REPUBLIC OF KENYA

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

Civil Suit 1114 of 2002

GITWANY INVESTMENT LIMITED …………………….......………………………. PLAINTIFF

V E R S U S

TAJMAL LIMITED ………………………………………………………………. 1ST DEFENDANT

GEOFFREY NJAGE ………………………..………………………..…… ……. 2ND DEFENDANT

MAX TOWERS LIMITED…………………………….…….……………………..3RD DEFENDANT

AND

COMMISSIONER OF LANDS THRO' ATTORNEY GENERAL…..................……….…..3RD PARTY

J U D G M E N T

Introduction

1. This suit relates to the ownership of a certain piece of land situated along Githunguri Road, Kileleshwa area in Nairobi particulars of which will become clear later in this Judgment. The land was previously Government land and on it was erected a house for occupation by Civil servants as was the practice in prior years. It was subsequently allocated to persons whose identity will shortly become known and it was that allocation process that triggered events leading to the dispute now before this court.

2. The Plaint by Gitwany Investments Ltd. was filed on 30.7.2002 and amended on 2.8.2002. In that Amended Plaint, the Plaintiff (hereinafter to be referred to as "Gitwany") sought the following orders:-

(a) A permanent injunction restraining the Defendant its servants and/or agents from erecting any structures, fencing constructing, and for in any other manner interfering with Land reference LR. No. 209/12004 formerly or also known as LR. No. 209/3088.

(b) That a mandatory injunction do issue to the defendant directing it to demolish all the structures, buildings and fences put on the land reference L.R No. 209/12004 also referred to as L.R. 209/3088 at its own costs.

(c) Special damages of Ksh.30,000,000 and interest.

(d) General damages for trespass and mesne profits.

(e) A declaration that the plaintiff is the bona fide title holder of L.R No. 209/12004 formerly known as L.R.209/3088 and the Defendants have no rights whatsoever over the same.

(f) Costs of this suit and interest.

3. The 1st Defendant on its part filed a Statement of Defence on 9.7.2002 which was amended on 9.8.2002 and while denying that it had committed any wrongful act as claimed by Gitwany also stated that it had bought the suit property legally and was therefore a bona fide purchaser of it. It then raised a Counter Claim for Ksh.160,500,000/-, interest thereon at 19% per annum from the date of filing suit till payment in full, interest on the latter at court rates, general damages and in the alternative a declaration that it is entitled to the sum of Ksh.151,500,000/- plus interest as claimed.

4. The 2nd Defendant, Geoffrey Njage was served with Summons to Enter Appearance by one Reuben Mauti Osuku on 24.6.2003 at 2.30 p.m. at his house within Kasarani area of Nairobi. He never entered appearance nor did he file any Statement of Defence and did not participate in the proceedings whatsoever. I have perused the Affidavit of Service sworn on 25.6.2003 by the said Reuben Mauti Osuku and I find that service was proper under Order V rule 9(1) of the Civil Procedure Rules.

5. The 3rd Defendant, Max Towers Limited was also served with Summons to Enter Appearance on 2.8.2002 through one of its Directors identified as one Mr. Enock who said that the company had been “dissolved” some years prior to that date but nevertheless he accepted the summons but refused to sign in acknowledgment. The Affidavit of service sworn on 25.6.2003 by Reuben Mauti Osuku is so detailed that I cannot find any fault in service. The 3rd Defendant aforesaid never entered appearance and like the 2nd Defendant took no part in the proceedings.

6. Pursuant to a Third Party Notice issued by the 1st Defendant, Tajmal Limited and addressed to the Attorney General, the Commissioner of Lands through the said Attorney General was enjoined as a 3rd party to the suit and the Attorney General filed a Third Party Defence on 23.9.2002 admitting that a mistake was made when two title deeds were issued in respect of the same parcel of land. That it was Gitwany which contributed to the magnitude of the mistake and was partly to blame for that costly mistake as will become apparent later in this judgment.

7. Upon pleadings thereby being closed, the hearing of the suit commenced on 18.11.2003.

Plaintiff’s Case

8. Gitwany called one of its Directors, Solomon Njuguna Mbugua as its first witness. He said that the Company was incorporated on 17.5.1990 with him and one Elizabeth Gitiri Muruatetu as Directors with the latter being the “hands on” Director. He then traced the history of the acquisition of the suit land as follows;

i) that the land in question was registered as L.R. No. 209/3088 and was Government Land.

ii) that it was one O.M. Nzwilli and Tata joint Services that applied to H.E.(Rtd) President D. T. Arap Moi on 4.5.1994 for allocation of the land and he approved the allocation to them on 26.5.1994

iii) a valuation requisition was done and the land was later valued at Ksh.340,000/-. The requisition is undated.

iv) a letter of Allotment was issued to O.M. Nzwilli and Tata Joint services on 10.8.1994 and the land was referred to as “residential plot L.R. No. 209/3088 Kileleshwa Nairobi” and the Allottees were

required to pay Ksh.404,846.00 which they did vide Bankers cheque No. 7B/BC 233929 dated 13.10.1994 forwarded to the Commissioner of Lands on 17.10.1994. A receipt dated 3.11.1994 was thereafter issued.

v) A form of transfer was signed by the Commissioner of Lands on 9.6.1995 whereby in the schedule it is indicated that he had consented to the "transfer of all that piece of land containing…..Ha or thereabouts situated in Kileleshwa Nairobi and known as L.R. No. 209/3088 (Now L.R. 209/12004) allocated to me by letter from the Commissioner of Lands dated 10th August 1994 and numbered 36599

I hereby consent to the transfer

Signed

For Commissioner of Lands."

