



Masto Holdings Limited v Njenga & 4 others (Environment & Land Case 226 of 2016) [2019] KEELC 1954 (KLR) (8 August 2019) (Judgment)

Masto Holdings Limited v Judith Wanjiru Njenga & 4 others [2019] eKLR

Neutral citation: [2019] KEELC 1954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 226 OF 2016**

**AK BOR, J
AUGUST 8, 2019**

BETWEEN

MASTO HOLDINGS LIMITED PLAINTIFF

AND

JUDITH WANJIRU NJENGA 1ST DEFENDANT

P.M. NG'ANG'A 2ND DEFENDANT

THE CHIEF LAND REGISTRAR 3RD DEFENDANT

THE ATTORNEY GENERAL 4TH DEFENDANT

THE NATIONAL LANDS COMMISSION 5TH DEFENDANT

JUDGMENT

1. This dispute relates to ownership of land reference number 209/522/2 (I.R. Number 3255/1) situated in Upper Hill, Nairobi (“the Suit Property”) which was initially registered in the name of Andrew Njenga, now deceased. The Plaintiff claims that the late Andrew Njenga charged the Suit Property to Cooperative Merchant Bank Limited to secure repayment of a loan of Kshs. 10,000,000/=. The bank realised its security and the Plaintiff claims it bought the suit land on 10/2/2004 from the bank. The Plaintiff claims that when it presented the transfer documents for registration at the lands office, the 3rd Defendant refused to register the Plaintiff as the owner of the Suit Property.
2. There have been other proceedings in relation to the Suit Property some of which were instituted by the 1st Defendant claiming to be entitled to the Suit Property by way of transmission. The Plaintiff claims that the 2nd Defendant fraudulently and irregularly issued a parallel title document to the 1st Defendant over the Suit Property yet he ought to have known that the Plaintiff was the owner of the Suit Property. The Plaintiff filed this suit on 8/3/2016 seeking cancellation of the title held by the 1st



Defendant over the Suit Property together with an order for rectification of the land register in respect of the Suit Property. It also seeks a permanent injunction to restrain the 1st Defendant from dealing with the Suit Property and her eviction from the suit land.

3. In her defence filed in court on 16/2/2017, the 1st Defendant denied the Plaintiff's claim. She averred that she purchased the Suit Property with her late husband, Andrew Njenga in 1974 and that they built their matrimonial home on it and have been in possession of the suit land to date. She admitted that her late husband entered into a transaction with the General Manager of Cooperative Merchant Bank Limited sometime in 2001 wherein he presented his title to the bank as a guarantor to secure a loan previously borrowed by Gwama Enterprises Limited. She averred that her late husband executed the charge on 13/6/2001 but Anthony Kamundia, the General Manager of Cooperative Merchant Bank Limited died before any business was conducted in relation to the title over the Suit Property. She denied that her late husband ever took a loan of 10,000,000/= from Cooperative Merchant Bank Limited and maintained that no documentary evidence of the loan and default by her late husband has ever been provided. She denied that an auction took place at which the Suit Property was sold as the Plaintiff alleges.
4. Her husband died on 26/7/2005. She applied for grant of letters of administration over her late husband's estate. The letters were confirmed and issued on 22/11/2010. Her attempts to get other documents in relation to the sale of the Suit Property were futile and she was only given copies of the charge but not the letter of offer or the statements relating to the loan. In her counterclaim, she averred that she is the registered owner of the Suit Property and that she acquired it through the succession cause. She also maintained that the Cooperative Merchant Bank stopped operating. She claimed that the purported charge and transfer of the Suit Property by chargee to the Plaintiff were fraudulent and sought a permanent injunction to restrain the Plaintiff from dealing with the Suit Property.
5. Paul Mungai Kamau, the managing director of Plaintiff gave evidence. He stated that the late Andrew Njenga who was the registered proprietor of the Suit Property charged it to secure repayment of a loan of Kshs. 10,000,000/=. When the late Andrew Njenga defaulted in repaying the loan, the bank exercised its statutory power of sale. The late Andrew Njenga filed Nairobi HCCC No. 1095 of 2002 to challenge the bank's right to sell the Suit Property. He averred that Mwera J. dismissed the application for injunction on 21/11/2002 paving way for the chargee's statutory sale of the Suit Property. He stated that the Plaintiff purchased the Suit Property at a public auction conducted on 10/2/2004 when the bank exercised its statutory power of sale. The Plaintiff presented the transfer documents to the Registrar of Titles on 24/3/2006. He claimed that the Registrar declined to register the Plaintiff as the new proprietor of the Suit Property while claiming that the original file had been misplaced. The Plaintiff filed Nairobi High Court Misc. Civil Application No. 487 of 2008 seeking to compel the Registrar of Titles to register it as the new owner of the Suit Property. Kihara J. granted the orders on 5/2/2009 compelling the Registrar of titles to register the Plaintiff as the new owner of the Suit Property. The 1st Defendant applied to have the orders set aside but Musinga J. dismissed her application on 10/6/2011. He claimed that following the court's order, the Plaintiff was registered as the new owner of the Suit Property. He added that the Suit Property was sold while Andrew Njenga was alive and that it did not form part of his estate after he died.
6. He stated that the 1st Defendant's claim to entitlement to the Suit Property through transmission has been the subject of numerous court cases including Nairobi Civil Appeal No. 177 of 2011, Nairobi HCCC No. 1095 of 2002, Nairobi HC Misc. Civil Application No. 467 of 2008, Nairobi ELC No. 46 of 2011, Milimani CMCCC No. 397 of 2011 and Milimani CMCCC No. 1399 of 2015. He claimed that in all these suits the court has consistently ruled that the 1st Defendant had no legal or proprietary right over the Suit Property.



