



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 214 OF 2011

ALBERT CHULAH WAMIMIMTAIRE.....PLAINTIFF

-VERSUS-

HAKIKA TRANSPORTERS SERVICES LTD.....DEFENDANT

JUDGEMENT

1. The plaintiff filed this suit on 25th July 2011 against Hakika transporters services Ltd. In the plaint dated 22nd July 2011, the plaintiff asked the Court to grant him the following :-
 - a) **Payments of the current market value of the residential house without land on plot No L. R 267/V/Mainland North.**
 - b) **Damages for loss of income**
 - c) **Costs of this suit**
 - d) **Interest thereon at the rate of 12% from 30th January 2010 until judgement and payment in full**
 - e) **Any other relief the Court deems just to grant**
2. The defendant opposed the suit and filed his defence on 17th September 2011. The defendant denied the plaintiff's claim in toto and demanded for strict proof. The defendant pleaded that neither him or the plaintiff have any relationship, interest, claim and/or title to plot No 267/V/MN and at no time has the defendant carried any works or constructions as alleged or approached the plaintiff for any payout as compensation.
3. At the close of pleadings parties set down the suit for hearing. Both plaintiff and the defendant called three witnesses each. The plaintiff testified as PW 1. He opened his testimony on 22nd May 2013. PW 1 said he lives in Kokotoni and is an employee of Kenya Revenue Authority working at Kilindini Port. He said he bought a makuti house built on plot No 267/V/MN for Kshs 40000= from Jared Aginga and produced the sale agreement as Pex. 1. He continued that he renovated the house which had about 15 rooms. The house was fully occupied and he received approximately 24000= per month in rent. The plot was owned by Mwanakombo and Kombo.

4. PW 1 continued there were other houses on the land and he paid ground rent of Ksh 350 per month and produced the bundle of receipts as Pex 4. In January 2010, the owner of the land sold the land to the defendant. PW 1 stated that the defendant decided they would pay him compensation because they also bought where his house was. He could not tell whether the owners of the other houses were paid. He said he was called by Francis Kemo and went to the offices of the defendant where he was offered payment of Kshs 800,000= but he declined. PW 1 then contacted a valuer who valued the property and prepared a report dated 26.1.2011 produced. The house was valued at Kshs 3.4 Million. He informed the defendant but the defendant refused to pay him this money.
5. PW 1's further evidence is that the defendant built a perimeter wall which came next to his house which wall blocked the drainage thus blocking the sewage hence water collected in his house filling all rooms with water. This he said made all tenants leave/vacate. The house was also damaged and became inhabitable. He is asking to be compensated by being paid Kshs 3.4 Million. He said he was compensated by the defendant for the other set of houses which had no electricity at Kshs 1.6 Million.
6. In cross – examination, PW 1 said he has lived in Mombasa since 1979 but went to Nairobi on transfer in 2005 before returning in 2012. He demolished the house he bought and built a new house. He paid ground rent until when the land was sold. Everyone who had a house on this land was paid including his one house. His interest was house without land. He did not know whether T. in the approval meant temporary. PW 1 said that if the owner of the land wanted to sell, he had to serve notice and pay you for the house. In Re – examination, PW 1 stated the defendant informed him they had bought the plot and they would pay him. He denied that the house was on the sewage or the drainage lines.
7. The plaintiff was later recalled on 22.10.2014. He was reminded of his list of documents he filed on 22nd July 2011 and supplementary list filed on 5.6.2012 which he produced in evidence as exhibits. In cross – examination, he admitted the building plan was not signed by anybody and it had no name of the person who made it. It bore no approval stamp. He had no evidence to prove rental income. He had not filed any complained to NEMA. He could not remember paying ground rents since four years ago.
8. EDWIN OTIENO ODUOR testified as PW 2. He lives in Mombasa where he works as a valuer. He has a degree in land economics from the University of Nairobi. He was instructed by the plaintiff to prepare a report. He visited the site at Jomvu which is both a residential and industrial area. On his visit, he found a building of a permanent nature which had 15 rooms and toilets. It was connected to electricity. PW 2 continued that the rooms were occupied by tenants but six of them had been vacated. It is his evidence that the sewage flooded the built up area and surrounding, and that the wall prevented the free flow of drainage which was blocked. He prepared his report valuing the building at Kshs 3.4 Million as at 8th June 2011. According to PW 2, the value appreciates and would go up by about 15%. He signed the report and produced it as evidence.
9. PW 2 testified further that he also took photographs. This particular land was initially zoned industrial area which later became residential so it is a mixed user zone. PW 2 stated that he took the rent per room the plaintiff was getting of Kshs 1800= as a basis of his report. He did not check where the sewer lines are supposed to pass. He was not aware whether the perimeter wall was approved. After this visit – he had not gone back to the land. He did not take a photograph of the perimeter wall because he had seen it.
10. TWAIMA SALIM MBARAK gave his testimony as PW 3. He adopted his statement which he recorded and was filed in Court as his evidence. He knew the plaintiff as one of the people who leased part of their plot No 267/V/MN from his late grandmother Mwanakombo. PW 3 said he was the caretaker at the time. He stated there were 35 tenants in all including the plaintiff. PW 3 said his late grandmother sold the plot in January 2000 to the defendant who undertook to

