REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 2555 OF 1997

TYREMASTERS LIMITED…………………………… PLAINTIFF

VERSUS

1. COMMISSIONER OF LANDS………………. 1ST DEFENDANT

2. ELIZABETH SIMUKWO……………………. 2ND DEFENDANT

3. J. KENNEDY OGUYA………………………. 3RD DEFENDANT

JUDGMENT

The Plaintiff herein M/S Tyremastres Limited filed this suit on 13th October 1997 seeking the following reliefs.

a) Kshs.7,500,000/= together with interest at Bank rates, being the refund of purchase price for two properties known as L.R. No.209/12466 and L.R. No.209/12562

b) Kshs.9,544,720 together with interest at Bank rates, being the cost of developing the above mentioned plots

c) General damages

d) Costs of the suit

e) Interest on (b) and (c) above

and

f) Any other relief as the court may deem fit to grant.

Although not very well articulated in paragraphs 5, 6,7 and 8 of the Plaint the genesis of the Plaintiff's claim is as follows:

1. By a letter of allotment dated 17.01.95 the 1st Defendant allocated to the 2nd Defendant an unserveyed Industrial Plot which after survey was given a title No.209/12466.

2. By a letter of allotment dated 9th February 1995 the 1st Defendant allotted to the 3rd Defendant an unserveyed Industrial Plot which after survey was given a title number 209/12562.

3. Whilst survey was pending, the 2nd and 3rd Defendants entered into sale agreements with the Plaintiff for the sale of the above plots for which the Plaintiff paid Kshs.3.5 million and Kshs.4 million respectively on the strength of which agreements the 1st Defendant issued the Plaintiff with two Grants namely I.R. No.65686 and 666331. The said grants as well as the sale agreements were tendered in evidence as exhibits 1A, 1B, 3 and 4.

4. After being issued with the Grants as aforesaid the Plaintiff commenced the development of the two plots only to be informed that the said plots were already previously allocated to other parties to whom titles had been issued. They were instructed to desist from further development of the plots Although the Plaintiff states in paragraph 11 of the Plaint that the letters advising of the prior allocations addressed to the 2nd and 3rd Defendants and purportedly copied to the Plaintiffs but not delivered to them, the same were produced in evidence marked Exhibits 5A and B and are dated 14th October 1996 (letter to the 2nd Defendant) and 9th October 1996 (letter to the 2nd Defendant). The first letter reads as follows:

"RE: UNSERVEYED INDUSTRIAL PLOT 'A'-NAIROBI NOW SURVEYED AS L.R. NO.209/12466.

I refer to the allocation of the above plot to you on 17th January 1995.

The plot was subsequently sold to M/S Tyremasters Limited who are now the current owners.

Please note that the same had already allocated to M/S Engineering Equipments Limited on 28th November 1988 and title was issued to them on 2nd May 1990.

As such, by the time the land was being allocated to you, it was not there!

G.L. Mokufu

<u>for: COMMISSIONER OF LAND</u>S

c.c. TyreMasters Ltd

P.O. Box 17927

<u>NAIROBI</u>

I understand that you are on site carrying on developments – you should stop any further constructions as the land had been allocated before.

c.c. Files 123588

123589

123590 "

The letter to the 3rd Defendant reads as follows:

"RE: UNSERVEYED PLOT 'B' –NAIROBI

NOW SURVEYED AS L.R. NO.209/12562

I refer to the allocation of the above plot to you on 9th February 1995 whereby you subsequently sold it to M/S TyreMastres Ltd and a title issued. Please note that the same land had been allocated to M/S Engineering Equipments Ltd on 28th November 1988 and a title issued on them on 2nd May 1990.

As such by the time the land was being allocated to you, it was not available!.

G.L. Mukofu For COMMISSIONER OF LANDS

c.c. TyreMasters Ltd

P.O. Box 17927

NAIROBI I am told that you are on site carrying out developments. You should stop any further construction as the land had been allocated before.

Files 123588

123589

123590 "

The two letters indicate that the two plots had been allocated to the same party, M/S Engineering Equipments Ltd. It is not clear why in paragraph 11 of the Plaint the Plaintiff mentioned Switchcraft Limited as one of the earlier allotees.

5. At the time the Plaintiff was asked to stop further development of the land the Plaintiff claims to have expended Kshs.9,544,720 which sum he claims as earlier stated herein.

Default judgment having been entered against the 2nd and 3rd Defendants on 12th January 2001, the suit was thereafter fixed for hearing on 6th May 2003. This was after a number of adjournments for one reason or another. The Attorney General did not attend to defend the 1st Defendant and proceedings were conducted ex parte before the Honourable Mr. Justice Mbito who unfortunately retired before delivering his judgment.

