



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA ELC NO. 84 OF 2019

LEGORN FEEDS INTERNATIONAL LTD.....PLAINTIFF

VERSUS

BABAYAO FERDINAND WAITITU.....1ST DEFENDANT

COUNTY GOVERNMENT OF KIAMBU.....2ND DEFENDANT

JUDGMENT

The Plaintiff herein **Legorn Feeds International Ltd** filed this suit on **8th May 2019**, against the Defendants vide a Plaint dated **17th April 2019**, and averred that it purchased the suit property being **L.R No. 4953/1982(I.R 99259) Thika Township**, in Kiambu County and the same was transferred to it on **11th October 2012**, after which it took possession. That it then set up a Perimeter wall and it has continued to pay due land rent and rates to the National Government of Kenya and the 2nd Defendant.

It further averred that it has been in full possession and Control of the suit property without any interference, but in the month of **April 2019**, the 1st Defendant unlawfully encroached on the suit property, claiming it was a Public land. Further that on **1st April 2019**, the 1st Defendant engaged his employees, servants and or agents to forcefully enter and demolish the Perimeter wall under the disguise of reclaiming the land. That the 1st Defendant's actions were personally executed and he personally supervised the pulling down of the Perimeter wall. That members of the public were incited and they took advantage in carting away the building materials and leaving the site bear. It was contended that the suit land is neither located on public amenity nor set aside for my public use. Further, that the Plaintiff was never served with any **Legal Notice** prior to the aggression and demolition and there was no eviction order.

That as a result, the Plaintiff has suffered loss by way of deprived rights of user and damage from the destruction and the Defendants actions are arbitrary and unconstitutional. The Plaintiff therefore sought for orders as against the Defendants that;

- a) A Declaration that the encroachment upon the Plaintiff's land Known as L.R No.4953/1982(I.R 99259) and consequent destruction of the Perimeter wall was/is illegal and unlawful**
- b) A Declaration that the suit property is not public land the actions on the part of the 1st & 2nd Defendants declaring the same as public land was/is illegal and misplaced.**
- c) A permanent injunction do issue restraining the 1st & 2nd Defendants, their agents, servants and or employees from entering, trespassing, selling, disposing or otherwise in any manner whatsoever from interfering with the continued Plaintiff's quiet user, occupation and or enjoyment of land parcel L.R No. 4953/1982(I.R 99259).**
- d) Damages in compensation for loss suffered by the Plaintiff during and after the demolition of the perimeter wall for Kshs.15,159,605/=**
- e) Costs of the suit and interest on (d) above until payment in full.**

The Defendants Contested the suit and filed a Statement of Defence dated **29th May 2019**, and denied all the allegations made in the Plaint. It was their contention that the Plaintiff did not purchase the suit property and that the **Contract Act** provides that no suit shall be brought upon a Contract for the disposition of an interest in land unless the Contract upon which the suit is founded on is in writing. That the payment of land rents and rates is not proof of ownership of the suit property and does not establish that the Plaintiff is registered as the absolute proprietor of the suit property.

Further that the suit property vests in the County Government of Kiambu County and the Plaintiff was served with an **Eviction Notice** from the suit property which is public land. That the Plaintiff encroached onto a public land and cannot claim to have suffered loss and it is the

Plaintiff who has illegally and unlawfully encroached onto public land and does not deserve any compensation.

The suit proceeded by way of viva voce evidence wherein the Plaintiff called one witness and closed its case. The Defendants did not call any witness.

PLAINTIFF'S CASE

PW1 Stephen Waithiru Baiyo testified that he is a Director of **Legorn Feeds International Ltd.** He adopted his witness statement as part of his evidence and further produced his list of documents as Exhibit 1 and urged the Court to allow his prayers as per the Plaintiff.

That the Plaintiff purchased the suit property in the year **2012**, and as per the grant produced in Court, there was a transfer to **Kinoti Mukundia** and **Lawrence Nderitu Mugambi** on **25th May 2008** for **Kshs.1.3 Million**. That the transfer to **Legorn Feeds** was made on **11th October 2012**, four months after the demise of **Kinoti Mukundia**. Further that as per the receipts dated **31st January 2019**, there is a disclaimer that the acceptance of rates is not conclusive evidence of ownership. That he was not served with any Notice before demolition nor was he given the eviction Notice by the County Government of Kiambu. That he claims damages of **Kshs. 15 Million**. That he did not serve any **Demand Notice** to the County Government of Kiambu and he relied on the **Valuation Report** as he is not a certified valuer. Further, that he sued the 1st Defendant as the Governor of Kiambu County since he was repossessing public land. That he has a valid title deed and he had sought various approvals from the County Government of Kiambu.

Upon the close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court has also read and considered the pleadings by the parties and the evidence adduced. The Court finds that the issue for determination is ***Whether the Plaintiff is entitled to the orders sought.***

The Plaintiff herein called one witness and closed its case. However, though initially Counsel appearing for the 2nd Defendant represented all the Defendants at first, vide an Application dated **7th May 2021**, the said Advocate sought to cease acting for 1st Defendant and the same was allowed.

The Counsel for the 2nd Defendant then proceeded with the Plaintiff's case and cross examined the said witness, but did not call any witness. The 1st Defendant despite service did not participate in the said proceedings. The Defendants therefore did not controvert the Plaintiff's evidence and therefore the Defendants statement of Defence has no probative value since the same remain mere allegations that have not been substantiated. See the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited ...Vs... City Council of Nairobi [2019] eKLR** where the Court held that;

“21.

process. (See Article 50 (1 of the Constitution) which states;

“Every person has the right to have any dispute that can be resolved by application of law decided in a fair and public hearing before a Court, if appropriate another independent and impartial tribunal or body”

The mere allegations by the 2nd Defendant that the suit property was a public land without following due process was thus illegal.

See also case of;

Isaac Gathungu Wanjohi & Another vs Attorney General & 6 others [2012] eKLR

Where the court held that;

“Where the state contends a property was acquired illegally, the state must follow due process to establish such illegality”

Further the Defendants have sought to dismiss the suit on the grounds that it does not meet the requirements of the provisions of **Section 3(3) of the Contract Act** which provides that;

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

(a) the contract on which the suit is founded –

(i) is in writing.

(ii) is signed by all 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.

Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

There is no doubt in the Court’s mind that the suit is not founded upon the Contract and therefore the Court finds and holds that the said provision is not applicable in the instant suit as the suit is on encroachment and not founded upon the Contract.

The Plaintiff has sought for a Declaration that there was encroachment and the subsequent destruction of the Perimeter wall was unlawful.

In its submissions the 2nd Defendant has sought to distance itself from the 1st Defendant’s action. However, the 1st Defendant was sued as the Governor of the 2nd Defendant. The Plaintiff in his evidence testified that the 1st Defendant used the employees of the 2nd Defendant to carry out the destruction and demolition of the perimeter wall. The Court has also seen the copy of the Newspaper excerpt. As already noted above, the evidence by the Plaintiff remains uncontroverted. In the absence of any evidence to controvert the Plaintiff’s testimony and the Court having had the benefit of analyzing the Plaintiff’s documents produced in Court as evidence and exhibits is therefore satisfied that there was encroachment and destruction of the Plaintiff’s property. The Plaintiff is therefore entitled to compensation.

To salvage its case, the 2nd Defendant has sought to give evidence in its submissions. However, it is not in doubt that a party cannot give evidence in its submission as submissions are only but a supporting factor to the evidence adduced. **See the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the Court held;

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the Court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented..... Regarding the punitive damages sum of Kshs.50 million awarded, the learned judge again found and lifted the proposal in the submissions of the 1st Respondent. We were unable to come by any pleading or evidence to warrant this award and therefore it cannot be sustained.”

Having failed to call any witness to controvert the Plaintiff’s evidence and given that the 1st Defendant was sued as an officer of the 2nd Defendant while he was still in office, and further the Plaintiff’s evidence that employees of the 2nd Defendant participated in the said destruction and demolition having not been controverted, the Court finds and holds that the Plaintiff has proved its case on the required standard of balance of probabilities.

The Plaintiff has also sought for compensation for the loss that it suffered upon the demolition of the Construction. The Court has seen the valuation report produced by the Plaintiff in evidence that was prepared by **ZanConsult Valuers & Management Company Limited** that has placed the value of the loss suffered at **Kshs.15,159 605/=**. There being no other valuation to controvert the one produced in evidence, the Court finds and holds that there would be no justification to deny the Plaintiff the said Compensation for the loss suffered.

The 2nd Defendant’s contention that the actions of the 1st Defendant ought not to be visited on the 2nd Defendant, it is the Court’s considered

view that these allegations are not justifiable as the 2nd Defendant did not prove that the 1st Defendant's actions were distinct from the 2nd Defendant.

The Plaintiff having testified that the 1st Defendant acted as the Governor of the County Government of Kiambu and with the help of the employees and or the agents of the 2nd Defendant, they carried out destruction of the Plaintiff's Perimeter wall, then both Defendants are liable.

Having carefully read and considered the pleadings by the parties, the evidence adduced and the rival written submissions herein, the Court finds and holds that the Plaintiff has proved its case against the 1st and 2nd Defendants herein on the required standard of balance of probabilities. Consequently, the Court finds the Plaintiff's claim as contained in the Plaint dated **17th April 2019** is merited and enters judgment for the Plaintiff against 1st and 2nd Defendants herein jointly and severally in terms of prayers No. **(a) (b) (c) (d) and (e)** therein.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF DECEMBER, 2021.

L. GACHERU

JUDGE

9/12/2021

Delivered online

In the presence of

Kuiyaki & Alex Mugo - Court Assistants

M/s Waigwa for the Plaintiff

N/Appearance for 1st Defendant

M/s Cheserek for 2nd Defendant

L. GACHERU

JUDGE

9/12/2021