a new allocation of land. She clarified that the practice of endorsing the correspondence file number on the deed plan had been there for long. She did not have the correspondence file in court which she stated was kept by the Land Administration Office. She also clarified that the Chief Land Registrar was the custodian only of the land files and registers. She confirmed that she had recorded a statement with DCI who were investigating the letter purported to have been signed by her.

11. Kirankumar Chandubhai Patel, a director of the Plaintiff also gave evidence. He replaced Mr. Dushyant Patel who was scheduled to give evidence but was unwell at the time the case was heard. He stated that the Plaintiff's predecessor was incorporated on 24/2/2016 under the name Daffodil Developers Limited with the intention of making it a special purposes vehicle for investment in the land forming the Suit Property. They changed the name to Premier Daffodil Limited on 29/5/2019. He stated that the Plaintiff was the registered owner of the Suit Property measuring 3 hectares and produced copies of the certificate of incorporation and certificate of change of name. He also produced a copy of the sale agreement over the Suit Property dated 19/2/2016 entered into by the Wrigley Company (East Africa) Limited on the one hand and Siddharth N. Patel, Dushyant N. Patel, Kirankumar Chandubhai Patel and Jitendra Patel, on the other hand, for Kshs. 309,200,000/=. The agreement indicated that the land was bought with vacant possession. He produced a copy of the transfer and correspondence exchanged by the lawyers regarding the sale of the Suit Property. Pramod Patel Advocate represented the purchasers while Anjarwalla Khanna Advocates represented the vendor. He produced a copy of the resolution authorising the transfer of the suit land by Wrigley Company (East Africa) Limited dated 18/7/2016. He stated that the Plaintiff paid the stamp duty for the transfer in the sum of Kshs. 176,000,040/= on 2/9/2016 and emphasised that not only did it pay the stamp duty, but that the full purchase price was paid to the vendor. He produced a copy of the letter from Anjarwalla and Khanna Advocates dated 26/7/2016 acknowledging receipt of payment of Kshs. 278,280,000/= from Daffodil Developers Limited.

12. Mr. Patel was aware that at the time of purchase of the Suit Property, Daffodil Developers Limited sought and was granted authority by the Kenya Pipeline Company Limited (KPC) to construct a permanent access road on the Suit Property. He produced a copy of KPC's letter dated 5/8/2016 on the authority to build an access road across the pipeline wayleave. He added that the Plaintiff constructed the small bridge that provides access to the Suit Property with the permission of KPC and the Kenya Power and Lighting Company Limited (KPLC). He added that the Plaintiff sought the approval of KPC to erect a perimeter wall round the suit land.

13. He testified that sometime in 2018 and 2019 the Kenya Ports Authority (KPA) and the Ministries of Transport and Lands expressed an intention to compulsorily acquire the Suit Property from the Plaintiff. He produced copies of the correspondence from KPA and Hassan Alawi Advocates on the intended acquisition of the Suit Property by KPA. He explained that the proposed acquisition aborted.

14. It was brought to Mr. Patel's attention on 31/1/2020 that some unknown persons had forced their way into the Suit Property with earthmovers and caterpillars and started excavation. Upon inquiry they were informed that Mr. Dave Munya Mwangi, a director of the Defendant was responsible for those activities. He pointed out several anomalies and discrepancies which led him to believe that the Defendant's title was fake. Some of these were that the valuation for rates filled by the Defendant on 13/5/2019 showed that they were transferring the rates records from the Wrigley Company (East Africa) Limited which logically would mean that Tui Limited did not feature in the Nairobi City Council records yet the Defendant claimed that Tui Limited owned the Suit Property between 2004 and 2009. He stated that he undertook a search over Tui Limited and the Defendant had noted that the companies were family companies owned by Mr. Dave Mwangi and his family. He intimated that the sale between the two companies with the consideration of Kshs. 65,000,000/= depicted was a way of disguising the fraud.

15. The Plaintiff's director pointed out that despite claiming to have owned the Suit Property since 2004, neither the Defendant nor Tui Limited put up a perimeter fence nor did they undertake any development on the suit land. The Plaintiff also pointed out that there was no record showing that Tui Limited was the owner of the Suit Property. He averred that the Defendant's trespass and illegal construction on the

Suit Property amounted to gross violation of the Plaintiff's rights to its property enshrined in Article 40 of the Constitution. Mr. Patel pointed out that in the land transfer authorisation form dated 13/5/2019, the Defendant indicated that Wrigley Company (East Africa) Limited was transferring the Suit Property to the Defendant. He maintained that the Defendant had not exhibited any agreement for sale or transfer between Vanguard Agencies (East Africa) Limited and Tui Limited, or the one between Tui Limited and the Defendant. He pointed out other irregularities apparent on the purported transfer of shares from Tui Limited to the Defendant and urged the court to grant the orders sought in the plaint.

16. On cross examination, Mr. Patel stated that there was a board resolution for Wrigley's Company (East Africa) Limited to sell the Suit Property to the Plaintiff. The Plaintiff dealt with Daniel Omusa who was a director of Wrigley's Limited, and whose name appeared on the board resolution. Mr. Omusa also signed the letter of offer.

17. Dave Munya Mwangi gave evidence for the Defendant. He stated that the Suit Property was originally registered in the name of Vanguard Agencies (East Africa) Limited, and that this company transferred the land to Tui Limited on 4/5/2004. He stated that he acquired shares in Tui Limited with his wife in 2005 and that all the necessary formalities on the change of ownership were carried out and they became shareholders and directors of Tui Limited. That at the time they acquired Tui Limited, it owned certain properties including the Suit Property which he and his wife acquired. He stated that Tui Limited transferred the Suit Property to the Defendant on 6/8/2009 pursuant to which a title was issued to the Defendant. He added that the Defendant had fully paid the land rent and rates due for the Suit Property for all the years to date and that he had receipts to prove the payments made.

18. Mr. Mwangi stated that the Defendant had been in possession of the Suit Property since 2009 and had carried out extensive developments on the land until it was stopped by this court's order. He denied that the Plaintiff had been in occupation of the Suit Property and added that the Plaintiff started claiming ownership of the land in 2019 and gave him copies of its ownership documents which upon checking at the lands office he was informed that those documents were fraudulent, forged and fake. He reported the matter to DCI who were investigating that issue. He urged the court to grant the orders sought in the counterclaim.

19. Mr. Mwangi produced a copy of the title issued on 23/5/1994 to Vanguard Agencies Limited. Entries number 2 and 3 endorsed on the title reflect the transfers to Tui Limited and the Defendant respectively. He produced a copy of the form of transfer dated 30/9/2005 in respect of Tui Limited, the resignation by W. M. Mbitiru and the companies' records relating to Tui Limited. He produced a copy of the rates demand dated 25/3/2020 for the Suit Property. He also produced demand notes dated 24/1/2020 and others dated 16/3/2020 issued to Kenya Insurance Corporation for L.R. No. 209/13306. He produced a copy of an official search dated 17/1/2020 showing that the Suit Property was transferred to the Defendant on 8/6/2009. He produced a copy of the letter dated 17/10/2019 which he wrote to the DCI complaining about the interference with the Suit Property.

20. He also produced documents relating to Wrigley Company (East Africa) Limited. He tendered in evidence a copy of his advocate's letter dated 15/6/2020 addressed to the Land Registrar seeking to confirm ownership of the Suit Property. He produced a copy of the letter dated 24/6/2020 on the notepaper of the Ministry of Lands and Physical Planning stating that the Suit Property was first granted to Vanguard Agencies Limited who transferred it to Tui Limited, which then transferred the land to the Defendant. He also produced copies of the letters dated 10/6/2020 and 24/6/2020 from the Ministry of Lands.

21. On cross examination, Mr. Mwangi stated that he did not have the transfers from Vanguard Limited to Tui Limited as well as the one to the Defendant. He stated that he bought the company known as Tui Limited together with its other assets for Kshs. 5,000,000/= but did not have evidence of this in court. He neither had the sale agreement in court nor did he have evidence of the payment of stamp duty for the transactions. He maintained that the Land Registrar who testified in the suit wrote to him a letter which needed to be subjected to a document examiner. He stated that the DCI had not completed investigations into the ownership of the Suit Property.

22. Parties filed submissions, which the court considered. The Plaintiff submitted that the main issues for determination was who between it and the Defendant was the lawful owner of the Suit Property and what reliefs the court should grant in this suit. It relied on Article 40 of the Constitution on the right to acquire and own property and a certificate of title being *prima facie* evidence of ownership of land pursuant to Section 26 of the Land Registration Act unless the certificate was acquired illegally, unprocedurally or through a corrupt scheme.

