



Softclans Technologies Limited v Nextgen Mall Management Company Limited & 2 others (Environmental and Land Originating Summons E004 of 2024) [2024] KEELC 5549 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024**

**JA MOGENI, J
JULY 18, 2024**

BETWEEN

SOFTCLANS TECHNOLOGIES LIMITED APPLICANT

AND

NEXTGEN MALL MANAGEMENT COMPANY LIMITED 1ST RESPONDENT

CRESTA INVESTMENTS LIMITED 2ND RESPONDENT

GULF AFRICAN BANK LIMITED 3RD RESPONDENT

JUDGMENT

1. This is an Originating Summons dated 29/01/2024 brought under Article 40 of *the Constitution*, Order 37 Rule 3 of the Civil Procedure Rules 2010, Sections 98 of the *Land Act* Cap 6 of 2012, Section 3 and 3A of the *Civil Procedure Act* and all other enabling provisions of the law.
2. Let NEXTGEN MALL MANAGEMENT COMPANY LIMITED of Post Office Number 37364649 Nairobi, CRESTA INVESTMENTS LIMITED and GULF BANK LIMITED of Post Office Number 43683-00100, the 1st, 2nd and 3rd Respondents' herein WITHIN 15 DAYS from the date of the service of summons on them inclusive of the day of service through the Applicant's Advocates, enter appearance to the summons which is issued on the application of SOFTCLANS TECHNOLOGY LIMITED, who at all material times relevant to these summons is the registered owner of UNIT C (IR NO. 182286) ON LR NO. 209/186648; NEXTGEN MALL and whose address of service for purposes of this suit shall be care of MERITEAD LAW AFRICA LLP, APPLEWOOD ADAMS BUILDING, 9TH FLOOR, SUITE 914 ALONG NGONG ROAD, ROAD P.O. Box 2368-00100, NAIROBI for orders:

1. Spent



2. That pending the hearing and determination of this Application, the Honorable Court be pleased to issue an order directing 1st Respondent to grant the Applicant vacant possession of Unit C (IR NO. 182286) on LR No. 209/18648; Nextgen Mall unconditionally
 3. That upon granting prayer No. 2 above, this Honorable court be pleased to issue an order directing the 1st Respondent to reinstate all utilities and to offer management services to the Applicant pending the determination of the instant Application.
 4. A Declaration that the Applicant is the lawful and registered owner of Unit C (IR No. 182286) on LR No. 209/18648, Nextgen Mall and therefore entitled to vacant possession of the said premises unconditionally
 5. An order do issue, directing the 1st Respondent to grant the Applicant vacant possession of Unit C (IR No. 182286) on LR No. 209/18648; Nextgen Mall unconditionally
 6. A Declaration that the Applicant is not liable to settle any service charges accrued prior to being granted vacant possession of Unit C (IR No. 182286) on LR No. 209/18648; Nextgen Mall
 7. An Order do issue directing the Respondents compensate the Applicant for loss of user of the suit premises at Kesh 100,000 per month from 23rd August 2022.
 8. Costs and interests of the suit to be provided for.
3. The Originating Summons is premised on the grounds that the Plaintiffs purchased the suit property Unit C (IR No. 182286) on LR No. 209/18648 Nextgen Mall through public auction conducted on 23/08/2022. The applicant fully settled the purchase price by paying Kshs. 30,100,000 and sought financing for Kshs. 15,000,000 from the 3rd respondent. Thus the suit property was charged as security having been transferred and registered to the applicant as proprietor.
 4. Despite the ownership the 1st respondent has violated the right to property of the applicant by denying the applicant access to the suit property leading to substantial loss due to lack office condemning it to pay for its current office rent of Kesh 100,000 per month.
 5. According to the Applicant's affidavit it avers that it is not liable to pay any outstanding service charges accrued prior to vacant possession. The plaintiff attached the ownership certificate and a copy of the transfer by charge dated 11/05/2023 marked as SNS1 and the memorandum for sale of the suit property dated 23/08/2022 nd marked as SNS -2.
 6. At the same time the applicant produced the letter of offer for the facility dated 3/04/2023 and the charge instrument dated 26/05/2023 following the offer to the applicant they wrote to the 1st respondent and requested for vacant possession vide a letter dated 27/07/2023 which was produced and marked as SNS4. In the letter the applicant avers that service charge should have been paid by 2nd respondent since the services were provided to the 2nd respondent as per the copy of the sublease that was annexed to the supporting affidavit. The sublease is dated 19/10/2016 and is marked as SNS5 including a statement of accounts of service charge to the 2nd respondent marked as SNS -6.
 7. The applicant deponed that the court should declare that the applicant as the lawful and registered owner of the suit property and compel the Defendant to transfer the suit property to them.
 8. The summons is opposed. There is a replying affidavit sworn by Sandra Gita, legal officer of the 1st respondent sworn on the 26/01/2024. She avers that the suit property was sold on an as is basis with all encumbrances including service charge and she annexed a copy of the conditions of sale marked as SG1.



She also opposed the prayer for compensation from the applicant and urged the court to dismiss the application. At the same time the 2nd respondent also filed a replying affidavit sworn on 19/03/2024.

9. The 3rd respondent also filed its response through a replying affidavit sworn on 22/02/2024 by its legal officer Lawi Sato who averred through its 6 paragraph affidavit that it was not opposing the prayers sought in the Originating Summons by the applicant. Save for prayers of compensation of Kesh 100,000 per month from 22/08/2022 as well as costs. That the 3rd defendant exercises its power of sale by public auction as a charge without warranting possession as per the memorandum of sale executed at the auction as evidenced by annexure marked LS-1. Thus it is not liable for what the plaintiff explicitly acknowledged that it did not effect from 3rd Respondent.
10. On 9/05/2024, the court directed that the originating summons be canvassed by way of written submissions.

The Applicants' Submissions

11. In its submissions, the applicant identified four issues for determination which were:
 - a. Whether the Applicant is the lawful and registered owner of the suit property?
 - b. Who is liable to pay the accrued service charge prior to the Applicant taking vacant possession of the suit premises?
 - c. Whether the Applicant is entitled to the claim for loss of user of the suit premises
 - d. Who should bear the costs of this proceedings
12. On the first issue the applicant's advocate submitted that the applicant is the registered proprietor of the suit property having purchased it vide an auction on for Kshs. 45,100,000 as a result of exercise of statutory power of sale against the charger, 2nd respondent by the 3rd respondent. On the second issue the applicant further submitted that under Section 98(4) of the Land Act the interest of the 2nd Respondent as chargee passed to the Applicant free of all liabilities. That the applicant was not responsible for provision of services which sublease terminated on 23/08/2022 the purchase date. Therefore, the applicant upon taking possession of the premises cannot be the one to pay for services that were utilized by the 2nd respondent.
13. Thus, on the third issue the applicant is entitled to the claim for loss of user of suit premises. Reference has been made to the cases of Minudi Okemba Lore versus Lucy Wangui Gachara [2019]eKLR, Savings & Loans (K) Limited versus Kanyenje Karangaita Gakombe & Another [2015]eKLR, Redington Kenya Limited versus Thomas N. Nabende & Another (2021)eKLR, Grgan (K) Limited & Another [2016]eKLR, and David Bagine versus Martin Bundi Civil Appeal No. 283 of 1996 (1997)eKLR. On special damages the applicant submitted that it had pleaded and proved the damages as pleaded in paragraph 16 of the supporting affidavit. The applicant rented alternative office space at Kshs. 100,000 per month despite being the registered owner of the suit property. The applicant was denied quiet enjoyment of the suit premises and thus claims the special damages in the nature of loss of user for the period it was denied occupation of the suit premises.
14. It is trite law that property passes at the fall of the hammer and therefore the suit property passed on to the applicant at the fall of the hammer whereas title of the suit property passes upon payment of the requisite fees by the applicants which was effected. They have put forward the case of Mursal Hajj



Ali versus Stanley Maina Macharia [2021]eKLR, where the court reiterated the provisions of Section 98(4) where the court stated:

“..... I hold that since the applicant is the absolute proprietor of the suit land which he purchased through a public auction, he is entitled to all rights and privileges belonging or appurtenant thereto”.

The 1st Respondent's submissions

15. They are dated 21/03/2024. The 1st respondent, also identified three issues of determination as follows:
 - a. Who is liable to pay the accrued service charges in the sum of Kshs. 11,450,989.00?
 - b. Whether the 1st Respondent should compensate the Applicant for loss of user of the suit premises?
 - c. Who should bear costs of the suit
16. On the first issue the 1st respondent submitted that the auction of the suit property was governed by the Conditions of Sale dated 23/08/2022 which were signed by the applicant's director. That the property was sold without vacant possession and with the provision in the conditions of sale. Thus the purchaser was deemed to be full aware of the contents of all documents of title and other matters that the outstanding land rates and other charges shall be paid by purchaser.
17. 1st respondent submitted that the Conditions of Sale are a statutory requirement as provided under Rule 16 (1) (b) of the Auctioneers Rules, 1997 which under Section 17 of the same rules the purchaser in an auction has to comply with since they constitute a valid contract whose terms are binding. This was the Court of Appeal decision in Bank of Africa Ltd & Another v Elijah Jacktone Odhiambo Mugah & Another [2022] eKLR.
18. The 1st respondent submits that Section 98(4) is about acquisition of interest in land acquired by a purchaser and this is not in dispute. That the issue in dispute is about vacant possession which is subject to the Conditions of Sale precipitating the auction including payment of service charge. He also referred to the case of Debra Limited v Board of Trustees National Social Securities Fund & Another [2017]eKLR, where the court referred to service charge as a debt that can be demanded for and recovered as a civil debt.
19. On the second issue on compensation the 1st respondent submitted that it is not liable to compensate the applicant since if the 3rd respondent had after exercising their statutory power of sale paid sums owing in line with section 101 (a) of the Land Act then the Applicant would not have been in the current position. That the applicant's relief if at all lies with the 2nd and 3rd respondents and not the 1st respondent.

2nd Respondent's Submissions

20. On their part, the 2nd respondent filed submissions dated 20/03/2024 and identified two issues for determination being;
 - a. Whether the 2nd respondent is liable to pay the disputed service charges in the sum of Kshs. 11,450,989.00
 - b. Whether the 2nd respondent should compensate the Applicant for loss of user of the suit premises?



21. The 2nd respondent submits on the 1st issue that the auction was governed by the Conditions of Sale which the applicant's director signed on 23/08/2023 which included the provision that the property was sold without vacant possession. Further that it was purchased subject to amongst other easement, conditions, restriction and other matters affecting the property.
22. Thus that the applicant was fully aware that they would be required to pay the outstanding service charges in order to obtain vacant possession post purchase. That the court should not redraft a contract that was agreed upon by the parties. Further that nothing in Section 98 (4) of the *Land Act* addresses the purchaser's commitments under the Conditions of Sale governing the auction. That section 98(4) is about charges that constitute registrable interest in land and a service charge is not such an interest as it does not secure the payment of money. They have relied on the cases of Bank of Africa Kenya Ltd & Another vs Elijah Jacktone Odhiambo Mugah & Another [2022] eKLR and Debra Limited vs Board of Trustees National Social Securities Fund & Another [2017]eKLR.
23. Further the 2nd respondent has submitted that section 101 (a) of the *Land Act* directs that the money received by a charge in exercise its statutory power of sale should be applied in first payment of rates, rent, taxes, charges or other sums owing and required to be paid on the charged land.
24. That the 3rd respondent was required to pay for the accrued service charges upon receipt of the proceeds of the auction which the disputed service charge of Kshs 11,450,989.00 or by the applicant pursuant to the conditions for sale. The 2nd respondent is not in any way concerned with the charges.
25. On the second issue the 2nd respondent submits that they are not liable for the disputed service charges or responsible for any harm suffered by the applicant due to denial of vacant possession by the 1st respondent and that the 2nd respondent's interest in the sit property was terminated by the statutory power of sale exercised by the 3rd respondent. Thus the applicant's relief lies with the 1st and 3rd respondents since the 2nd respondent lacks the means or basis of causing any harm to the applicant.

3rd Respondent's Submissions

26. The 3rd respondent vide its submissions dated 12/04/2024 identified one issue for determination is Whether the 3rd respondent is liable for the compensation of the Applicant for loss of user of the suit premises?
27. The 3rd respondent has submitted that the applicant was furnished with conditions of sale that addressed the issue of vacant possession and execute the Memorandum of Sale dated 23/08/2022. Further that the Conditions of Sale which are under the Auctioneers' Act Rule 17 mandate the purchaser to comply with the Conditions during a public auction.
28. It is their submission that the applicant is to deflect liability onto the 3rd respondent for the applicant's own omissions since he had the Conditions of Sale which were clear on the terms including the fact that the property was sold without vacant possession. They referred to the cases of Bank of Africa Kenya Limited & Another vs Elijah Jacktone Odhiambo Mugah & Another [2022] eKLR, Kenya Breweries Ltd & Another vs Bia Tosha Ltd & 5 Others [2020]eKLR, and National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR.
29. It is the submission of the 3rd respondent that it is not liable to pay any compensation claimed by the applicant for loss of user in suit property. That the 3rd respondent prays that the applicant's claim for loss of user of the suit premises and costs of the suit be dismissed with costs to the 3rd respondent.



Analysis and Determination

30. I have considered the originating summons, the supporting affidavit, the summons and the annexures filed on behalf of the respective parties. The issues for determination are: -
- i. Whether the plaintiff/applicant is the registered owner of the suit property?
 - ii. Whether the plaintiff/applicants purchase of suit property took into consideration due diligence?
 - iii. Who should bear costs?
31. The Originating Summons has been filed pursuant to the provisions of Order 37 Rule 3 of the Civil Procedure Rules and Section 98(4) of the *Civil Procedure Act*.
32. Order 37 Rule 3 of the Civil Procedure Rules provides that a purchaser may file an Originating Summons for the determination of any question which may arise in respect of any requisition or objections, or any claim of compensation; or any other question arising out of the contract of sale (not being a question affecting the existence or validity of the contract).
33. On its part, Section 98 (4) of the *Land Act* states that upon registration of the land or lease sold and transferred by the chargee, the interest of the chargee shall pass to and vest in the purchaser free of all liability on account of the charge. I opine that even though the Respondent was the previous owner of the suit lands, once the said lands were sold to the Applicant, he lost his entitlement to them.
34. The applicant herein is seeking guidance on the issue of vacant possession having purchased the suit property in a public auction ..
35. I note from affidavits of the respective parties that it is not in dispute that the plaintiff is the registered owner of the suit property. Section 26(1) of the *Land Registration Act* provides as follows;
- “The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
36. The plaintiff therefore is an innocent purchaser for value and that their title over the suit land was therefore obtained procedurally and I need not belabour on the legality of title.
37. On the second issue, one of the conditions of sale in the advertisement by M/S Garam Investment Auctioneers was that interested buyers were requested to view and verify the details of the suit property for themselves. This meant that the plaintiff/applicant ought to have done due diligence before purchasing the suit property. Due diligence included conducting an inquiry on the accrued charges, rent or any other charges and they would have discovered the suit property was encumbered to the tune of Kshs. 11,450,989.00 in service charge arrears.



38. Due diligence is a crucial step in the property auction process and ensures buyers make the most informed decision. Through conducting thorough research and analysis, buyers can identify potential issues, assess the property's value, and feel confident going into the auction.
39. Through performing the necessary checks, buyers can assess the true value of the property, establish its market value and potential for appreciation. This way, buyers can avoid overpaying and ensure a fair purchase price. For investors, reviewing financial documents, such as property taxes, utility bills, and rental income can help accurately estimate the property's operating costs and potential returns. [Empasis mine]
40. In the case of Joseph Muriithi Njeru vs Mary Wanjiru Njuguna & Another [2018] eKLR. The Court of Appeal held that: -
- “.....A purchaser who does not hold a title to property and who did not exercise due diligence in acquiring a registered property cannot be described as a bonafide purchase or innocent purchaser...”
41. I agree with the 1st respondent's submissions that the applicant was fully aware after conducting due diligence or should have been informed by the Chargee, the 3rd respondent that they would be required to pay outstanding service charges in the suit property before obtaining vacant possession. Further that by signing the Conditions of Sale the applicant bound themselves to a contract whose obligations they had to discharge.
42. The 2nd respondent has submitted that by the applicant signing the Conditions for Sale this amounted to a contract for sale whose conditions are binding on the parties therein. Thus the court could not rewrite contracts on behalf of the parties or imply terms that are not agreed upon. They were emphatic that a plain reading of the Conditions of Sale showed that the 2nd respondent did not owe any duty to the applicant regarding the condition of sale and that Conditions of Sale invited bidders do their own investigations and not to rely on the statements relating to the suit property.
43. In the case of Ngere Tea Factory Company Ltd vs Alice Wambui Ndome [2018] eKLR the court held that since the plaintiff was the one buying the land his clear duty was to conduct due diligence.
44. As things stand, there are service charge arrears amounting to Kshs.11,450,989 which cannot be wished away. The said service charge tax arrears have not been contested by the 2nd respondent or the 3rd respondent. They only contest that they are liable to pay the same and that the applicant should be the one to pay.
45. I reiterate that failure by the applicant to do due diligence before purchasing this suit property has put them in this position. They are the authors of their own misfortune. The alternative would be for them to pay up in order for them to get vacant possession.
46. I will not address the issue of compensation since my finding on the second issue in a way answers this question on whether the applicant should be compensated for the rent it has paid since it purchased the suit property.
47. In conclusion, I find that the applicant is not entitled to the orders sought. The originating summons dated 29/01/2024 is therefore dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JULY 2024



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MOGENI J

JUDGE

In the virtual presence of:

Mr. Ojong'a for the Applicant

Mr. Mulaku for the 1st Respondent

Mr. Makau for the 2nd Respondent

No appearance for the 3rd Respondent

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

