



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC LAND CASE NO. 282 OF 2013

HOUSING FINANCE COMPANY OF KENYA LTD.....PLAINTIFF

-VERSUS-

KENYA BROADCASTING CORPORATION.....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

AND

KENSKO AGRO PRODUCTS.....THIRD PARTY

JUDGEMENT

1. The plaintiff Housing Finance Company of Kenya Limited brought this claim against the Kenya Broadcasting Corporation vide its plaint dated 16th February 2006 and later amended on 19.10.2009. It claimed that the defendant has trespassed on its parcels of land title numbers Mombasa/Block XXI/580, 581 & 582 thus denying it the right of user and enjoyment. The plaintiff prays for judgement to be entered in its favour on the following terms:

- a. A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property.**
- b. A declaration that the defendant, whether by themselves or their servants agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly trespassers on same.**
- c. A declaration the defendants whether by themselves or their servants or agents or otherwise howsoever are not entitled to remain on the suit property.**
- d. A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property.**
- e. A mandatory injunction requiring the defendant to demolish the wall erected on the suit property.**
- f. Vacant possession of the suit property.**
- g. Loss of mesne profits.**
- h. General damages for trespass.**
- i. Costs of this suit together with interest therein at such rate and for such period of time as this Honourable Court may deem fit to grant.**
- j. Any such other or further relief as this Honourable Court may deem appropriate.**

2. The defendants have defended the suit. The 1st defendant pleaded that it has always been in occupation of the suit properties for a period in excess of twelve (12) years. Secondly that the suit property was government land that vested in the defendant. Thirdly that the plaintiff's

claim is time barred. The 1st defendant also pleaded that the suit is bad in law as no notice of the institution of the suit was ever given. The 1st defendant thus prays in the counter-claim that judgement be entered in its favour on the following terms:

a. A declaration that the suit properties, L.R Nos. Mombasa/Block XXI/580, Mombasa/Block XXI/581 and Mombasa/Block XXI/582 belongs to the 1st defendant.

b. An order that the plaintiff be deregistered as the owner of the suit properties but instead the 1st defendant be registered as the owner of the owner thereof.

c. An order of permanent injunction restraining the plaintiff whether by themselves, their servants and/or agents from trespassing, alienating, fencing or otherwise dealing with the suit properties.

d. Costs of the suit.

e. Any other or further relief as this Honourable Court may find fit and just to grant.

3. After the close of pleadings, the parties adduced oral evidence in support of their case. The plaintiff called **Mr Martin Machira** who is its legal manager – litigation. Mr Machira stated that he joined the plaintiff's employment on 3.6.2014. That the legal manager as at 2006 was Joseph Kinya who left their employment and joined K.C.B. The witness said the plaintiff purchased the suit properties from the 3rd party in 1995 for Kshs 44,000,000. The plaintiff was represented in the transaction by J. F. Kagwe advocate. The sale agreement was executed on 22.2.1995 which was produced as Pex 3. Duly executed transfers produced as Pex 4 were lodged at the land's office and on 15.3.1995, the plaintiff was issued with certificates of lease in respect of the 3 plots which he produced as Pex 5. The plaintiff began paying rates to the municipal government and produced evidence of such payment as Pex 7.

4. The plaintiff's witness continued that they intended to lease the property and offered the same to Auckland Agencies vide their letter dated 9.4.2005 and rent was agreed at Kshs 25000 per month (Pex 8). When Auckland took occupation and began developing the land, they were stopped by the District Commissioner and the 1st defendant. That it is at this point when the 1st defendant took possession of the suit premises and put up a perimeter wall. The plaintiff's case is that the 1st defendant continues with the trespass to date. The plaintiff stated that a search conducted on 9.2.2006 reveals the plots are still registered in their name. The searches were produced as Pex 9. They also did a demand letter dated 11.1.06 which was produced as Pex 10 but they received no response hence the filing of this suit.

5. In response to the 1st defendant's counter-claim, the witness denied the land was reserved for KBC. The witness denied the allegations of fraud on the part of the plaintiff stating it is the government itself who issued them with a title deed. He stated further that there was nothing to show there were underground cables on the suit land. That in the 1st defendant's document is a letter dated 17.1.1989 requesting to be given the land meaning the land had not been alienated to them. He urged the Court to dismiss the counter-claim with costs.

