REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appeal 149 of 2007

KENYA HOTEL PROPERTIES LIMITED.....APPELLANT

AND

WILLESDEN INVESTMENTS LIMITED.....RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Mutungi, J.) dated 14th December 2006

In

H.C.C.C NO. 367 OF 2000)

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JUDGMENT OF THE COURT

On 1st March 2000 Willesden Investments Limited, the respondent, filed a suit in the superior court and sought various reliefs against Kenya Hotel Properties Limited, the appellant, namely:-

"(a) Mesne profits from January 1994 to February 1998 both months inclusive in the sum of Kshs.54,902,400/= as set out in paragraph 15 hereinabove,

(b) General damages for trespass from January 1994 to February 1998 both months inclusive,

(c) Damages for loss of business opportunities as set out in paragraph 18 hereinabove,

(d) In the alternative and without prejudice to paragraph (b) above general damages for trespass

(e) Special damages as set out in paragraph 20 above.

(f) Costs of this suit.

(g) Interest on (a), (b), (c) and (d) above;

(h) Any such or other or further relief as this Honourable court may deem fit and just to grant."

The grounds upon which the suit was filed were that though the respondent was the registered proprietor of the plot known as L. R. No. 209/12748, (the suit property), the appellant had, in 1994, wrongfully entered thereon without the respondent's consent and taken possession of the same upto February 1998 which action amounted to trespass and which deprived the respondent the use and enjoyment thereof.

In a defence filed in court on 21st March 2000 and amended on 14th March 2003 the appellant stated that it had occupied the suit property que tenant on a lease from the Nairobi City Council in an honest belief that the said Nairobi City Council was the lawful owner thereof and thus entitled to receive from the appellant the rentals which were paid by it in respect of the suit property until 1997 when the appellant vacated the same at the end of the said lease. The case was heard by the superior court (Mutungi, J) between 31st May 2004 to 17th June 2005 when counsel for the parties made their submissions. Though judgment was set for delivery on 23rd July 2005 this was not done until 14th December 2006 when it was delivered. In concluding his judgment, the learned Judge, after reviewing the evidence adduced by the parties said:-

"In the result I hold that the plaintiff has proved its claim on a balance of probabilities. Accordingly, I enter judgment in favour of the plaintiff against the defendant. I award the following to the plaintiff against the defendant:

> "(a) Mesne profits from January 1994 to February 1998,
>
> both months inclusive, in the sum of Kshs.54,902,400 with interest at court rates from January 1994 till payment in full.
>
> (b) General damages for trespass for Kshs.10,000,00/= with interest from the date of this judgment at court rates till payment in full.
>
> (c) Kshs.6,000,000/= as damages for loss of business opportunity, with interest at court rates, from the date of this judgment till payment in full.
>
> (d) Costs of this suit, with interest at court rates, from the date of filing of the suit till payment in full."

It is this decision which provoked this appeal to this Court in which the appellant, through its advocates, set out the following grounds of appeal; namely:-

> "1. The learned trial Judge erred in law (*sic*) in fact in awarding Kshs.54,902,400/= as *mesne profits* based on an assumption that each of the 43 parking lots generated Kshs.70/= each and was occupied 12 hours each day, 7 days each week and everyday of the year.
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> 2. The learned judge erred in law and in fact in considering that the sum of Kshs.54,902,400/= was "*proved*" notwithstanding the evidence to the contrary.
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> 3. The learned trial Judge erred in law and in fact in considering that the gross assumed income of Kshs.54,902,400/= represented a reimbursement of what the respondent "has actually spent or lost as a consequence to" the disputed trespass.
>
> 4. The learned trial Judge erred in law and in fact in awarding interest on the assumed gross income of Kshs.54,902,400/= as from January 1994 till payment in full.
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> 5. The learned trial Judge erred in law and in fact in not delivering the judgment within the stipulated 42 days, and in condemning the appellant to pay interest on the assumed gross income for the period of 1 year 6 months i.e. the period it took for delivery of judgment.
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> 6. The learned trial Judge erred in law and in fact in awarding Kshs.6 (six) million "*in respect of loss of business opportunity*" in addition to the *mesne profits* of Kshs.54,902,400/=.

7. The learned trial Judge erred in law and in fact in making the award of loss of business opportunity notwithstanding the prior holding that there was no "*evidence in support of this claim and the plaintiffs counsel offered no submission*."

8. The learned trial Judge, erred in law and in fact in considering that he could make the "*token award*" of Kshs. 6 million without proof of the alleged lost opportunity.

9. The learned trial Judge erred in law and in fact in holding that damages under lost business opportunity cannot be quantified and therefore are in the nature of general damages.

10. The learned trial Judge erred in law and in fact in holding that the respondent had been deprived of the suit property for a period of 4 years.

11. The learned trial Judge erred in law and in fact in considering that the sum of general damages for trespass is dependant upon the prestigious location and/or value of the suit property.

12. The learned trial Judge erred in law and in fact in awarding Kshs. 10 million as general damages for trespass in addition to the award for lost business opportunity as well as *mesne profits*.

13. The learned trial Judge erred in law and in fact in making the afore-averred awards against the appellant notwithstanding that the appellant was not in possession of the suit property.

14. The learned trial judge erred in law and in fact in not appreciating sufficiently or at all that the three awards namely *mesne profits*, lost business opprotunity and general damages for trespass were in essence a duplication of the damages awardable for trespass.

15. That the learned trial Judge erred in law and in fact by finding that the plaintiff had established its case against the defendant for trespass, while it had been shown by the defendant that a separate person other than itself was in possession at the material time.

16. The learned trial Judge erred in law and in fact in awarding interest on costs from the date of filing suit.

17. The learned trial Judge erred in law and in fact in failing to consider sufficiently or at all the defence of the appellant and only considering an alternative plea for purposes of undue criticism."

The facts of the case in the superior court were that the respondent was the leasehold proprietor and registered owner of the suit property L.R No. 209/12748 situated between Nyayo House and Hotel Intercontinental. It complained that the appellant had, without its consent, entered onto and illegally or unlawfully occupied the suit property between January 1994 and February 1998 using it as a parking for 43 motor vehicles at Kshs.70/= per hour and for storage. As a result of such unlawful occupation the respondent was deprived of the use and enjoyment of the said property between the aforesaid period leading to loss of income which he estimated at Kshs.54,902,400/=. Apart from this claim, the respondent also claimed damages for trespass, general damages, and loss of business opportunity; which led to the various awards made by the learned Judge in his final judgment as herein before stated. On its part the appellants position was that it was in occupation of the suit premises as a tenant of Nairobi City Council to whom it paid the necessary rentals.

These awards culminated in the appeal which came up for hearing before us on 1st July 2008 when Mr. Fred Ngatia leading Mr. John Katiku appeared for the appellant while Mr. Pheroze Nowrojee leading Mr. Fred Athuok appeared for the respondent. On that day Mr. Ngatia and Mr. Nowrojee made their submissions but the appeal had to be adjourned to 3rd February 2009 when Nowrojee completed his submissions and Mr. Ngatia made a reply.

This being a first appeal, it is our duty to re-evaluate the evidence, assess it in order to make our own independent conclusions and as we do so we should remember that we neither saw nor heard the

witnesses testify as the superior court did and to give due allowance for that. In Selle & Another v. Associated Motor Boat Company Ltd & Another [1968] E.A. 123 at p.126 Sir Clement de Lestang V. P. said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is in consistent with the evidence in the case generally. (*Abdul Hameed Saif v Ali Mohamed Sholan (1955) E.A. C.A. 270*."

The above has been adopted by this Court in numerous decisions e.g. Williamson Diamonds Ltd v. Brown [1970] E.A. 1 and Arrow Car Limited v. Bimomo & 2 Others [2004] 2 KLR 101.

In his submissions Mr. Ngatia did not agree with the learned Judge that the appellant had admitted acts of trespass when pleadings denied it. He also disputed the user of the suit plot which would have enabled the learned Judge to award damages for loss of business opportunity. Counsel also referred to the existence of a lease between the appellant and the company which operates Hotel Intercontinental dated 29.9.1988 for a term of 22 years from 1988 to 2010 which he said was still in existence at the time of the proceedings in the superior court. He submitted that the special damages awarded, Kshs. 54,902,400/= were not specifically pleaded nor strictly proved but that the learned Judge used the appreciation of his visit to the site to make this award. He said that the awards for trespass, loss of business and for lost revenue were duplicated and that interest awarded by the superior court on costs should not have been from the date of filing suit. To buttress his submissions, Mr. Ngatia relied on various authorities in his list of authorities which we have considered.

On his part Mr. Nowrojee submitted that what was required in a suit for trespass was for the respondent to establish the right of possession and ownership of the suit land, which it did. According to him, the respondent established that the appellant had at all material time occupied the property on the premises that it was a tenant of Nairobi City Council., but it never produced the lease documents to support this hence he supported the learned Judge's finding against the appellant on the issue of occupation. He submitted that through correspondence, counsel for the appellant acknowledged such occupation when it showed a willingness to give up vacant possession of the property to the respondent in a letter dated 26th January 1998 which the respondent acceded to subject to condition 3 in its letter dated 27th January 1998. According to the respondent's counsel there was no doubt in the correspondence that it was the appellant giving vacant possession of the suit property to the respondent and not to Nairobi City Council. On damages, Mr. Nowrojee did not support the award of Kshs. 6 million for loss of business opportunity as there was no evidence offered to warrant this award but supported all other awards made by the learned Judge of the superior court, though he doubted the calculations used in arriving at the award of Kshs.54,902,400/=. Counsel did not see anything wrong with the costs and interest awarded by the learned Judge. He therefore prayed for the dismissal of the appeal.

It would appear that though no issues were framed by counsel for the parties, the learned Judge considered the issues of ownership and occupation of the suit property, the issue as to whether the appellant had trespassed thereon and then the issue of damages. He correctly found that the property L.R No. 209/12748 was owned by the respondent who had a 99 year lease over it as per the lease agreement registered at the Department of Lands on 15th September 1995. Though the appellant denied trespassing on-to the suit property and said it occupied it que tenant of a lease from the City Council of Nairobi in the honest belief that the latter was the lawful owner thereof and that it was entitled to receive the rentals which were paid by the former upto 1997, the learned Judge found no evidence to support such a lease. In light of this evidence and the correspondence exchanged by and between counsel for the parties herein, we find no justification in faulting the learned Judge in his finding that the appellant had no right at all in

occupying the suit property and declaring it as a trespasser thereon.

On damages the first consideration was the award of mesne profits. In regard to this award, it was incumbent upon the learned Judge to determine first the correct number of days the appellant could be held to have occupied the suit property as a trespasser and the correct daily rate charged for each motor vehicle. Although the respondent claimed that the appellant trespassed thereon between January 1994 to February 1998, the evidence on record shows that the said respondent was not registered as proprietor of the suit property until 15th September 1995. In this regard, the respondent could not have held the appellant as a trespasser thereon during the period between January 1994 and 15th September 1995 when it was not registered as the owner of the same. However it would be held as a trespasser in respect of the period between 15th September 1995 and February 1998 which translates to 881 days.

As regards daily charge per slot the evidence of Ben Muli (PW1) in cross-examination was that

"In 1997 the fees were Kshs.50/=. But are claiming Kshs.50/= per day. I leave it to court to judge whether our claim is wrong."

The superior court accepted the evidence that there were 43 parking lots and that the daily parking was for 12 hours. However, there is no table to show how the calculations were made to arrive at Kshs.54,902,400/= as mesne profits. But from what has been stated above and considering that the daily rate was Kshs.50/= per hour for 12 hours per day, we are of the view that the calculations should have been 881 x 43 x 50 x 12 = Kshs.22,729,800/= which the superior court should have awarded to the respondent.

As to Kshs.10 million which the learned Judge awarded the respondent for trespass, we refer to the judgment of Lord Lloyd of Berwick in the Privy Council decision of INVERUGIE INVESTMENTS v. HACKETT (LORD LLOYD) [1995] 3 ALL ENG. REP. 842 where he said:-

"This is in form of an ordinary claim for mesne profits, that is to say a claim for damages for trespass to land. …… The trespass thus lasted for a continuous period of 15½ years. The question for decision is the appropriate measure of damages. Mr. Mowbray QC. made clear to the Board, as he had already made clear in the court below that Mr. Hackett was claiming a reasonable rent for the apartments throughout the period of the trespass. This is the basis on which damages for *mesne profits* are awarded everyday in the County Courts."

And to lend credence to this Stroud's Judicial Dictionary 4th Edition Volume 3 describes mesne profits as:-

"Another term for damages for trespass arising from particular relationship of landlord and tenant."

Our understanding of the above persuasive authorities is that once the learned Judge made the award under the subhead "*mesne profits*" there was no justification for him awarding a further Kshs.10 million under the subhead "*trespass*", since both mean one and the same thing. We would therefore set aside the award of Kshs.10,000,000/= for trespass, and also set aside the award of Kshs.6,000,000/= which counsel for the respondent conceded.

We find the respondent did not claim any special damages and we find no basis for prayer (e) of the grounds of appeal.

In view of the foregoing the award for general damages for trespass in the sum of Kshs.10 million and the award of damages for loss of business opportunity in the sum of Kshs.6 million cannot stand. Consequently those awards are set aside.

The award of Kshs.54,902,400/= is reduced to Kshs.22,729,800/= with interest at court rates from January 1994 to the date of full payment. The appellant shall have half the costs of this appeal and half

the costs in the superior court.

These shall be the orders of this Court.

Dated and delivered at Nairobi this 2nd day of April 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. S AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR