



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 19 OF 2004**

**KIGIKA DEVELOPERS LIMITED.....PLAINTIFF**

**VERSUS**

**THE CITY COUNCIL OF NAIROBI.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 9<sup>th</sup> January 2004, amended on 22<sup>nd</sup> September 2009 and further amended on 21<sup>st</sup> March 2014, the plaintiff has filed this suit against the defendant seeking:-

*(a) A declaration that by failing to give the plaintiff vacant possession of LR No. 209/12759 Nairobi otherwise known as Dandora Block F, the Nairobi City Council alias County Government of Nairobi, the defendant, breached a material condition of the court order and that the purported compensation is of no effect and further that the defendant is still indebted to the plaintiff on account of incomplete compensation.*

*(b) The current market value of LR NO. 209/12759 Nairobi otherwise known as Dandora Block F.*

*(c) Alternatively an order compelling the defendant to otherwise demolish all illegal structures, temporarily or permanently erected on the LR NO. 209/12759 Nairobi formerly LR NO. Dandora Block F and evict all the squatters and illegal occupants thereon so as to give the plaintiff quiet and vacant possession.*

*(d) Any inquiry as to damages.*

*(e) Any other or further relief that this honourable court deems fit to grant.*

2. Upon being served with copies of plaint and summons to enter appearance the defendant filed a statement of defence on 22<sup>nd</sup> January 2004.

3. PW2 Daniel Munene Kabogo the Managing Director of the plaintiff told the court that by a consent order the defendant agreed to settle the plaintiff in an alternative plot being LR NO. Dandora Block F, Nairobi also known as LR NO. 209/12759. The defendant issued the plaintiff with a special letter of allotment and the transfer and conveyance was eventually sealed by the court on 23<sup>rd</sup> October 1995. Further that the defendant was to facilitate settlement without hindrance from any person whatsoever. Efforts to occupy the said property have been frustrated by the squatters, the existence of whom the defendant ought to have reasonably known but failed to disclose.

4. He also told the court that todate the plaintiff has not been able to utilize the suit property. In support of the plaintiff's case he produced the following documents as exhibits; consent order dated 2<sup>nd</sup> July 1992 exhibit P2, consent order dated 6<sup>th</sup> October 1993 exhibit P3, copy of receipt from the department of lands for Kshs 197,420/- dated 26<sup>th</sup> October 1995 –exhibit P4, copy of letter addressed to M/s Kigika developers Ltd dated 26<sup>th</sup> May 1995 as Exhibit P5, copy of lease between City Council of Nairobi and Kigika Developers Ltd as Exhibit P6, copy of memorandum of registration of transfer of land signed by T. M. Obaga exhibit P7, copy of an order of the High Court of Nairobi dated 9<sup>th</sup> May 1995 exhibit P8, copy of a letter addressed to the Kigika Developers Limited from the defendant dated 7<sup>th</sup> August 1995 exhibit P9, copy of letter addressed to the Commissioner of Lands from the defendant dated 14<sup>th</sup> November 1995 exhibit P10, copy of form of statement of payment of rates and other charges Receipt No TA 19970 exhibit P11. Copy of transfer dated 5<sup>th</sup> February 1996 exhibit P12. Copy of the receipt from the department of lands No. D285309 dated 5<sup>th</sup> February 1996 – Exhibit P13. Copy of the receipt from the department of lands No D 388400 dated 26<sup>th</sup> October 1995 Exhibit P14. Copy of Rates Statement for Kigika Developers Limited from the City council of Nairobi Kshs 155,700 Exhibit 15. A copy of letter dated 7<sup>th</sup> May 2003 from Sport View Scrap Metal to the plaintiff Exhibit P16. A letter dated 4<sup>th</sup> September 2003 from Sportsview Scrap Metal & Hardware to the Plaintiff Exhibit P17. He prays that the prayers in

the plaint be allowed.

5. PW2 James Githaiga Thirikwa a valuer, told the court he carried out valuation on the suit property. He produced the valuation report as exhibit P1. He gave the value of the suit property to be approximately Kshs 6.9 Billion.

6. The defendant did not call any witnesses but chose to rely on the statement of defence. Written submissions were also filed on its behalf.

#### **The Defendant's Submissions**

7. It is the defendant's submission that it complied with the orders of the court and issued the suit property free and of vacant possession to the plaintiff herein. The defendant was pushed into sealing the transfer by the plaintiff after it (plaintiff) was satisfied that the suit property met all the requirements as per the consent order.

8. It is the defendant's further submission that the plaintiff sold the property to the third party, Sportsview Scrap metal and Hardware Limited. The plaintiff lacks the *locus standi* to institute this suit in relation to the suit property as it had sold the property to Sportsview Scrap metal and Hardware Ltd. The suit property was transferred to a third party on 15<sup>th</sup> January 2014. No attempt was made to enjoin the owners of the suit property to this suit. It prays that the suit be struck out. They have put forward the case of **Alfred Njau & Others vs City Council of Nairobi [1983] eKLR; Wilmot Mwadilo & 3 Others vs Eliud Timothy Mwangi & Another [2017] eKLR** which quoted with approval the case of **Patrick Kiseki Mutisya vs K. B Shangani & Sons Ltd & Others [2012] eKLR**, among others.

9. The owners of the suit property Sportsview Scrap metal and Hardware Ltd should have instituted the suit herein against the defendant and included the plaintiff as defendant or interested party. The plaintiff has not proved its case on a balance of probabilities. It cannot be compensated for a property it does not own. They pray that the suit be dismissed with costs to the defendant.

#### **The Plaintiff's Submissions:**

10. There were trespasses and squatters on the suit property and the plaintiff could not obtain free and vacant possession. The plaintiff later conveyed the suit property to its sister company, Sportsview Scrap metal and Hardware Limited on 5<sup>th</sup> February 1996 for Kshs 5 Million. That Sportsview Scrap metal and Hardware Limited later rescinded the contract and advised the plaintiff to re-convey the suit property to itself.

11. The plaintiff was not able to re-convey the suit property to itself due to arrears of land rates payable to the defendant. The valuation report produced as exhibit P1 confirms the presence of illegal occupants on the suit property who had put up permanent houses. The valuers came up with a figure of Kshs 6.6. billion. The plaintiff had legitimate expectation to be allocated the suit property free from encumbrances. They have put forward the cases of **Sirikwa Squatters Group vs Commissioner of Lands & 9 Others [2017] eKLR; R (Bibi) vs Newham London Borough Council [2001] EWCA Civ 607 [2002] 1WLR 237 at [19]; R vs Jockey Club ex P RAM Racecourses [1993] 2All ER 225**, among others.

12. The defendant represented to the plaintiff vide the letter of allotment dated 7<sup>th</sup> August 1999 (Exhibit[p1] P9) – and the court order dated 2<sup>nd</sup> July 1992 (Ex P2) that the plaintiff would be allocated unencumbered property. The plaintiff relied on the said representation and it had high expectations of utilizing the suit property. It urges that the prayers on the plaint be allowed.

13. I have considered the pleadings, the evidence on record, the written submissions of counsel and the authorities cited. The issues for determination are:-

***(i) Whether by a consent order dated 6<sup>th</sup> May 1999 the defendant offered for allocation LR NO. Dandora Block F- Nairobi otherwise known as LR NO. 209/12759 to the plaintiff.***

