



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CORAM: OMOLO, TUNOI & PALL, J.J.A.
CIVIL APPEAL NO. 71 OF 1997

BETWEEN

WRECK MOTOR ENTERPRISES.....APPELLANT

AND

THE COMMISSIONER OF LANDS

SATPAL SINGH BHATTI

CITY COUNCIL OF NAIROBI

CHEMOMO ENTERPRISES.....RESPONDENTS

**(Appeal from the order and ruling of the High Court of Kenya
at Nairobi (Shah J) dated 22nd June, 1994**

in

H.C.MISC.C.A. NO. 457 OF 1994)

JUDGMENT OF THE COURT

The facts giving rise to this appeal are largely not in dispute and are as follows. The appellant firm has since 1989 been operating on plot Land Reference Number 209/12059, South "B" Nairobi, hereinafter referred to as the suit plot, an open air Jua Kali business of repairing motor vehicles and dealing in reconditioned vehicles, vehicle spare parts and accessories. On March 11, 1993, it sought through the Commissioner of Lands, the first respondent in the appeal, the approval of H.E. the President under section 36 of the Government Lands Act for the suit plot to be allocated to it. Presidential approval was obtained on November 24, 1993, but by a letter dated January 31, 1994, the Commissioner of Lands wrote to the appellant that the suit plot had been allocated to another person and so was no longer available as an unalienated land, for allocation to the appellant. However, no details as to when the related allocation was made were given. Thereafter things turned sour for the appellant. The Commissioner of Lands ordered it to clear out of the suit plot, and; the Nairobi City Council, despite the fact that it had issued licence for an open air garage, gave the appellant a removal notice requiring it to vacate the suit

plot within 7 days.

Suffice it to say that the appellant was compelled by the circumstances described above, to move the superior court in a notice of motion dated March 31, 1994, for an order of mandamus directed against the Commissioner of Lands to accordingly give effect to the appellant's application as approved by H.E. the President. In the notice of motion, the Commissioner of Lands was the first respondent, the Nairobi City Council which had sought to remove the applicant from the plot, was the third respondent and the fourth respondent was Chemomo Enterprises the firm that the Commissioner of Lands had in fact, allotted the plot to, and which was the one being referred to in the Commissioner of Lands' letter. Upon the allotment having been made to the fourth respondent on November 22, 1993, it lost no time in seeking and obtaining the consent of the first respondent to sell its interest in the plot to the second respondent on January 14, 1994, for the handsome price of KShs.2,000,000/=. The second respondent on the other hand, was to depone in his replying affidavit that he paid KShs.5,000,000/= for the plot.

It is the fourth respondent's case that it made an application for the allotment of the suit plot on September 8, 1992 and that it obtained the Presidential approval for it much earlier than the application by the appellant. We note that the copy of the fourth respondent's application has a date which does not show the year it was written. The date of the Presidential approval appearing on the application is, therefore, left to conjecture. It is not surprising, therefore, that the appellant whose contention is that its application and its approval by the President were both first in time to those of the fourth respondent, applied to cross examine the fourth respondent at the hearing of the appellant's application for an order of mandamus. The second respondent on his part, raised the preliminary objection that he, being the properly registered proprietor of the suit plot, the application by the appellant who had no interest in the suit plot, for an order of mandamus to compel the first respondent to allocate the suit plot which was no longer an unalienated land that can be granted by the President, to it, was misconceived and bad in law.

This was then the preliminary matter that came for decision before Shah J. (as he then was). The learned judge stated correctly, we think, that a preliminary objection such as the one before him could be "sustained if facts undisputed or indisputable show a certain state of affairs". On the facts before him, the learned judge observed as follows:

"It is not in dispute that the 4th respondent was first in time in terms of Presidential approval of grant of suit land. Thereafter the title was perfected. Thereafter the 2nd respondent has become owner of land under Cap 281. Although Mr. Kamau Kuria disputed the fact of approval by H.E. The President as not confirming any property rights the fact is that right had been conferred on 4th respondent on 22nd November, 1993 who passed his title to the 2nd respondent One has an earlier approval and grant (that is the 4th respondent). The other has an approval only and no grant and he is later in time (that is the applicant). ... The earlier grant takes priority. The land is alienated already. Since then there is another proprietor (2nd respondent)".

The learned judge then concluded:

"It is in these circumstances that I am constrained to dismiss the suit (application)".

The appellant, being aggrieved by this decision of the learned judge, has preferred this appeal.

It is apparent that the combined effect of many of the grounds of appeal filed by the appellant and argued on his behalf by Mr. Nagpal, is that the learned judge erred in sustaining the preliminary objection or demurrer on the ground that the material facts of the matter then before him, were not disputed. The material part of the ruling complained of reads:-

" A preliminary objection is what used to be demurrer. For such an objection to succeed the facts as pleaded or shown by the other side must be accepted. However a preliminary objection can be sustained if facts undisputed or indisputable show a certain state of affairs."

Mr. Nagpal's forceful submission is that there were before the learned judge until resolved, crucial facts which could not be regarded as "undisputed or indisputable" in the face of many glaringly conflicting facts. He was confident the learned judge misunderstood the ratio decidendi of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd*, [1969] E.A. 697 on which the learned judge greatly placed reliance, quoted from it in extenso and adopted into his own ruling the following dictum by Sir Newbold, P:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Mr. Nagpal further contended that two separate and distinct plots were involved and it was only mete and just that the learned judge should have sanctioned a trial for proper determination of the issues involved. It was wrong, he submitted, to shut out for ever the appellant due to mere technicality.

In reply to the appeal, Mr. Gautama who submitted on behalf of all the Counsel for the respondents, urged that the procedure adopted by the appellant in bringing this application is wrong and that the appeal should not be entertained. We would point out, however, that we did not have the benefit of full arguments on this from Counsel for the parties and in the circumstances we do not think that we should base our decision on it.

As far as the facts are concerned, we agree with the learned judge that there can be no dispute. The suit plot was registered in the name of the second respondent on 27th January, 1994, as the grant shows. There is no ambiguity as to the number and the extent of the suit plot and neither are there two separate and distinct plots. Any suggestion as to their existence is falacious. The fact that H.E. the President endorsed the appellant's application is of no consequence.

In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See *Dr. Joseph N.K. Arap Ng'ok v Justice Moiwo ole Keiwua & 4 Others*, Civil Application No. NAI.60 of 1997 (unreported). Sections 23(1) of the Registration of Titles Act reads as follows:-

"Section 23 (1)

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

The pleadings do not disclose any fraud on the part of the second respondent. In such event, therefore, the second respondent is a bona fide purchaser for value without notice. His title takes precedence and is supreme over all other alleged equitable rights of title. The Act is very specific on this protection and sanctifies title. In such circumstances, it is now too late and irrelevant whether or not the Commissioner of Lands ignored the appellant's application for the suit plot. It would not, either, help matters to go to trial to ascertain whether or not the Commissioner of Lands abused his discretion as a public officer.

We think that the learned judge came to the correct decision on the material before him.

Consequently, this appeal must fail and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 24th day of October, 1997.

R.S.C. OMOLO.

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR