



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 704 OF 2016

MWAKINI RANCHING (D.A) COMPANY LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF KITUI.....1 ST DEFENDANT

NATIONAL LAND COMMISSION.....2 ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff, through a plaint dated 16/10/1993, instituted this suit as Nairobi HCCC No. 5106 of 1993. An amended plaint was filed on 22/4/2014. This case was subsequently transferred to the Environment and Land Court and designated as Nairobi ELC Case No 704 of 2016. The plaintiff sought the following orders:

- a. A declaration that the plaintiff is entitled to the peaceful enjoyment of the premises for a new leasehold term of 20 years commencing on the date the plaintiff shall be granted total occupation of the suit property.**
- b. A declaration that the defendant purported rescission of the resolution of the defendant council meeting held on 25/6/1991 is ultra vires, null and void.**
- c. An injunction to restrain the defendant from in any manner interfering with the plaintiff's occupation of the suit premises.**
- d. Damages for the defendant's interference with the plaintiff's enjoyment of the suit premises.**
- e. Costs of and incidental to this suit.**

Plaintiff's Case

2. The case of the plaintiff was that the County Council of Kitui through the Commissioner of Lands granted it a 20 year lease in respect of 8.207 hectares comprised in ID Plan Number 76152/30A within the jurisdiction of the then Kitui County Council. It developed necessary infrastructure for grazing livestock in tandem with the conditions set out in the lease. Upon expiry of the 20 year lease, the Council granted it a further term of 20 years effective from 1/9/1991. The extension was duly approved by the Minister for Local Government, and the Commissioner of Lands was asked to prepare a formal lease. Two years into lease, the Council unexpectedly and without prior notice to the plaintiff, purported to terminate the lease by purporting to rescind the full council resolution which had granted the extension. It was further contended by the plaintiff that the defendant went ahead and allocated the suit property to other individuals and destroyed the facilities which the plaintiff had constructed. Aggrieved, the plaintiff brought this suit seeking the above orders.

Defendant's Case

3. The case of the 1st defendant was that the plaintiff's 20 year lease having expired in 1991, the plaintiff was illegally occupying the suit property. It was further contended that the earlier resolution granting the plaintiff a 20 year extension was not binding on the Council and the Council was within its mandate and within the law in rescinding the earlier resolution and in sub-dividing the suit property. Further, it was contended by the 1st defendant that the plaintiff's continued occupation of the suit property was illegal.

Evidence

4. Hearing of this suit commenced before the Hon Justice Kihara Kariuki in March 2005. The plaintiff called one witness, Stephen Muna - PW 1. He concluded his testimony before the Hon Justice Kihara Kariuki and the plaintiff closed its case on 21/3/2016.

5. PW 1 stated that he was the chairman of the board of directors of the plaintiff company. He testified that in 1971, the Kitui County Council, through the Commissioner of Lands, granted the plaintiff company a lease for 20 years in respect of the suit property. The user was to be ranching. Upon expiry of the 20 year term, the company was granted a further extension of 20 years from 1/9/1991 through a full Council resolution. Two years later, in 1993, the Council purported to pass a resolution terminating the 20 year lease by purporting to rescind the previous resolution. He added that arising from the breach, the plaintiff filed this suit and obtained an injunctive order. The Council still went ahead to issue letters of allotment to third parties. He stated that since the Council passed the resolution of 1993, the company's quiet enjoyment of the suit property had been disrupted.

6. The 1st defendant called one witness, John Mwivithi Mutie – DW1. He testified that he was the Deputy Town Clerk of Kitui County Council. He stated that the Council leased to the plaintiff the suit property for a period of 20 years from 1971. Upon expiry of the lease, the plaintiff requested for an extension for a further term of 20 years which the Council granted. He further stated that the Council's resolution was forwarded to the Minister for Local Government for approval and the Minister granted the approval on 7/8/1992. The Council subsequently passed a resolution rescinding the extension of lease because it wanted to settle squatters on the suit property. He added that the notice to rescind the lease was served on the Commissioner of Lands and not on the plaintiff. He added that the resolution rescinding the lease was made in 1993.

Determination

7. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence on the key questions in this dispute. Four key issues fall for determination in this dispute. The first issue is whether the decision made on 24/6/1993 by the County Council of Kitui to rescind its earlier decision of 25/6/1991 granting the plaintiff a lease extension for a period of 20 years discloses a cause of action in favour of the plaintiff and against the 1st defendant. The second issue is whether the reliefs sought by the plaintiff, including damages, are available. The third issue is whether the 1st defendant is entitled to the reliefs sought in the counterclaim, including damages. The fourth issue is, if the remedy of damages is available, what should be the quantum?

8. Under the current constitutional framework, the County Government of Kitui is the constitutional and statutory successor of the now defunct County Council of Kitui. It is for this reason that the County Government of Kitui replaced the County Council of Kitui as the 1st defendant in this suit. Secondly, it is common ground that the suit property was trust land within the meaning of the repealed Constitution and was at all material times vested in the County Council of Kitui. Lease instruments relating to trust land were to be executed by the Commissioner of Lands upon grant of lease by the local authorities.

9. Further, it is common ground that on 13/9/1971, the County Council of Kitui leased the suit property to the plaintiff for a period of 20 years effective from 1/9/1971. The twenty year period lapsed on 31/8/1991. It is also common ground that on 5/6/1991, the plaintiff applied for a renewal of the lease. The Council considered the plaintiff's application in a full council meeting held on 25/6/1991 and resolved to renew the lease for a period of 20 years effective from 1/9/1991 at an annual rent of Kshs 10,000. The full council meeting requested the Commissioner of Lands to issue and execute a formal lease in favour of the plaintiff for the extended period of 20 years. Subsequent to that, a council meeting convened on 7/2/1992 requested the Minister for Local Government to approve the extension. In a letter dated 7/8/1992, the Minister for Local Government approved the extension of the lease. Subsequently, a full council meeting convened on 24/6/1993 passed a resolution rescinding the lease extension granted to the plaintiff.

10. The plaintiff contends that the rescission was unlawful because: (i) the council had no power and or authority to rescind the previous resolution; (ii) the council was legally bound by the prior resolution; (iii) the purported rescission was an illegal attempt to acquire the plaintiff's property; (iv) the plaintiff had a legal right to the suit premises for the 20 years commencing on 1/9/1991.

11. The case of the 1st defendant is that the council was not bound by its earlier resolution and that it was within the statutory mandate of the council to rescind the earlier resolution. The 1st defendant further contends that the subsequent sub division was within the powers of the council. Thirdly, the 1st defendant contends that because the rescission resolution was made before the Commissioner of Lands executed a formal instrument of lease, there was no cause of action against the council.

12. I have considered the case of the 1st defendant. Article 115 of the repealed Constitution vested all trust land in the County Council in whose area of jurisdiction the land was situated. By dint of that constitutional framework, the Commissioner of Land was merely an agent of the council designated by statute for the purpose of executing instruments on behalf of the council. The council was the lessor. In the dispute before court, the County Council in whom the suit property was vested duly granted an extension through a full council resolution. All that remained was the preparation and execution of the formal instrument of lease. Secondly, the council duly sought and obtained approval from the Minister for Local Government in tandem with the requirements of the Local Government Act (repealed). This, in my view, was a key step in the crystallization of the plaintiff's interest as a lessee. Thirdly, the material lease extension was not a paper lease; the plaintiff was granted the actual physical possession of the suit property and for two years, the plaintiff enjoyed exclusive possession of the leased property and invested in the property.

13. In my view, the plaintiff's interest in the suit property crystallized upon the full council resolution coupled with the grant of possession and the approval of the Minister for Local Government. The council was therefore not at liberty to terminate the lease without any wrong doing on part of the plaintiff. It is therefore my finding that the decision of the council to rescind the extended lease was unlawful and properly discloses a cause of action against the council. The 1st defendant as the constitutional and statutory successor of the council is therefore liable for the illegal rescission of the lease by the council.

14. The second and third issues relate to the question as to whether the parties are entitled to the reliefs sought in the plaint and counterclaim respectively. The material lease was for a period of 20 years from 1/9/1991. Upon grant of the extension, the plaintiff continued to have

possession of the suit premises. Secondly, on 8/11/1993, the plaintiff procured a court order which barred the council against interfering with the plaintiff's occupation of the suit property. That order was in force up to the time the term of the 20 year lease lapsed on 31/8/2011. In essence therefore, the 20 year term was secured through the interim court order granted by Shields J in 1993. Given that the 20 year term has now expired by the effluxion of time, prayers (a) and (c) are in essence spent.

15. I will however grant the plaintiff nominal damages arising from the illegal rescission and the resultant disruption which affected the plaintiff's activities. The plaintiff urged the court to assess the damages at Kshs 2,500,000. The defendants did not give counter proposals on quantum. I will therefore assess the nominal damages at Kshs 2,500,000/

16. The 1st defendant made a counterclaim for various orders. Having found that the council's purported termination of the lease was wrongful and that the plaintiff was entitled to the extended term of lease, it follows that none of the reliefs sought by the 1st defendant is available. It is noted that the 1st defendant, through written submissions, asked to be awarded unpaid rent in the sum of Kshs 270,000. I will not make that award because it was not specifically pleaded and prayed for in the counterclaim.

17. On costs, the plaintiff's suit has largely succeeded. Indeed, were it not for the fact that the term of the lease lapsed during the pendency of the suit, the plaintiff would have been entitled to all the prayers itemized in the plaint. It therefore follows that the plaintiff is entitled to costs as against the 1st defendant.

18. The 2nd defendant was joined in this suit by dint of its constitutional and statutory mandate. I do not find any evidential basis for granting any order against the 2nd defendant.

Disposal Orders

19. In light of the above findings, the plaintiff's suit and the defendant's counterclaim are disposed in the following terms:

- a. It is hereby declared that the Kitui County Council's purported rescission of the earlier resolution of the Full Council Meeting held on 25/6/1991 awarding the plaintiff a lease extension was null and void.**
- b. The plaintiff is hereby awarded damages of Kshs 2,500,000 against the 1st defendant arising from the said illegal rescission and resultant disruption. The same shall attract interest at court rate from the date of judgment.**
- c. Prayers (a) and (c) of the plaint are spent because the term of the material lease has already expired by the effluxion of time.**
- d. The 1st defendant's counterclaim herein is wholly dismissed for lack of merit**
- e. The plaintiff is awarded costs of this suit to be borne by the 1st defendant.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Nyaga holding brief for Ngatia for the plaintiff

No appearance for the defendant

June Nafula - Court Clerk