



**El-Busaidy v Multi Investments Limited & another (Environment & Land Case 396 of 2017) [2023] KEELC 730 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 396 OF 2017**

**M SILA, J**

**FEBRUARY 15, 2023**

**BETWEEN**

**ABASS SOUD ALI EL-BUSAIDY ..... PLAINTIFF**

**AND**

**MULTI INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES, MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff's predecessors having granted a 99 year old lease in the year 1914; lease transferred to the 1<sup>st</sup> defendant in the year 1971; lease was to expire in the year 2013; in year 1995, 1<sup>st</sup> defendant procuring an extension for 99 years; plaintiff contending that this was done fraudulently as the trustee who held the title was deceased; evidence indicating the trustee was indeed deceased and could not be available to extend the lease; no document or explanation forthcoming from the defendants to show how the lease was extended; judgment entered for the plaintiff; purported extension of lease declared null and void)

1. This suit was commenced through a plaint filed on November 3, 2017. The property in dispute is LR No 91 section XX Mombasa (also registered as Mombasa/Block XX/91) (the suit property). The plaintiff is son of Soud Bin Ali Al Busaidi (deceased) and Mwana Jahi Binti Abass (also known as Jahi Shariff Taib) (deceased). Upon the death of Soud Bin Ali, the administrator of his estate, one Said Bin Saif (also now deceased), appointed the plaintiff's mother, Mwana Jahi (identified in some instruments as 'Mwana Jaha') as the trustee of the suit property to hold on behalf of the children of the deceased, being Aisha Binti Soud (now deceased), Shariffa Binti Soud (now deceased), Mohamed Bin Soud (now deceased) and the plaintiff, who were then minors. The trust was created vide HM's Court of Kenya, Probate & Administration Cause No 39 of 1949. Mwana Jahi remarried and subsequently died on 21 March 1979. Through a



court order dated September 1, 2016, the plaintiff took over the trust from Mwana Jahi. The trust established the Trustee to be the Head Lessor of the suit property. It is the pleading of the plaintiff that the defendant purchased the remainder of a 99 year lease which had commenced on 10 June 2014. The plaintiff contends that the defendants illegally extended the lease of the suit property from 18 July 1995, for another term of 99 years, without the consent of the trustee/head lessor. For the reasons aforesaid, the plaintiff now seeks the following orders :-

- 1) A declaration that the defendants' action of extending the lease for a period of 99 years without the trustee/head lessor's consent is illegal null and void.
  - 2) A declaration that the lease granted to the predecessor in the title of the 1<sup>st</sup> defendant in 1914 expired in 2013 by effluxion time and therefore the property reverts back to plaintiff.
  - 3) A cancellation of the 99 years extension of lease procured on the property by the defendants.
  - 4) A cancellation of leases/sub-lease procured by the defendant with third parties by dint of illegality.
  - 5) General damages for trespass.
  - 6) Costs of the suit.
  - 7) Interests on (5) and (6) above at the court's rates.
  - 8) Any other relief deemed appropriate.
2. In response to the plaintiff's claim the 1<sup>st</sup> defendant filed a statement of defence on June 24, 2020 where it denied all the allegations raised by the plaintiff against her and put the plaintiff to strict proof. She pleaded that the lease was extended for a further period of 99 years with effect from 18 July 1995 and a certificate of lease issued to her. She denied any attempts to divest the suit property from the trustees/head lessor.
3. The plaintiff testified as the sole witness. He was born in the year 1940 and he currently lives in England. He testified that his father, Soud Bin Ali, died in the year 1949. Seif Bin Said, the administrator of his father's estate, was his uncle. His mother was appointed trustee over the suit land as they (the children of the deceased) were minors. He referred to the title of the suit land and mentioned that the same was leased to one Reginald Edward D'Souza for 99 years from June 10, 1914. The lease was then transferred to the 1<sup>st</sup> defendant on 26 August 1971. His mother died on March 21, 1979. He was subsequently appointed the trustee (in the year 2016). He stated that his mother was not alive in the year 1995 so as to extend the lease held by the 1<sup>st</sup> defendant. He asserted that she was the only one who could extend the lease. Cross-examined, he stated that he has had no interaction with the 1<sup>st</sup> defendant and has never collected rent from them. He left for England in the year 1988 and came back in the year 2013. He then commenced investigations over the suit property and it was brought to his attention that the suit land was among the properties held by his late mother. He acknowledged that his mother gave consent to transfer the lease to the 1<sup>st</sup> defendant in the year 1971 which transfer he does not dispute. He stated that he knew a deceased director of the defendant, one Ram Gidoomal, who was murdered around the year 2004, and testified



that he was also known to his mother, so that if he had wanted an extension of lease he would have seen her. The problem he has is with the extension of lease in the year 1995, which in his view is fraudulent, as his mother was not alive then to extend it. All the while he did not know much about the property nor who was collecting rent.

4. Mr Prem Jethanand Gidoomal testified on behalf Bharati Suchita, the sole director of the 1<sup>st</sup> defendant, whom he revealed to be his niece. He stated that he had a power of Attorney donated to him by Bharati who lives in England. His evidence was that the 1<sup>st</sup> defendant's directors were initially Ramchand Gidoomal and his wife Jasota Ramchand Gidoomal. They were murdered in the year 2004 and the company was left in the hands of Bharati, their daughter. Since she resides in the UK, she requested him to help with running the affairs of the company. His duties include collecting rent from the tenants therein. On the allegations that the lease was illegally extended, he stated that to his knowledge, Mr Ramchand, who was his cousin, always dealt above board. As far as he was concerned, the 1<sup>st</sup> defendant holds good title to the suit property. In the year 1995, he (DW-1) had nothing to do with the company or the property. He only started getting involved in the year 2004 after his cousin and wife were murdered and Bharati was not available to manage the property. His role was to help Bharati in collection of the rent.
5. The 2<sup>nd</sup> defendant, the land registrar, Mombasa, did not file any defence nor offer any evidence.
6. Counsel were invited to file submissions and I have taken note of the submissions filed by Mr Bryant, learned counsel for the plaintiff, and Mr Kiarie Kariuki, learned counsel for the 1<sup>st</sup> defendant. No submissions were filed by the 2<sup>nd</sup> defendant's counsel.
7. I hold the following view.
8. In a nutshell, the case of the plaintiff is that what the 1<sup>st</sup> defendant acquired was the residue of a 99 year old lease which commenced in the year 1914 and therefore expired in the year 2013. The plaintiff's complaint is that somehow the 1<sup>st</sup> defendant purported to obtain an extension of the lease for a further period of 99 years from July 18, 1995. He avers that this was fraudulent as they were not involved at all as the owners of the land.
9. I have gone through the documentation. From the same, I have gathered that the suit land was owned by Sir Ali Bin Salim who held a freehold title. This is discernible from the register of the suit land which shows that the nature of title is 'absolute.' Sir Ali leased the suit land to Reginald Edward D'Souza for a term of 99 years commencing June 10, 2014. Sir Ali died, and the administrator of his estate transferred the suit land to Soud Bin Ali subject to the lease. Soud Bin Ali is the father of the plaintiff. He died on June 28, 1949. His estate was administered by Said Bin Seif who distributed his estate. The suit land was bequeathed to the children of Soud Bin Ali, being the plaintiff and three others who are now deceased. They were however minors at the time and the property was held in their trust by their mother Mwana Jaha Binti Abbas. Through a transfer of lease instrument dated August 3, 1971, the leasehold interest held by D'Souza was transferred to the 1<sup>st</sup> defendant. That transfer was consented to by Mwana Jaha and this is apparent from the instrument itself. What was transferred was the residue of the leasehold interest held by D'Souza and which would expire on June



10, 2013 unless validly extended. The 1<sup>st</sup> defendant of course asserts that she legally got an extension of lease in the year 1995 for a further 99 years.

10. I do not see how the 1<sup>st</sup> defendant can contend to have obtained a valid extension of lease. First, Mwana Jaha Binti, who was the trustee, died on 21 March 1979 and she was not there in the year 1995 to execute an extension of lease. Secondly, the 1<sup>st</sup> defendant has not provided any instrument of extension of the lease which was registered to demonstrate any extension of the lease. All we see is that from the blues, the register shows that the lease of the 1<sup>st</sup> defendant has been extended for 99 years with effect from 18 July 1995 at an annual rent of Kshs 6,400/=. In absence of any documentation to support this extension of lease, it cannot be said that the extension was valid or legal.
11. In the evidence provided by Mr Gidoomal, on behalf of the 1<sup>st</sup> defendant, all that he stated was that the dealings of Mr Ramchand, the now deceased director of the 1<sup>st</sup> defendant, were always above board. I am afraid that this is not good enough in the circumstances of this case as Mwana Jaha was deceased in the year 1995 and could not be present to execute any extension of lease. I have already pointed out that there is no document showing this extension of lease.
12. In his submissions, Mr Kiarie Kariuki, learned counsel for the 1<sup>st</sup> defendant, submitted that no particulars of fraud were pleaded in the plaint and none were proved. He provided a couple of authorities to press the point that fraud needs to be pleaded and that proof of it is beyond a balance of probabilities. It is true that the plaint did not particularize fraud, in form of a heading with particulars, but that is not the only acceptable way of pleading fraud. One can plead fraud within a paragraph in the plaint which is what was done in this case. This is clear in paragraph 13 of the plaint which is drawn as follows :-  
  
‘By virtue of the defendants’/and or their agents’ action of obtaining an extension of the Leasehold term of the property without the consent of the trustee/head Lessor, the said act amounts to fraud, illegality ill conceived action not known in law, logic and or common sense.’
13. One can discern the pleading relating to fraud and the particulars in this paragraph even if not itemized. The fraud is pointed out to be that the 1<sup>st</sup> defendant obtained an extension without the consent of the Trustee/Head Lessor. The 1<sup>st</sup> defendant has not demonstrated any consent of the trustee. The only conclusion one can reach is that the extension of lease was done fraudulently. Thus fraud was pleaded and proved.
14. From the foregoing, it will be seen that I find merit in the plaintiff’s case. I proceed to cancel the purported extension of lease purporting that the 1<sup>st</sup> defendant’s lease is extended for 99 years from July 18, 1995. With that, any subleases entered into by the 1<sup>st</sup> defendant that go beyond June 10, 2013 are nullified as the 1<sup>st</sup> defendant had no capacity to enter into them. The property will be held by the persons to whom the same was bequeathed, in the same shares, with the plaintiff as trustee. I therefore issue an order to the 1<sup>st</sup> defendant to give immediate possession of the suit property to the plaintiff.
15. In the suit, the plaintiff sought general damages for trespass. It would probably have served the plaintiff better to seek mesne profits but none was pleaded. I will however award the plaintiff Kshs 1,000,000/= (Kenya Shillings One Million) as general damages



for trespass against the 1<sup>st</sup> defendant the same to attract interest at court rates from the date of this judgment. The plaintiff will also have the costs of this suit.

16. I now issue the following final orders :-

That a declaration is hereby issued that the lease of the 1<sup>st</sup> defendant in the land parcel Subdivision No 91 section XX Mombasa, also registered as Mombasa/Block XX/91, expired on 10 June 2013.

- (b) That a declaration is hereby issued that the purported extension of lease, providing that the lease of the 1<sup>st</sup> defendant has been extended for a further term of 99 years from July 18, 1995, is illegal, null and void.
- (c) That a declaration is hereby issued that the property has reverted to the following persons in the following shares :-
  - (i) Mohamed Bin Soud (1/3<sup>rd</sup> share)
  - (ii) Abbas Bin Soud (1/3<sup>rd</sup> share)
  - (iii) Aisha Binti Soud (1/6<sup>th</sup> share); and
  - (iv) Shariffa Binti Soud (1/6<sup>th</sup> share).
- (d) That a declaration is hereby issued that the plaintiff holds the suit property in trust for the above beneficiaries.
- (e) That the purported Leasehold title held by the 1<sup>st</sup> defendant purporting that the 1<sup>st</sup> defendant holds a leasehold interest in the suit land for a period of 99 years from July 18, 1995 is hereby cancelled and all other subleases entered into by the 1<sup>st</sup> defendant for any period beyond June 10, 2013 are also cancelled.
- (f) That the land registrar, Mombasa, is hereby directed to cancel the entry in the register dated July 18, 1995, purporting that the lease of the 1<sup>st</sup> defendant is extended for a period of 99 years from 18 July 1995.
- (g) That the plaintiff is awarded general damages for trespass in the sum of Kshs 1,000,000/= against the 1<sup>st</sup> defendant the said amount to attract interest at court rates from the date of this judgment till payment in full.
- (h) That the 1<sup>st</sup> defendant is hereby ordered to give immediate possession of the suit property to the plaintiff.
- (i) That the 1<sup>st</sup> defendant shall pay the costs of this suit to the plaintiff.

17. Judgment accordingly.

**DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**MOMBASA**

