Midland Emporium Limited v County Government of Kisumu & another; Prime Bank Limited (Interested Party) (Land Case E007 of 2021) [2024] KEELC 4030 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4030 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

LAND CASE E007 OF 2021

E ASATI, J

APRIL 25, 2024

BETWEEN

MIDLAND EMPORIUM LIMITED ..... PLAINTIFF

AND

COUNTY GOVERNMENT OF KISUMU ..... 1ST DEFENDANT

CITY MANAGER, KISUMU ..... 2ND DEFENDANT

AND

PRIME BANK LIMITED ..... INTERESTED PARTY

JUDGMENT

1. The suit herein was commenced vide the plaint dated 25th January 2021. The plaint was later amended and vide the amended plaint dated 30th September 2023, the Plaintiff, Midland Emporium Ltd, a limited liability Company sued the Defendants herein claiming for;

    a. An order of injunction directed at the Defendants whether by themselves or through their servants, agents or employees restraining them from entering the premises on Kisumu Municipality Block 13/76 or remaining thereon or from selling, offering for sale, damaging or in any other way attempting to alienate the suit premises from the Plaintiff.

    aa. special damages of Kshs.8,650, 000.

    b. An inquiry as to damages and damage found done.

    c. Damages for trespass

    cc. damages for loss of use and Kshs.280,000 per month from 16th January 2021 until payment.

d. Costs of the suit.

e. Interest on (c)and (d).

2. The Plaintiff's case as contained in the amended plaint is that it is the registered Lessee of the premises known as Land Reference No. Kisumu Municipality/Block 13/76 (the suit land) and has a Certificate of Lease issued on 21st October, 2003 pursuant to a transfer. That on 16th January, 2021, the agents of the Defendants raided the Plaintiff's premises on the suit land, destroyed the perimeter wall and damaged the Plaintiff's property within the premises. That the Defendants then attempted to bring squatters and other people to start a makeshift market in the premises thereby denying the Plaintiff peaceful possession and occupation of its property. The Plaintiff therefore sought intervention of the court for the aforementioned relief.

3. An affidavit of service sworn by James Otieno Okudo on 29th January, 2021 shows that the Defendants were, on 29th January, 2021, served with Summons to Enter Appearance, the plaint, Verifying Affidavit, List of Witnesses and witness statements and list of documents. Copies of the said documents duly received and stamped by the Defendants were attached to the Affidavit of Service confirming service.

4. Vide court ruling made on 31st January, 2022 Prime Bank Limited was joined as an Interested Party in the suit.

5. Save for a Memorandum of Appearance dated 26th November, 2021 filed for the Defendants on the same date by the Office of County Attorney, Kisumu County, the Defendants did not respond to the suit in any way. The suit therefore proceeded to hearing in their absence.

The Evidence

6. The evidence placed before the court by the Plaintiff comprised of the testimonies of PW1 and PW2 and the exhibits they produced.

   PW1, Irene Muthama, testified through her witness statement dated 25th January, 2021 that the Plaintiff is the registered owner of the suit land and has been in occupation to date. That on 13th January 2021 one Mr. Ogada an employee of the Defendants went to the suit land seeking to verify the plaintiff's title documents. That he was requested to go back on 15th January, 2021 to verify the documents. That the Plaintiff took the said documents to the Defendants' offices 15th January 2021.

7. That the Plaintiff has been paying land rent and rates for the property.

8. That on Saturday 16th January, 2021 at about 4.00 pm . while the premises were locked for the weekend, the agents of the Defendants led by the said Mr. Ogada raided the suit land, destroyed the perimeter wall and damaged the Plaintiff's property within the premises. That the Defendants have never served the Plaintiff with any notice to undertake any process of whatever nature. That the said Mr. Ogada, on the instructions of the Defendants attempted to bring into the premises squatters and other people to start a makeshift market thereon thereby denying the Plaintiff quiet and peaceful possession and occupation of its property.

9. That the actions of the Defendants are intended to unlawfully dispossess the Plaintiff of its property without due process. That unless restrained by an order of this honourable court the Defendant will continue trespassing onto the property. That the property is charged to a bank and the Plaintiff shall suffer immense loss if the Defendants are not restrained.

10. The Plaintiff produced Certificate of Lease, Beacon Certificate, original agreement, payment receipts, Rent Clearance Certificate, Rates Demand Notice, payment receipts, photocopies and Valuation report as exhibits.

11. PW2, Luke Okeyo Madande, a Valuer testified that he prepared a valuation report in respect of the suit property. That he ascertained that there was demolition of the perimeter wall and some of the side walls. That the destruction was shown in the photographs produced in court. That he assessed the value of the damage as follows; value of the site works was Kshs.8,650,000 and the estimated monthly rental value for alternative storage or accommodation at Kshs.280,000 per month. He produced the valuation report as an exhibit.

12. At the instance of the Plaintiff, the court through the Deputy Registrar accompanied by the County Land Surveyor did a site visit to the suit land and filed a comprehensive report dated 5th January 2024 signed by the Deputy Registrar, Environment & Land Court and County Land Surveyor.

Submissions

13. Written submissions dated 8th November 2023 were filed on behalf of the Plaintiff by the firm of Mogeni & Co. Advocates. Counsel submitted that ownership of the suit property by the plaintiff is validated by the Certificate of Lease over it as it gives absolute and indefeasible title. Counsel relied on the case of *Samwel Ambasa & 3 others vs Stella Ingasia* [2022] eKLR where it was held *inter alia* that Section 23 (1) of the *Registration of Titles Act* gives an absolute and indefeasible title to the owner of the property. Relying on the case of *Rhoda S. Kiilu vs Jianqxi Water and Hydropower Construction Kenya Limited* (2018) eKLR, Counsel submitted that trespass to land occurs when a person intentionally enters someone else's property without permission.

14. Counsel submitted further that the issues and factors to be considered before assessing and awarding damages for trespass were as articulated in the case of Kenya Power & Lighting Company Limited vs Ringera & 2 Others (2022) KECA 104 KLR.

15. Finally, Counsel framed three issues for determination namely:

    i. Whether the plaintiff is the rightful owner of the suit land?

    ii. Who should compensate the plaintiff for unlawful damage to their property, unlawful dispossession of the land and unlawful occupation by squatters?

    iii. Who should bear the costs of the suit?

Issues for Determination

16. Though the suit was undefended, the burden of proof remains with the Plaintiff under the provisions of Sections 107, 108 and 109 of the *Evidence Act* to prove that;

    a. it is the registered owner/Lessee of the suit land.

    b. That the Defendants trespassed onto the suit land and caused damage.

    c. that it is entitled to the relief sought.

Analysis and Determination

17. Under the provisions of Order 21 Rule 4 *Civil Procedure Rules, 2010* judgements in defended suits should contain a concise statement of the case, the points for determination, the decision thereon and

the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue.

18. The first issue for determination is whether or not the Plaintiff is the registered owner/Lessee of the suit land. In support of its case that it is the registered Lessee of the suit land, the Plaintiff produced as exhibit, a copy of Certificate of Lease dated 21st October, 2003 in respect of land parcel known as Kisumu Municipality /Block 13/76 in the name of Midland Emporium Ltd, the plaintiff herein, for 99-year lease with effect from 1st March, 1999. The Plaintiff also produced other documents including clearance certificate and payment receipts for land rates and rent.

19. Under the provisions of section 24(b) of the *Land Registration Act* 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 express rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreement liabilities or incidents of the lease. Section 25 of the same *Act* pronounces the right of a proprietor that the said rights shall not be liable to be defeated except as provided in the *Act* and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever subject to the encumbrances, conditions or restrictions shown in the register and liabilities rights and interest as affect the land.

20. Section 26 provides that certificate of title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land subject to the encumbrances, easements, restrictions and conditions contained in the certificate. No evidence of any such encumbrances, condition or restriction was produced. No evidence was produced impeaching the Plaintiff's title.

21. I find that the Plaintiff has proved that it is the registered owner of the suit land pursuant to the Certificate of Lease it holds.

22. The next issue is whether or not the Defendant trespassed onto the suit land and caused damage. In addition to the testimonies of PW1 and PW2, the Plaintiff produced photographs to show the damage on the suit land. The valuation report by ADD Property Consultants described the site works that the Valuer found demolished as the security guards house, the power house, perimeter wall, fence and gate.

23. Similarly, the report by the Deputy Registrar of the court and County Surveyor, on the status of the suit land, made observation that the property had at its main corners marked by what looked like old pillar (most in halves) and stalks of blocks to indicate a former fence, that there was no physical encroachment or settlement on the ground but there were no intact fences. That there was indication of complete destruction of the entire perimeter wall. That it was possible to see the outline of former concrete fence, corner pillars, heaps of blocks scattered along sections of the property and other bricks stacked in piles. That there was an overhanging double-sided structure marron in colour that looked like a double door of a former metallic gate with indications of demolition and vandalization. There was no evidence from the defence to controvert the Plaintiff's evidence.

24. I find that the Plaintiff has proved that the Defendants unlawfully entered the suit land in the manner described in the plaint and damaged the plaintiff's property.

25. The next issue is whether or not the Plaintiff is entitled to the relief sought. The Plaintiff filed and served an amended plaint dated 30th September, 2023 and prayed for an order of injunction, special damages, damages for loss of use of the suit land and interest and costs.

    The uncontroverted evidence on record is that the Defendant without any justification and/or notice to the Plaintiff, who is the registered owner, trespassed onto the suit land and damaged the Plaintiff's property and even made attempts to bring in third parties to establish a makeshift market on the suit

land. There is no dispute that the Plaintiff is the owner of the suit property for the period of the lease hence entitled to the protection of its rights to the property as provided for under article 40 of the *Constitution* of Kenya 2010. There is no guarantee that the Defendant will not repeat the trespass unless restrained by an order of this court. I find that an order of injunction is merited as prayed so as to preserve the suit land and protect the Plaintiff's interest in and rights over the same.

26. Regarding special damages, the Valuer, who testified as PW2 quantified the damages caused on the suit property at Kshs.8,650,000/-. There was no evidence to controvert this quantification. As regards damages for loss of use, I find that there was no evidence that the premises were not fit for use as a store or accommodation after the trespass. There was also no evidence that the Plaintiff was forced to hire alternative storage at Kshs.280,000/- per month. The figure of Kshs.280, 000/- was introduced by the Valuer. There was no other evidence to corroborate the same. As it is a special damage claim, it needed to be proved by production of receipts or lease agreement for the rented alternative storage, if any. I find that the claim was not proved.

27. Regarding general damages for trespass, trespass is actionable per se. Counsel submitted for a sum of Kshs.10,000,000. Taking into account the facts of the case, namely; that there was trespass but there was no evidence of settlement on or taking possession of the suit land by the Defendants or their agents and guided by the authorities cited by the plaintiff, I find that an award of Kshs.2,000,000 is adequate as damages for trespass.

28. Costs of any action, cause or other matter or issue, under the provisions of Section 27 of the *Civil Procedure Act*, follow the event. No reason has been demonstrated for the court to exercise its discretion and decide otherwise.

29. In conclusion, this court has found that the Plaintiff is the registered owner of the suit property, that the Defendant trespassed onto the suit property and caused damage and that the Plaintiff is entitled to the relief sought save for damages for loss of use. On the basis of these findings, the court finds that the Plaintiff has proved its case on a balance of probabilities and enter judgement in its favour for;

    i. An order of permanent injunction directed at the Defendants by themselves or through their servants, agents or employees restraining them from entering the premises on Kisumu Municipality Block 13/76 or remaining thereon or from selling, offering for sale, damaging or in any other way attempting to alienate the suit premises from the Plaintiff.

    ii. Special damages of Kshs.8,650, 000 and interest thereon at court rates from date of filing suit.

    iii. Damages for trespass of Kshs.2,000,000.

    iv. Costs of the suit.

    v. Interest on (ii)and (iii) above.

    Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 25TH APRIL, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen- Court Assistant.

M/s Mogeni for the Plaintiff.

No appearance for the Defendants.