



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1704 OF 1993

KICH INDUSTRIES LIMITED.....PLAINTIFF

AND

THE COMMISSIONER OF LANDS.....1ST DEFENDANT

HON. ATTORNEY GENERAL.....2ND DEFENDANT

A TO Z INDUSTRIES LTD.....3RD DEFENDANT

ZACHARIA KENGARA NYAMBANE.....4TH DEFENDANT

JUDGMENT

Background

1. The original court file relating to this suit got lost in the 1990s. The present court file was reconstructed pursuant to the order issued on 23/1/2002 by C K Njai, Deputy Registrar. From the affidavit filed on 6/10/2004 by Mr. Mwangi Njoroge, Litigation Counsel at the Attorney General's Office (as he then was), it does appear that on 14/3/1994, Amin J issued an order in the following verbatim terms:-

“1. A to Z Industries Ltd is joined as party in this suit.

2. Zakaria Kengara Nyambane is hereby joined as party to this suit.

3. The issue of ownership of the plaintiff company and Land Reference No. 209/10564 be determined by this court.

4. That there be liberty to apply.”

2. The same affidavit contains, as an annexure a defence and counterclaim by M/s A to Z Industries Ltd, listed as 3rd defendant. There are however, no pleadings by Zakaria Kengara Nyambane. The affidavit also contains a Third Party Notice dated 7/4/1993 but there is no indication as to whether the 3rd party notice was served.

3. In summary, the plaintiff's case is that it was allotted Land Reference Number 209/10564 in 1986 by the 1st defendant. It accepted the allotment and paid the 1st defendant Kshs 882,395. The 1st defendant subsequently prepared a Grant in the name of the plaintiff but released the Grant to one Zakaria Kengara Nyambane who was a stranger to the plaintiff company. The plaintiff contends that the 1st defendant

wrongfully, negligently and in breach of the agreement between it and the Government of Kenya released the Grant to the 4th defendant who was a total stranger to the plaintiff. In the alternative, the plaintiff contends that the Registrar of Companies in connivance with other persons wrongfully and fraudulently procured the registration of another company with a name similar to the plaintiff's name on 26/2/1987. It was the plaintiff's case that as a result of the foregoing actions, it suffered loss and damages amounting to Kshs 212,535,965.70. Consequently, it seeks the following verbatim prayers against the 1st and 2nd defendants:-

"1. An order that the first defendant do issue the said Grant LR NO. 43062 registered on 10th September 1987 to the plaintiff (sic).

2. Special Damages, Kshs.212,535,965.70.

3. General Damages.

4. Costs and interest on (2) and (3) hereof."

4. The 1st and 2nd defendants filed an amended defence dated 10/11/2004. Their case is that indeed the plaintiff was allotted the suit property and a Grant was subsequently processed and issued in the plaintiff's name on 10/8/1987. The Grant was collected by one Zachariah Kengara Nyambane who presented himself to the 1st defendant as a director and agent of the plaintiff. The Grant was released to the said Zachariah Kengara Nyambane as a result of his acts of fraud and misrepresentation to the 1st defendant. The 1st and 2nd defendants deny negligence, wrong, illegality and/or breach of any agreement and contend that the said Zachariah Kengara Nyambane is the person liable for any loss and/or damages suffered by the plaintiff. The 1st and 2nd defendants further contend that between 1987 and 1993, the plaintiff's directors were fully aware of the fraud and the whereabouts of the Grant. They were aware of these facts as at the time they purported to sell the property to the 3rd defendant. They add that the plaintiff's claim is statute-barred. It is further contended by the 1st and 2nd defendants that under the law, the plaintiff was required to apply for a fresh title but failed to do so. They add that the loss and damages claimed in paragraphs 7 and 9 of the plaint are too remote and speculative. Lastly, the 1st and 2nd defendants aver that the plaintiff was issued with a new Grant in 1996 pursuant to an order issued by the High Court. They urge the court to dismiss the plaintiff's suit against them.