6. In cross-examination, Mr Machira stated that he has not visited the suit properties. He admitted not producing a search done before the acquisition of the suit property by the plaintiff. He did not witness the construction of the perimeter wall neither have they excavated to discover what is underground. That the 1st defendant's letter dated 29.12.1988 addressed to the provincial administration enclosed a print copy of the approved plan. He was referred to several letters by the 1st defendant, which were all dated before the plaintiff entered the land. That the entries on the green cards on 14.3.1995 were all after the execution of the sale agreement. The witness had not seen the allotment letter. He had no evidence that Auckland Agencies took possession and were thrown out by the police.

7. In re-examination, PW 1 said he was not the author of the green cards. That if Auckland took possession the matter would not be in Court. That he has not been shown anything that confirms the 1st defendant had underground cables or that the land was allocated to them. That the extract from the Ndungu report refers to L. R Nos 522 – F. R 126/85 which is different from the suit property. That they were issued the titles by the Commissioner of lands.

8. PW 2 is **MAINA CHEGE** who is a registered and practicing land valuer. He received instructions from the plaintiff to value 3 plots. He had a copy of the subdivision scheme. He visited the plots, inspected and carried out the valuations which he reduced into writing vide his report dated 21.2.1995. The open market value was assessed at Kshs 44,500,000 for the 3 plots. That the plots were vacant. Currently there is a restaurant. He produced his report as Pex 10 and the receipt for his Court attendance charges of Kshs 5000= as Pex 11.

9. During cross-examination, PW 2 stated that when he did the valuation, the sub-division had been done but not the registration. That a valuation is a guide to parties but they are at liberty to agree on a price. He did not know what was the purchase price in the sale agreement. This marked the close of the plaintiff's case.

10. The 1st defendant called his witness on 11th July 2017, that is **Charles Ndeto** who has worked for KCB for 29 years. He adopted his witness statement signed on 1.10.2013 and documents filed in Court on 30.5.2006 plus supplementary list dated 10.7.2007 and a further list dated 25.11.2013 which were all produced as Dex 1 – 12. Mr Ndeto said that the plot was allocated to the Corporation in 1988 for staff housing. That they have Sauti house on one of the plots. They learnt someone was claiming the land in 2006 i.e. the plaintiff. That the land was transferred to KBC through an Act of Parliament. The witness stated that they attempted to get title to the suit properties by writing letters but which efforts were not fruitful.

11. In cross-examination, Mr Ndeto said he took part in some of the correspondences as it fell under his duties. That the letter dated 29.7.1990 written by Andaba was requesting the land to be allocated to them which was after the Act came into operation. That the cables were laid down in 1989 after they got approvals to use the land and also erected a perimeter wall. The witness said the 1st defendant did not know the plaintiff was registered in 1995. That the plot numbers given constitutes where Sauti house, staff houses and cables are. That on

the ground the land is not divided. They are claiming part B of the PDP. He is not aware besides the plaintiff there are two other people claiming the land but they are only interested on the land purchased by the plaintiff.

12. Further cross-examination by Mr Wachira advocate for the 3rd party, the witness said he does not know the acreage of the whole land or the portions taken. The 1st defendant inherited the land from the Ministry of Information. Mr Ndeto confirmed they do not have a title deed but maintained they are in occupation. He said the 3rd party's title is not valid and should be revoked. In re-examination, the witness said the land in the Ndungu report is part of the land they are claiming. That it is the plaintiff who sub-divided the land. This marked the close of the 1st defendant's case.

13. The 2nd defendant chose not to call any evidence. The 3rd party did not call any witness for failing to file a witness statement in time. The advocates for the parties took time to put in written submissions which are all filed. I have had opportunity to read those submissions together with the case law cited. The parties had agreed on the main issues for the Court's determination which are:-

- 1. Is the plaintiff or the 1st defendant, the registered owner of the leasehold properties known as MSA/BLOCK XXI/580, 581 and 582?**
- 2. Was the Transfer for the Suit Properties to the plaintiff by the 3rd party irregular, fraudulent and invalid?**
- 3. Did the Government reserve and/or allocate the Suit Property to the Voice of Kenya in 1988 and did the 1st defendant vide Section 54 of the Kenya Broadcasting Act acquire the said properties?**
- 4. Has the defendant acquired rights under adverse possession and can the rights be claimed in this suit?**
- 5. Has the plaintiff suffered any loss and damages?**
- 6. Is the plaintiff's suit time barred?**
- 7. Was the Mandatory Notice of Intention to sue issued by the plaintiff to the 1st defendant?**
- 8. Is the plaintiff or the defendant entitled to the prayers sought in the plaint and counterclaim?**

14. On the 1st issue whether the plaintiff or the 1st defendant is the registered owner of the suit properties, it is without a doubt the plaintiff is. The plaintiff produced certified copies of the certificates of leases as well as certificate of official search showing its registration. The 1st defendant confirmed through its witness that its attempts to acquire title for the suit property were futile. This brings the second issue for determination on whether the transfer of the suit property by the 3rd party were irregular, fraudulent and invalid. The plaintiff bought the suit properties from Kensko Agro Produce Ltd (the 3rd party) vide an agreement for sale dated 22nd February 1995. From the certificates of leases produced, the 3rd party was registered as the first lessee from the government of Kenya for a period of 99 years from 1st May 1994. The 3rd party filed a defence on 30th July 2009. In its defence, the 3rd party did not deny transferring the suit titles to the plaintiff. The transactions as done between the 3rd party and the plaintiff is not disputed. The 3rd party did not deny selling and transferring the properties to the plaintiff. I do not see how the transfer to the plaintiff therefore should become an issue for my determination. I will leave the matter to rest for the reason that it is not contested.

15. For me, what determines this case is to find out whether the 3rd party had a good title to pass on to the plaintiff. In the alternative to determine whether the suit properties were reserved for the 1st defendant hence was not available for allocation to anyone including the 3rd party. In the 1st defendant's list of documents dated 17.9.2008, they listed the following;

- a) Certified extract for L. R No Mombasa/Block XXI/580.**
- b) Certified extract for L. R No Mombasa/Block XXI/581.**
- c) Certified extract for L. R No Mombasa/Block XXI/582**

These documents showed that as at 14.3.1995, the government of Kenya owned the suit titles. Overleaf, Kensko Agro Products was indicated as the registered leasehold owner.

16. In the 1st defendant's 2nd list of documents is dated 25.5.2006, it had included a letter dated 29.12.1988 forwarding a print copy of a plan approved by the Commissioner of Lands to the P.C., D.C, Provincial Surveyor, District Land Officer and the Town Clerk. It is referred to as P.D.P N0 CT/12/11/88/1 – Mombasa Island. The letter of 17.1.1989 to the Provincial Information Officer also referred to plot development (**approved proposed site for existing V.O.K offices, extension of V.O.K and extension of extelecoms – staff houses**). The letter dated 27th July 1990 addressed to the Managing Director of the 1st Defendant by Controller of programs Mombasa was requesting for additional land. The letter of 27.7.1993 was advising the corporation secretary of the 1st defendant to visit the provincial surveyor to confirm whether the plot had been surveyed. The letter of 30.12.1994 confirmed the PDP of 6.5.1988 had been approved but it is only the Commissioner of Land who could address the queries raised in the letter of 26.10.1994. The last document is the extract of the Ndungu report referring to Mombasa L. R 522/XXI F R 126/85 reserved for future extension of KBC and alleged to have been allocated to HFCK. It stated revoke the allocations.

17. In the 1st defendant's 3rd list of documents dated 25.11.2013 are two letters. The 1st one is dated 9.9.1993 from Coast Provincial Surveyor confirming that P.D.P No CT/12/II/88/1 – Mombasa Island has not been surveyed. It was a reply to the queries of the 1st defendant's letter dated 20.7.1993 listed as number 2. In this letter, the 1st defendant wrote thus ***“we would like to start development on the reserved plot “B”. However we would seek your guidance on whether the reserved plot has been surveyed and beaconed or whether we could ask the survey department or I rate a surveyor to do so for us.”***

18. The 1st defendant was advised in one of the correspondences that it is the Commissioner of lands who could answer to their queries. They did not however produce any letter addressed to the Commissioner of lands requesting to be given title in respect of the suit plots. In the amended defence of the 3rd party, it is pleaded at paragraph 4 that ***“the 3rd party had a good title and denied obtaining the same irregularly, wrongfully and or fraudulently and the 1st defendant is put to strict proof.”***

19. The 1st defendant in his witness statement at paragraph 2 said that V.O.K was a department within a government ministry and as such there was no need to process title as it was still government land. At paragraph 8, Mr Ndeto recorded that the property belonged to the 1st defendant and it has never been available for allocation. The Commissioner of Lands could therefore not have issued leases to the 3rd party. This contradicts the 1st defendant's own correspondences requesting for approval by the Commissioner of land for extensions of V.O.K offices & extelecoms – staff houses. The impression I get is that through the correspondences they were requesting for additional land for their future extensions. Unfortunately their requests did not receive a positive answer. Instead the leases for the plots were issued to the 3rd party. If the 1st defendant is questioning the validity of the leases issued to the 3rd party, the burden shifts on it (the 1st defendant) to demonstrate that they were fraudulently acquired as the law is that ***“he who alleges has the burden to prove those allegations”***.

20. This is what is provided for in section 26 of the Land Registration Act as well as the holding in the case of in **Chememei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005 at paragraph 64** it was held:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the Court in the case of Milan Kumar Shah & 2 Others vs City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

21. The 3rd party was not in the picture when the 1st defendant was writing to the government agencies over the subject land. The 1st defendant says it was in occupation thus the land was not available for allocation. However in their letter dated 20th July 1993, it expressly stated that ***“they would like to start development on the land reserved plot B,”*** If plot B is the same as the suit plots then as at July 1993 it was not developed. The averment by Mr Ndeto that the 1st defendant continues to be in occupation and has substantially invested in the property and that the subsequent title issued was either issued or illegally acquired is not supported with any evidence. Further there was no evidence to the effect that indeed plot marked ***“B”*** was reserved for the 1st defendant. Since the documents produced suggest the land was unsurveyed and had no title, it is only the office of the Commissioner of Lands or the Minister of Lands as being invalid that would have disowned the leases issued to the 3rd party. In the absence of such evidence and in line with the provisions of section 24 & 25 of the Land Registration Act, the registration of the 3rd party remains conclusive proof that he was the owner of the suit parcels and therefore had a good title.

22. The 4th issue is whether the 1st defendant have acquired rights under adverse possession and whether those rights can be claimed in this suit. The 3rd party and the plaintiff acquired the title into their names as from 14.3.1995. Before then the property was registered as government land. Therefore before March 1995, time could not run as per the provisions of Limitation of Actions Act, time does not run as against the government. Twelve years from 14.3.1995 would lapse on 13.3.2007. The suit seeking possession against the 1st defendant was filed on 16.2.2006 before the lapse of 12 years. The right under adverse possession therefore had not crystallized in favour of the 1st defendant. My answer to this question is thus in the negative.

23. Was the Mandatory Notice of intention to sue issued by the plaintiff? The 1st defendant did not cite the law requiring compliance with this procedure given that it has capacity to sue and be sued in its own name. Be that as it may the plaintiff produced the demand letter dated 11th January 2006 and the suit was filed on 16.2.06 which means between the date of the letter and the date of filing was a clear 30 days. The 1st defendant submitted this letter was not received by them. However the 1st defendant's own witness told the Court they heard the plaintiff was claiming the land in 2006. He did not say how they heard about the plaintiff's claim other than this Court taking it to be as a result of the demand letter issued or taking pf possession by Auckland Agencies. Although my position is that not having been shown requirement under the law to serve notice, it was not fatal to the plaintiff's case to fail to do so.

24. Has the plaintiff suffered damage or loss? Having found that the 3rd party's title was good and ownership having been passed to the plaintiff, the plaintiff was entitled to use and occupation of the suit parcels of land. By the 1st defendant denying their tenant occupation, they have indeed suffered loss as they were denied opportunity to get rental income from the lease from the date of their agreement which they pleaded in paragraph 9 of the plaint as from October 2005. The loss is therefore proved and is to be calculated from October 2005 upto the time vacant possession is handed over at a monthly rent of Kshs 25,000 per month.

25. In conclusion, I am satisfied that the plaintiff's case is proved on the standards required under the law. Accordingly I enter judgement in its favour as prayed in prayers (a) – (d) of the plaint. I also find the 1st defendant has not proved its counter-claim which I hereby dismiss. The costs of the suit is awarded to the plaintiff.

Dated, signed & delivered at Mombasa this 14th February 2018.

A. OMOLLO

JUDGE