7. Despite this, he averred that in contempt of the court decisions the 2nd Defendant fraudulently and irregularly issued a title to the 1st Defendant on 3/3/2015 over the Suit Property when he ought to have known that the Plaintiff was the registered proprietor of the Suit Property. He claimed that the Plaintiff had suffered loss and damage as a result of the 1st Defendant's trespass and occupation of the Suit Property which has thwarted the Plaintiff's plans to develop an ultra-modern office block on the Suit Property.
8. On cross examination, the Plaintiff's managing director stated that the Plaintiff bought the land at an auction in 2004 on a date which he could not recall. He did not have any documents showing the auction was to take place. He stated that he did not go to the auction and did not know where the auction was held. He maintained that the land was now registered in the Plaintiff's name and that he had the original title over the Suit Property in his office. He stated that the Plaintiff bought the land for Kshs. 4,000,000/= which he claimed was paid at the Cooperative Bank Limited. He did not have any documents to prove this. He stated that the Plaintiff's title came out in 2006. He conceded that the transfer by chargee under statutory power of sale dated 16/11/2004 was registered as I.R. 3254/33 on 24/3/2010. He stated that at some point in time the file in respect of the Suit Property went missing at the lands office.
9. The copy of the title over the Suit Property that he produced showed the charge to Cooperative Merchant Bank dated 15/6/2001. The next entry number 33 shows a transfer to the Plaintiff freed and discharged from number 32. This entry is dated 24/3/2006. He stated that before purchasing the suit land they visited it and found someone staying on the land. He also stated that they did not do a search on the land at the land's office. He confirmed that he was not the one following up on the registration. He did not see the gazette notice on the issuance of a provisional certificate of title over the Suit Property to the 1st Defendant. He confirmed that the Plaintiff had not paid rates and land rent for the Suit Property. He could not recall whether or not the Plaintiff paid stamp duty on transfer of the Suit Property. He maintained that the transfer by chargee confirmed that the Plaintiff bought the Suit Property from the bank. He produced copies of the charge, transfer by chargee and the title in evidence.
10. The 1st Defendant gave evidence. She stated that she purchased the Suit Property with her husband in 1974. Her late husband entered into an arrangement with the late Mr. Anthony Kamundia who was the General Manager, Business Division, Cooperative Merchant Bank Limited in which he presented his title over the Suit Property to the bank to guarantee a loan that was previously borrowed by Gwama Enterprise. She stated that her late husband executed the charge in favour of Cooperative Merchant Bank over the Suit Property on 13/6/2001 but unfortunately, Mr. Anthony Kamundia died before any business in relation to the title over the Suit Property could be conducted. Further, she stated that around the same time Cooperative Merchant Bank stopped operating.
11. She stated that her late husband wrote to Cooperative Merchant Bank requesting it to return his title over the Suit Property because it had not served the purpose of the loan but the bank did not respond following which her husband instructed Simba and Simba Advocates to write to the bank but the bank never responded. She stated that a statutory notice dated 27/9/2001 was served on her husband and he instituted HCCC No. 1095 of 2002 against Cooperative Merchant Bank Limited. His application was dismissed at the interlocutory stage. Her late husband obtained interlocutory judgement against the bank on 27/2/2003, which was set aside by Mohamed Ibrahim J. on 16/1/2004 and the Judge directed the bank to file its defence within 15 days.
12. She claimed that in disregard of the court's direction, the bank issued a notification of sale through its auctioneers on 26/8/2003 and an advertisement was placed in the Daily Nation of 22/10/2003 which indicated that the auction of the Suit Property would take place on 12/11/2003. She claimed that her



