



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 20 OF 2017

WESTWARD PROPERTIES LIMITED.....PLAINTIFF

- VERSUS -

CHEZER INVESTMENTS LIMITED.....DEFENDANT

JUDGEMENT

Background.

1. The dispute in this case is one of the examples of the craze in the 1990's where open spaces reserved for public purposes were converted into private properties. Where the planners of the City of Nairobi foresaw the need for future expansion of the existing infrastructure, others saw an opportunity to make quick money out of these open spaces.
2. The property in dispute is at the intersection of Uhuru Highway-Museum Road and Harry Thuku Road. The property is next to the Boulevard Hotel which was established in the 1970's. Aware that the property was government land, the owners of Boulevard Hotel M/s Chezer Investments Limited applied to the Commissioner of Lands to be allowed temporary occupation of the land for use as a parking lot for the hotel.
3. The Commissioner of lands granted a licence to Chezer Investments Limited for use of the property with effect from 1st May 1976 at an annual rent of Kshs. 4,840/=. Chezer Investments Limited who is the Defendant in this case had been using the public property since 1972 as a parking lot . Todate the Defendant is using the space and paying for it annually to the government.
4. On 22nd January 1998, one Enock Tuitoek approached the Defendant and informed them he was the owner of the property which had now been registered as LR No.209/12231. The Defendant's property which abuts the disputed property is LR No.209/2574. The Defendant then wrote a letter to the Commissioner of Lands on 23rd January 1998 objecting to the demand by Enock Tuitoek . The Commissioner of Lands wrote back and informed the Defendant that he had put a caveat on the disputed property.
5. The Defendant later received a letter from the firm of Kimamo Kuria Advocates informing them that they had encroached on their client's property which is the disputed property. It later turned out that the disputed property had been registered in the name of Jamachar Limited who then entered into a sale agreement with Soroya Investments Limited for the sale of the disputed property vide a sale agreement dated 10th January 1995. The disputed property was later transferred to the Defendant which is a sister company to Soroya Investments Limited.
6. During the construction of the Thika Super Highway, Roads like Museum Road and Uhuru Highway were expanded at the area of the disputed property. The expansion took part of the disputed property and what remained is the portion which the Defendant occupies as a parking space for which it still pays annual rent to the government. The Defendant has secured the parking with a permanent wall with permission from Kenya National Highways Authority (KENHA). The remaining portion which abuts Uhuru Highway and Harry Thuku Road has been landscaped by the Defendant with permission from KENHA.
7. The Plaintiff filed a suit against the Defendant on 14th August 2008 in which it sought the following reliefs: -
 - a. **A Commission do issue directed to the Director of surveys to investigate and ascertain whether the Defendant's property land reference number 209/2574 has encroached on the Plaintiff's property, Land Reference Number 209/12231 and if so, by what area and to thereafter report the findings to this Honourable Court.**
 - b. **A declaration do issue that the Defendant's property Land Reference Number 209/2754 has encroached on the Plaintiff's property, land reference Number 209/12231 by an area of 0.3037 acres.**

c. An order do issue directing that if indeed the Defendant's property, land reference Number 209/2574 has encroached on the plaintiffs property, Land reference Number 209/12231, the present boundary and/ or fence between the two properties be rectified to reflect the correct delineation and/or boundary.

d. Mesne profits and interest thereon at court rates.

e. Costs

f. Such further orders and directions as this Honourable Court may deem fit and/or appropriate.

8. The Defendant filed a defence and counter-claim on 20th November 2008. The Defendant later filed an amended Defence and Counter-Claim on 4th July 2018 in which it sought the following reliefs:-

a. Revocation of title issued over LR NO. 209/12231.

b. A declaration that the Defendant has become entitled by adverse possession to the whole or part thereof of LR NO. 209/12231 or any part thereof.

c. An order directing the Plaintiff to execute any necessary documents to effect the transfer of the disputed property to the Defendant.

d. Dismissal of the Plaintiff's claim and grant of the counter-claim with costs.

9. On 26th July 2012, the Plaintiff withdrew its suit on the ground that the disputed property had been compulsorily acquired by the government. On 11th October 2012, the Defendant followed suit and withdrew its counter-claim citing the same reason. In an interesting turn of events, the Plaintiff hired new advocates who moved the court seeking to set aside the withdrawal of the suit on grounds that it had not instructed its advocate to withdraw the suit. Following a hearing, the withdrawal was set aside.

Plaintiff's case.

10. The Plaintiff through Bryan Julian & D'Sousa, an employee of Soroya Investments Limited which is a sister company to the Plaintiff testified that he is a property manager of Soroya Investments Limited and that he is the custodian of all property records of the Plaintiff which is a real estate investment company. In 1995, Soroya Investment Limited entered into a sale agreement with Jamacher Limited for purchase of the disputed property at a consideration of Kshs. 12000000/-. Subsequently, Soroya Investment Limited assigned its interest to the Plaintiff. The disputed property was transferred to the Plaintiff on 24th December 1997 upon payment of all the rents, rates and stamp duty.

11. In 2005, the Plaintiff engaged Boma Surveyors Limited to establish the boundaries of the disputed property so that they could develop it. The surveyors found out that the Defendant had encroached on to the disputed property by 0.3037 acres. The plaintiff through its advocates M/s Kimamo Kuria Advocates protested the encroachment. This prompted the Defendant through its lawyers Messrs. Hamilton Harrison & Mathews to write to the Commissioner of Lands questioning the legality of the title to the disputed property. The Commissioner of Lands placed a caveat on the disputed property as he commenced investigations. As investigations by the commissioner of lands took time, the Plaintiff was forced to file the present suit to assert its title over the encroached area.

Defendant's case.

12. The Defendant through its director Jagdish Patel testified that it owns LR No. 209/2574 on which it has erected a hotel known as Boulevard Hotel. The Defendant acquired the property on 10th April 1970. It set up Boulevard Hotel in 1972. The Defendant has been using the disputed property as a parking lot since 1st January 1972. Sometime in 1976, it applied for a licence from the Commissioner of Lands. The Commissioner of Lands granted it a licence over the suit property with effect from 1st May 1976 at an annual rent of Kshs.4,840/= .

13. The Defendant testified that it has been paying annual rent of Kshs.4,840/= since 1st May 1976 to-date. The Defendant explained that the payment of Kshs.4,840/= is for licence fee but because the Ministry of Lands has no specific description of licence payment, it is referred to as annual rent. The Defendant explained that annual rent for its property which is in excess of Kshs.500,000/= is paid separately.

14. In January 1998, one Enock Tuitoek who described himself as a representative of Specialized Suppliers Limited approached the Defendant and informed its officials that he was the owner of the disputed property which was now LR No. 209/12231. He demanded that the Defendant vacates from the disputed property. The Defendant later received a letter from the firm of Kimamo Kuria Advocates who were claiming that the disputed property which was allegedly registered in the name of Soroya Investments Limited had been encroached onto by the Defendant.

15. The Defendant resisted the demands by M/s Kimamo Kuria Advocates as it had always had a licence over the disputed property. The Defendant then engaged the firm of Hamilton Harrison & Mathews to establish the claim. The Advocates found out that the disputed property had been registered in the name of Jamachar Limited in 1994 and that the same had been transferred to the Defendant in 1997.

16. The Defendant protested this action to the Commissioner of Lands who caused a caveat to be registered against the title to the disputed property on 19th August 2005. The Defendant contends that the disputed property has always been a road reserve and that it wrote to

KENHA who confirmed that the disputed property is indeed a road reserve and that KENHA had written to the National Land Commission asking it to have the title held by the Plaintiff revoked.

17. The Defendant is still in occupation of the disputed property and has put up a permanent wall to secure its parking lot with the express permission of KENHA and that it is the one which did the landscaping on the portion outside the permanent wall. The Defendant therefore argues that there is no way it can be blamed for encroachment when it has been utilizing the disputed property on licence with effect from 1st May 1976 whereas the disputed property was illegally created in 1994.

Analysis and determination.

18. I have carefully considered the Plaintiffs evidence as well as that of the Defendant. I have also considered the submissions filed by the parties. This is a classic case of abuse of the process of the court. The parties were well aware that they had no case against each other and this is why the Plaintiff and counter claim were withdrawn on 26th July 2012 and 11th October 2012 respectively. As I have said hereinabove, the Plaintiff in an interesting turn of events applied for setting aside of the withdrawal order which resulted in the counter-claim being revived as well. The Defendant thereafter amended the revived counter-claim which it is not interested in pursuing if its submissions are anything to go by.

19. From the pleadings and evidence adduced herein, the issues which emerge for determination are as follows: -

a. Was the acquisition of the disputed property by Jamachar Limited lawful.

b. Has the Defendant acquired the suit property by way of adverse possession?

c. Is the Plaintiff and Defendant entitled to the reliefs in their respective claims.

a. Was the acquisition of the disputed property by Jamachar Limited lawful.

20. There is no contention that the property owned by the Defendant borders the disputed property. The deed plan in respect of the property owned by the Defendant was prepared and signed on 16th January 1939. This deed plan clearly shows that where the disputed property was created from is a government road. The Defendant testified that it applied for a licence from the Commissioner of Lands to use part of the land as a parking lot. The Defendant was granted a licence with effect from 1st May 1976. It has since used part of the disputed property as a parking lot to date. It still pays annual rent of Kshs.4,840/=.

21. When the Nairobi Thika Road improvement Project was being undertaken, a huge part of the disputed property was taken by the road project. As was expected, the Plaintiff would have called for prompt payment of compensation. It never called for any compensation and this is a pointer to the fact that it was aware that the property which it acquired from Jamachar Limited was illegally obtained.

22. When the Commissioner of Lands was informed that there were persons who were claiming to have obtained title to the disputed property, the Commissioner of Lands moved and put a caveat against the title to the disputed property. The Defendant who had the disputed property transferred to it in 1997 has never taken possession of the disputed property. Part of the disputed property is still occupied by the Defendant which is still paying rent to the government. It has put up a permanent fence to secure its car park with the express permission of KENHA.

23. There are correspondence from KENHA and the Defendant's lawyers in which KENHA has indicated that the disputed property was illegally obtained and that KENHA was in the process of having the title revoked. It is therefore clear that as the disputed property comprised a road reserve for three key roads, it was not available for allocation to Jamachar Ltd. The Plaintiff claims to be a sister company with Soroya Investments Limited with whom Jamachar Ltd entered into a sale agreement. Soroya Investments Limited claims to have assigned its interest to the Plaintiff which was finally registered as owner of the disputed property. This being the case, the Plaintiff cannot claim to have been an innocent purchaser for value without notice. I therefore find that Jamachar Limited did not pass a good title to the Plaintiff. Jamachar Limited's title had been obtained illegally from land reserved for road expansion which was not available for allocation.

24. The Plaintiff failed to carry out due diligence when purchasing the disputed property through its sister company Soroya Investments Limited. The Court of Appeal in **Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others (2015) eKLR** had the following words of caution to investors in land:-

“ It was common knowledge and well documented at the time that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima Market’.

b. Has the Defendant acquired the suit property by adverse possession.

25. One of the prayers of the Defendant in the counter-claim is that it be declared as having acquired the suit property or part of it by way of adverse possession. The Defendant was not being serious in coming up with such a claim. The Defendant's position has been that it is a licensee from the government over part of the disputed property. The Defendant has also maintained that the disputed property is on a road reserve. It has had a spirited effort to have the title held by the Plaintiff revoked. It cannot now turn around and claim to be declared as having acquired the portion occupied by adverse possession. The law is clear that limitation does not run against the government as to be the basis of the Defendant's claim for adverse possession.

26. The Defendant in its submissions state that it is not claiming any part of the disputed property and that it is not pursuing any reliefs. One

then wonders why it had to amend its counter-claim and seek the reliefs therein. This is why I said in this Judgement that both the Plaintiff's claim and the Defendant's counter-claim are an abuse of the process of the court.

c. **Is the Plaintiff and the Defendant entitled to the reliefs in their respective claims?**

27. The Plaintiff wanted an order directed at the Director of survey to go and investigate whether the property held by the Defendant had encroached on to the disputed property and if so by what area. The Plaintiff also sought for a declaration that the Defendant had encroached on to the disputed property by 0.3037 acres and that the boundary between the two properties should be rectified to reflect the correct position. The plaintiff also sought for mesne profits. As I have found out hereinabove, the title to the disputed property was illegally obtained by Jamachar Limited. The plaintiff did not acquire good title from Jamachar Limited because as I have demonstrated hereinabove, the Plaintiff was not an innocent purchaser for value without notice. There is therefore no basis upon which any reliefs can be granted to it.

28. The Defendant's counter-claim had been withdrawn on 11th October 2012. When the plaintiff applied to have its withdrawn claim revived, the Defendant benefited from this when the court *suo moto* revived it. The Defendant thereafter amended the counter-claim in which it sought reliefs which it is not pursuing as per its submissions. This counter-claim is incompetent in that it was not accompanied by a verifying affidavit. There is therefore no relief which can be granted based on the same.

Disposition

29. From the above analysis, it is clear that both the Plaintiff's claim and the Defendant's counter-claim cannot succeed. The same are dismissed with each party bearing its own costs.

Dated, Signed and Delivered at Nairobi on this 24th day of September 2020.

E.O.OBAGA

JUDGE

In the virtual Presence of : -

Mr Kiarie for Defendant

Mr Awori for Plaintiff

Court Assistant: Hilda

E.O.OBAGA

JUDGE