



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 13 OF 2008 (OS)

VINCENT E. MUKOKO.....PLAINTIFF/APPLICANT

-VERSUS -

ABDIRAHMAN ABDINUR.....DEFENDANT

HARUN OMAM OKAL OKEYO.....INTERESTED PARTY

JUDGEMENT

1. By Originating Summons dated 16th January 2008, the Plaintiff filed this suit under order 36 rules 3B and 12 of the Civil Procedure Rules, Section 3A of the Civil Procedure “Act and Section 57(5) of the Registered Title Act (Cap 281) (repealed) for the court to determine the following questions;

1. Whether the caveat registered at IR 96961/3 on land parcel LR NO 209/12308/II Maisenette No 2 Nairobi South C (South Gate Estate) (“the suit property”) by the Defendant was fraudulent as it was based on a false document being an agreement for sale dated 10th January 2007 having not been executed by the Plaintiff;

2. Whether the caveat should be withdrawn by the Defendant or removed by the order of this court;

3. Whether the Plaintiff is entitled to immediate vacant possession of the premises after the expiry of the tenancy by the Defendant on 31st December 2007 to enable the Plaintiff to renovate the same and transfer it to a third party who has purchased the property to take possession; and

4. Whether the Plaintiff is entitled to compensation in general damages for fraud and loss of earnings perpetuated by the Defendant.

2. The suit property was registered in the name of the Plaintiff who on 1st December 2006 leased it to the Defendant at a monthly rent of Kshs. 25,000/- with an option to purchase it for Kshs.3.5 million which option was to be exercised within six (6) months of the agreement.

3. It was agreed that if the Defendant did not exercise the option within 6 months; the same would terminate by operation of the law and that the balance of the monies held would be applied as payment of rent in advance. The Defendant failed to exercise the option to purchase within 6 months and therefore the option to purchase automatically lapsed.

4. The Plaintiff found a buyer (the Interested Party) who agreed to pay Kshs.5.8 million. He paid Kshs.1,000,000/- deposit on the signing of the sale agreement and was ready to pay the balance but the Defendant placed a caveat against the title. In the meantime, the Defendant had been served with a notice to vacate the suit premises on or before 31st December 2007 when the lease expired. The Defendant did not vacate.

5. The Defendant responded to the summons by filing a replying affidavit on 8th February 2008. He denied that he had failed to exercise the option to purchase the suit property. He stated that he was ready and willing to exercise the option but the Plaintiff kept avoiding him. He claimed that the alleged sale to the Interested Party was a nullity. Similarly, the notice to vacate the suit property was invalid and illegal. He maintained that the caveat he had placed on the title was right and legal as it had been done to enforce a purchaser’s interest.

6. During the pendency of the suit the Interested Party was enjoined to these proceedings. He purchased the suit property from the Plaintiff.

7. It is on record that the Defendant has since passed on. He was substituted with his legal representatives. On the 27th November 2018, when the matter came up for hearing before Justice C Ochieng, Mr. Ndege told the court that the Defendant’s family was willing to negotiate

to settle the matter.

8. On 5th February 2019, this court was informed that the negotiations had failed. On the 28th March 2019, the Defendant's counsel sought for more time to substitute the (deceased) Defendant. By a notice of motion dated 31st July 2019, the Defendant was substituted by Shamsa Abdirahman and Jabril Abdirahman Abinur, who were the legal representatives of the deceased Defendant. They were last represented in court on 23rd September 2020. On the 23rd September 2020, Mr. Ndege for the Defendant took a hearing date. As the Plaintiff and Interested Party were absent, he undertook to serve them.

9. On the 20th January 2021, when the matter came up for hearing there was no appearance for the Defendant or the Plaintiff. Mr. Okwatch for the Interested Party was present. He sought directions that the matter do proceed by affidavit evidence and that parties be directed to put in written submissions in support of their respective positions. The court granted the said directions. On the 18th March 2021 Mr. Ndege for the Defendant sought and was given 14 days to file the Defendant's submissions. On the 21st June 2021, the Defendant's submissions were not on record. By the time of writing this judgment they are still not on record.

The Plaintiff's Submissions

10. They are dated 5th May 2021. They raise two issues for determination. They are:-

a. Whether applicant is entitled to compensation in general damages for fraud and loss of earnings perpetuated by the respondent and if so, how much?

b. Who should bear the costs of this suit?

11. The Defendant had no capacity legally or otherwise to lodge a caveat after failing to exercise the purchase option within six (6) months. The documents used to lodge the caveat were a forgery and a fraud which the Lands Registry discovered. The Defendant was issued with a 45 day notice and the caveat was removed by the Registrar upon expiry of the notice.

12. He has relied on Section 75 of the Land Registration Act, 2012. The Defendant knowing that he had not executed any sale agreement with the Plaintiff/Applicant and that he was only a tenant having failed to exercise his option to purchase, proceeded to register caveat using forged documents. The Defendant is therefore liable to pay damages for the wrongful caveat which he instituted without any reasonable cause. He has put forward the cases of **Victoria Laundry (Windsor) Ltd vs Neman Industries Ltd; Coulson & Co. Ltd (Third Parties) [1949] 2KB 528** as quoted in the case of **Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR**.

13. Under clause 4 of the lease agreement with option to purchase, the Defendant's payment of Kshs.300,000/- was to cater for rent for 12 months from 1st January 2007. It is fair and just for this honourable court to order compensation of the Plaintiff/Applicant, a sum of Kshs.1,000,000 for fraudulent and wrongful caveat and loss of earnings sum of which is inclusive of Kshs.100,000/- for the rent arrears.

14. It is trite law that costs follow the event and are granted at the discretion of the court. He has relied on Section 27 of the Civil Procedure Act and the case of **Peter Muriuki Ngunjiri vs Equity Bank (K) Ltd [2018] eKLR**.

15. This court vide the rulings of Honourable Lady Justice Sitati on 1st October 2010, Honourable J Muchelule issued on 3rd February 2012 and this court dated 18th October 2018 ordered the Defendant to vacate the suit property and granted the Plaintiff the right to handover vacant possession to the Interested Party, entitled the Plaintiff to be paid costs.

16. The Plaintiff filed a statement of defence to HCCC 132 of 2013 instituted by the Defendant. The Defendant ought to bear costs of this suit.

The Interested Party's Submissions

17. They are dated 17th June 2021. They raise four issues for determination. They are:-

i. Whether there was a valid and enforceable sale agreement between the Plaintiff and the Defendant.

ii. Whether the Defendant's right to ownership was breached.

iii. Whether the interested party is entitled to mesne profits accrued and still accruing sought.

iv. Whether the ruling in this matter were challenged.

18. Under clause 2 of the lease agreement between the Plaintiff and the Defendant, the Defendant was to exercise his option to purchase within six months from 1st December 2006. He has relied on Section 107, 109, 112 of Evidence Act (Cap 80 Laws of Kenya) and the case of **Jeniffer Nyambura Kamau vs Humphrey Mbaka Nandi [2013] eKLR**. The Defendant has provided no evidence whatsoever to prove that he pursued the Plaintiff in a bid to exercise his right to purchase the suit property.

19. The option to purchase has been a subject of two rulings issued by this court. The same have not been challenged, varied and or set

aside. This court is *functus officio*. He has put forward the cases of **Telkom Kenya Ltd vs John Ochanda (suing on his own behalf and on behalf of 996 Former employees of Telkom Kenya Ltd [2014] eKLR; Raila Odinga & 2 Others vs IEBC & 3 Others [2013] eKLR.**

20. The Defendant upon registration of a caveat presented an unsigned sale agreement dated 10th January 2007 claiming purchaser's interest. The Plaintiff has denied the same. He has relied on Section 3(3) of the Law of Contract Act (Cap 23 Laws of Kenya) and the words of **Steyn L J in G Percy Trentham Ltd vs Archital Luxfer Ltd [1993] 1 Lloyds Rep 25**. He has also put forward the case of **RTS Flexible Systems Ltd vs Molkerei Alois Muller GmbH & Co. KG (UK production) [2010] UK SC14, [45]**.

21. No evidence has been tendered that Defendant paid Kshs.840,000/- within six months.

22. The Defendant unjustly and unfairly lived on the Interested Party's premises from May 2008 to April 2019 without paying a single sent and further denying him the rightly earned income that he would have gained from the suit property. The Defendant has since been evicted from the suit property.

Section 2 of the Civil Procedure Act, Cap 21 defines mesne profits as **"mesne profits" in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession"**

He has also relied on order 21 rule 13 of the Civil Procedure Rules and the Court of Appeal decision in **Attorney General vs Halal Meat Products Ltd [2016] eKLR**. He has also put forward the cases of **Rajan Shah t/a Rajan S. Shah & Partners Bipin P. Shah [2016] eKLR; Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR**.

23. The Interested Party is entitled to mesne profits from the date of registration of the transfer to the date of eviction (May 2008 to April 2019) at the sum of Kshs.3,300,000/- as the rent collection for the amounts unpaid. The rental amount was as per the existing agreement. He also prays for interest and costs of the suit.

24. I have considered the originating summons and the affidavit in support. I have also considered the affidavits in response, the written submissions filed on behalf of the parties and the authorities cited.

It is not in dispute that the Defendant has since passed on and has been substituted by the Legal Representatives. It is also not in doubt that the rulings of Lady Justice Sitati of 1st October 2021, Muchelule J of 3rd February 2012 and this court's dated 18th October 2018 have not been varied, challenged and or set aside. The issues for determination are:-

i. Whether the Plaintiff is entitled to compensation and loss of earnings. And if so, how much?

ii. Whether the Interested Party is entitled to mesne profits.

iii. Who should bear costs of this suit?

25. Under clause 2 of the Lease Agreement, the Defendant was to exercise the option to purchase within 6 months from the date of the agreement. If he did not exercise within 6 months, the same would terminate by operation of the law and that the balance of monies would be applied as payment of rent in advance.

26. It is not in doubt that the Defendant failed to exercise the option to purchase within 6 months, therefore the option to purchase automatically lapsed. It is the Defendant's contention that he pursued the Plaintiff, but the Plaintiff evaded him purposely. The Defendant has adduced no evidence to confirm this assertion. He has not placed before this court any material to confirm that he took any steps to exercise the option to purchase or that he deposited Kshs.840,000. In fact, there is nothing to suggest that he pursued the Plaintiff.

27. It is the Plaintiff's case that the Defendant used a forged sale agreement to register a caveat with the ministry of lands. He has denied that he signed the said sale agreement. It was upon the Defendant to demonstrate that indeed the Plaintiff signed the said sale agreement. He failed to do so.

28. Upon discovery that the Defendant had used forged documents to lodge the caveat, the Defendant was given 45 days' notice to remove the same, when he did not object the same was removed. By lodging a fraudulent caveat the Plaintiff was prejudiced in that he could not handover a vacant possession of the suit property to the Interested Party. He was highly inconvenienced and necessitated to the filing of this suit. He has suffered loss and damage.

29. **Section 75** of the Land Registration Act, 2012 provides that:-

"Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person."

I am guided by the case of **Kenya Tourist Development Corporation vs Sandowner Lodge Ltd [2018] eKLR**, where it was held that:-

"It is well settled that the governing purpose of the damages is to put the party whose rights have been violated in the same position so far as money can so as if his rights had been observed".

The Plaintiff suggests Kshs.1,000,000/= as adequate compensation. I award Kshs.500,000/= which I think is reasonable.

30. The Plaintiff found a buyer (the Interested Party) who agreed to pay Kshs.5.8 million for the suit property. He paid Kshs.1,000,000/- deposit on the signing of the sale agreement. He was ready to pay the balance when the Defendant placed a caveat against the title. The suit property was eventually transferred to the Interested Party on 27th May 2008.

31. Despite knowledge of the transfer the Defendant continued to live on the suit property without paying any rent. The Defendant's dependents were finally evicted in April 2019. The Interested Party is entitled to mesne profits.

According to Section 2 of the Civil Procedure Act mesne profits are defined as:-

“mesne profits” in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”

32. I am guided by the case of **Attorney General vs Halal Meat Products Ltd [2016] eKLR** where the Court of Appeal stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on damages on 18th Ed. Para 34-41”.

The Interested Party suggest Kshs.3,300,000/- is adequate as payable as the rent for the unpaid months. The Defendant as per the Lease Agreement was paying Kshs.25,000/- per month. The rent that would have been payable from 27th May 2008 to April 2019 is Kshs.3,250,000/-. This is what the interested party is entitled to as mesne profits.

33. As costs follow the event. I award costs to the Plaintiff and the Interested Party to be borne by the Defendant.

34. Accordingly, Judgement is entered as follows: -

- a. The Plaintiff is awarded Kshs.500,000/- general damages.**
- b . The Interested Party is awarded Kshs.3,250,000/-.**
- c. The costs to the Plaintiff and the Interested Party to be borne by the Defendants.**

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 28TH DAY OF OCTOBER 2021

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Sichangi for Mr. Ashiruma for the Plaintiff

Mr. Ndege for the Defendants

Ms Lutta for Mr. Okwach for the Interested Party

Steve - Court Assistant