REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 73 OF 2000

SYEDNA MOHAMMED BURHANNUDDIN SAHEB ..... 1ST PLAINTIFF

MOHAMMED FIDAALI HEBATULLAH ……..…….. 2ND PLAINTIFF

HUSSEINBHAI AHMEDALI HEBATULLAH…..…… 3RD PLAINTIFF

VERSUS

BENJA PROPERTIES LTD ……..….. 1ST DEFENDANT

ATTORNEY GENERAL ……..……1ST THIRD PARTY

COMMISSIONER OF LANDS ……..…… 2ND THIRD PARTY

JUDGMENT

The First Plaintiff herein, H.H. Dr. Syedna Mohammed Burhannuddin Saheb, is the head of the Dawoodi Bohra Community, and an eminent and well-renowned World Spiritual Leader. His Holiness resides in India. The Second and Third Plaintiffs are businessmen who reside in Nairobi.

The Defendant, Benja Properties Limited, is a company incorporated in Kenya, and is represented here by its Managing Director, Shareholder and Advocate, Mr. Geoffrey Kirundi.

In this action, commenced by way of a Plaint dated 28th July, 2000, the Plaintiffs seek an injunction against the Defendant from dealing in any manner with grant I.R. 72150, and for the said grant to be delivered up and cancelled, on the grounds that the plot purportedly represented by it, actually belongs to the Plaintiffs.

This is one of those horrible and unfortunate cases of "double allocation" by the Commissioner of Lands whose notoriety in issuing double and parallel title deeds cannot be gainsaid. I will take judicial notice of that fact, although there is also evidence before this Court of the same. And the fact that this mischief at the Lands Office can visit upon a spiritual leader of such high eminence is a matter of great embarrassment to our nation.

To me, this is a simple and straightforward case of one person owning a piece of prime property, and

another of finding a way to have the same "allocated" to him, and then selling it as a huge profit to a third person, who now is competing for interest against the original owner.

Here is the Plaintiffs' case, expounded by Mr. Mohamedali Fidaali Hebatullah, the Second Plaintiff, and a key witness before this Court: According to him, in 1960, his uncle, Ahmedali Mulla Hebatullah and his father, the late Fidaali Hebatullah, bought 68 acres of land known as L.R. 209/136/239 (hereinafter "the suit land") from Colonel E.S. Grogan. By an assignment dated 21st March, 1960 the suit land was conveyed to Ahmedali Mulla Heptulla, Fidaali Mulla Heptulla, Heptulla Investment Limited and Heptulla Properties Limited, and the assignment was registered in 6298 N44 160/1 13706.

Subsequently, there were further deeds of assignment, resulting in the suit land being vested in Moiz Fidaali Hebatullah, Mohamed Fidaali Hebatulla, Shabbir Fidaali Hebatullah, Saifuddin Fidaali Hebatulla, Hebatullah Investments Limited and Hebatullah Properties Limited. The Second Plaintiff testified that the Assignors began subdividing and selling the suit land, after obtaining deed plans.

The deed plans for the two properties which are the subject of dispute before this Court, namely 209/136/269 (hereinafter "Plot 269") and 209/136/322 (hereinafter "Plot 322") were obtained in 1992. The Assignors assigned to the First Plaintiff Plot 269 (registered in 1911 N64 428/1 20772) and to the Second and Third Plaintiff's Plot 322 (registered in 1907 N64 425/1 20769).

Now, three years later, in 1995, the Second Plaintiff testified, that there were strangers who came to the suit land, claiming to be "owners", and attempted to evict their tenants. He was shocked that the strangers had a title to the same plot, when in fact he had had possession, control and ownership for the past 40 years. That is the time they decided to file this suit.

The Defendant's case is that it purchased the rights to an allotment letter, secured by four individuals (who are not parties in this suit) namely Charles Mwangi, David Some, Joseph Sang and P. Nzuki (hereinafter "the allotees"). Plot L.R. 209/12999, which according to evidence before this Court, does not physically exist, and which is in fact "part of" or "overlaps" the suit land, was "allocated" to the allotees for Shs.143,837 being stand premium and other charges. They promptly sold the allotment to the Defendant for Shs.4 million, although the internal form of transfer shows the consideration was only Shs.1.6 million, and the stamp duty paid was on the reduced value of Shs.1.6 million, which in itself is, in my view, an act of illegality. Nevertheless, the Defendant obtained "title" on 23rd July, 1997, prompting the Plaintiffs to file this action on 17th January, 2000.

The Defendant, through its principal witness, Mr. G.C. Kirundi, admitted in cross-examination, that in purchasing the rights to allocation, he never actually physically examined the property; he never commissioned a professional survey of the same; never bothered to inquire about the adjoining plots; and admitted that it was actually him that paid all the stand premium and other charges relating to the "allocation" of the suit land. He also admitted that he was the principal shareholder, the Managing Director and the Advocate of the Defendant Company, and that his law firm did all the legal work relating to the conveyance of the disputed property.

The Plaintiff's second witness, Mr. Duncan Kimani, is a Licensed Land Surveyor, and a person of

considerable experience in his field. He worked with the Government of Kenya for 30 years as a Land Surveyor, and Chief Records Officer, before joining Harunani and Associates, Licensed and Chartered Land Surveyors, in 1992. He is familiar with the suit land, having handled its plans, since the 1980s. He outlined to the Court the history relating to the suit land, and how the title issued to the Defendant was illegally carved out of the suit land belonging to the Plaintiffs. His undated report reference 97/45 is part of the agreed bundle of documents presented before this Court.

