



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 164 OF 2009

RAHANS INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

AMARNATH ENTERPRISED LIMITED.....DEFENDANT

AND

KENYA NATIONAL CHAMBER OF COMMERCE.....THIRD PARTY

JUDGMENT

1. By a plaint dated 29th May, 2009 and filed on 8th June, 2009, the plaintiff has pleaded that it is and was at all material times the registered proprietor of parcel of land known as MOMBASA/BLOCK XXIII/185 measuring 0.1668 hectares (hereinafter referred to as “the suit property”), situated in Mombasa Municipality. The plaintiff states that on or about 20th December 2007, it entered into a sale agreement with the then registered proprietor, Westend Limited for purchase of the suit property for a consideration of Kshs.20,000,000.00. That it was a term of the said sale agreement, inter alia, that upon payment of the purchase price, the plaintiff would take immediate possession of the said property with the seller relinquishing all its rights and interests over the said land and release to the plaintiff all the completion documents to effect the transfer of the title into the plaintiff’s name. The plaintiff avers that upon paying the said purchase price, it took possession of the suit property and obtained the relevant and statutory consents and/or approvals with the assistance and co-operation of the seller and eventually had the suit property duly transferred into its name. The plaintiff avers that the transaction relating to the purchase of the suit property between Westend Limited and the plaintiff was done without interference of the defendant.

2. The plaintiff stated that sometime in or about March 2009, the defendant unlawfully and/or wrongly moved into the suit property and proceeded to deposit construction materials and other materials for sale on the suit property in violation of the plaintiff’s ownership rights and as a consequence thereof, the value of the property is diminishing and the plaintiff is unable to develop or use the said property. By reason of the matters aforesaid, the plaintiff avers that the defendant’s acts of trespass and depositing of construction and/or other materials on the suit property is illegal, unlawful, malicious and done in bad faith. The plaintiff avers that the defendant had entered into, deposited materials into, using and continuing to use and intermeddling with the suit property is without the plaintiff’s consent or approval. It is the plaintiff’s contention that unless restrained by this Honourable Court, the defendant threatens and intends to continue with the wrongful acts complained of. The plaintiff avers that by reason of the defendant’s actions, the plaintiff has suffered loss and damage and/or is at high risk of incurring substantial loss and damage to wit investigation fees – Kshs.20,000.00, legal fees based on the consideration of Kshs. 20,000,000.00 and costs for removing the materials deposited on the suit property. The plaintiff states that despite demand and notice of intention to sue, the defendant has refused and/or neglected to make good the plaintiff’s demand.

3. The plaintiff’s claim against the defendant is for orders as follows:

a. A permanent injunction restraining the defendant whether by itself, its servants, officers and/or agents or any of them whatsoever from dealing in any way or interfering with the plaintiffs’ possession and quiet enjoyment of all that parcel of land known as MOMBASA/BLOCK XXIII/185.

b. A mandatory injunction compelling the defendant by itself, its servants and and/or agents to vacate parcel of land known as MOMBASA/BLOCK XXIII/185 and to remove all the construction materials deposited on the parcel of land known as MOMBASA/BLOCK XXIII/185.

c. A declaration that the defendant has no right in law or otherwise to use, to enter or trespass the parcel of land known as MOMBASA/BLOCK XXIII/185.

d. General and aggravated damages against the defendant.

e. Costs of this suit.

f. Such other or further orders as this Honourable Court may deem fit to grant.

4. The defendant filed its statement of defence dated 17th June, 2009 on even date. The defendant states that it was in lawful and peaceful occupation of the suit property as lawful and legal tenant of the Kenya National Chamber of Commerce and Industry. Further, that at the time of filing of the suit, the plaintiff was not in possession of the suit premises.

5. The defendant sought and was granted leave on 18th February 2010 to issue a Third Party Notice to the Kenya National Chamber of Commerce and Industry seeking indemnity for loss of business and breach of contract, and the latter was subsequently enjoined as a Third Party in the suit. The Third Party filed its defence on 12th March, 2010. It denied leasing the suit premises to the defendant. The Third Party further stated that it was the registered owner of the suit property and that the purported purchase by the plaintiff of the suit property was fraudulent, and was the subject of Mombasa CMCC No. 1902 of 2006.