23. The Plaintiff relied on **Florence Wairimu Nduru v Ruth Wanjiru Mukunga & 2 Others [2020] eKLR** in which the court stated that for it to determine who had a valid claim over disputed land, it had to examine who between the two parties had established the root of their title. The Plaintiff submitted that the root and sanctity of its title was decipherable but the same could not be said of the Defendant's title. It submitted that it had demonstrated that it purchased the Suit Property from Wrigley Company (East Africa) Limited, and produced correspondence on the payment of the purchase price, the agreement for sale, evidence of payment of stamp duty, rates clearance certificate and the certificate of change of name. It submitted that the Defendant had failed to show the root of its title over the Suit Property.

24. The Plaintiff also relied on the correspondence it had exchanged with the Ministry of Transport, Infrastructure, Housing and Urban Development, KPA, the National Land Commission and KPC. The Plaintiff urged that since the title issued to Wrigley's Company (East Africa) was granted in 1991, Vanguard Agencies (East Africa) Limited could not have acquired a good title to the Suit Property. The Plaintiff submitted that the evidence of Betty Atieno, a Registrar of Titles, was sufficient to impeach the documents held by the Defendant including its certificate of title.

25. The Plaintiff submitted that it had demonstrated trespass on its land by the Defendant and relied on the photographs exhibited, while urging the court to grant it general damages of Kshs. 1,000,000/= for trespass as being *metu* in the circumstances of this case.

26. The Defendant submitted that the Plaintiff's witness failed to produce evidence to show that investigations on the purported forgery of its title were ongoing. It maintained that the letters in question which it produced in evidence emanated from the Ministry of Lands and confirmed that the Defendant's title was legitimate. It faulted the Registrar of Titles who testified for failing to produce the correspondence file and the reference book and maintained that her testimony was not backed by evidence. The Defendant maintained that it was the registered proprietor of the Suit Property and relied on a copy of its title while maintaining that there was no evidence of the alleged fraud

nor was there any allegation of unlawful acquisition of the land by the Defendant. It relied on the decision in **Teresiah Njeri Mwangi Another v Rosaline Kamunyu & 2 Others [2019] eKLR** on the court's obligation to investigate the root of title. It submitted that it had established its root of title by explaining that the Suit Property was originally registered in the name of Vanguard Limited before being transferred to Tui Limited which eventually transferred it to the Defendant. It maintained that fraud had not been proved against it or misrepresentation hence its title should not be impeached. It reiterated that it held a valid title and added that not even earlier irregularities to which it was not a party could lead to impeachment of its title over the suit land. It maintained that the Plaintiff had failed to prove fraud on its part and urged the court to allow its counterclaim.

27. The issue for consideration is who between the Plaintiff and the Defendant holds a superior title to the Suit Property. Official records relating to land transactions are maintained and kept in safe custody by the land registry under Section 7 of the Land Registration Act. The Plaintiff called Ms. Betty Atieno, a Registrar of Titles to give evidence on its behalf. Ms. Atieno produced copies of documents showing the registration of the transfer from Wrigley Company (East Africa) Limited to Daffodil Developers Limited on 6/9/2016. She confirmed that the change of the name of the proprietor from Daffodil Developers Limited to Premier Daffodil Limited was done on 3/7/2019 and produced a copy of the title over the Suit Property reflecting the changed name. She denied that the documents which the Defendant relied on emanated from the Ministry of Lands and disclaimed the letters which the Defendant produced, claiming that she wrote the letters to confirm the Defendant's ownership of the suit land.

28. What emerges from the documents which the Defendant produced is that the Suit Property initially was owned by Wrigley (East Africa) Limited. Unlike the Plaintiff, the Defendant did not produce any documents tracing its title to this company. The Defendant failed to prove how it obtained the title it claimed to have over the Suit Property. It did not produce copies of the transfer of the land from Wrigley Company (East Africa) Limited to Vanguard Agencies or the transfer from Tui Limited for that matter. It also failed to produce evidence of the registration of the transfer from Tui Limited to its name. On these grounds, the Defendant's claim to the suit land must fail for its failure to trace its root of title.

29. The Plaintiff has proved its case on a balance of probabilities. The court grants prayers (a) and (b) sought in the plaint. The court awards the Plaintiff general damages of Kshs. 1,000,000/= for trespass. The Defendant's counterclaim dated 26/5/2020 is dismissed. The Defendant will pay the Plaintiff the costs of the suit and the counterclaim.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. E. Mwangi and Mr. D. Kimani for the Plaintiff

Ms. Eva Musa for the Defendant

Mr. V. Owuor- Court Assistant