



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 3066 OF 1996

HIRJI SHAMJI VISHRAM.....1ST PLAINTIFF

TEJBAL DHANJI & HIRJI SHAMJI VISHRAM

(Suing as the personal representatives of the late

DHANJI SHAMJI VISHRAM.....2ND PLAINTIFF

KARSAN SHAMJI VISHRAM.....3RD PLAINTIFF

VIRBAL widow of SHAMJI VISHRAM.....4TH PLAINTIFF

RADHABAI widow of NATHA SHAMJI.....5TH PLAINTIFF

VERSUS

NAIROBI COUNTY GOVERNMENT (formerly known as NAIROBI CITY COUNCIL)...DEFENDANT

JUDGMENT

Background:

On 3rd October, 1994 the defendant filed a suit in the Resident Magistrate's Court at Nairobi ("the lower court") against one, Harji Shanji & Another namely, Civil Case No. 908 of 1994 ("the lower court suit"). In that suit, the defendant claimed a sum of Kshs.35,602/50 together with interest at the rate of 1% per month from 1st October, 1992 until payment in full being rates, arrears of rates and penalties due on L.R No. 1870/2/195 ("the suit property") as at 30th September, 1992. The defendant averred that despite demand having been issued to the said Harji Shanji & Another under Section 17(1) of the Rating Act, Chapter 267 Laws of Kenya, they had failed or refused to pay the said sum together with interest.

The said Harji Shanji & Another were served with summons to enter appearance on 21st October, 1994 and failed to do so. On 15th December, 1994, the lower court entered judgment in favour of the defendant against the said Harji Shanji & Another following a formal proof in the sum of Kshs.35,602/50 being the principal amount together with interest in the sum of Kshs.2,848/20 as at 1st September, 1994. On 1st February, 1995, a decree was issued in the sum of Kshs.49,988/20. On 9th February, 1995 the defendant applied for execution of the said decree by way of attachment and sale by public auction of L.R No. 1870/2/195 (the suit property). On 6th March, 1995, a prohibitory order was issued for the attachment of the suit property. The said prohibitory order was registered against the title of the suit property on 26th April, 1995. On 27th October, 1995, the suit property was sold by public auction by Capital Auctioneers at Kshs.2,000,000/= to one, Parrin K. Shah. On 22nd August, 1996, the lower court issued an order vesting the suit property upon the said Parrin Shah. On 6th September, 1996, the property was transferred by Parrin Shah to Praful Bhangwaji Shah at Kshs.2,500,000/= and subsequently charged to Trust Bank Limited on 5th December, 1996 to secure a loan of Kshs.10,000,000/=.

The plaintiffs herein who were the registered owners of the suit property were not aware of the existence of the lower court suit. The plaintiffs entered into an agreement for sale dated 10th April, 1995 with one, Ashwinkumar Ochhhawlal Madhiwala in respect of the suit property under which they agreed to sell the property to the said Ashwinkumar Ochhhawlal Madhiwala at Kshs.7,500,000/=. When the advocates who acted for the plaintiffs and the purchaser presented the instrument of transfer for registration against the title of the suit property, they discovered the existence of a prohibitory order that had been issued by the lower court in favour of the defendant herein. Unaware that the suit property had been sold by the defendant pursuant to that prohibitory order, the plaintiffs made an application in the lower court to lift the said prohibitory order so that the transfer in favour of Mr. Madhiwala could be registered.

When the application came up for hearing, they learnt that the suit property had been sold and transferred to a third party, Parrin K. Shah as a result of which they withdrew the application. The plaintiffs did not apply to the lower court for the setting aside of the judgment of that court neither did they challenge the process through which the suit property was sold pursuant to the decree of that court. On 13th August, 2002 after the filing of this suit, the plaintiffs made applications in the lower court for the release to them of the proceeds of sale of the suit property less the decretal amount. Pursuant to the said applications, the plaintiffs were paid a sum of Kshs.1,828,884/80 together with interest.

The present suit:

The plaintiff and Ashwinkumar Ochhawal Madhiwala brought this suit on 11th December, 1996 through a plaint of the same date. The original suit was brought against the present defendant, Parrin K. Shah, Praful Bhagwanji Shah and Githire Nderitu Kagia practising as Kagia & Company Advocates as 1st, 2nd, 3rd and 4th defendants respectively. The plaint was amended and further amended on 9th April, 2002. In the further amended plaint dated 1st November, 2001, Ashwinkumar Ochhawal Madhiwala was removed as plaintiff and Parrin K. Shah, Praful Bhagwanji Shah and Trust Bank Limited (which had been added as a party to the suit through amended plaint) were removed from the suit as defendants.

In their further amended plaint, the plaintiffs averred that at all material times, they were registered as the leasehold proprietors of all that parcel of land known as L.R No. 1870/II/195 (Original Number 186/2) ("L.R No. 1870/II/195"). The plaintiffs averred that on 10th April, 1995, they entered into an agreement with Ashwinkumar Ochhawal Madhiwala ("the purchaser") under which they agreed to sell while the purchaser agreed to purchase L.R No. 1870/II/195 at a consideration of Kshs.7,500,000/=. The plaintiffs averred that on 5th January, 1996 they paid to the defendant all the rates which were the subject matter of the lower court suit and were issued with a Rates Clearance Certificate. The plaintiffs averred that when their advocates presented the transfer in respect of the suit property in favour of the purchaser for registration, the same was rejected on the ground that there was a prohibitory order issued in the lower court case registered against the title of L.R No. 1870/II/195 on account of non-payment of rates accruing on the said property. The plaintiffs averred that they made several requests to the defendant to lift the said prohibitory order but it failed to do so and that it was until they applied to the lower court to discharge the said prohibitory order that they learnt that L.R No. 1870/II/195 had been sold by public auction on 27th October, 1995 pursuant to a judgment entered by the lower court against them.

The plaintiffs averred that upon carrying out a search on the title of the suit property, they learnt that the property was vested on Parrin K. Shah on 22nd August, 1996 and that the said Parrin Shah transferred the same to Praful Bhagwanji Shah on 6th September, 1996 and that both transactions took place while the instrument of transfer which the plaintiffs' advocates had presented at the land registry for registration in favour of the purchaser was pending. The plaintiffs averred that they were never served with summons in the lower court and that the sale of the suit property was concealed to them by the defendant.

The plaintiffs averred that no demand or request for payment was made to them to settle the decretal amount before the suit property was put up for sale. The plaintiffs averred further that the sale of the property was not advertised and that the property was sold at a throw away price below its market value. The plaintiffs averred that the defendant proceeded to auction the suit property even after receiving outstanding rates in full from the plaintiffs in January, 1996 in the sum of Kshs.82,261/= and issuing a Rates Clearance Certificate to the plaintiffs.

The plaintiffs averred that the sale of the suit property, the vesting thereof upon Parrin K. Shah and subsequent transfer of the same to Praful Bhagwanji Shah were fraudulent and illegal. The plaintiffs averred that no demand was issued to them under section 17 of the Rating Act, Chapter 267 Laws of Kenya before the lower court suit was instituted and that the prohibitory order was not affixed on the suit property the same as the notice of public auction. The plaintiffs averred that summons to enter appearance was not served upon them and that as at the time the property was auctioned, the plaintiffs were not indebted to the defendant. The plaintiffs averred that the lower court suit was not filed for the purposes of recovering a genuine debt but with the intention of depriving the plaintiffs of the suit property.

The plaintiffs averred that as a result of the illegal and fraudulent disposal of the suit property by the defendant, the plaintiffs were unable to complete the agreement for sale which they had entered into with the purchaser on 10th May, 1995. The plaintiffs sought judgment against the defendant for:

- (i) A declaration that the sale and transfer of the suit property was fraudulent and illegal;
- (ii) An order that Githire Nderitu Kagia advocate as an officer of the court acted negligently and/or fraudulently;
- (iii) Kshs.7,328,884/80;
- (iv) General damages;
- (v) Kshs.49,988/20;
- (vi) Costs of the suit and;
- (vii) Interest on the above at court rates from 10th April, 1995 until payment in full.

The claim against Githire Nderitu Kagia practising as Kagia & Company Advocates was struck out with costs on 8th May, 2008 leaving the present defendant, Nairobi City Council as the only defendant.

In its defence dated 11th June, 2002 filed on 12th June, 2002, the defendant denied the plaintiffs' claim in its entirety. The defendant

admitted that the plaintiffs were at all material times the registered owners of the suit property. The defendant also admitted that the suit property was sold by public auction pursuant to a decree for rates that was issued in the lower court suit. The defendant averred that summons to enter appearance was duly served upon the plaintiffs and that judgment and subsequent orders made in the lower court were made upon the court satisfying itself that service had been effected. The defendant denied that the suit property was sold at a throw away price and contended that the property was sold to the highest bidder. The defendant denied that the suit property was sold illegally and fraudulently. The defendant averred that the suit property was sold pursuant to a decree from a court of competent jurisdiction that had never been varied or set aside. The defendant averred that the lower court decree was issued after the plaintiffs failed to pay rates which had fallen due and that the payment of rates which the plaintiffs purported to make after the suit property had been sold was received by the defendant by mistake and that the Rates Clearance Certificate was similarly issued to the plaintiffs by mistake. The defendant averred that the said mistakes could not be taken as evidence of fraud.