5. The 3rd defendant filed a defence and counterclaim dated 17/11/1995. Its case is that on 11/1/1989 it entered into a sale agreement with the plaintiff in relation to the suit property and paid the plaintiff a deposit of Kshs.400,000. Notwithstanding its willingness to complete the transaction, the plaintiff refused or neglected to obtain the title to the suit property. Consequently, the 3rd defendant seeks the following verbatim orders against the plaintiff by way of counterclaim.

(a) Specific performance of the said agreement.

(b) Costs of this suit.

(c) Any further or alternative relief as may to this honourable court appear fit and just to grant.

6. Hearing of this case commenced on 7/5/2003 before Hayanga J on the basis of the plaintiff's amended plaint dated 14/12/2001. The plaintiff called one witness and closed its case. I was assigned this case on 24/1/2018 and hearing of defence case took place before me on 3/12/2018.

Plaintiff's Evidence

7. The plaintiff led evidence by one witness, Charles Kiptoo Chemweno (PW1). He stated that he was a director of the plaintiff company. The other director was his deceased brother. Through him, the plaintiff made an application to the 1st defendant seeking to be allotted an industrial plot. The application was accepted and the plaintiff was allocated the suit property. He subsequently discovered that the Grant had been processed and issued to a company which had a name similar to that of the plaintiff. The said other

company with a name similar to the plaintiff was incorporated on 26/2/1997. The directors of the other company were Zacharia Nyambane and Sadrudin Nurani. He complained to the Attorney General and the Office of the President before initiating this suit. He entered into a sale agreement with the 3rd defendant for sale of the suit property to the 3rd defendant at Kshs 4,000,000. He was paid a 10% deposit. Because he did not have the Grant, he lost the deal and had to refund the 10% deposit plus a further Kshs.1,000,000. He added that the Registrar of Companies subsequently deregistered the imposter Company. The Commissioner of Lands subsequently issued the plaintiff with another Grant. The plaintiff thereafter proceeded to sell the suit property.

8. PW1 added that he incurred accommodation expenses totaling Kshs.4,890,000 between 1987 and 1996. He stated that had he invested Kshs 4,000,000 in farming, he would have earned Kshs 20,000. He asked the court to award him special damages of Kshs 212,000 and general damages because he had suffered mentally for 10 years.

Evidence by the 1st and 2nd Defendants

9. The 1st and 2nd defendants called one witness, Gordon Ochieng (DW1). He stated that he worked in the Ministry of Lands and Physical Planning as a Senior Assistant Director. He adopted his witness statement dated 20/3/2015 as his sworn in evidence in chief. He testified that the suit property was allocated to the plaintiff on 18/11/1986 and the plaintiff accepted the offer on 29/1/1987. A Grant was prepared, executed and registered on 10/9/1987 as IR 43062. It was then collected by one Zacharia Kengara Nyambane who claimed to be a representative of the plaintiff company. When the Registrar of Companies discovered that Kich Industries Limited had been registered twice, he published Gazette Notice No 3022 of 23/6/1989, deregistering the second Kich Industries Limited. In compliance with the court order of 2/3/1996, another Grant was issued to the genuine allottee, the plaintiff herein. He contended that the plaintiff was in possession of the suit property all along and had sub divided it and sold it to third parties. He further contended that the 1st and 2nd defendant should not be held liable for breach of contract between the plaintiff and the 3rd defendant because the plaintiffs should have secured the Grant first before entering into a sale agreement. He stated that the plaintiff's claim of Ksh 25,500,000 should be justified because the suit property was sold for Ksh 4,000,000 and the company has been in possession since the time it was allocated the land.

10. He added that the first grant was regular because all the requirements had been met. He stated that the Grant was collected by Zacharia Kengara Nyambane after producing a valid certificate of incorporation. He stated that the plaintiff's advocate was informed through a letter that the Grant was processed and collected by the 4th defendant. He said that the Department of Lands should not be held liable because it did not bar the plaintiff from taking possession of the suit property and that the Ministry took less than a year to issue the Grant which was collected by a fraudster. He further added that the title was cancelled pursuant to a court order and a fresh Grant was issued. He stated that the Ministry of Lands did not have the power to cancel the Grant but once the order was issued and served, a fresh Grant was processed and issued to the plaintiff.

