



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 113 OF 2010**

**TELPOSTA PENSION SCHEME**

**TRUSTEES REGISTERED.....PLAINTIFF**

**=VERSUS=**

**CITY COUNCIL OF NAIROBI.....DEFENDANT**

**JUDGMENT**

At all material times, the plaintiff was the owner of all that parcel of land known as L.R No. 209/13957/2, Grant No. I.R 82998 situated in the city of Nairobi. Adjacent to L.R No. 209/13957/2 was unsurveyed piece of land owned by the Government of Kenya measuring approximately 0.1333 hectares. The defendant was at all material times using the said unsurveyed piece of land for public parking. The defendant had established 45 parking bays on the said piece of land (hereinafter referred to only as “the disputed property”) from which it was collecting daily parking fees from motorists.

When the plaintiff’s predecessor in title, Kenya Posts and Telecommunications Corporation started the construction of a building known as Telposta Towers on L.R No. 209/13957/2 in 1980s, it requested the defendant to allow it to use the disputed property for hoarding during the construction of the said building. The plaintiff’s said predecessor in title entered into an arrangement with the defendant whereby it made periodical payments to the defendant for the use of the said property. The ownership of L.R No. 209/13957/2 together with the said Telposta Towers that was still under construction was vested upon the plaintiff on 1<sup>st</sup> July, 1999 through Legal Notice No. 154 that was published in the Special Issue of the Kenya Gazette Supplement No. 59 on 5<sup>th</sup> November, 1999.

Sometimes in the year 2005, the defendant at the request of the plaintiff agreed to surrender the disputed property to the plaintiff permanently in consideration of Kshs. 14,969,200/= that was to be paid by the plaintiff to the defendant. The said amount was paid to the defendant by Telkom Kenya Limited on behalf of the plaintiff on 18<sup>th</sup> March, 2005. Following the surrender of the disputed property by the defendant to the plaintiff, the plaintiff applied to the Government of Kenya to be allocated the same. The plaintiff’s application was accepted and the disputed property was amalgamated with the plaintiff’s parcel of land, L.R. No. 209/13957/2. The said amalgamation gave rise to a new title, L.R No. 209/16954, Grant No. I.R 104299 (hereinafter referred to as “the suit property”). To facilitate the amalgamation of the disputed property with the plaintiff’s parcel of land, L.R No. 209/13957/2, the plaintiff surrendered Grant No. I.R 82998 in respect of the said parcel of land and was issued with the new Grant, I.R No. 104299 for L.R No. 209/16954 which included the disputed property. After acquiring the disputed property, the plaintiff did away with the parking bays that the defendant had erected thereon and constructed new underground parking bays and a recreational area on top of the said parking bays. These parking bays which were now part of Telposta Towers were in addition to the other parking bays that had been constructed by the plaintiff at the basement of Telposta Towers.

The plaintiff brought this suit against the defendant on 16<sup>th</sup> March, 2010 seeking an order of prohibitory injunction restraining the defendant from entering, taking possession, repossessing and/or levying any parking fees on the parking bays situated on the basement of Telposta Towers which is erected on the suit property and from in any manner whatsoever harassing the plaintiff’s tenants and interfering with plaintiff’s possession of the said parking bays. The plaintiff also sought a mandatory injunction compelling the defendant to forthwith vacate, cease entering and/or taking possession and/or repossessing and/or levying any parking fees on the said parking bays on the suit property.

In its plaint dated 16<sup>th</sup> March, 2010, the plaintiff averred that it was the registered proprietor of the suit property on which it had erected a building known as Telposta Towers which consisted of among others 29 storey 3 tower office blocks with 3 basement level parking having 408 parking bays. The plaintiff averred that the suit property resulted from amalgamation of the plaintiff’s former parcel of land, L.R No. 209/13957/2 with the disputed property on which the defendant had erected 45 parking bays for public use. The plaintiff averred that the defendant surrendered the disputed property to it during the construction of Telposta Towers at a consideration of Kshs. 14,969,200/= which amount was paid to the defendant in full before the said parcel of land was amalgamated with L.R. No. 209/13957/2 to form the suit property. The plaintiff averred that after acquiring the disputed property it converted the same into a recreational area whose exclusive ownership, possession and use it had enjoyed since then.

The plaintiff averred that on 20<sup>th</sup> November, 2006, the defendant wrote to it demanding payment of Kshs. 16,200,000/= which it claimed to be due to it for the disputed property that it had surrendered to the plaintiff. The plaintiff averred that it responded to the defendant's said demand through a letter dated 4<sup>th</sup> April, 2007 in which it informed the defendant that no payment was due from it to the defendant on account of the disputed property. The plaintiff averred that the defendant went silent until March, 2010 when its employees invaded the suit property and attempted to evict the security personnel who were manning the plaintiff's parking bays in Telposta Towers with a view to forcefully taking possession and control of the said parking bays and illegally levy parking fees on the plaintiff's customers and tenants. The plaintiff averred that the defendant's actions aforesaid were unlawful and unless halted could subject the plaintiff to further loss and damage.

The defendant filed a defence to the plaintiff's claim which it amended on 12<sup>th</sup> September, 2013 to plead a counter-claim against the plaintiff, and the Commissioner of Lands and Attorney General. The defendant amended its defence further on 30<sup>th</sup> January, 2014. In its further amended defence, the defendant averred that the disputed property on which it had erected 45 parking bays remained its property. The defendant denied that it sold the disputed property to the plaintiff and that the same was amalgamated with the plaintiff's parcel of land, L.R No. 209/13957/2. The defendant averred that it was not a party to the surrender and amalgamation of the disputed property with the plaintiff's said parcel of land. The defendant denied that the plaintiff paid to it Kshs. 14,969,200/= for the disputed property. The defendant averred that the plaintiff's suit was intended to defraud it of the disputed property. The defendant averred that the title that was issued to the plaintiff for the suit property after the purported amalgamation of the disputed property with L.R No. 209/13957/2 was illegal, null and void.

The defendant averred that the purported shutting down of its parking bays on the suit property by the plaintiff was illegal and that the plaintiff had no right to use the disputed property. The defendant averred that it had suffered loss as a result of the plaintiff's actions aforesaid and that the public had been denied the use of the parking bays that the defendant had erected on the disputed property. The defendant denied that it invaded the suit property and attempted to take over the management of the parking bays thereon forcefully. The defendant averred that as the owner of the disputed property, it had a right to possession of the same and to charge parking fees for the use thereof.

In its counter-claim, the defendant averred that it was still the lawful owner of the disputed property on which it had erected 45 parking bays for public use. The defendant averred that the disputed property was illegally amalgamated with the plaintiff's parcel of land, L.R No. 209/13957/2 to form L.R No. 209/16954 ("the suit property"). The defendant averred that the plaintiff had illegally encroached on the disputed property and erected structures thereon. The defendant averred that the plaintiff's title to the suit property was a product of fraudulent and illegal activities and as such should be cancelled. The defendant sought judgment against the plaintiff, the Commissioner of Lands and the Attorney General for; a declaration that the surrender by the plaintiff of its grant in respect of L.R No. 209/13957/2, the amalgamation of the said parcel of land with the disputed property and the issuance to the plaintiff of a new title was null and void, an order for the cancellation of the title held by the plaintiff in respect of the suit property, rectification of the register of the suit property so as to have the disputed property registered in the name of the defendant as the owner thereof, a permanent injunction restraining the plaintiff from trespassing, encroaching onto, remaining on and/or in any other way whatsoever interfering with the disputed property and general damages.

There is no evidence that the Commissioner of Lands and the Attorney General were served with the counter-claim. The plaintiff filed a reply to the further amended defence and counter-claim on 30<sup>th</sup> April, 2014 in which it joined issue with the defendant in its defence. The plaintiff reiterated the contents of its plaint and denied the allegations in the amended defence and counter-claim. The plaintiff urged the court to dismiss the defendant's counter-claim and to enter judgment in its favour as prayed in the plaint.

At the trial, the parties called one witness each. The plaintiff called its administrator and trust secretary, PETER KIPYEGON ROTICH (PW1) as its witness. PW1 adopted his witness statement and further witness statement dated 26<sup>th</sup> September, 2011 and 16<sup>th</sup> July, 2014 respectively as his evidence in chief. PW1 narrated to the court how the plaintiff acquired the disputed property which was being used by the defendant for public parking. PW1 told the court that the plaintiff paid for the disputed property and that with the blessings of the defendant, it amalgamated the same with its parcel of land known as L.R No. 209/13957/2 to give rise to the suit property. PW1 also told the court how the defendant invaded the suit property and attempted to collect parking fees from the motorists entering the plaintiff's parking bays on the suit property. PW1 produced two bundles of documents dated 14<sup>th</sup> December, 2010 and 16<sup>th</sup> July, 2014 as plaintiff's exhibits.

The defendant's witness was its valuer, MAGIRI GYNETH KARIMI (DW1). DW1 adopted her witness statement dated 23<sup>rd</sup> January, 2014 as her evidence in chief. DW1 produced the defendant's bundle of documents dated 23<sup>rd</sup> January, 2014 as the defendant's exhibit. DW1 told the court that the disputed property was not lawfully acquired by the plaintiff. DW1 stated that there were no minutes in the defendant's records showing that the amalgamation of the disputed property with the plaintiff's parcel of land, L.R No. 209/13957/2 was approved by the defendant. DW1 stated that if the defendant intended to allocate or alienate the disputed property to the plaintiff, such proposal had to be presented to the defendant's Town Planning Committee for deliberation and approval. DW1 stated that there was no evidence that the said committee met and approved such transaction. DW1 told the court that the disputed property was still public land and that the defendant was entitled to continue collecting parking fees from the motorists parking their vehicles thereon. DW1 stated that the disputed property belonged to the defendant and urged the court to return the same to the defendant. DW1 stated that the defendant had lost parking revenue that it was earning from that parcel of land and as such it was claiming damages.

After the close of the defendant's case, the parties made closing submissions in writing. The plaintiff filed its submissions on 22<sup>nd</sup> November, 2019 while the defendant filed its submissions on 10<sup>th</sup> December, 2019. I have considered the evidence adduced by the parties in support of their respective cases and the submissions filed by their respective advocates. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues arising for determination in the plaintiff's suit and the defendant's counter-claim;

1. Whether the plaintiff acquired the disputed property lawfully.
2. Whether the defendant trespassed on the disputed property.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

4. Whether the defendant is entitled to the reliefs sought in the counter-claim.

5. Who is liable for the costs of the suit?

Whether the plaintiff acquired the disputed property lawfully.

From the evidence on record, it is not clear whether the disputed property was owned by the City Council of Nairobi, the defendant herein or the Government of Kenya prior to its amalgamation with L.R. No. 209/13957/2 that was owned by the plaintiff. It was common ground that the disputed property was unsurveyed. That means that the property had no title. Although the defendant claimed that it owned the said parcel of land, the defendant made no attempt to place any form of evidence before the court in proof of its ownership of the property. It was not disputed that the disputed property was situated within the jurisdiction of the defendant and that the defendant was using the same for public parking. The fact that the defendant was using the disputed property for public parking did not mean in my view that the property was legally owned by the defendant.

From the material that has been placed before the court by the plaintiff, I am persuaded that the suit property was owned by the Government of Kenya. This conclusion is informed by the fact that the disputed property was allocated to the plaintiff by the Government of Kenya before it was amalgamated with L.R No. 209/13957/2 which was also owned by the Government of Kenya as the freehold owner and leased to the plaintiff for a term of 99 years with effect from 1<sup>st</sup> January, 1949. I cannot see how the Government of Kenya could have allocated to the plaintiff land that did not belong to it or how it could have amalgamated the said land that it did not own with its own land, L.R No. 209/13957/2 and then leased the same to the plaintiff.

In its defence and counter-claim, the defendant did not contend that the disputed property was owned by it and that the allocation of the same by the Government of Kenya to the plaintiff was illegal on that account. The defendant's claim concerned the 45 parking bays that it had erected on the disputed property from which it was collecting parking fees. Although the defendant joined the Commissioner of Lands and the Attorney General as parties to its counter-claim against the plaintiff, no effort was made by the defendant to take out summons and effect service of the same upon them so that they could defend themselves against the defendant's claim.

Since the defendant was not the legal owner of the disputed property, its interest in the property in my view was limited to the parking bays that it had on the property from which it was deriving revenue in the form of parking fees. I am satisfied from the evidence before the court that the defendant relinquished its interest in the said parking bays to the plaintiff in consideration of Kshs. 14,969,200/= that was paid to it by the plaintiff through Telkom Kenya Limited on 18<sup>th</sup> March, 2005. The evidence that was adduced by the plaintiff that; it proposed to the defendant the payment of the said sum of Kshs. 14,969,200/= as a final payment for the defendant's parking bays; the defendant accepted the proposal; the payment was made by a bankers cheque and receipts were issued in acknowledgement of the payment was not rebutted by the defendant. The defendant's claim that it was not Nairobi City Council to which the payment was made does not hold water. This court takes judicial notice of the fact that although the legal name of the defendant was City Council of Nairobi; the names, City Council of Nairobi and Nairobi City Council was being used interchangeably by the defendant and the public in reference to the defendant. I am satisfied from the evidence before the court that the said payment of Kshs. 14,969,200/= was made to the defendant and was received by the defendant for the interest that the defendant had in the disputed property. Since the defendant's interest in the disputed property was limited to the parking bays that it had erected on the said property which was public land, the Town Clerk of the defendant who represented the defendant in the disposal of the said interest must be taken to have had authority of the defendant to do so.

I am also satisfied that after the defendant relinquished its interest in the disputed property, the same was lawfully allocated to the plaintiff and subsequently amalgamated with L.R No. 209/13957/2 to give rise to L.R No. 209/16954. The evidence placed before the court shows that the process of allocation and amalgamation was done in accordance with the law. Due to the foregoing, it is my finding that the plaintiff acquired the disputed property lawfully.

Whether the defendant trespassed on the disputed property.

I have made a finding that the plaintiff acquired the disputed property lawfully before it was amalgamated with L.R No. 209/13957/2 to give rise to L.R No. 209/16954 (the suit property). The suit property which includes the disputed property was registered in the name of the plaintiff on 18<sup>th</sup> January, 2007. I am satisfied from the evidence on record that the defendant's employees entered the suit property on 15<sup>th</sup> March, 2010 and attempted to collect parking fees from the motorists accessing the property. Since the defendant had no proprietary interest in the suit property, it had no right to enter the suit property without the plaintiff's permission and purport to be demanding parking fees from the motorists accessing the premises. Since the defendant entered the suit property without the plaintiff's authority or lawful excuse, the defendant was a trespasser on the property. It is my finding therefore that the defendant trespassed on the suit property on 15<sup>th</sup> March, 2010.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

From the findings above, I am satisfied that the plaintiff has proved its case against the defendant on a balance of probabilities and as such it is entitled to the injunction sought in prayer (a) of the plaint. The plaintiff is however not entitled to the mandatory injunction sought in prayer (b) of the plaint because no evidence was placed before the court showing that the defendant is in possession of the suit property or any part thereof.

Whether the defendant is entitled to the reliefs sought in the counter-claim.

The defendant's claim was not proved and as such the defendant is not entitled to any of the reliefs sought in its counter-claim.

Who is liable for the costs of the suit?

As a general rule, costs follow the event unless the court orders otherwise for good reason. The plaintiff is successful in its claim against the defendant. There is no reason why it should be denied the costs of the suit and the counter-claim. The plaintiff shall have the costs of the suit and the counter-claim.

Conclusion:

In conclusion, I hereby enter judgment for the plaintiff against the defendant in terms of prayers (a) and (c) of the plaint. The defendant's counter-claim is dismissed with costs to the plaintiff.

**Delivered and Dated at Nairobi this 25<sup>th</sup> Day of June 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams video conferencing platform in in the presence of;**

Ms. Mathenge h/b for Mr. Bundotich for the Plaintiff

Mr. Omagwa for the Defendant

Ms. C. Nyokabi-Court Assistant