Barng'etuny v Kenya Oil Company (Environment & Land Case 340 of 2012) [2025] KEELC 2847 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2847 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE 340 OF 2012

EO OBAGA, J

MARCH 26, 2025

BETWEEN

ERICK KIPKEMBOI BARNG'ETUNY .... PLAINTIFF

AND

KENYA OIL COMPANY .... DEFENDANT

JUDGMENT

Introduction

1. This suit was filed on 26th April, 2007 by Ezekiel Kiplelei Barngetuny (Deceased) against Kenya Oil Company Limited. The deceased died on 20th December, 2013. The deceased's son Erick Kipkemboi Barngetuny took a grant of letters of administration on 24th October 2014 and replaced the deceased as Plaintiff. On 31st October, 2022, the Defendant applied for substitution of the name of the Defendant to that of Rubis Energy Kenya PLC. The Defendant's application was allowed on 16th January, 2022.

2. Though there was an amended plaint filed bringing in Erick Kipkemboi Barngentuny as Plaintiff, there was no description of him as having come in as the administrator of the Estate of Ezekiel Kiplelei Barngetuny. This notwithstanding, I will proceed to determine the rights and interests of the parties as provided for under Order 1 Rule 9 of the Civil Procedure Rules.

3. By an amended plaint dated 25th June, 2018, the Plaintiff sought the following reliefs:

    a. Rent due to the Plaintiff from the period between 2000 to date assessed at Kshs.100,000/= per month with effect from September, 2000 totaling to Kshs.6,700,000/=.

    b. A declaration that land parcel number Eldoret Municipality Block 7/111/1 belongs to Ezekiel Barngetuny.

    c. An eviction order against the Defendant for illegal occupation of Eldoret Municipality Block 7/111/1.

d. An order directing the Defendant to discharge title number Eldoret Municipality Block 7/111/12 from Kenya National Capital Corporation.

e. Costs of the suit.

f. Any other or further relief that the Honourable court may deem fit to grant.

4. By an amended defence and counterclaim dated 6th July, 2016, the Defendant sought the following reliefs:

a. A declaration that the Defendant is the owner of Eldoret Municipality Block 7/111/1 and that the Plaintiff is registered proprietor as Defendant's trustee.

b. An injunction directing the Plaintiff to take necessary steps to ensure that the Defendant is registered as proprietor of Eldoret Municipality Block 7/111/1.

c. Costs of the claim and counterclaim.

Plaintiff's case

5. The Plaintiff testified that the deceased was the registered owner of Eldoret Municipality Block 7/111/1. (Suit property) which is next to Barngetuny Plaza at the centre of Eldoret City. There is a petrol station on the suit property that is run by the Defendant. The deceased entered into a lease agreement with the Defendant. The lease was to run for 20 years with effect from 1st August, 1980.

6. On 12th October, 1992, the deceased entered into a sale agreement with the Defendant in which the Defendant agreed to purchase the suit property at Kshs.1,650,000/=. The Defendant paid the entire purchase price but the suit property was never transferred to the Defendant as the Commissioner of Lands could not give consent to the sale as the original title was lost.

7. The deceased wrote a letter cancelling the sale but it was agreed that the paid purchase money was to be utilized as rent for remainder of the lease. Clause 4 the lease provided that upon expiry of the initial lease, the Defendant had an option to renew the lease for a further 10 years at rent to be mutually agreed upon.

8. Upon expiry of the lease in 2000, the deceased wrote to the Defendant informing them of the lease extension and increase of rent to Kshs.100,000/= per month payable yearly. The deceased kept on raising invoices for rent but the Defendant did not pay any rent. The Defendant wrote back and stated that they were going to look at the issue.

9. The Plaintiff stated that he is the one paying rates for the suit property. It is on this basis that the Plaintiff seeks the prayers in the plaint.

Defendant's Case

10. The evidence on behalf of the Defendant was given by Nelson Owiye Wetoyi, the retail Development manager of the Defendant. He stated that the relationship between the Plaintiff and Defendant was one of lessor and lessee respectively. This relationship lasted from 1980 upto 1992 when the parties entered into a sale agreement. The process of transfer of the suit property into the name of the Defendant was put in motion but it was not completed as the Plaintiff did not provide the original title.

11. He went on to state that he had become aware of letter dated 31st January, 1993 a week before he testified. He sent a copy to their legal team who could not find the letter in their records. He further stated that he did not know if the Defendant accepted the variation of terms of rent payment. He

further stated that he could not find letter of 8th August 2000 in their records. He explained that the suit property had already been purchased and that is why they did not acknowledge the letters from the Plaintiff. He denied ever seeing the invoices raised by the Defendant and called for an order compelling the Plaintiff to transfer the suit property to the Defendant.

Submissions of the parties

Plaintiff's submissions

12. The Plaintiff filed submissions dated 3rd June, 2024. The Plaintiff submitted that this case rests on the lease agreement which the parties entered into and the sale agreement which was entered into by the parties. He submitted that no extrinsic evidence can be allowed to add on to what the lease and sale agreement contained. He relied on the case of Twiga Chemicals Industries Limited –vs- Allan Stevens Reynolds (2015) eKLR where it was stated as follows:

> "It is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

13. He submitted that the Defendant's attempt to import a meaning of the contract between the parties which is unsupported by documents cannot be allowed. The Plaintiff submitted that the sale agreement between the parties was frustrated as the Plaintiff could not obtain consent of the Commissioner of Lands which was one of the special conditions in the agreement.

14. The Plaintiff submitted that as no consent of the Commissioner of Lands was obtained, no transfer could be effected and he proceeded to cancel the agreement and notified the Defendant that the purchase price which was paid was to be utilized towards rent for the extended period of 10 years after the expirty of the initial lease agreement. He submitted that the cancellation of the sale agreement followed a meeting at the Defendant's office.

15. The Plaintiff submitted further that failure by the Defendant not to come back to the Plaintiff upon cancellation of the sale meant that it had accepted the cancellation and that is why there was no attempt to lodge the transfer at the Lands Registry.

16. The Plaintiff submitted that when he communicated to the Defendant that rent had been increased to Kshs.100,000/= per month, the Defendant did not protest. The Plaintiff kept sending invoices but no payment was made. The Plaintiff submitted that he took it that the Defendant had accepted the extended lease and increased rent. He therefore submitted that the Defendant cannot turn around and say that there was no extension of lease. He relied on the case of Steadman -vs- Steadman (1976) AC 536 at 540 where it was held as follows:

> "If one party to an agreement stands by and lets the other party incure expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable."(emphasis mine).

17. The Plaintiff further submitted that the Defendant is not entitled to specific performance Reliance was placed on Reliable Electrical Engineers Ltd -vs- Mantrac Kenya Limited (2006) eKLR where it was held as follows:

> " Specific performance like any other equitable remedy is discretionary and the court will only grant it on well laid principles.
>
> The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alterantive remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remediy specific performance may still be refused on the ground of undue influenced or where it will cause sever hardship to the Defendant."

Defendant's submissions

18. In submissions dated 8th July, 2024, the Defendant submitted that though it was not pleaded in the plaint that the Plaintiff was suing as legal representative of the Estate of his late father, it was clear that he is the legal representative. It was equally submitted that though the Defendant had been granted leave to substitute Kenya Oil Company with Rubis Energy Kenya PLC, no amendment was done. The Defendant submitted that this court should proceed on the basis of Order 1 Rule 9 of the Civil Procedure Rules and hold that the Plaintiff is Erick Kipkemboi Barngetuny and that the Defendant is Rubis Energy Kenya PLC.

19. On the issue of which property is the subject of this suit, the same has been variously described by the Plaintiff as LR No. Eldoret Municipality Block 7/111/1, LR No. Eldoret Municipality Block 7/111/12 and LR No. Eldoret Municipality Block 7/111. It was submitted that LR No. Eldoret Municipality Block 7/111/1 was mentioned in a lease issued to the Defendant which has since expired and is thus not the property in issue. On LR No. Eldoret Municipality Block 7/111/12, the Defendant submtited that it did not know the same and thus it is not the suit property. It was submitted that for purposes of this suit, the proper description is LR No. Eldoret Municipality Block 7/111.

