



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 168 OF 2009

FRANKLIN KAMATHI KAMAU.....PLAINTIFF

VERSUS

TERCY INVESTMENTS LIMITED.....DEFENDANT

JUDGEMENT

1. The Plaintiff seeks a permanent injunction to restrain the Defendant from trespassing, evicting, erecting, obstructing or in any other way interfering with the Plaintiff's quiet possession of L.R. No. Nairobi/Block 63/748 (the Suit Property) situated at Jamuhuri Estate, Nairobi. Abraham Mwangi Njihia previously owned the Suit Property and gave the Plaintiff a Power of Attorney on 25/6/2007 to execute all instruments and do such acts as would be necessary for carrying out the powers granted. Pursuant to the power of attorney, the Plaintiff took possession and developed a five storey block of flats christened Frank Apartments on the Suit Property after transferring it to his name. He later learnt that the Defendant was claiming ownership of the Suit Property. He also seeks general damages against the Defendant in the amended plaint.

2. The Defendant avers that Abraham Mwangi Njihia, the donor of the power of attorney had by 23/7/2004 sold the Suit Property to the Defendant who paid him Kshs. 491,775,000/= between 23/7/2004 and May 2009 and that it took possession of the Suit Property. It claims that it constructed a 3 feet stone wall around the Suit Property at the cost of Kshs. 180,225/= and deposited building materials worth Kshs. 200,000/= between July and December 2006 and posted a guard at the suit plot. The Defendant maintains that the donor had no capacity to execute a power of attorney in favour of the Plaintiff in 2007 having sold the plot to the it three years earlier. The Defendant believes that there was fraud and collusion between the donor and the Plaintiff to deprive the Defendant of the suit plot. The Defendant caused a caution to be registered against the Suit Property.

3. The Defendant counterclaimed a declaration that the Suit Property belonged to it and sought a mandatory injunction ordering the Plaintiff to remove its structure from the suit plot. The Defendant also sought a permanent injunction to restrain the Plaintiff from interfering with its quiet enjoyment of the Suit Property and restoration of the plot to the Defendant. It also seeks damages for trespass and the cost of materials plus cost and interest.

4. Abraham Mwangi Njihia testified. Previously, he owned the Suit Property and Nairobi Block 63/759 situated in the same area. He claimed that he entered into an agreement with the Defendant on 5/7/2004 for the sale of Nairobi Block 63/759 at the agreed price of Kshs. 1 million. On 23/7/2004 he further entered into an agreement with the Plaintiff for the purchase of the Suit Property at the agreed consideration of 900,000/=. The latter sale was subject to conclusion of a suit being **Nairobi HCCC No. 1978 of 2001**. The agreement stipulated that if the court order in this case was not removed, then all the monies paid towards the purchase of the Suit Property would be credited to the purchase of Nairobi Block 63/759.

5. He claimed that most of the monies paid by the Defendant were in respect of the purchase of Nairobi Block 63/759. In his statement he gave a breakdown of five payments of Kshs. 90,000/=, 50,000/=, 31,200/= and 100,000/= which were paid in respect of that plot. It was his evidence that the payments made in respect of the Suit Property were Kshs. 90,000/= paid on the execution of the agreement, Kshs. 35,000/= paid to him when he had medical emergency, Kshs. 20,000/= paid to Anne Kithinji Advocates in relation to other court case and 2 additional payments of Kshs. 10,000/= and 50,000/=.

6. He claimed that the Defendant did not pay the balance of the purchase price and refused to see him in 2006 prompting him to call off the transaction in respect of the Suit Property. He relied on clause 8 of the agreement which stated that the amounts which had been paid for the Suit Property were to be transferred to the account for Nairobi Block 63/759 if the sale did not go through. He denied that the Defendant acquired any proprietary rights over the Suit Property.

7. The Defendant filed **CMCC No. 8038 of 2008** against Mr. Njihia claiming the Suit Property on 18/12/2008. That suit was withdrawn by consent of the parties on 20/4/2011. Mr. Njihia maintained that he executed the power of attorney and donated the powers to deal with the Suit Property to the Plaintiff after cancelling the sale transaction with the Defendant. He denied that the Defendant ever took possession or

fenced the Suit Property as it alleges. He confirmed that he transferred the Suit Property to the Plaintiff.

8. The Plaintiff gave evidence. He confirmed that Abraham Mwangi Njihia gave him a power of attorney over the Suit Property and later transferred it to him. He constructed 25 units of 2 bedroom flats on the Suit Property which he lets out as furnished apartments. He stated that the Defendant began trespassing on the suit land in 2008 prompting him to file the suit. He produced a copy of the power of attorney, a copy of the certificate of lease issued on 221/2/2012, photographs of the apartments, a copy of the court order in CMCC No. 8038 of 2008 as well as the pleadings in that case.

9. He produced a copy of the sale agreement dated 5/7/2004 between Abraham Mwangi Njihia and the Defendant in respect of Nairobi Block 63/759. He also produced a copy of sale agreement dated 23/7/2004 entered into by Abraham Njihia and the Defendant in respect of the Suit Property. Under the agreement, the completion date was to be 90 days after finalisation of HCCC No. 1978 of 2001. Under the special conditions, Kshs. 50,000/= was to be paid for the removal of court order while Kshs. 31,200/= was to be paid to Nairobi City Council. Kshs. 90,000/= was to be paid on the execution of the agreement. The balance of the purchase price was payable 90 days after removal of the court order.

10. Condition 8 stated that if the court order registered against the Suit Property was not lifted, then all the amounts paid by the purchaser to the vendor would be deducted from the account of L.R. No. Nairobi Block 63/759. Further, if the completion date for L.R. No. Nairobi Block 63/759 reached before the finalisation of the suit, the purchaser was to deduct the amounts spent on the Suit Property from the balance of the purchase price due on Nairobi Block 63/759.

11. Abraham Njihia stated that he was issued with a title over Nairobi Block 63/759 in 2001. He stated that he lost the certificate of lease. When he did a search he discovered that it had been transferred to the Defendant on 10/12/2004. He stated that the Defendant paid Kshs. 205,000/= for the Suit Property yet the purchase price was Kshs. 900,000/=. He also stated that the Plaintiff paid Kshs. 400,000/= for Nairobi Block 63/759. The consideration for this plot had been agreed at Kshs. 1 million.

12. The Defendant called Mr. Chacha Maroa, a Land Registrar working for the Ministry of Lands and Physical Planning who is based at Ardhi House, Nairobi as a witness. He produced a copy of the official search and confirmed that entry number 4 dated 1/3/2006 was a caution registered by the Defendant. He stated that entry number 5 dated 18/11/2011 lifted the entry at number 3 and it reflected a court order. He stated that there was no entry showing that the caution appearing as entry number 4 had been removed. He stated that by virtue of the court order registered as entry number 5, entry number 4 was not in existence. He clarified that a caution lasts until it is withdrawn by a cautioner or lifted by a court order or where the Land Registrar gives the cautioner notice of intention to remove the caution.

13. The Defendant's director, Mercy Nyambura Kanyara gave evidence. It was her evidence that the Defendant paid Abraham Mwangi Njihia a total of Kshs. 496,775/=. She gave a breakdown of other payments made on diverse dates between 2004 and 2006. She stated that the Defendant registered a caution against the Suit Property as a purchaser. She produced copies of the sale agreements, the caution and a breakdown of the payments the defendant made to Abraham Mwangi Njihia totalling to Kshs. 491,775/=. She also produced copies of payment vouchers and cheques as well as Mr. Njihia's hand written requests for payment.

14. The Defendant produced a copy of the search over the Suit Property. It shows that Abraham Njihia was registered as the proprietor on 9/10/2001. Entry number 3 dated 25/1/2002 is a court order while the caution lodged by the Defendant was registered as entry number 4 on 1/3/2006. Entry number 5 made on 18/11/2011 lifted entry number 3 vide an order dated 23/8/2011. Entry number 6 shows that a certificate of lease was re-issued on 18/11/2011. The Plaintiff was registered as the proprietor of the Suit Property on 21/2/2012 and issued with a certificate of lease. Under the encumbrances section, a charge in favour of Equity Bank Limited for Kshs. 25,000,000/= was registered on 20/3/2012. This was discharged on 2/12/2013 and a new charge in favour of Housing Finance of Kenya Company Limited for Kshs. 105 million was registered on the same day.

15. The Defendant also produced a copy of the search done on the Suit Property showing the registration of the charge in favour of Housing Finance of Kenya Company Limited. It also produced a copy of the court order stated to have been issued on 23/8/2011 in **HCCC Milimani Commercial and Tax Division HCCC No. 1877 and 1878 of 2001** consolidated stating that the suit was being withdrawn. Words are inserted to the order which seem to have been inserted by a typewriter as follows:

“and caution placed on Nairobi Block 63/759 is lifted herein”.

16. Elizabeth Tanui, a Deputy Registrar in the Commercial and Tax Division of the High Court in Milimani gave evidence. She produced the two court files in respect of HCCC No. 1877 and No. 1878 of 2001 which were consolidated. She confirmed that the order produced by the Defendant did not emanate from the court records in the two files. She stated that the name Frank Kamathi Kamau did not appear in the two files. She clarified that the two suits were not withdrawn by consent. The case had been dismissed by the court for want of prosecution but was later reinstated.

17. The Suit Property is currently charged to Housing Finance Company of Kenya Limited to secure payment of Kshs. 105 Million. This financial institution was not made a party to the suit yet its rights and interest would be affected by any orders made in this case.

18. The Defendant entered into the sale agreement with Abraham Mwangi Njihia. Clause 7 of the agreement provided that if the sale did not go through for any commission attributed to the vendor then all monies paid to the vendor or on his behalf would be refunded with interest. Clause 8 provided that the amounts paid to the vendor in respect of Nairobi Block 63/748 would be credited to the account of Nairobi Block 63/759 if the court order on Nairobi Block 63/748 was not lifted. No evidence was led to prove that the court order issued in Civil Suit No. 1978 of 2001 was ever lifted.

19. Under the agreement entered into between the Defendant and Abraham Mwangi Njihia, the Defendant's recourse against Abraham Mwangi Njihia lay in the remedy agreed upon at special condition number 7. The Plaintiff was not a party to that agreement. No evidence

was adduced to show that the Plaintiff breached a court order stopping him from constructing on the suit land. No such order was produced by the Defendant.

20. The Defendant did not prove that it paid the full purchase price for Nairobi Block 63/759. It is not clear what sums the Defendant paid towards the purchase of Nairobi Block 63/748 and Nairobi Block 63/759. The Defendant has failed to prove its counterclaim on a balance of probabilities. It is dismissed with costs to the Plaintiff.

21. The court finds that the Plaintiff has proved on a balance of probabilities that he owns L.R. No. Nairobi/Block 63/748 and grants a permanent injunction to restrain the Defendant from threatening, trespassing, evicting, erecting, obstructing or in any other way interfering with the Plaintiff's quiet possession of L.R. No. Nairobi/Block 63/748. The Plaintiff is awarded the costs of the suit.

Dated and delivered at Nairobi this 12th day of September 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Wanjala Mcharo holding brief for Mr. Thuita for the Plaintiff

Ms. Rashid for the Defendant

Mr. V. Owuor- Court Assistant