



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

**Civil Case 411 of 2003**

1. Land and Environmental Law Division

2. Subject of main suit: Land ownership:

LR9042/224

Grant IR48936/1

(15 December 1988) or 1 February 1982

a) Plaintiff/company allocated suit land on 15 December 1988) or 1 February 1982

LR9042/224 Grant IR48936/1

b) Plaintiff/company leaves land vacant and does not construct, as per laid down requirements of 24 months

c) Plaintiff/company discovers in 1998 that as of 21 June 1993 the 2<sup>nd</sup> defendant had excised 0.400 hectares from the plaintiff and obtained from 1<sup>st</sup> defendant grant

IR 59414/1

IR9042/290

D) That 2<sup>nd</sup> defendant constructed godown and rented same to a third party.

e) 2<sup>nd</sup> defendant alleges suit property now belongs to them by virtue of non-compliance by plaintiff of not constructing/developing land within 24 months.

Issue – whom of the two plaintiff or 2<sup>nd</sup> defendants e rightful owners.

3. Held:

The plaintiff entitled to declaratory orders

a) A portion of plaintiff land LR9042/224

granted to 1<sup>st</sup> defendant is null and void.

b) Grant number IR59414/1 - Crete to first defendant is null and void.

c) The Commissioner of Land order to cancel 2<sup>nd</sup> grant IR59414/1

Damages – Nil - to 1<sup>st</sup> defendant equity does not remedy – a wrong doer

Nil - to plaintiff against 2<sup>nd</sup> and 3<sup>rd</sup> defendant not proved nor mentioned in evidence.

#### 4. Case law

a) Gitwany Investment Ltd v Tajmal Limited & 2 Others & The Commissioner of Lands & Another Nbi Hccc1114/20002 unreported Lenaola,J.

b) Sworhealth Properties Ltd v Tabet & Other (1971) I ALL ER 240

c) Inverugie Investments ltd V Hacket (1995) 3 ALL ER 84

#### 5. Text book

Clerk and Lindsell on TORT 7<sup>th</sup> Edition

#### 6. Advocates

M. Nyaoga for Mohammed Nyaoga & Co. Advocates for the plaintiff

D.O. Ojwang for the Kirundi & Co. Advocates for the 1<sup>st</sup> defendant

C.M. Mutula for Attorney General for 2<sup>nd</sup> and 3<sup>rd</sup> defendants

**EMBAKASI PROPERTIES LTD .....PLAINTIFF**

**VERSUS**

**SAFE CARGO LTD .....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT**

#### **JUDGMENT**

##### 1: Background

1. The suit before me concerns land situated in the vicinity of the Jomo Kenyatta International Airport, a prime area for godown business. M/s Embakasi Properties Ltd. the plaintiffs herein were allocated land in this area by the Kenyan Government through the President of the Republic of Kenya

the Registration of Titles Act Cap.281 Laws of Kenya

2. The grant number IR 48936 being 1.575 hectares on LR No.9042/224 was issued as from the first of February 1982 for a term of 99 years. A title deed was accordingly issued to them on 18 January 1990.

3. The said grant contained special provisions that the land “shall be used for inoffensive light industrial purpose with ancillary offices and stores” within six months of the actual registration of the

grant submit plans of development of the property. That after 24 months of the actual registration to actual erect a construction. If there is any default of the said requirements, then “the Commissioner of Lands or any person authorized by him on behalf of the President” would be permitted to “re enter into and upon the land” . . . and the term of the grant so created shall cease to exist but “without prejudice to any right of action or remedy of the President or the Commissioner of lands of any antecedent breach of any condition contained.”

4. The registration of the title as mentioned above was signed on 18 January 1990 at 12.00 hours. The plaintiff had 24 months in which to construct a building on the land. They did not. Infact the plaintiff, through PW1 – a director resides and carries on business in Mombasa. They did not actually come to Nairobi to examine the piece of land and let it sit vacant.

5. Sometime in December 1998 the plaintiffs discovered that the said piece of land had been excised by the Commissioner of Lands of about 0.400 hectares and a new grant was issued to M/s Safe Cargo Ltd, the first defendant herein on the 21<sup>st</sup> day of June 1993.

6. The plaintiffs filed suit on 20 September 1999 at Mombasa High Court of Kenya and stated that as they held the original title the Commissioner of Lands had no powers to grant to Safe Cargo Ltd as the said land was “not unalienated Government land and was therefore NOT capable of being granted and or allocated out ...” They further alleged that the 1<sup>st</sup> defendant title was obtained fraudulently.

7. The defendants No.1 entered appearance and filed defence in October 1999. They denied the allegations and stated that they had no knowledge that the title they held was not unalienated Government land originally. In the alternative they stated that the plaintiff were infact “guilty of laches by virtue of not abiding with the special conditions annexed to the grant; “Namely, the plaintiff had failed to erect a building within 24 months and develop the said land. According to the Special Condition, if this is not done, then the “lease lapses” and or is “determined by forfeiture.” The plaintiffs had in effect no right to the land in any event.

8. The plaintiffs filed an application for injunction restraining the defendants from alienating, selling transferring changing mortgaging or dealing in any manner whatsoever with the said title LR 9042/290. This application filed on 20 September came before Khaminwa, Commissioner of Assize (as she then was) and granted his prayer and a prayer to restrain the defendants from making further construction.

9. The status at the time was that the 1<sup>st</sup> defendant had constructed 3 godowns in December 1994 at a cost of Ksh.38 million. The said construction had been completed by August 1996. As from September 1996, the 1<sup>st</sup> defendant had leased the godown to a third party (who is not a party to this suit).

10. The 1<sup>st</sup> defendant applied to have the suit transferred to the High Court of Kenya for trial. This was duly done on 3 April 2003 (Sergon J). The advocates for the plaintiffs changed and continued with the proceedings and conduct of this case. The advocate for the defendant remained on record.

11. The Commissioner of Land was represented by the Hon. the Attorney General.

## II: Issue for determination.

12. The main issue for determination as agreed by parties is as follows:-

- i) Was the excised portion unalienated government land capable of being granted?
- ii) Was the granting of the excised portion to the first defendant procedurally proper legal and or lawful?
- iii) Was the grant issued in favour of the first defendant with respect to the excised portion of the plaintiffs land fraudulently issued?

13. There are 19 more issues for determination but I believe that the above three would first be addressed before proceeding to the remaining issues.

A) Plaintiff

14. From the evidence before court PW1 a director to the plaintiffs company produced the original title deed grant NO. IR 48936 for LR9042/224. This title had not been cancelled nor not interfered with from 19 January 1990 when it was registered (I must note at this stage that whilst this suit was pending, the plaintiffs registered an instrument known as a deed of variation of Special Condition to No 2 and 4 on 11 October 2002. The parties had by admission of facts noted this although it was surprise to the defendants who had not been aware of this development).

15. The land in question had therefore been alienated to the said plaintiffs, legally and lawful. Dennis Malembeka (PW2) a land surveyor by profession made a ground inspection of the land and in a report of 11 February 2005 found that the original beacons were missing and instead reestablished. He further found that there were “two overlapping operational developments and two over lapping vacant undeveloped portions.” These were searched and found to be:-

LR 9042/290 on F/R 238/102 (missing)

LR9042/301 on F/R 242/114

LR 9042/303 on F/R 242/131

LR 9042/582 on F/R 278/2

16. When he searched for the particulars of the original title to LR 9042/224 he found that those of the overlapping on encroaching properties were missing in the Inland registry records office.

17. The task of a surveyor is to ensure there is no overlap of titles. His opinion was that once land had been alienated by the government, that said property is not available for alienation. If a title has been issued it must first be cancelled before a new one is issued. It was not the case with the new titles issued to the defendants.

B) 2<sup>nd</sup> and 3<sup>rd</sup> defendant Commissioner of Lands and Attorney General.

18. The Attorney General filed defence whereby they denied having excised 0.4 hectares. They admit that the 1<sup>st</sup> defendant did submit to the Commissioner of Lands Survey and deed plans done by a private surveyor known as M/s Geometre Surveyors in respect of LR9042/301 (FR:242/114 sometime in June 1993.

19. Even if this is the case, that portion of the plaintiffs land was excised in favour of the 1<sup>st</sup> defendant then under section 21 (1) 2 of the Survey Act Cap.299 Laws of Kenya no liability can attach upon the Attorney General and Commissioner of Lands.

20 The Attorney General case had been that the 1<sup>st</sup> defendant was under a duty to ensure that the complete survey work was done in accordance with the deed plan as the survey work was done by private persons they were not liable. A senior land officers, one Gordon Odeka Ochieng was called to give evidence. This witness confirmed to court the procedure on obtaining title. A letter of allotment is first issued. Thirty days is given to have the property surveyed and premiums paid. A letter of allotment would always have a deed plan to confirm the surveyed area. As a deed plan comes from the Director of Survey this is never questioned.

21. The Lands Department came to learn from the case before court that another title had been issued. In his opinion that according to law, no title ought to have been issued again as the reason being that the

deed plan of the main title LR9042/290 was not available to be alienated. It is this title for LR9042/290 that is the correct one. That any other title ought not to have been issued as the first title had been alienated. The director of surveying would therefore not process the deed. To his opinion the suit land still belong to the plaintiff M/s Embakasi Properties. Ltd.

C) The defendant No.1 Safe Cargo Ltd

22. The 1<sup>st</sup> defendant called Ajikumai Prechand Shah, a director of the 1<sup>st</sup> defendant and a retired certified account. His evidence was that at all times M/s Kirundi & Company were his advocate during the transaction of the sale of land. This was allocated to M/s Horticultural Exporters (1977) Ltd Industrial Plot No.19 at the Jomo Kenyatta International Airport on the 23 March 1993. The portion of land allotted was for 0.4 hectares. One of the directors passed away. They, the other directors wrote to the Commissioner of Lands on 4 May 1993 that due to the director's death they were unable to meet the construction costs. That the plot in question be transferred to the first defendant. The parties signed a transfer and the first defendant duly paid the premium. A grant was issued, not to Horticultural exports (1977) Ltd but to Safe Cargo Ltd being LR.9042/290 registered on 21 June 1993. Within 24 months of registration they were able to construct godowns as required by law.

23. It was DW1 – Mr. Shah who instructed a reputable firm of private surveyor to establish the beacons. Prior to this he had conducted a search and established that M/s Horticultural Exporters (1977) held a good allotment letter. He took due care, confirmed that all requirements to be met was done. Though the premiums was meant to be paid within 30 days this was done outside the said period.

24. It was not until 1 November 1999 that the first defendant was aware of the title to the plaintiffs. Their defence nonetheless was that although the plaintiffs were issued with a title they forfeited this for failure to comply with conditions No. 2 of the Special Conditions that called for the re-entry suit the land by the Commissioner of Land and the title ceases to exists for non-compliance of the said development.

25. The 1<sup>st</sup> defendant were unable to prove nor established whether the Commissioner of Land exercised its powers under clause 2 of the Special Conditions to reenter onto the land.

D) Findings

26. I would find that the excised portion was not unalienated government land that was capable of being granted to the 1<sup>st</sup> defendant from the portion of land originally held by the plaintiff.

27. The granting therefore of the excised portion to the first defendants of the land was not procedurally proper legal and or lawful.

28. It can therefore be safely stated and it is hereby concluded that the grant issued in favour of the first defendant in absence of any proof of the special condition being effected that was in favour of the first defendant in respect of the excised portion of the plaintiffs original land was so fraudulently issued.

E) Further issues

29. It is true that the plaintiff was guilty of laches by not developing the said land. By the time they were ready to develop the land in 1998 the 24 months period to develop the same had lapsed. Yes, the plaintiffs may have been guilty of laches but the Commissioner of Lands, as stated earlier, did not take any action. The land had never been forfeited y the Commissioner of Lands and or the Government of Kenya. The Commissioner of lands was entitled to enter onto the said land but did not do so.

30. It has been further established in evidence that the first defendant had no legal authority to posses, occupy, construct and or carry on business on LR9042/290. A cause of action does exists against the first defendant.

f) Authorities

31. In the authorities decided and relied on by Khaminwa CA (as she then was at Mombasa) the case of Gorvas Holdings Ltd v Tom Mayani Omani & Others Mombasa Hccc182/99

A first grant issued by the Commissioner of Lands is in defensible under section 23 of the Registration of Titles Act Cap.281.

32. In the case law of:-

Gitwany Investment Ltd v Tajmal Limited & 3 Others

(2006) Hccc1114/2002 Lenaola J

It also reconfirmed this fact that once a title is issued in conclusive evidence that the person named is the undefeasible owner.

33. Section 23 of the Registrar of Title Act Cap.281 reads:-

“The certificate of title issued by the registrar to a purchase of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and undefeasible owner thereof subject to the encumbrances easement, restrictions and conditions contained therein or endorsed hereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

34. The title once issued the Commissioner of Lands has no legal powers to issue a subsequent grant to the first defendant. Indeed the case law relied on by Khamiwna (CA) on this point of :-

i) His Holiness DR. Sayedna Mohamed & 2 Others v City Council of Nairobi

Hccc247/96, unreported,

And ii) Insurance Company of East African Ltd V Attorney General & Others

Mombasa Hccc 151/97

Support this view.