- late husband obtained orders stopping that auction. She stated that the court delivered its ruling on 16/1/2004 and the bank filed its defence on 23/1/2004.
13. She stated that nothing else happened in that suit until her husband died on 26/7/2005. Upon his death, she applied for letters of administration over his estate which were issued and confirmed on 22/11/2010. She perused her late husband's records, conducted a search and discovered that Cooperative Merchant Bank Limited was not operating. When she went to inquire at the Cooperative Bank Limited she was informed that the bank had sold the Suit Property to Plaintiff on 10/2/2004 and was only given a copy of the charge. She did not find any evidence of any advertisement for sale of the Suit Property or that an auction took place on 10/2/2004.
 14. She stated that she did a search at the land's office which revealed that the deed file was missing but the correspondence file indicated that the Suit Property was still registered in her late husband's names. She was shocked in June 2011 to learn that Kindest Auctioneers had filed Misc. Application Number 397 of 2011 to levy distress on her Suit Property. She got the order for the levying of distress stayed by the Magistrate's Court which directed that it had no jurisdiction. She filed ELC No. 46 of 2011 against Cooperative Bank of Kenya Limited and the Plaintiff which she claimed was determined at the interlocutory stage.
 15. She maintained that the Registrar of Titles did not act on the order for mandamus issued in Nairobi Misc. Application Number 467 of 2008 because the Registrar realised the anomalies regarding the Suit Property which included the fact that no record of any charge had been registered against the Suit Property. The 1st Defendant had also applied for a provisional title over the Suit Property which raised the issue as to whether the Plaintiff got the original title from the bank at the time it purported to have had the chargee transfer the land to it. The other concern was how the bank could have transferred the Suit Property to the Plaintiff if the bank did not have the original title over the Suit Property. Lastly there was no evidence that the auction took place. She filed Civil Appeal Number 177 of 2011 in the Court of Appeal challenging the orders issued in Misc. Application Number 467 of 2008.
 16. She challenged the copy of the title over the Suit Property presented by the Plaintiff to court and pointed out that entry number 25 on the Plaintiff's copy only showed the annual rent as Kshs. 8,630/= while the copy she had indicated the consideration of Kshs. 215,000/= on the transfer to her husband. Entry number 26 on the Plaintiff's photocopy only mentioned a charge to Housing Finance of Kenya Limited while the search she conducted showed the loan sum of Kshs. 173,340/=. Entry number 30 on the Plaintiff's title did not indicate the charge sum. Entry number 32 on the Plaintiff's photocopy showed a charge to Cooperative Merchant Bank Limited without indicating the sum secured by the charge, while the search done by the 1st Defendant showed notification of charge by Commissioner of income tax for Kshs. 1,000,000/=. Entry number 33 on the Plaintiff's photocopy showed the transfer to the Plaintiff freed and discharged from number 32. The search done by the 1st Defendant had the cancellation of charge number 32 as entry number 33, which would be the entry by the Commissioner of Income Tax. The Plaintiff's copy of title showed no further entries Entry number 33 after entry number 33 but the search done by the 1st Defendant had another entry at number 34 being the registration of the 1st Defendant as a personal representative based on the letters of administration in the estate of the late Andrew Njenga. Entry number 35 of the 1st Defendant's copy of title showed a provisional certificate of title was issued to the 1st Defendant vide gazette notice number 9215 of 24/12/2014.
 17. The 1st Defendant maintained that the substantive dispute over the Suit Property has never been conclusively determined by the court. Further, that all the previous court proceedings were never concluded and the orders made by the courts were of an interlocutory nature. The 1st Defendant



- questioned why the Plaintiff filed Nairobi Misc. Civil Application number 467 of 2008 seeking to compel the Registrar of Titles to register the Plaintiff as proprietor of the Suit Property if indeed the Plaintiff was already registered as proprietor in 2006 as it claimed.
18. On cross examination the 1st Defendant conceded that she did not have evidence of repayment of the sum of Kshs. 10,000,000/= indicated in the charge. She stated that she did not know that there was a debt against the suit land. She pointed out that the transfer by chargee to the Plaintiff indicated that it had paid a consideration of Kshs. 13,000,000/= for the Suit Property.
 19. She maintained that the Suit Property was her matrimonial and family home with her late husband. She conceded that initially she did not list the Suit Property as part of the estate of her late husband. She stated that she applied to be issued a provisional certificate over the Suit Property and that no objection was raised after the notice was published in the Kenya Gazette. She was emphatic that the provisional certificate of title over the Suit Property issued to her did not reflect any charge. She stated that this was the first time she was testifying in court over the Suit Property and urged the court to bring an end to this dispute while lamenting that auctioneers including hooligans have been sent to her house severally to harass her.
 20. Parties filed submissions which the court has considered. The Plaintiff relied on the earlier decisions made in respect of this dispute. The Plaintiff's claim is that it purchased the Suit Property pursuant to the exercise of the statutory power of sale by Cooperative Merchant Bank Limited following the 1st Defendant's default on the loan secured by a charge over the Suit Property. The Plaintiff relied on the decision made by Mwera J. on 21/11/2002 in Milimani HCCC No. 1095 of 2002 in which the court stated that it was satisfied that the sum of Kshs. 10,000,000/= was disbursed and was not repaid. It also relied on the decision by Mohamed Ibrahim J. of 16/1/2004 vide which the interlocutory judgement against the bank was set aside. It further relied on the order for mandamus granted in Nairobi HCC Misc. Appl. No. for 467 of 2008 on 5/2/2009 and the order of 10/6/2011 by Musinga J. dismissing the 1st Defendant's application to join those proceedings. It also relied on Nairobi Court of Appeal, Civil Appeal No. 177 of 2011 which dismissed the 1st Defendant's appeal against the orders made by Musinga J. on 10/6/2011. It produced a copy of the order issued in Milimani CMCC Misc. No. 397 of 2011 authorising Kindest Auctioneers to levy distress against the 1st Defendant.
 21. Further, the Plaintiff relied on the decision of Nyamweya J. made in Milimani HCC No. 46 of 2011 dismissing the 1st Defendant's application for injunction in which the court stated that there was reasonable suspicion of fraudulent dealings on the suit land as the 1st Defendant alleged but the court nevertheless recognised that the Plaintiff purchased the Suit Property pursuant to the exercise statutory power of sale by the bank. The Plaintiff also relied on the judgement in Milimani HC Constitutional and Human Rights Petition No. 124 of 2011 delivered by Majanja J. on 20/1/2012 in which the court while dismissing the 1st Defendant's petition, concluded that the suit was an abuse of the court process and the matter in issue was the subject of adjudication in several other disputes before courts.
 22. The Plaintiff submitted that where a party claims to have suffered loss as a result of the exercise of the statutory power of sale by the bank, their remedy lies in suing the bank for damages. The Plaintiff explained that the filing of this suit became necessary after the 1st Defendant obtained a parallel title to the Suit Property. The Plaintiff urged the court to find that it is the bona fide and indefeasible owner of the Suit Property.
 23. The 1st Defendant in her submissions challenged the charge and sale transaction from which the Plaintiff derived its title. She maintained that the charge over the Suit Property was never registered at the lands office which is why it is not reflected on the search that she produced in court. She urged the court to go by the entries reflected against the title which were contained on the search that she carried



- out. She was emphatic that no auction took place and queried the difference in the purchase price. The Plaintiff's managing director stated when he gave evidence in court that the Plaintiff purchased the Suit Property for Kshs. 4,000,000/= yet the transfer by chargee which he produced in evidence indicated the sum of 13,000,000/=.
24. The 1st Defendant relied on the gazette notice number 6404 dated 23/9/2002 which notified the public that the shareholders of Cooperative Merchant Bank Limited had resolved that its assets and liabilities be transferred to the Cooperative Bank of Kenya Limited. Based on this gazette notice, the 1st Defendant urged that as at the date the auction is alleged to have taken place and the transfer by chargee presented for registration, the entity known as Cooperative Merchant Bank Limited did not exist and was incapable of transacting in this name.
 25. The 1st Defendant made a curious submission that the courts had previously locked out her evidence and dismissed all her applications at the interlocutory stage, which she attributed to the influence of a senior advocate who may have influenced the court in its decisions. This court will disregard this line of submission since no evidence of any influence or impropriety by the judicial officers in handling the dispute over the Suit Property was adduced by the 1st Defendant.
 26. The 1st Defendant urged that the Plaintiff would not be seeking cancellation and rectification of title if it held a valid title over the Suit Property.
 27. The Honourable Attorney General filed submissions and argued that this suit was not res judicata and that the previous decisions on the Suit Property were given on interim applications. The Attorney General submitted that the Plaintiff should not have filed this suit but instead should have followed up on the other suits to have the dispute between the parties finally concluded. The Attorney General submitted that there was no valid charge over the Suit Property in respect of which the statutory power of sale could have been exercised by the bank. Further, that the charge was never registered against the suit land and relied on Section 46 of the repealed Registration of Titles Act which required a charge to be registered. The Attorney General urged that a charge could only become valid after registration and that there was no charge upon the Suit Property.
 28. The Attorney general submitted that the 1st Defendant was the registered owner of the Suit Property based on the fact that her late husband's name, Andrew Njenga, was the one on the register held at the lands office. The Attorney General brought up the issue of why the Plaintiff did not obtain the original title from the Cooperative Merchant Bank after the alleged sale at the auction and register the transfer. The Attorney General submitted that the provisional certificate was validly issued to the 1st Defendant following the advertisement in the Kenya Gazette to which no objection was lodged by any person. It was submitted that the 3rd Defendant had never issued a title to the Plaintiff. The entries on the copy of the title produced by the Plaintiff were challenged by the Attorney General who submitted that the errors on the document cast doubt as to the authenticity of the Plaintiff's title.
 29. The issue for determination is who between the Plaintiff and the 1st Defendant holds a valid title over the Suit Property. The Plaintiff did not adduce evidence of the auction at which it claimed it purchased the Suit Property on 10/2/2004. Such evidence would have included the statutory notification of sale served on the registered owner, the advertisement of the auction in a newspaper with nationwide circulation, the memorandum of sale upon the successful auction and, most importantly, evidence of payment of the purchase price by the Plaintiff.
 30. The Plaintiff only relied on the charge and transfer by chargee without showing evidence of any payment it made of the purchase price for the Suit Property. The registration of the charge against the suit land was challenged by the Defendants. There is also uncertainty over the purchase price the



Plaintiff could have paid for the Suit Property, with the transfer by charge indicating the consideration as Kshs. 13,000,000/= while the Plaintiff's director stated in court that the Plaintiff paid Kshs. 4,000,000/= for the Suit Property. The discrepancies on the entries on the copy of title relied on by the Plaintiff also raise doubts as to whether the Plaintiff purchased the Suit Property at an auction as it claimed. The Plaintiff did not call a witness from the Cooperative Bank of Kenya Limited to give evidence on the actual conduct of the auction. No bank statements were produced to show the loan sum advanced and actual receipt of the sale proceeds by the bank.

31. The Plaintiff did not produce evidence to show that it was registered as proprietor of the Suit Property in 2006. In any event the transfer by chargee dated 16/11/2004 was registered as I.R. 3254/33 on 24/3/2010, which means the Plaintiff could only have been registered as proprietor of the Suit Property after the land had been discharged on 24/3/2010 and not on 24/3/2006 as the Plaintiff claimed.
32. The numerous suits filed in relation to the Suit Property also point to the questionable manner in which the Plaintiff acquired the suit land. Had the Plaintiff been registered as proprietor of this land on 24/3/2006 as it stated, then the filing of this suit would not have been necessary and it would not have needed to obtain the orders of mandamus to compel the Registrar of Titles to register it as the owner of the suit land. The Plaintiff's director did not bring the original title to court and claimed that the title was in the office.
33. After reviewing the evidence adduced by the parties and considering the submissions made, the court finds that the Plaintiff has failed to prove its claim on a balance of probabilities, and it is hereby dismissed. The 1st Defendant has on a balance of probabilities proved that the auction of the Suit Property did not take place.
34. The 1st Defendant's counterclaim is allowed. Each party will bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF AUGUST 2019.

K.BOR

JUDGE

In the presence of: -

Mr. Vincent Odhiambo for the Plaintiff

Mr. W. Ndanu holding brief for Mr. Mbichire for the 1st Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2nd to 5th Defendants