11. During cross-examination, he stated that his evidence was based on what was in the records because he joined the Ministry of Lands in 1989. He stated that the Department of Lands assumed that the person who produced the certificate of incorporation was the legitimate director of the company. He said that the fraudsters should bear damages and costs resulting from their activities.

12. In re-examination, he stated that the Department of Lands does not carry out searches on directorship of companies before releasing grants. He stated that the person who collected the Grant produced a copy of the certificate of incorporation together with a copy of his ID card and signed for the Grant. He further stated that when the Registrar of Companies revoked the registration of the imposter company, a new title was issued by the Ministry of Lands.

Submissions

13. The plaintiff's counsel, Mr. Omboto filed written submissions dated 3/6/2019. He submitted that the

1st and 2nd defendants were negligent and breached their statutory duty of care to the plaintiff by releasing the plaintiff's Grant to strangers. As a consequence, the plaintiff suffered loss and damages. Counsel added that the plaintiff had proved the damages it seeks against the defendants.

14. Mr Allan Kamau, Senior State Counsel, filed written submission on behalf of the 1st and 2nd defendants. He identified the following as the two key issues in this suit: (i) Whether the defendants were negligent; and (ii) whether the plaintiff is entitled to the damages sought. Mr. Kamau submitted that the existence of duty of care was not contested. He argued that there was, however, no breach of the duty of care. He contended that for breach to be established the plaintiff must show that the 1st defendant failed to exercise reasonable care. He contended that the 1st defendant fulfilled his duty in a diligent manner and without negligence.

15. On whether the plaintiff is entitled to the damages sought, Mr. Kamau submitted that there was no negligence on part of the 1st and 2nd defendants. He added that the plaintiff's claim was based on the tort of negligence and had not been proved. He argued that the plaintiff's claim lay against the 4th defendant who had fraudulently procured the registration of an imposter company. He added that any other claim in relation to the registration of the imposter company is not within the purview of the 1st defendant and the damages sought cannot be recoverable from the 1st and 2nd defendants. Counsel added that the plaintiff had failed to prove the claim for special damages. Counsel urged the court to dismiss the plaintiff's suit.

Analysis and Determination

16. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework, common law principles and relevant jurisprudence on the key issues falling for determination in this suit. On 14th March 1994, Amin J issued an order joining the 3rd and 4th defendants as parties to this suit. The plaintiff did not, however, amend its pleadings to make a claim against the two added parties. Consequently, the amended plaint which forms the basis of this Judgment does not have a claim by the plaintiff against the 3rd and 4th defendants. Secondly, although the 3rd defendant filed a defence and counterclaim against the plaintiff, there was no claim against it to warrant the defence. Thirdly, no evidence was tendered to support the 3rd defendant's counterclaim. The net result is that there is no claim pleaded by the plaintiff against the 3rd and 4th defendants and there is no evidence in support of the 3rd defendant's counterclaim. Due to lack of evidence, the counterclaim by the 3rd defendant against the plaintiff fails.

17. It is also noted that the amended plaint does not specify the department of Government on whose behalf the attorney general was sued. It does not similarly contain particulars of the alleged negligence, wrong, illegality or breach. The plaintiff did not produce a copy of the notice served under the Government Proceedings Act, which would ordinarily contain details of the Government department and the actionable act or omission necessitating court proceedings. In its opening address to the court and in its evidence and submissions, the plaintiff focused on the Commissioner of Lands and his release of the Grant to the 4th defendant who, together with others, had incorporated a company with exactly the same name as that of the plaintiff. The plaintiff did not focus on the Registrar of Companies or make a claim against the Registrar of Companies.

18. Consequently, taking into account the pleadings, evidence and submissions in this suit, the following are the three key issues falling for determination in the suit: (i) Whether the Commissioner of Lands and the Department of Lands acted negligently, wrongfully, illegally or in breach of contract in releasing the original grant relating to the suit property to the 4th defendant; (ii) Whether the plaintiff is entitled to the prayers sought in the amended plaint against the 1st and 2nd defendants; and (iii) Who should bear costs of this suit.

19. The first issue is whether the Commissioner of Lands acted negligently, wrongfully, illegally or in breach of contract in releasing the original Grant to the 4th defendant. There is common ground that on 26/2/1987, the 4th defendant together with two other persons fraudulently procured the registration of a company under the name **Kich Industries Limited**. They consequently obtained Certificate of Incorporation Number C 33922. At that time, the plaintiff already existed, having been initially

incorporated under the name **Water and Power Supply Consultancy Services Kenya Limited** and having changed its name to **Kich Industries Limited** on 29/8/1986. DW1 testified that the 4th defendant went to the Department of Lands armed with the fraudulent certificate of incorporation and his ID card, identified himself as a representative of Kich Industries Limited, and collected the original grant. There was common evidence by both PW1 and DW1 that indeed the fraudulent Kich Industries Limited had been incorporated by the Registrar of Companies. When PW1 went to collect the Grant, he learnt that the Grant had been collected by the 4th defendant in his capacity as a director of Kich Industries Limited. He carried out investigations and established that indeed another company with a name similar to the plaintiff existed. It is after PW1 made a complaint that the Registrar of Companies discovered the fraud and caused the imposter **Kich Industries Limited** to be deregistered.

20. Against the above background, the plaintiff contends that the 1st defendant acted wrongfully, negligently, illegally and in breach of its agreement with the Government by releasing the Grant to the 4th defendant who was a total stranger to the plaintiff. The question which arises is whether the 1st defendant or the Department of Lands breached their duty of care to the plaintiff? In my view, based on the above evidence, the answer to this question is in the negative. I say so because the person who presented himself as a director of the plaintiff company had procured the registration of a company with a name similar to that of the plaintiff company. There is no evidence to suggest that the 1st defendant or the Department of Lands was aware of or privy to the fraudulent incorporation of the imposter company. In the absence of evidence demonstrating that the 1st defendant or the Department of Lands knew or had reasonable opportunity to know that the “Kich Industries Limited” which the 4th defendant represented was not the plaintiff company herein this court has no basis upon which to attribute negligence, wrong or illegality or breach to the 1st defendant or to the Department of Lands. In my view, the 1st defendant and the Department of Lands exercised reasonable care. My finding on the first issue therefore is that the Commissioner of Lands and the Department of Lands did not act negligently, wrongfully, illegally or in breach of contract in releasing the original grant to the 4th defendant. Like the plaintiff herein, the 1st defendant and the Department of Lands were victims of the fraud perpetuated by the 4th defendant and his cohorts.

21. The second issue is whether the plaintiff is entitled to the prayers sought in the amended plaint against the 1st and 2nd defendants. In prayer number 1, the plaintiff seeks an order directing the 1st defendant to issue it with a grant relating to the suit property. At the interlocutory stage of this suit, the court granted the prayer and the plaintiff was issued with a Grant. The plaintiff has since disposed the suit property. Prayer 1 is therefore not available at this stage. Prayers 2 and 3 relate to special and general damages respectively. Without saying much, having found that the 1st defendant and the Department of Lands were blameless, the claim for special and general damages is in my view, misdirected. The persons who should have answered the claim for special and general damages are the people who fraudulently procured the registration of a company with a name similar to the name of the plaintiff. Regrettably, the plaintiff did not pursue any of them, including the 4th defendant who was joined as a party to this suit at the behest of the defendant. The plaintiff did not bother to amend its pleadings to make a claim against the 4th defendant. It is therefore my finding that the plaintiff is not entitled to the prayers sought in the amended plaint against the 1st and 2nd defendants.

22. Lastly, in view of the criminal activities which led to the release of the title and to which the plaintiff and the 1st defendant were not privy, there will be no orders as to costs of this suit.

23. In summary, the plaintiff has failed to prove its claim against the 1st and 2nd defendants on a balance of probabilities. Secondly, the 3rd defendant has failed to prove its counterclaim. Lastly, there will be no orders as to costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF DECEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Chepngeno holding brief for Mr Omboto for the plaintiff

Court Clerk - June Nafula