



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC CASE NO.728 OF 2012

GANSHYAMBHAI DESAIBHAI PATEL.....1ST PLAINTIFF

SARLABEN GANSHYAMBHAI PATEL.....2ND PLAINTIFF

-VERSUS-

KENYA AIRPORTS AUTHORITYDEFENDANT

JUDGEMENT

By way of Plaint dated **16th October, 2012**, the Plaintiffs herein have come to Court seeking for various Orders. The orders sought are:-

- 1. The Defendant to allow and permit the Plaintiffs peaceful and quiet enjoyment of the leased premises.**
- 2. Mandatory Injunction against the Defendant to give approval/permission for the construction of the perimeter wall.**
- 3. An injunction to prevent the Defendant or its agents or officials from interfering with the Plaintiffs possession and enjoyment of the premises**
- 4. Damages**

In their Plaint, the Plaintiffs pleaded that they entered into a Lease Agreement with the Defendant vide a **Lease Agreement** made on **19th February 2009**, and duly registered as **I.R No. 120457/1**. The Lease Agreement provided that it was a **Lease for 87 years** commencing on **1st June 2008**. The rent payable was **Kshs.1,024,000/=** for the **first 10 years** and, thereafter **increasing at a rate of 10%** for each period of **10 years**. The Plaintiffs were to seek prior consent from the lessor which consent was not to be unreasonably withheld for purposes of carrying out construction and/or sub-letting etc. The Plaintiffs on their part were to submit buildings/drawings for approval before commencing any constructions and the approvals were not to be unreasonably withheld. In totality, it was imperative upon the Defendant to provide quiet enjoyment of the leased premises. The Plaintiffs claim that the Defendant has breached the terms of the lease by failing to approve the construction of the said perimeter wall, thereby causing the Plaintiffs to suffer immense loss and damages.

The Defendant **filed its Defence** on **14th December 2012**, denying the allegations in the Plaintiff in totality. The **Defence** was subsequently **struck out** by the Court on **21st May 2014**, on the premise of being a **sham and bare denial**; hence the matter proceeded to formal proof.

The **hearing commenced on 20th June 2016**, wherein **PW1** the 1st Plaintiff herein, stated that he came to know the Defendant as a result of owning a plot adjoining Defendant's plot. The Authority wanted to purchase his plot however, the parties came to a consensus that an exchange of plots was more suitable than a sale. This was done wherein the Plaintiffs plot **No. L.R No. 9042/633**, was exchanged with the Authority's Plot which was **L.R No. 70118/1**. Consequent thereto, the Plaintiffs entered into a Lease Agreement with the Defendant for a period of 87 years.

The Lease Agreement was signed and the Plaintiff sought approvals as far back as the **year 2009**, from the Defendant as stipulated in the agreement to put up a perimeter wall. However all correspondences to that effect were neglected and not responded to. Being aggrieved, the plaintiffs were constrained to file this suit as they were unable to utilize the land occasioning enormous loss to them.

PW1 testified that for the **8 years** he held the lease he had paid a cumulative sum of **Kshs.8,192,000/=** which did not translate to business as the Defendant had withheld approvals to enable him construct a perimeter wall and warehouses for his export business. He urged the Court to allow their claim.

Parties thereafter proceeded to file their written submissions.

Plaintiffs Submissions

The Plaintiffs in their submissions dated **9th August 2016**, formulated Four(4) issues for determination. These issues are; whether there was a valid Contract between the Plaintiff and the

Defendant and whether the Defendant breached the said contract?, whether there was any loss occasioned to the Defendant whether the Plaintiffs were entitled to the Orders sought and damages. The Plaintiffs submitted that since the Plaintiffs had expended a sum of **Kshs.8,192,000/=** as rent for the premises they could not utilize, it was only right and fair that the Defendant compensate them in damages of the said amounts. Secondly the Plaintiffs submitted that it was not in doubt that the Defendant had breached the Lease Agreement and consequently, it was incumbent that this Court does make an order for specific Performance as damages were not sufficient remedy.

Defendant's Submissions

The Defendant filed its submissions on **13th September 2016**. The Submissions also raised three issues; Whether there was breach of the existing Contract between the parties? Under this heading, the Defence submitted that the Plaintiffs did not submit complete documents while making the application for consent. This was illuminated during cross-examination wherein, PW1 testified that he did not submit building plans and/or drawings for approval by the Defendant while making the application for Consent. In support of this contention the Defence cited Clause 2(b) (i) of the Lease Agreement which stated that;

“ Upon application by the Lessee or any of its sub-tenants for approval from the lessor in respect of construction on the demised premises , the Lessee ... shall before commencing and construction submit the plans, drawings and or specifications thereof to the engineering department of the Lessor for approval with or without modifications ...and the Lessee.. Shall not commence such construction without having first obtained the Lessor's approval (which approval shall not be unreasonably held...”

It was submitted that since the Plaintiffs had also not fulfilled their obligations under the Lease Agreement by submitting Plans and drawings, then it followed that a one party cannot be faulted for the breach of the Contract. The case of **Nakana Trading Co. Ltd Vs. Coffee Marketing Board 1990-1994 EA 448**, was cited. In this case the Court held that a breach of contract occurs when one or both parties

fail to fulfil the obligations imposed on them by the terms of the contract.

The Second limb of the Defence submissions was whether the Plaintiff's suffered any loss or damage? The Defence submitted that without actual proof of the expended sum of **Kshs.8,192,000/=** the claim must fail. The defence further submitted that the documents given to court were photocopies and not originals copies and did not have a bearing to the Claim. They sought for the said prayer to be dismissed for lack of evidentiary backing.

The Court has considered the evidence adduced in court, the Submissions and two issues lay before this court for determination:-

a. Was the Defendant in breach of the Lease Agreement?

b. What remedies accrue to the Plaintiffs?

a) Was the Defendant in breach of the Lease Agreement?

A careful look at the Lease Agreement Clause 2(b)(i) states that;

“ Upon application by the Lessee or any of its sub-tenants for approval from the lessor in respect of construction on the demised premises , the Lessee ... shall before commencing and construction submit the plans, drawings and or specifications thereof to the engineering department of the Lessor for approval with or without modifications(emphasis mine) ...and the Lessee.. Shall not commence and such construction without having first obtained the Lessor's approval (which approval shall not be unreasonably held...)”

According to the Plaintiffs bundle of documents, the Plaintiffs vide their erstwhile Advocates **Messrs. Archer & Wilcox** wrote several letters to the Defendant seeking approvals to erect a perimeter wall commencing from **January 2011** culminating to the last letter written on **1st September 2011**. A cursory look at all those letters reveals that there were no plans, drawings or specifications attached to the said request. This was contrary to above-mentioned Clause. The Defendant vide the letter dated 21st April, 2011, intimated to the Plaintiff that they were looking into the request, subject to finalization of their internal processes. The Court finds that the request was not complete and that being the case, the Defendant cannot be fully to blame for what happened. The Lease agreement was explicit on the methodology of the request. PW1 during cross-examination stated that the maps and plans had been attached. This Court finds no evidence of the same.

b) What remedies accrue to the Plaintiffs?

The Plaintiffs sought for an injunction to restrain the Defendant from interfering with their quiet enjoyment of the plot. Having found that the Defendant was not in breach, this Court further finds that an injunction cannot issue and damages cannot flow. The Court also finds that it is imperative for the plaintiffs to make the requisite complete application and the Defendant should consider the same and thereafter issue approval or disapproval for the intended construction therein within a reasonable period but not less than **90 days** after the date of this Judgement.

The Court therefore finds and holds that the **Plaintiffs have not proved their case on the required standard of balance of probabilities**. Consequently, the Court **disallows the orders sought by the Plaintiffs in prayers No.(a), (b), (c) (d) and (e)**.

However, on **prayer no.(f)**, the Court finds and holds that the **Plaintiffs herein should submit a complete application to the Defendant within a period of 45 days from the date hereof** and the **Defendant should issue its decision on whether the same is approved or not within a period of 45 days after receipt of the said complete application**. Each party to bear its own cost.

It is so ordered.

Dated, Signed and delivered at Nairobi this 12th day of October 2017.

L. GACHERU

JUDGE

In the presence of

Mr. Rombo for Plaintiffs

M/S Nyawira holding brief for M/S Kamay for Defendant

Hilda - Court clerk

L. GACHERU

JUDGE

12/10/2017