This judgment is therefore recorded and delivered based upon proceedings as recorded and typed. Only the Chairman of the Plaintiff testified and produced documents as previously stated in this judgment. In his evidence he submitted that it was whilst excavation of the plot was well in progress that M/S Engineering Equipment and Switch Craft came claiming the land, leading the Plaintiff to refer the matter to the Commissioner of Land who then wrote the two letters quoted hereinabove. The Plaintiff tendered 47 documents in one bundle evidencing the costs of consultation and Excavation works, the firms involved being Gillconsult Integrated Planning Consultants and Dhanji Vaghji & Company Ltd. The said documentation having been admitted in evidence by the trial judge and the Defendants having not attempted to controvert the same, I see no reason to find otherwise than that the same do represent the cost incurred by the Plaintiff in the aborted development of the said plots.

I have considered the submissions filed herein for the Plaintiff and for the 1st Defendant. The latter does not deny that the Plaintiff purchased the plots in question from the 2nd and 3rd Defendants in the circumstances explained by the Plaintiff and for the sum claimed, that is, Kshs.7.5 million. However the

1st Defendant claims not to be in any way liable. I find the 1st Defendant's submissions self defeating in that it does admit having allocated the property twice. The Plaintiff is a victim of the 1st Defendants' act of allocating the "non-available" plots to the 2nd and 3rd Defendants who then sold the same to the Plaintiff. The 1st Defendant in pursuance of the "informal transfer" as has been referred to in these proceedings, issued the Plaintiff with Grants. Though claiming in its submissions to have done so under mistake or error, no evidence of such mistake or error has been tendered in evidence as to support this submission. The A-G has submitted on behalf of the Commissioner that

> **"….The role of the 1st Defendant in these transactions is clear; when he realized that the land had been previously alienated and the plots could not legally be transferred to the Plaintiff he duly informed the Plaintiff that their grant was invalid. The Titles/Grants herein having originated from a letter of allotment issued under the Government Lands Act, in our humble view the letter of allotment must be examined together with the Grant. The Letter of allotment clearly stated in paragraph 6 (of the letter of allotment) that the Government was not liable in the event of prior commitment of the land, which it sought to allocate. This in my humble view was intended to protect the government against liability in the event of mistakes or errors while issuing letters of allotment….."**

The 1st Defendant has submitted further that the requirements of the Government Lands Act Chapter 280 of the Laws of Kenya were not complied with in the issuing of the Titles/Grants and that the onus of proving compliance lies with the Plaintiff. I do not think this argument holds in view of Section 120 of the Evidence Act Cap 80 of the Laws of Kenya which provides as follows:

> "120. **When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."**

By issuing the Titles/Grants to the Plaintiff in this case, the 1st Defendant represented that the title was validly issued. Nowhere in these proceedings has the 1st Defendant demonstrated fraud on the part of the 2nd and 3rd Defendants of which the Plaintiff was aware or took part in. I think I would have found differently if the Plaintiff was claiming the land, since I would be able to hold that the 2nd and 3rd Defendants having not acquired good title had none to pass to the Plaintiff, considering that in law no-one can pass a better title to land than that which he himself possesses. However this being a claim for damages I think the 1st Defendant cannot escape liability in the circumstances. And such liability attaches for both the purchase price and the construction costs incurred as a result of the 1st Defendant's actions.

I am surprised to observe from paragraph 4 of the Plaint that the 3rd Defendant was at the time of filing suit an employee of the 1st Defendant, yet nowhere in the proceedings or submissions by the Attorney General is the Court told what action the 1st Defendant has taken against him in form of investigation as to the circumstances in which he had the relevant property allocated to himself for him to quickly dispose of it for a hefty sum. I mention this because this Court is greatly concerned that such seemingly unscrupulous parties have in the past made undeserved monetary gains in dubious land deals, yet the tax payer has to bear the burden of setting damages awarded to litigants in cases such as the present one.

For the Attorney General to say, as appears in his submissions that the 1st Defendant informed the Plaintiff

> **"to stop construction immediately it realized that the grant issued to the Plaintiff was**

invalid."

is not only misleading but incorrect. The correct position is that the Plaintiff itself brought to the attention of the 1st Defendant the knowledge that all was not well with the title the 1st Defendant had issued to the Plaintiff. The callousness with which the 1st Defendant handled the issue and which the Attorney General seems to condone is without comprehension. As the custodian of Government Land on behalf of the citizenry the 1st Defendant is expected to and must adopt a more serious approach in dealing with such land and not to expect to wriggle out of responsibility when his actions lead others to incurring losses. Unfortunate as it is for the tax payer the law binds me to find that the 1st Defendant is jointly and severally liable for the special damages claimed herein.

Consequently I find that this suit succeeds as against all the defendants jointly and severally and do enter judgment in favour of the Plaintiff as follows:

(a) Kshs.7,500,000/= being the purchase price for L.R. No.s 209/12466 and L.R. No's 209/12562

(b) Kshs.9,544,720/= being the costs incurred in the partial development of the said plots.

(c) Costs of the suit.

(d) Interest on (a) (b) and (c) at Court rates from the date of filing suit until payment in full.

No award of general damages shall be granted as no submissions were tendered thereon.

Dated, Signed and Delivered at Nairobi this 22nd day of Ap**ril 2005**

M.G. Mugo

Judge

<u>In the presence of:</u>

Aboge h/b for Chacha Odera for the Plaintiff

N/A for The Attorney General