



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1538 OF 2013

FLASH AUDIO SERVICES LIMITED.....PLAINTIFF

VERSUS

MBESA LIMITED.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

JUDGEMENT

1. This is a dispute over ownership of land reference number (L.R. No.) 1870/1/186 located in the Highridge area in Nairobi County (“the Suit Property”) which the Plaintiff claimed was allocated to it by the Government of Kenya in consideration for its surrender of a portion of land in Malindi. In the Amended Plaint filed in court on 17/10/2014 the Plaintiff averred that the Suit Property was registered in the name of Michael Lubicz for a lease of 99 years which expired in 2003 paving way for reallocation of the land by the Government. After the allocation, while the Plaintiff was processing its title an issue arose in the lands registry that the 1st Defendant was laying claim to the Suit Property purporting it to be L.R. No. 1870/1/544 under deed plan number 219938.

2. The Plaintiff claimed that it conducted a search and confirmed that it was the registered owner of the Suit Property and there were no records in respect of IR No. 1870/1/544. The Plaintiff claimed that the 1st Defendant had fraudulently obtained the survey plan in support of the extension of the lease for L.R. No. 1870/1/544. It also claimed that the 1st Defendant procured the insertion of forged documents into F/R No. 528/67 kept by the Director of Surveys and contended that the 1st Defendant purported to have changed the user and registration number for the Suit Property.

3. In the endeavour to develop the Suit Property, the Plaintiff applied to the Nairobi City County for a permit to conduct demolition in November 2013. When it went to the Suit Property on 17/12/2013 with officials from the City County of Nairobi, they were confronted by the 1st Defendant’s directors who prevented them from gaining entry into the land. The Plaintiff contended that the 1st Defendant had no legal interest in the Suit Property and claimed that it had been deprived of its right to own property as a result of which it had suffered loss and damage.

4. The Plaintiff sought a permanent injunction to restrain the 1st Defendant from dealing with the Suit Property or interfering with the Plaintiff’s rights over the suit land. Further, it sought a mandatory injunction to remove any structures or developments the 1st Defendant may have placed on the land.

5. In the alternative, the Plaintiff sought an order for compensation or indemnity against the 2nd Defendant for the loss of the value of the Suit Property at prevailing market rates, general damages and the costs of the suit in the event that the 1st Defendant’s title was upheld by the court.

6. The 1st Defendant averred in its statement of defence and counterclaim filed in court on 28/8/2014 that Michael Lubicz transferred the remainder of his leasehold interest in the Suit Property to Gulamhussein Chatur Popat Ko6tendia and Nurally Chatur Popat pursuant to an indenture of conveyance dated 30/4/1962. Title to the property was transferred to Amir Sidi and Pamir Hamir Sidi in July 1983 who in turn transferred the remaining term of the lease over the Suit Property to the 1st Defendant in June 1995.

7. The 1st Defendant averred that it applied for extension of the lease and change of user which led to it being issued with deed plan number 219938 and the land reference number changed from 1870/1/186 to 1870/1/544. The 1st Defendant was issued with a renewal of lease on

15/12/2003 and it surrendered the expired lease whereupon it was issued grant number I.R. 92986 dated 2/10/2003.

8. The 1st Defendant averred that the Nairobi City Council approved the change of user of the land from residential to shops and flats at a council meeting held in November 1996. The Commissioner of Lands also approved the change of user and communicated this to the 1st Defendant through a letter dated 15/4/1998. The 1st Defendant denied that it had fraudulently acquired the Suit Property.

9. In its counterclaim, the 1st Defendant averred that the Plaintiff had tampered with the lands documents and records and fraudulently removed deed plan number 219938 from the survey records. Further, that it had manipulated the lands officials into thinking L.R. No. 1870/1/186 still existed and was available for allocation. The 1st Defendant averred that the Plaintiff's title was fraudulent and sought a declaration to that effect. Further, it sought a mandatory injunction for the Plaintiff's grant dated 28/12/2018 to be delivered up for destruction. The 1st Defendant sought rectification of the deed file and correspondence file at the lands registry to reflect that its grant dated 2/10/2003 and registered as I.R. No. 92986 was the true title over the Suit Property. It sought a permanent injunction to restrain the Plaintiff from dealing with the Suit Property. The Plaintiff filed a reply to defence and defence to counterclaim in which it denied the 1st Defendant's claim and challenged the manner in which the 1st Defendant obtained the extension of the lease over the Suit Property.

10. The 2nd Defendant filed a defence on 17/2/2015 and averred that it was for the Plaintiff to prove that the land it alleged was allocated to it was allocated legally and that the land was available for allocation. The 2nd Defendant denied having any evidence of the Plaintiff's surrender of any land in Malindi to Kenya Wildlife Service (KWS). The 2nd Defendant denied liability and referred to the provision in the letter of allotment to the effect that the government would not accept liability in the event of prior commitment or otherwise and added that there was no basis for the Plaintiff's claim for indemnity or compensation.

11. The 2nd Defendant filed a defence to the 1st Defendant's claim and averred that there was no evidence that Michael Lubicz ever sold the Suit Property before the lease expired on 31/12/2002. It stated that its records showed that the Suit Property was allocated to the Plaintiff vide a letter of allotment for 99 years from 1/10/2011 and that the allocation was in consideration for the surrender of portion 9377 located in Malindi. The Plaintiff made the requisite payments and upon resurvey deed plan number 345793 dated 27/11/2012 was issued to the Plaintiff. In the process of preparation of the grant, it emerged that deed plan number 219938 dated 11/9/1998 had been issued over the same land but given L.R. No. 1870/1/544. It set out the issues highlighted by the Director of Surveys which led to the registration of the Plaintiff's grant and averred that the Director of Surveys had raised serious issues touching on the validity and authenticity of the 1st Defendant's title.

12. In its statement of defence filed in court on 11/2/2019, the 3rd Defendant admitted that the Suit Property was allocated to the Plaintiff as an alternative in consideration for the Plaintiff's surrender of land in Malindi to KWS. It added that the allocation of the Suit Property to the Plaintiff was unlawful since the land was not available for allocation. It averred that Michael Lubicz transferred the remainder of his leasehold interest in the Suit Property to Gulamhussein Chatur Papat Kotedia and Nurally Chatur Papat. The suit land was subsequently transferred on multiple occasions and finally to the 1st Defendant on 14/6/1995. It confirmed that the extension of lease and change of user of the Suit Property were processed in favour of the 1st Defendant which gave rise to L.R. No. 1870/1/544.

13. The Plaintiff called two witnesses to testify on its behalf. James Gichuki Wambugu, a director of the Plaintiff testified that the Plaintiff was the registered proprietor of the Suit Property and had an original grant issued by the Commissioner of Lands. The Suit Property was allocated to the Plaintiff by the Government as an alternative property in consideration for its surrender of Portion 9377 in Malindi to the Kenya Wildlife Service (KWS). He produced copies of the letter of allotment dated 13/9/2011 and surrender dated 15/1/2013. He stated that the Suit Property was surrounded by a perimeter wall and had an old dilapidated and that there was an unoccupied colonial era-type of structure on the land. He stated that he had established from the records held at the lands office that Michael Lubicz did not transfer the lease he held and that it expired in 2003 upon which the Suit Property reverted back to the Government of Kenya which was at liberty to allocate the land as it did to the Plaintiff.

14. He stated that the Plaintiff accepted the offer of the land and met the conditions stipulated in the letter of allotment. Owing to the fact that the Suit Property had been surveyed a long time ago, the Plaintiff was required to resurvey the land and it therefore engaged Edward Kiguru, a licensed land survey who resurveyed the Suit Property and prepared a deed plan. The deed plan and resurvey were approved by the Director of Surveys. Before the Plaintiff obtained the title over the Suit Property, an issue arose at the lands registry that the 1st Defendant was claiming ownership of the same land purporting that it was L.R. No. 1870/1/544, with deed plan number 219938.

15. Mr. Wambugu stated that the Director of Surveys asserted that the documents relating to L.R. No. 1870/1/544 were fraudulent and that no change of user or new number had been issued in respect of the Suit Property. The Director of Surveys requested the Commissioner of Lands to process a grant over the Suit Property in favour of the Plaintiff. He claimed that the Commissioner of Lands disowned the 1st Defendant's documents. He conducted an official search on the land and confirmed that the Plaintiff had been registered as proprietor of the Suit Property. He could not find records at the lands registry in respect of L.R. No. 1870/1/544 which the 1st Defendant was laying claim to. He stated that the investigations done by the Criminal Investigations Department (CID) exonerated the Plaintiff from any fraudulent activities but revealed that the 1st Defendant forged and fraudulently prepared deed plans, extension of lease and change of user in an attempt to make it look like they related to the Suit Property. Following the investigations by CID the 1st Defendant's Directors were charged at the Makadara Law courts in Criminal Case No. 5915 of 2013 with offences relating to forgery and conspiracy to defraud.

16. The Plaintiff applied to the Nairobi City Council for a permit to demolish the structures on the Suit Property in November 2013 but was denied entry into the Suit Property by the 1st Defendant's directors who were in the company of a dozen hired goons. The Plaintiff claimed that it had been denied access to its land by the 1st Defendant.

17. He produced a copy of the request for payment dated 29/1/2013 and the indent dated 27/11/2012 issued by the Director of Surveys to the Commissioner of Lands. He also produced the requests for rates payment issued to the Plaintiff in respect of the Suit Property. He produced a copy of the cheque dated 20/12/2012 for Kshs. 914,770/= together with the receipts issued by the lands office on the same date. He produced

a copy of the letter dated 24/10/2012 written on behalf of the Commissioner of Lands confirming that the Suit Property was allocated to the Plaintiff in exchange for the Malindi plot. The letter stated that the Commissioner had no objection to the issuance of a deed plan to facilitate the issuance of a grant. He produced letters from Edward Kiguru Land Surveyors dated 22/10/2012 and 8/11/2012 regarding the survey together with a letter dated 3/11/2012 from the Director of Surveys.