The transfer was from O.M. Mzwilli and Tata Joint Services to Gitwany Investment Ltd. and P.W.1 said that the consideration was Ksh.2 million.

vi) By an undated letter subsequent to the transfer forms being signed, O.M. Nzwilli and also on behalf of Tata Joint Services wrote to the Commissioner of Lands seeking that the title for "Residential Plot 209/3088 – NAIROBI" be issued directly to Gitwany. A consent fee of Ksh.40,000/= was paid on 28.6.1995 and receipt No. D 237742 was issued on 29.6.1995.

vii) On 21.7.1995, the Commissioner of Lands wrote to Gitwany seeking additional stand premium and annual rent and it was said in that letter that the plot identified as "L.R. No. 209/12004 (formerly 209/3088 – KILELESHWA NAIROBI" upon "resurvey" had decreased from 0.464 ha to 0.3861 ha. necessitating a revaluation of the plot. Gitwany paid the amount of Ksh.6500/- as requested for this purpose on 24.7.1995 and a receipt issued on the same date (Receipt No. D 242023)

viii) On 24.7.1995 Mr. Wilson Gacanja Commissioner of Lands signed a Certificate of Lease issued under the Provisions of the Registration of Titles Act Cap 281 to Gitwany to hold the land for a term of 99 years. The land is referred to as "L.R. 209/12004" measuring 0.3861 Ha.

ix) On 16.10.1995, the Permanent Secretary, Ministry of Public Works and Housing wrote to the 2nd Defendant Geoffrey Njage asking him to vacate the house on the suit land.

9. P.W.1 testified further that L.R.No. 209/12004 was formerly L.R. 209/3088 and that he was surprised when in 2002 he found that a block of flats was being put up on the land which he knew nothing about. A search was only made possible at the Lands Registry when he obtained a court order to that effect and that is when he found that another title had been issued and held by Tajmal Limited before cancellation of the title properly held by Gitwany.

10. P.W.1 later had the land valued by Kibui Associates at Ksh.47,300,000/-. In support of his case P.W.1 produced P.Exhibits 1, a bundle containing pages 1-50 covering the evidence outlined above.

11. In further evidence P.W.1 produced pages 61-72 of his bundle of documents to show that land reference numbers in the Kileleshwa Area had been changed and that there was nothing unique about the change regarding the suit property. He particularly made reference to L.R. Nos. 209/12005,14423,14148 as being indicative of changes similar to that which created L.R.No.209/12004.

12. P.W.2 Michael Sebastian Kibui, a valuer said that he visited L.R.No.209/12004 on 15.5.2003 and estimated its value at Ksh.47,300,000/- being the value of the land, value of improvements, forced sale element (25%) plus interest on land and improvements. He then produced his report being pages 51-60 of the plaintiff's bundle of documents (P.Exh.1)

13. In cross-examination, the witness stated that the plot he valued was L.R. No. 209/12004 which was

the same as L.R.No.209/3088 but in the survey plan the words “L.R. No. 209” were missing which he said was unusual but could only be explained by a surveyor.

14. The case for the plaintiff was closed at this stage and the 1st Defendant opened its case.

1st Defendants Case

15. Tajmal Limited called its Managing Director, Ramesh Chandra Govin Gurasia as its first witness. He stated that one Kaberere of Landmark Estate Agency introduced the idea of buying the suit property for development and upon conducting a search he found that it was “vacant”. That the title was in the names of Geoffrey Njage together with Max Towers Ltd, the 2nd and 3rd Defendants respectively. Having made contact with the said person and company and having seen a Certificate of Lease held by them, a Sale Agreement was drawn up and dated 19.3.2001 whereby Tajmal would purchase the property for a consideration of Ksh.10 million. Thereafter a transfer dated 18.7.2001 was executed in its favour. It is important to state that the land appearing in the title to Maxtower and Njage and issued and signed by Mr. Silas Komen Mwaita as Commissioner for Lands on 12.2.2001 refers to “L.R. No. 209/3088” measuring 0.3861 ha.

16. The 1st Defendant having had the suit land transferred to it quickly moved to develop it and charged it to the Company for Habitat and Housing in Africa (Shelter Afrique) as security for the advancement of a loan of Ksh.39,500,000/- and the said charge was registered on 10.12.2001. Thirty (30) housing units were then constructed on the land.

17. That when this dispute came to light enquiries were raised by the 1st Defendant with the Commissioner of Lands and on 10.7.2002, One Z.A. Mabea writing on behalf of the Commissioner of Lands stated that “L.R. No. 209/12004 is fictitious and the title although registered, doubtful”. He added that the title to the 1st Defendant was the lawful one as it had been properly acquired from the 2nd and 3rd Defendants.

18. In support, P.W.1 produced D.Exh.1 (Bundle of Documents pages 1-43) which support the evidence as analyzed above.

19. In cross-examination P.W.1 admitted that there was no evidence of fraud on the part of the Plaintiff, Gitwany and that the problems belabouring both Gitwany and Tajmal should be placed at the doorstep of the Commissioner of Lands who caused them their troubles in the first place.

20. D.W.2 Samuel Otieno Odiembo, a valuer with Tysons Ltd produced pages 44-61 of D.Exh1 which was a Valuation Report over L.R. No. 209/3088 and in that report the value thereof is estimated at Ksh.160,500,000/-. He said that this was the open market value based on prevailing market factors at the time of the valuation. The valuation was done on 26.9.2002.

21. The 1st Defendant closed its case and there being no evidence on behalf of the 2nd and 3rd Defendants, the 3rd party then tendered its Defence in response to the 3rd Party Notice issued by the 1st Defendant.

Case for the 3rd Party, Commissioner of Lands

22. The 1st witness for the 3rd party was Gordon Ochieng, Senior Lands Officer at the Ministry of Lands and Settlement.

23. It was his evidence that two allotment letters at different times were issued in respect of L.R.No. 209/3088. The first was issued to O.M. Nzwilli and Tata Joint Services in line with evidence on behalf of the Plaintiff. The second was issued later to Maxtowers Ltd and Geoffrey Njage in line with the evidence on behalf of the 1st Defendant. The only difference, he said, was that the former indicated that their land

was measuring 0.464 hectares while the latter indicated that the land measured 0.386 hectares.

24. The witness in his further evidence delved into the question of a Deed Plan which he said should always accompany a title document and becomes part of the register and that the land reference number in the deed plan must correspond word by word with that appearing on the title document. The acreage in both must also be similar and all these pieces of information authenticate the title and the register and therefore ownership.

25. Gordon Ochieng faulted the title held by Gitwany and stated that "L.R. No. 12004" appears on the Deed Plan while the title had "L.R. No. 209/12004" which meant that the Deed Plan was not for the said parcel of land but for a different one altogether. The significance of this evidence will become clearer when I reproduce the evidence of the other witness for the 3rd party, Zakayo Mwendwa Mwenga, shortly.

26. Gordon Ochieng saw another anomaly in the title held by Gitwany; the acreage appearing on the letter of allotment was different from that appearing on the title. I however have seen the two documents; the acreage in both is 0.3861 ha.

27. As regards the title that Maxtowers Ltd and Geoffrey Njage acquired, Ochieng said that the land reference number is consistently "L.R. No.209/3088" in both the Deed Plan and the title document and the acreage in the Deed Plan was the same as that indicated in the Letter of Allotment.

28. Turning to the matter of change of land reference number from L.R. No. 209/3088 to L.R. No.12004 in the Gitwany title, Ochieng said that the reason for such a change is not indicated anywhere and no record from the Director of Survey was produced to explain such a change. In any event, he added, notice to the Lands Registry to reflect the change in its register was never given. According to him, and by mistake of the Commissioner of Lands, the witness said that an irregular or "wrong" title was then issued to Gitwany. He admitted that the Director of Survey gave a wrong L.R. Number with decreased acreage resulting in a revaluation leading to a higher amount of rent payable. He expressed surprise at the speed with which the title to Gitwany was issued upon revaluation as everything happened on the same day. He opined that the reason for this may have been the relationship between the then Commissioner of Lands and one of the Directors of Gitwany, she being his wife.

29. The witness stated further that the records presently held by the Commissioner of Lands did not show any relationship between L.R. No.209/3088 and L.R.No.209/2004 or L.R. No. 12004. To his mind however, the lawful title is L.R. No. 209/3088 now properly in the name of the 1st Defendant.

30. The 2nd witness on behalf of the 3rd party was Zakayo Mwendwa Mwenga, Head of Department of Survey at the Kenya Institute of Survey and Mapping. Previously, he said, he was the officer appointed to sign Deed Plans in Kenya and was designated, "Deed Plan Officer."

31. The witness, and I alluded to this point earlier, explained the significance of the reference to "L.R. No. 209" in descriptions over land. He said that such a reference would only relate to land in the Milimani and Kileleshwa areas of Nairobi and also parts of Embakasi and that "L.R. No. 12004" would not be land in Nairobi but land along the Machakos- Kajiado border. I will leave the matter there but will again revert to it in depth later.

32. Explaining how a land reference number can change, the witness stated that such a change can only occur on certain pre-conditions being met including change of user of land. The original Deed Plan would in any event always indicate whatever changes are made to it and the Directorate of Survey would keep the Survey Plan with those changes. He produced the Survey Plan for L.R. No. 209/3088 (3rd party Exh.4) but said that no records of a survey plan for L.R.No. 209/12004 existed whereas the Survey Plan for L.R. No.12004 (2nd party Exh.5) as earlier indicated relates to land elsewhere than in Nairobi. The Witness denied that in the records of the Director of Survey Deed Plan No. 79828 related to L.R. No. 12004.

33. The witness stated that there are no records of any change of L.R.No. 209/3088 and L.R. No.12004 and that in the Deed Plans Register (3rd Party Exh.7) the Deed Plan No.79828 prepared on 31.7.1962 was for L.R. No. 209/3088 and was signed by a Mr. Taylor. There is no record he added, that plot No.209/3088 is the same as L.R.No. 12004.

34. In cross-examination and having been shown the Deed Plan No.79828 attached to the title held by Gitwany, the witness said that it was unnecessary to prepare it again on 8.1.1995 as it had been prepared earlier although it was usual to do so and a Mr. Gitau who signed it was authorized so to do. He added that he had not found the original Deed Plan No. 79828 to see whether there were any changes to it.

35. The 3rd party thereafter closed its case and I asked parties to prepare submissions which were filed together with authorities relied on. I have read them, considered them and will if necessary allude to them along the way.

Issues for Determination

36. Having read the pleadings and the evidence tendered and taking into account the submissions made, I should frame the issues to be determined as;

i) Is L.R. No. 209/3088 the same as L.R. No. 209/12004 or L.R.No.12004?

ii) If so, who is the lawfully registered proprietor thereof?

iii) Was any party fraudulent in the acquisition of title to the disputed land?

iv) Is the 1st Defendant a trespasser on the land?

v) Is the Plaintiff entitled to its reliefs?

vi) Is the 1st Defendants counter-claim valid?

vii) Is the 3rd party liable to the 1st Defendant as stated in the 3rd party Notice?

viii) Costs.

L.R. NO. 209/3088, L.R. NO.209/12004 AND L.R. NO.12004

37. I have taken cognizance of all exhibits produced by the parties and there really is no doubt that on the ground, L.R. No. 209/3088 and L.R. No. 209/12004 are in fact situate in the very same piece of solum. It cannot be said to be terra incognita. It is known and identifiable as is L.R. No. 12004 which is land situate along the railway line between Machakos and Kajiado District. The disputed land is within Kileleshwa area of Nairobi. Where did the confusion arise if this be the case and when did L.R. No. 209/3088 start being named L.R. No. 209/12004? From my reading of the evidence, the change came as regards the process leading to the title held by Gitwany. Upto 9.6.1995 all references to the land was clearly to L.R. No. 209/3088. The form of transfer of land (page 10 of P.Exh.1) has the words “L.R. No. 209/3088 (now L.R. 209/12004)” and that is the point of departure. The reasons are given in a letter dated 21.7.1995 (page 14 of P.Exh.1) addressed to Gitwany and signed by one P.N. Mutwira on behalf of the Commissioner of Lands. It is said in that letter that the land was resurveyed and that the acreage had reduced from 0.46 ha to 0.3861 ha. The reference is then given as “L.R. No. 209/12004 (formerly 209/3088) – Kileleshwa Nairobi”.

38. Both the above documents were produced by consent and their authenticity was never challenged. This being the case, counsel for the 3rd party cannot be heard in submission to say that the Plaintiff failed to prove that “L.R. No. 209/12004 was on the ground the same plot as L.R. 209/3088, or that L.R.209/3088 had changed number to L.R. No. 209/12004.” In saying so I am aware that the Deed Plan

No. 79828 attached to the title held by Gitwany refers to L.R. No. 12004 and yet by the evidence of Zakayo Mwenga Mwendwa that Deed Plan is in fact for L.R.No. 209/3088. My view is that his evidence only reinforces the argument that in fact L.R. No. 209/3088 is the same on the ground as L.R. No.209/12004 as the original Deed Plan remains No. 79828 which he failed to produce. The only difference as I have said is the acreage which changed upon resurvey of the plot before issuance of title to Gitwany. Thereafter both titles held by Gitwany and the subsequent one by Tajmal indicate the acreage as 0.3861 hectares.

39. I should only state firmly that the hype about the missing "L.R. No. 209" in Deed Plan No. 79828 attached to the Gitwany title is misplaced as this court looking at the evidence in totality, and not in isolation is clearly of the view that the land referred to is in fact L.R. No. 209/12004 as opposed to L.R. No. 12004 whose location has elsewhere above been explained and which is irrelevant to this case. The land is clearly defined as it clearly also exists (see Ratwani vs Deganela [1956] 17 EACA 37. I should not in any event belabour the point because both the Plaintiff and the 1st Defendant have an agreement on this point but the 3rd party had a different view hence my firm finding above.

Who is the lawfully registered proprietor of the suit land?

40. Having concluded that L.R. No. 209/3088 is in fact the same on the ground with L.R. No. 209/12004 this court is then confronted with really the main issue in this matter. Both Gitwany and the 2nd and 3rd Defendants were issued with title documents by the Commissioner of Lands. Gitwany's title for L.R. No. 209/12004 was issued on 24.7.1995 and it is signed by Wilson Gacanja as such Commissioner in the presence of the Registrar of Titles whose name is unclear. The one in the name of Maxtowers and Njage was signed by Sammy Silas Komen Mwaita as Commissioner for Lands on 12.2.2001 in the presence of J.K. Wanjau, Registrar of Titles. The land was then transferred and is presently held in the name of the 1st Defendant which transfer was registered against the title on 26.7.2001.

