REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 293 OF 2013

HEDWIG-HIRT MITTERLERLEHNER ULRICH.....PLAINTIFF

VERSUS

HENDRICK SPIN .....DEFENDANT

JUDGMENT

(Suit based on a landlord/tenant relationship; plaintiff claiming to have a lease with defendant which provided for a pre-emption right of purchase on its expiry; defendant stating that the pre-emption right would only apply if he intended to sell and he did not wish to sell; plaintiff claiming entitlement to the developments made on the suit land if defendant does not wish to sell; suit by plaintiff accompanied by a verifying affidavit which the plaintiff herself affirmed she did not sign; suit thus based on a fraudulent affidavit and is incompetent; plaintiff stating in her evidence that she did not sign the lease instrument; no suit therefore can be founded on the basis of the purported lease agreement for it was never signed by the plaintiff; signature of the defendant in the lease not properly attested; developments made on the land not being in conformity with the leasehold conditions and not made with the consent of the defendant; defendant cannot be made to compensate plaintiff for developments that he has not consented to and go contrary to the terms of the leasehold title; plaintiff's suit dismissed with costs; counterclaim by defendant for rent upheld and plaintiff ordered to give vacant possession)

1. This suit was commenced through a plaint which was filed on 11 December 2013 and which plaint was later amended on 19 February 2019. It is the pleading of the plaintiff that by a lease agreement made on 10 February 2003, the defendant let to the plaintiff, the land parcel described as CR No. 15140/1/425/Section III/Mainland North, Mombasa, for a period of 10 years at the yearly rent of Euros 1,500. It is pleaded that it was a condition of the lease that at the expiry of the lease period, the lessor was to give the lessee the first priority to purchase if he was to sell the property, and that if he did not desire to sell, he would compensate the plaintiff for all the developments that the plaintiff has made on the suit property. The plaintiff contends that though the defendant has informed him that he does not wish to sell, the truth of the matter is that the defendant intends to sell to a third party, without giving the plaintiff the first priority to purchase.

2. In the suit, the plaintiff has asked for the following orders (slightly paraphrased) :-

a. A mandatory injunction compelling the defendant to sell the suit land.

b. A permanent injunction restraining the defendant from evicting or removing the plaintiff from the suit land or in any other way interfere with his tenancy and enjoyment of the premises.

c. An order that the defendant compensates the plaintiff for the expenses incurred on installations, renovations and maintenance of the leased premises and as per a valuation and quantity survey report which amounts to Ksh. 23, 249,463.30.

d. Costs and incidentals.

e. Any further orders of this court as deemed fit to grant.

3. The defendant filed a defence and counterclaim which he later amended. The defendant pleaded that he does hold the leasehold title, and that there are conditions attached to his title, including special conditions on developments, inter alia, that the premises is to be used for a shop and residential purposes only and not more than one private dwelling house is to be erected on the plot; further, that the owner is not to erect any buildings until the plans and drawings have been approved by the Local Authority and Commissioner of Lands. He pleaded that the lease agreement dated 10 February 2003 was prepared by the plaintiff's advocates and executed by the defendant in Holland, and not Mombasa, without any person witnessing his signature. He pointed out that the plaint refers to a lease agreement dated 10 February 2003 whereas what the plaintiff has displayed is a lease agreement dated 10 September 2004 and no sub-lease has been registered against the title. He pleaded that the plaintiff has only paid a total of Euros 3,540 and is in arrears of rent for seven years, amounting to Euros 11,460. He pleaded that according to the lease, the plaintiff was to be given first priority to purchase if the defendant wished to sell, and that since he

does not wish to sell, the question of "first priority of purchase" to the plaintiff does not arise. He denied that he was to pay any compensation to the plaintiff if he did not intend to sell and pleaded that compensation was only payable if he intended to sell to a third party. He pleaded further that compensation would only be payable to the plaintiff if the plaintiff carried out development with the consent of the defendant and complying with the terms of the head lease. He averred that the developments carried out by the plaintiff were not done with his consent and neither did they comply with the terms of the head lease. He pleaded that he offered to sell the premises to the plaintiff for the sum of KShs. 25,000,000/=, which the plaintiff declined, and he thus withdrew the offer and advised the plaintiff that he no longer intends to sell. In the counterclaim, he asked for the following orders :-

a. Euros 11,460 being arrears of rent;

b. Mesne profits at the rate of Euros 1500 per annum or part thereof as from 1 January 2014 until vacant possession is given.

c. Possession of the suit property.

d. Costs.

e. Interest on rent and mesne profits at court rates.

f. Any other or further relief that this Honourable Court may deem fit to grant.

4. PW-1 was Ulrich Mitterslerle, the husband to the plaintiff. He adopted his witness statement as his evidence. The said statement basically reiterates what is pleaded in the plaint. He produced as an exhibit a lease dated 10 September 2004 which he said was signed by himself, the plaintiff, and the defendant, and was witnessed by an advocate. He testified that from the year 2007 they were paying the rent into a Swiss account. He testified that they renovated the premises by putting up a water system, waste management system, and electricity. He stated that there was only a pit on the land where there now exists a "beautiful" swimming pool. He testified that he is the one who renovated the swimming pool at a cost of KShs 1 million. He testified that they had called a valuer to value the premises before embarking on the renovations. They also set up three bungalows for tourists and prepared the garden. He further put up a complete workshop and a parking bay. Cross-examined, he acknowledged that he is still in occupation of the premises though the lease was to expire on 31 December 2013. He stated that he stopped paying rent in the year 2007 though rent was to be paid every January. He stated that the lease did not give provision for the renovations. He testified that he built the three bungalows on his own authority. He did state that he is the one who signed the verifying affidavit to the plaint, asserting that there are two plaintiffs, himself and his wife. He was not sure whether the defendant wants to sell the land.

5. PW-2 was the plaintiff. She is from Switzerland. She stated that she is the lessee of the suit land. She affirmed that the lease was to expire in the year 2013 and that she was paying the rent. She stated that they agreed that the defendant would not sell the property so long as they were still in it. She testified that they renovated the house and improved the surrounding and also paid ground rent and rates every year amounting to KShs. 800,000/=. She stated that the amount claimed as rent by the defendant was paid into an account in Switzerland which account is in her own name. She stated that because there were some things not done according to the lease agreement, the defendant could not access the money in the Swiss account from the year 2007. She testified that the defendant was to contact them and they would have instructed their son to release the money to him. She cited lack of communication as the problem. She wished to have the property transferred to her and also to be compensated for the renovation works.

6. Cross-examined, she testified that the signature in the verifying affidavit is neither her's nor her husband's. She testified that both herself and her husband were tenants as both their names appear in the lease instrument. She stated that she did not sign the lease agreement. She could not recall receiving any offer to purchase the property at KShs. 25 million though she could recall that the owner gave them an offer to purchase at a price that she could not recall. She wanted title because she has been on the property for 20 years. She conceded that there was no term in the contract permitting her to pay money into her own account. She affirmed that the defendant has not been paid rent since the year 2007. She also conceded that she did not get the consent of the defendant before embarking on the renovations. She stated that she had written to him but there was no reply. Re-examined, she stated that the lease did not indicate where the rent was to be paid.

7. PW-3 was Martin Simiyu Nyongesa. He is a practising Quantity Surveyor. He testified that he was engaged by the plaintiff to assess the extent of developments that she had made. He prepared a report which he produced as an exhibit. He quantified the value of renovations at KShs. 23, 249,463.30/=. Cross-examined, he stated that he did not know the time the main house and guest house were done. He used costing using rates prevailing as at October 2018. He did not know the cost at the time the renovation was done. He also did not see any building plans.

8. Parties agreed by consent to have a valuation report done by M/s Quince Estate produced as one of the plaintiff's exhibit without calling the maker.

9. With the above evidence, the plaintiff closed her case.

10. DW-1 was Janny Theodora Jennings. She holds a power of attorney from the defendant. She fully relied on her witness statement as her evidence in chief. In it, she has stated inter alia that the defendant is a family friend and she has personal knowledge of the issues at hand. She stated that the defendant previously owned the suit land with one Peter De Ruiter. The property is a leasehold from the Government for 99 years from 1 October 1973 and has some special conditions. She cited the following :-

i. That the property was to be used for a shop and one private dwelling house.

ii. No constructions without the consent of the local authority and Commissioner of Lands.

iii. No lease sale or other disposition of the property without the prior consent of the President.

11. She stated that at the time the defendant was leaving the country, he intended to sell the suit property and the plaintiff informed him that she had a purchaser but needed some money to have some repairs carried out before the property could be sold. She stated that the defendant sent to the plaintiff some money from Netherlands which have never been accounted for. No sale materialised and the plaintiff herself offered to lease the property. A lease agreement was then prepared by the plaintiff's advocates, M/s Okanga & Company, and the same was sent to the defendant in Netherlands through a letter dated 28 June 2004. The defendant then executed the lease without the same being witnessed or dated, and returned the same to M/s Okanga & Company Advocates. That lease is what is now dated 10 February 2003. The lease was never registered. She stated that the lease was for a period of 10 years expiring on 31 December 2013 and the rent payable was Euros 1,500 per annum payable in January. She stated that the plaintiff only paid Euro 540 in 2006, Euros 2,500 in 2007 and another Euros 1,500, in total Euros 3,540. She is thus in arrears amounting to Euros 11,460. She stated that it was a term of the agreement that it is only if the defendant was going to sell the property that the plaintiff would be compensated for the improvements that she had made on the property. She was not aware of the exact developments, but if any were done, then they were not approved by the defendant nor the Local Authority, nor the Commissioner for Lands, as required in the special conditions. She stated that if there was any right of pre-emption, the same was to be exercised before the expiry of the lease. She stated that the defendant offered to sell the property to the plaintiff at KShs. 25 million which offer the plaintiff declined. He does not now have any intention to sell the property. She averred that the term of the lease has expired but the plaintiff is still in occupation of the property.

12. Cross-examined, she stated that the defendant (Mr. Spin) is of Dutch nationality. He was partners with Peter De Ruiter. She stated that he left the country shortly after Mr. De Ruiter died which was about the year 2003. She testified that she had been to the property and there were three cottages and a swimming pool apart from the main house. She did not know if the plaintiff paid land rates. She stated that rent was paid in Euros by way of bank transfer.

13. With the above evidence, the defendant closed his case.

14. I invited counsel to file written submissions which they both did. I have considered the same before arriving at my decision. In his submissions, Mr. Birir, learned counsel for the plaintiff, inter alia submitted that the defendant quoted an astronomical figure to prevent the plaintiff from purchasing the property. He submitted that the plaintiff should be compensated for the renovation works done. He referred to the lease and submitted that the defendant cannot run away from his obligations. He submitted that the special conditions in the leasehold title apply only to the defendant and that the plaintiff is only bound by the lease between herself and the defendant. He referred me to the various valuation reports on record and pointed out that the value of the property in December 2003 was KShs. 3.2 million, but as at the year 2018, the value was KShs. 25 million, with the value of developments being KShs. 23,249,463/=. He submitted that the lease agreement provides for a right of pre-emption to the plaintiff at the current price as at September 2003 when the lease commenced. I observe that Mr. Birir did not address himself on the counterclaim of the defendant.

15. On his part, Mr. Omolo, learned counsel for the defendant, inter alia submitted that the plaintiff had in her possession the leasehold grant thus fully aware of the special conditions, and being a sub-lessee, she was bound by these conditions. He submitted that the defendant carried out works in flagrant breach of the special conditions and without the consent of the defendant. He submitted that it is trite that developments on the land form part of the land and cannot be removed. On the lease instrument, he submitted that the plaintiff admitted to not having signed it. He submitted that the clause on pre-emption would be a disposition of land which requires a signature. He submitted that an offer was made to the plaintiff but she did not respond. He submitted that there is no legal basis for the plaintiff to claim a mandatory injunction to compel the defendant to sell. He further submitted that the plaintiff cannot claim a permanent injunction to stop the defendant from evicting the plaintiff as the term of the lease has expired. On the claim of KShs. 23, 249,463.30/= he submitted that this is a claim for special damages which must be pleaded and that there was no such pleading in the amended plaint. He continued to submit that in any event, the claim for compensation would only be triggered if the property was to be sold to a third party, and in this case, the defendant does not wish to sell due to a slump in the property market. He submitted that in order to be eligible for compensation, the plaintiff needs to prove that there is a change of user of the property, approved plans, and consent for the renovations. He submitted that the plaintiff cannot claim compensation for works done illegally. He submitted that the renovation works were only done to further the tourist business of the plaintiff and not for the residence of herself and her husband. He further faulted the valuation of the renovations as the value is that of 2018. He submitted that the plaintiff could claim the actual cost incurred by her and not the value of the developments as at 2018. On the counterclaim, he submitted that the defendant is entitled to judgment thereof as the plaintiff admitted to not having paid rent since the year 2007.

16. I have considered all the above and now take the following view of the matter.

17. At the outset, I must say that I have a serious problem with the veracity of the plaintiff's suit, for I do not believe that it was properly filed following the prevailing rules of procedure. The plaintiff herself stated that she did not sign the verifying affidavit that commenced this suit. It is trite that it is the requirement of the law that a plaint needs to be accompanied by a verifying affidavit sworn by the plaintiff which is not the case here. This is provided in Order 4 Rule 1 (2) which is drawn as follows :-

> (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

18. In our case, the plaintiff herself admitted that she did not sign the verifying affidavit. She therefore never presented an affidavit sworn by her as required above. PW-1, the husband of the plaintiff, testified that he is the one who signed the verifying affidavit, though of course, in her evidence, the plaintiff stated that the signature therein is neither her's nor her husband's. Either way, the undisputed evidence is that the verifying affidavit was not sworn by the plaintiff. The plaint herein was thus not accompanied by a verifying affidavit as required by the rules and the suit was incompetent *ab initio*. One may argue that this is a procedural lapse, but there was never any overture to try and comply with the rules, even after it became obvious that the plaintiff had not sworn the verifying affidavit. But in our case it is not a simple procedural lapse, say, where one has forgotten to file his suit with a verifying affidavit. This is a case where an affidavit sworn by another person has been used to institute a suit. To have an affidavit which is sworn by someone else and use it to file suit is fraudulent to say the least and courts should not condone such conduct from persons or litigants. If this is taken lightly, then people will be filing suits pretending that such suit has been filed by the person named as plaintiff, when in actual fact, this is not the case. I am personally averse to such acts and

I am unable to sympathise with the plaintiff. I find this suit to be incompetent and liable to be struck out.

19. Assuming that the suit is competent, which in my view it certainly is not, I will delve into the merits of it.

20. The dispute between the plaintiff and defendant stems from a lease over the suit property. There is of course some contention over whether or not the plaintiff and defendant executed the lease as required by law. The lease instrument produced by the plaintiff as P-exhibit 1, shows that it was actually never signed by the plaintiff, but by PW-1. This was admitted by PW-1 during cross-examination where he stated that only his signature appears. The plaintiff also admitted as much in her evidence in chief, where she stated as follows :- *"I confirm this lease agreement Pex 1 was signed by Ulrich (sic)"*. In cross-examination, she stated as follows :- *"I did not sign the lease agreement."* The evidence given by the defendant is that the lease instrument was sent to him and he signed it in the Netherlands without the same being attested. There is indeed some evidence of this because I have seen the letter dated 28 June 2004 from M/s Okanga & Company Advocates addressed to the defendant in Netherlands, and forwarding to him three re-drafted copies of a lease agreement. It is apparent that the defendant did sign the lease agreement while in the Netherlands and sent back the copies to M/s Okanga & Company Advocates. The attestation of the lease agreement by one Mwaboza Mwasambu Advocate is therefore doubtful because all along the defendant was in Netherlands. The instrument purporting to be a lease was therefore not properly attested and for that reason cannot be relied on as evidence of the lease between the parties.

21. Putting the issue of attestation aside, there is even a more grave problem for the plaintiff, for she herself confirmed that she never signed the lease. This being the case, then clearly, there is no written instrument that can be said to be a lease between the plaintiff and the defendant. This presents a myriad of challenges for the plaintiff, one being that the lease instrument cannot be enforced following the provisions of Section 3 of the Law of Contract Act, Cap 3, Laws of Kenya, which provides as follows :-

> 3 (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
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> (a) the contract upon which the suit is founded—
>
> i. is in writing;
>
> ii. is signed by all the 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 subsection 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.

22. There is really no written contract between the plaintiff and defendant because the lease at hand was never signed by the plaintiff. Secondly, even if it was so signed, it was never attested as required by law. It follows that, there is no instrument of a lease that can be presented before this court as being the contract between the plaintiff and defendant. The effect is that the plaintiff cannot therefore come before this court to enforce any term that requires the defendant to sell the land to her on the basis of a pre-emption right contained in the purported lease. That being the case, this court can only enforce basic obligations under a lease which in the circumstances of this case will be the right to rent and vacant possession on expiry of the term of lease. None of these are in favour of the plaintiff. The plaintiff cannot certainly claim any money that she expended on the property, bar an explicit agreement to that effect, which as I have pointed out, we do not have here, for it is trite that any improvements on the land are deemed to be part of the land. In essence, it would mean that the defendant is fully entitled to the amount of rent that remained outstanding for the duration that the plaintiff has been in occupation of the premises.

23. The plaintiff has not called forth any evidence to dispute the claim by the defendant that all that she has paid under the lease is the sum of Euros 3,540. The defendant permitted the plaintiff to remain in the premises for 10 years at the rate of Euros 1,500 per year, meaning that the plaintiff needed to pay the sum of Euros 15000. Clearly, the plaintiff owes the defendant the sum of Euros 11,460. The plaintiff has continued to remain in possession of the premises beyond the 10 years and must pay mesne profits. The defendant may have been entitled to mesne profits at current rates but he has been gracious enough to only demand mesne profits at the same rate, that is Euros 1,500 per annum. This would mean that the plaintiff is meant to pay to the defendant for the years 2014, 2015, 2016, 2017, 2018, 2019 and 2020, which are seven years, at the rate of Euros 1500 per year, thus the sum of Euros 10,500. In total therefore, the plaintiff owes the defendant the sum of Euros 21,960 and needs to vacate the premises forthwith.