18. The witness produced the letter dated 13/2/2013 from the Commissioner of Lands requesting the Director of Surveys to confirm the authenticity of deed plan number 219938. The letter mentioned that the Suit Property had been allocated to the Plaintiff and during the process of registration of the new grant it emerged that L.R. No. 1870/1/186 had changed to L.R. No. 1870/1/544 as a result of possible change of user. The Director of Surveys responded on 10/4/2013 and indicated that upon scrutiny of the records they held it transpired that L.R. No. 1870/1/544 was fraudulently inserted into F/R No. 528/67 and deed plan number 241395 was issued and that it was fake. He pointed out that the survey plan supporting extension of lease for L.R. No. 1870/1/544 was prepared in respect of L.R. No. 1870/1/165 for National Cereals Produce Board. The Director of Surveys confirmed that L.R. No. 1870/1/186 never changed user for a new number to have been issued. He pointed out that deed plan number 219938 was prepared on 11/9/1988 while the survey was carried out in 2003. The letter urged the Commissioner of Lands to process the registration of the new grant over the Suit Property in favour of the Plaintiff.

19. He also produced an internal memo from the Commissioner of Lands to the Director of Surveys dated 31/10/2012 which stated that the lands records available did not indicate any approval for subdivision purposes and that the subplots had not been registered in their records which meant that the subdivision would have been the product of fraudulent activity. Ochieng G. O. signed the letters on behalf of the Commissioner of Lands. The letter from the Directorate of CID dated 27/11/2013 which the witness produced stated that the Plaintiff's documents had been exonerated from fraud and the matter was conclusively investigated.

20. He stated on cross examination that the Plaintiff was incorporated in September 2011. He did have a copy of the Plaintiff's certificate of incorporation in court. When the Plaintiff's director was referred to the letter from the Registrar of Companies dated 11/2/2019 which indicated that the Plaintiff was registered on 2/1/2013 he did not agree with that letter and stated that he had the certificate of incorporation. He did not have a copy of the title for the Malindi plot which he claimed the Plaintiff had bought in September 2011.

21. He stated that it was the lands officials who told him that Michael Lubicz had never transferred the Suit Property. He claimed that there were street children living in the dilapidated house when the Suit Property was allocated to the Plaintiff. He explained that the purpose of the resurvey by Edward Kiguru was to establish where the beacons were.

22. He stated that he bought the Malindi plot for Kshs. 1,200,000/= but did not have the sale agreement or the search in respect of that land in court. He claimed that they were told by officers in the office of the Minister for Lands that the Malindi plot could be exchanged because the government wanted to construct for KWS officers on that land. He did not have any correspondence on this. He added that he attended meetings in Hon. Orengo's office when he was Minister for Lands.

23. He claimed that he looked for Caleb Miheso (deceased) who used to work for Michael Lubicz and Caleb took him to the Suit Property in 2010 and told him to look for the owners so that he could buy the land. This was before the Plaintiff purchased the Malindi plot. He did not have a copy of the title for the Malindi land. He stated that he looked for land in Parklands and asked the government to investigate the land and allocate it to him. He claimed he took the letter to Mr. Orengo who was the Minister for Lands. He stated that he went to the land in 2013 after getting the title. He conceded that the deed plan number 345793 attached to the Plaintiff's title is written extension of lease. He stated that before giving instructions to the surveyor Mr. Kiguru, they got a copy of the indenture from the Minister's office. He denied receiving the letter dated 31/10/2013 from the Chief Land Registrar informing the Plaintiff that the registration of its title over the Suit Property was erroneously done and should be cancelled. He stated that he had paid land rent except for the time when they have been in court.

24. He stated that his lawyer did due diligence in 2011 and advised him to purchase the Malindi plot. He stated that he was called to the Minister's office and they were informed that the Malindi land was required for KWS purposes. He confirmed that the letter of allotment dated 13/10/2011 required the Plaintiff to pay Kshs. 914,770/= in 30 days and that it paid this sum on 20/12/2012. He conceded that the survey by E. M. Kiguru was undertaken before the Plaintiff paid for the allocation of the Suit Property. The deed plan is dated 27/11/2012. He stated that the Ministry of Lands did a search on the Suit Property but did not give him a copy. He maintained that the Plaintiff was incorporated in September 2011 and not in January 2013.

25. Narmin Alnashir Kassam gave evidence for the 1st Defendant. He stated that he was familiar with the Suit Property being the niece of the late Gulamhussein Chatur Popat Kotedia's sister. He lived in the house on the Suit Property sometime around 1966 to 1967 with his uncle and grandmother. He confirmed that in 1966 the Popats were in possession of the Suit Property and lived in the house on it. He used to visit the house almost every weekend and they had family gatherings on the land over the weekends. He could recall the interior of the house vividly. He visited the home in 1981. His Uncle Mr. Popat sold the property. He do not know who the uncle sold the land to.

26. Parin Hamir Sidi gave evidence. She recalled that sometime in 1983, Zarina Gulamhussein Popat and Abdul Karim Chatur Popat, Noorali Chatur Popat and Zaherali Chatur Popat, who were the administrators of the Estate of the Late Gulamhussein Chatur Popat Kotedia wanted to sell the Property that was owned by Zarina Popat and the late Gulamhussein Chatur Popat Kotedia. Zarina Popat and the late Gulamhussein Chatur Popat Kotedia were husband and wife ("the Popats")

27. They decided to buy the Suit Property from the Popats which included the existing house that was on the property with her husband, Hamir Sidi. The Popats had lived on the Suit Property for long. An indenture dated 7/7/1983 was drawn up by Sayet Ahmed Advocate which they signed and paid Kshs. 900,000/= to the Popats for the Suit Property. She stated that they moved into the house sometime in 1983 and made some renovations to the house. They lived in the house and she was familiar with the surrounding area. The residents in the flats opposite the Suit Property knew her well as the owners of the kiosks near the suit land. She had both fond and bad memories the house on the suit land. She raised her children on the suit land. They had regular family gatherings over the weekend on the Suit Property. The house had a separate outer house where members of staff lived with their families. They lived in the house for 12 years until they sold it to the 1st Defendant in 1995.

28. Her mother in law was brutally murdered in a robbery with violence incident that took place in the Suit Property in the day time sometime in 1988. All their possessions were stolen from the house. She gave details of the attack. The police eventually got the robbers and they were taken through trial. It became untenable for them to continue living in the house. They entered into an assignment with the 1st Defendant dated 14/6/1995 for the sale of the Suit Property for Kshs. 2,500,000/=. They moved to Rhapsa Road in Nairobi and the 1st Defendant took possession of the Suit Property. She stated that there had been continuous occupation of the Suit Property. She did not know Michael Lubicz. She was prepared to bring photographs she took of the house including the wallpaper which Popat had put in the house which they did not pull down because they liked it.

29. Rose Nandutu gave evidence. She worked for Amir and Parin Sidi and lived on the Suit Property. She first went to the house on the Suit Property in 1983 to clean it up before they moved in. She lived with her husband on the outer house located on the garden past the driveway from 1983 to 1995. She stated that she raised four of her children on the Suit Property. They moved out of the house following a terrible incident in 1988 when Amir Sidi's mother was brutally murdered in the daytime. She recalled that the Sidis she worked for would have family come over to the Suit Property where they would sit and talk in the big space. She did not know anything about the title documents.

30. Zahir Manji, a director of the 1st Defendant gave evidence. He stated that Michael Lubicz acquired the Suit Property from Emma Louise Cave through a deed of assignment dated 25/6/1953. Michael Lubicz transferred the remainder of the lease to Gulamhussein Chatur Popat and Noorali Chatur Popat. Gulamhussein Chatur Popat died on 22/7/1981 and a grant was issued to his executors who through an indenture of assignment dated 7/7/1983 transferred the Suit Property to Hamir and Pamir Sidi. He stated that following the loss of a relative in a violent robbery incident in 1988, the Sidis were greatly distressed and forced to transfer the property to the 1st Defendant through an indenture of assignment dated 14/6/1995. He claimed that the 1st Defendant paid the Sidis Kshs. 2,500,000/= as consideration for the transfer of the balance of the lease term. He produced copies of the indentures together with the certificate of confirmation of grant in respect of the Estate of Chatur Popat.

31. He averred that the 1st Defendant applied for the extension or renewal of the lease over the Suit Property which was to end on 1/6/2003. It wished to have a use of the Suit Property changed from only residential to shops and flats. The 1st Defendant's advocates M/s Harit Sheth Advocates made an application to the Nairobi City Council for approval to change of the use of the Suit Property. He produced copies of the minutes of the meeting of the Town Planning Committee held on 15/11/1996 which approved the change of user on certain prescribed conditions.

32. He also produced a copy of the letter dated 11/12/1996 which the Director of City Planning of the Nairobi City Council wrote to the Commissioner of Lands over the change of user from residential to shops and flats of L.R. No. 1870/1/186 Mpaka Road while recommending the approval of the change of user. He also produced a copy of the letter dated 15/4/1998 from the Commissioner of Lands to Harit Sheth Advocate confirming that the application for change of user over the Suit Property had been approved.

33. He stated that on 26/8/1998, the Commissioner of Lands requested the Director of Surveys to prepare a new deed plan which was registered as deed plan number 219938 and was signed by the Director of Surveys on 11/9/1998. The change of user resulted in the change of the land reference number from 1870/1/186 to 1870/1/544 with a new deed plan number 219938.

34. Mr. Manji produced a copy of the letter dated 6/11/1998 from the Commissioner of Lands to Mohammed Madhani and Company Advocates regarding the extension of the lease over the Suit Property. The letter required a surrender of the existing title together with the new deed plan signed by the Director of Surveys to the Commissioner of Lands. It asked for certain payments to be made in the sum of Kshs. 13,480/=. The Commissioner of Lands issued a letter of allotment to the 1st Defendant on 15/9/2003 whose reference read "Renewal of Lease L.R. No. 1870/1/544". The land was to be used for shops, offices and flats including the sale of petrol and motor oils. He produced a copy of the surrender deed vide which the 1st Defendant surrendered the piece of land known as L.R./ No. 1870/1/186. It bears the stamp for Central Registry for 16/10/2003 at 12.30 p.m.

35. After a long delay a new grant was issued to the 1st Defendant registered as I.R. No. 92986 for a term of 50 years from 1/6/2003 being the date the earlier lease expired. The copy of the lease shows that it was registered on 16/10/2002. He produced copies of the cheques paid by the 1st Defendant to the Commissioner of Lands and receipts issued between 2003 and 2015 on account of land rent and other charges. He stated that the 1st Defendant had been in actual and continuous occupation of the Suit Property and urged that it was never available for allocation to any other person.

36. He stated that the Plaintiff claimed ownership of the Suit Property in **Nairobi ELC Case No. 487 of 2011** which was dismissed for want of prosecution. He produced a copy of the letter dated 23/9/2011 from the Chief Land Registrar to Archer and Wilcock Advocates which confirmed that according to their records, the registered proprietor of L.R. No. 1870/1/544 was the 1st Defendant through grant number I.R. 92986 registered on 16/10/2003 pursuant to a renewal of lease. He produced a copy of the internal memo dated 16/1/2014 vide which the 3rd Defendant's Commissioner requested information from the Director of Surveys on the status of L.R. No. 1870/1/186 and 1870/1/544.

37. The Acting Director of Surveys responded on 13/3/2014 and confirmed that deed plan number 219938 was issued on 11/9/1998 following change of user for L.R. No. 1870/1/544 (original number 1870/1/186) on F/R number 22/178. The letter stated that deed plan number 241395 was issued on 6/5/2002 for MN/1/12469 for land in Mombasa Municipality. The letter stated that deed plan number 241395 for extension of lease for L.R. No. 1870/1/544 was under investigation and was not in their records.

38. Further, the Director of Surveys stated that deed plan number 345793 was issued on 27/11/2012 as a new grant in favour of the Plaintiff. The memo stated that it was not clear under what circumstances private land was alienated and allocated to a third Party. Mr. Manji stated that the Chief Land Registrar summoned both parties with a view to cancelling the Plaintiff's title which was erroneously issued. He stated that the 1st Defendant provided evidence of its ownership of the Suit Property but the Plaintiff nevertheless made false accusations against the 1st Defendant's directors following which criminal proceedings were initiated against them.

39. He denied hiring any goons to lock the Plaintiff out of the Suit property and averred that it was actually the Plaintiff who hired dozens of personnel to forcefully evict the 1st Defendant from the Suit Property. He stated that the prosecution of **Makadara Criminal Case No. 5915 of 2013** was halted by an order of the High Court. The criminal charges were later withdrawn. He confirmed that there was one residential house on the suit land. He maintained that the change in the land reference number for the Suit Property was occasioned by the 1st Defendant's application for change of user.

40. The 2nd Defendant called three witnesses. Gordon Ochieng, a Senior Assistant Director, Land Administration in the Department of Lands gave evidence. He stated that there was no evidence to show that Michael Lubicz sold the Suit Property before the lease expired on 31/12/2002. He confirmed that the Suit Property was allocated to the Plaintiff on 13/10/2011 vide a letter of allotment pursuant to its surrender of land in Malindi. The Plaintiff paid the requisite payments and upon resurvey, deed plan number 345793 dated 27/11/2012 was issued. In the course of preparation of the Plaintiff's title it emerged that deed plan number 219938 dated 11/9/1998 could have been issued over the same piece of land numbered L.R. No. 1870/1/544. The Commissioner of Lands wrote to the Director of Surveys on 13/2/2013.

41. The Director of Surveys highlighted some issues including that L.R. No. 1870/1/544 deed plan No. 219938 was fraudulently inserted into survey plan number 528/67 and a fake deed plan number 24135 was issued; the survey plan supporting the extension of lease for L.R. No. 1870/1/544 was prepared in respect of 1870/1/165 owned by the National Cereals and Produce Board; a resurvey of L.R. No. 1870/1/186 for purposes of a new grant was processed on 2/1/2012 in favour of the Plaintiff and deed plan number 345793 was issued and that L.R. No. 1870/1/186 had never changed its user to warrant a new number. In his view the import of these issues was that the title held by the 1st Defendant could not stand. He stated that the Plaintiff got its title over the Suit Property after the lease expired and the land was available for alienation.

42. On cross examination, he conceded that the evidence on the sale of the Suit Property by Michael Lubicz should have been in the custody of the Chief Registrar and not in the Land Administration Division where he worked. He later clarified that at the time he recorded his witness statement the lands records shown to him in court were missing. He stated that the 1st Defendant's documents were not available at the land's office when the Suit Property was allocated to the Plaintiff in 2011. He stated that he relied on the position given by the Director of Surveys at that time and added that had he seen the letter of allotment issued to the 1st Defendant on 15/9/2003 he would not have processed the Plaintiff's lease. He conceded that the reference in the Plaintiff's letter of allotment was the same file used in the 1st Defendant's allocation except that it was a temporary file.

43. Priscilla Njeri Wango, a land surveyor in the Ministry of Lands and Physical Planning gave evidence. She took the court through the procedure for processing deed plans. She stated that from the survey records, an indent for L.R. No. 1870/1/186 Mpaka Road dated 26/8/1998 forwarded deed plan number 21998 in favour of the 1st Defendant. The Commissioner of Lands required the 1st Defendant to surrender the existing title with a new deed plan. She stated that from their records deed plan number 219938 dated 11/9/1998 was signed and sealed by Director of Surveys on behalf of the 1st Defendant. This deed plan was used to prepare grant I.R. 92986 for L.R. No. 1870/1/544 registered on 16/10/2003. The deed plan was issued as a change of user deed plan for L.R/ No. 1870/1/544 original number 1870/1/186 on F/R No. 222/178. This followed the approval of change of user and indent from the Commissioner of Lands for the Suit Property vide his letters dated 15/4/1998 and 26/8/1998 respectively.

44. She stated that deed plan number 219938 was released to the Commissioner of Lands by the Director or Surveys and that it was authentic. Deed plan number 241395 for extension of lease was not supported by their records. She confirmed that deed plan number 345793 was issued on 27/11/2012 as a result of a new grant allocation to the Plaintiff vide a letter of allotment dated 6/7/2010 and an indent from the Commissioner of Lands dated 16/10/2012 for L.R. No. 1870/1/186. She pointed out that it was not clear under what circumstances private land was alienated and allocated to a third Party.

45. By the time the new grant deed plan number 345793 was presented for registration, the change of user deed plan number 219938 had already been registered. She stated that the Director of Surveys confirmed in the letter dated 8/3/2013 that deed plan number 219938 was authentic and was prepared by the Director of Surveys for L.R. No. 1870/1/544. The letter advised the Commissioner of Lands to exercise caution before preparing a new grant.

46. Ms. Wango produced the maps in respect of the Suit Property and the correspondence exchanged between the Director of Surveys and the Commissioner of Lands on the survey of the Suit Property. She confirmed that where there is a change of user the land reference number and the deed plan number both change. She confirmed that the survey plan for the Suit Property was still missing and added that it was a mistake to process the new grant deed plan when Edward Kiguru, the private surveyor resurveyed the Suit Property in 2012.

47. Edwin Munoko Wafula, a Senior Land Registration Officer working in the office of the Chief Land Registrar at the Ministry of Lands and Physical Planning gave evidence for the 2nd Defendant. He stated that according to the records held by the Chief Land Registrar, the 1st Defendant was registered as proprietor of L.R. No. 1870/1/544 through grant number IR 92986 registered on 18/10/2003 following the renewal of the lease. The Chief Land Registrar summoned the Plaintiff and the 1st Defendant for a hearing in respect of the disputed titles over the Suit Property through the letter dated 7/8/2013. They were to appear on 6/9/2013.

48. Through the letter dated 31/10/2013, the Chief Land Registrar informed the Plaintiff that the registration of grant number IR 143915 was erroneously done as a result of a resurvey and was not captured in the database of the Chief Land Registrar who recommended its cancellation.

49. Mr. Wafula confirmed that from their records the 1st Defendant executed a deed of surrender dated 2/10/2003 in which it agreed to surrender to the government the land comprised in grant L.R No. 1870/1/186 in exchange for a grant of an extended term of lease. The surrender was booked at the Central Registry on 16/10/2003 as number 609. Grant IR 92986 was executed by the Commissioner of Lands on 2/10/2003 and subsequently registered as IR 92986/1 on 16/10/2003. Mr. Wafula confirmed that he was familiar with the signature of R. N. Mule his colleague who signed the grant and confirmed that that was her signature.

50. He produced a copy of the assignment dated 19/6/1995 through which the Suit Property was transferred by Hamir and Parin Sidi to the 1st Defendant; the letter dated 23/9/2011 from the Ministry of Lands to the 1st Defendant's advocates confirming that the 1st Defendant was the registered proprietor of L.R. No. 1870/1/544; a copy of the title issued to the 1st Defendant and the summons to appear before the Chief Land Registrar.

51. Mr. Wafula confirmed that L.R. No. 1870/1/544 and 1870/1/186 refer to the same piece of land and clarified that two titles over the same piece of land ought not to exist. He stated that since the title over L.R. No. 1870/1/544 was issued before the title in L.R. No. 1870/1/186, the title over 1870/1/186 was void. He stated that the deed file in respect of IR No. 143915 for the Plaintiff's deed plan was missing but the one in respect of the 1st Defendant was available and he had it in court. He stated that the procedure for registration of a new grant was not followed when the grant in favour of the Plaintiff was issued. The recommendation by the lands office was that the Plaintiff's title should be cancelled.

