



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 152 OF 2012

CITY FINANCE BANK LIMITED.....PLAINTIFF

VERSUS

CEDAR BANK ENTERPRISES LIMITED..... DEFENDANT

COMMISSIONER OF LANDS.....THIRD PARTY

J U G E M E N T

INTRODUCTION

1. The Defendant's suit against the Third Party is premised upon the allegation that it was the *bonafide* purchaser of L. R. No. 209/12581 which the Third Party had allocated to M/s Kikabi Houses Limited without ascertaining whether the land was Government Land available for allocation. The Third Party also authorized the informal transfer of the parcel of land to the Defendant and issued them with a Certificate of Title. The Defendant charged the said title to the Plaintiff Bank to obtain credit. It was only when the Defendant defaulted in repayment of the loan that it discovered that there was an earlier title on the same parcel of land issued to M/s Ukulima Co-operative Savings and Credit Society.
2. As a result of this double issuance of title, the Defendant alleges that it has suffered loss and damage. The Defendant is therefore, claiming the purchase price, stand premium stamp duty, consent fee and legal fees for the invalid title. The Defendant is also claiming interest at commercial rate for this amount was borrowed from a bank.
3. The suit came up for hearing on 16th June, 2002 wherein it was adjourned to the 13th June, 2002 for further hearing. The suit against the Defendant was settled as the Defendant had repaid the money it had borrowed from the Plaintiff Bank. The Defendant's case is that the Third Party cannot escape liability as the Third Party is under a statutory duty to ensure that there is no double issuance of title for the same parcel through maintenance of accurate records. Through this double issuance of title, the Third Party is alleged to have misrepresented to the Defendant who was an innocent purchaser for value without notice that the parcel they were purchasing was available. The Third Party actions therefore amounted to gross negligence and the Defendant's case is that it is entitled to the remedies it has sought. The Defendant's claim is as follows:-

- Principal Sum - Kshs. 45,340,075.15
- Interest at 30% from 1/7/97 until full payment
- Costs

4. The Third Party controverted the Defendant's claim through a defence filed on 30th June 2000 denying all the allegations pleaded in the defence. The defence was amended on 19th December 2012. The hearing initially proceeded *ex-parte* but the court ordered the Attorney General to participate and defend the claim prompting the filing of an application to set aside the *ex-parte* proceedings. The said application was allowed by consent and the Defendant's witness was recalled for cross-examination. The Third Party in its defence stated that the Defendant is guilty of fraud or collusion and that the Defendant's title was riddled with guilt, complicity and irregularities attributed to the conduct of both the Defendant and M/s Kikabi Homes Limited. The Third Party stated that it was necessary that M/s Kikabi Homes Limited be joined to this suit for the purposes of bearing liability for its part in the illegal acts leading to the issuance of the grant by the Third Party in the names of the Defendant, yet the Defendant did not enjoin it at the commencement of the suit.