6. PW1, Rupen Haria testified on behalf of the plaintiff. He adopted his witness statement dated 17th October 2017 as his evidence-in-chief, and was cross-examined by Mr. Mwawasi counsel for the defendant. He testified that the plaintiff is the registered owner of the suit property having purchased the same from Westend Limited pursuant to a sale agreement entered into on 20th December 2007. That prior to the purchase of the suit property and particularly on 25th January 2008, the plaintiff carried out a search at the Lands office which indicated that Westend Limited was the registered owner of the land. It was his evidence that all the relevant consents were obtained prior to the transfer, which was done on 12th March 2008. The transfer was registered in favour of the plaintiff on 19th March, 2008 and the plaintiff was issued with a certificate of lease on the same date. He stated that a certificate of official search issued on 19th March 2008 confirmed that the plaintiff was the registered owner of the suit property and that the property was free from encumbrances. PW1 stated that he was aware that Westend Limited purchased the suit property on 7th September 2007 in a public auction conducted pursuant to an order of attachment given by the Resident Magistrate's Court Mombasa in CMCC No. 1902 of 2006. That before the public auction, the suit property was registered in the name of Kenya National Chamber of Commerce and Industry. PW1 Testified that when the defendant moved into the suit property, the plaintiff instructed its advocates who issued a demand to the defendant for the immediate removal of all the materials deposited in the property and cessation of any further acts of trespass on the property, but the defendant failed to heed the demand, hence the institution of this suit. when cross-examined by Mr. Mwawasi, PW1 stated that the plaintiff is in possession of the suit property, the defendant having moved out two years earlier. PW1 produced the list of documents filed on 14th May 2010 as exhibits. These documents are a certificate of lease for title number MOMBASA/BLOCK XXIII/185 issued on 4th October, 2007 to Westend Limited; a copy of certificate of official search dated 25th January, 2008 in respect of title no. MOMBASA/BLOCK XXIII/185; receipt of official search dated 25th January 2008; sale agreement between the plaintiff and Westend Limited dated 20th December, 2007 in respect of property title no. MOMBASA/BLOCK XXIII/185, a copy of cheque dated 9th January, 2008 to Westend Limited for Kshs.2,000,000/=, letter dated 24th January 2008 from Shazeen Chatur Advocate; letter of consent to transfer in respect of title no. MOMBASA/BLOCK XXIII/185 dated 20th February, 2008; copy of stamp duty declaration and pay in slip; copy of Bankers cheque No.039365 for Kshs.800,010.00 for payment of stamp duty; a copy of a letter from RM Mutiso Advocates addressed to the District Land Registrar dated 12th February, 2008; receipt for transfer of lease and certificate of lease for MOMBASA/BLOCK XXIII/185; a copy of transfer of lease registered in favour of the plaintiff herein dated 12th March 2008 in respect of property title no. MOMBASA/BLOCK XXIII/185; a copy of certificate of lease in respect of property title no. MOMBASA/BLOCK XXIII/185 issued on 9th March 2008 in favour of the plaintiff; copy of certificate of official search dated 19th May 2009; a copy of demand letter dated 11th May 2009 addressed to the defendant and letter dated 14th May 2009 from defendant to the plaintiff.

7. Gorave Amarnath (DW1) testified on behalf of the defendant. He adopted his witness statement dated 14th December, 2018. He stated that he is a director with the defendant company and testified that the defendant leased the suit property from the third party on the terms and conditions contained in the lease agreement dated 16th December, 2008 and registered on 28th August 2012. He stated that the defendant paid the agreed rent as well as rates for the suit property. The defendant contends that the third party is the registered owner of the suit property and that it has lawfully leased it to the defendant. He alleged that the third party in fact still has concerns with how the suit property was transferred from the third party to Westend Limited who ultimately sold it to the plaintiff. That dispute is said to be the subject of Mombasa RMCC No. 1902 of 2006. Therefore, the defendant contends, the plaintiff has no good title to the suit property. DW1 testified that the plaintiff has since taken possession and developed the suit property and since 2016, the plaintiff has been running a car dealer business. He stated that the defendant is claiming for compensation from the plaintiff and the third party for special damages for loss of business. He produced the documents filed on 29th October, 2012 as D.exhibits 1-8 and the document filed on 17th December 2018 as D.exhibit 9. These documents are: - Lease agreement dated 16th December 2008 registered with the ministry of lands; receipt No. 98 AGM 01714 dated 25th March 2009; handwritten letter dated 11th February, 2009 by Mr. Andrew K. Mattaza, vice national chairman, KNCCC & 1 for grant of lease to M/s Amarnath Enterprises Limited; Handwritten letter dated 11th February 2011 by Mr. Laban Onditi; letter dated 21st May 2009 by Mr. T. G Ruhii, the Chief Executive Officer of the Kenya National Chamber of Commerce & Industry confirming the ownership and lease of the suit property; property rates statement no. U. P. N. 3-01837 by municipal council of Mombasa dated 14th May 2009; letter dated 11th February, 2011; letter dated 14th May, 2009 to Muriu Mungai & Co. Advocates; Order dated 8th October 2009 in Mombasa RMCC No. 1902 of 2006; and certificate of lease in respect of title no. MOMBASA/BLOCK XXIII/185 in favour of Kenya National Chamber of Commerce & Industry.

8. The third party did not present any witness to testify.

9. In their submissions filed on 25th March, 2019, the plaintiff submitted, inter alia, that on a balance of probabilities, it has demonstrated that it is the validly registered owner of the suit property. Relying on the case of **Wreck Motor Enterprises –v- Commissioner of Lands & 3 Others (1997) eKLR**, the plaintiff submitted that the evidence adduced shows that stamp duty was paid, the purchase price was paid, consent was obtained, and the transfer was registered and a certificate of lease was issued in its favour. That neither the defendant nor that third party challenged the plaintiff's title over the suit property. The plaintiff further relied on the case of **Joseph N. K. Arap Ng'ok –v- Moijo Ole Keiwua & 4 Others (1997) eKLR** and argued that there is no evidence that the plaintiff was anything but an innocent purchaser

for value. The plaintiff further referred to the ruling made by the court at an interlocutory stage on 27th August 2009 where the court (Azangalala J, as he then was) found that the plaintiff was the registered proprietor of the suit property and that the defendant was a trespasser thereon. Relying on the case of *Wreck Motor Enterprises (supra)*, the plaintiff submitted that whatever equitable rights the defendant may have, whose rights cannot take precedence over those of the plaintiff who is the registered owner. Secondly, that since the defendant does not have any lawfully recognized rights to occupy the suit property, it becomes a trespasser over the suit property. The plaintiff also relied on *Shariff Abdi Hassan-v- Nadhif Jama Adan (2006)eKLR* and submitted that the prayer for both prohibitory and mandatory injunction are merited. And while relying on the case of *Damasius Musya Malinda & Another –v- Daniel N. Mwangi & Another (2018)eKLR* and *Kenya Hotel Properties Limited –v- Willesden Investments Limited (2009)eKLR*, it is the plaintiff's submission that it is entitled to aggravated damages. That in the present case, there is a lease agreement dated 16th December 2008 showing that the monthly rent payable was Kshs.14,000.00 which would escalate by 5% for every year. That the total rent that would have been earned by the plaintiff from 2009 until 2016 when the defendant gave vacant possession is Kshs.1,436,245.48. The plaintiff urged the court to award this figure as general damages and Kshs.1,500,000.00 as aggravated damages. It is therefore the plaintiff's case that it has proved its case to the required standard and award the reliefs sought.

10. On its part, the defendant submitted that the plaintiff was unable to provide any evidence that Westend Limited had bought the suit land from the Kenya National Chamber of Commerce and Industry at a public auction on 7th September, 2007. Again that the plaintiff was unable to rebut the evidence provided by both the defendant and the third party that the purported purchase by the plaintiff from Westend Limited was illegal, unlawful, null and void as it was conducted in contravention of specific order made in CMCC No.1902 of 2006 between the third party and the plaintiff and in which Westend Limited was a third party. That in order to conceal the truth both the plaintiff and the third party failed and/or refused to produce any evidence on the status and circumstances of CMCC No. 1902 of 2006. The defendant stated that it was evicted on 26th January 2016 by the plaintiff who fenced off the plot in spite of the fact that the case was still pending. It is the defendant's submission that the plaintiff did not obtain any valid title to the suit land and that the defendant came into the suit property lawfully. It is therefore the defendant's submission that the third party is wholly liable to the defendant to indemnify it and make good the defendant's loss in the case. The defendant submitted that the plaintiff's suit ought to be dismissed with costs and judgment entered for the defendant against the third party in terms of the third party notice dated 19th February, 2010.

11. I have carefully considered the pleadings, the evidence tendered and the submissions made by the plaintiff and the defendant. The issues for determination are: -

i. Whether the plaintiff is the lawfully registered owner of the suit property.

ii. Is the plaintiff entitled to the reliefs sought?

iii. Is the defendant entitled to the orders against the 3rd party in terms of the third party notice herein?

12. From the material placed before me, there is no dispute that the suit property is registered in the plaintiff's name. The plaintiff produced the sale agreement dated 20th December, 2007 between it and Westend Limited in respect of the suit property. There is evidence that shows that the purchase price was paid, that consent was obtained, that transfer was executed in the plaintiff's favour, that stamp duty was paid, the transfer was registered and a certificate of Lease issued in favour of the plaintiff on 19/3/2008. In my view, there is sufficient evidence to confirm that the plaintiff acquired title to the property legitimately.

13. The defendant filed a statement of defence. It is the defendant's case that it leased the suit property from the third party. However, in its defence, the third party has denied the defendant's averments. Whereas the third party contended that it was the registered proprietor of the suit property and alleged the sale to the plaintiff was fraudulent and subject to challenge in Mombasa CMCC No. 1902 of 2006, the third party did not lead any evidence to support its allegations. In my view, neither the defendant nor the third party led any evidence challenging the plaintiff's title over the suit property. The evidence on record shows that the plaintiff was issued with a certificate of lease over the suit property on 19th March, 2008. For such a title to be successfully impeached, the court of appeal in *Joseph N. K. Arap Ng'ok (supra)* stated:

“The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. As no fraud on the part of the sixth respondent, the registered proprietor of the leasehold interest in the suit property, is pleaded, we see no arguable appeal.”

14. In this case, there is no evidence that the plaintiff was anything but an innocent purchaser for value. I see no arguable case on the validity of the plaintiff's title. It is therefore my finding and I so hold that the plaintiff has demonstrated, that it is the validly registered owner of the suit property. The submissions by the defendant that the plaintiff acquired the suit property fraudulently and unprocedurally has not been supported by any evidence. As the registered owner of the suit property, the law gives the plaintiff an absolute and indefeasible title of the property. Since the defendant did not have any lawfully recognized rights to occupy the suit property, the defendant became a trespasser over the suit property. The evidence on record is that the defendant entered the suit property in or about March 2009 and only gave vacant possession in 2016. The defendant is therefore liable to compensate the plaintiff for trespass for the period it was in occupation and possession of the suit property.

15. The court will, once trespass is proved, be obliged to assess the reasonable damages to be awarded to the plaintiff. The plaintiff has urged the court to take into account the total rent that would have been earned for the seven (7) years the defendant was in possession of the suit property. The plaintiff proposed Kshs.1,436, 245.48 and Kshs.1,500,000.00 as general and aggravated damages respectively. I note however, that the defendant has submitted that it gave vacant possession on 26th January 2016. The plaintiff did not rebut this evidence. The court will therefore award the plaintiff rent it would have earned up to January, 2016 and not the end of the year 2016 as proposed. I will therefore deduct the sum of Kshs.216,692.30 from the sum proposed by the plaintiff. Consequently, it is my finding and I so hold that the sum of Kshs.1,500,000/= as aggravated damages and Kshs.1,219,551.18 as general damages would be reasonable.

16. The other issue to consider is whether the defendant is entitled to the reliefs sought against the third party. I note however that whereas the defendant applied for and obtained and issued third party notice, and the third party filed its defence, no application for direction has been made by the defendant as required by the provisions of Order 1 Rule 22 of the Civil Procedure Rules. As such, in my view, as such application has not been filed and considered by the court, the defendant's claim against the third party cannot be considered. It is my understanding that the issues of the third party are issues that are triable only between the third party and the defendant after the provisions of Order 1 Rule 22 have been complied with, and cannot be a bona fide issue triable between the defendant and the plaintiff.

17. The upshot is that this court is satisfied that the plaintiff has proved its case against the defendant on a balance of probabilities. Accordingly, judgment is entered for the plaintiff against the defendant in the following terms: -

a. A permanent injunction restraining the defendant whether by itself, its servants, officers and/or agents or any of them whatsoever from dealing in any way or interfering with the plaintiffs' possession and quiet enjoyment of all that parcel of land known as MOMBASA/BLOCK XXIII/185.

b. A mandatory injunction compelling the defendant by itself, its servants and and/or agents to vacate parcel of land known as MOMBASA/BLOCK XXIII/185 and to remove all the construction materials deposited on the parcel of land known as MOMBASA/BLOCK XXIII/185, in default, the plaintiff to remove them at the defendant's cost.

c. Kshs 1,219,551.18 as general damages for trespass.

d. Kshs.1,500,000.00 as aggravated damages.

e. Costs and interest.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE