



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 450 OF 2012

FALCON PROPERTIES LIMITED.....PLAINTIFF

=VERSUS=

TOM CHORE ODIARA.....1ST DEFENDANT

JECT LIMITED.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

JUDGMENT

Background

1. I am confronted with the often unenviable task of writing a judgment in a dispute I did not have the opportunity to hear. This File was assigned to me towards the close of 2017. Hearing took place before Nyamweya J.

2. From the record, the dispute in this suit has a chequered and disturbing history. The dispute relates to Five (5) parcels of land: Nairobi/Block 97/376; Nairobi/Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi/Block 97/381 all situated in Tassia Estate, Embakasi, Nairobi (the **suit properties**). At all material times, the suit properties belonged to Falcon Properties Limited (the **plaintiff**). In or about 2007, the City Council of Nairobi (the **Council**) sued the plaintiff in separate suits in the 1st Class (Senior Resident) Magistrate Court at City Court, Nairobi, claiming unpaid land rates. The Council obtained judgments and decrees in the said Court and proceeded to execute the decrees by selling the suit properties through public auction. The 1st defendant bade and purchased the suit properties. Following the sales, the Council obtained vesting orders in the same Court in favour of the 1st defendant in 2008.

3. Subsequently, the plaintiff initiated judicial review proceedings seeking to quash the proceedings in the 1st Class (Senior Resident) Magistrate Court. The plaintiff named the Senior Resident Magistrate and the City Council of Nairobi as respondents in the Judicial Review Motion. It did not, however, join the 1st defendant as a party in the Judicial Review Motion. In a judgment dated 24/11/2009, Judge Osiemo quashed the proceedings, the orders and the decrees of the Magistrate Court. When the 1st defendant got to learn about the quashing orders, he made an application seeking to be joined in the judicial review suit as an interested party and to set aside the judgment rendered by Judge Osiemo. Judge Muchelulue heard the application and on 29/11/2010, he allowed the application and set aside the judgment of Judge Osiemo in so far as it related to the suit properties. A subsequent application by the plaintiff seeking to "recall and cancel" Judge Muchelulue's ruling setting aside the Judgment of Judge Osiemo was declined by Judge Githua in a ruling delivered on 20/7/2012. It is not clear what steps the plaintiff subsequently took to prosecute the Judicial Review Motion.

4. From the evidence adduced at the hearing, the judgments and vesting orders of the Magistrate Court which were restored through the ruling of Judge Muchelulue have not been set aside in so far as they relate to the suit properties.

5. Certified copies of the parcel registers reveal that the five suit properties were transferred to the 1st defendant in August 2011 and certificates of lease duly issued to the 1st defendant on the same day. The registers also reveal that in May 2012, the suit properties were transferred to the 2nd defendant. Subsequently, in June 2012, restrictions were registered against the five titles.

Plaintiff's Case

6. Against the above background, on 27/7/2012, the plaintiff brought this suit seeking the following prayers:

a) **An order of inhibition restraining the 2nd defendant by itself, its agents, servants or otherwise from alienating the plaintiff's properties known as Nairobi/Block 97/376, Nairobi Block 97/378, Nairobi/Block 97/379, Nairobi/block 97/380 and**

Nairobi/Block 97/381.

- b) An order do issue to the 3rd defendant revoking and cancelling the certificates of lease to the suit lands issued to the 1st and the 2nd defendants**
- c) An order do issue to the 3rd defendant directing the rectification of the register to restore the suit lands to the name of the plaintiff**
- d) An order do issue for the eviction of the 1st and 2nd defendants from the suit land and that the OCS Embakasi do assist in such eviction.**

7. The plaintiff contends that no demands for rates were made against it by the Council, no summonses were served, and no hearing notices were issued and served. The plaintiff further contends that the 1st defendant used the order of Judge Muchelule to fraudulently transfer the suit properties to himself and subsequently to the 2nd defendant. It sets out the following particulars of fraud:

- a) transferring the suit lands being Nairobi/Block 97/376, Nairobi Block 97/378, Nairobi/Block 97/379, Nairobi/Block 97/380 and Nairobi 97/381 to his name when no such order had been made by the court.**
- b) transferring the suit lands to his and 2nd defendant's names without the consent of the Commissioner of Lands.**
- c) transferring the suit lands to his name by falsely claiming the court had vested the suit lands to his name.**

Case of the 1st and 2nd Defendants

8. The 1st and 2nd defendants filed a joint statement of defence dated 31/8/2012. Their case is as set out in the following summary. The 1st defendant purchased the suit properties in a public auction conducted at Nairobi on the same day by M/s Ideal Auctioneers on instructions from their principal, the City Council of Nairobi. The said properties were sold at the public auction following warrants of attachment and sale issued in execution of decrees issued in favour of the City Council of Nairobi against the plaintiff in five separate suits instituted in the 1st Class (Senior Resident) Magistrate Court at Nairobi, City Court, to wit, Civil Suit Nos 20 of 2007; 22 of 2007; 23 of 2007; 24 of 2007; and 26 of 2007. The 1st defendant paid the full purchase prices in respect of all the five properties and vesting orders were subsequently issued by the Court in 2008. On 4/9/2009, the Commissioner of Lands issued consents to transfer the properties to the 1st defendant. Because neither the City Council nor the 1st defendant had original titles, notices were published in the Kenya Gazette on 13/11/2009 and new certificates of lease were issued. The 1st and 2nd defendants further contend that the judgment of Osiemo J was set aside and no appeal was preferred hence there was no bar whatsoever to the 1st defendant being issued with the certificate of lease in respect of the suit properties. They add that the subsequent transfers to the 2nd defendant were justified. They deny the allegations of fraud as particularized and contend that the suit herein does not disclose any cause of action against them.

Case of the 3rd Defendant

9. The 3rd defendant filed a statement of defence dated 24/9/2012. The case of the 3rd defendant is that the suit properties were registered in the name of the plaintiff and certificates of lease (titles) issued in April 1988. The 1st Class (Senior Resident) Magistrate Court at Nairobi City Courts in Civil Suit Nos 20 of 2007, 22 of 2007, 23 of 2007, 24 of 2007 and 26 of 2007 ordered that the suit properties be transferred to the 1st defendant. Because efforts to get the plaintiff to surrender the original titles were in vain, the Land Registrar caused appropriate notices to be published in the Kenya Gazette calling for objection and none was forthcoming. The Registrar proceeded to issue fresh certificates of lease. Subsequently, the suit properties were transferred to the 1st defendant.

10. The 3rd defendant adds that all transactions concerning the suit properties were above board and all substantive and procedural requirements, including obtention of consents were complied with. The 3rd defendant further states that the judgment of Judge Osiemo was set aside. Lastly, the 3rd defendant contends that the suit against her is incurably defective and an abuse of the court process because it was not preceded with a statutory notice in tandem with the requirements of Section 13A of the Government Proceedings Act.

Evidence

11. At the hearing, the plaintiff called one witness, Jaswant Singh Rai, a director of the Company. He adopted his written statement in which he stated the plaintiff's case as summarized in the preceding paragraphs. He also set out the history of this dispute as summarized in the background part of this judgment. He added that upon Judge Muchelule setting aside the judgment of Judge Osiemo, the 1st defendant proceeded to extract the order without first sending the draft to the plaintiff's advocate for approval. He added that the said order did not authorise transfer of the suit properties to the 1st defendant.

12. The 1st defendant testified that on 8/12/2007, he saw an advertisement in the newspaper, itemizing properties that were to be sold in public auction. He attended the auction and purchased the suit properties, each at Kshs 300,000. He paid full purchase price. He reiterated his case as summarized in the preceding paragraphs. He added that together with his wife, they are directors of the 2nd defendant Company and he was testifying on his own behalf and on behalf of the 2nd defendant.

13. The 3rd defendant called one witness, Edwin Wafula. He outlined the procedure for effecting a transfer in the Lands Registry. He testified that he registered the five transfers in favour of the 1st defendant on the basis of vesting orders issued by the Senior Resident Magistrate Court at City Court. He adopted his written statement in which he set out the facts outlined in the 3rd defendants' case in the preceding paragraphs.

Issues and Determination

14. I have carefully scrutinized and considered the parties' pleadings, evidence and written submissions. I have also considered the relevant law and the applicable jurisprudence. The three key issues which fall for determination in this suit are: (i) whether the suit herein discloses a cause of action against the defendants; (ii) whether the transfer of the suit properties to the 1st defendant and subsequently to the 2nd defendant was fraudulent; and (iii) whether the suit against the 3rd defendant is incurably defective. Because the first two issues are intertwined, I will deal with them simultaneously.

15. It is common ground that the City Council of Nairobi sued the plaintiff in the Senior Resident Magistrate Court at City Court (1st Class Magistrate Court) claiming unpaid rates. The Council obtained *ex parte* judgments and decrees and proceeded to execute the decrees against the plaintiff. Through execution of the decrees, it sold the suit properties to the 1st defendant. Aggrieved by that action, the plaintiff initiated judicial review proceedings and Judge Osiemo rendered a judgment quashing the proceedings and the orders of the Senior Resident Magistrate Court. The judgment of Judge Osiemo was in turn set aside by Judge Muchelule on an application by the 1st defendant. The tenor and import of the ruling of Judge Muchelule was that, the judgment, decrees, orders, actions and indeed status of the suit properties which the Judgment of Judge Osiemo had quashed were restored to the position in which they were prior to the judgment of Judge Osiemo. Put differently, the obtaining status prior to the judgment of Judge Osiemo was restored. What was the status before the judgment of Judge Osiemo? There existed judgments of the Senior Resident Magistrate Court; there existed decrees of the Court; the suit properties had been sold to the 1st defendant in public auction in execution of the decrees of the Court; and there existed vesting orders of the Court in respect of the suit properties vesting the five properties in the 1st defendant.

16. There is no evidence that the plaintiff took steps to stay the vesting orders which existed. Similarly there is no evidence that the plaintiff challenged the ruling of Judge Muchelule in the Court of Appeal. In the absence of a stay order, the 1st defendant presented the vesting orders to the 3rd defendant and the 3rd defendant implemented the vesting orders as ordered by the Senior Resident Magistrate Court.

17. I have deeply reflected on the allegation of fraud against the 1st defendant. DW 3 - Edwin Wafula testified that the transfers were registered on the basis of the vesting orders and all requisite documents such as consents and clearance certificates were presented. The said documents were produced as exhibits. The plaintiff built its case on the orders issued by Judge Muchelule and contended throughout that those orders did not authorize transfer of the suit properties. My view is that, although the ruling of Judge Muchelule did not expressly authorize the transfers, they restored the judgments, decrees and vesting orders which existed prior to the Judgment of Judge Osiemo. It was incumbent upon the plaintiff to move promptly to protect its interests through stay and vacation orders. Regrettably, this did not happen. Indeed, there is no evidence that the Judicial Review Motion was set down for hearing and determination after Judge Muchelule's ruling. Similarly, there is no evidence of any internal review mechanism or appeal pursued by the plaintiff to vacate the judgments, decrees and vesting orders in the Senior Resident Magistrate Court.

18. In my view, what the 1st defendant did was to present the vesting orders to the Land Registrar. In the absence of any stay or vacation order, he was entitled to present the vesting orders. My view is that presentation of valid vesting orders cannot be interpreted to constitute a fraud. The 3rd defendant was by law obliged to implement the vesting orders. I therefore see no legal or factual basis for holding that the transfers presented and registered pursuant to the judgments, decrees and vesting orders of the Magistrate Court were fraudulent. Secondly, the 1st defendant purchased the suit properties in a public auction. The City Council of Nairobi which obtained the judgments and decrees leading to the auction was not joined as a defendant in this suit. The judgments, decrees and vesting orders of the Senior Resident Magistrate Court have not been stayed or vacated in so far as they relate to the five suit properties. In my view, as long as the judgments, decrees and vesting orders remain in force, the plaintiff cannot sustain a cause of action against the defendants. Similarly, enforcement and implementation of the vesting orders does not constitute fraud. Consequently, my finding on the first issue is that the plaintiff does not have a cause of action against the defendants. My finding on the second issue is that, there is no evidence of fraud on part of the defendants.

19. The last issue relates to the validity of the claim against the 3rd defendant in the absence of service of formal notice to the Attorney General under Section 13A of the Government Proceedings Act. The requirements of Section 13A of the Government Proceedings Act are mandatory. The plaintiff however, appears to have ignored that limb of the defence by the 3rd defendant. No attempt was made to justify the failure to serve notice. In the circumstances, the court upholds that limb of the third defendant's defence.

20. The totality of the above findings is that the plaintiff has failed to prove its case on a balance of probability. The net result is that the plaintiff's suit against the defendants is dismissed for lack of merit. The defendants shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Muhonja holding brief for Mr Goshwami Advocate for the plaintiff

Mr Akwabi holding brief for Mr Githinji Advocate for the 1st and 2nd defendants

Mr Kamau Senior Counsel Advocate for the 3rd defendant

Ms Halima Abdi - Court Clerk