



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 331 OF 2010

**ASSETS PROCUREMENT AND
DEVELOPMENT COMPANY LIMITED.....PLAINTIFF**
=VERSUS=
KENYA BREWERIES LIMITED & 2 OTHERS.....DEFENDANTS

JUDGEMENT:

1. The Plaintiff Asset Procurement And Development Company Limited (The Company) entered into a sale agreement with the first defendant Kenya Breweries Limited (KBL) for the purchase of a property on **LR No. 209/1498/3**(suit premises). The suit premises had been leased to the second defendant Nairobi City Council (The Council) from the Government of Kenya for a period of 99 years with effect from 1.1.1924.
2. The Council gave a sub-lease to KBL for a period of 40 years with effect from 1st May 1945. After the expiry of the lease, the process of extension of the same was started through Kyaloka Property Development Limited. The extension was obtained for 37 years with effect from 1st May 1985. It is after the extension of lease that KLB started process of sale of the suit premises to the company.
3. The purchase price was Kshs.6,300,000/=. The Company paid Kshs.630,000/= being 10% of the purchase price on 19.5.2004 and the balance of Kshs.5,670,000/= was paid on 20.12.2004. The company was given possession of the suit premises on payment of the balance of the purchase price. The suit premises was being used to house the staff of KBL. The Company thereafter put in its own tenants upon taking possession of the suit premises.
4. As the Company was in the process of perfecting the transaction, an extension of lease in favour of KBL was sent to the Company. The Company noted that the lease had been extended for 47 years with effect from 14th December 1985. The Company noted that there was a mistake as the lease had been extended by more than 10 years above what had been applied for. Besides this, there was a mistake in the acreage of the suit premises. The lease was sent back to KBL's Advocates who then sent it back to the council for rectification. The Council rectified it and it was sent back to the Company where it was received on 15th June 2006.
5. The Company was caught up by the new regulations which required photographs of parties to a transfer to be affixed on the transfer. The company amended the transfer in 2007 and sent it to the advocates of KBL on 3rd August 2007. The amended transfer was never sent back by KBL. The third defendant who

was a Councilor of Ziwani Ward where the suit premises is situate went to the suit premises and incited the tenants against paying rent to the agent of the company on grounds that the suit premises had been grabbed from the Council and that he was going to process rent cards for the tenants from the Council where they would be paying rent to. All the tenants in the suit premises refused to pay rent to the Company's agent and this has gone on to date.

6. The Council contended that the extension of KBL's lease was obtained fraudulently as the General Purposes Committee of the Council had rejected KBL's application for extension of the lease and the Council does not understand how KBL obtained the extension which it presented to the Company awaiting lodging of the same with other documents. This has been the reason why the transaction between the Company and KBL could not go through forcing the Company to file a suit against KBL, the Council and Peter Muchiri who was a Councilor for Ziwani Ward between 2007 and 2013 in which the Company claims the following reliefs:-

i. That an order of permanent or perpetual injunction does issue against the defendants, jointly and severally, whether by themselves, their directors, officers, employees, servants agents and/or any other person claiming through or under them, restraining them from entering upon ,trespassing unto, transferring ,leasing, charging ,mortgaging, letting, encumbering or in any other way interfering with the plaintiff's rights and/or the plaintiffs tenants quiet and peaceful possession of the suit property known as land Reference Number 209/1493/3 situate at Ziwani, Nairobi.

ii. That an order of Specific Performance does issue against the 1st Defendant compelling it to complete the sale of the suit property known as land Reference Number 209/1493/3 Ziwani, Nairobi in favour of the plaintiff and more particularly to deliver up to the plaintiff the following completion documents:-

a. A duly executed and sealed transfer, failing such execution the Deputy Registrar of the High Court at Nairobi to execute the transfer on behalf of the 1st Defendant and that the same be deemed to have been properly executed.

b. Three duly certified passport photographs of the Directors/Attorneys of the 1st Defendant who will have executed the transfer and certified copies of the powers of Attorney.

c. A valid consent to transfer by the 2nd Defendant.

d. A valid and current rates Clearance Certificate.

e. Evidence of payment of water bills up to the 24th September,2004.

f. A duly completed stamp duty form.

g. The Original Lease (title Document) between the 1st and 2nd Defendant and or a duly certified provisional title.

h. Duly certified copies of the 1st defendant's Pin Registration Certificate and Certificate of incorporation.

AND that the above said documents be delivered to the plaintiff within 14 days of the judgement or within such rime as the court may deem reasonable.

iii. That an order of mandatory injunction do issue against the 2nd defendant compelling it to issue a current and valid rates clearance certificate to the plaintiff within 14 days of the date of the judgement or such other period of time as may be deemed reasonable by this Honourable

Court.

iv. General damages for trespass against the 2nd and 3rd defendants

v. That an order directed to the 1st Defendant to indemnify the plaintiff for any losses incurred as a result of the delays in the completion of the transaction such as the penalties due on the stamp duty payments, escalations on the stamp duty, taxes and the statutory charges that may become apparent during the registration of the transfer documents.

vi. That in the alternative and without prejudice to prayers (i) to (v) a foregoing , an order that the 1st defendant compensates the plaintiff by way of damages, for the loss incurred by its breach of the contract and or loss of bargain ,being the open market value of the suit premises as specifically pleaded herein at paragraph 23.

vii. Interest on (vi) above at the contractual rate of (8%) eight per cent above the base rate as may be published by the Barclays Bank of Kenya from time to time and if no rate is so published Eight percent (8%) above the Bank rate as may be published by the standard Chartered bank of Kenya Limited from time to time.

viii. An order directing the 2nd and 3rd defendants to pay the plaintiff lost revenue at the rate of Kshs.180,000/= per month from the date of filing suit until payment in full together with interest at commercial bank lending rates.

ix. Costs of this suit and interest thereon at court rates.

x. Any such other or further orders as maybe deemed apt by the Court in the circumstances of this case.

7. It is the company's case that despite meeting its part of the contract in respect of purchase of the suit premises, KBL has failed to perform its part and is only blaming its inability to perform its part on the council. The Company gave a 21 day notice of completion but despite this, KBL has not done anything towards completing the contract. The council and the third defendant are responsible for non-payment of rent by the tenants in the suit premises. This is because the council and the third defendant are the ones who advised the tenants not to pay rent to the agents of the Company. One of the officials of the Council wrote a letter advising the town clerk to repossess the suit premises. As a result of the interference of the council and third defendant the Company is losing revenue at the rate of Kshs.180,000/= per month.

8. The position of KBL is that it did all what it could in its power to see that the transaction went on smoothly but its efforts were frustrated by the Council which claimed that the extension of lease in its favour had been obtained fraudulently. KBL further contends that the original lease which would have enabled a transfer to be registered in favour of the Company could not be traced. This is what complicated the matter and its effort to obtain a provisional title did not succeed. KBL therefore contends that the contract between it and the Company was frustrated by factors beyond its control.

9. The Council's position is that the sub-lease granted to KBL was for 40 years with effect from 1st May 1945. When the lease expired, it was not extended as a request for its extension was rejected by the Council. The Council further contends that the purported extension of the sub-lease between KBL and the Council was fraudulent. The Council communicated its position to the Ministry of Lands and asked for cancellation of the extension so that the property could revert to the Council. There was no response from the Ministry of Lands over the request for cancellation of the extension of lease.

10. The third defendant stated that he was a Councilor of Ziwani Ward in Kariokor where the suit premise is situated. By virtue of his position as a Councillor , he became aware of the expiry of sub-lease in favour of KBL. The sub-lease had expired in 1985. Attempts by KBL to extend the lease were rejected by the Council. He denied the Company's claim that he instructed tenants not to pay rent to the agents of the

Company arguing that he had no capacity or power to do so. The third defendant contends that he was wrongly sued and that if tenants in the suit premises were not paying rent, the Company was at liberty to sue the defaulting tenants.

11. The parties in this suit agreed on the following issues for determination.

- 1. Is the Plaintiff entitled to an order of specific performance compelling the 1st defendant to complete the sale of this suit property known as Land Reference Number 209/1498/3 Ziwani, Nairobi?***
- 2. Is the Plaintiff entitled to an order of permanent injunction against the defendants?***
- 3. Has the plaintiff suffered any loss and is the plaintiff entitled to damages and is so, what is the quantum of damages payable?***
- 4. Whether the Plaintiff is entitled to an order directing the 1st defendant to indemnify the plaintiff for any loss incurred as a result of the delays in the completion of the transaction?***
- 5. Was the purported lease to the 1st defendant properly extended upon expiry of the initial lease?.***
- 6. Was the purported lease extension to the 1st defendant fraudulent?***
- 7. Does the suit property belong to the 1st and 2nd defendants?***
- 8. Is the Plaintiff entitled to an order of specific performance compelling the 2nd and 3rd defendant to take whatever action necessary to enable the 1st defendant complete the sale of the suit property known as land Reference No.209/1498/3 Ziwani Nairobi?***
- 9. Who should bear the liability of the failure to complete the transaction?***
- 10. In the event that the 1st defendant is found liable to indemnify the plaintiff for any loss incurred as a result of the delays in the transaction, is the 1st defendant entitled to an order of indemnity in respect of those sums as against the 2nd and 3rd Defendants?.***
- 11. Who is to bear the costs of this suit?.***

12. I have gone through the evidence adduced by the parties herein as well as the submissions filed. The Company's suit is predicated on an extension of lease in favour of KBL. Before I address the other issues, I will first start with the issue of whether the lease to KBL was properly extended upon its expiry or whether the purported extension was fraudulently done. The position of KBL is that extension of lease was made on 15th April 2002 and the same was registered at the Lands Office on 18th April 2002. The Council's contention is that this extension was obtained fraudulently and the registration was also done fraudulently.

13. In support of the Council's contention, minutes of the General Purposes Committee of the Council conducted in the year 2000 were produced. In these minutes, it is clear that KBL through Kyaloka Property Development Company had made an application for extension of lease which had expired. The proposed extension was for 47 years from the expiry of the previous sub-lease. The application for extension was expressly rejected and the ground for rejection was that KBL had by then laid off most of its staff and the houses which had been put up purposely to house its staff would not serve the purpose.

14. There is no evidence that KBL ever made any other application which would have enabled it to have the lease extended. It is clear from the evidence in this case that in 2001 and 2002 KBL managed to

secure an extension of lease dated 15th April 2002 and registered at the lands office on 18th April 2002. The Council protested in writing to the Ministry of Lands that the lease which had been registered at the Lands Office on 18th April 2002 had been obtained fraudulently because KBL's application for extension had been rejected in 2000.

15. What is interesting is that the recommended extension of 47 years in the application which was rejected is the period which was later taken as the one which had been approved. The advocates of KBL then wrote a letter dated 30th November 2004 to the town clerk of the council bringing to the attention of the town clerk that they had noted errors in the extended lease which required rectification. This is what prompted the council to execute a deed of rectification in January 2006. Though the Council is purported to have executed the deed of rectification and endorsed the transfer in favour of the company, these documents could not be registered as the council maintained that the purported extension was done fraudulently.

16. There is no way an extension of lease which had been rejected in 2000 would have been revived and led to a lawful extension and subsequent registration without it being subjected to the normal process of approval. KBL was asked to show proof of a valid extension but it did not. The Council had given particulars of fraud and illegality in its amended defence and it proceeded to prove the same through documentary evidence. Minutes of the General Purposes Committee of the Council were produced which showed that the application for extension had been rejected.

17. The documents which enabled KBL to register the extension of lease though prima facie were from the council, there is no evidence that such documents had support of the necessary approval from the relevant committee of the council. The fact remained that the application for extension had been rejected. To this extent I find that the council has proved the particulars of fraud and illegality. I therefore find that the purported extension of lease and its subsequent registration was obtained fraudulently.

Is the Plaintiff entitled to an order of specific performance compelling the first defendant to complete the sale of the suit property known as LR No.209/1498/3 Ziwani, Nairobi.

18. There is evidence that the company paid the entire purchase price to KBL. I have already made a finding that the purported extension of lease in favour of KBL was obtained fraudulently. The application by KBL for extension of lease having been rejected, the position remained that there was nothing left in favour of KBL which would be offered for sale to the company. There is therefore nothing to order KBL to perform because the suit premise does not legally belong to it. A Court cannot order for specific performance when it is clear that neither party is capable of performance. In **Fiat Kenya Ltd Vs Roble (1973)EA 11 at Pg 20 Spry Ag P** stated as follows:-

“The Court never awards specific performance when it is incapable of enforcing its order. By parity of reasoning, I do not think it should ever award specific performance if it entertains serious doubt that the contract is capable of performance”.

I therefore find that no order of specific performance can be granted in the circumstances.

Is the plaintiff entitled to an order of specific performance compelling KBL and the third defendant to take whatever action necessary to enable KBL to compete the sale of the suit property known as LR No. 209/1498/3 Ziwani Nairobi.

19. The Company is not entitled to an order of specific performance against KBL and the third defendant. There was no valid or lawful extension of lease in favour of KBL. The third defendant was a councilor of the area where the suit premises is situate. He came to know of the issue of the expiry of the sub-lease in favour of KBL and rejection of its extension by virtue of him being a member of the Council. As the lease to KBL had expired and there was no lawful extension, there is no basis upon which the company can ask the council and the third defendant to assist KBL to compete the sale. KBL purported to enter into a sale agreement over a property which it had no valid lease.

Is the plaintiff entitled to an order of permanent injunction against the defendants?

20. The Company had not obtained any valid interest in the suit premises which would entitle it to protection by way of permanent injunction. I have found hereinabove that the extension of lease pursuant to which KBL entered into an agreement with the company was not lawful. This being the case, there is no basis upon which the council KBL, or even the third defendant can be enjoined. Equally there is no basis upon which a mandatory injunction can be issued against the Council compelling it to issue rates clearance certificate to the company.

Does the suit property belong to the 1st and 2nd defendants?

21. The suit premises legally belong to the council. In the Lands Office, the suit premise appears to be registered in the name of KBL. However I have already found that that registration was obtained fraudulently. The property therefore remains that of the Council and by extension the County Government which is its successor. The Council or County Government would only need to have the illegal extension expunged so that the suit premise reverts to it.

Has the plaintiff suffered any loss and is the plaintiff entitled to damages and if so what is the quantum of damages payable?.

22. The Company had been made to believe that it could get the suit premises. The Company paid the entire purchase price. The Company was put in possession of the suit property in December 2004. It looked for tenants who occupied the suit premises. However due to failure on the part of KBL to deliver on its part, the Company has lost in that it did not have the suit premises registered in its name. The tenants who were in the suit premises refused to pay rent. All these losses are directly attributable to KBL which entered into an agreement which it could not carry through. Any loss suffered by the Company would therefore fall squarely upon KBL.

23. The next issue to be determined is what quantum of damages is payable to the company. The Company had tenants in its 43 units. According to the statement of rent payments for the years 2008 and 2009, the rent payable varied between Kshs.2500 and 7500/= per month. It would appear the houses were of various sizes and attracted rent according to the sizes. What the Company has lost is rental income. For purposes of calculating loss of rental income, I will take an average rent of Kshs.5000/= per unit. There are 43 units. This will therefore translate to $5000 \times 43 \times 12 = 2,580,000/=$ per year. This suit was filed in 2010. I will therefore award loss of rental income for 8 years which will come to Kshs.20,640,000.

Is the 1st defendant entitled to indemnity from the 2nd and 3rd defendants?

24. The right to indemnity arises either as a result of an express or implied contract to that effect or operation of the law. In the instant case there was neither an implied contract or express contract on the part of KBL and the Council or the third defendant. There would only have been a case of indemnity as between KBL and the Council if the issue of extension of lease was valid. As the purported extension of lease was not lawful, the Council cannot indemnify KBL. Equally there is no basis upon which the third defendant would indemnify KBL. The third defendant was genuinely concerned about public property going into private hands in a way which was not lawful.

25. The Plaintiff's suit cannot succeed as against the Council and the third defendants. The Company had paid kshs.6,300,000/=. The Company is entitled to a refund of this money which shall attract interest at Court rates from December 2004 until payment in full. I therefore enter Judgement herein in the following terms:-

a. Loss of rental income of Ksh.20,640,000/= which shall attract interest at court rates from the date of judgement until payment in full.

b. Refund of purchase price of Kshs.6,300,000/= which shall attract interest at court rates with effect from January 2005 until payment in full.

c. Plaintiff suit against the 2nd and 3rd defendants is dismissed with costs payable by the plaintiff.

d. The costs of this suit shall be paid to the plaintiff by the 1st defendant.

Dated, Signed and delivered at Nairobi on this 19th day of April 2018.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Lubullelah for Mr Mutugwa for Plaintiff

M/s Mukami for Mr Amoko for 1st Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE