



REPUBLIC OF KENYA

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IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

LAND SUIT E & L NO. 286 OF 2012

FORMERLY CIVIL SUIT NO. 130 OF 2006

HASHAM LALJI PROPERTIES LIMITED.....PLAINTIFF

VERSUS

HASSAN K. KOSKEY alias JASSAN K. KOSKEY.....DEFENDANT

JUDGEMENT

The plaintiff, Hassam Properties Limited has come to court against the Defendant Hassan Koskey alias Jassan K. Koskey claiming to be the proprietor of the leasehold interest in the parcels of land situate in Uasin Gishu District and known as Eldoret Municipality Block 6/115 (0.0464 Ha) and Eldoret Municipality Block 13/60 (0.7564 Ha). The said properties are developed with buildings (residential) thereon and have been used as such for a long time. The defendant has been occupying parcel known as Eldoret Municipality Block 6/115 and has been paying rent albeit irregularly to the Plaintiff through its authorized agents.

The plaintiff claims that on or about 26/10/2006, when he did official searches on the suit properties, to its astonishment, discovered that the Defendant had, on or about 30/8/2006, caused cautions to be placed on the land register wherein the Defendant claims to have “purchaser’s interest” in the suit properties.

The Plaintiff further obtained copies of the cautions, dated 28/8/2006, a letter dated 16/5/2005 purportedly written by the Plaintiff and addressed to the Defendant, a letter dated 27/8/2002 also purportedly written by the Plaintiff to the Defendant and the two letters purported to imply that the suit properties had been sold to the Defendant by the Plaintiff. The Plaintiff has also received a letter dated 10/11/2006 from M/s Wagara, Koyyoko and Company Advocates, who appear to act for the Defendant, seeking that the Plaintiff does execute transfers in favour of the Defendant in relation to the suit properties.

The Plaintiff states that It has never sold the suit properties to the Defendant or any other person, and has never negotiated the sale or receive any money from the Defendant, in relation thereto. The Defendant has been a tenant over parcel No. Eldoret Municipality Block 6/115 and has never bought the same. The tenancy was terminated by the Plaintiff in September, 2006.

The plaintiff contends that the cautions placed on the suit properties and the statutory declarations in support of the caution are based on falsehoods. The letters dated 16/5/2005 and 27/8/2002 purportedly done by the Plaintiff and purportedly signed by A.H. Lalji are both forgeries, and did not emanate from the plaintiff. The said A.H. Lalji never signed the said letters and no officer of the Plaintiff has signed or written letters, concerning the suit properties, addressed to the Defendant.

That the Plaintiff claims that he has not entered into any contract with the Defendant for sale of the suit properties. That certificate of leases and other documents hitherto in custody of the Plaintiff have over a period of time gone missing and this fact has already been advertised in the press. That the Defendant has formed the habit of forging documents in the name of the Plaintiff or its officers and has gone ahead to irregularly and illegally acquire other properties of the plaintiff and there is a suit pending in this court, against the Defendant. The Plaintiff is apprehensive that the Defendant is now laying a basis to acquire the suit properties herein unless restrained by orders of this court.

The Plaintiff further states that the Defendant has unlawfully, illegally and in total disregard of the law, taken possession of land parcel number Eldoret Municipality Block 13/60 and a report was made to the Eldoret police Station and unfortunately, for reasons not know to the Plaintiff, the police have been reluctant to take action against the Defendant. The Plaintiff avers that the acts by the Defendant are illegal, fraudulent and intended to unlawfully acquire the Plaintiff’s properties.

The particulars of forgery, illegality and fraud are that the Defendant forged the letters dated 16/5/2005 and 27/8/2002 and that the Defendant gave a false statutory declaration in support of the caution vide the declarations sworn on 26/8/2006 allegedly before Mr.

Hilary K. Chemitei Advocate. The Defendant fraudulently and without lawful cause placed cautions on the suit properties on 30/8/2006. The Defendant illegally chased the security guards of the Plaintiff and took over control of parcel No. Eldoret Municipality Block 13/60, and continues to do so to date. That the Defendant, a tenant on one of the suit properties, now wants to claim that he is the owner thereof without any basis. That on or about 10/11/2006, the Defendant fraudulently instructed his advocates to write a letter dated 10/11/2006 demanding the transfer of suit properties to him without having bought the same.

Reasons wherefore the plaintiff prays for a permanent injunction to restrain the Defendant by himself or by his agents and/or servants from claiming ownership of the suit properties, interfering with the Plaintiff's rights as proprietor, taking possession as owner, placing cautions on, procuring any right as proprietor, or in any other manner interfering with land parcels Eldoret Municipality Block 6/115 and 13/60. Moreover, orders removing the cautions, inhibitions or restrictions placed by the Defendant on the suit properties and eviction orders against the Defendant and/or his agents and servants from parcel Eldoret Municipality Block 13/60 and Eldoret Municipality Block 6/115. Furthermore, a declaration that the Defendant did not buy the suit properties from the Plaintiff at any time. Last but not least, an order for mesne profits to be assessed by the Court for the period the defendant has been, or shall be in unlawful possession of the suit properties and Costs of this suit and interests.

The Defendant on his part states that the plaint as drawn and filed is fatally defective, discloses no or any reasonable cause of action and prays that the suit be struck out *in limine* with costs. The defendant contends that the plaintiff's suit is an action brought in bad faith, despair and deceit. The same is contrary to statute, public policy, and an affront to the smooth and proper administration of due process and that the Plaintiff's suit is a fraud upon the Honorable court and gross abuse of due process. The suit is a concerted scheme by the plaintiffs to achieve unjust enrichment and take undue advantage of the defendant.

The defendant admits that the plaintiff is the registered proprietor of all those parcels of land known as Eldoret Municipality Block 6/115 and Eldoret Municipality Block 13/60 herein after referred to as 'the suit properties'. The defendant further states that he has a purchaser's interest over the suit properties.

The defendant states that sometimes in the year 2002 one Ahmed Hasham Lalji a director of the Plaintiff company informed him that the Plaintiff was desirous of selling the suit properties. The purchase price was negotiated and agreed as follows:

- a. LR Number Eldoret Municipality Block 6/115 would be sold at kshs. 4,500,000.00.
- b. LR Number Eldoret Municipality Block 13/60 would be sold at Kshs. 8,000,000/=.

Upon conclusion of the negotiations the Defendant effected payment receipt whereof was acknowledged by the Plaintiff, possession given together with the original certificate of lease to LR Number Eldoret, Municipality Block 13/60. The plaintiff did inform the Defendant that the certificate of lease for LR Number Eldoret Municipality Block 6/115 was misplaced and would be released as soon as it was traced. The Defendant further states that the contentions in the plaint are fraudulent, misleading, falsehoods and made with the intention of unjust enrichment.

The Defendant specifically denies that letters dated 16th May 2005 and 27th August 2006 referred to in paragraph 7 of the plaint are forgeries. The Defendant states that he personally collected the said letters from one Ahmed Hasan Lalji a director of the Plaintiff company who he has been known to him for over 20 years. Save that a complaint was lodged by the Plaintiff at the Eldoret Police Station, the Defendant denies the contents of paragraph 10 of the plaint and states that the investigating officers at Eldoret Police Station found no merit in the Plaintiff's complaint and as a result the same was dismissed and no charges were preferred. The Defendant specifically denies that he took the law into his hands, states that the key to the premises was voluntarily given by the Plaintiff.

The Defendant denies particulars of forgery illegality and fraud and further states that the letters dated 16th May 2005 and 27th August 2002 were signed and delivered to the Defendant by Ahmed Hasham Lalji. The Defendant placed cautions on the suit properties to protect his interests over the same. The statutory declarations are not falsehoods. They portray the true factual position of the matters deposed therein and the Plaintiff is put to strict proof. The defendant's Advocates letter dated 10th November 2006 was not fraudulent in any manner or at all. Subsequent to the said letter the Plaintiff's advocates placed a false, fraudulent and misleading advertisement on the Daily Nation of 16th November 2006 alleging that the certificate of lease to LR Number Eldoret Municipality Block 13/60 was lost a fact which the Plaintiff and its advocates knew was false. The misleading fraudulent and false advertisement was corrected by the Defendant's advertisement on the same Newspaper dated 16th November 2006.

In the Counter Claim, the defendant states that these proceedings are a scheme employed by the Plaintiff in the counterclaim to camouflage, its change of mind in the sale transaction of the suit properties and to fraudulently and unjustly enrich itself from the proceeds of sale and abdicate its obligations under the transaction. The Defendant states that the Directors of the Plaintiff company have had several disputes relating to the disposal and or ownership of properties which were bequeathed to them upon the demise of their father through the Defendant company.

The Defendant avers that he is aware that soon after concluding the sale transaction herein one Mr. Badru who is a brother to said Directors learnt of the transaction herein objected to the same and is challenging the sale on the grounds that the suit properties were being sold behind his back and to defraud him of his share in their late father's estate. The defendant therefore states that these proceedings have been brought in bad faith by the Directors of the Plaintiff to sanitize the change of mind in the transaction and to appease their brother Mr. Badru.

The defendant further states that it has a purchaser's interest on the suit properties, the sale of which and receipt of money whereof has been duly acknowledged in writing by the plaintiff. The cautions placed over the properties are lawful and cannot be removed as the Plaintiff is purporting to do in these proceedings.

In the premises of the foregoing, the defendant prays for an order of specific performance compelling the Plaintiff to perform its obligations in the transactions and prepare and execute deeds of conveyance for the suit properties to the defendant and in the alternative thereof, the defendant states that it is unlawful, inequitable and unjust enrichment for the plaintiff to retain the purchase price of the sale transaction together with proprietary interests over the suit properties. The defendant further states that the said purchase price is for restitution. The defendant thus prays for restitution of the sum of Kshs. 12,500,000.00 from the Plaintiff. A permanent injunction restraining the Defendant by itself, its agents and or servants for selling, disposing of, changing or in any other manner interfering with ELDORET MUNICIPALITY BLOCK 6/115 and 13/60. Costs of the counterclaim together with interests thereon at court rates.

In the reply to defence and defence to the counter claim, the plaintiff states that no money was received from the defendant and no contract within the meaning of the law of contract Act Cap 23 Laws of Kenya and no documents under the registered land Act cap 300 Laws of Kenya have been executed by the Plaintiff in favour of the defendant and therefore no consent under the Land Contract Act was ever sought and obtained from the relevant authority.

When the matter came up for hearing, the plaintiff called six witnesses. PW1 Ahmed Hasham Lalji Nurani testified that the plaintiff is a limited liability company and that he was one of the directors. The suit properties belong to plaintiff. He produced the certificates of lease. He produced evidence that the Plaintiff has been paying rates and the land rent. He produced evidence that the defendant was a tenant of the Plaintiff running a hospital on the premises. He was surprised when the defendant demanded that they transfer the property to him. The defendant invaded the properties and that is why the plaintiff came to court. He denied having authored the letter dated 27/8/2002. He denied that the company sold the property to the defendant. He demonstrated that he was not in the Country on 27/8/2002. The Managing Director was Ismael Lalji. He produced evidence that he left the country on 14/8/2002 and returned on 14/9/2002. He produced a copy of the passport as evidence. On cross-examination by Mr. Waigara, he denied having authored the letters dated 27/8/2002, 16/8/2005, 6/7/2006. He complained to the CID and it was revealed that they were forged signatures.

PW2 Eric Njuguna a certified Public Accountant testified that he knew the plaintiff and had been auditing their accounts for 17 years. He testified that he audited the accounts of the plaintiff and verified that he property was still in their name. PW3, Diamond Hasham Lalji, the Chief Executive testified that he had the authority to testify and also file the case. The suit properties belong to Hashm Lalji Properties Ltd. He produced the certificates of official search. He denied having sold the properties to the defendant. The defendant was a rent paying tenant. The company has never offered the property for sale. On cross-examination, he reiterated that the Land Registrar placed caution in the register of the properties to protect the same property. PW4, Emanuel Korise Kenga a document examiner formerly employed by the National Government in the National Police Service as a Commissioner of Police in Charge of document examination a department in the CID. He stated that he was approached to examine the letter dated 27/8/2002 addressed to Hassan K. Koskei. There is a signature purported to be signed by A. H. Lalji. He compared this signatures with the known signatures of A.H. Lalji and found that the purported signatures did not agree with the known signatures. On cross examination, he admitted that at the time of examination, the documents had been made 14 years before and that he relied on photocopies. PW5, the Land Registrar testified that he had custody of the land records in respect of the suit properties. He produced certified copies. Block 15/60 is registered in the plaintiff's name having been registered on 30/4/1979. There were a cautions entered by the Land Registrar prompted by Hashim Lalji Properties Ltd and Hassan. K. Koskei. PW6, was the in charge of the Civil Division of the High Court of Kenya Eldoret. He produced file no. 102 of 1995 where the Plaintiff was Visram buildings whilst the defendant was the defendant therein. The suit was filed on 19/2/1995. The Plaintiff was claiming Kshs. 1,935,987 from the defendant and a decree was issued on 4/10/1999. There was application for execution of decree field on 7/4/2000. In summary, the defendant was not able to pay the decretal sum and was imprisoned in Civil Jail.

At the close of the plaintiff's case, the defendant was called to give evidence and adopted his statement dated 26/8/2013. He further testified that he was a wealthy man with a hotel valued 45,000,000/=. He did not pay Vishra the debt because he did not owe them anything. He decided to go to jail rather than pay a debt he did not owe. He states that the suit property belonged to Hashm Lalji properties. Ahmed Lalji wanted to sell the property Block 6/115. The plaintiff also agreed to sell Block 13/115. The defendant paid Kshs. 4.5 million for Block 6/115 and Kshs 8,000,000 for Block 13/60. He relied on the letters dated 6/5/2005 and 27/8/2002 by Ahmed Lalji who received Kshs. 4.5 million and 8 million respectively. He denied having forged any document. He was not charged as the Attorney General found that the document had been signed by one person. On cross-examination by Mr. Ngeno he states that he was a tenant on Block 6/115 from 2002 paying rent until 4/2/2003. On Block 13/60, he was not a tenant. He does not have an agreement for sale. He did not enter into agreement with Ahmed Hashm Lalji. He paid Ahmed money without an agreement. The money was in the house and not in the bank.

I have considered the evidence and submissions on record and do find that the genesis of this dispute are the two letters dated 27/8/2002 and 16/5/2005.

In the letter dated 27/8/2002, it is alleged that A. H. Lalji the Managing Director of Hehsm Lalji Properties Ltd wrote to the Defendant stating that despite receiving his monies of Kshs 4,500, 000 and entering into transactions with them over the suit parcel of land no. 6/115, they would only indicate Kshs 2,500,000 in the agreement and transfer documents. The certificate of lease was misplaced and it would be sent as soon as it was found. In the letter of 16/5/2005, it was stating that the plaintiff had received Kshs. 8,000,000 for the purchase of parcel of land Block 13/60.

This court finds that the two letters having been disputed, the plaintiff called a document examiner who went at length to demonstrate that the known signatures of the alleged signatures were different from the signatures on the letters. However, the same document examiner had found earlier in the criminal investigations that the signatures were the same hence I find his evidence invaluable because he prepared two contradictory reports.

This court further finds that there is no evidence of the sale agreement between the plaintiff and the defendant as envisaged by Section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya which provides:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) The contract upon which the suit is found-

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

This provision came into force in June 2002 and amended and replaced the previous Section 3 of the Law of Contract Act which had provided as follows: -

“No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of the contract: -

(i) Has in part performance of the contract taken possession of the property or any part thereof; or

(ii) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

In the case of **Patrick Tarzan Matu & Another –vs- Nassim Shariff Abdulla & 2 Others [2009] eKLR Azangalala, J.** (as he then was) struck out the plaintiffs case where he found the contract relied upon was in contravention of Section 3(3) of the Law of Contract Act and declined to entertain the claim for damages for breach of the contract. Inter alia he stated:-

“...The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of Section 3(3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. The claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the law. So, the very foundation of their claim is untenable.”

10. In the case of **Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR** which came before me sitting at a different court station (Milimani Environment and Land Court, Nairobi) an application had been made by the 1st defendant to strike out the plaintiff's suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, I stated inter alia:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff's claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya.”

Going back on the letters dated 27th August 2002 and 16/5/2005, the same do not constitute an agreement for sale of land. The defendant has not demonstrated that the said letters were written by Ahmed Halsham Lalji. Ahmed Hahsm Lalji denied having written the two letters and therefore I do find that the defendant did not produce enough evidence that the same were written by Ahmed Hashm Lalji on behalf of the plaintiff.

Moreover, there is no resolution by the plaintiff to sell the suit parcels of land to the defendant. It is trite law that a company is a distinct person that should transact in its own name, sue and be sued in its own name. Ahmed Harsham Lalji did not have the mandate to transact on behalf of the company. The letters purported to have been written by Ahmed Harsham Lalji do not have the seal of the company. There is no valid resolution by the company to sell the disputed properties.

The upshot of this is that the plaintiff is still the legally registered proprietor of the suit parcels of land by virtue of Section 24 of the Land Registration Act Provides:

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25. provides

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26. provides:-

(1) 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, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground 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.

The Plaintiff has established that he is the legally registered proprietor of the suit properties and the defendant has not proved an iota of fraud and therefore I do find that he has proved his case on a balance of probabilities and therefore I do grant a **permanent injunction to restrain the Defendant by himself or by his agents and/or servants from claiming ownership of the suit properties, interfering with the Plaintiff's rights as proprietor, taking possession as owner, placing cautions on, procuring any right as proprietor, or in any other manner interfering with land parcels Eldoret Municipality Block 6/115 and 13/60. Moreover, I do grant orders removing the cautions, inhibitions or restrictions placed by the Defendant on the suit properties and eviction orders against the Defendant and/or his agents and servants from parcel Eldoret Municipality Block 13/60 and Eldoret Municipality Block 6/115. Lastly, I do make a declaration that the Defendant did not buy the suit properties from the Plaintiff at any time.**

Signed, Dated at Kisumu This 20th Day of September, 2021.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DELIVERED AND SIGNED AT ELDORET THIS 29TH DAY OF SEPTEMBER 2021

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE