



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. E02 OF 2021

JAMES KARIUKI KANYEKI.....1ST PLAINTIFF

WAMUKOTA TOKI THE REGISTERED TRUSTEES

(suing on behalf of Kenya Railways Staff Retirement Scheme).....2ND PLAINTIFF

-VERSUS -

BLUE WATER PROPERTIES LIMITED.....DEFENDANT

JUDGEMENT

I. Preliminaries

1. The suit was instituted by way of a Plaint filed on 5th January, 2021 by the 1st and 2nd Plaintiffs. On 19th January, 2021 they filed an Amended Plaint dated 19th January 2021 by 1st and 2nd Plaintiffs herein. The 1st and 2nd Plaintiffs also executed Verifying affidavits herein on 5th January 2021 and 19th January, 2021 respectively. Subsequently, they fully complied with the provisions of Order 11 of the Civil Procedure Rules, 2010 on case management by filing lists of Documents, List of Witnesses and Witness Statements and further list of documents dated 19.1.2021.

2. From the filed suit, the 1st and 2nd Plaintiffs sought for the following orders.

a. That the a declaration that lease agreement made on 28th May 2014 between the Plaintiff and Defendant stands rescinded for failing to comply with the obligations under the lease and the obligations set out under Section 66 of the Land Act 2012.

b. That the a permanent injunctions against the Defendant by herself, her agents and/or appointed Attorneys from any manner course further acts of vandalism and wantons destruction on the property known as Land Reg. No. MOMBASA/BLOCK XX VI/941 Chambilo Road and the building standard thereon by denying access by the Defendant by herself, her agents and/or appointed Attorneys into the property.

c. Special damages at Kshs. 86,780,760.

d. Costs of this suit.

3. This Honourable Court was fully satisfied that service of the pleadings was effectively undertaken. has The summons to enter appearance dated 12th January 2021 and 1st January 2021 to the Defendant, as demonstrated vide an Affidavit of Service filed in court on 22nd January 2021 by one Paul Odhiambo Outah a Licensed Court Processor Server dated 21st February, 2021 upon the Defendant. Indeed, the Court Processor Server deponed that on 20th January, 2021 at 2:06 pm, he effected personal service on the Defendant of the said Summons and the Plaintiffs' pleadings through the Director of the Defendant, one Mrs. Diamond Hashem Lalji a bearer of mobile cell phone numbers 0722207711 & Postal address 12705 – 00400 Nairobi through the registered post and where a Certificate of Postage numbers M80100 – 01217932058 was issued to the Court Process Server and which was returned to court. Despite of the said proper service having been effected, the Defendant never entered appearance nor filed any Defence as required by the provisions of Orders 6 & 7 of the Civil Proceedings Rules 2010 accordingly.

4. Pursuant to the afore going, on 16th March 2021 and 4th May 2021 the 1st and 2nd Plaintiffs requested for interlocutory judgement to be entered against the Defendant for a sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty

(Kshs. 86,780,760.00) plus interest at the court rate and costs of the suit as prayed for in the Amended Plaintiff filed and dated 19th January 2021. Subsequently, on 13th May 2021, the above interlocutory judgment was entered in favour of the Plaintiffs and against the Defendant under the provisions of Order 10 Rule 4 of the Civil Procedure Rules, 2010. Nonetheless, being a land matter, this court directed that the Plaintiffs takes a date for formal proof session. It is for these reasons, therefore, that on 22nd September 2021 the matter proceeded for formal proof hearing accordingly.

II. 1ST THE PLAINTIFF'S CASE

5. **PW - 1 Mr. James Kariuki Kanyeki.** PW – 1 tendered his evidence in examination in chief as per the context of his recorded witness statement dated 5th January 2021 and amended on 19th January 2021. The said witness statements were adopted and admitted to be part of the proceedings. Further the list of documents dated 5th January, 2021 were also admitted and marked as Plaintiffs' Exhibit Numbered as 1 to 7. PW - 1 testified that he was a citizen of Kenya and a holder of the National Identity card bearing numbers 11186022 issued on 24th August 2016. He produced a copy of it and which was marked as Plaintiffs' Exhibit 1. He stated that he was a Trustee of the Kenya railways Staff Retirement Benefits Scheme. He lived in the County of Mombasa. He held that the Plaintiffs were then registered owners of all that parcel of land known as Mombasa/Block XX VI/941/Chambilo road. He produced the original Certificate of title deed marked as Plaintiff Exhibit 2. (hereafter called (“The suit land”) They were also the lessor of the suit land and had leased it to the Defendant by virtue of the lease agreement duly executed on 28th May 2014 terms and conditions stipulated thereof. He produced the Certificate of the Lease and the Lease Agreement marked as Plaintiffs' Exhibits 3 and 4 respectively. He held that the Defendant had breached its obligation under the lease agreement.

6. He stated that the lease agreement provided that there were 132 apartment blocks which were to be refurbished. The refurbishment works were to be taken and thereafter as they belonged to the lessor, to be handed over to them upon the expiration of the lease for the refurbishing works. PW - 1 stated that second schedule to the lease agreement, the Director to the Defendant appended her signature. It marked the practical completion date to be 31st May 2015. But by this date the refurbishment still remained undone. PW – 1 held that the Defendant was currently vandalizing the property. They had turned the subject matter into a waste dumping ground. Further, it was his testimony that they had caused wanton destruction of the apartments. and the fixtures which were on the apartment as the property had been subject to vandalism, doors corridors, plumbing works, fixtures and fittings had been ripped off from the blocks. PW – 1 produced a set of photographs on the said damages and Marked as Plaintiff Exhibit 5 (a) to (k). PW – 1 further stated that they had issued several 21 days notices for the Defendant to terminate the agreement but it never elicited any responses at all. For all these damages, the PW - 1 intimated to be a sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty (Kshs. 86,780,760.00). He held that that would be the total costs of the restoration and repairs of the already damaged building. PW – 1 stated that this estimation was based on a Site Survey and Valuation report they commissioned to be prepared by a Land Valuation Company trading in the names and style of Messrs. Shelta Costs Solution Limited.

7. For all these evidence adduced in court and the pleadings, he urged court to enter judgment against the Defendant as prayed for in the filed Amended Plaintiff.

PW - 2 – MR. ROBERT OUMA JOHN.

8. PW – 2 stated that he was a holder of the National Identity Card bearing Numbers. 26542251. A copy of it was marked as Plaintiffs' Exhibit - 4. He stated that he was a qualified Quantity Surveyor (QS) by profession. He testified having a practice Licensing Certificated dated 7th July, 2021. He worked for a company trading at the names and style of Shelta Costs Solution Limited. He was one of the Directors there. The company was based at both the County of Nairobi and Mombasa at Nyali – off Links road, He produced a Certificate of Incorporation marked as Plaintiffs' Exhibit - 6.

9. He testified having prepared the Site Survey and Valuations report dated 11th January 2021 entitled ***“Proposed Restoration Works for Residential Development on Plot No. Msba Block XXVI/941 Kizingo Mombasa for the Kenya Railways Staff Retirement Benefits Scheme”*** and he fully associated himself with the report. The reported is segmented into three Parts 1 – preliminary; Part II – Trade & part III the type of the items. He produced the report and marked as Plaintiffs' Exhibit No. 7. PW – 2 stated that upon visiting the apartment he noticed that the windows and the stairs were missing. He testified that they had been vandalized. He further, held that the external elements being the drainage system were blocked and the paint works were defaced and plumbing were all vandalized. The car parking bay was blocked through piling of waste bins. They did restoration quantity Bill Surveying meaning the quantity exercise in order to restore back the building to its proper state.

10. According to the PW – 2, they took numerous photographs of the suit property which were all attached to the report. They saw the doors were removed the electrical systems, the dumping and the drive ways were all missing. They took all these pictures and were appended to the report. The appendix 1 of the report contained the Bill of quantity as item No. 3.

PW - 2 stated that it was after that he arrived at the costs of the repairs to restore the building to the required standard. He stated that this amount was intended for the replacement of the doors, the painting works and other intended repairs. They used a standard measure to reach at this remedy. The total costs was estimated at a sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty (Kshs. 86,780,760.00) as seen from the main summary of the bill of Quantity attached to the report. PW – 2 justified that this estimation was based on the current market value. Further, the value was arrived at based on the 32 units apartments on the 2 bed – roomed volume found at the suit property. It was his testimony that the Defendant had undertaken to refurbish them and there had them over to the developer the Plaintiffs herein but failed to do it. In the long run, he stated that the re was need for the Plaintiffs to be restored to the position they were before.

II THE SUBMISSIONS

11. On 22nd September, 2021, upon the closure of the Plaintiff's case, with clear time frame, parties were directed to file their written submission and eventually, on 7th October, 2021 they obliged accordingly. Pursuant to that, court reserved the 15th December, 2021 as the day to deliver its Judgment.

A. THE SUBMISSION BY THE PLAINTIFF

12. On 4th October 2021 the Advocate for the Plaintiffs the law firm of Messrs. O.M ROBINSON & Company Advocate filed their written submissions dated 4th October 2021. They submitted and urged that the court should issue a declaration that the lease agreement made on 28th May 2014 terms and conditions stipulated thereof by the Plaintiffs and the Defendant stood rescinded. This was simply as the Defendant had failed to comply with its obligations particularly that under Clause 17(2) of the Lease Agreement and those set out under the provisions of Section 66 of The Land Act 2011.

The Learned Counsel urged court to find that the Defendant had turned the subject matter into a waste dumping ground, caused wanton destruction of the apartment and the fixtures which were on the apartments. They stressed that they had subjected the property to vandalism, doors, corridors plumbing works fixtures and fittings had been ripped off from the blocks contrary to the provisions of Section 66 of the Land Act of 2012.

They cited Clause 17 of the Lease Agreement which provided for the termination of the agreement by issuance of a termination notice of 21 days which had been done. The notice had specified the default and required the Plaintiff to make good the default.

13. The Learned Counsel further submitted that they be granted a permanent injunction against the Defendant their agents restraining them from any manner cause further acts vandalism and wantons destruction on the suit property and building standing thereon by denying access by the Defendant or her agents. They argued that since the Plaintiff was the registered owners to the property therefore they were entitled to this orders as sought.

14. The Learned Counsel urged court to grant them a sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty (Kshs. 86,780,760.00) as the special damages caused by the acts of omission and commission by the Defendant and costs for the restorations to the suit property. They held that from the lease agreement duly executed it had created legitimate expectation upon the Plaintiff that the property was to be refurbished and the works handed to them in a refurbished as it belonged to the lessor – Plaintiff herein. On this aspect, they relied on the Site Surveyor and Valuation report prepared and produced by the Shelta Costs Solution Limited which was neither rebutted nor uncontroverted on its entirety. To further buttress their point they relied on the decisions of *Nkuene Daily Farmers Cooperative Society Ltd and Another –Versus - Ngache Ndeya (2010) eKLR* on special damage. They urged court to find that they had proved their case hence enter judgment to their favour as prayed as pleaded in the Amended Plaintiff.

III. ANALYSIS AND DETERMINATION

15. I have carefully considered all the filed pleadings, oral evidence adduced in court during the full trial by all the witnesses, the articulate written submission the cited authorities and the provisions of the law on the suit instituted by the Plaintiffs vide an Amended Plaintiff dated 19th January 2021.

In order to arrive at an informed and just judgment in this matter, I have framed the following four (4) salient issues. These are:-

a) Whether the lease agreement – terms and conditions stipulated thereof duly executed on 28/5/2014 between the Plaintiffs and Defendant should be rescinded for failing to adhere to its obligation?

b) Whether the Plaintiffs have met the threshold for being granted permanent injunction against the Defendant on interference and/or any way dealing with the suit hand?

c) Whether the Plaintiffs were entitled to the orders sought from the amended Plaintiff.

d) Who should bear the costs.

Issue No. (a) Whether the lease agreement – terms and conditions stipulated thereof duly executed on 28/5/2014 between the Plaintiffs and Defendant should be rescinded for failing to adhere to its obligation?

16. Prior to embarking into the intense analysis and hence the final judgement hereof in this matter, let me enumerate the brief facts of this case. From the pleadings and the evidence orally adduced in court by the PW - 1 & PW - 2 herein on behalf of the witnesses summoned, the Plaintiffs are the registered legal and absolute owner to the suit land with all the indefeasible rights, interest and title vested on it by law. On the land there existed a developed permanent structure consisting of 32 units apartments of two (2) bed roomed house each. Arising from the many years of use the Plaintiffs felt it needful to have the property refurbished and brought to good living modern standards and conditions. As a result, on 28th February 2014 the Plaintiffs and the Defendant entered into a Lease Agreement for its refurbishment terms and conditions clearly stipulated thereof. Each party was to meet its part of the obligation. The Defendant was to have refurbished the property and handed it to the owner the Plaintiffs as already refurbished. But instead, the Defendant failed as it substantially breached this obligation. According to the evidence by the PWs – 1 & 2 they caused wanton vandalism and destruction of the windows, doors and other fixtures of the property. The paints were defaced while the electrical and plumbing system were completely damaged. The sewerage system blocked and the road blocked with rubbish bin from their own quantity surveying in order to restore the building to its proper position they estimated the cost to Kshs. 86,780,760 at the current market value and other accepted valuation management measures . All these information are contained in details valuation report.

17. Although they issued a 21 days notice to terminate the lease with a default clause the Defendant decided to ignore, neglect and/or failed to respond which caused the Plaintiffs to institute this suit hereof. Despite of the Defendants having been served with summons to enter appearance and pleadings still they failed to enter appearance nor file a Defence. It's for this reason on 13th May, 2021 interlocutory judgement was entered against the Defendant but being a land matter the law demands it has to proceed from formal proof. On two (2) witnesses testified and they close their case Lease Agreements are governed under the principles of Law of contract where there are two or more people and there is a consideration for it to be binding and enforceable by law.

This court fully concurs with the Plaintiff to the effect that from the lease agreement, it created high legitimate expectation onto the Plaintiffs. Under the provision of Section 66 (1) of the Land Act holds *inter alia*:-

“There shall be implied in every lease, Government by the laws with the Lessor binding the Lessor

a. To pay the rent reserved by the lease at the time, and in the manner specified in the leave

b. To one any land in a sustainable manner and in accordance with any condition imposed on the use of that land by the loose or any written law or any provisions in a grant of a public land out of which that lease has been created and, in particular, not to cut down, injure or destroy any living tree on the land unless the purpose for which the land has been leased cannot be carried out without 80 days.

c. To yield up the land builders in the same conditions as they were when the term of the lease began, except that the lessor shall not be bound to repair change or restores the land builders to the some conducts they were at the being of the lease of the damage or deterioration of the condition is caused by

i. Reasonable wear and tear

ii. Fire, flood or explosion or other accident nor attributable to the negligence of the Lessee, or the Lessor or employee

iii. Civil Commotion

iv. Lighting, storm earthquake, volcanic activities or other natural disaster.

d. To keep all boundary marks in repair and

e. To keep all buildings comprised in the lease in a reasonable state of repair.

18. Notwithstanding this provisions of the law, the Defendant breached the contract obligations as already indicated here. In fact they abandoned the property in a horrible and deplorable state of destruction, damaged and disrepair. This Honourable court finds the Defendants extremely sensitive and non committal at all to the contract. In saying so, Court has observed that they willfully never bothered to refurbish it returning it to the Plaintiff in a better condition but also failed to honour the notices for the termination of the Lease issued by the Plaintiff. These state of affairs compelled the Plaintiffs to under take steps which they had never anticipated at all. Firstly, the Plaintiffs had engage on mechanism to terminate the lease agreement as provided for under Clause 17(1) and (2) of the Lease agreement. Secondly, the Plaintiffs in order to restore their property to where it should be were forced to engaged a professional Land Valuation experts to assess and value the damage caused and advise them on the means to restore the suit property to its original state. And Finally, they were compelled to institute this suit against the Defendant. For these reasons, they have no alternative but to get to be awarded a declaration for the Lease agreement to be rescinded accordingly. I proceed to hold that this lease agreement be and is hereby rescinded forthwith.

Issue b). Whether the Plaintiffs have met the threshold for being granted permanent injunction against the Defendant on interference and/or any way dealing with the suit hand?

19. It is not in doubt that the property is legally registered in the names of the Plaintiffs. It incumbent that the same should be protected and preserved from and wastage, further, vandalism alienation or further wantons destruction. That as the essential purpose of injunctions orders to restore the owner to its original state. For huge reasons this court do find that the plaintiff is entitled to grant and meets all the of a pronouncement in future against the Defendant and all their agents from further dealing and interfering with the suit property in any way.

20. The purpose of any injunction is ensure there is maximum preservation, protection and prevention of any wastage, destruction, transfer and/or alienation of the suit property. As founded from the principles in the now famous case of **“Giella - Versus - Cassman Brown case (Supra)”** the Plaintiffs have fulfilled all the three fundamental ingredients considered before granting an injunction. Firstly, the Plaintiffs being the registered owner an issue which is not in doubt at all, they have established having **“a prima facie”** case and hence entitled to the Injunction orders sought.

21. Secondly, from the breach of the lease agreement as clearly demonstrated hereof and the contents of the detailed Site and valuation report it is quite evident that the Plaintiffs already have incurred substantial loss and irreparable suffering caused by the deliberate wanton destructions and vandalism of the fixtures of the building – doors, windows, paints, plumbing and car parking bay which can only be compensated by damages. Finally, this court is fully satisfied that the balance of convenience tilts in favour of the Plaintiffs by being granted the permanent injunction on the preponderance of probability.

Issue c). Whether the Plaintiffs are entitled to the orders sought from the amended Plaintiff.

22. From the testimony and elaborate evidence adduced herein by the PW -1 and PW – 2. It is clearly demonstrated that the Plaintiffs suit property was subjected to wanton and extensive damage, destruction and substantial loss by the vandalism and wastages caused by the Defendant. The Plaintiffs have proved they will require a sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty (Kshs. 86,780,760.00) restore it to the legitimated expectation created by the terms of executed lease agreement. The argument that special damage once pleaded must be strictly proved is not applicable here. I am persuaded and fully concur and rely on the decision cited by the 1st and 2nd Plaintiffs of:- *Nkuene Dairy Farmers Cooperative Society Ltd and Another – versus - Ngacha Ndeiya (2010) eKLR to wit:*

“In our view special damages in a material damages claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damages and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of”.

The 1st and 2nd Plaintiffs need to have the property restored to where it was before the entering of the lease agreement. Definitely, that will require substantial financial resources. Therefore, in the given circumstances the Plaintiffs are entitled to the prayers sought and this Court proceeds to grant it accordingly.

ISSUE No. (d) - Who will be bear the costs.

23. Based on the provisions of Section 27(1) of the costs follow the events. The events here are the results of this case where the 1st and 2nd Plaintiffs have proved their case to the required standard based on the preponderance of probability. Thus, the costs of the suit is to be borne of the Defendant.

V. DETERMINATION

24. The upshot of the above detailed preposition of this case is that the 1st and 2nd Plaintiffs has proved its case on all required standards. For avoidance of any doubts, I proceed to enter judgment severally and jointly in favour of the 1st and 2nd Plaintiffs and against the Defendant as follows:

a. THAT a declaration that Lease Agreement made on 28th May 2014 between the 1st and 2nd Plaintiffs and Defendant be and is hereby rescinded for failing to comply with the obligations under the lease and the obligations set out under Section 66 of the Land Act 2012.

b. THAT there be granted a permanent injunctions against the Defendant by herself, her agents and/or appointed Attorneys from any manner course further acts of vandalism and wantons destruction on the property known as Land Reg. No. MOMBASA/BLOCK XX VI/941 Chambilo Road and the building standard thereon by denying access by the Defendant by herself, her agents and/or appointed Attorneys into the property.

c. THAT the 1st and 2nd Plaintiffs be awarded Special damages at a Sum of Kenya Shillings Eighty Six Million Seven Hundred & Eighty Thousand Seven Hundred Sixty (Kshs. 86,780,760.00)

d. THAT the Costs of this suit to the 1st and 2nd Plaintiffs to be borne by the Defendant.

IT IS SO ORDERED.

RULING IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 15TH DAY OF DECEMBER 2021.

HON. JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Robinsons Malombo Advocate for the Plaintiffs.

No appearance for the Defendant