52. The 3rd Defendant called Silas Kiogora Mburugu as its witness. He confirmed that the 3rd Defendants conducted internal investigations into the parcels of land known as L.R. No. 1870/1/186 and L.R. No. 1870/1/544 which refer to the same piece of land. The records on the allocation of the two parcels are contained in correspondence file number 47885. L.R. No. 1870/1/186 originated from L.R. No. 1870 of Section 1 in Upper Parklands Estate and was created from a subdivision done in 1952 through F/R No. 61/142 which subdivided the land into several parcels including L.R. No. 1870/1/24. L.R. No. 1870/1/24 was divided into 8 parts being L.R. No. 1870/1/24/1 to L.R. No. 1870/1/24/8. L.R. No. 1870/1/24/3 changed to L.R. No. 1870/1/186.

53. L.R. No. 1870/1/186 was allocated to the Plaintiff vide a letter of allotment dated 13/10/2011 and the Plaintiff was registered as its owner on 28/12/2012. The allocation was done on the presumption that the 99 year lease from 1/6/1904 had expired without extension or renewal of the lease by the government. A resurvey had to be undertaken upon allocation of L.R. No. 1870/1/186 to the Plaintiff for purposes of preparation of a new deed plan for registration. A survey for a new grant of L.R. No. 1870/1/186 was carried out in 2012 on F/R 536/3. He stated that upon resurvey, L.R. No. 1870/1/186 should have changed to a new number since it was a fresh allocation. L.R. No. 1870/1/186 was allocated to the Plaintiff pursuant to a surrender it had made over a parcel of land in Malindi known as portion 9377 which was found to have been illegally hived off KWS land in Malindi alongside twelve other plots. He stated that this fact was captured in the report of the Commission of inquiry into the illegal/irregular allocation of public land commonly known as the Ndung'u Report.

54. On the 1st Defendant's claim to the Suit Property, Mr. Mburugu confirmed that an assignment of L.R. No. 1870/1/186 was made between Hamir and Parin Sidi as vendors and the 1st Defendant as purchaser. He confirmed that the 1st Defendant applied to change the user of the Suit Property from residential to shops and flats and that it also applied for extension of the lease based on the correspondence gathered by the 3rd Defendant in the course of its investigations. He stated that the application for change of user and the extension of the lease were approved by the Commissioner of Lands following which the 1st Defendant surrendered its original title to facilitate the issuance of a new title. He concluded that the allocation of L.R. No. 1870/1/186 to the Plaintiff was not valid in light of the approval for change of user and extension of lease in favour of the 1st Defendant.

55. He produced copies of the correspondence together with the internal memos exchanged by the departments in the Ministry of Lands. He also produced a copy of the letter dated 11/2/2019 from the Registrar of Companies to the 3rd Defendant which stated that the Plaintiff was registered on 2/1/2013 and gave the names of its directors as Franklin Kamathi Kamau, James Gichuki Wambugu and Anne Masete. He stated that the Suit Property was not available for reallocation and that the land reference number must change where there is change of user of land.

56. Sospeter Kohanya also gave evidence on behalf of the 3rd Defendant. He gave a history of the survey of L.R. No. 1870/1/186. He stated that F/R No. 222/178 from which deed plan number 219938 was prepared has been missing. There were two survey plans bearing F/R No. 222/178 the first of which was prepared pursuant to the survey done E. M. Kiguru and submitted to the survey records office on 15/5/1992. He pointed out the mistakes and errors in that survey, such as the land reference numbers of the subplots being completely different from the head title and the difference in the aggregate sizes of the subplots. He stated that it was not technically possible that E. M. Kiguru could have carried out a new grant survey of L.R. No. 1870/1/186 on F/R No. 536/3 in 2012 for the Plaintiff when he had already subdivided the same parcel of land for other parties in 1992 through F/R number 222/178.

57. He added that the deed plan number 345793 from F/R No. 536/3 issued to the Plaintiff is described as "extension of lease" yet the Plaintiff claims to have acquired the land as a new grant. He produced copies of the maps and the minutes from the Town Planning Committee on the change of user of the Suit Property from residential to shops and flats. He stated that the land was later converted to the Registered Land Act regime. He stated that the 3rd Defendant complained to Mr. E. M. Kiguru about the resurvey he had undertaken over the Suit Property.

58. The Plaintiff called Patrick Maloba Khaemba, the Chief Inspector of Police to give evidence. Initially Mr. Khaemba was scheduled to be called as a witness by the 2nd Defendant but could not be reached by Mr. Kamau State Counsel. Mr. Khaemba investigated **Makadara Criminal Case number 5915 of 2013** in which the directors of the 1st Defendant were charged together with the 1st Defendant with obtaining registration of land by false pretences contrary to Section 320 of the Penal Code; making a document without authority contrary to Section 357 (a) and forcible detainer contrary to Section 91 of the Penal Code.

59. He relied on his Replying Affidavit filed in **Milimani HCC Constitutional Petition No. 598 of 2013**. The conclusion he drew from his investigations was that grant number IR 92986 in respect of L.R. No. 1870/1/544 and deed plan number 219938 dated 11/9/1998 in the 1st Defendant's name was "fake" because the letter dated 6/11/1998 under reference 47885/37 by the Ministry of Lands on the extension of lease was in relation to L.R. No. 1870/1/186. Based on the evidence he gathered he decided to charge the Petitioners in the criminal case. He produced copies of the documents which he retrieved during his investigations. He did not know what happened to the criminal case and confirmed that he had not been called to testify. He stated that he found a house on the Suit Property when he visited the land and was informed it belonged to previous owners who were the accused persons in the criminal case. The house in the Suit Property had no occupants in it. He had not seen the internal memo stating that deed plan number 219938 was authentic which came after his investigations. He based

his report on that of the Director of Surveys and maintained that there was no change of user of the Suit Property.

60. Parties filed submissions which the court has considered. It is not in dispute that both L.R. No. 1870/1/186 and L.R. No. 1870/1/544 refer to the same piece of land. The Plaintiff submitted that Michael Lubicz did not transfer his interest in L.R. No. 1870/1/186 to anybody and that this land was therefore available for allocation by the Government of Kenya after the lease expired. The Plaintiff was asked to surrender its land in Malindi and it then successfully applied for allocation of the Suit Property and met the conditions for the allocation of the land. The Plaintiff added that Sections 24 and 26 of the Land Registration Act protected its title over the Suit Property and that its title was prima facie evidence that it was the proprietor of the Suit Property. It contended that the 1st Defendant had failed to prove that the Suit Property was transferred was transferred to it. It added that there was no change of user over the Suit Property.

61. The 1st Defendant submitted that its title should prevail being first in time since it had not been shown to have been illegally or unprocedurally acquired. It relied on Section 23 of the repealed Registration of Titles Act and contended that the Plaintiff had failed to establish that it has a good root of title.

62. The 2nd Defendant submitted that the Plaintiff was not entitled to damages and compensation as against the 2nd Defendant based on Article 40 of the Constitution sub-article 6 of which stipulated that the right to property does not extend to property found to have been unlawfully acquired.

63. The 3rd Defendant submitted that the court ought to look into the manner in which the two parties acquired title over the Suit Property. It urged that the Plaintiff could not have legally acquired any interest in the Suit Property prior to its incorporation on 2/1/2013. It challenged the surrender for the Malindi for not being registered and the fact that a copy of the title over the Malindi plot surrendered was not adduced in evidence.

64. The issue for determination is whether the court should grant the orders sought in the plaint or those sought in the 1st Defendant's counterclaim. The Plaintiff's main contentions are that the Michael Lubicz never transferred his title over the Suit Property hence the land was available for allocation when the lease expired in 2003; and that there was no change of user for the Suit Property as the 1st Defendant contended.

65. Looking at the evidence of adduced by the witnesses called by the Defendants including that of the officers from the Survey department and Chief Land Registrar's office, it is clear that Michael Lubicz transferred the Suit Property to Gulamhussein Chatur Popat and Noorali Chatur Popat. Gulamhussein Chatur Popat's executors transferred the Suit Property to Hamir and Pamir Sidi who in turn transferred the balance of the lease term to the 1st Defendant. The evidence of the witnesses called by the 1st Defendant also confirmed that the Popats and the Sidis bought and lived on the Suit Property before it was transferred to the 1st Defendant.

66. The correspondence exchanged between the Commissioner of Lands, Director of Surveys and the Nairobi City Council tendered in evidence by the defence witnesses confirms that the 1st Defendant applied for the extension of lease over L.R. No. 1870/1/186 as well as change of user of the land from residential to shops and flats. The application was approved and the land reference changed to L.R. No. 1870/1/544 following the change of user.

67. The Plaintiff made an alternative prayer for indemnity and compensation in the event the court upheld the 1st Defendant's title over the Suit Property. From the evidence adduced by the Plaintiff, it is apparent that it applied to be allocated L.R. No. 1870/1/186 after surrendering the Malindi plot. The court notes that the letter of allotment dated 13/10/2011 issued to the Plaintiff indicated as one of the terms of the offer that the Government would not accept any liability in the event of prior commitment or otherwise.

68. At the time the Suit Property was allocated to the Plaintiff the land was not available for alienation having been leased by the Government of Kenya to the 1st Defendant for 50 years from 1/6/2003. The Plaintiff's claim is dismissed with costs to the 1st Defendant. The Plaintiff's claim for indemnity against the 2nd Defendant is also dismissed. The 2nd Defendant is directed to refund the Plaintiff the sum of Kshs. 914,770/= which it paid on account of stand premium, stamp duty approval fees and other charges on 20/12/2012.

69. The court grants prayers (b), (c), and (d) of the 1st Defendant's counterclaim together with the costs of the counterclaim.

Dated and delivered at Nairobi this 2nd day of March 2020.

K. BOR

JUDGE

In the presence of: -

Mr. M. Waweru holding brief for Mr. F. G. Thuita for the Plaintiff

Mr. A. Mbugua holding brief for Mr. J. Rimui for the 1st Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2nd and 3rd Defendants