compensate all the tenants with houses on the plot before removal of their houses. He confirmed that all the 34 tenants were compensated apart from the plaintiff.

11. On cross – examination, PW 3 said the late Mwanakombo is his maternal grandmother. He had nothing to show the land was sold to the defendant. He knew the defendant was paying a monthly ground rent of Kshs 500/= but he did not carry any documents to show. In re – examination, PW 3 said the land was bought by the defendant and before it belonged to his grandparents. The plaintiff's house was there before the defendant purchased it. With these evidence the plaintiff closed his case.
12. The defence opened his case by calling Abdalla Chuo Ali as DW 1. He said he works with the defendant as an accounts clerk and he is also a broker of buying and selling of land in his private capacity. He is aware of plot No 442/V/MN where he got instructions from Hakim Abeid, Shamal Abeid and Mohamed Abeid to liase with their advocates in processing title documents. He also did carry a search. Subdivision application was done and the numbers changed to 2621 and 2622. They were interested in 3.5 acres only. All documents were processed and the defendant obtained a transfer in respect of land parcel L. R No 2621/V/MN. They also obtained approvals from NEMA and the Council before putting up the perimeter wall. He was not aware of any objections made to their approvals. He produced the documents in their list as Dex 1, 2, 3. He denied the defendant's wall is built on plot No 267/V/MN neither any damage to a house on that plot or sewer. He concluded by saying the defendant's interest on the land was permanent ownership.
13. During cross – examination, DW 1 admitted that what he has said was not contained in his statement dated 4.10.2011. He was not aware how much money the plaintiff was claiming. When he went to the land, he did not see any house but saw a normal Swahili house. The plan showed the original number of 267 before No 442. DW 1 admitted the plaintiff owns a house on the defendant's land. He was not aware of any flooding. He was not aware the other tenants were paid. In re – examination, he denied seeing any houses on the land. He also knew what “house without land” mean.
14. DW 2, Francis Ogeso Kemo testified that he is a Mason and he lives near Mombasa stadium. He knew the defendant although he does not work there. He remembered constructing a wall at Jomvu for Jamal. DW 2 testified that before he commenced construction he was given approvals from the County government and NEMA. He continued that before construction, there was no house on this land. He does not remember being charged with blocking storm waters or sewer lines.
15. In cross – examination DW 2 stated that he does not know the plaintiff. He denied working as a supervisor in charge of construction for the defendant as he is a qualified contractor trading as Kemu Construction Co. He stated that he built a wall around plot No 442. He admitted the area has many Swahili houses. He denied being involved in any compensation payments. He does not know what happens there when it rains as he has never returned there after the wall was built. In re – examination, he said he worked for Jamal and he was not concerned with any compensation payouts.
16. The defence last witness is a valuer. Paul Wambua testified that he is a registered valuer and a member of the ISK. He qualified in 1995 from the University of Nairobi with a bachelors in land economics. He was instructed to undertake a valuation of house without land on the suit premises and write his report. He continued that he prepared his report dated 30.4.13 which he produced as Dex 4. DW 3 testified that the house had 15 rooms, occupied with a total monthly rent of Kshs 22500= . He valued the house at Kshs 1,450,000. He has not seen the house again.
17. During cross – examination, he said he knew Edwin Oduor (PW 2). He had not seen Oduor's report before filing his. Part of Oduor's report was similar to his i.e 15 rooms, 2 no bathrooms & 2 no toilets. He stated that he had never been to the site but his report was prepared by his assistant. He did not know whether this house belonged to the plaintiff. He denied the house was un-

occupied as at 30.4.2013. DW 3 admitted the variation of the two reports in terms of the value of the property is abnormal. The defendant closed its case.

18. Both parties filed their rival submissions. The plaintiff gave a summary of the evidence adduced and submitted that the plaintiff had proved his case on a balance of probabilities. He urged the Court to enter judgement in his favour as prayed in the plaint. The defendant also gave a summary of the evidence on record. He raised questions based on the evidence to which he answered inter alia that the plaintiff had not proved the existence of plot No 267/V/MN where his house was. The defendant submits that their evidence showed that the house was located on plot No MN/V/442. Further the defendant submits that evidence on record showed it had no interest or involvement with the construction of the perimeter wall or nexus between the defendant and the alleged complaints. The defendant cited the cases of **Active Automobile Spares Ltd vs Crane Bank Ltd and Another (2009) [E A] & Lakhani vs Vaitha (1965) EA 452** submitting that the plaintiff's structure was built without approval plans therefore illegal and which then disentitle him to any compensation.

19. Having considered the pleadings, evidence on record and the submissions, I find the following as arising for my determination ;

i) Has the plaintiff proved he owned a house and on which plot was it located ?

ii) Has the defendants' actions caused any loss to the plaintiff ?

iii) Is the plaintiff entitled to the compensation sought and how much ?

iv) Who bears the costs of this suit ?

20. The plaintiff and his witnesses adduced evidence that he had a house without land on plot MN/V/267 which comprised 15 rooms. The plaintiff stated that he had two houses. One was demolished by the defendant and he was duly compensated. PW 2 who is the plaintiff's valuer confirmed visiting the suit property and undertaking a valuation of the suit property. PW 2 produced a valuation report which had pictures of the house at page 2 of the report and a sketch map in page 1. Besides, PW 1 also produced a sale agreement between him and Jared Ayinga dated 1.9.1993. The documents show the house is on a plot in Jomvu area.

21. DW 1 and DW 2 gave conflicting evidence as to the existence of this house. DW 1 claimed that he did not see any house on the land but saw several Swahili houses. DW 2 also said there was no house on this land but admitted in cross – examination of seeing several Swahili houses in the area. DW 3 was actually instructed to undertake a valuation of the house the subject of this suit. His report in terms of the kind and structure of the house confirmed the evidence of PW 1 and PW 2. This Court is thus satisfied that there existed a house on the plot 267/V/MN. PW 3 confirmed the plaintiff was amongst the tenants his late grandmother had leased this land to. From the defendant's own documents i.e provisional certificate of title show plot No 442 was a sub-division from original No 267/4 Mainland North. The plaintiff's house is thus on a portion of the plot that was formerly 267.

22. Has the defendant's building of the perimeter wall caused the plaintiff harm ? It is not in dispute that a wall is built on plot 442. There are two issues raised by the defendant's witnesses i.e that the wall was built after obtaining approval therefore it should not bear any blame. The second issue is that the defendant has nothing to do with this wall as DW 1 and 2 stated that they worked on instructions from individual persons other than the defendant. The two valuers described the house to lie adjacent to Hakika Transporters Limited to the north. DW 3 at page 5 of his report stated thus ;

“Valuation : We value the interest in the property referenced HOUSE WITHOUT LAND ON PLOT No MN/V/442 free from all encumbrances and subject to our terms of reference, limiting conditions and general remarks at the current open market in the sum of Kshs 1,450,000=”

23. DW 3 in effect admits the house is located on plot No 442. DW 1 Abdalla Chuo who said he is a broker was instructed with the named individuals to process title documents. He stated that he liaised with the defendants' advocates and title documents were processed and the defendant obtained a transfer in respect of L. R No 2621/V/MN. He did not say the title documents were processed in the names of the individuals who instructed him. Again this is an admission the land in question belongs to the defendant. DW 2 confirmed building a wall around plot 442. The plaintiff stated that the defendant already compensated him for one of his houses that was demolished. This fact was not contravened by any of the defence witnesses. On limb one, I find the defendant has an interest in the land where this house stands. The question therefore is whether the wall has made the plaintiff's house inhabitable thus causing the plaintiff loss. The plaintiff in his evidence stated that the wall blocked flow of water (storm) and sewers thus causing the houses to flood. DW 1 role was only processing the title documents. His evidence does not contradict the evidence of PW 1. DW 2 has never gone back to the land after he completed building the wall. He doesn't know what happens when it rains. DW 3 only went to the land to carry out the valuation. I do find that the facts as put forth by the plaintiff as regard to the inconvenience the building of the wall has caused is unchallenged.

24. Is the plaintiff therefore entitled to compensation and how much? The plaintiff stated that he used to receive monthly rent of Kshs 1800 per room. All the tenants have moved out occasioning him loss of income. DW 3 confirmed there was rent being received from the premises at Kshs 1500 per room per month. He did not visit the site as it was done by his assistant. DW 3 therefore cannot confirm whether the rooms were vacant or not at the time his report was prepared. As to the illegality of the structure, the existence of Swahili houses as tenants at will is a known practice in Mombasa. The defendant is not the right body to claim whether such a house is built without approval and therefore illegal but the local authority. No evidence was presented by the local authority in the defendant's favour therefore such defence is without basis. The plaintiff certainly deserves compensation because the wall put up by the defendant is permanent and the defendant has purchased this land and the plaintiff is unlikely to receive rent from those premises again. The compensation should thus be reasonable enough to cover the value of the house and the lost income. PW 2 valued the house at Kshs 3.4 Million and added the house was likely to appreciate. In response to the appreciation, I have my doubts given the harsh conditions the house is exposed to which made the plaintiff file this suit. DW 3 put the valuation at Kshs 1,450,000. These are two professionals who have decided to disregard ethics and follow the whims of their instructing clients by not assisting this Court in giving a true value of the house in dispute.

25. This Court is therefore expected to assess compensation payment based on the two valuation reports that give a value so far apart. To bridge this, I can only guess that the true value of the house in dispute must be in between i.e. not lower than Kshs 1,450,000 and not higher than Kshs 3.4 Million. My maths teacher taught me the law of averages which I find useful in this instance ;

$$1,450,000 + 3,400,000 = 4,850,000$$

$$4,850,000 \text{ divide by } 2 = 2,425,000$$

I do make an opinion that a reasonable compensation payable to the plaintiff which is equivalent of a buy-out of his house is a sum of Kshs 2.5 Million. Consequently the defendant is ordered to pay the plaintiff the sum of Kshs 2.5 Million as compensation for the house and Kshs 270,000 as lost income being equivalent of one year's rent.

26. The last issue is who should bear the costs of the suit. The plaintiff's suit has succeeded after hearing the evidence of six witnesses. He engaged the services of an advocate. It is only fair that he be re-imbursed such costs as he has incurred. The costs of the suit is hereby awarded to the plaintiff. The plaintiff is also awarded interest at Court rates on the sum awarded for lost income from the date of filing this suit till payment is made in full. While for buy-out value interest runs from the date of judgement.

Ruling dated and delivered in Mombasa this 8th day of October, 2015

A. OMOLLO

JUDGE