REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 36 OF 1995

KATANA KALUME

ROSHANALI SIURA t/a ANYTIME

TRANSPORT SERVICES.....PLAINTIFFS

VERSUS

MUNICIPAL COUNCIL OF MOMBASA

OMAR HASSAN.....DEFENDANTS

JUDGEMENT

The plaintiffs submitted that the plaintiff's evidence was not rebutted by the defence. Accordingly, the plaintiff's case remains unchallenged they relied on the decision on Linus Nganga Kiongo & 3 Others vs. Town council of Kikuyu [2012] e KLR where the court cited the decision in the case of Motex Khitwear Limited vs. Gopitex Khitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 which held thus:-

> *"Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counterclaim must fail."*

The principal laid out in Kiongo's case applies in this matter and accordingly, the plaintiffs' case is taken as proved. It is clear that the 1st plaintiff was allocated the suit property, Plot No. 5, Shimazi by the 1st defendant. The 1st plaintiff assigned (transferred) his rights thereon to the 2nd plaintiff. The exhibits produced herein prove beyond a shadow of doubt that the 2nd plaintiff developed the said property upto the point whereby the 1st defendant issued an occupation permit to the 2nd plaintiff confirming that the construction works had been properly carried out. The 2nd plaintiff has been carrying out his business activities thereon ever since.

They submitted that the 1st defendant purported to allocate the very same property to the 2nd defendant sometimes in 1994, the 1st defendant did not have the capacity to allocate the very same property to the 2nd defendant. That could only have been done if the property had been properly repossessed from the plaintiffs by the 1st defendant through the recognized legal process as the 2nd plaintiff was already in occupation and infact the construction works thereon were done on the authorization of the 1st defendant to claim that the property had been repossessed by the 1st defendant thereby making it available for allocation to the 2nd defendant. The 1st defendant could not have granted such authorization if the property had already been repossessed from the plaintiffs. In this regard, the 1st defendants' allegation is paradoxical. It simply does not logically add up. In light of the above, the crucial issue that arises is whether the said allocation was proper or not, for if not the same is null and void for all purposes. The rule expressed as, "Nemo Dat quod Non Habet" (No one can give that which one does not have) equally applies to the purported allocation of the suit property herein to the 2nd defendant. A person cannot give a better title than what he has, except in rare cases such as, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case.

No person can ever pass a better title than the one he has. They relied on the decision of the Court of Appeal in diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others [2015] e KLR. Firstly, section 26 (1) and (2) are exceptions to the general rule in the sale of goods that a person who does not have title to goods cannot, without the owner's authority or consent, sell and confer a better title in the goods than he has. (Nemo dat quod non habet). These exceptions are examples of initiatives towards the protection of commercial transactions that Lord Denning famously referred to in Bishopsgate Motor Finance Corporation Ltd vs. Transport Brakes Ltd (1949) 1 KB 322, at pp. 336-

337 when he stated.

> *"In the development of our law, two principles have striven for masterly. The first is for the protection of property; no one can given a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."*

They submitted that, as the 1st defendant allocated the suit property in the 1980's to the 1st plaintiff who assigned it to the 2nd plaintiff, the 1st defendant did not have the capacity to allocate the very same property to the 2nd defendant. In other words, having eaten that cake (by way of allocating it to the 1st plaintiff who in turn assigned it to the 2nd plaintiff), the 1st defendant did not have any cake in their hand to give the same cake to the 2nd defendant. It is as simple as that and that is how the principal of Nemo Dat Qod Non Habet comes into play through which the 2nd plaintiff's right of ownership of the suit property requires to be protected by the court entering judgment in favour of the plaintiffs as claimed in the plaint herein.

The first defendant admits allocating on or about 28th July, 1980 to the first plaintiff an unsurveyed plot No. 5 along Shimanzi Road Reserve on temporary occupation only on the terms and conditions contained in the first defendant's letter reference TP35/60/80 dated 28th July, 1980 (hereinafter referred to "the said Temporary Occupation Licence") but the first defendant denies giving any consent to the first plaintiff to sublet the said plot to the second plaintiff as alleged therein. The first defendant states that any construction on the said plot was subject to the terms and conditions of the said Temporary Occupation Licence, inter alia,

(a) That the occupation of the said plot was strictly temporary.

(b) That the first defendant could terminate the said Temporary Occupation Licence at any time by giving three months' notice of termination under clause 3 of the said Temporary Occupation Licence.

(c) That on expiry of the notice of termination of the said occupation Licence the plaintiffs are obliged under Clause 4 of the said Temporary Occupation Licence to remove at their own cost any structures which may have been erected on the said plot and hand over vacant possession of the said plot to the first defendant.

The first defendant further contends that the said Temporary Occupation Licence does not and is not capable of creating an interest in the said plot except that it grants a licnece to occupy the same temporarily on the terms and conditions contained therein and in the premises the first defendant maintains that the plaintiffs suit herein is misconceived both in law and fact and the plaintiffs do not have any cause or right of action against the first defendant. The first defendant states that by a letter dated 23rd January, 1995, terminated the said Temporary Occupation Licence by giving three months' notice of termination with effect from 1st February, 1995 requiring the plaintiffs to vacate and hand over possession of the said plot at stipulated in paragraph 3 of the said Temporary Occupation Licence. The first defendant further avers that under Clause 4 of the said Temporary Occupation Licence the plaintiffs are on the expiry of the notice of Termination required to remove at their own cost any structures erected on the said plot and no compensation is payable to the plaintiffs in respect of the said structures. The first defendant states that plaintiffs are not entitled to any of the reliefs being sought by them and prays that their suit against the first defendant be dismissed with costs.

The 2nd defendant categorically states that the said plot has been allocated to him after fulfilling all the necessary procedures and obligation and he is the legal proprietor of the said plot. The 2nd defendant avers that the said allocation of the plot was lawful and the 2nd defendant has no knowledge of the interest if any of the plaintiffs. The 2nd defendant further avers that the plaintiff have no locus standi in this matter and this suit is bad in law and incompetent for want of pleading and shall either before or at the hearing of this suit be dismissed.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA IN OPEN COURT THIS 29TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE