

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 417 OF 2012

PATRIA PROPERTIES LIMITED PLAINTIFF

- V E R S U S -

THE ATTORNEY GENERAL DEFENDANT

JUDGEMENT

[1] The plaintiff in this case is the registered owner of all that piece of land known as LR. No. MN/VI/3835 (Title No. CR. 27769). This is a leasehold tenure for 99 years from the Government of the Republic of Kenya with effect from 1st January 1995, renewable at an annual rent of Kshs. 8,500.00.

The Plaintiff's claim is that on 5th March, 2010 it learnt that the employees of the Ministry of Public works, the Ministry of State for Provincial Administration and Internal Security and District Commissioner Changamwe had entered the suit premises without the plaintiffs permission and constructed thereon some structures for occupation by the Administration Police. It wrote a letter through its lawyers on 18th March, 2010 to District Commissioner Changamwe who was supervising the construction where it demanded the demolition of those structures and an admission of liability for trespass in the suit property. There was no response forcing it to file this suit against the Attorney General under Government Proceedings Act Cap. 40 on behalf of the relevant government Ministries aforesaid.

[2] In its prayers it prayed for a declaration that it is the lawful registered owner of the suit land, that the putting up of the alleged structures on the land was unlawful and that the continued existence of the said structures on the suit property therefore by the Administration Police amounted to trespass and an order for the said structures on the suit premises to be demolished and the said debris resulting therefrom be cleared and damages for the said trespass and costs of the suit.

The defendant was served with the requisite notice under the provisions of Government Proceedings Act Cap. 40 Laws of Kenya. A defence was filed on 20th July, 2011 and reply to that defence filed on 1st August, 2011. On 14th June, 2012 the plaint was subsequently amended with leave of the court to include prayer (g) as an alternative claiming Ksh. 50 million as the value of the property as per the valuation annexed to the application. Though the defendant was granted 14 days to amend his defence after service of the amended plaint by the court, he did not file an amended defence.

[3] This matter came up for hearing on 12th November, 2013. Mr. Karega Learned Counsel appeared for the plaintiff while Ms. Lutta Learned State Counsel appeared for the Attorney General. She applied for adjournment on the ground that Mr. Eredi Senior State Counsel who had the conduct of this matter was out of the country and that the State wanted to file some survey maps and plans in respect of the suit property. Mr. Karega objected to the adjournment and said that the matter had been fixed earlier in May, 2013 by consent. I overruled the objection. I allowed the adjournment and the case was fixed for hearing by consent on 12th February, 2014 by consent. The Plaintiff and his lawyers appeared on the hearing date aforesaid but the Attorney General never attended. At 11.20 a.m. on 12th February, 2014 Mr. Karega advocate told the court that he was prepared to proceed with the witness. I ruled that I did not want to proceed without the input of the Attorney General and I therefore asked Mr. Karega to accord the Attorney General more time and contact their chambers and come back in the afternoon at 3 p.m. At 3 p.m Mr. Karega told the court that he had called the office of the Attorney General on 0412313195 and

spoke to Mary Kiti State Counsel and he gave her the case number and did inform her that the file had been placed aside to enable the Attorney General to attend. It was at ¼ to four p.m, he argued that the date was taken by consent and that he was prepared to proceed. The case proceeded and one Ashok Labhshanker Doshi a director of the plaintiff company gave evidence. He said he was a director of the plaintiff company the owner of Plot No. MN/VI/3835. He produced a grant CR. 27769 from the Government of Kenya granted to Fredrick Makau Kimotho and Ernest Ngure Mwangi. He stated that his company bought the land from them and produced a transfer of lease from Kimotho and Ngure to Dim properties Ltd dated 19th January, 1996. He produced another transfer from Dim Properties to Patria Properties dated 10th January, 2006 for a consideration of Kshs. 6,254,799.00. The transfer was registered on 10th March, 2006. All the original transfers and the sale agreements were produced in court. He said that the District Commissioner entered the land illegally. The Director produced a letter he wrote to the District Commissioner aforesaid. He averred that his company did a survey of its plot. The surveyor showed the area the District Commissioner had encroached. He produced a letter of 19th September, 2010 from the Senior Litigation Counsel Attorney General's Chambers to the Permanent Secretary Public Works and to Permanent Secretary Ministry for State for Provincial Administration requesting for instructions within 30 days. In spite of all that the plaintiff said it had not received any response from the Government. It stated that it complied with the terms of the lease and has paid the rates regularly from 1996 to date. It produced through its director a bundle of receipts from 1996 to 2013 in respect of rates. It produced a valuation for the land. The valuation was pursuant to the amended plaint and it stated the same had been served on the Attorney General. The valuation was dated 20th September, 2011. The same was Kenya shillings 50 million. It further produced a search certificate of the land. It asked for the orders as prayed in its amended plaint. It closed its case and requested the court to apply Order 12 (2) (a) and requested for judgment.

It was 4.30 p.m. The plaintiff had closed its case. The case was fixed by consent. The defendants were not there. I had requested counsel for the plaintiff to contact them. I waited for them from 11.30 a.m to ¼ to 4 p.m.. State Counsel Mary Kiti was aware having been contacted by Mr. Karega. She did not bother to come to court. I found the plaintiff's request to apply Order 12 (2) (a) a reasonable request. I proceeded to hear the plaintiff's case and after the close of the plaintiffs' case, there being no defence, I fixed the case down for judgement.

[4] The plaintiff through its Director Mr. Doshi clearly explained how it bought the suit land. It also proved that the land was duly transferred to it. It has regularly paid land rates for the same from 1996 to 2013. When the District Commissioner encroached on this land, a due notice was given to him that he was on private land and that he should move out and vacate therefrom. He did not do so. The requisite notice was sent to Attorney General under Section 13A of the Government Proceeding Act. The Attorney General wrote to the relevant Government Ministries vide his letter 19th September, 2010 and the Ministries apparently did not respond. The defence filed by the Attorney General was a general defence comprising of mere denials. It would appear that the Government was aware it was on private land and that is why it chose not to defend this suit. The court was told that the Government has built an office and house for the Administration Policemen on part of the suit land. Under the circumstances an eviction will be almost impossible to execute. The plaintiff has valued its land at 50 million. This valuation was served on the Attorney General and he has not disputed the same.

[5] The plaintiff has proved to me that this land belongs to it.. I believe it and confirm that, that is so. The government has taken it without complying with requirements of Land Acquisition Act Cap. 295. Section 8,9 and 10 of the said Act have an elaborate procedure on how land can be compulsorily acquired. To my mind this is the only way the Government can acquire private land. The Act allows Government to compulsory acquire private land on full compensation at market value. I therefore order the Government to pay full compensation of the entire suit land at the valuation price presented to court of Kshs. 50 million. If the Government does not want to pay such an amount, it shall have 90 days to move and vacate therefrom and clear all debris resulting from such vacation at its own cost. The plaintiff shall have the costs of this suit and interests.

Dated and delivered in open court at Mombasa this 27th day of March, 2014.

S. MUKUNYA

JUDGE

27.3.2014

In the presence of:

Mr. Khanna Advocate for the plaintiff'

Mr. Eredi Advocate for the respondent