41. The position as at now is that both Gitwany and Taj Mall claim and in fact have title to the same piece of land. Which title should prevail? The one issued on 24.7.1995 or the one issued on 24.2.2001? I would agree with the submissions by counsel for the 1st Defendant that it is to S.23(1) of the Registration of Titles Act Cap. 281 that this court must turn to. That section reads as follows:-

"The certificate of title issued by the registrar to a purchaser 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 indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, 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."

42. I have taken the pains in this judgment to set out exactly how each party obtained title. I have also read the submissions by all parties and sadly none has offered any evidence that Gitwany or the 1st Defendant in any way acted fraudulently or that any of them misrepresented any fact and which then led them to obtain fraudulent titles. In fact the entire mess in which those parties find themselves in is the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. All documents leading to the issuance of title are not prepared, kept nor issued by any other party other than that office, sometimes in conjunction with the Directorate of survey. Any change in L.R.No. or in acreage is a matter that is always in the hands of those offices and even if a private person in a professional capacity undertakes those tasks then those offices must always approve and thereafter take responsibility for those actions. This finding is also in line with the evidence of the 3rd party's witnesses. My finding is fortified by the fact that in its Defence to the 3rd party Notice, the 3rd party at paragraph 6 of that Defence filed on 23.9.2002 stated as follows:-

"The Third Party further states that in view of the changed Land Reference number and the continued occupation of the 2nd Defendant in the government house on the suit premises a mistake occurred in the issuance of two titles in respect of the same premises as the Third Party was not on notice that the same

premises had been allotted to the plaintiff."

43. The alleged mistake on the part of the issuing authority, the 3rd party is clearly admitted and it relates to the issuance of two titles to two different parties. I should only reiterate that the claim at paragraph 7 of that Defence that the Plaintiff was party to the alteration of the original title is not borne out by the evidence before this court and is clearly an afterthought and an escapist approach to an otherwise very serious error on the part of the Commissioner of Lands.

44. Having so stated, I must return to s.23(1) of the Registered Land Act. To do so I must now state that the law as regards two conflicting titles was set out in Dr. Joseph N.K. Ng'ok vs Justice Moijo Ole Keiwua and 2 others C.A. No. 60/1997(un reported) where the Court of Appeal in an Application under Rule 5(2)(b) of the Court of Appeal Rules stated thus;-

"Mr. Kajwang for the Applicant conceded that not a single factor was pleaded showing any fraud on the part of the sixth respondent. In such event the sixth respondent is a bona fide purchaser for value without notice.

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy".

45. The fears expressed by the court in that case are exactly what has confronted the parties and this court in the present case.

46. My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs Commissioner of Lands, C.A. No. 71/1997 (unreported):- is the "grant [that] takes priority. The land is alienated already." This decision was again upheld in Faraj Maharus vs J.B. Martin Glass Industries and 3 others C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel it!

47. My answer above does not solve the puzzle however. What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in s.23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere, a matter I will shortly address.

48. My final word in this regard is that the lawfully registered proprietor of title No. L.R. No. 209/2004 (formerly L.R. No. 209/3088) is Gitwany the Plaintiff, for reasons I have attempted to articulate above.

Was any party fraudulent in the acquisition of title?

49. I have elsewhere above stated my view as regards how each party acquired title. It is imperative however, that I should in few words state that Counsel for the 1st Defendant has in submissions attempted to show that the title to Gitwany may have been fraudulently obtained but what I gather is that in fact all the actions complained of related to the conduct of the 3rd Party and not the Plaintiff. The only additional

point is that one of the Directors of Gitwany was/is the wife of the Commissioner of Lands who signed the title to Gitwany and that "this is a fact that cannot be ignored in a situation like this one". One witness for the 3rd party also took the same view to suggest fraud on the part of Gitwany. Further submissions were made as regards the fact that the said Co-Director is now incarcerated on a conviction of murder. For my part, all these matters cannot be ignored as suggested only if evidence is tendered to show their relevance and connection with the dispute. Both the 1st Defendant and the 3rd Party were supposed to show fraud or misrepresentation on the part of Gitwany and give cogent evidence in that regard. As none was offered, I take them to be merely sensational statements calculated to attract sympathy one way or the other and I shall spend little time in making an analysis of them.

50. I should only add as regards the question posed above this last one point; whereas both the Plaintiff and the 1st Defendant have particularized certain aspects of alleged fraud by each of them, I saw and heard no evidence from both of them showing fraud on the part of the other. Perhaps there are elements of fraud on the part of the 2nd and 3rd Defendants leading to the title now held by the 1st Defendant. The only problem is that the Plaintiff led little or no evidence to show such fraud which could then be said to attach to the 1st Defendant upon transfer of title. This is all there is to say on this aspect of the case.

Is the 1st Defendant a trespasser on the land?

51. I have held that the Plaintiff's title is lawful and that the 1st Defendant's title although apparently procedurally obtained is in fact a sham and cannot confer any indefeasible and absolute rights to it. The only question is whether the 1st Defendant is a trespasser through no fault of its own on the suit land.

52. It is admitted that the 1st Defendant is in occupation and has put up blocks of flats or apartments on the suit land. The Plaintiff never effectively occupied nor had it taken physical possession of the suit land since it obtained title. The 1st Defendant took possession on the basis of a mistaken title on the other hand. The 1st Defendant acted in good faith and believed that it had a good title and that its possession completely entitled it to the land and by such possession it was the owner of the land. As stated in Cheshire and Burn's Modern Law of Real Property 15th ed. [1994] at page 26:

53. "All titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title, and it may be said without undue exaggeration that so far as land is concerned there is in England no law of ownership but only a law of possession." I should rephrase by saying that by its title the 1st Defendant properly entered into occupation and possession believing itself to be owner. We live in modern times and sometimes there is need to modernize the law but as was said by Lord Lloyd of Berwick;

"Like, I imagine, all your Lordships I would be in favour of modernizing the law wherever this can be done. But it is one thing to modernize the law by ridding it of unnecessary technicalities; it is another thing to bring about a fundamental change in the nature and scope of a cause of action."

(See Hunter and others vs Canary Wharf Ltd UKHL decision of 24.4.1997). Without attempting to modernize the law, all I am saying is that as is stated in Mullah, the Transfer of Property, 9th edition 2003, at page 358, "the expression believing in good faith merely means honestly believing. Honest belief is not incompatible with negligence or with a mistake of law." The 1st Defendant holding title to land and entering in good faith and with honest belief, came to the conclusion that it was not a trespasser until that title is nullified and then it may be so termed.

I am of the view that the old cause of action in trespass as known to English Law can apply to this case as against the 1st Defendant prior to nullification of its title and I so find. My view on the matter is supported by the old case of Wuta-Ofei vs Danquah [1961] 3 All E.R. 596 and the decision in Moya Drift Farm Ltd vs Theuri [1973] E.A. 114 where in the latter case the Court of Appeal in East Africa approving the decision in the former stated:-

(a) Per Spry V-P – "Mr. Hewitt conceded that it was formerly the law in England that a person had to have taken possession of land before he could take proceedings in trespass but he submitted that this cannot be the law of Kenya, as it would make nonsense of s.23 [of the Registration of Titles Act (Cap 281)]. I find this argument irresistible and I do not think it is necessary to examine the law of England. I cannot see how a person could possibly be described as 'the absolute and indefeasible owner' of land if he could not cause a trespasser on it to be evicted. The Act gives a registered proprietor his title on registration, and unless there is any other person lawfully in possession, such as a tenant, I think that title carries with it legal possession. There is nothing in the Act to say or even suggest that this title is imperfect until he has taken physical possession."

(b) Per William Duffus P;

(c) "The following passage from the Judgment of the Privy Council delivered by Lord Guest in the case from Ghana of Wuta-Ofei vs. Danquah [1961] All E.R. 596 at pg.600 sets out in general terms the possession necessary to maintain the action" and this is that;

'…….In these circumstances, the slightest amount of possession would be sufficient.'"

To my mind the legal possession established by Gitwany entitles it to possession against all other parties that have shown no better title than its own. The 1st Defendant falls in this category and once its title is found to be invalid it can only be termed a trespasser. In Winfield and Jolowic on Tort, 16th edition 2002, the point is graphically put at page 487 para 13.1.

"…it is no defence that the only reason for…..entry was that he [the trespasser] had lost his way or even that he genuinely but erroneously believed that the land was his."

The 1st Defendant is accordingly declared to be a trespasser on the suit land as argued by the Plaintiff and I so hold.

Is the Plaintiff entitled to its Reliefs?

I note from the Amended Plaint that one of the prayers sought by the Plaintiff is a declaration at prayer (e) thereof that it is the bona fide title holder of L.R. No. 209/12004 formerly known as L.R. No. 209/3088 and the Defendants have no rights whatsoever over the same. I have already effectively granted that prayer and I see no reason to return to it.

54. Prayer (a) relates to a permanent injunction restraining the Defendant from erecting any structures, fencing, constructing and in any other manner interfering with the suit land. Since I have already held that the Plaintiff holds a valid title and therefore is entitled to both ownership and possession of the suit land it follows that no party save itself with its authority should have any right to enter therein and attempt any construction thereon. This finding is consistent with the holding in Moya Drift Farm (Supra) that a perpetual injunction can issue to stop further trespass by the trespasser.

55. Prayer (b) seeks an order that the 1st Defendant should at its own cost remove any structures now on the suit land. I have held that the 1st Defendant entered the land because of a mistake perpetrated by the 3rd party. It commenced construction of flats or apartments on the basis of that mistake and in good faith. It has by this Judgment been told that it all along operated innocently, but on the basis of a mistaken belief that its title is indefeasible while in fact it is not. The blame has been passed on to the 3rd party and I note that in the 3rd party Notice, the 1st Defendant states inter-alia as follows;

"The relief sought from you (the 3rd party) is a reimbursement of all costs, expenses expected profits and generally full compensation to the said TAJ MALL LIMITED…."

56. It is my considered view that while removing all structures now on the suit land, the costs thereof

shall be met by the 3rd party and not the 1st Defendant. I say so because clearly upon nullification of the title held by the 1st Defendant as I will shortly do, all structures on the suit land would amount to an act of continuing trespass if the 1st Defendant lays claim to them. It is my understanding that once a transferee such as the 1st Defendant makes improvements on land believing in good faith that it was absolutely entitled to do so, once its title is faulted, then it must be evicted (see Mullah (supra) pg.354). I have however held elsewhere that the peculiar circumstances of this case would necessitate that neither the Plaintiff nor the 1st Defendant should meet the costs of doing so but the party that caused them the inconvenience should do so hence my direction that the 3rd party should bear the costs. That is my finding and order in this regard.

57. Prayer (c) is one for special damages in the sum of Ksh.30,000,000/= and interest being the cost of the structures demolished when the 1st Defendant entered the suit land. I have seen the valuation report produced by P.W.2 and it has as one basis for the valuation on the item called “Improvements on the plot prior to trespass.” No particular amount in valuation is attached to that item. In his evidence before court however, the witness (P.W.2) stated that the value of the improvements before trespass was Ksh.7,000,000/= and the land valued at Ksh.18,000,000/-. In cross-examination the same witness said that the house which was on the land was valued at Ksh.18,000,000/- based on a City Council Plan he saw in 1996 and which he did not produce. He did not know when the house was constructed and he had no current City Council Valuation for it. It is the Counsel for the Plaintiff who submitted that special damages must be specifically pleaded before being strictly proved as was held in R.R. Siree Vs Lake Turkana Lodges Ltd C.A. 229/1998 per Omolo J.A. What the Plaintiff then did was to plead a figure of Ksh.30,000,000/= but went on to fail to strictly prove that figure or any figure at all. Without such strict proof I am unable to know exactly what is claimed as special damages and with that lack of clarity and proof, the claim must fail.

58. Prayer (d) is for general damages for trespass and mesne profits. I have explained the 1st Defendant’s entry to the suit land but it is still a trespasser in law. I have seen that the proper approach as regards this heading is that taken by the court in Moya Drift where evidence was tendered on two important factors:-

(a) the amount to be awarded as mesne profits per month.

(b) The period for which the amount should be payable i.e. from the date of notice to vacate the land until the date of delivery of possession by the trespasser.

59. I have attempted to apply my mind to these two matters but unlike the court in the Moya Case I do not have the evidence from the Plaintiff to reach a determinate finding on this matter. What counsel for the Plaintiff has done is to use the valuation Report by the 1st Defendant to say; “give us Ksh.151,500,000/- because that is the value of the property plus improvements made for it, as the damages for trespass and mesne profits” I have perused the authorities of Sword Health Properties Ltd. Vs Tabet and others [1979] All E.R. 241 as well as passages from Halsbury’s Laws of England, 4th ed. Page 1730 and what comes out is that the “ordinary letting value of the property” would be the value in damages to be paid to a successful claimant. This I said is also true of the principles set out in the Moya case. I have 2 valuation Reports on record but what they give is the value of the property and not the monthly income expected from it. In fact the value is so grossly different that I should, later in the judgment say something definite on the matter.

60. Without a firm basis in evidence I cannot see how this court can engage in guesswork and speculation to reach a fair amount in damages on this heading. In the circumstances, I can only dismiss the Plaintiff’s prayers in that regard.

61. The last prayer is as to costs a matter I shall address at the end of this judgment.

Is the 1st Defendant’s Counter Claim valid?

62. Like the Plaintiff, the 1st Defendant seeks a declaration that it is the bona fide owner of the suit land. I have elsewhere held that this prayer is only available to the Plaintiff, Gitwany and not any other party, the 1st Defendant included.

63. The 1st Defendant also seeks orders that the Plaintiff should pay to it Ksh.151,500,000/- being the value of the improvements it has made on the suit land. The basis for this sum is the Valuation report by Tysons Ltd produced at page 44 – 61 of the 1st Defendant's bundle of exhibits. That report is unchallenged by any party in the suit. I have seen no fraud on the part of the Plaintiff and as regards the suit land, I have found no unlawful act on its part or even on the part of the 1st Defendant. The Plaintiff is not to blame for the predicament now facing the 1st Defendant including the fact that Shelter Afrique has recalled its loan facility given to the 1st Defendant to put up blocks of apartments on the suit land. I see no basis for passing any judgment in the sum sought as against the Plaintiff and in favour of the 1st Defendant. The claim for interest on the stated sum is also misguided for the same reasons and I really have nothing more to say on the matter.

64. However, the 1st Defendant has taken out a 3rd party Notice against the 3rd Party in which certain reliefs are sought and I will address the issue shortly.

65. The 1st Defendant also seeks general damages against the Plaintiff. The basis for this claim is unclear to me and in submissions Counsel chose not to address the issue at all. For my part in any event, I have seen nothing to show why the Plaintiff should pay damages to the 1st Defendant and that is the end of the matter.

66. As for costs again I shall leave the issue to the conclusion of this Judgment.

Is the 3rd Party Liable to the 1st Defendant as stated in the 3rd Party Notice?

67. It is I am sure now patently clear where this court must throw the 1st Defendant's predicament. By its actions, the Commissioner of Land together with the Registrar of Titles who is also named in the 3rd Party Notice led the 2nd and 3rd Defendant s to believe that the suit land was vacant and available for them to take over. The 3rd Party proceeded to issue title six years after a valid title had already been issued to the Plaintiff. The 1st Defendant innocently, intending to develop the land and for a fair amount in consideration purchased the land without notice of a prior title and obtained a loan to develop it. It became its waterloo when the Plaintiff surfaced and enforced its claim to the land.

68. In the 3rd Party Notice, and I have reproduced the relevant part of it, the 1st Defendant seeks that the 3rd Party should pay to it all that it spent in buying the land and in construction thereof. I have else where above stated that the sum of Ksh.151, 500, 000/= is unchallenged. The 3rd party in its evidence took no notice of it. The 3rd party instead set out to attack the Plaintiff's case and did nothing to defend the claim by the 1st Defendant as against him. Reading Order 1 Rules 14A, 15, 15A and 18 of the Civil Procedure Rules even the Government is expected to defend any question of its own liability to a Defendant who has given a 3rd Party Notice against it. In this case sadly no evidence in reply to the Notice was led and none is before this court.

69. This being the case and for reasons expressed in depth elsewhere above I am satisfied that as between the 1st Defendant and the 3rd Party, the 3rd Party is truly liable to the 1st Defendant. On 24.6.2003 Ibrahim J. gave the 3rd party time to either "oppose the suit or accept the claim against him." He chose to oppose but focused on the wrong matters. It is my view that the claim for Ksh.151,500,000/- is based on the "value of the apartment free from all encumbrances" as at 7.10.2002 when Tysons Ltd conducted the valuation. On the other hand, Kibui and Associates conducted its valuation on 14.5.2003 and like I said earlier its valuation was inconclusive and I was unable to accept it as expressive of the value of the improvements let alone the current market value as it purported to do. I am acceptable therefore to the

figure of Ksh.151,500,000/= as the value of the property plus improvements as shown in the detailed and expressive valuation by Tysons Ltd.

70. I am entering Judgment for the 1st Defendant as against the 3rd party in that sum as prayed by the 1st Defendant.

Costs

71. I have said that the 3rd Party is the author of the misfortune that has brought the Plaintiff and the 1st Defendant into the corridors of Justice. It is the 3rd party pursuant to Order 1 Rule 19 of the Civil Procedures Rules that must bear the costs of all parties save the 2nd and 3rd Defendants who have never bothered to appear. That is the price a party that either knowingly or unknowingly, especially a public institution, acts to the detriment of innocent investors wishing to benefit from the worth of their investments especially in that now very attractive item called urban land. Both the plaintiff and the 1st Defendant purchased the suit land at different times, 6 years apart, for substantial amounts of money. The 1st Defendant the last in line, even borrowed a much more substantial amount of money to develop the land and should not be penalized for the gross acts of incompetence and negligence on the part of the Commissioner of Lands who went on to issue to it a title without canceling the prior existing and validly acquired title held by Gitwany. Such a party cannot expect that this court would countenance those actions. Equity never looks with favour upon such a party and this court would not condone those actions. Equity never looks with favour upon such a party and this is a court of equity in that regard. That is the end of the matter on my part and I shall now bring the dispute to a close in the way that as I think is to the interests of justice and based on my finding above.

Conclusion

These are the final orders of this court;

1. It is hereby declared that the Plaintiff, Gitwany Investments Ltd is the bonafide owner of Land Parcel No. L.R. No.209/12004 (formerly known as L.R. No.209/3088.

2. The title held by the 1st Defendant, Tajamal Ltd over No. 209/3088 which is the same as L.R.No.209/12004 is hereby declared to be invalid and the 3rd party ought to cancel it within the next thirty (30) days.

3. There shall be a permanent injunction restraining the 1st Defendant, its servants and/or agents from further erecting any structures or fences, engaging in any constructions in the suit land or in any other way interfering with L.R. No. 209/12004.

4. The structures contracted on L.R. No. 209/12004 by the 1st Defendant shall be removed there from within the next 90 days in a manner to be agreed between the parties failure to which the 1st Defendant shall determine the manner in which the structures should be removed and where they should be deposited. Such agreement between the parties should be negotiated within 30 days from today's date failure to which the default clause above shall apply.

5. All costs incidental to the removal of the structures in (4) above shall be borne by the 3rd party, the Commissioner of Lands.

6. The 3rd party shall pay to the 1st Defendant Ksh.151,500,000/= being the costs and expenses incurred in the purchase and improvements of the suit land.

7. The 3rd party shall pay interest on the amount stated in (6) above at court rates from the date of filing suit to the date of payment in full.

8. The 3rd party shall pay the costs of the suit to the plaintiff and the 1st Defendant.

9. Any party shall be at liberty to apply.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2006

ISAAC LENAOLA

J U D G E