35. The parties in this suit have no issues to the above holding in law. What the defendant had all along claimed was that the Commissioner of Land had forfeited the plaintiff's title. The representative of the Commissioner of Lands in effect denied this forfeiture and laid the blame of the second title having been issued, on the director of surveyor. Indeed whilst the suit was pending a special deed of condition was registered in 2002. This should not have occurred whilst the suit was in fact pending. The effect of the special deed was to extend the time to develop the property by 8 years more.

III: Does the maximum

Pari delecto, potior

Est conditio

Possitentis apply?

36. This maxim means that “where both parties are equally wrong, the person who is in possession of the suit land in this case, will retain it and the law will not intervene.”

36. Yes, the Commissioner of Lands was in the wrong to issue a title against a fraudulently acquired letter of allotment. The defendant No.3 was wrong to acquire title before confirming that the original title had been forfeiture and was available for alienation and the plaintiff was not diligent in ensuring that he complied with the Special Condition.

37. All in all the plaintiff are not penalized on the grounds that the Commissioner of Lands did not act on the said Special Conditions. I believe the persons who in effect are in the wrong equally are the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs still legally holds the title. I would accordingly hold that maxim *Pari delecto, potior est Conditio possitentus* does not apply to the plaintiff

### III Court orders

Is the plaintiff entitled to the declaratory order as prayed in the amended plaint?

38. I find that the plaintiff are entitled to the declaratory orders as prayed namely

“1. That the excise of a portion of the plaintiffs land LR No.9042/224 and granting of the same to the first defendant is null and void.

2. That the grant number IR 59414/2 made to the first defendant by the Commissioner of lands, the second defendant is null and void.”

39. The Commissioner of land is hereby ordered to cancel the second grant IR59414/1.

### 40. IV Damages

The 1<sup>st</sup> defendant seeks for orders to be underutilized by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant jointly and severally. If they are so entitled they allege whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendant can rely on their own misrepresentation.

41. The first defendant alleges that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant took his payments which included the land rent. That they spent Ksh. 70 m in the development of the said premises. It is through this misrepresentation that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant require to be indemnify.

42. Thus both the 1<sup>st</sup> defendant and the plaintiff want to claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant the government of Kenya for damages and losses sustained as a result of the said fraudulently issuance of the land title deed to the first defendant.

43. Both parties relied on the case law of:-

Gitwany Investment Ltd V Taj Mal Limited & 3 Others and The Commissioner of Lands

Hccc1114/02

(Supra)

Whereby that court held that the reason why the defendant Taj Mall Limited were allocated the plot it was based on the pure mistake by the Commissioner of Land. The court ordered that the Commissioner of lands should meet the costs of removing the structures from the land. I would be persuaded by the said authority that the party who caused the inconvenience should bear the costs of removing the structures from the land. In this case, the Commissioner of Lands.

44. The parties though are interested in damages. The 1<sup>st</sup> defendant as far as I can tell from the pleading has not pleaded any damages due to him. There is on record a valuation report of the property

put up of Ksh.70,000/-. This was not pleaded as special damages against the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendants. Nonetheless this case was determined upon fraud. That the 1<sup>st</sup> defendant cannot be remedied in equity for a wrong that he may have done. I say so as the procedure of obtaining the allotment letter was irregular and unprocedural. If it was regular I would have been inclined to have awarded them Ksh.70,000,000/- to be paid by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. As it stands the issue of damages against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant be and is hereby dismissed.

45. As to the plaintiffs claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendant by the plaintiff I decline the grant damages by way of mense profit from 21 June 1993 to date at 20% interest. The plaintiff never spoke in evidence of this mense profits. I dare say that the plaintiff had in fact gone to sleep from 1993 to 1998. If anything time would have began to run from 2002 which time ought not to have been made. I decline to grant these damages.

V: In summary

46. I enter judgment for the plaintiff and do hereby grant the prayers for a declaration that excising the 1<sup>st</sup> defendant title is unlawful null and void and further the grant is also null and void. I have made orders canceling the said grant.

47. I dismiss the prayer for damages

Dated this 29<sup>th</sup> day of May 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Nyaoga for Mohammed Nyaoga & Co. Advocates for the plaintiff

D.O. Ojwang for the Kirundi & Co. Advocates for the 1<sup>st</sup> defendant

C.M. Mutula for Attorney General for 2<sup>nd</sup> and 3<sup>rd</sup> defendants