

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 527 OF 2001 'B'

OCEAN VIEW PLAZA LTD.....PLAINTIFF

VERSUS

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

The plaintiff herein is the registered owner of two suit premises, namely LR No MN/1/9933 registered as CR No 29190 at the Mombasa Lands Registry and LR No MN/1/9892, registered as CR No 29303 at the Mombasa Lands Registry. Grants of Titles thereto were exhibited during the hearing of this case as Exhibits 1(a) and 1 (b) respectively. By letters dated 29th November, 2000 put in evidence as exhibit 2(a) and 2(b) and written by the Commissioner of Lands, the letters notified the plaintiff that, the Commissioner of Lands had cancelled the respective Titles upon the grounds that the respective plot were created on a road reserve which has telephone cables and water pipelines passing underneath the lands. Soon after, on 5.2.2001, the plaintiff claims in his evidence, he received a letter from the Register of Titles, Mombasa, Exhibit No 3 advising the plaintiff that due to the cancellation of the allocation, he was under instruction to and had in fact entered a restriction over LR No MN/9933 and that the plaintiff was required to surrender the title to him for the purpose of cancellation of the same. The plaintiff refused to comply and proceeded to file this suit, making the Attorney-General a party for and on behalf of the Commissioner of Lands as per the requirement of the Government Proceedings Act, Cap 40. This was done after the plaintiff's lawyers had served the requisite Statutory Notice in compliance with the said Act to which the defendants failed to respond, inviting the filing of this case.

The plaintiff was served with the plaint and Summons to Enter Appearance on 3rd December, 2001. Appearance was due on 18th December, 2001 but was not filed until 23rd January, 2002, a month later. Thereafter defence was to be filed within 15 days after the filing of Appearance but none had been filed by the time of the hearing, about three months later. The plaintiff served the defendant with a hearing notice but the defendants did not attend to defend the suit. During the hearing the plaintiff called only one witness, its Managing Director, one Naresh Kotak who gave evidence establishing the facts aforementioned.

It is not in doubt that the plaintiff company is the registered owner of the suit premises and that one plot was directly allotted to it and the other was transferred to it by the original allottee. It is not also in dispute and is common knowledge in respect of which I take judicial notice, that allotted plots are either before or immediately after such allotment surveyed by the Government Survey Department before the Title documents are prepared and issued. It is difficult to understand therefore the grounds given for the purported cancellation of the titles. The grounds given are those that could have been easily discovered before the titles were prepared and issued. Indeed the preparation exercise towards the issuance of the title deeds, including the survey, is to make sure that an allocated plot is free from such encumbrances and is therefore truly available for allocation. The defendant in this case chose not to come and explain the said reasons and defend the case. The presumption here then is that they could not possibly raise an adequate defence to the plaintiff's case.

The plaintiff's case is that the Commissioner of Lands had no acceptable and lawful grounds to cancel the said titles. He did not follow the laid down procedures if he wanted to acquire the plots compulsory. Compulsory acquisition would be the only lawful way of taking away a piece of land from the registered

owner. Allotment of land to a citizen or others protected under the Constitution, which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act. It is not in evidence that such procedure was followed. Indeed it is categorically denied that the provisions of the said Act were applied to the pieces of land the subject of this case. I would further hold that where the compulsory acquisition procedure would be applied, it would or should be applied uniformly and without discrimination against all the parties concerned. In this case it would appear that the Commissioner's letter was discriminative.

I am accordingly satisfied that the plaintiff has proved on the balance of probability that it is entitled to the reliefs it has sought. I further hold that the attempt by the Commissioner of Lands to cancel the two title deeds aforementioned lacks the legal efficacy it would require to succeed and I rule it null and void.

The plaintiff sought to prove that it has suffered loss and damage because it was stopped by the act of the Registrar of Titles, Mombasa who had clogged an encumbrance upon the titles in form of a restriction. That may be so and in a suitably drawn claim this court may have been inclined to consider assessing general damages. However no prayer for damages was included although it was vaguely alluded to in the evidence of the plaintiff.

Having come to the above conclusions my final orders would be as follows-

ORDERS

1. A declaration is hereby issued that the Commissioner of Lands letter dated 29th November, 2000, is null and void.
2. A declaration is hereby issued also that the Mombasa Registrar of Titles letter dated 5th February 2001 is also null and void.
3. The Registrar of Titles, Mombasa is hereby ordered to forthwith uplift, cancel and vacate the restriction or any encumbrance placed upon LR Numbers MN/1/9892 and LR Number MN/1/9933 by him or by the Commissioner of Lands on his behalf.
4. Costs to the plaintiff to be agreed upon or taxed as the case may be.

Dated and delivered at Mombasa this 24th day of April 24, 2002

D.A ONYANCHA

JUDGE