



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CASE NO. 1344 OF 2006**

**SOUTHFORK INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**PRIDE GROVE INVESTMENTS LIMITED.....1ST DEFENDANT**

**COMMISSIONER OF LANDS.....2ND DEFENDANT**

**THE REGISTRAR OF TITLES.....3RD DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT**

**JUDGEMENT**

1. The Plaintiff, which is a limited liability company, sued the 1<sup>st</sup> Defendant on 20/12/2006 claiming that the 1<sup>st</sup> Defendant had fraudulently caused L.R. No. 1870/11/410 (“the Suit Property”) to be registered in its name instead of the Plaintiff’s name and was issued with grant No. I. R. 89671 over this parcel of land for 99 years from 1/7/2002. The Plaintiff sought a declaration that it is the legal owner of the Suit Property; and an injunction to restrain the Defendant from subdividing, fencing, developing, transferring, selling, delineating and or in any manner interfering with the Suit Property. The Plaintiff also sought damages, costs of the suit plus interest.

2. The plaint was amended on 7/2/2007 to join the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to the suit and was further re-amended the same year to join the 4<sup>th</sup> Defendant. The Plaintiff claimed that after granting it an extension of the lease in respect of the Suit Property, the 2<sup>nd</sup> Defendant wrongly, fraudulently or erroneously caused the Suit Property to be registered in the name of the 1<sup>st</sup> Defendant and issued a grant to it.

3. The 1<sup>st</sup> Defendant denied the Plaintiff’s claim. It claimed it had been in possession of the Suit Property and that the plaint referred to a different property other than the one it occupied. It denied that the Plaintiff was the owner of the Suit Property or that the Plaintiff had a cause of action against it.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their defence. They denied the Plaintiff’s claim. They denied receiving the Plaintiff’s application for extension of the term of lease while maintaining that the Plaintiff did not comply with the requirements for the extension of the term of lease. They argued that if the Suit Property belonged to the Plaintiff and was later transferred and registered in the 1<sup>st</sup> Defendant’s name, then the Plaintiff was party to the transaction that transferred the Suit Property to the 1<sup>st</sup> Defendant and the registration of the transfer.

5. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants argued that if there was an extension of the lease over the Suit Property, the extension could only have been effected if all the procedures laid down by law were followed. They also stated that the extension would have maintained the old land reference number 209/11875 and not the new number L.R. No. 1870/11/140 claimed by the Plaintiff.

6. The 2<sup>nd</sup> Defendant averred that it had no way of knowing who between the Plaintiff and the 1<sup>st</sup> Defendant had proprietary rights over L.R. No. 209/11875 and L.R. No. 1870/11/140 unless both parties produced evidence of the transactions leading to the issuance of grants. The two Defendants denied allowing the 1<sup>st</sup> Defendant to be registered as the owner of L.R. No. 1870/11/140 and further stated that if indeed the registration was done, then that was only after the 1<sup>st</sup> Defendant confirmed that the plot belonged to it.

7. The court fixed the case for hearing on 27/9/2017 in the presence of counsels for all parties. When the matter came up for hearing on 20/12/2017, the 1<sup>st</sup> Defendant was not represented. The Plaintiff called one witness. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants also called one witness.

8. The Plaintiff’s director adopted his witness statement dated 18/4/2013 and produced the documents in its bundle. The Plaintiff’s evidence is that the dispute relates to ownership of the property known as L.R. No. 1870/11/410 which was previously known as L.R. No. 209/11875. The Suit Property is situated off General Mathenge Drive in Westlands, Nairobi.

9. The property was originally owned by the City Council of Nairobi (“the Council”). Through a deed of assignment dated 27/5/1993, the

Council assigned L.R. No. 209/11875 to Sky Structures Limited. The deed of assignment was registered at the lands registry in Volume N60 Folio 72/1 file No. 19003 on 3/5/1994. Deed plan number 169724 dated 4/2/1993 is attached to the assignment. The term of the lease was the residue of the unexpired term of 99 years from 1/6/1904.

10. Sky Structures Limited transferred the Suit Property to the Plaintiff on 5/10/1994 at the agreed consideration of Kshs. 2 million. The Plaintiff had plans to develop the Suit Property but it became apparent that the unexpired term of the lease was too short to guarantee any meaningful returns on its investment. The Plaintiff applied to the Commissioner of Lands for extension of the term of lease through its advocates' letter of 9/6/1998.

11..The Commissioner of Lands vide its letter of 16/6/1998 sought comments from the Director of Physical Planning and the Director of City Planning with regard to the extension of the lease over the Suit Property.

12..The Director of City Planning and Architecture gave his comments in the letter dated 25/8/1998 which was copied to the Plaintiff's advocate, confirming that the Council had approved the extension of the term of the lease of the Suit Property without any conditions. The Director of Physical Planning confirmed in his letter of 26/4/2010 that he had no objection to the extension of the term of the lease sought by the Plaintiff.

13. The 2<sup>nd</sup> Defendant in his letter of 9/8/2010 addressed to the Plaintiff's advocates confirmed that the Plaintiff's application for extension of the lease had been approved for a term of 50 years with effect from 1/6/2000 subject to conditions set out in the letter. The conditions related to payment of ground rent and legal fees for surrender of the existing title and provision of a duly signed survey plan from the Director of Surveys.

14. The Plaintiff claims it complied with the conditions set by the 2<sup>nd</sup> Defendant and made all the payments required. It also procured the preparation of deed plan number 241973 by the Director of Surveys which its advocates forwarded to the Commissioner of Lands vide the letter dated 5/10/1994. The Plaintiff executed a deed of surrender which its advocates forwarded to the 2<sup>nd</sup> Defendant on 4/11/2002. The Plaintiff believes that deed plan no. 241973 prepared by the Director of Surveys identified the Suit Property as L. R. No. 1870/11/410 over which a new grant of title in respect of the extended term of the lease was to be issued to it.

15. The Plaintiff later learnt that in the course of preparation of the deed plan, the Director of Surveys discovered that the plot fell within the 1870/11 registration block just like the other properties adjacent to it. It therefore became necessary to change the registration number to L.R. No. 1870/11/410. This position was confirmed by the letter dated 19/8/2003 which read as follows:-

RE: L. R. No. 1810/11/410 (Formerly L. R. N. 209/11875)

The above plot belonged the City Council which transferred the same to Sky Structures Limited vide assignment made on 27/5/1994 registered in Vol. N. 60 Fol. 72/1 GLA 19003.

Sky Structures Limited transferred the same to South Fork Investment Limited of Box 39060, Nairobi.

The lease for the same was re-newed for a further 50 years w.e.f 1/6/2000, the change of L.R. No. from 209/11875 to 1810/11/410 is that it was found by the Director of Surveys to fall within the 1810/11 registration block.

I was in the process of preparing the title for extension of lease and the above quoted letter is misleading since the Council transferred the plot and it is no longer Council land.

Let me have your confirmation that the above plot does not belong to the Council but private property, so that title preparation can go on."

16. The Plaintiff expected to be issued a new grant of title in respect of the extended term of the lease after it complied with the conditions given by the 2<sup>nd</sup> Defendant in the letter of 9/8/2002. However, it was never issued with a title. On 19/8/2003 the Commissioner of Lands wrote to the Director of City Planning addressing an objection to the extension of the lease after approvals had been given.

17. The Plaintiff discovered in June 2005 that the Suit Property had been advertised for sale in the local newspapers. Plots measuring 1/8 acres each were offered for sale at Kshs. 2.8 million each in *The Standard* of 22/6/2005. On enquiry, the Plaintiff discovered that the 1<sup>st</sup> Defendant had obtained the grant of title in respect of for L.R. No. 1870/11/410, the Suit Property, on 14/8/2002. The Plaintiff could not trace the records in respect of this land at the lands office.

18. The Plaintiff believed the 1<sup>st</sup> Defendant could not have legitimately acquired title to the Suit Property since the original term of the lease had not expired by 24/8/2002 when the 1<sup>st</sup> Defendant's title was issued; the Suit Property still belonged to the Plaintiff who had not executed any documents of transfer to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant's title was issued soon after the Plaintiff surrendered the deed of assignment together with the original deed plan number 241973 to the Commissioner of Lands.

19. On the 1<sup>st</sup> Defendant's allegations that the Suit Property was different from its land, the Plaintiff noted that both parcels measured 1.10 hectares and the 1<sup>st</sup> Defendant's title had deed plan number 241973 attached to it, which is the deed plan the Plaintiff had surrendered to the 2<sup>nd</sup> Defendant.

20. The Plaintiff reported the matter to the police and recorded a statement for the police to conduct investigations. The Plaintiff obtained a

valuation in March 2012 which showed that the open market value of the Suit Property then was Kshs. 400 million.

21. The Plaintiff was aware when it purchased the Suit Property in 1994 that it was purchasing the remainder of the lease and that renewal of the lease was not automatic but was subject to approval. It was aware that its application for approval would be circulated to other government departments for their comments.

22. The Plaintiff's witness stated that they were shocked when the Council declined to give approval for the extension of the lease yet it had previously given its approval. The Plaintiff maintains that the land was the same but that the reference number may have changed after the survey. The Plaintiff is not claiming compensation but is seeking to get the land back. The witness confirmed that the search they did confirmed that the title was in the name of Southfork Investment Limited. The Plaintiff had never been told that the Suit Property was an open space.

23. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants called the Senior Assistant Director of Land Administration to give evidence on their behalf. He adopted his witness statement filed in court on 21/7/2017.

24. His evidence was that L. R. No. 209/11875 originally formed part of L.R. N. 1870/II/121 which was allocated to the City Council of Nairobi. It measured 5.62 acres and was allocated for 99 years from 1/6/1904. The land was meant to be an open space. Over time, this land was subdivided to create L.R. Numbers 1870/II/298, 299, 331, 332, 333, 334, 335 and L. R. No. 209/11875 and 876.

25. It was his evidence that even with the subdivision, the user of the resulting parcels of land remained as an open space. He confirmed that the City Council Nairobi leased L.R. No. 209/11875 measuring 1.101 hectares, which was a portion of L.R. No. 1870/II/121 to Ms. Sky Structures Limited for the residue term of 99 years from 1/6/1904 at a consideration of Kshs. 400,000/=.

26. He confirmed that the land was transferred to the Plaintiff by the assignment dated 5/10/1994. The Plaintiff initiated the process of extension of the lease and obtained approval from the City Council of Nairobi. Approval was given to the Plaintiff extending the term of the lease for 50 years from 1/6/2000 subject to certain conditions. He stated that a title could not be processed because the Director of Surveys did not release the deed plan for the grant to be processed. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants aver that the Suit Property was reserved for use as an open space and was supposed to be safeguarded by the City Council of Nairobi.

27. The 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants denied issuing the title for L.R. No. 1470/II/410 to the 1<sup>st</sup> Defendant on 4/9/2002 registered as I.R. 89671. The witness stated that I.R. 89671 is registered against L.R. No. 209/14372 measuring 0.7733 hectares which title is held by Weston Hotel Limited for a term of 99 years with effect from January 1998. The witness produced a copy of the grant for L.R. No. 209/14372 issued to Weston Hotel Limited.

28. The witness stated that there were no records at the lands office pertaining to the 1<sup>st</sup> Defendant's title and that it was concluded that the 1<sup>st</sup> Defendant's title must have been fraudulently acquired. The witness stated that the deed plan annexed to the 1<sup>st</sup> Defendant's title was disowned by the Director of Surveys.

29. The witness explained that an "open space" was public utility land set aside for play and use by the general public. The reason the 2<sup>nd</sup> Defendant gave for not extending the lease was that the City Council of Nairobi, being the custodian of public utility land for general use by members of the public, should not have subdivided the land to create portions which were transferred to private individuals.

30. The witness stated that he could not trace the deed plan or original surrender submitted by the Plaintiff in the lands office. He confirmed that approval for the extension of the lease was given to the Plaintiff and that the Plaintiff had never been given any documents showing that the Suit Property was public land. He also agreed that the Defendant never wrote to the Plaintiff to inform it that the user for the Suit Property was public hence a grant could not be issued to it.

31. He maintained that the process of renewing a lease takes time and that if at any stage there is a reason why it should not proceed, then the process is stopped. According to him, the lands office must exhaust all the processes before extending the lease. He confirmed that the Plaintiff was given four conditions to comply with but he did not know if these conditions were complied with.

32. He conceded that the lands office had commenced the preparation of the Plaintiff's grant over the Suit Property but stopped when the City Council raised objections. The 2<sup>nd</sup> Defendant has to confirm compliance with the conditions which would include user and development before renewing a lease. The witness confirmed that there was evidence the Plaintiff presented a new deed plan but the Director of Surveys challenged it saying the numbering was wrong. Plots are given numbers by Director of surveys and the Director can recall a deed plan if a number is incorrect. He maintained that the lands office did not receive the deed plan from the Director of Surveys or a Licensed Surveyor commissioned to carry out the work.

33. The witness confirmed that he was aware that titles for L.R. Numbers 1870/II/331, 332 and 333 were issued by the Ministry of Lands one of which was a telephone exchange. He did not know if titles had been issued for other parcels of lands. He did confirm that the Suit Property was the only remaining open space out of all the plots created from the subdivision of L.R. N. 1870/II/121.

34. At the close of the Defendants case, the Plaintiff's advocate applied to amend the land reference number in the plaint to read L.R. No. 209 209/11875 and not L.R. No. 1870/11/410. The court allowed the amendment.

35. The issues for determination are:

a) Was the Suit Property reserved for public use as an open space?

- b) Did the Council object to the extension of the Plaintiff's lease over the Suit Property?
- c) Does the 1<sup>st</sup> Defendant hold a valid title over the Suit Property?
- d) Is the Plaintiff entitled to the orders it seeks in the Re-amended Plaintiff?
- e) Costs.

36. It is not in dispute that the City Council Nairobi leased the Suit Property to Ms. Sky Structures Limited for the residue term of 99 years from 1/6/1904 which in turn transferred it to the Plaintiff by the assignment dated 5/10/1994. These transactions were duly registered and the records kept by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants. The Plaintiff applied to the 2<sup>nd</sup> Defendant for an extension of the lease over the Suit Property.

37. The witness who testified on behalf of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants confirmed that the process of renewing the lease began and certain approvals were given by the relevant bodies. As all this was going on, the 2<sup>nd</sup> Defendant never brought up the issue of the Suit Property forming part of an open space. If it was reserved for public utility, then the 2<sup>nd</sup> Defendant ought not to have issued a lease to Sky Structures Limited in the first place.

38. The witness also testified that L.R. N. 1870/II/121 measuring 5.62 acres was allocated to the City Council of Nairobi for 99 years from 1/6/1904 and that this land was meant to be an open space. This parcel of land was subdivided to create L.R. Numbers 1870/II/298, 299, 331, 332, 333, 334, 335 and L. R. No. 209/11875 and 876. All the portions created from the subdivision have been transferred. The Suit Property is fenced off, which means it is not in use as an open space.

39. Article 68 (c) (v) of the Constitution mandated Parliament to enact legislation to enable the review of all grants or dispositions of public land to establish their propriety. Pursuant to this, Parliament enacted the National Land Commission Act which mandated the National Land Commission to review grants of public land. Where the Commission found that the title was acquired in an unlawful manner, the Commission would direct the Registrar to revoke the title and where it found that the title was irregularly acquired, the Commission would take appropriate steps to correct the irregularity.

40. This is the avenue the 2<sup>nd</sup> Defendant should have pursued if it believed that the title over the Suit Property formed part of public land and should have been revoked.

41. From the correspondence exchanged which the Plaintiff produced in court, the Council approved the extension of the Plaintiff's lease over the Suit Property vide its letter of 25/8/1998. From the correspondence produced, the 2<sup>nd</sup> Defendant also approved the extension of the Plaintiff's lease for a further term of 50 years.

42. The 2<sup>nd</sup> Defendant's witness confirmed that the Plaintiff was required to comply with some conditions for the lease over the Suit Property to be extended but did not know if the Plaintiff complied with those conditions. One of those conditions related to the preparation of a survey plan and deed plan. The Plaintiff forwarded an executed deed of surrender to the 2<sup>nd</sup> Defendant. The preparation of deed plans falls within the ambit of the Director of Surveys. It is not clear why the Plaintiff had to procure the Director of Surveys to prepare deed plan no. 241973 if the land reference for the Suit Property was not going to change. In the absence of evidence from the 2<sup>nd</sup> Defendant of the Plaintiff's non-compliance with the conditions it gave for the extension of the lease for the Suit Property, the court is inclined to believe the Plaintiff's averment that it complied with the conditions for the extension of the lease.

43. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants confirmed that the 1<sup>st</sup> Defendant does not hold a valid title over the Suit Property. They denied issuing the title for L.R. No. 1470/II/410 registered as I.R. 89671 to the 1<sup>st</sup> Defendant on 4/9/2002 and confirmed that I.R. 89671 is registered against a different parcel of land being L.R. No. 209/14372 which is owned by Weston Hotel Limited.

44. The court has considered the pleadings, evidence and submissions of the parties and finds that the Plaintiff has proved on a balance of probabilities that it is entitled to the orders sought in the Re-amended Plaintiff. The court allows prayers (a) (b) (d) and (e) of the Re-amended Plaintiff. The Suit Property was amended to read L.R. No. 209 209/11875 and instead of L.R. No. 1870/11/410.

Dated and delivered at Nairobi this 30<sup>th</sup> day of April 2018.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Kimani holding brief for Mr. Mwangi for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants