



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 254 OF 2015

ASMUHAR DEVELOPERS LIMITED :.....PLAINTIFF

VERSUS

ABDALLA NZARO & 50 OTHERS.....DEFENDANTS

JUDGEMENT

By a plaint dated 14th July 2010 the plaintiff states that, at all material times to the suit, the plaintiff was the registered owner of the parcel of land LR. No. 4826/I/MN situated in Mwembe Legeza sub-location, Bamburi location of Mombasa District. The land is 6.031 hectares or thereabouts and consists of two sections lying on opposite sides of Bamburi Factory-Kiembeni road. The plaintiff avers that it did carry out a survey and sub-division of the aforesaid parcel of land which falls on the right hand side of the Bamburi Factory-Kiembeni road and has sold the various sub-divisions thereof to other individual persons for their respective developments. The plaintiff avers that the defendants together with other unknown persons encroached and/or trespassed onto the section of the plaintiff's aforesaid parcel of land which falls on the right hand side of Bamburi Factory-Kiembeni road and have unlawfully erected thereon buildings/structures and houses without the plaintiff's consent and/or authority. The plaintiff avers that all attempts to negotiate an amicable settlement have been negated by the defendants' attitude of invoking political goodwill to frustrate the negotiation process. The defendants' aforesaid actions caused great inconvenience and irreparable loss to the plaintiff as the plaintiff has been denied access to survey, sub-divide, develop and/or sell the northern section of the aforesaid land and risks losing the whole property. The plaintiff's claim against the defendants jointly and severally is for vacant possession of land parcel No. 4826/I/MN and a further order of this honourable court to evict the defendants from the aforesaid property. The plaintiff avers that save for Mombasa CMCC No. 3600 of 2004 which was withdrawn on 26th March, 2010 between the parties herein there is no other suit pending between itself and the defendants herein over this subject matter. The plaintiff prays for judgment against the defendants jointly and severally for:-

- (a) A permanent injunction restraining the defendants by themselves, agents, families and/or representatives from building, developing and/or erecting structures on or in any other manner dealing with LR. No. 4826/I/MN.
- (b) An order compelling the defendants to give vacant possession of LR. No. 4826/I/MN and in default, an eviction order to issue.
- (c) Costs and interest of this suit.

PW1 testified that his father vide a deed of partition dated 24th January 1989, did partition between himself Masoud Mohamed Muhashamy and his relatives, the said land. On 18th July 1990 he transferred his share to Ashmuhar Limited. He also became a co-director together with Hirji Patel of the plaintiff entity and upon his demise, the wife (mother to the PW1 became the director and on her moving to the USA, left the Directorship to the son, PW1). That this suit was initially filed in the Lower Court at Mombasa as CMCC 3600 of 2004, it was later withdrawn when this matter was filed initially as HCCC 242 of 2010 and now ELC 254 of 2015. Simultaneously other suits were filed i.e. CMCC 5612 of 2003 – Asmuhur Limited vs. Ibrahim Alajau Mbela and HCC 249/2006 – Asmuhar Limited vs. Issa Ali Ngawawa. That Ibrahim Majau Mbela moved the court vide ELC 58/2012 seeking adverse possession over subdivisions CR. No. 38961, 44701, 44702, 44703, 44704, 44705, 44706 and 44707 which are 8 subdivisions out of the mother title No. 4826/I/MN.

That the land is 6.031 acres, the plaintiff entity has formerly sold and registered on the mother title certificate of title Number CR. 19180, subdivisions 4826 original number 1500/3 Section/Mainland North. That there has been further sales to others including to Mohamed Sheikh Bin Sheikh. That this purchaser was so frustrated that he retransferred the two portions back to Asmuhar as the access to his plot was built on by one of the defendants. That almost 30 portions have been sold and 27 of them registered on the mother title with issuance of certificate of title and separate CR numbers given to each purchaser/transferee. The plaintiff relied on the case of Signon Co-operative Savings and Credit Society Limited vs. Kiriga & 3 others (2019) eKLR, the court held in favour of the plaintiffs giving orders of vacant possession against the defendants and an order of permanent injunction restraining the defendants from remaining on the said property; the defendants who were claiming adverse possession had trespassed into the fenced property, living on the property illegally. Also in the case of Sophie Wanjiku John vs. Jane Mwihi Kimani (2013) eKLR where court awarded the plaintiff, a purchaser of a parcel of land, the subject matter of the suit, orders of vacant possession against a trespasser who was staying there without any right. The defendants were served through a newspaper advertisement but failed to attend court or file any defence.

This court has considered the evidence and the submissions filed herein however, before going into the merit and the demerits of this case the court first needs to consider the preliminary legal issues before it. It is trite law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect. The plaintiff in this case is a limited liability company as pleaded in paragraph 1 of the plaint. In the case of **Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000 the court held that:**

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

In the case of **Affordable Homes Africa Limited vs Ian Henderson & 2 Others, HCCC No. 524 of 2004**, Njagi J. found that the Board of Directors had not passed a resolution to authorize the institution of the suit. In the circumstances, the learned Judge said;

“The upshot of these considerations is that in the absence of a board resolution sanctioning the commencement of this action by the company, the company is not before the court at all. For that reason, the preliminary objection succeeds, and the action must be struck out with costs, such costs to be borne by the advocates for the plaintiff”.

In the case before me, I have perused the court file and find that the plaintiff has not lodged in court, the resolution authorizing the institution of the suit. The plaintiff has also not exhibited the letter of authority, pursuant to which the Verifying Affidavit was sworn.

In the case of **Philomena Ndanga Karanja & 2 Others vs Edward Kamau Maina, ELC No. 1411 of 2014 the court stated that;**

“I have considered the rival submissions, and it is obvious that the suit herein was filed without the resolution of the Board. The 1st plaintiff tried to justify that position. However, it is trite law that where a suit is instituted for and on behalf of a company, there should be a company resolution to that effect”.

As there was no resolution passed by the Board of Directors, authorizing the institution of proceedings in that case, the learned Judge struck out the suit.

Be that as it may, PW1 gave evidence in court that he a co-director together with Hirji Patel. That upon the demise of his father, the wife (mother to the PW1 became the director and on her moving to the USA, left the Directorship to the son, PW1). No evidence has been adduced in this court to establish the same. The said Hirji Karsan Patel who swore the verifying affidavit never testified in court. I find that PW1's locus standi was not established in this matter. This being a preliminary point of law there would be no reason to go into the merits and demerits of this case. For these reasons I strike out this suit with no orders as to costs as the same was not defended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH SEPTEMBER 2020.

N.A. MATHEKA

JUDGE