



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO.1000 OF 2013

AVECO LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF

THE CITY OF NAIROBI.....1ST DEFENDANT

REGISTRAR OF TITLES, NAIROBI

INLAND REGISTRY.....2ND DEFENDANT

JOHN JOSEPH NDUNGU MWENJA &

PARTNERS LIMITED.....3RD DEFENDANT

SHAMJI KALYAN PINDORIA LIMITED.....4TH DEFENDANT

JUDGEMENT

1. In the Originating Summons filed in court on 16/8/2013, the Plaintiff seeks a determination of the issue as to whether the transfer of L.R. No. 9042/105 Nairobi (“the Suit Property”) dated 14/7/2011 from the 3rd to the 4th Defendant should be declared null and void on grounds of fraud and non-disclosure of material facts and whether this court should issue a vesting order in favour of the Plaintiff over the Suit Property. The summons is supported by the affidavit of George Oduor Otieno, a director of the Plaintiff sworn on 14/8/2013.

2. The Plaintiff claims that the Suit Property was advertised for sale by public auction by the 1st Defendant on 18/3/2009 in a daily newspaper. The auction was conducted by Ideal Auctioneers in which the Plaintiff was declared the highest bidder for the Suit Property at the price of Kshs. 2,050,000. The Plaintiff claims it paid a deposit of Kshs. 512,500 on 2/4/2009 and the balance of Kshs. 1,537,500 on 22/4/2009. The 1st Defendant gave possession of the Suit Property to the Plaintiff and the Plaintiff developed the Suit Property.

3. The Plaintiff annexed copies of a restaurant, a school and rental houses that it developed on the Suit Property. In June 2009 the 1st Defendant gave the Plaintiff a vesting order that was supposed to assist the Plaintiff by facilitating the transfer of the Suit Property to its name. The vesting order was issued on 16/6/2009 in the First Class Magistrate’s Court at City Court Nairobi in **Civil Suit No. 23 of 2008**. The Plaintiff also produced a copy of the order dated 20/5/2010 which authorised the Executive Officer of the Chief Magistrate’s Court, Milimani Commercial Court to execute the transfer documents over the Suit Property in place of the 3rd Defendant.

4. The Plaintiff attempted to transfer the Suit Property to no avail. The Plaintiff produced copies of its advocates letters dated 8/6/2011, 15/7/2011, 17/8/2011 and 6/9/2011. The Ministry of Lands wrote to the Plaintiff’s advocate on 30/6/2011 indicating that efforts were being made to trace the file in respect of the Suit Property which was missing. The letter requested the advocates to forward copies of the vesting order, court proceedings and certificate of lease to the Lands Office.

5. The Plaintiff learnt that the 3rd Defendant had caused a transfer of the Suit Property to be registered in September 2011 in favour of the 4th Defendant. The copy of the transfer which the Plaintiff produced in evidence showed that the consideration for the Suit Property was Kshs. 4 million.

6. The 1st Defendant filed a Replying Affidavit on 16/10/2013 sworn by Violet Oyangi, its Deputy Director of Legal Affairs in which she deponed that the 3rd Defendant which formerly owned the Suit Property, defaulted in its obligation to pay rates for the Suit Property as a result of which **CMCCC No. 23 of 2008– City Council of Nairobi v John Ndungu Mwenje** and partners was filed. Judgement was entered in favour of 1st Defendant and a sale by public auction was conducted during which the Plaintiff was the highest bidder. She deponed that legal title to Suit Property passed to the Plaintiff at the fall of the hammer and that the auction and sale have never been set aside. The 1st Defendant argued that the 3rd Defendant had no title which it could lawfully pass to the 4th Defendant after the entry of that judgement.

7. The 3rd and 4th Defendant could not be traced for service. The Plaintiff was granted leave to serve summons to enter appearance on the 3rd and 4th Defendants on 27/10/2014. When they failed to enter appearance and file defence, the court on 9/4/2013 directed the Plaintiff to set down the case for hearing. Hearing proceeded before Gacheru J. on 21/10/2015 and the Plaintiff's director gave evidence along the lines of his supporting affidavit. The 1st Defendant did not call any evidence. The court directed parties to put in written submissions. Only the Plaintiff filed submissions. The Plaintiff faulted the 1st Defendant for issuing a rates clearance certificate to the 3rd Defendant which enabled the 3rd Defendant transfer the Suit Property to the 4th Defendant yet the 1st Defendant should have known that the Plaintiff had purchased the Suit Property at the auction conducted by the 1st Defendant's agent.

8. The court has considered the Plaintiff's submissions and authorities relied on by the Plaintiff. The Plaintiff bought the Suit Property at an auction and developed it. Had the 4th Defendant conducted due diligence before acquiring the Suit Property and made enquiries before having the land transferred to it in September 201, it would have realised that the Plaintiff was in actual occupation of the Suit Property. The Plaintiff stated that the 1st Defendant went to the Suit Property on 3/11/2018 and destroyed the Plaintiff's buildings.

9. On evaluating the evidence adduced, the court is satisfied that the Plaintiff has proved its case on a balance of probabilities and finds that the transfer of L.R. No. 9042/105 Nairobi dated 14/7/2011 from the 3rd to 4th Defendant is void. A vesting order is issued in favour of the Plaintiff over L.R. No. 9042/105. The Plaintiff will have the costs of the suit to be borne by the 3rd Defendant.

Dated and delivered at Nairobi this 8th day of April 2019

K.BOR

JUDGE

In the presence of: -

Mr. J. Ochwo for the 3rd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff, 1st, 2nd and 4th Defendants