According to Mr. Kimani, the suit land is more particularly shown on Deed Plan No. 74461, signed and sealed by the Director of Surveys. L.R. 209/12999 being the title issued to the Defendant is an excision out of part of the suit land on the eastern end and fronting the canalized Nairobi River on the southern bank and adjacent to Racecourse Road to the east. He testified that his investigation revealed that the survey of L.R. 209/12999 was carried out by one Ben Okumu sometime in March 1996 and is shown on survey plan No. F/R 296/112; that Mr. Okumu did not bother to check that there already existed a survey of the same plot, with a different Land Reference No. 209/136/322 which was done in March 1988 following the approval of the sub-division of the suit land; that in disregarding the existing survey, Mr. Okumu acted contrary to Section 29(1) of the Survey Regulations, of the Survey Act, Cap. 299.

Mr. Kimani concluded his report with the following remarks:

"***From the foregoing, LR No. 209/12999 completely overlaps LR No. 209/136/322 and encroaches into LR No.209/136/269. It is also evident that the plan attached to the letter of allotment for the plot eventually surveyed as LR No.209/12999 was defective. It ignored the existence of LR Nos.209/136/269 and 322 or was itself a false or fake Part Development Plan produced to facilitate the allotment of the plot, with clear intentions of defrauding any person who opts to buy the plot without prior verification of the status of the land on which the proposed plot falls."***

When I said, at the beginning of this Judgment, that I would take judicial notice of the notoriety that the Commissioner of Lands had acquired in issuing double title deeds, I also said that that statement was based on evidence before this Court. Here is what Mr. Kimani told this Court, through his report (Page 3):

"***From our experience in matters of land, land allocation and land survey, this is only one of many similar cases of illegal allotment and allocation of privately owned land and immediate disposal of such land to gullible and uninformed members of the public, who are unable to verify the status of such plots from relevant authorities or departments of government.***

In the present case, the Licensed Surveyor and the Director of Surveys are as culpable as the Commissioner of Lands and the Director of Physical Planning for their failure to detect the overlap before the land was allotted to the individuals who transferred the plot to Benja Properties Ltd."

The evidence before this Court is clear and uncontroverted. The Plaintiffs acquired title to the suit lands (which include the disputed land held by the Defendant) in 1960, through an Assignment by way of purchase from Colonel Grogan, the original owner. That title is clear, clean, and completely legitimate. In 1995, some 35 years later, the allotees managed to secure an "allotment" of the same under the Government Lands Act, and promptly sold the same to the Defendant who actually paid the stand premium and other charges, including the inflated price of Shs.4 million for an allotment costing only

Shs.143,837/=.

Based on the evidence before the Court, Counsels for all the three parties have filed written submissions, and have also made oral submissions. I have carefully considered all the evidence and submissions made and I find as follows:

1. Plaintiffs' claim against the Defendant

The Plaintiffs have established very clearly, and methodically, and on a balance of probability, that they are the legitimate and proper owners of the suit land by way of an Assignment made on 21st March, 1960 between E.S. Grogan and the Plaintiffs, or their predecessors, and thereafter by various further deeds and subdivision schemes as outlined before in this Judgment.

I accept the Plaintiffs Counsel, Mr. Gitonga's submission, that the Defendant's title, which came into being through a "letter of allocation" is invalid, and void, because the very "allotment" contravened Section 3(a) of the Government Lands Act (GLA) which provides for alienation of only unalienated land. The suit land here, having been owned privately, was **not** GLA land, and was **not** available for alienation. Its alienation was illegal and void abinitio. In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive". Finally, the letter of allotment had a disclaimer: the Government was not to be liable for any prior commitment. Indeed, here, the Government had prior commitments to the Plaintiffs. Finally, the Plaintiffs' have demonstrated that they have a title to the suit lands that is superior to any other person, including the Defendant and are fully entitled to the orders sought in the Plaint.

2. Defendant's claim against the Third Parties

In addition to filing the Defence in the year 2000, the Defendant more recently, issued a Third Party Notice against the Attorney General and Commissioner of Lands, for damages and indemnity. That notice was issued on 14th July, 2005, some five years after the commencement of the suit, for damages and indemnity amounting to Shs.22,057,537.

Mr. E. Bitta, Counsel representing the Attorney General, submitted that the Defendant's claim against the Attorney General was time-barred; that the statutory one-month notice required under Section 136(2) of the Government Proceedings Act had not been complied with; that the Defendant's claim, if any, was against the four allotees of the land; that the disclaimer clause in the letter of allotment which stipulated that the allotment was subject to previous commitments absolved the Third Parties; and finally that the letter of allotment had long expired when it was purported to have been acted upon.

I accept the Third Parties Submission and hold that the Defendant's claim against the Third Parties is statute-barred by reason of the affluxion of time; that the claim is invalid for failure to issue the

mandatory statutory one-month notice under S. 136(2) aforesaid; that in any event the letter of allotment purchased by the Defendant had expired, and was subject to a disclaimer. In any event, that letter was worthless because it purported to allot land under the Government Lands Act that was not available for allotment. Accordingly, the Defendant's claim, if any, is against the four allotees, and no one else. I, therefore, reject the Defendant's claim against the Third Parties.

Accordingly, and for all the reasons outlined, the Plaintiffs' claim against the Defendant succeeds, and I hereby

1. **Order** cancellation of Grant No. I.R. 72150 and title to L.R. No. 209/12999.

2. **Order** an injunction barring the Defendant from interfering with L.R. Nos.209/136/269 and L.R. No.209/136/322.

3. **Dismiss** the Defendant's claim against the Third Parties, with costs; and

4. **Order** that the Defendant pay the costs of this suit to the Plaintiffs.

Dated and delivered at Nairobi this 27th day of February, 2007.

ALNASHIR VISRAM

JUDGE