



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 971 of 2003 ,Civil Suit 2450 of 95 & 1432 of 97

MICHAEL HAMISI MWAYAYA WABUNGO PLAINTIFF

VERSUS

BIARUSI LIMITED DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT NO.2450 OF 1995

- 1. MICHAEL H.M. WABUNGO 1ST PLAINTIFF**
- 2. NATIONAL BANK OF KENYA LIMITED 2ND PLAINTIFF**

VERSUS

- 1. COMMISSIONER OF LANDS AND**
- 2. KISO ENTERPRISES LIMITED DEFENDANTS**

AND

AS CONSOLIDATED WITH

CIVIL SUIT NO.1432 OF 1997

- 1. MICHAEL H.M. WABUNGO 1ST PLAINTIFF**
- 2. NATIONAL BANK OF KENYA 2ND PLAINTIFF**

VERSUS

- 1. COMMISSIONER OF LANDS AND**
- 2. KISO ENTERPRISES LIMITED DEFENDANT**

AND

AS CONSOLIDATED WITH

CIVIL SUIT NO.1432 OF 1997

1. MICHAEL H.M. WABUNGO 1ST PLAINTIFF

2. NATIONAL BANK OF KENYA 2ND PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL DEFENDANT

JUDGMENT

I: Procedure

1. For ease of reference in the three consolidated suit before me, the parties and their representation were referred to during the trial and subsequently in this judgment as follows:-

Michael Hamisi Mwayaya Wabungo Plaintiff No.1

Advocate M/s Kyalo & Associates

National Bank of Kenya Ltd Plaintiff No.2.

Advocate M/s Rachuonyo & Rachuonyo

Co. Advocates.

Versus

Commissioner of Lands

Advocate: The Attorney General

Biarusi Ltd Defendant No.2

Advocate M/s Harith Seth & Co. Advocates

Kiso Enterprises Ltd Defendant No.3

(No appearance)

City Council of Nairobi Interested Party

Suit in Hccc1432/97

Determined and stayed pending finalization of suits above.

2. By application of 1 March 2004 the suits were consolidated 10.11.04 by Ojwang J and referred to this court for hearing.

II: Background Facts

3. The case before me concerns land and its ownership.

M/s Kishore Lalsahni and

Raghubir Singh Sain

were allocated land parcel Nairobi block 91/192 and were issued a lease under the Registered Land Act Cap.300 for a period of 99 years on the 1st August 1978.

4. The total area of land according to the lease was 0.6713 and the lease was issued on the 30 November 1989. It was registered on the 18 December 1989.

5. From the evidence before the court the two original joint registered owners were initially issued with 0.4225 ha of an

unsurveyed area in Gigiri Nairobi. When the survey was actually undertaken the actual area was 0.6713 ha. The Commissioner of Lands wrote to the registered owners on 21 November 1989 and notified them of this fact. That their parcel of land now increased in by 0.2488 ha.

6. The Commissioner of Lands then demanded an additional increase of payment in “stand premium” from Ksh.9,600/- to Ksh.16,600/- a difference of Ksh.7000/-.

And an increase in annual rent from Ksh.1920/- to 3,320/- a difference of Ksh.1,400/-. A further stamp duty of Ksh.580/- was demanded.

7. On the August 1993 the registered owners sold the whole parcel of land to Michael Hamisi Mwayaya Wabungo the plaintiff No.1 herein. A transfer was effected and a certificate of lease was issued to the plaintiff No.1 on the 3 August 1993.

8. Plaintiff No.1 was a former bank employee. He was able to take a loan for a purchase of the land and thereafter a second loan for the construction of his property.

9. The bank in question is the National Bank of Kenya the Plaintiff No.2 herein.

10. The plaintiff No.1 constructed a perimeter wall. The City Council of Nairobi stopped this construction on the grounds that the plaintiff had not obtained any permission to so construct. They proceeded to restrain the plaintiff No.1 from further construction. They also alleged he had obtained no building plans. The plaintiff No.1 and 2 filed Hccc1432/07 case in the High Court of Kenya at Nairobi. This case was heard and finalized by this court but was stayed when it was disclosed there was a another pending case for determination. The court had recommended that the cases be consolidated.

11. The problems arose when the Commissioner of Lands allocated to M/s Kiso Enterprises Ltd, Defendant No.3 herein, a Riparian reserve that is adjacent to the plaintiffs 1 and other land running along the river. The area described as unsurveyed residential plots A,B,C,D,E,F,G,H,I. Defendant No.3 was allocated No. E,F,G,H,J. The plot adjacent to the plaintiff land LR Nairobi Block 91/192 is either “G” or “H”. What was shown to court was “H” that was an area of 0.200 ha.

12. The plaintiff filed suit against the Commissioner of Lands and M/s Kiso Enterprises Ltd challenging this allocation (Hccc2450/95). It is thereafter that the City Council Case Hccc1432/97 was filed and stayed by this court.

13. Whist the suit against the third defendant was pending, the third defendant sold the parcel of land allocated to them to

M/s Biarusi Ltd, the Defendant No.2 herein. The defendant No.2 was issued with a lease of 99 years under the Reregistered Lands Act Cap.300 Nairobi/Block 91/339 with effect from 1 September 1993. The area allocated was 0.1865 ha. The registration of this lease was on 2 August 1994.

14. The effect of this allocation is that the charge the plaintiff No.2 had over the plaintiff No. 1's property had decreased in value. The security held by the bank was no longer the acreage of 0.6713 ha as stated in the title on the ground but less.

15. Both plaintiff No.1 and 2 questioned this allocation as being irregular.

16. The issue arises as to whether the Commissioner of Lands had the mandate to allocate this lands?

II: Trial

17. The Attorney General for defendant No.1 called no evidence. The defence filed stated that the allocation of 0.6713 ha was done in error by the Commissioner of lands. The portion allocated should have been much less. The land therefore does not belong to the plaintiff. In any event, argued the state counsel, no injunction can issue against the Government of Kenya.

18. Defendant No.2 stated that they hold title to plot E,F,G,H now portion of Land parcel in dispute being Nairobi Block 91/339. This is the first registration title. It is therefore a title that is indivisible under section 27,28 and 143 of the registered Lands Act. The plaintiff 1 and 2 should actually sue Defendant No.1, the Commissioner of Lands who issued the title deed. That this suit be dismissed.

III: Agreed Issues.

19 The agreed issues are determined as follows:-

19.1. The Commissioner of Lands did issue a letter of

allotment of Government land to M/s Kiso Enterprises Limited to an unspecified and unsurveyed plot in Gigiri area Nairobi. This was situated in the riparian reserve and included land that was already surveyed and adjacent to plaintiff No.1's property. The said allocation to M/s Kiso Enterprise Ltd now title No. Nairobi block 91/339 that arose from that allocation was **NOT** available for allotment. The Commissioner of Land is only entitled to allocate land that has not been committed and or allotted and lease title issued. It therefore means that the subsequent allocation and title Block 91/339 was issued whilst another title was in place concerning the same area without there being acquisition or a revocation of the former title.

19.2. This therefore means that the issuance of the subsequent title interfered with the interest of the plaintiff No.1 and 2 that they had in Land Parcel Nairobi/Block 91/192.

19.3. Title therefore that passed to Biarusi Ltd in respect of Block/91/339 was so passed by M/s Kiso Enterprises Ltd Defendant No.3. Defendant No.3 had a pending suit against it. In the pendency of the suit, the said Defendant No.3 sold the property to Defendant No.2 knowingly that there had arisen a dispute to the said parcel of land. Defendant No.2 did so at its own peril.

20. In the case law of:

Embakasi Properties

V

Safe Cargo Ltd & Others

Hccc411/03, Ang'awa J

The Commissioner of Lands had issued title to the plaintiff in the Embakasi area of Nairobi. The Commissioner of lands went and sub-divided the same piece of land and allocated it to third parties who

in effect constructed a go down and rented the same out.

This court held that the plaintiff held an indivisible title. That the Commissioner of Lands had no mandate to allocate land that was already allocated and title issued.

21. I would accordingly hold that the plaintiff's title being the correct registration and duly issued by the Commissioner of Lands cannot be interfered with nor be allocated to third parties.

22. There was no mistake by the Commissioner of Lands in increasing the acreage. The Environmental Law requires that riparian areas of a river should not be built on but left as a green area. The letter to the original registered owner of 29 November 89 clearly confirms as such that the Commissioner of Lands did indeed issue the said additional acreage and a total of 0.6713 ha is the full entitlement to the plaintiff.

II: Finding

23. I hereby enter judgment in favour of the plaintiff against the defendant and find that the plaintiff is entitled to the suit premises at 0.6713 ha. The title Nairobi Block 91/339 is accordingly revoked.

24. As to the issues of damages, the Commissioner of Lands issued title to the Defendant No.3 and later defendant No.2 knowingly that the land was not available for alienation. I would accordingly find that M/s Biarusi Ltd are entitled to damages from the Commissioner of Lands and Defendant No.2. I would, on revoking their grant Nairobi Block 91/339 award them damages of Ksh.1.3 million. I base this from the value of land on 20 March 96 for the whole portion of land being about 5 million.

25. I further order that any construction upon the said land Nairobi Block 91/339 by defendant 3 or 2 be demolished at their costs within 90 days. Failure to, the plaintiff is to demolish the same at the defendant No. 3 and Defendant No. 2's costs. The road must accordingly be closed.

26. The other issues I require to address is that of the City Council of Nairobi. Their case was finalized after trial. The principle is that for a perimeter wall to be erected and or for a residential house to be erected, there must be permission and approval from the City Council of Nairobi. If no approval is there, a notice to bring down the wall is given failure to, demolition occurs.

27. I would hold that permission must be obtained from the City Council and compliance with the said by laws required to be made.

28 The orders of restraining the City Council is hereby lifted.

29. In summary

29.1 Judgment be and is hereby entered in favour of the plaintiff against the defendants.

29.2 That LR 91/192 Gigiri measuring 0.6713 ha belongs absolutely, subject to plaintiffs' No. 2's interest to Plaintiff No.1.

29.3 That the allocation to Kiso Enterprise by the Commissioner of Land is illegal null and void and is accordingly of no effect.

29.4 That the title issued to M/s Barusi Ltd on LR Nairobi Block 91/339 is null and void and accordingly revoked.

29.5 That M/s Barusi Ltd are to remove and or demolish any structure that is upon land parcel LR Nairobi Block/91/192 (Nairobi Block 91/339) Gigiri within 90 days at their own costs, failure to, the plaintiff to thereafter demolish and or remove any structures or material on the site at the defendants No.2's costs.

29.6. That the court awards no damages for the Plaintiff No.1 against defendant No.2.

29.7. That the court awards damages of Ksh.1.3 million with interest at courts rate in favour of the 2nd defendant to be so awarded and paid by defendant No.1 and 3 the Commissioner of Lands and Kiso Enterprises from the date of this judgment; jointly and severally.

30. I award costs of this suit to the plaintiff to be paid jointly and severally against the defendants 1, 2 and 3. There will be no costs against the interested party City Council of Nairobi.

DATED THIS 10TH DAY OF JULY 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

Kenyatta O.A instructed by Kyalo & Associaies Advocates for the plaintiff –present

Njeru L.O. holding brief for Were L.A instructed by Rachuonyo & Rachuonyo advocates for the 2nd plaintiff – present

Cherogony instructed by A.G. Advocates for the 1st defendant – present.

Kariuki R.M. instructed by R.M. Kariuki & Co. Advocates for the 2nd defendant - present