20. The Defendant further submitted that a party is bound by his pleading. It was submitted that on 11th April, 2024 the Plaintiff was granted leave to file documents and that in the process of doing so, an amended witness statement was sneaked in. It was submitted that the statement introduced new issues which were not in the amended plaint and that this should not be allowed. The Defendant relied on the case of Mayfair Holdings Ltd -vs- Origa (Environment and Land Case Civil Suit 214 of 2015) (2024) KEELC 192 (KLR) (25 January, 2024) (Judgement), Raila Amolo Odinga & another -vs- Independent Electral and Boundaries Commission and 4 others & Attorney General and another Petition No. 1 of 2017 (2017) eKLR and Daniel Otieno Migore -vs- South Nyanza Co. Ltd (2018) eKLR where it was held that any evidence which is at varriance with pleadings is of no vlaue and must be disregarded.

21. The Defendant submitted that pre 1992, it was a lessee but after signing the sale agreement of 1992, it became an owner of the suit property. It was submitted that the Plaintiff could not unilaterally extend a lease which had expired and whose extension was clearly set out in the first lease agreement which was not the case.

22. The Defendant further submitted that the unilateral increase of the rent amount was contrary to the lease agreement. The Defendant further went on to submit that it had acquired the suit property by prescription and that the Plaintiff was holding the suit property in trust for it.

Analysis and Determination

23. I have carefully considered the Plaintiff's evidence, the evidence by the Defendant, the submissions by the parties as well as the authorities cited. There is no contention that there was a lease agreement signed between the Plaintiff and the Defendant. The lease was to run for 20 years with effect from 1st August, 1980. It is also not contested that before the expiry of the lease, the parties entered into a sale agreement on 12th October, 1992. The following are the isuses for determination:

    1. What was the nature o the relationship between the Plaintiff and the Defendant upon signing the agreement of 12th October, 1992.
    2. Was the sale agreement of 12th October, 1992 properly terminated.
    3. Did the Plaintiff extend the lease which expired on 31st July, 2000 in accordance with the lease agreement.
    4. What was the relationship between the parties after the expiry of the lease.
    5. Is the Plaintiff entitled to the reliefs in the amended plaint.
    6. Is the Defendant entitled to the reliefs in the amended defence and counterclaim.
    7. Which order is to be made on costs.

What was the nature of relationship between the Plaintiff and the Defendant upon signing of the agreement of 12th October, 1992.

24. Under clause 4 of the agreement of sale, the parties subjected themselves to the Law Society conditions of sale 1989. Under Condtion 6(1) on possession before completion, it is provided as follows:

> Where the purchaser takes possession of the property before completion other than under a lease or tenancy enteredinto before the contract, the purchaser occupies the property as licensee of the vendor and not as tenant and the taking of posession is not an acceptance of the vendor's title or a waiver of the purchaser's right to make requisitions or objections to title.

25. A per clause 6(1) (Supra) the Defendant was still a tenant of the Plaintiff as it had entered into possession on the basis of a lease. The Defendant was not a licensee of the Plaintiff as the Defendant submits.

Whether the agreement of 12th October, 1992 was properly terminated.

26. The completetion date was on or before 6th October, 1992. The Plaintiff was unable to beat the completetion date as consent of the Commissioner of Lands could not be obtained in the absence of the certificate of title which was lost. There was no express clause in the sale agreement stipulating on how the contract was to be rescinded. On 31st January, 1993, the Plaintiff wrote to the Defendant a letter in which he terminated the contract. The reason for the termination was indicated in the letter. The reason was because the Defendant was not prepared to wait any longer.

27. There is evidence that the replacement of the lost title was obtained in 2012 and shortly thereafter, the original Plaintiff died. In the case of Beatrice Muthio Nzioka -vs- Charles Akelo Ong'wen (2014) eKLR it was stated as follows:

> " This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former postion. This position of law is provided in Harlsbury's Law of England Volume 42, 4th Edition at paragraph 242."

28. From the above decision in the Beatrice Muthio Nzioka case (Supra) and the contents of the Plaintiff's letter of 31st January, 1993, the conduct of the Defendant amounted to repudiation of the contract and therefore the Plaintiff was at liberty to rescind the agreement which restored the partis to their former position. The former position was that of lessor and lessee. I therefore find that the agreement was properly rescinded.

Did the Plaintiff extend the lease which expired on 31st July, 2000 in accordance with lease agreement.

29. By a letter dated 8th August, 2000, the Plaintiff wrote a letter extending the lease period by a further 10 years at a monthly rent of Kshs.100,000 payable yearly. The extension was contrary to clause 4 of the lease agreement which provided that it was the tenant who was to indicate its willingness to extend the lease 3 months to the expiry of the lease. The rent payable was to be mutually agreed failing which the same was to be determined by a single arbitrator appointed by the Chairman of the Institute of Chartered Surveyors. I therefore find that the lease was not extended in accordance with clause 4 of the lease.

What was the relationship between the parties after the expiration of the lease.

30. The lease having expired on 31st July, 2000 and the sale agreement having been rescinded on 31st January, 1993, the Defendant's occupancy became that of a month to month tenancy which was terminable by one month's notice. The tenancy was not terminated. The Defendant is still on the suit property as a tenant.

Is the Plaintiff entitled to the reliefs in the amended plaint

31. The Plaintiff is claiming rent at the rate of the Kshs.100,000/= per month until the Defendnat leaves the suit premises. As at the time of filing the plaint, the Pliantiff was claiming a sum of Kshs.6,700,000/=. The amount was calculated as from September, 2000. While dealing with issue number 3 hereinabove, I found that the extension of lease by the Plaintiff was not in accordance with the lease agreement. The Plaintiff cannot therefore unilaterally charge rent of Kshs.100,000/= per month.

32. The fact however remains that the Defendant has been on the suit premises without paying rent as from 1st August, 2000 to date. The issue of what rent ought to have been paid can neither be determined by this court nor based on the figure given by the Plaintiff. However it is possible that the same can be assessed by an expert in this case a valuer.

33. The Plaintiff also sought for a declaration that the suit property belongs to his father and for an eviction order to issue. The court having found that the sale agreement was rescinded lawfully, the property remains that of the Plaintiff's father and he is therefore entitled to an order of eviction.

34. The Plaintiff also prayed for an order directing the Defendant to discharge the suit property. The Defendant in its amended defence and counterclaim averred that it had discharged the property which had been charged to Kenya National Capital Corporation. Courts do not give orders in vain. As the Plaintiff did not adduce any evience on whether the property was charged at the time of testifying in court, no roder can be given as prayed.

Is the Defendant entitled to the reliefs in the counterclaim

35. The Defendant prayed for an order that it had acquired the suit property by way of prescriptive rights. The Defendant being a tenant in the suit property and the sale agreement having been rescinded cannot claim the property by adverse possession. I therefore find that the Defendant's counterclaim is misconceived.

Disposition

36. From the above analysis, it is clear that the Defendant has failed to prove its claim on a balance of probabilities. The same is dismissed with costs to the Plaintiff. On the other hand, I find that the Plaintiff has proved his claim on a balance of probabilities. I enter judgment for him against the Defendant in the following terms:

    1. An order for payment of rent payable montly with effect from 1st August, 2000 until the time when the rent due is asessed by a valuer to be nominated by the Chairman of the Chartered Institute of Surveyors of Kenya. A report to be filed in court within 30 days.

    2. An order of eviction do issue against the Defendant from LR No. Eldoret Municipality Block 7/111. The eviction to take efect within 30 days of the time of the filing of the valuation of rent report in court.

    3. The assessed rent shall attract interest at court rates from the date of filing of valuation until payment in full.

    4. The plaintifff is at liberty to apply to court.

    5. The Defendant shall pay the costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26TH DAY OF MARCH, 2025.

....

HON. E. O. OBAGA

JUDGE

In The Presence Of:

Mr. Nyachiro for Plaintiff.

Mr. Too for Mr. Mwangi for Defendant.

Court assistant - Steve Musyoki