***(ii) Whether it was free from all encumbrances and the plaintiff was entitled to vacant and quiet possession.***

***(iii) Whether the plaintiff has locus standi to institute this suit property against the defendant.***

***(iv) Who should bear costs of this suit?***

14. It is not in doubt that the plaintiff vide suit Nairobi HCCC No. 3929/1985 sued the defendant and obtained a decree against the defendant to pay the plaintiff a sum of Kshs.4,072,192/25 and to further convey LR NO. 12911/4 to the plaintiff. This was vide a decree dated 7<sup>th</sup> February 1994. Subsequent to the decree, the plaintiff sought to enforce the decree by committing the then Town Clerk to civil jail vide HC Misc. Case No. 961 of 1992. The said application was compromised vide a consent wherein the defendant agreed to settle the decretal sum in instalments and further offered the plaintiff LR No. 209/12759, the suit property. The defendant in full compliance of the said order issued the plaintiff with a special offer of allotment and the transfer and conveyance was eventually sealed by court on 23<sup>rd</sup> October 1995. All these facts are not in doubt. The defendant complied with the consent order dated 9<sup>th</sup> May 1005 (Exhibit P8).

15. From his own evidence while being cross examined by defence counsel, PW2 told the court that initially when they received the property from the City Council it did not have squatters. This confirms that the defendant had complied with the court order (Exhibit P8). On further cross examination he stated:-

***“Later on I realized there were squatters who had encroached on the property”***

It is not clear when these squatters encroached on the suit property.

16. In paragraph 9 of the plaint the particulars of misrepresentation by the defendant are given as follows:-

**“(a) Failing to disclose and/or deliberately, concealing from the plaintiff that the parcel is occupied by squatters.**

**(b) Failing to disclose to the plaintiff that a substantial portion of the land is under illegal construction and occupation”**

Parties are bound by their pleadings. It was incumbent upon the plaintiff to prove these particulars of misrepresentation by the defendant to the required standard. There is no iota of evidence by the plaintiff to support these particulars. It is a well settled principle of law that whoever alleges must prove. How could the defendants have known there were squatters when PW2 confirms that when they received the suit property from the defendant it was free from squatters? I find that there is no evidence put forward by the plaintiff to suggest that the title to LR No. 209/12759 was not free from encumbrances. I find that the defendant met its part of the bargain and complied with the court orders. It is safe to say that by the time the plaintiff received the suit property it was free from encumbrances.

17. It is also clear from the evidence of PW2, Daniel Munene Kabogo, that the plaintiff has since sold the suit property to a third party Sportsview Scrap metal and Hardware Limited for Kshs.5 million. As things stand now the suit property is registered in the name of Sportsview Scrap metal and Hardware Limited. PW2 produced two letters from the said company exhibit P 16 and 17 which it sought to rescind the contract and a refund of the purchase price. PW2 told the court that they have not been able to re-convey the suit property to the plaintiff. In essence there is no evidence adduced that the exhibits P16 and 17, were acted upon. It would therefore mean that Sportsview Scrap metal & Hardware Limited is the owner of the suit property. The plaintiff herein therefore had no *locus standi* to institute the suit against the defendant.

18. In fact, PW1 James Githaiga Thirikwa valuer confirmed that the registered owner of the suit property was Sportsview Scrap metal & Hardware Ltd. He learnt this during the investigations and compilation of his report. From the documents presented by the plaintiff it is clear that the transfer to Sportsview Scrap Metal and Hardware Limited took place before the plaintiff filed this suit. I rely on the cited case of **Wilmot Mwadilo and 3 Others vs Eliud Timothy Mwanmunga & another [2017] eKLR** where the learned judge quoted the case of **Patrick Kiseki Mutisya (suing as the personal representative of the Estate of Nzomo Mutisya (Deceased) vs K. B. Shangani & Sons Ltd & Another [2012] eKLR** where the learned judge cited with approval the case of **Macfoy vs United Africa Ltd [1961] 3 ALL ER where at page 1172, Lord Denning held:**

**“If an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”**

19. It is therefore clear that the plaintiff not being the registered owner of the suit property does not have *locus standi* to institute this suit against the defendant.

20. All in all I find that the plaintiff has failed to prove any of the allegations in the plaint against the defendant. It has failed to prove its case on a balance of probabilities as against the defendant and the suit is dismissed. I have taken into account the facts that the defendant did not avail any witnesses and I order that each party do bear its own costs

It is so ordered.

**Dated, signed and delivered in Nairobi on this 25<sup>TH</sup> day of MARCH 2019.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant