



East Africa Data Centre Limited v Mombasa Wonderpark Limited (Environment & Land Case 225 of 2020) [2024] KEELC 6105 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6105 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 225 OF 2020
NA MATHEKA, J
SEPTEMBER 24, 2024**

BETWEEN

EAST AFRICA DATA CENTRE LIMITED PLAINTIFF

AND

MOMBASA WONDERPARK LIMITED DEFENDANT

JUDGMENT

1. The plaintiffs have come to the court seeking relief against breach of a sale agreement dated 11th September 2019 whereby they had agreed on purchase of a parcel of land described as L.R. 20433/I/MN hereafter known as the suit property and a subdivision of a parcel of land known as I.R. 69408/1 which was delineated on Land Survey Plan Number 351012 hereafter known as the mother title. That the purpose of purchase was for construction of data centre and they had disclosed the same to the defendant in clause C of the preamble of the said agreement. In the same agreement, the defendant had given express and unequivocal warranties that they had good title and upon which the plaintiffs paid a consideration of Kshs. 170,000,000 followed by a Transfer which was registered sometime in December 2019. The plaintiff submitted drawing and building plans for approval by the County Government of Mombasa on 18th December 2019 but was terminated sometime in February 2020 for the reason that there were ongoing investigations by the National Lands Commission (NLC). That the plaintiff later discovered upon enquiries that on 31st July 2018, the NLC had directed the Registrar of Titles to place a restriction on various parcels of land including the mother title and this was pursuant to a complaint by Nyali Primary School & Kindergarten (hereafter known as the school) who were alleging ownership of the said parcels including the mother title. They further discovered that on 16th December 2019 the NLC had written to the senior registrar of titles Mombasa directing that restriction be placed on the suit property.
2. Later on, the plaintiff became aware of an investigation by the Ethics and Anti-Corruption Commission (EACC) for purposes of ascertaining ownership of the suit property. The plaintiff



therefore alleged that the defendant misrepresented the suit property and as a result suffered loss and damage of Kshs. 345,819,193.12 and loss of profits of Kshs. 8,850,000 and therefore sought prayers in the plaint dated 5th December 2020 for inter alia a declaration for breach of the said agreement; a mandatory injunction directing the defendant to refund the sum of Kshs. 354,669,193.12 as special damages together with general damages for misrepresentation and inducement.

3. In rejoinder, the defendant avers that the suit property was a subdivision of L.R 10768 which was also a subdivision of L.R 6542/I/MN (hereafter original parcel). It explained that subdivision 10768/I/MN was further subdivided into 16701,16702 and 16703/I/MN where the defendant changed user and issued new titles 20431,20432 and 20433/I/MN. The defendant denies inducing or misrepresenting facts to the plaintiff to enter into agreement and that further it had neither been made aware of the allegation by Nyali Primary School that the mother title had been hived from public land which had been reserved for Nyali Primary School nor had it ever been summoned by any state agency. Further, that the defendant has paid all land rates and rents and that the NLC had given consent twice vide a letter dated 14th February 2017 and 17th June 2020. That the defendant made inquiries and found out that the school is private and public land cannot be reserved for private entities; further that the school had requested the owners of the neighbor properties to sell their properties for purposes of expansion and that sometime in 2018 the school caused a survey on the original parcel which was rejected by the Director of Surveys for reason that it overlaid on other parcels; that despite the rejection the school caused another survey and allegedly obtained a deed plan 442310 under FR No. 630/124 and that the new deed plan overlaid L.R 10068/I/MN, 10077/I/MN, 11277/I/MN,11278/I/MN and 10768/I/MN; that they also discovered that it is on the basis of the new deed plan above mentioned that the NLC and the EACC started investigation; the defendants averred that the one of the other sister subdivisions of the suit property sold to Petrol Oil Kenya have never elicited investigations.
4. Furthermore, the defendant washed off its hands from actions by state agencies as expressly stated in clause 13.2.32.2 of the said agreement and denied causing any loss and damage and that it did not breach the agreement to solicit a rescission. That the plaintiffs are also obligated to take the steps in clause 13.2.33 and hence cannot claim the loss it has given particulars of.
5. At the hearing only two witnesses were presented. PW 1 Judy Gakii Njeri is the head of legal in the plaintiff's company and she testified that the register for the suit property cannot be traced at the Land registry and that they are unable to access the suit property. Further, that the defendant misrepresented facts and is in breach of the said agreement. In addition, she testified that there are investigations and have been unable to develop the property as they could not get approval from the County Government. PW 1 testified that they conducted due diligence in 2019 and that Transfer was done in November 2018 and title was obtained in December 2018. That they contacted the defendant who told them that their title was clear and that they even wrote to NLC who never responded and even appeared before the EACC. DW1 Elka Kwamboka Motanya the group company secretary who testified that the defendant purchased the suit property together with other subdivisions. She further testified that at the time of purchase in 2011, they did due diligence and that she was informed by their Mombasa representative that the letter of July 2019 did not include the defendant's property. She added that they were never subjected to investigation and the NLC in their letters stated that the property is clear. However, they found out that the school has title for the suit property and there is a suit pending in court for the same matter and concluded by stating that they were not in a hurry to dispose off the suit property.
6. The parties filed their submissions which the court has considered. Having considered the pleadings and submissions by counsel, the issues for determination is whether there was breach of the agreement of sale dated 11th September 2019 and what orders can the court give?



7. Black's Law Dictionary 9th Edition, Page 213 defines a breach of Contract as:

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

8. The breach that the plaintiff claims is that the defendant failed to disclose the fact that the school had lodged a complaint with the NLC about ownership of the suit property and that consequentially the alleged restriction registered by NLC and thus misrepresented through clauses in the sale agreement that it had good and marketable title; that there was no dispute on the suit property; that there was no adverse claim; that there was no third party who could exercise power of entry or take possession of the suit property; that there were no complaints, notices or requirements made by competent authorities over the suit property; that there was no dispute between the defendant and its neighbours at the date of the said agreement. Upon the failure of the plaintiff in pursuing its project of constructing a data centre, they issued a restriction notice on 6th October 2020 which the defendant has not acted and their defence is that the said letter dated 31st July 2018 had asked for restrictions on parcel MN/I/10768 but the said parcel did not exist at the time as they had already subdivided the same into three parcels L.R 120431, 120432, 120433/I/MN. It is also their defence that the NLC vide a letter dated 17th June 2020 confirmed that they had not placed restrictions on the three aforesaid parcels and that the plaintiff made further demands that the defendants obtain clearance certificates from the EACC which the defendant was unable to do.
9. It appears to the court that the defendant is using technicalities to deny liability. What the plaintiff cites as I.R 69408/1 is one and the same as C.R 69408 L.R 20433/I/MN; the suit property which the defendant has admitted is a subdivision of L.R 10768/I/MN which is part of the parcels that were under investigations before the said agreement was executed. The defendant in a letter dated 15th April 2020 in response to the plaintiff's advocate stated that the summons for afore stated were attended by representatives from Mini Bakeries (defendant's parent company) who were assured that the properties owned by the defendant were not subject to investigation.
10. The court noted that the NLC requested for a restriction to be placed on parcel L.R 10768/I/MN vide a letter dated 20th May 2020 authored by Mr. Brian Ikol the director of legal affairs and enforcement and a month later one M/s Mercy Nyamweya, the Director of Land Administration vide her letter dated 17th June 2020 confirmed that the suit property and the other sister parcels L.R 20431 and 20432/I/MN are not subject to any investigation.
11. Be that as it may, what is evidently clear is that the defendant was aware of the complaints by the school, despite the several assurances by the NLC that the suit property is not under investigation. The letter dated 25th May 1997 (page 36 defendant's list of documents) produced by the defendant has no probative value as the outcome of the letter was never attached. The response by the then Commissioner of Lands would have greatly assisted this court. It is instructive to note that EACC caught up with the prevarication of the defendant and finally confirmed the veracity surrounding the suit property as they placed a restriction on the suit property albeit too little too late. There can be no doubt that the defendant acted dishonestly in failing to disclose the summons issued to them on 12th July 2018 by the National Land Commission with regards to the legality of the titles hived from



LR No. MN/I/6542. I find that the Defendants are guilty of misrepresentation and the Plaintiffs are entitled to rescind the sale agreement.

12. The plaintiff pleaded that they suffered as loss due to the defendant's actions. They pleaded for loss to proceed with the intended purpose of purchasing the suit property and the heavy penalties and losses occasioned by the contractual agreements with third parties. With regards to all the particularized losses, the plaintiff has attached documents such as Tax invoices, legal fee receipts, valuation invoices, stamp duty payment, financial proposals, invoices for perimeter walling, combined quotes and purchase orders. It is trite law that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit.
13. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs Electrocom International Ltd* (1992) KLR 177 where it was stated that;

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
14. Where proved, a claim for special damages will restate the claimant to the position he would have been saved for the action complained of, however the documents placed before the court do not entirely do this. What has been seen by the court is a tax invoice of USD 10,615.81 dated 30th August 2019 from Coulson Harney LLP for fees. Nevertheless, there are few receipts proving payment such as payment of legal fees of USD 9,609.15 receipt number 05699 from Coulson Harney LLP, statutory payment receipt dated 3rd December 2019 of Kshs 6,800,040 through NCBA bank and receipt number 583 from Kolmans Geomatic Consultants dated 17th November 2020 of Kshs 100,000/= as payment for verification of boundaries for the suit property. Some documents do not prove that the said services were ever rendered to the plaintiff, for example, the purchase order number 027527 dated 30th October 2019 for the data centre consultancy fee. On the purchase order, Appendix 3 it states that the consultant shall be paid once services have been completed to the satisfaction of the client; there is no evidence the services were ever rendered to the plaintiff. The plaintiff's evidence was in general terms mostly for services that were to be rendered once the purchase of the suit property was completed and construction of the data centre was actualized.
15. The plaintiff also prayed for damages for loss of profits and business opportunities arising from the failure to operate the data centre. The loss of profit cannot be awarded simply because the documents placed before the court do not show what, if anything the business that the plaintiff runs concerning the profit anticipated. There is no loss of income that the court is to restore as a result of the defendant's actions. What the plaintiff did, unfortunately, is to put forward documents without demonstrating to the court what they stood to prove, for instance, the plaintiff prays for Kshs 699,322/= for an EIA study services yet no report has been attached or even the receipt proving payment.
16. It is my considered view that no evidence has been adduced of the loss of future profits and the court can only award general damages for misrepresentation. Save for a few documents, the plaintiff has not discharged the burden of proof placed on them to strictly prove their entire special damages claim.



Consequently, I find that the plaintiff has proved their case on a balance of probabilities and proceed to make the following orders;

1. A declaration that the Plaintiff is entitled to rescind the Sale Agreement.
2. A mandatory injunction directed at the Defendant compelling it to refund to the Plaintiff the sum of Kshs. 170,000,000/= being the purchase price for the Suit Property.
3. Refund of legal fees of USD 9,609.15
4. Refund of stamp duty of Kshs 6,800,000/=.
5. Refund of Kshs 100,000/= as payment for verification of boundaries for the suit property.
6. General damages of Kshs 500,000/=
7. Costs of the suit to be paid to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

