



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 199 of 2007

RESTVILLA LIMITEDPLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTDDEFENDANT

RULING

The application filed in this court under certificate of urgency on 9th July 2007 sought the following orders; namely;

2. an order of injunction do issue to restrain the defendant by itself, its agents and/or servants from further disturbing or interfering with the plaintiff's quiet and peaceful occupation and possession of L.R. No. Nairobi/Block 37/167 and Nairobi/Block 37/168 pending inter-parties hearing.

3. That a mandatory order do issue against the defendant to forthwith vacate L.R. No. Nairobi Block 37/167 and Nairobi/Block 37/168 and deliver possession thereof to the plaintiff pending hearing inter-parties.

4. An order of injunction be issued to restrain the defendant by itself, its agents and/or servants from further disturbing or interfering with the plaintiff's quiet and peaceful occupation and possession of L.R. No. Nairobi/Block 37/167 and L.R. No. Nairobi/Block 37/168 pending the hearing and determination of the suit.

5. A mandatory order do issue against the defendant, to forthwith vacate L.R. No. Nairobi Block 37/167 and Nairobi/Block 37/168 and deliver possession thereof to the plaintiff pending hearing and determination of the suit.

6. That the defence do pay costs.

This application is based on the supporting affidavit, the grounds on the face of the application and further arguments to be adduced at the hearing.

The grounds argued are that the plaintiff purchased ***L.R. Nairobi/Block 37/167*** and ***L.R. Nairobi/Block 37/168*** in good faith and without notice of any defect in any title. The plaintiff took

possession after the purchase.

That on Friday 6th July 2007, the defendant invaded the plaintiff's said two parcels, without notice, and demolished its walls, some of its buildings and took away its goods, without giving notice to the plaintiff.

3. That the defendant did not care that the plaintiff had title to the properties for value, in good faith and without any notice.

4. That to date the defendant has not shown any order to evict the plaintiff it could be holding;

5. That the defendant is a state corporation and its actions are:-

I. unlawful, illegal, callous, made in bad faith and an affront to the rule of law.

II. Without colour of right most particularly in the absence of an order to evict the plaintiff. It is now trite law that a party cannot be evicted without an eviction order and notice, duly issued to the party to be evicted obtained from a competent authority. The need for a Court order as a basis for eviction is without exception, and all including private individuals, State Corporations and the State itself, must get it prior to any eviction.

III. An unconstitutional deprivation of private property without compensation.

IV. An aggravated act of trespass.

6. That the Commissioner of Lands, Chief Land Registrar and the Nairobi City Council were involved and gave approvals throughout the course of the conveyance of the parcels to the plaintiff for valuable consideration and did not demur the conveyance, and further received such fees and payments as are ordinarily due, in acquiescence to the plaintiff's bonafide acquisitions of the titles.

7. That the plaintiff's registered rights make it bonafide registered proprietor of the parcels and its titles are conclusive evidence that it is the proprietor, absolutely and indefeasibly, subject to lawful encumbrance's easements, and restrictions. The defendant's invasion is not pursuant to any encumbrances and/or easement and/or restriction as the plaintiff may have had notice of, as from either the Commissioner of Lands, and/or Chief Land Registrar and/or Nairobi City Council.

There was a supporting affidavit deposed to by one **George Atetwe**, Legal Assistant to the plaintiff/applicant. In this affidavit **Atetwe** said that the plaintiff is a duly incorporated company. That it purchased the two parcels in dispute for good value without any notice of defect in their title.

That the properties originally belonged to Njima Investments Limited. Copies of title deed and search reports for the two plots were annexed to the affidavit.

That throughout the course of transfer the Commissioner of Lands and the Registrar of Titles and Nairobi City Council were involved and raised no demur, made no indication that there were any limitations or challenge or contest to the titles the plaintiff was purchasing.

According to the affidavit, on 6th July 2007 the defendant invaded the plaintiff's premises with no prior notice and showed the plaintiff's employees an order given on 5th July 2007 and started demolishing and damaging everything belonging to the plaintiff with the help of Expeditions General Merchants Auctioneers.

That by 5.00 p.m. the defendant had demolished the plaintiff's perimeter wall, pulled down some of its buildings, taken away its assets including furniture, files, inventories, machinery and office facilities and parked its cars in the plaintiff's parcels.

That the said demolitions, damages and occupation:

- (i) Were not preceded by notice to the plaintiff;**
- (ii) Targeted the eviction of Njilux Motors, not the plaintiff or its predecessors registered owner Njima Investments Limited.**
- (iii) Did not refer to any land parcel.**
- (iv) Was given on 5th February 2007 and no explanation was given for the delay of its use since February 2007 to 6th July 2007.**

According to the affidavit, by 3.30 p.m. the plaintiff had obtained an objection order under **Order XXI Rule 53** but that the defendant disregarded it and continued with damaging and carrying away the plaintiff's goods and assets.

That in view of the occupation there has arisen the need for mandatory orders of eviction and damages hence the lodging of this suit as objection proceedings are inadequate to redress the plaintiff.

That the deponent spoke to one of the directors of the previous owner of the parcels (**L.R. Nairobi/Block 37/167** and **L.R. Nairobi/Block 37/168**) and he confirmed to him that:

- (i) The previous owners of the parcels Njima Investments Limited had never been sued as to their title,**
- (ii) The defendant had earlier on attempted to effect eviction and the same was restrained by an order made by Court in H.C.C.C. No. 1047 of 2000.**
- (iii) Njilux Motors Limited has never ever owned the parcels and were mere tenants sometime ago, of the said parcels.**

That the defendant, when invading and trespassing onto the plaintiff's parcels did not care that the plaintiff had title to the properties for value, in good faith and without notice.

That up to the time of swearing the affidavit the defendant had not shown an order – it could be holding to evict the plaintiff that the defendant a State Corporation and its actions were:

- (i) unlawful, illegal callous made in bad faith and an affront to the rule of law;**
- (ii) Acts of trespass.**

(iii) Without colour of right, most particularly in the absence of an order to evict the plaintiff. That an advice from the plaintiff's advocates on record which he verily believes to be correct, it is now trite law that a party cannot be evicted without an eviction order and notice duly issued to the party to be evicted obtained from a competent authority. The need for a court order as a basis for eviction is without exception and, including private individuals, State Corporations and the State itself must get it prior to any eviction.

(iv) An unconstitutional deprivation of private property without compensation.

That the Commissioner of Lands, Chief Land Registrar and the Nairobi City Council were involved and gave approvals throughout the course of the conveyance of the parcels to the plaintiff for valuable consideration and did not demur the conveyance and further received such fees and payments as are ordinarily due; in acquiescence to the plaintiffs bonafide acquisition of the titles, that the plaintiff has registered rights and that on advice from his advocate which he believes to be correct the said registered status makes the plaintiff the bonafide registered proprietor of the parcels and its titles are conclusive evidence that it is the proprietor absolutely and indefeasibly subject to lawful encumbrances, casements and restrictions. The defendant's invasion is not in pursuance to any encumbrances and/or easement and/or restriction as the plaintiff may have had notice of as from either the Commissioner of Lands and/or the Chief Land Registrar and/or Nairobi City Council.

That unless restrained, the plaintiff (He must have meant the defendant) may proceed with the demolition, damage and eviction to the applicant's irreparable injury, loss and damage to the plaintiff.

The deponent annexed to the affidavit the correspondence obtained from Njima Investments Limited, **Hon. P. Njurwa**, a director of the predecessor of the plaintiff to title in further establishment of the plaintiff's bona fide acquisition.

Beatrice Muendo, Chief Legal Adviser of the defendant filed a replying affidavit to the plaintiff's application on 18th July 2007.

In her said affidavit she deponed that an annexure G1 to the supporting affidavit proves that it was not legally and factually possible to the plaintiff to purchase **L.R. Nairobi/Block 37/168** as alleged unless of cause fraudulently.

That she was conversant of the matters pertaining to and surrounding the suit property and stated that the defendant was the proprietor of **L.R. No. 209/1159 Nairobi** having been registered as proprietor of the same on 20th January 1993. That the plaintiff by exhibiting the ruling in **Civil Case No. 1047/2000** delivered by **Ransley J.** on 25th November 2005 as annexure **G-8** cannot plead that it is a bonafide purchaser for value without notice as the ruling itself shows that the subject property was a subject of dispute as shown in exhibit **BM2**; then she lists the documents listed in **BM2**.

That the above notwithstanding, the defendant did also place an advertisement in the Nation and Standard newspapers clearly spelling out to the whole world its rights over the subject property; she listed it in annexure **BM3** to the replying affidavit.

According to her affidavit, the defendant did not in taking possession of the subject property take away any furniture, files inventories, machinery or office cars as alleged as there was no activity in the subject property at all when the defendant obtained possession at 10.00 a.m.

That looking at exhibit **G-8(iii)** it is quite clear that the plaintiff's alleged predecessor in title was

dealing with the said property against the rule and doctrine of *Lis pendens* and the plaintiff cannot again claim that it had no knowledge of the dispute involving the suit property before the alleged purchase by the plaintiff.

That exhibit **G-9(iv)** clearly again shows that the alleged lease document for the plaintiff forwarded for registration to the Chief Land Registrar by the Deputy Town Clerk, legal, was clearly done in contravention of the doctrine of his predecessor as City Council and Njima Investments Limited were parties to **Civil Suit No. 1047 of 2000** which dealt with the proprietorship issues of the subject property and which suit was still alive as at the time of the preparation and registration of the alleged leases.

The deponent to the replying affidavit averred that the registration of the lease were therefore done in contravention of the law to the knowledge of the Commissioner of Lands, the Chief Land Registrar, Njima Investments Limited and the plaintiff. That the Chief Land Registrar perpetrated fraud in the alleged conversion of the defendant's property from the Registration of Titles Act in conjunction with the Deputy Town Clerk, Legal; and that she was aware that the Chief Land Registrar had been sacked for fraudulent activities at the Lands Office.

That the defendant did, through M/s Expeditions General Merchants and the Court order of 5th February 2007 obtain possession of the said property on 6th February 2007 at 10.00 a.m.

That the defendant is not aware that in enforcing the Court order of the 14th June 2000 by an authorized agent of the Honourable Court there was requirement of the notice alleged in paragraph 7 of the affidavit.

That in further answer to paragraph 7 of the said affidavit the defendant/respondent refers to the contents of paragraphs 5 and 8 of the supporting affidavit.

That the contents of paragraph 8 of the said affidavit are incorrect. The objection order was served upon the defendant's advocates on 6th July 2007 at about 5.15 p.m. and that the defendant got to know about it on the 9th July 2007 at about 9.00 a.m.

That in any event the said order of objection was not and has never been served upon the defendant herein to-date.

According to the deponent the objection proceedings were a nullity in any event and the defendant has applied for the setting aside of the same.

That the contents of paragraph 9 of the supporting affidavit are completely false and that the defendant was taking possession of its property and did not find anybody on site alleging ownership of the same in whatever capacity and that by the time the plaintiff's representative showed up at the defendant's offices on 11th July 2007 to serve a Court order, the said **Mr. Peter Murigi Njiwa** had shown up earlier on over the subject property saying that it was his.

That the defendant was in possession of the property with the full authority of the law and that if the plaintiff had any titles in its possession in competing capacity with the defendant registered proprietary then the plaintiff should seek redress from the party who sold to it "**the said titels**".

That exhibit **G-9(i)** was the subject of Judicial Review Application in **Miscellaneous Civil Application Number 605 of 2006**. That the matters raised therein were therefore moot.

The deponent avers that this application is misconceived, an abuse of the Court process and fails to comply with the mandatory procedural law and that the plaintiff has failed to establish a clear cut and obvious case to warrant the grant of the orders sought in terms of mandatory injunction.

That the application has failed to establish basic principles required for the grant of interlocutory orders and that in the circumstances the application should be dismissed with costs.

In Court on 26th September 2007 and 12th October 2007 counsel of the parties appeared to either propose or oppose the application. Counsel for the applicant, **Mr. Katwa**, argued that after the applicant purchased the suit plots from Njima Investments Limited it immediately took possession thereof and how, on 6th July 2007, the defendant came round demanding the same, breaking down the perimeter wall and carrying away furniture on the basis of an order made *ex parte* on 5th February 2007 in **High Court Civil Case No. 1887 of 1994** against Njilux Motors Limited.

According to counsel's submissions, the order did not indicate the parcel number upon which eviction was to be effected.

It was not addressed to the plaintiff/applicant or to its predecessor, Njima Investments Limited and this is why the applicant, came to Court with this application for an injunction order.

Counsel sought confirmation of the interim orders granted by the Court on 10th July 2007 and agreed upon by counsel for the parties on 12th July 2007.

Counsel submitted that there was no order given to the defendant to evict the plaintiff from the suit properties and that in any case no person can be evicted from his land unless he/she (and I add "*it*") has been given an opportunity to be heard; even if such occupation is improper or the titles acquired improperly.

Counsel submitted that neither the plaintiff or its predecessor in title were sued for the purpose of obtaining injunctive orders.

According to counsel, Njilux Motors who were sued in **High Court Civil Case No. 1887 of 1994** and which resulted in the eviction order of 5th February 2007 had never been the owners of the suit plots, hence those eviction orders had nothing to do with these plots.

Counsel also cited **High Court Civil Case No. 1047/2000** in which **Honourable Justice Ransley**, as he then was, restrained the defendant herein from evicting the plaintiff's predecessor in title, Njima Investments Limited because it could not do so using the order made in **HCCC No. 1887/94** which was directed at evicting Njilux Motors Limited; and that that order did not bind a party who was not involved in the case.

Counsel stated that the plaintiff claim the rights of registered proprietor of the suit plots under **section 27** of the Registered Land Act while the rights the defendant purports to exercise are not provided for under **sections 27 to 31** of that Act.

According to counsel, after obtaining the order of injunction the plaintiff has remained on the plots though some of its goods are still with the defendant and that though part of the perimeter wall had been demolished, because of the order of status quo this wall has remained in that condition.

Mr. Okeyo opposed the application on behalf of the defendant and relied on the replying affidavit

sworn by **Beatrice Muendo**, the legal officer of the defendant.

According to counsel, the plaintiff had not satisfied the conditions required for the grant of the order sought. He said further that the defendant was registered as proprietor of the suit plots on 20th January 1993 when at the time it was **L.R. 209/11590**.

Counsel submitted that this is the same plot as **L.R. No. Nairobi/Block/37/164** which the plaintiff claims was subdivided into two to give rise to **L.R. Nairobi/Block 37/167** and **168**.

According to counsel the plaintiff has concealed a very material fact from this Court because the suit property they are dealing with is also known as **L. R. No. 209/11590** which title is registered under the Registration of Titles Act (Cap. 281).

Counsel stated that there were two competing titles on the suit plots; one issued to the defendant in 1993 and the other to the plaintiffs fourteen (14) years later.

According to counsel the dispute is complex with chequered history and cannot be handled by way of interlocutory mandatory injunction.

That this dispute has been the subject of many cases. That a decision in **Civil Appeal No. 206 of 1998** made on 31st March 2000 was before the plaintiff allegedly obtained registration of the suit parcels; and that since City Council of Nairobi was party to this suit, hence its leasing the same parcels to the plaintiff was null and void because it was done in breach of the Court order.

That the documents exhibited by the plaintiff to prove the ownership of the suit plots are such that by their own examination cannot confer proprietorship to the plaintiff.

That according to one of the annexures – **G.1**, the plaintiff was incorporated on 3rd July 2006 while the certificate of lease for **L.R. No. Nairobi/Block 37/168** was granted to it on 30th July 2005 – which was ten (10) months before the plaintiff acquired the capacity to own property as it was then not incorporated. That this anomaly is not curable by annexure **GA1** annexed to the supplementary affidavit sworn by **George Atetwe**.

According to counsel, the plaintiff could not have been registered as the proprietor of the suit property before it came into being as a legal personality.

That as regards **L.R. No. Nairobi/Block 37/167**, Intoil Limited is the one described as the proprietor, not the plaintiff; hence the plaintiff has no proprietary right or interest in this plot either.

That even in the letter from Nairobi City Council to the Chief Land Registrar dated 21st September 2005, the said Council encloses a lease of **L.R. No. Nairobi/Block 37/167** which it says has been given to Intoil Limited and not the plaintiff.

According to counsel, the decision in **HCCC No. 605 of 2006** delivered on 11th June 2006 shows that the title for the original title held by the defendant is indefeasible, and that this is the plot later subdivided into **L.R. No. Nairobi/Block 37/167** and **168** against the Court decree.

On the other hand counsel states that the purported registration of the plaintiff as the proprietor of the suit plots was against the express doctrine of *Lis pendens* because though the plaintiff said it obtained the title from a company called Njima, annexure **G8** shows both Njima and the plaintiff were aware of the

existence of ***HCCC No. 1047 of 2000*** because Njima Investments was the plaintiff in the case and the defendant herein the defendant in that case; which was withdrawn by Njima on 22nd November 2006.

That Nairobi City Council was also the defendant in that case, hence the plaintiff's herein could not have obtained a good title to the suit plots given the above doctrine.

That the order which granted the defendant the right to evict the plaintiff from the suit plots described the property involved and that the plaintiff and the predecessor in title were bound since the execution of the order of 14th February 2000 had been changed as modified to cover them.

That the Court order was valid and was executed with its authority.

According to Counsel, the restraining order was served on the auctioneer on 9th July 2007 when the defendant had already taken possession of the suit plots on 6th July 2007 and therefore that the defendant did not disobey any Court Order.

Counsel said there was no evidence that the defendant had carried away the plaintiff's goods or what type these were. According to him the property was vacant at the time the defendant took possession thereof and this is why the plaintiff has no claim for the return of the valuables.

Counsel said that damages will be an adequate remedy if the plaintiff's eventually win the case since they can quantify the claim if they purchased the property.

He submitted that a balance of convenience tilts in favour of the defendant because it has the first title in time which has been tested by the court and found to be the only title held by it.

And that since the defendant's title had been given almost fifteen (15) years before that of the plaintiff, for a public utility and approved by the President of the Republic of Kenya, unlike the case with the plaintiff's title, it should be upheld as against that of the plaintiff's whose application for mandatory and interlocutory injunction should be dismissed.

According to counsel, the plaintiff had failed to prove that it is entitled to the prayers sought in the application dated 9th July 2007 or that the suit filed herein on the same date has any chances of success.

In reply counsel for the plaintiff said that the plaintiff was a third party who purchased the plots for value without notice. That during the transaction no notice was given to the plaintiffs that there were some conditions to be met or satisfied.

That even if the plaintiff were trespassers, they were entitled to the protection of the law and defendant should have sought a Court order to evict them.

According to him, the matter as well as the role of officials charged with allocating land were complex and hence the defendant should not have attempted to evict the plaintiff until these complications were resolved through a full trial.

That whether someone can use an order addressed to some party to evict another is a triable issue. And also another triable issue is whether the suit plots are governed by the Registration of Titles Act.

That a Court order is needed to spell out responsibilities of the Commissioner of Lands, Registrar of Titles and Nairobi City Council, in particular the issuance of titles under different Acts to two different

persons.

Those are the submissions by both parties which I should consider and make a decision on.

This matter has been a subject of various Court decisions under different suits.

Originally the whole parcel of land so far as I can see was known as **L.R. No. 209/6559 Nairobi**. Nairobi City Council was granted a ninety-nine (99) year lease over this land by the Government of Kenya from 1st September 1932.

It would appear from the records on this file that a portion of this plot which falls on the corner of Forest and Limuru roads was allocated to a firm known as Njilux Motors on 20th May 1992 under a temporary occupational certificate terminable by one month's notice on either side. The user for the plot was for parking new and used motor vehicles.

It would also appear from the records that by 1992 this portion of the land had been surveyed and excised from the main land **L.R. 209/6559** and given its own number **209/11590**, previously **L.R. No. 209/6559(B)**. A lease for this portion was given to a firm known as Njima Investment for the residue of the council's lease on 13th August 1992. The user approved for this lease was commercial-cum Residential.

From submissions advanced herein it is this plot which was sold to the plaintiff, Rest Villa Limited as **L.R. No. Nairobi/Block 37/167 and 168** by Njima Investments Limited. The plaintiff was issued titles for these plots on 30th September 2005 and 27th September 2006. It is not clear from the record who subdivided the plot **L.R. 209/11590** into two plots and when.

In the meantime, the Government of Kenya had, on 20th January 1993, granted unto Kenya Power & Lighting Company (KPLC) a ninety-nine (99) year lease in respect of **L.R. No. 209/11590** and issued it with the relevant title (grant) under the Registration of Titles Act (RTA) Chapter 281 Laws of Kenya.

This is the plot the plaintiff alleges the defendant and a firm of auctioneers known as Messrs Expeditions General Merchants invaded without Court order to evict the former there from on 6th July 2007 in the morning.

That in fact the order shown to the plaintiff and issued on 5th July 2007 by the Court targeted the eviction of Njilux Motors and not the plaintiff from the suit premises. If this is the true position, then can a party not before the Court be bound by the orders made therein.

Hon. Justice A.B. Shah (as he was then) had this to say in a similar situation in the case of **The Town Council of Olkalau v. Ng'ang'a General Hardware C.A. No. 269 of 1997** at page 10:

“There is a factor which was not considered by the learned Judge. His order affects several parties who were not before the Court nor were they given an opportunity of showing cause why they should not vacate the suit premises (property). The common law principle of audi alteram partem is of a fundamental importance. Parties not before the Court may not be bound by orders which may affect them.”

This principle was upheld and followed in the case of **Njima Investments Limited v. Nairobi City Council & 3 Others, High Court Civil Case No. 1047 of 2000.**

When the applicant in this application brought to the notice of the respondent, lack of an eviction order from a competent authority and followed this with a submission to this effect on the hearing of the same in this Court, it was incumbent upon the respondent to annex such order or copy thereof to the replying affidavit which was not done. Nor was such copy produced before the Court during the submissions on the application.

Apparently the plaintiff has titles for the two plots **L.R. No. Nairobi/Block 37/167** and **168** which are subdivisions of **L.R. NO.209/11590** (the suit land) over which the defendant has also a title raising the issue of competing interests by the two parties in the plots. Nairobi City Council which allocated the two plots to the plaintiff's predecessor, and the Commissioner of Lands. Which also allocated the plot **L.R. 209/11590** to the defendant are not parties to this suit, and without their participation as parties this case may not be conclusively resolved.

Even if the plaintiff had only fenced off the plots, this amounts to constructive possession and the defendant should not have attempted to evict it there from by taking the law in its own hands.

In view of the forgoing and on a balance of convenience, **I grant this application** dated 9th July 2007 and make an order it terms of prayer 4 of that application.

But since, to my mind, the parties may not be to blame for this confusion, each party should bear its own costs of the application.

Dated and delivered at Nairobi this 28th day of February 2008

D. K. S. AGANYANYA

JUDGE OF APPEAL



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