



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
CIVIL CASE NO. 537 OF 2005

WAAS ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

FELISTERS NJAMBI MWAI.....2ND DEFENDANT

JUDGMENT

By an amended plaint dated 26th October 2009 and filed in court on 18th December 2009 the plaintiff sued the 1st and 2nd defendants for orders:-

1. That the 2nd defendant be evicted from the suit property LR No 209/7176/185
2. That a declaration be made by this court that the 2nd defendant is trespasser of and ought to vacate the suit property immediately,
3. That the 2nd defendant demolishes and removes the illegal structures on LR No 209/7176/185 at her own costs and in default the plaintiff removes the illegal structures on the suit property at the expense of the defendant.
4. That the temporary occupational Licence issued by the 1st defendant to the 2nd defendant on 11th August 2000 under Ref.No 630/VAL/SG/1/0/mnw HARAMBEE ESTATE with effect from 15th August 2000 in respect of the suit property is illegal null and void and a nullity and that the same is void and unenforceable.
5. That a permanent injunction restraining the defendants their agents, workers and all others whether or not deriving title from both or either of them or any other persons from entering or occupying or trespassing on or claiming title to or in any way buying or selling or charging or mortgaging or allowing others to enter into or erecting any structures on or in any manner whatsoever occupying or dealing with title to LR No 209/7176/185 in any manner inconsistent with the rights or interests of the plaintiff.
6. General damages and/or exemplary damages and/or aggravated damages and/or punitive damages against both defendants for loss of business to be assessed and quantified and proved at the hearing of this suit.
7. General damages for fraud and special damages as pleaded in the plaint.
8. Mesne profits against the 2nd defendant at a rate to be determined based on the comparable rents in the area also to be assessed and quantified and proved at the hearing thereof.

9. Costs of the suit with interest thereon at court rates
10. Interest on general damages on the above at the rate of 12% per annum from the date of judgment until payment in full.

It is the plaintiff's claim that it is the registered proprietor of LR No 209/7176/185 measuring 0.0184 of a hectare as a lessee from the 1st defendant for a period of 99 years from 1st April 1969. He added that the suit property had been surveyed and registered as LR No 209/7176/185 and is situated in Harambee Estate, Nairobi. It is his averment that the suit property had previously been allocated to one Joseph Ndegwa who subsequently with the 1st defendant's consent and approval sold it to Waas Enterprises. Later Waas Enterprises transferred its business concern, assets and liabilities including the suit property to the plaintiff company vide a novation agreement for transfer of assets dated 30th October 2001. That the plaintiff was later registered as the owner of the suit property by virtue of the allocation and the execution of the lease. It stated that upon the allocation it acquired the right to immediate and exclusive possession of the suit property and therefore the 1st defendant had no legal right, authority and capacity to deal with the suit property by way of allocation, transfer, grant, transfer, grant of licence or lease because the said property no longer belonged to the 1st defendant. The plaintiff alleges that by a letter dated 11th August 2000, the 1st defendant purported to grant to the 2nd defendant a temporary occupation licence (T.O.L) with effect from 15th August 2000 which is vaguely described as Harambee Estate on the terms and conditions set out in the letter and on the basis of the said letter the 2nd defendant entered and occupied the suit property. The 2nd defendant has constructed illegal structures which has a kiosk, a bar, butchery and has put up other open air trade business. It alleges that the defendants have acted in conspiracy and in complicity in expropriating the plaintiff's property and have so persisted to the damage, loss and detriment of its detriment. Further the 1st defendant has deliberately failed, refused and neglected to grant possession of the suit premises to the plaintiff. The plaintiff's contention is that the defendants, conspired, connived and schemed to fraudulently, deliberately, maliciously, and knowingly expropriate the suit property and have through their devious machinations, wilful acts and omissions perpetuated the 2nd defendant's illegal occupation of the suit property. It stated the particulars of fraud, malice and conspiracy on the part of the defendants as follows:-

1. The 2nd defendant has been trespassing on the suit premises with the 1st defendant's knowledge and approval since 15th August 2000 when she obtained a T.O.L from the 1st Defendant when she knew or ought to have known that the suit premises was a private property.
2. The 1st defendant un procedurally and unlawfully issued an illegal T.O.L over the suit premises to the 2nd defendant when it knew that the same was private property.
3. The illegal T.O.L was granted under conditions which gave the 1st defendant power to terminate the same in a month's notice but the 1st defendant has deliberately failed to do so as to ensure that the 2nd defendant remains in the suit premises for as long as the 2nd defendant desires.
4. The 2nd defendant acted in breach of the T.O.L by erecting illegal structures on the suit premises without approval and the 1st defendant has elected to ignore that irregularity and condoned the same.
5. The 1st defendant has deliberately refused to approve the building plans submitted by the plaintiff without assigning good reasons thereof alleging loss or misplacement of the plaintiffs applications and plans thereby subjecting the plaintiff to serious and indefinite delay in developing the suit property which delay was calculated by the 1st defendant to the benefit of the 2nd defendant and to the loss and damage of the plaintiff.
6. The 1st defendant gave a notice to the 2nd defendant of infringement only after the plaintiff had made several constant and sustained complaints to the office of the 1st defendant and only gave a notice of 7 days instead of 30 days which was a deliberate mistake and even then, had failed to re-issue a correct notice or to act on the directive notice thereby ensuring that the advantage enjoyed by the 2nd defendant through illegal occupation of the plaintiff's plot continues indefinitely.
7. The defendants acted in breach of the terms of their own temporary occupational licence by failing to comply with clause 3 requiring confirmation that the site was available to the 1st defendant to

- produce evidence of the confirmation.
8. The defendant have continuously connived, deferred or avoided to identify the actual plot No. or land reference number of the suit premises and always giving a vague description of the property in order to confuse all and to delay the settlement of this case.
 9. The 1st defendant is double benefitting by accepting stand premium rates and all levies payable to it by the plaintiff, confirming the plaintiff's title to the suit property while at the same time purporting to legitimize the 2nd defendant's continued trespass and illegal stay on the suit property.

The plaintiff avers that upon the acquisition of the suit property it was to commence the construction of commercial cum residential building on the property comprising of 5 shops on the ground floor, two bedroomed houses and one bedroomed house on the 1st floor and to continue further construction to the 5th floor in conformity with the 1st defendant's regulations. The plaintiff alleges that it submitted its building plans for the construction to the 1st defendant for approval but the 1st defendant deliberately procrastinated the approval sought and at one point alleged to have misplaced the plans forcing the plaintiff to re submit the same. The plaintiff avers the 1st defendant's by laws, state that building plans ought to be approved within 40 days of the application but the 1st defendant approved the plans on the 28th June 2005.

Its contends that as a result of the malicious acts of the defendants, the plaintiff has been prevented from undertaking development and construction work on the said suit property and as a consequence it has suffered a loss of earning and profit in the sum of ksh 39,700,000/= as at June 2009 which loss continues to escalate with the defendants continued occupation of the suit property.

It particularised special damages as; that taking into consideration that the building plans ought to have been approved within 40days of their submission with a further construction period of 2 years the suit property would have been ready for occupation in June 2002.He calculated his profits as;

One 2 bedroom House x Ksh 15,000 Rent per Month x 5 Units	=Ksh 75,000
Two 1 bedroom House x Ksh 10,000 Rent per Month x 10 Units	= Ksh 100,000
Five Shops Ground floor x Ksh 10,000 Rent per Month	= Ksh 50,000
Subtotals	= Ksh 225,000/=
Annual rent Receivable Ksh 225,000 x 12 Months	= Ksh 2,700,000.
Less out goings 10%	= Ksh 270,000
	= Ksh 2,430,000/=

Add less purchase 8% for 7 years x 5.2

Capital Value **= Ksh 12,636,000**

Add Re-invested value of the above rent as at the end of June 2003

In the market at 21% **=Ksh 39,700,000/=**

It added that this amount continues to escalate until payment in full.

The plaintiff averred that the defendants have refused, failed and or neglected to remedy the situation and to grant possession of the suit property to the plaintiff despite numerous demands and requests being made in this regards by the plaintiff.

The 1st defendant entered appearance and filed its defence on the 6th June 2005. It denied any knowledge of the alleged registration of the plaintiff as proprietor of LR No 209/7196/185 (IR NO 2693011) and added that there is no valid, lawful and enforceable lease between the plaintiff and the 1st defendant's temporary occupation licence (T.O.L) was issued before the plaintiff's leasehold interest on the 14th August 2002. It stated that a letter of allotment dated 17th June 1999 does not confer proprietary rights in the suit property and that the court found by the court to be fictitious, fraudulent, a forgery and suspicious in its ruling dated 5th December 2003. It further averred that the plaintiff had no *locus standi* to demand or question any termination of any agreement between the 2nd defendant and the 1st Defendant. It also denied that there were approvable plans submitted to the 1st defendant by the plaintiff. It denied the particulars of fraud, malice, conspiracy and wilful concealment as alleged by the plaintiff and also denied knowledge of any loss and damages suffered by the plaintiff and prays that the suit be dismissed with costs.

The 2nd defendant filed her defence on the 9th June 2005. She dismissed the allegation raised by the plaintiff and stated that the plaintiff never disclosed to the court the facts in **HCCC No, 993 of 2001** adding that this suit is an abuse of the court process as the plaintiff intends to achieve what he did not achieve when its application to be enjoined as co-defendant in **HCCC No.993 of 2001** was dismissed.

The plaintiff and three of its witnesses filed their written statements which they reiterated in their evidence in court.

PW1: MATHEW NJOROGE KABETU who stated to be one of the directors. He stated that the company was incorporated on 24th November 2001. He stated that the proprietor of LR No 209/7196/185 is Waas Enterprises Limited. He produced a letter of allotment dated 17th June 1999 and a partnership letter since at the time the company was allotted the allotment letter it was a partnership. He alleged that the property was purchased from Joseph Ndegwa who was the original allottee and paid Ksh 22,200 to the City Council and paid the annual ground rent and other fees relating to the property. He testified that when he wanted to construct on the said property he learnt that there was encroachment on his property adding that he knew the trespasser well as he had approached him to lease the suit property so that he could put up a bar. On learning of this encroachment he notified the Director of City Planning and a notice was set to the trespasser to demolish his structure but the structures were not demolished. He sought the assistance of the provincial and district commissioners and when they were to work on the issue they were served with a court order stopping them from interfering with the site. However the suit was never pursued and was dismissed for want of prosecution. That was the time he filed this suit in 2005. He further added that he had the deed of transfer of assets and a title issued by the 1st defendant. He testified that the 2nd defendant was still on the suit property because he was issued with a temporary licence by the 1st defendant. His building plan was finally approved by the 1st defendant and since he wanted to construct on his property he pleaded with the director of planning so that he could cancel the licence issued to the 2nd defendant but he was told the same had to be conceded formally. A letter was sent to the 2nd defendant to demolish her structure but nothing took place and when that failed he approached the court to sue both the 1st and 2nd defendants and that was when the 1st defendant issued an enforcement order asking the 2nd defendant to demolish her structures within 30 days but this was never complied with. He believes that the 1st defendant is to blame for causing the crisis. He alluded to the fact that the 1st defendant had sought to settle this matter out of court but it was never to be. He came back to court and at the same time sought the services of a land economist; New Light Limited to assess the loss he incurred over the years and they submitted a loss of Ksh 70,700,000/= in their report. He therefore prays that the court makes an order that the trespasser be removed and he be paid damages for loss of business over those years, costs of lawyers and mesne profits. On cross examination by counsel for the 1st defendant he stated that the company did their assessment of loss of business by looking at the rent obtaining in the area which was about a rent of Ksh 350,000/= a month and they included interest over the years. He however stated that he did not know the cost of construction of the building but had the money for the construction.

PW2; ISAAC LUNALO WIRUNDA a property valuer testified that he was the director of MW Realite Limited. He stated that he was a registered valuer of 10 years' experience and licenced to do so having graduated from the University of Nairobi with a BA Land Economics in 2002. He added that he received instructions from PW1 to assess the loss occasioned by the non-development of his property on LR No 209/7196/185 Harambee Estate. When he visited the property in January 2002 he saw kiosks, a bar, and an M- Pesa kiosk that were all temporary in nature. They proceeded with their assessment and produced a report on 6th December 2012 which showed that they had arrived at a figure of Ksh 70,700,000/= and made an analysis that once the property was developed there was income that would have been earned from the property as at the completion date. The investment value they arrived at was for 9 ½ years (2003-2012) which amounted to Ks 11,552,527/= as the investment value. That amount was then reinvested at a given rate of return in 9 ½ years compounded to give Ksh 70,700,000/= They also based the annual rent receivable as the income which would have been obtained from five shops. On cross examination by the 1st defendant's counsel he stated that he was not a quantity surveyor but a land valuer. He explained the difference between the two was that a valuer values property and a quantity surveyor assesses costs. He added that what they produced was an assessment of loss incurred. On cross examination by the 2nd defendant's counsel he stated that he values both existing and proposed buildings and in the present case he assessed a property that was non-existent and his assessment was for the loss incurred by the plaintiff as at February 2012 since the property was to be developed in 2003. He added that the figures were based on the building plans but added that they did not base their figures on the current interest rate of 21%. He added that they did not compare the return and rental income with similar neighbouring properties but they used their own office database and the ISK database.

PW3: PETER AYIMBA ATAMBI A land surveyor by profession stated that he is a registered land surveyor and works with Hectares & Associates. He stated that they were given instruction by Waas Enterprises to carry out a property identification at Harambee Estate. He testified that they get the folio register for a particular property from the survey of Kenya and using the co-ordinates they are able to know the location of a property and added that every property has its own co-ordinate. He also stated that the beacon identification was done using the GPS and surveyors tape. He however added that they could not identify the beacons because the structures on the property had overlapped the boundary. The report was later submitted to the client having been signed and dated.

I have considered the pleadings, the evidence and the submissions of counsel during the hearing of this suit. The plaintiff's evidence is that he purchased the suit land from Joseph G. Ndegwa at a consideration of Ksh 460, 000/= on 2nd July 1999 then the 1st defendant transferred the allotment letter to the plaintiff. I have seen the allotment letter which is dated 17th June 1999 from the 1st defendant. The letter is offering plot No. R,5 being land measuring 0.0215 hectares for a term of 99 years from 2nd December 1994 at a stand premium of Ksh. 7,200/=. The Certificate of Lease exhibited by the plaintiff is dated 14th August 2001 and this lease was registered on 14th November 2002. The Certificate of Lease also shows that plaintiff is the first registered lessee. There is also evidence that the plaintiff has been paying rates. There is also a letter dated 27th July 2001 from the 1st defendant to the plaintiff's advocates confirming that the suit property belonged to the plaintiff. On the other hand the 2nd defendant was a licensee in the suit property having been given allocated Temporary Occupation Licence on 11th August 2000. She has however not claimed ownership of the suit premises.

Looking at the terms of the Temporary Licence dated 11th August 2000, the licence was on temporary basis and either party may give one month's notice in writing to terminate the tenancy. The Nairobi City Council was also to repossess the site immediately when and if it is required for the designated user or if the use to which the licensee put the site is no longer acceptable. The plaintiff's contention is that once he was issued with the allotment letter the suit property was not available to the 2nd defendant and he blames the 1st defendant for allowing the 2nd defendant use the suit property to his detriment because his plans of putting up commercial cum residential premises were hindered. The plaintiff being aggrieved by the conducts of the 1st and 2nd defendants wants this court to grant him mesne profits for the period he was not able to use his legally acquired property. The 2nd defendant was on the suit property from 2000 yet the plaintiff was allotted the suit property in 1999. The law to my understanding is that once the suit property has been allotted to someone it is not available to another person unless the allotting body

cancels the allotment. This is supported by the case of **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** where Warsame J. [as he then was] stated that, “...once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.” It is therefore my opinion the suit property was not available at all for the 2nd defendant because by the time the licence was issued to the 2nd defendant, an allotment letter had already been issued to the plaintiff. To my understanding since the 2nd defendant has been in the suit property illegally, she is a trespasser. As a registered proprietor, the plaintiff is entitled to enjoy all proprietary rights to the exclusion of all others. This includes the right to exclusive possession of the suit land. The rights of a proprietor of land are set out in **Sections 24 and 25 of the Land Registration Act** which provide as follows :-

“24. Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. (1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

- 1. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*
- 2. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

It therefore follows from the above that only the plaintiff is entitled to enjoy proprietary rights over the suit land. The 2nd defendant had no right to the suit land. She must therefore vacate the suit land and hand over possession to the plaintiff. It is my opinion that the 1st defendant should ensure that the 2nd defendant has vacated the suit land and hands over vacant possession of the suit land to the plaintiff within a period of 30 days from the date hereof.

The plaintiff also prayed for permanent injunction against the defendants from entering or occupying or trespassing on or claiming title to or in any way buying or selling or charging or mortgaging or allowing others to enter into or erecting structures on the suit property. Since I had earlier made a finding that the plaintiff has the absolute ownership of the subject parcel and also found that the 2nd defendant is a trespasser with no proprietary interest over the suit property, I am inclined to hold and find that the plaintiff has proved its case on a balance of probability. I therefore make order of permanent injunction restraining the defendants from dealing with the suit land or in any other way developing the same.

The plaintiff has made a claim for general damages and loss of business. The 2nd defendant moved into the suit property in the honest belief that she had a licence from the 1st defendant. However there was communication to the 2nd defendant from the 1st defendant through the Chief valuer cancelling her

licence because her business stood on privately owned property. There is also an enforcement notice dated 15th February 2012. This notice ordered her to stop further occupation of the suit property since she was among other things in illegal occupation of the said property. Even when this suit was filed, she was put on notice that she was not legally on the suit property and had she conducted due diligence, say by seeking to have a certificate of official search of the suit land, she would have discovered that her licence was valid as per the terms of the T.O.L. In my opinion I think that both defendants should pay the plaintiff general damages for trespass from the time of the institution of this suit which was 6th May 2005. Since General damages are in the discretion of the court, taking into consideration the nature and location of the suit land the assessed general damages at Ksh. 1,000,000/= in a year to be calculated with the number of years that this suit has been pending in court. This amounts to attract interest at court rates from the date of this judgment till settlement in full.

The plaintiff has also prayed for mesne profits. The **Black's Law Dictionary 9th Edition** defines mesne profits as: - *"the profits of an estate received by a tenant in wrongful possession between (2) two dates."* In the **Concise Oxford English Dictionary 12th Edition** defines mesne profits as: - *"the profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord."* From the facts of this case, it is evident that the relationship between the Plaintiffs and the Defendant was that of Bank and customer. Nowhere does their relationship fall within the ambit of a suitable case where mesne profits would be claimed. Many factors would have come into play. In the absence of the costing of constructing the ground and the 1st floor at the suit property, the court would be proceeding on a presumption that the money the plaintiff claimed to have would have been sufficient to have completed the two (2) floors as was alleged by the Plaintiff and that they would have immediately starting earning the rental income. This is because the court cannot ignore the intervening factors such as rise in construction costs or other unexpected circumstances that could have caused the Plaintiff not to have completed the said development. The Court of Appeal in **Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No. NAI No.38 of 2004** stated the law on mesne profit as follows, *"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..... That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all."* It is therefore my opinion that the plaintiff is not entitled to mesne profits as claimed.

The Plaintiff has pleaded for a sum of Ksh 39,700,000/= by way of special damages. The principle is that special damages must be both pleaded and proved. The Plaintiff should understand that it is not enough to write particulars and later seek the court to award the damages yet the plaintiff has not proved them to the satisfaction of the court. That is why the court of appeal in **Coast Bus Service Ltd versus Murunga Danyi & 2 Others (1992) LLR, 318** stated that, *"Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case, that the particulars of special damages were to be supplied at the time of trial. If at the time of filing suit, the particulars of special damages were not known, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars..."* The plaintiff stated in its amended plaint that had its plans been approved by the 1st defendant within 40 days of their submission and a construction period of 2 years the suit property would have been ready for occupation in June 2002. It stated that the loss of rental income and profits as it calculated in seven (7) years was Ksh 39,700,000/=. The plaintiff has produced a report titled **"Report and Assessment of Loss occurred for LR No 209/7196/185 in Harambee Estate Nairobi"** dated 6th February 2012. However the report states the value of the loss at Ksh 70,700,000/= and not Ksh 39,700,000/= as pleaded. The amount of Ksh 70,700,000/= was not pleaded by the plaintiff. The principle is that parties are not allowed to depart from their pleadings. This is meant to enable parties to prepare their evidence on the issues as joined and to avoid any surprises by which no opportunity is given to the other party to meet the new situation. The court in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** cited with approval the case of **Adetoun Oladeji (Nig) Ltd Vs. Nigeria Breweries Plc S.C. 91/2002** where it was held that, *"...it is now a very trite principle of law that*

parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.” It is therefore my opinion that the plaintiff has not proved its case on special damages.

In the end my considered opinion is that the plaintiff's amended plaint be allowed in terms of prayer **(b), (bi), (b ii), (c), (d), and (e)**. Cost be awarded to the plaintiff.

DELIVERED AND SIGNED AT NAIROBI THIS 26TH

DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE