



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 258 OF 2008

JOHN KARIUKI MAINA.....PLAINTIFF

VERSUS

THE TOWN CLERK OF THE

MUNICIPAL COUNCIL OF THIKA.....DEFENDANT

JUDGMENT

In a Plaintiff dated 6th November 2007 the Plaintiff averred that he purchased a canteen on Site No. 86 B situate along Garissa Road off Kamenu Road within Thika Municipal Council from a licensee in 1997. Subsequently, that he paid the requisite charges to the Council when after the licensee processed the transfer. However, that on 14th July 2002, the Town Clerk, Deputy Town Clerk, Engineer and a Councilor known as Muthoni conspired and sold the plot to a Ms. Wamunyu who fenced the property. The Plaintiff averred that he approached the Town Clerk over the issue but that as at the time of filing suit, his efforts were in vain despite assurances by the Town Clerk that he would be allocated a different plot.

In support of his case, the Plaintiff annexed to his Plaintiff several documents including: a Sketch Map of the area; a Temporary Occupation License for a construction of a canteen dated 1st February 1995; copy of a License Renewal Receipt No. 245 dated 17th July 1997; Authorization and Receipt for Payment of Building Plan and Building Inspection Card; Sketch Map of the Deed Plan which the Plaintiff avers that he paid a total of Kshs. 10,350/- being drawing fees; Internal Memo within the Town Engineer's Department in respect to the Plaintiff's building plans. The Plaintiff also annexed a copy of a letter of complaint addressed to the Head of Civil Servants dated 26th July 2000 which was forwarded to the Ministry of Local Government for investigations and further action. Also annexed was a copy of Minutes of the Council's meeting of 23rd October 2003 wherein it was resolved that the Plaintiff would be given first priority for allocation in the future. The Plaintiff further annexed correspondence between him and the Council over allocation of another site to which the Council replied that his application was under consideration.

On the foregoing, the Plaintiff prayed for Judgment against the Defendant for orders that:

- a. Damages for the loss incurred from the date of purchase of the site in 1997 up to when the suit is finalized.
- b. Net profit of 15% per month derived from the purchase price of the site and the payments made

to Thika Municipal Council for renewal of license, building plan, inspection card, deed plan and other expenses.

c. Damages for loss incurred in the pursuit of the case.

Defence

A defence was filed on 2nd July 2008 wherein the Defendant denied the allegations stated in the Plaintiff. The Defendant further averred that the suit as framed is barred in law as well as statute barred. Alongside the Defence, the Defendant filed an application seeking orders that the suit be struck out with costs for being frivolous, vexatious and an abuse of the court process. This application was heard and a ruling delivered by this Court (Mbogholi – Msagha J.) on 14th June 2011 when the Court dismissed the application with costs.

Trial

When the matter came up for hearing, the Court directed that the matter would be determined based on the Witness Statement and Supporting Documents as filed by the parties. However, the Defendant failed to file Witness Statements despite being afforded an opportunity to do so. On the scheduled date for hearing, neither the Defendant nor its counsel attended court despite the date having been given by the court in the presence of the Defendant's counsel and thus, the hearing proceeded ex-parte. The Plaintiff relied on the supporting documents annexed to the Plaintiff, Witness Statement sworn on 23rd June 2008 and submissions dated 2nd March 2015 in support of his case.

In the submissions, the Plaintiff prayed that he be awarded Kshs. 450,000/- being the sum total of the purchase price for the Plot; payments for license renewal, transfer, Deed Plan, Building inspection card, preparation of the Deed Plan Map, beacons and transport. The Plaintiff further prayed that he be awarded 25% profit per month instead of the 15% prayed for in the Plaintiff. This percentage, the Plaintiff stated would be profit made from his business of selling wares. The Plaintiff also prayed for damages for loss incurred as well as the costs of the suit.

Determination

Import of Temporary Occupation License

Courts have established that a TOL is a permissive right to a licensee to occupy property but does not create an interest on the property itself that can be disposed of by the licensee. Courts have also held that such permission is personal.

Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) v J. B. Martin Glass Industries & 3 Others C.A. No. 130 of 2003

It is indeed settled law in Kenya that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in Runda Coffee Estate LTD. v Ujagar Singh [1966] E.A. 564

It is the essence of a license of this nature that is personal to the licensee and creates no interest which can be disposed of by the licensee.

Waki, J (now JA.) in the case of Omar & 8 Others v Murania & Another [2006] 1 KLR (E&L) 206 stated as follows:

The applicants do not deny that they are licensees of the Municipal Council on the plots they occupy and have constructed kiosks therein. The council has power under section 144(5) of the Local Government Act to grant something upon the immovable property of the grantor and does not amount to the creation of the interest in the property itself. It is permissive right and personal to the grantee and since the license has no interest or estate in the property such possession as he might have for enjoyment of the right is no judicial possession but only an occupation.

In the **Faraj Maharus Case and Runda Coffee Estate Case**, the grantee/licensees had died and their personal representatives were claiming that the properties were part of the estates. In the case of **Omar v Murania case** the issue was on the duration of notice issued to the licensee to vacate the premises.

On the foregoing, it is my view that the licensee had no authority to dispose of the site to the Plaintiff. Nevertheless, the Plaintiff did purchase the site and avers that he renewed the license. It is the Plaintiff's averment that before he could get the requisite approvals to develop the site, some officials of the Council transferred the plot to another owner. The Defendant did not put much of a response to the Plaintiff's claim but from perusal of a copy of the Minutes of the Town Planning & Works Committee held on 23rd October 2003, availed by the Plaintiff it was recorded that the site in dispute fell part of Kenyatta Primary School and the alternative site that was proposed was found to have the Council sewer line passing underneath. It was hence resolved that the Plaintiff will be given first priority. The Plaintiff also annexed a letter from the Municipal Council's Engineer's Department dated 22rd March 2000 in response to building plans of a Canteen lodged by the Plaintiff. The Engineer advised that the building plans were differed to await a sub-committee meeting that will discuss kiosks. The Plaintiff's letter to the Council dated 28th December 2005 requesting for allocation of space at Gatitu Bus Park was responded to on 3rd September 2006 wherein the Counsel stated that the said application would be considered after the relevant approvals of the Bus Park are granted by the Ministry of Local Government.

Section 165(1) of the Local Government Act (now repealed) gave a local authority powers to refuse to grant or renew licenses and to cancel licenses on any such grounds as it may, by by-law, specify and in addition upon any of the following grounds whether specified in such by-laws or not—

(a) with respect to any licence whether relating to a trade, business or occupation, or to premises or otherwise—

- i. that the premises in or at which the applicant intends to carry on his trade, business or occupation do not conform to the requirements of any by-laws in force in the area of such local authority, whether made under this Act or any other written law;**
- ii. that sufficient provision for the needs of the area of such local authority already exists;**
- iii. that the granting of such licence or the renewal hereof, as the case may be, would be contrary to the public interest;**

From the foregoing and coupled with the provisions of Section 165 of the Local Government Act (now repealed) it is my considered view that there was no mischief or malice on the part of the Council's officials as alleged by the Plaintiff. It is apparent that the proposed sites on which was available for allocation at the time were not proper for one reason or another. It is my finding that the Plaintiff has failed to establish that he was dispossessed of the suit plot. Consequently, it cannot be said that the Plaintiff has suffered loss as a result of the Defendant's action.

General Damages

The Plaintiff prayed for an award of loss and damage together with profit of 25% margin per month on

what he would be making had he be in business. From the Plaintiff's own admission, he never commenced business. There is therefore no basis upon which the court can award profit. The Court has also made a finding that the Defendant was not at fault in declining to officiate the Plaintiff's business pursuant to Section 165 of the then Local Government Act. The Plaintiff's claim on general damages fails.

Special Damages

The undoubted principle is that special damages must be pleaded and specifically proved. Undoubtedly, the Plaintiff made some payments to the Council and availed receipts as follows:

- i. License renewal Receipt dated 17/8/1998 – Kshs. 1,000
- ii. Plan Approval Fees & Inspection Card Receipt dated 12/10/1998 – Kshs. 350
- iii. Receipt for copies and printing dated 27/7/2000 – Kshs. 200
- iv. Receipt dated 10/8/2005 to obtain council minutes – Kshs. 500

The Plaintiff averred that he paid Kshs. 10,350/- to have the sketch map of the deed plan drawn but did not avail a receipt to prove this expenditure. He is entitled to Kshs. 2,050 that he has proved.

I consequently enter judgment for the Plaintiff in the sum of Kshs. 2,050/= together with interest thereon at court rates from the date of filing suit until full payment. The rest of the Plaintiff's claim is dismissed.

Orders accordingly.

Dated, signed and delivered at Nairobi this 23rd day of April, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent

