



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CIVIL SUIT ELC NO. 273 OF 2010

MOHAMED ASHIF KASSAM ABDULGANI TOBARIA....PLAINTIFF

VERSUS

MAHBUB KASSAM ABDULGANI TOBARIA.....1ST DEFENDANT

SHEINAZ MEHBOOB KASSAM TOBARIA.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed this suit on 3/6/2010 against his brother seeking a permanent injunction to restrain him from selling, transferring, charging, leasing out, disposing of or in any other manner interfering with the Plaintiff's right of ownership and legal interest in L.R. No. 209/4300/78 I.R.9496 ("the Suit Property").
2. The Plaintiff also seeks to have the Suit Property be valued by an independent valuer to ascertain its value and the share of each of the registered owners for purposes of sharing and or buying out one of the parties.
3. He also seeks an order directing M/s Magnate Ventures Limited to pay each of the parties an equal amount of the annual rent for the advertisement mast placed on the Suit Property for the remainder of the term of its lease.
4. The Plaintiff wishes to have the Defendants account for all the rent collected from the Suit Property from December, 2005 and a declaration that the Defendants should pay on a *pro rata* basis half of the market rent for the double storey four bedroomed residential house that he has occupied since December, 2005 to the Plaintiff. The Plaintiff seeks costs and interests and any other relief the court may deem fit to grant.
5. The Plaintiff and the 1st Defendant jointly own the Suit Property as tenants in common. The 2nd Defendant, who is the 1st Defendant's wife, was added as a party to the suit when the plaint was amended on 29/11/2010.
6. The Plaintiff and 1st Defendant used to do business as Kassim Abdulgani and Brothers (Nairobi) Limited. They purchased the Suit Property in 1995 as tenants in common. The 1st Defendant has occupied the Suit Property from 1995 to date. The Suit Property has a guest house at its rear which the Defendants have been renting out and collecting rent.
7. The Suit Property was initially charged to Habib Bank Ltd and later to Cooperative Bank to secure the sum of Kshs. 3.6 million. The Suit Property was charged with the consent of both the Plaintiff and the 1st Defendant.
8. According to the Plaintiff, each of them was to pay 50% of the loan sum. The Plaintiff claims he paid Kshs. 1.9 million to Co-operative Bank to defray the loan. The 1st Defendant contends that part of this sum was money from the sale of a motor vehicle owned by their company, a fact which is denied by the Plaintiff.
9. The Plaintiff avers that the charge which Cooperative Bank held over the Suit Property was transferred to Motifamy Investment Limited and later to the 2nd Defendant in unclear circumstances.
10. The Plaintiff contends that he paid Kshs. 1.9 million to redeem the property and was not made aware that the charge had been transferred to Motifamy Investment Limited and later to the 2nd Defendant. He did not authorize the transfer of charge and denies that the 2nd Defendant redeemed the Suit Property from Motifamy Investment Limited.
11. He later learnt that the Suit Property is rented to Magnate Ventures but the Defendant did not account for the rent paid by Magnate Ventures.

12. The 1st Defendant denied that the Plaintiff was the owner of the Suit Property and claimed that it was now his wife's property after she redeemed it by paying the debt owed to Co-operative Bank. He admitted that Motifamy Investment Limited is owned by his wife's cousin. He claimed that the Plaintiff refused to attend the meetings in which he would have informed him that the charge over the Suit Property was being transferred.

13. It was his evidence that the Plaintiff sold the truck for Kshs. 750,000/= and only gave him Kshs. 400,000/=. He denied that there was any agreement between him and the Plaintiff for payment of rent for the Suit Property.

14. He claimed Magnate Ventures removed the mast in 2014 and that the rent collected from the mast is held in a joint account in the name of the Plaintiff and the 1st Defendant's Advocates pursuant to a court order.

15. The 2nd Defendant testified that Motifamy Investments Limited paid Co-operative Bank Kshs. 1 million and that she later paid Motifamy Investments Kshs. 1 million as result of which the charge was transferred to her. She claims that as the current chargee she has a beneficial interest in the Suit Property and urged the court to dismiss this suit with costs to her. She did not produce any evidence of payment of the sum of Kshs. 1 million she claims have made to Motifamy Investment Limited. She averred that it was not her duty to inform the Plaintiff about the transfer of charge.

16. Only the Plaintiff filed submissions in the suit. The 1st Defendant's Advocate informed the court on 9/10/2017 that the parties were negotiating an out of court settlement. The Plaintiff's Advocate was not aware of any negotiations. No settlement was reached.

17. The issue for determination is whether the Plaintiff is entitled to the reliefs he seeks in the Plaintiff. It is not in dispute that the Plaintiff and the 1st Defendant own the Suit Property as tenants in common. It is also admitted that the Defendants have been residing in the Suit Property since 1995 and letting out the guest room without sharing the rent with the Plaintiff. It is also admitted that the Defendants collected rent for the mast which had been placed on the Suit Property and only banked the rent in the joint account after the Plaintiff obtained orders in this suit. It is necessary for the Defendant to account for the rent they have received from the guest wing and from Magnate Ventures Limited.

18. The court has looked at the copy of the charge in favour of Co-operative Bank of Kenya and notes that it was to secure the sum Kshs 3.6 million.

19. The transfer of charge dated 9/11/2006 states that the Co-operative Bank of Kenya transferred the charge to Motifamy Investments Limited in consideration of Kshs. 1 million. A further transfer dated 23/11/2009 transferred the charge from Motifamy Investment Limited to the 2nd Defendant for the consideration of Kshs. 1 million.

20. The Plaintiff annexed copies of the deposit slips showing the payments he made to Co-operative Bank of Kenya. The Plaintiff's evidence that he paid his share of Kshs. 1.9 million to settle his share of the loan was not challenged.

21. He also annexed a copy of the agreement between the 1st Defendant and A1 Outdoor Kenya Limited in which this company was to pay an annual rent of Kshs. 175,000/= to the 1st Defendant as consideration for the company to place its advertising bill board on the Suit Property. The agreement is dated 21/2/2007. The Defendants testified that the contract was terminated in 2014 which means they collected rent for at least 7 years.

22. The Plaintiff also annexed a letter on the note paper of Kasim Abdulgani & Bros (Nairobi) dated 28/3/2006 addressed to the bank as follows:-

“We are acceptable with the bank transferring the charge over the above referred property to Motifamy Limited who have liquidated the debt at an amount of Kshs. 1 million.”

The court notes that the letter is signed by the 1st Defendant only.

23. The Defendants have occupied the suit premises and collected rent both from the guest wing and the advertisement bill board without giving an account to the Plaintiff who owns half share in the Suit Property. No evidence was tendered by the 2nd Defendant to show how she paid of Motifamy Investment Limited.

24. The court prefers the evidence of the Plaintiff that he made payment of his share of the loan owed to Cooperative Bank of Kenya Limited over the evidence of the 1st Defendant. If indeed the loan was paid off by Motifamy Investment Limited, then that is what the 1st Defendant ought to have paid the Cooperative Bank after the Plaintiff had paid his share of the sum secured. The loan sum was Kshs. 3.6 million and it is only alleged that Motifamy paid 1 million shillings to the bank. There was no evidence to show how the 2nd Defendant paid off Motifamy Investments, which is her cousin's company.

25. The court has considered the pleadings and the evidence together with the submissions and finds that the Plaintiff has proved his case on a balance of probabilities. The money paid by M/s Magnate Ventures Limited held in the joint account is to be released to the Plaintiff. This sum will be taken into account when the Defendants render an account. The rates and other outgoings paid by the Defendants will be deducted when ascertaining the sum payable to the Plaintiff.

26. The court grants prayers (a), (b), (d), (e) and (f) of the Amended Plaintiff dated 29.11.2010.

Dated and delivered at Nairobi this 9th day of November 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Nganga for the Plaintiff

Mr. Ondegu for the 1st Defendant

No appearance for the 2nd Defendant

Mr. V. Owuor- Court Assistant