24. I would still have come to the same result had I thought that there is a valid instrument of lease that is enforceable between the plaintiff and defendant. The terms of the document presented before me has 9 clauses as follows :-

> 1. THAT the lease agreement shall run for a period of 10 years ending 31/12/2013.
>
> 2. THAT the rent of the premises, shall be paid yearly for a sum of 1,500 Euros (One thousand five hundred only) in the month of January.
>
> 3. THAT at the expiry of 10 years if the LESSOR wants to sell the parcel of land, then the LESSEE shall be given first priority of purchase.
>
> 4. THAT should the LESSOR prefer to sell the property, to a third party, then the LESSOR shall compensate the LESSEE for the improvements and developments already made on the parcel of land.

5. To pay the rent hereby reserved on the year and in the manner aforesaid without any deductions whatsoever.

6. To pay all water, electricity charges now or hereinafter imposed upon the parcel of land in respect thereof.

7. To permit the LESSOR at all reasonable times and a prior notice of intention to enter the same to be given, or any person he sends in his name (sic).

8. The LESSEE paying the Ground Rent hereby reserved and observing the stipulations on his part, herein contained shall peacefully hold and enjoy the said term without any interruption by the LESSOR or any person rightfully claiming under or in trust for him.

9. The LESSEE has the right of pre-emption at the price of the current value as at September 2003, only when there is no compensation.

25. The dispute herein would be over the interpretation of clauses 3, 4 and 9 of the document. Under clause 3 and 9 the lessee has a right of priority if the lessor wants to sell. From clause 4, it is only if the lessor wishes to sell to a third party that he would have an obligation to compensate the lessee for the improvements done. It follows that the lessee is only entitled to compensation if the lessor is selling the property to a third party. The instrument does not say that if the lessor does not wish to sell, then the lessee will have to be compensated for the developments made. In the instance of this case, the lessor has stated that he does not wish to sell. The lessee cannot therefore claim compensation for any developments.

26. Having said that, there is also a lot of ambiguity on the drafting of the lease. For example, does it mean that if the lessor changes his mind to sell, say after 5 years, the right of pre-emption would still exist ? One would expect that there be clauses on how this right of pre-emption is to be exercised if the document was drawn more elegantly. Be that as it may, my own view is that the right of pre-emption and the right to compensate would only apply while the terms of the lease are alive, that is, only up to 31 December 2013. Beyond that, the lease would no longer be alive, and parties will be free to operate as they wish. Moreover, even if I was to hold that there is a right to compensate, where the defendant does not intend to sell, the compensation can only be for developments that conform with the terms of the leasehold title, unless there is proof that the developments were done with the consent of the defendant. The developments here certainly do not conform to the special conditions of the leasehold title and neither were they made with the consent of the defendant. For all intents and purposes, they are illegal developments and the defendant cannot be made to compensate the plaintiff for an illegality.

27. Apart from the above, the plaintiff was clearly in breach of the terms of the document presented as a lease for not paying rent to the defendant. She cannot claim that she did not know where to pay rent for she did pay rent up to the year 2006. She was never informed that rent ought not to be paid into that account that she was paying previously and it follows that this is the exact account where she needed to pay her rent. It would be unconscionable for the plaintiff to claim that she has a right to purchase the property or to be compensated for developments, on the basis of the same document that she herself has breached with impunity. That would be unjust to the defendant.

28. Whichever way one wants to look at it, the case of the plaintiff is hopeless to say the least. Her case is hereby dismissed.

29. I have already mentioned that the defendant is entitled to rent arrears and mesne profits which I have calculated at Euros 21,960. I thus enter judgment in favour of the defendant for the sum of Euros 21,960. This sum will attract interest at court rates from 27 May 2014 which is the date that the counterclaim was filed. The defendant is also entitled to vacant possession of the property and the plaintiff is hereby ordered to give vacant possession within 14 days of this judgment. In default, the defendant is at liberty to appoint a court bailiff and have the plaintiff and/or her servants agents or anyone claiming possession under her to be evicted. The plaintiff will also pay the costs of this case to the defendant.

30. Judgment accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN PRESENCE OF:

Mr Birir for the plaintiff

Mr Omolo for the defendant

Court Assistant; Wilson Rabongo