THE DEFENDANT'S CASE

5. The Defendant's main witness **Jignesh Navinchandra Desai** – PW1, testified that he is the director of the Defendant company, fully conversant with the facts herein and was authorized by the board of directors of the Defendant Company to make his witness Statement on its behalf. The Witness adopted his Witness Statement dated 2nd March 2012 and relied on the Defendant's Bundle of Documents dated 9th March 2012.
6. DW 1 testified that the Defendant Company was incorporated on 6th November 1995, under Certificate of Incorporation No. C.67696. He testified that the Defendant, in one of its business venture got interested in a piece of land within the Nairobi County belonging to one M/s Kikabi Homes Limited and upon further inquiry the said owner produced documents which persuaded the Defendant of true ownership. ***(Exhibited in a bundle, inclusive of handwritten Letter of Acceptance from Kikabi Homes Limited received at the Department of Lands on 29th December, 1995, Government Application from G.A.1/SCOM/3 and Letter of Allotment addressed to Kikabi Homes Limited and dated 11th December, 1995 are document number 35.)***
7. DW1 testified that by virtue of a Form of Transfer duly filled and dated 17th January 1996, all that pieces of land containing 0.2482 acres and known as L. R. No. 209/12851, the suit property, was transferred from the previous owner, one M/s Kikabi Homes Limited to the Defendant, for a consideration. ***(Copy of the said Form of Transfer is exhibited as document number 9 on the Defendant's Notice to Admit Documents dated 10th June, 2002).*** Having filled the said Form of Transfer for a consideration, the Defendant filled a form known as Instructions to Prepare a New Grant dated and signed on 25th January, 1996. A Memorandum of Registration of Transfer of Lands presented on 26th January 1996, was also filled. ***(Copies of the said form of Instructions and Memorandum of Registration of Transfer of Lands presented on 26th January, 1996 are exhibited as document numbers 4 and 5 on Defendant's copies of documents).***
8. DW1 testified that the Defendant was duly issued with Grant number I.R. 68265 which was duly collected and signed for on 26th January, 1996. ***(Copy of the said Grant is exhibited as document number 6 on the Defendant's Notice to Admit Documents dated 10th June, 2002).***
9. The Defendant's case is that in acquiring the property known as L. R. No. 209/12581, the Defendant incurred a colossal amount as more particularly tabled on the Defendant's details of payment made on behalf of M/s Kikabi Homes Limited running from 29th December, 1995 ***(Copies of the said details of Payments together with copies of cheques and receipts for payments made at the Department of Lands are exhibited as document numbers 30, 31, 32, 100, 101, 102, 103, 104, and 105 on Defendant's Bundle of Documents).*** The Defendant further financed this venture by applying for and being advanced a loan of Kshs. 50,000,000.00 (fifty million) from City Finance Bank Limited (the Plaintiff herein), through a Legal Charge made on the 12th day of February 1996, between the Defendant (referred as "the Borrower") and City Finance Bank Limited (referred as "the Lender"). The Defendant serviced the loan as more clearly elaborated by the Plaintiff's letter dated 17th January 2002, but later defaulted in repaying the loan. ***(Copies of the Legal Charge made on 12th February, 1996 and the Plaintiff's letter of offer dated 12th February, 1996 and letter dated 17th January, 2002 are exhibited as document***

- numbers 36 to 66 on Defendant's Bundle of Documents).**
10. DW 1 testified that the Plaintiff, in an attempt to secure its interest sought to exercise its Statutory Power of Sale and in the process discovered that the suit property had two (2) grants one in the name of the Defendant and the other allegedly in the name of Wakulima Co-operative Savings and Credit Society Limited who purchased the property by virtue of an instrument registered on 29th September, 1988 necessitating the present suit (**Copy of Grant No. I. R. 12015 together with entry No. 17 is exhibited and marked as documents number 72 on the Defendant's Copies of Documents**). The Plaintiff filed a suit against the Defendant to recover the loan. The Defendant, being aggrieved by this development, sought to include the Commissioner of Lands to the suit by virtue of a Third Party Notice filed under Order 1 Rule 14 of the Civil Procedure Revised Rules, 1978 and pursuant to this Court's Order issued on 23rd day of April, 1999.
 11. The witness testified that sometime in the year 2002, the Defendant instructed its then Advocates to approach the Third Party with a view of settling the case out of Court.
 12. It was the evidence of the witness that the Third Party in its various letters between itself and the Attorney General, admitted to double issuance of title. (**Copies of the letters dated 12th, 14th and 19th June, 2002 and also one dated 4th December, 2002 respectively are exhibited at pages 90 to 91, 93 to 94, 95 to 96 on the Defendant's Bundle of Documents**). The witness referred the court to a letter dated 4th December, 2002 by one S.A.K. Wangila for and on behalf of the Commissioner of Lands in reply to the Defendant's then Advocates' letter dated 3rd December, 2002 acknowledging the fact that the consent to transfer the property was given and further acknowledges all due payments to its office, payment of all land rent and rates and obtaining of clearance as well. (**Copies of the Commissioner of Lands' letters dated 4th December, 2002 and Guram & Company. Advocates letter dated 3rd December, 2002, respectively are exhibited at page 97 forward on the Defendant's Bundle of Documents**).
 13. Despite demand and notice of intention to sue having been given to the Third Party, the Attorney General for and on behalf of the Commissioner of Lands has failed, neglected and or continues to decline liability and to make good the Defendant's claim, making the issue between the Defendant and the Third Party necessary in the present suit.
 14. DW1 reiterated the Defendant's claim against the Third Party as follows:-
 - i. **Special damages for Kshs. 22,500,000.00 and also Kshs. 4,008,000.00**
 - ii. **Further special damages for stamp duty, legal fees paid, consent to transfer.**
 - iii. **Interest on (a) and (b) at 30% from 25th January, 1996 until payment in full,**
 - iv. **Declaration that Defendant was legal bona fide owner of L. R. 209/12581**
 - v. **Costs of the suit**
 - vi. **Any other relied that this Honourable Court may deem just and fit to grant.**