The defendant averred that it was not liable to satisfy the plaintiffs' claim. The defendant averred that the plaintiffs were not entitled to the reliefs sought in the further amended plaint and that the suit disclosed no reasonable cause of action. The defendant averred further that the plaintiffs' suit was procedurally defective.

At the trial, the plaintiffs called one witness while the defendant closed its case without calling evidence. The 1st plaintiff, Hirji Shamji Vishram (PW1) gave evidence on behalf of all the plaintiffs. He adopted as his evidence in chief his witness statement dated 14th April, 2014. In the statement, the 1st plaintiff stated that although the plaintiffs were the registered owners of the suit property having acquired the same from one, Walter Joseph Trevor Torch in 1990, the records held by the defendant still reflected the rate payer as Walter Joseph Trevor Torch in whose name the receipts for rates paid were issued. The 1st plaintiff stated that the plaintiffs met their obligations under the Rating Act, Chapter 267 Laws of Kenya by paying to the defendant rates as and when the same fell due. The 1st plaintiff stated that the plaintiffs had settled rates for the years 1995/1996 and had been issued with Rates Clearance Certificate on 7th May, 1996. The 1st plaintiff stated that the plaintiffs entered into an agreement for sale of the suit property with Ashwinkumar Ochhawlal Madhiwala on 10th April, 1995 and before they could complete the agreement, they were advised that the suit property had been sold to Parrin K. Shah in execution of a decree that was issued in the lower court suit which concerned rates payment.

The 1st plaintiff stated that the plaintiffs were not served with summons to enter appearance in the lower court suit neither was any demand issued before the filing of that suit. The 1st plaintiff stated that they discovered several anomalies upon perusing the lower court file. The 1st plaintiff stated that the record of that court revealed that fraud was committed against the plaintiffs which led to them being deprived of the suit property. The 1st plaintiff stated that the plaintiffs were unable to set aside the sale of the suit property in the lower court because the property had been transferred to third parties. The 1st plaintiff stated that the plaintiffs' claim was for the recovery of the value of the suit property which was unlawfully and fraudulently sold by the defendant.

As I have stated earlier, the defendant closed its case without calling any evidence. After the close of the plaintiffs' case, the parties made closing submissions in writing. The plaintiffs filed their submissions on 9th January, 2019 while the defendant filed its submissions in reply on 14th February, 2019. I have considered the evidence tendered by the plaintiffs and the submissions by counsels. The parties did not frame issues for determination by the court. In their submissions, each party framed its own issues. From the pleadings, the following in my view are the issues that arise for determination in this suit: -

- 1) Whether the plaintiffs' suit is properly before the court.
- 2) Whether the plaintiffs are entitled to the reliefs sought in the further amended plaint.
- 3) Who should bear the costs of the suit

Whether the plaintiffs' suit is properly before the court:

I am in agreement with the defendant that this suit was instituted by the plaintiffs to challenge the judgment and execution proceedings in the lower court suit. The plaintiffs contended that the judgment of the lower court was irregular in that; the suit was not against them; they were not served with summons and no valid notice was served upon them as required under section 17 of the Rating Act, Chapter 267 Laws of Kenya. The plaintiffs contended also that the execution proceedings were flawed in several material respects. The plaintiffs contended that the suit property was not properly described and that no auction sale actually took place. The plaintiffs contended further that no demand was made upon them to pay the decretal amount before the property was purportedly auctioned. The plaintiffs termed the lower court suit a fraudulent scheme that was intended to deprive them of the suit property.

It was not disputed that the plaintiffs became aware of the lower court suit even if they were not served with summons to enter appearance as they claimed. It was also not disputed that upon learning of the said suit, the plaintiffs became fully aware of the circumstances under which the said suit was filed, judgment obtained and executed by attachment and sale of the suit property. There is no evidence that the plaintiffs made any attempt to move the lower court to set aside the judgment that was entered against them for the reasons that have been advanced herein. The plaintiffs also made no attempt to set aside the sale of the suit property which they have claimed to be fraudulent and illegal. Instead, the plaintiffs applied to the lower court to be paid the balance of the proceeds of the auction sale after the recovery of the decretal amount. The plaintiffs had contended that they were not the ones who were sued in the lower court. That contention cannot be taken seriously. If the plaintiffs were not the judgment debtors in the lower court, there was no way they could have applied and succeeded in having released to them the balance of the proceeds of sale of the suit property. The plaintiffs cannot be allowed to approbate and reprobate at the same time.

Since the plaintiffs did not challenge the lower court judgment and the execution proceedings that resulted in the sale of the suit property, the said judgment and subsequent orders issued in execution thereof remained valid and binding. I am in agreement with the defendant that the said judgment and orders could only be challenged before this court by way of appeal. The Civil Procedure Rules provided the plaintiffs

with adequate remedies for the grievances that form the basis of this suit. It was up to the plaintiffs to apply to the lower court to set aside the ex parte judgment that was entered against them if at all they were not served. It was also open to them apply to the lower court to set aside the sale of the suit property if the sale of the property was irregular. I am in agreement with the defendant that it was not open for the plaintiffs to challenge a judgment of a court of competent jurisdiction through another suit. The issues raised by the plaintiffs in this suit could only be interrogated in the lower court. This court cannot be called upon in exercise of its original jurisdiction to declare as illegal and fraudulent a sale of a property that was conducted pursuant to a judgment issued by a court of competent jurisdiction which has neither been set aside nor reviewed.

Due to the foregoing it is my finding that the sale of the suit property could only be challenged in the first instance in the lower court suit. The plaintiffs could only fault the judgment and proceedings of the lower court before this court on an appeal filed for that purpose. In the circumstances, this court has not been properly moved and as such does not have jurisdiction in the current proceedings to entertain the plaintiffs' claim

As rightly submitted by defendant, the cases relied on by the plaintiff in support of the institution of this suit are distinguishable. In the case of Allied Investments Limited v City Council of Nairobi & 4 others [2015] eKLR, the plaintiff did not take part in the lower court proceedings and the issue of the competency of the suit was not raised before the High Court. In the case of Flagship Holdings Ltd. v Municipal Council of Mombasa and Another [2010] eKLR, the attempted sale of the plaintiff's properties was not pursuant to a court order. In the case of Mwai Limited & 2 others v Municipal Council of Mombasa & 5 others [2015] eKLR, the decision and proceedings of the lower court were challenged by way of Judicial Review application and not by way of a civil suit. The same applies to the case of Musk Deer Limited v Benjamin K. Kipkurui & Another [2018] eKLR in which the decision of the lower court was challenged by way of a constitutional petition.

Whether the plaintiffs are entitled to the reliefs sought:

The plaintiffs' suit as I have stated above was premised primarily on the ground that the sale of the suit property was carried out illegally and fraudulently. As I have pointed out, the sale was conducted pursuant to a judgment of a court of competent jurisdiction that had not been set aside or reviewed. The sale cannot therefore be said to have been carried out illegally and fraudulently. In the case of Allied Investments Limited v City Council of Nairobi & 4 Others (Supra) that was cited by the Plaintiff, the court stated that:

“The law is trite that fraud must be pleaded with meticulous particularity and proved strictly.”

The onus was upon the plaintiffs to prove their case. No evidence was placed before the court showing that the sale of the suit property was fraudulent or that there was a fraudulent scheme to deprive the plaintiffs of the property. From the material before me, it is clear that the plaintiffs had defaulted in the payment of rates for the suit property as at the time the lower court suit was filed by the defendant to recover the same. The payment of rates which the plaintiffs referred to in the plaint and in their evidence was made after judgment had been entered against the plaintiffs in the lower court and as such cannot support the allegations of fraud directed at the defendant. There was also no evidence that the suit property was sold at a throw away price. No evidence was placed before the court as to the price the suit property could attract on a forced sale like the one that was conducted by the defendant. The sum of Kshs.7,500,000/= which the plaintiffs relied on as the value of the suit property was arrived at on a willing buyer willing seller arrangement. It was not a result of an auction sale.

For the foregoing reasons, I am not satisfied that the plaintiffs have established their claim against the defendant. The plaintiffs are therefore not entitled to the reliefs sought against the defendants.

Who is liable to pay the costs of the suit:

The general rule on costs is that it is at the discretion of the court and that the same follow the event unless for good cause, the court orders otherwise. In this particular case, I can see no reason why I should deny the defendant the costs of the suit.

Conclusion:

In conclusion, I find no merit in the plaintiffs' claim against the defendant. The same is dismissed with costs to the defendant.

Delivered and Dated at Nairobi this 26th day of September 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Mwangi h/b for Mr. Luseno for the Plaintiffs

Mr. Mokuia for the Defendant

C. Nyokabi-Court Assistant