THE THIRD PARTY'S CASE

15. On their part, the Third Party called Gordon Ochieng, TP1, who adopted his witness statement filed in court on 26th January 2015, and testified that on 29th September 1988, the suit property file disappeared mysteriously before a letter of allotment was issued. A temporary File No. 55685/II was opened on 9th January, 1996 on the grounds that the original file was missing. The witness testified that there appears to have been collusion by M/s Kikabi Homes Limited with some unknown Ministry Officials to get the said parcel of land allocated to them by misrepresentation using a temporary file on 11th December 1995. TP 1 testified that it is curious that there is no name of any human director of M/s Kikabi Homes Limited in all the transaction documents. This according to the witness, points to an attempt to conceal the persons behind the scheme and therefore presupposes an illegality being committed. TP 1 also testified that the Defendant Company has not demonstrated that they ever reported to the police that M/s Kikabi Homes Directors did obtain money from them illegally and by false pretences by purporting to sell them land that was already allocated to Ukulima Co-operative Savings and Credit Society. In the view of TP1, a police investigation into this matter would have settled the issue of the criminal culpability of any party to the transaction. The consent was granted on 14th February, 1996.

Investigations by the Ministry of Lands revealed that the transfer between M/s Kikabi Homes Limited to the Defendant was in respect of L. R. No. 209/12581 and not L. R. No. 209/5001 which is owned by Ukulima Co-operative Savings and Credit Society. At no time did M/s Kikabi Homes Limited or the Defendant, seek consent to charge, transfer or otherwise for parcel No. L. R. 209/5001. TP1 also noted that the issue of double titling was first brought to the attention of the Department of Lands by M/s Ndungu Njoroge & Kwach in their letter dated 4th July, 1996, yet they are the same firm that had dealt with the conveyance. Since they were involved in the transactions involving the purported property, they are deemed to have conducted a due diligence check and ascertained whether the land their client was dealing with existed as unalienated land before the purported letter of allotment. PT1 testified that it is not logical that the Government can be held liable for a loan advancement to the Defendant and utilized by the Defendant. In the opinion of the witness the claim by the Defendant herein, if merited should therefore, be recovered by the Defendant from the beneficiary M/s Kikabi Homes Limited, since the Defendant knew M/s Kikabi Homes Limited, and its directors. The Defendant failed to pursue M/s Kikabi Homes Limited when it “discovered” that the land was already allocated to Ukulima Cooperative Savings Limited. Instead it chose to pursue the Commissioner of Lands.

16. However, during the cross-examination of TP1 it emerged that the witness as the Principal Land Administration officer, was just recently involved in the matter. He had no direct knowledge about the issues but received communication from third parties. He was also unable to produce any Ministry records/documents in support of his allegations in the Witness Statement.
17. PT1 also claimed to be familiar with the Court proceedings as deposed yet he could not give any comments about the uncontroverted evidence of the former Commissioner of Lands - Mr. ZABLON AGWATA MABEA, and the evidence adduced earlier on in the proceedings as per the evidence at page 56 to 57 of the Typed proceedings. He could also not explain his statement at paragraph 3 that the file “disappeared mysteriously”, nor could he give any evidence nor explain as to how he established that fact. PT 1 also could not satisfactorily explain his statement at paragraph 4 about “collusion” of M/s Kikabi Homes Limited with some unknown Ministry officials. However, PT1 did confirm that from his direct knowledge none of the Lands officials or any of Kikabi directors/ representatives have been arrested nor charged with fraud or any criminal offence. PT1 in his statement and testimony in Court states absolutely nothing regarding the legal opinion rendered by the AG to the Commissioner of Lands on settlement of the dispute.
18. Parties filed written submissions which I have considered. The following are the issues which after going through the pleadings and submissions, I think need to be determined to reach a solution.

19. ISSUES FOR DETERMINATION

- 1. Was the title in favour of the defendant procured by fraud?**
- 2. Is M/s Kikabi Homes Limited a necessary party to the suit?**
- 3. Could the transfer of the Property in favour of the Defendant have happened through the collusion of the Kikabi Homes Limited, the Defendant and Third Party and/or their servants/agents within the Lands Registry?**
- 4. Are communications between the Third Party and the Attorney General privileged and should be expunged from those proceedings?**
- 5. Did the Defendant conduct due diligence to confirm the existence of the plot?**
- 6. Who had the mandate to register the Defendant’s interests?**

SUBMISSIONS, ANALYSIS AND DETERMINATION

20. On the issue as to whether there were correspondences indicating that the parties had agreed that the Defendant was wronged and was deserving of compensation, it is to be noted that the Attorney General in its letters written to the Third Party, and which the Third Party has acknowledged, it is

- common knowledge between the Third Party and the Attorney General that the suit herein was instituted by M/s City Finance Bank Limited against the Defendant for recovery of Kshs. 50,000,000.00 loan advanced to the Defendant. The loan facility was granted to the Defendant by virtue of a legal charge against plot L. R. No. 209/12581. The Defendant defaulted in repayment of the loan and the bank in an effort to exercise its statutory power of sale of the charged property was unable as it transpired that the plot has another title registered as I. R. 12015 (L.R. No. 209/5001) in favour of Ukulima Co-operative Savings and Credit Society Limited. This was apparently a case of double allocation or double titling. According to The Attorney -General in its said letters written to the Third Party, it is clearly stated that the background to the double titling of the property appears rather puzzling. It is on record that the original title for the plot went missing and a temporary file was opened and a letter of allotment Ref No. NTP.9.1 and II/163 dated 11th December, 1995 issued to M/s Kikabi Homes Limited of P.O. box 8696, Nairobi. The allottee accepted the offer and paid the required charges of Kshs. 4,257,110.20. The property was informally transferred to the Defendant herein for a consideration of Kshs. 22,500,000.00. The Defendant also paid stamp duty of £9000/= and consent fees on the informal transfer.
21. It is further acknowledged by The Third Party that the Director of Surveys supplied the deed plan for the plot L. R. No. 209/12851 for preparation of the grant. It is noted that on survey the plot was renumbered which also contributed to the anomaly. It is the Defendant's submission that the Defendant was not responsible for the Third Party's actions and/or inactions at the material time, and the Defendant states that it cannot therefore be held accountable for the defaults of the Third Party.
22. The Attorney General in his letter REF: ag/mls/87/97 dated 12th June, 2002 (*at pages 90-92 of the Defendant's Documents*) has advised that the Third Party settle the claim by the Defendant on account of gross negligence on its part. The Attorney General asserts that **“. . . Third Party cannot escape liability as it is Third Party's statutory responsibility to ensure that there is no double issuance of title for the same parcel of land, through the maintenance of accurate records.”** The Attorney General furthermore states that through this double issuance of title, the Third Party misrepresented to the Defendant who was an innocent purchaser for value. On account of the negligence, the A.G. concludes that the Defendant is entitled to the remedies. The Defendant further submitted that consistent with the Attorney-General's advice and recommendations, the then Commissioner of Lands vide letter dated 14th June 2002 to the then Permanent Secretary, Ministry of Land and Settlement, agreed with the recommendations for settlement, and forwarded the case for consideration and settlement of the claim of Kshs. 167,524,775/25 plus Advocates costs of Kshs. 8,000,000.00. It is the Defendant's submission that this Court do award the said and/or any reasonable sum to the Defendant.
23. However, the Third Party submitted that the above letters did not amount to a consent or admission of liability, and that the same was privileged communication between the Third Party and its advocates, and should not be relied on by this court. In my view, however, the said communication were made in good faith. The third Party now questions how the Defendant accessed the communication. This is not proper question at this stage. It is to be noted that the communications are contained in the Defendant's Bundle of Documents, which was not objected to by the Third Party during pre-trial conference. It is too late in the submission to object to those documents. The court shall treat those communications as evidence that the Third Party was duly advised by the Attorney General to accept liability. In the case of **Tomlini V Standard Telephones and Cables Limited, [1969] 3ALL ER 201**, the court held that

“The court was entitled to look at letters marked “without prejudice” to see if an agreement had been reached. There was a concluded agreement on the issue of liability leaving over for further negotiations the separate and severable question of quantum of damages.”

The difference however is that in the instant case, the letters are not marked “without prejudice” but are communication between advocate and client.

24. On the issue of who had the mandate to register the Defendant's interest, the Defendant submitted that the information of registration of any instrument against the Title is in possession and custody

of the Commissioner of Lands (The Third Party). The Commissioner of Lands knew or ought to have known that a legal title could not have been passed to the Defendant. The Commissioner of Lands had caused or permitted the Defendant to suffer loss and damage. The Defendant further submitted that this is a matter for which The Third Party cannot escape liability as it is under a statutory duty to ensure that there is no double issuance of title for the same parcel, through maintenance of accurate records. Through this double issuance of title the Third Party misrepresented to the Defendant who was innocent purchaser for value without notice that the parcel they were purchasing was available. In the premises, the Defendant submitted that the Third Party's actions amounted to gross negligence. On its part, the Defendant submitted that it followed the formalities as required to have the Transfer lawfully registered, by doing the following acts:-

- i. Payment of consent fees at 2% and stamp Duty at 4% of the capital values;
- ii. Payment of all land rent and rates;
- iii. And obtaining clearance certificates; and
- iv. Completion of the informal transfer forms.

25. On the issue of whether or not there was fraud, the Third Party quoting **Black's Law Dictionary Ninth Edition** at page 731 defines fraud as "***a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.***" The Third Party submitted that the existence of two companies with similar names M/s Kikabi Homes Limited even though with different registration numbers, raise suspicion and one could easily conclude that they were formed to hoodwink the public. The existence of two different titles with respect to the same property, and with all the necessary endorsements made thereon is in itself evidence of participation in a forgery by some officers at the Ministry of Lands, the Defendant and M/s Kikabi Homes Limited which is surprisingly not a party in this suit. The Third Party submitted further that the Defendant has not laid proper basis as to why it sought principal sum of Kshs.45,340,075.15 together with interest at a whopping rate of 30% from 1st July, 1997 until payment in full as well as costs. The Defendant has further not provided to Court any tangible valuation report as regards the Property. The Third Party pointed out that the Defendant has already confirmed to Court that they settled the loan which led to the termination of the claim against it by City Finance Bank, and therefore the Defendant cannot again claim interest on the loan at commercial rate when the loan was obtained for the sole benefit of the Defendant.

26. The Third Party submitted that it should not be condemned to pay the Defendant the stamp duty and legal fees as it is clearly evident that the Advocates representing the Defendant in the purchase were negligent as they failed to conduct proper due diligence and advise their client accordingly, which should have discovered the existence of a title already issued to Ukulima Savings and Credit Society. The Third Party submitted that the Defendant had a duty to exercise due diligence by conducting a historical search on the premises to establish the sanctity of title and failure to do so meant that the Defendant was not a bona fide purchaser for value without notice of any irregularities. The Third Party found it absurd and devious for the Defendant to allege that they only came to discover the existence of another title when they defaulted to service the loan prompting City Finance Bank to exercise its statutory power of sale to recover the amount borrowed. The Third Party submitted that the Commissioner of Lands should not be condemned to pay any indemnity or compensation to the Defendant for losses and costs of acquisition of the suit property transferred to it by virtue of a purported letter of allotment issued to M/s Kikabi Homes Limited when they knew or ought to have known that the suit property was not available for allocation as it was not vacant. It is vital to note that the Defendant as well as M/s Kikabi Homes Limited pursuant to the alleged purchase and allotment of the Property did not visit the site of the Property to ascertain whether the same was vacant. The Third Party cited the Court of Appeal in the case of **Henry Muthee Kathurima v Commissioner Of Lands & Another [2015] eKLR, Civil Appeal No. 8 of 2014**, where the court held as follows:-

"We note that it is not in dispute that the 2nd respondent has always been in actual and physical occupation of the suit property from 1989 to-date. The appellant must have known of this fact when he applied for the suit property to be allotted to him. In his application for allotment of a commercial plot made by letter dated 21st March, 1997, the

appellant identified the suit property and marked it red in the attachment.

The inference to be drawn is that the appellant identified and knew the specific plot he desired and knew that the 2nd respondent was in physical possession; it was the appellant's clear intention not only to dispose the 2nd appellant of the suit property but to acquire a public utility land that was in possession of a public entity.

The bona fides of the appellant in applying for the specific suit property knowing that it was in possession and occupation of a public entity is put in issue”.

27. I have carefully considered the submissions on this issue. It is the law that any party who pleads fraud must give particulars of the same, and the allegations must be proved. The Defendant referred the court to the typed proceedings of this Court of 11th September 1997 to 1st March 2007, and which are annexed to the Defendant's Submissions dated and filed in Court on 6th September 2012 attached to the Third Party's Notice of Motion dated 14th March 2012 (***at pages 9 to 58 of the Typed proceedings***). Mr. Zablon Agwata Mabea, The Commissioner of Lands (then Assistant Commissioner of Lands) when being cross examined said at page 56 of the Typed proceedings as follows:-

“This double allocation of L. R. No. 209/1285 and L. R. No. 209/5001 was for one and the same plot. The number changed from 120501 to 5001. The indent was done by Commissioner of Lands on 15.1.1996”.

“I have said nowhere in my affidavit that the transfer was irregular”. See at page 58 of the Typed proceedings;

(For ease of reference, the affidavit of Mr. Zablon Agwata Mabea is dated 30th July 2003.)

28. The Third Party's Amended Defence from Paragraphs 10 to 18 contains averments of facts already pleaded and admitted. There has been no complaint of any fraud, collusion, conspiracy, complicity or criminal allegations. There is nothing to stop the Third Party from bringing criminal proceedings against anybody culpable. Further, the averments are pleadings of evidence contrary to Order 2 Rule 3(1) and 6(1) of the Civil Procedure Rules. In view, of all above, this court finds that any allegations by the Third Party of collusion, conspiracy, illegality fraud or corruption have not been proved and are hereby rejected. Besides, the above allegations of fraud or negligence on the part of the Defendant are time barred by Limitation of Actions Act. The third Party has not stated nor set forth any particulars nor provided any cogent evidence of fraud or conspiracy.
29. As to whether the Third Party was negligent, or whether the Defendant was negligent or whether M/s Kikabi Homes Limited ought to have been made part of these proceedings, my view is that M/s Kikabi Homes Limited was a necessary party to this suit, and they ought to have been joined to this suit by the Defendant the moment the Defendant realised that there was a double allocation. Together, the said M/s Kikabi Homes Limited and the Department of Land should provided a valid explanation of what actually transpired. If the third Party has been accused of negligence by the Defendant, the Defendant also stands accused of failure to bring on board the said M/s Kikabi Homes Limited. The two entities, that is, the Third Party and M/s Kikabi Homes Limited must share liability, if any, owed to the Defendant. After all the Defendant paid the purchase price to M/s Kikabi Homes Limited.
30. While this court does not attach any criminal conduct on M/s Kikabi Homes Limited, this court is of the view that as the Vendors of the suit property to the Defendant, they held valuable information as to how double titles were issued, and even if they are criminally not culpable, they could be found liable in negligence.
31. The Defendant also has not explained why it failed to conduct proper due diligence. If they had done proper due diligence they should have discovered the existence of a title already issued to Ukulima Savings and Credit Society. However, the duty to issue a title is a sacred one which only the Third Party has. No other entity can share in this duty, and that is partly why a title is a sacred document. At all times it is the duty of the Third Party to ensure the sanctity of a title, and

purporting to issue two titles for one plot is a gross negligent for which the Third Party cannot escape liability. It is the Third Party's sole mandate to register the Defendant's interest in land. However, in my judgement, parties who have a role to play in the process of protecting the sanctity of a title must also be penalised if they are found to be guilty. In that regard, M/s Kikabi Homes Limited cannot escape liability, even if they are not party to these proceedings, and for failing to join the said M/s Kikabi Homes Limited, the Defendant must take responsibility. It must be noted for the record that the Defendant paid the purchase price to M/s Kikabi Homes Limited, who ought to have provided clear and cogent evidence as to how it acquired title to a property which had already been allocated to another party. In my judgement, both the Third Party and the said M/s Kikabi Homes Limited share liability, and in the absence of the said M/s Kikabi Homes Limited in these proceedings, the liability which the Third Party can legally assume cannot exceed 50%. The amount claimed herein was verified by the Attorney General as due to the Defendant. Further, the Defendant has proved to this court that it is entitled to the claim. However, due to the foregoing reasons, I will only allow 50% of the claim, and award the same to the Defendant to be paid by the Third Party.

32. In the case of **Gitay Investments Limited – Vs – Tajmal Limited & 3 Others and the Commissioner of Lands, through Attorney General HCCC No. 1114 of 2002**, a case which has uncanny similarities with the case at hand, the court had the following to say

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

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 Defendants 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.

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.

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.

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

prayed by the 1st Defendant.

Costs

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.”

33. In the upshot, it is the finding of this court that the Defendant has proved its case against the Third Party on a balance of probabilities, except that the quantity of that liability must be shared equally with M/s Kikabi Homes Limited, who are not party to these proceedings. It will be upon the Defendant to bring a new suit, if it so desires, and if the limitation period allows the same, against M/s Kikabil Homes Limited to recover the other 50% of its claim herein. It is also noted for the record that although the Attorney General had advised the Third Party to pay the entire claim, this court is not bound by that advice, having found that M/s Kikabi Homes Limited shared in the liability owed to the Defendant herein.
34. On the issue of interest, this court has a wide discretion. The Defendant claims interest at 30% per annum from 1/7/1997. That rate of interest was last applied in the 1990's. Since then interest rates have dropped significantly, although there is new evidence that the same could be raising. I take it that the Defendant is seeking interest at commercial rates. In my view any rate of interest above court rates translates to commercial rates, and unless there is a specific agreement on applicable interest rate of 30% per annum, the Defendant must give reasons to justify the rate of interest at 30% per annum. In my view, until last few weeks, commercial bank rates were as low as 15% per annum. The Defendant's claim is large, and in the absence of an interest rate regime which is agreed or is part of the transaction between the parties, I will apply a commercial rate of 17% per annum.

DISPOSITION

35. In the end, I enter judgement for the Defendant against the Third Party as follows:-

- a. 50% of principal sum Kshs.45,340,075.75, hence Kshs.22,670,037.87.*
- b. Interest thereon at 17% per annum from 1st July 1997 until the date of Judgement.*
- c. Interest at court rates rates form the date of Judgement until payment in full.*
- d. Costs of the suit.*

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. R. Billing for the Defendant

Mr. Sekwe for the Third Party

Teresia – Court Clerk