



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: OMOLO, AKIWUMI & PALL J.J.A)
CIVIL APPEAL NO.138 OF 1997

BETWEEN

PASHITO HOLDINGS LIMITED.....1ST APPELLANT

SHITAL BHANDARI.....2ND APPELLANT

AND

PAUL NDERITU NDUNGU

KIHARA WAITHAKA

RICHARD GATHECHA NJOMBA (Suing on their

own behalf and on behalf

of Loresho Estate Nairobi).....RESPONDENTS

**(Appeal from the Ruling and Order of the High Court of
Kenya at Nairobi (Hon. Justice Msagha Mbogholi) made
on 18th April 1997**

in

H.C.C.C. NO.3063 OF 1997)

JUDGMENT OF THE COURT

This is an appeal from the ruling and order of the High Court of Kenya at Nairobi (Msagha Mbogholi J.) made on 18th April, 1997 in High Court Civil Case No.3063 of 1997 in which the respondents Paul Nderitu and two other have sued the appellants Pashito Holdings Ltd. and Shital Bhandari for two declarations and a permanent injunction which are hereinafter mentioned. The respondents are residents of Loresho Estate in the City of Nairobi. They have sued the appellants in the superior court on their own behalf and professedly on behalf of the other residents of the said Loresho Estate.

By their plaint filed on 11 December, 1996, the respondents have alleged that in or about the year 1976 the Commissioner of Lands approved the subdivision of two parcels of land in the City of Nairobi

known as L.R.5952 and L.R.1653 which two parcels after the subdivision are known as Loresho Estate. Each respondent owns and occupies a piece of land which is a subdivision of the aforesaid two parcels of land.

It has been alleged that as a condition of the approval of the subdivision, the developer concerned was required by the Commissioner of Lands (the Commissioner) to reserve a part of the land for public use and surrender it to him free of cost. Among the areas reserved for public use were an area reserved for a police station and an area reserved for a water reservoir for the estate. It is also alleged that by his letter dated 23rd April, 1993 the Commissioner informed the Commissioner of Police that Nairobi/Block 90/307 measuring 2.575 hectares or thereabouts had been reserved for the construction of a police station thereon. It is further alleged that on one side of the plot 'reserved' for the water reservoir the City Council of Nairobi has built a large underground water reservoir. The respondent have further alleged that in or about July 1996 they learnt that a portion of the land had been carved out of the said piece of land reserved for a police station and subdivided into six subplots known as Nairobi/Block 90/575 to 580 (inclusive) and that a search at the Lands office has revealed that the said six plots have been allocated to "or are now in the name of the 1st appellant Pashilo Holdings Limited." and that total area allocated to the 1st appellant is 1.2858 hectares or thereabouts, thus leaving only 1.2892 hectares or thereabouts for the proposed police station.

The respondents have further contended that the land reserved for the water reservoir, was known as Title Number/Nairobi/Block 90/229. Out of that the Commissioner carved three sub plots and assigned them new title numbers as titles No.Nairobi/Block 90/584 to 586 (inclusive) and purported to cancel the said Title No. Nairobi/Bloc 90/229. The said sub plots have been allegedly "allocated" to and are now in the name of the 2nd appellant. It is not in dispute, however, that the 2nd appellant purchased the three sub plots from original allottees and they were not allocated to him by the Commissioner.

The respondent's contention is that the two parcels namely Nairobi/Block 90/307 and Nairobi Block 90/229 were reserved for public use and as such neither the Commissioner nor anybody else had a right to alienate them or any part thereof for any use other than that for which they were reserved and that as such their alienation for any purpose other than that for which they had been reserved is null and void.

It has been further alleged that as the Commissioner's action was void ab initio, none of the appellants could claim to have a good and legal title to the said sub plots.

Consequently, the respondents have prayed in the superior court for a declaration that neither the Commissioner nor anybody else has a right to alienate public lands or any part thereof to any person for any use other than that such public lands had been reserved for and another consequential declaration that the allocation to the appellants or to any other person through whom they have derived their titles to all those sub parcels of land known as Nairobi/Block 90/575- 580 and Nairobi Block 90/584-586 is null and void.

The respondents have also prayed for a permanent injunction restraining the appellants from taking possession of, fencing and or in any other way howsoever developing or selling the said sub parcels. Along with the plaint the respondents filed an application for an interlocutory injunction against the appellants in the aforesaid terms pending hearing and final determination of the "application" (sic suit) or until further order of the court.

By his affidavit sworn on 21.1.1997, Mandip Singh Amrit, a director of the 1st appellant, deponed that the 1st appellant was the legal owner of Nairobi/Block 90/575 to 580 (inclusive). Annexed to his affidavit are photostat copies of six certificates of lease in respect of the said pieces of land issued by the Land Registrar Nairobi under the Act on behalf of the Commissioner in favour of the 1st Appellant. Each lease is for a period of 99 years from 1.12.1993. Under s.32 of the Act a certificate of lease is a prima facie evidence of the title of the proprietor and the 1st appellant is in occupation of the said six sub plots. By his affidavit, sworn on 17 December, 1996, Shital Bhandari, the 2nd appellant, has similarly deponed that he purchased on or about 13th February, 1996 the said three plots namely Nairobi/Block 90/584 to 586 (inclusive) from their original allottees. He has also annexed to his affidavit photostat copies of

certificates of lease relating to these 3 plots issued by the Nairobi Land Registrar on behalf of the Commissioner on 6th March, 1996. The 2nd appellant paid to the original allottees Shs.3 million for each piece of land. Thus he paid 9 million shillings to acquire these three pieces of land. Also he is already in occupation of these sub plots.

The learned Judge granted the respondents application with costs and restrained each appellant from taking possession of, fencing and or, in any other way however, developing or selling the suit pieces of land pending the hearing and final determination of the suit or until further orders of the court. It is from this ruling and order of the superior court that the appellants appeal.

The Memorandum of Appeal consists of 22 grounds of appeal. However most of them are overlapping and we need not set them out in extenso for the purposes of this appeal. The combined effect of these grounds of appeal can be summed up as follows:-

That the learned Judge erred in not holding that the respondents claim did not disclose any cause of action against any of the appellants; that the learned Judge erred in not holding that the respondents had no locus standi; that the learned Judge erred in not holding prima facie at this stage that the declarations sought by the respondents concerned the Commissioner who was not before the court; that the learned Judge further erred in not holding that the titles of the appellants issued under the Act could only be challenged in accordance with the provisions of that Act and not otherwise and the respondents suit did not disclose any infringement of the Act; that the learned Judge erred in holding that the two parcels referred to in his ruling had been alienated and could not be re-alienated by the Commissioner; that the learned Judge erred in not finding that all unalienated land is vested in the Government of Kenya and there is no legal bar to the President of the Republic of Kenya alienating unalienated land to any party and that the learned Judge erred in holding that the respondents had made out a prima facie case for injunction against the appellants.

According to the learned Judge, the real issue before him was: "Whether or not the Commissioner of Lands had the authority to alienate the land to the first defendant and to the three companies who subsequently sold the plots to the second defendant". Obviously, however, he could not have resolved that issue unless the Commissioner was a party to the proceedings and had a fair opportunity to be heard. It is breach of the rule of natural justice to attempt to resolve the issue behind his back and in his absence from the proceedings. Again, the learned Judge went on to say:-

"Under the Government Lands Act the Commissioner of Lands can only make grants of dispositions of any estates interests or rights in or over unalienated Government Lands See s.3. In the instant case the two parcels among others had been alienated or designated for particular purposes".

But we do not find any evidence before us that these two parcels had been formally alienated to the Commissioner of Police and the City Council of Nairobi or anybody else. We are of the view the learned Judge was aware that these parcels had not been alienated and that is why he has qualified himself by saying "alienated or designated". We believe by "designated", he meant "reserved".

The learned Judge without having the Commissioner before him and without hearing him in his defence has finally condemned him on an interlocutory application for injunction in the following terms:- "It was not open to the Commissioner of lands to realienate the same".

He could have made only a prima facie finding and that too if the Commissioner had been sued and served with the application. Not only that, the learned Judge appears to have finally sealed the fate of this suit which is yet to be heard on merits by holding: " So the alienation was void ab initio"

No such finding prima facie or final can be made without the Commissioner's participation in the proceedings.

The gravamen of the respondent's suit is that the Commissioner had no right to alienate a public

land to any person for any use other than that for which it has been reserved. The respondents could not have established a prima facie case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

" However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not upto the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief.

The titles to the parcels in question have been registered under the Act S.28 of the Act (paramateria) reads:

"The right of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by any order of court, shall be the right not liable to be defeated except as provided by this Act,....."

Thus, unless there is any infringement of the Act on their part, the appellants' titles are indefeasible. There was no evidence before the learned Judge of any infringement of the Act. The learned Judge further said in his ruling:-

" I know the law provides that he (the 2nd appellant) was not bound to investigate the titles before he purchased the plots. However, over the last few years and in the recent past, dealings in land have become more and more precarious. More than ever before it is incumbent upon any party dealing in land to ascertain the legal status before committing himself".

He went on further to say:-

"If the second defendant did not take such precautions before parting with substantial sums of money, the loss may be where it has fallen. In the circumstances of this case the face of equity will frown at the transaction".

However in our view, these were gratuitous remarks on the part of the learned Judge. It is trite that equity cannot override the express provisions of law. Section 39 of the Act in material part protects all persons dealing or purporting to deal for valuable consideration with a proprietor and are not required to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered.

On the issue of locus standi of the respondents, the less we say at this interlocutory stage the better.

We are aware that the court's discretion to grant an injunction will not be interfered with, unless it has not been exercised judicially. See **Sargent vs Patel (1949) 16 EACA 63**. Here, however, the learned Judge granted the injunction against the appellants as a direct result of his prima facie holding that the Commissioner, who had neither been sued, nor served with the application for injunction, had no right to allocate the six sub plots in question to the 1st appellant and the 3 sub plots to three companies who subsequently sold them to the 2nd appellant. He cannot be said to have exercised his judicial discretion correctly particularly when there is no evidence of fraud or any wrong doing in the course of the two transactions on the parts of the appellants.

The learned Judge's finding that the plaintiff respondents had presented a prima facie case with a probability of success cannot therefore be sustained. No direct cause of action has been pleaded by the respondent against the appellants. Any conceivable injury to the respondents, unless the injunction as prayed by them is granted would be remote. Any interference with the proprietary rights of each appellant will not be prima facie justified. The learned Judge should have therefore held that the respondents had failed to satisfy the parameters of **Giella vs Cassman Brown Co. Ltd (1973) EA. 358**.

For these reasons, we allow the appeal and set aside the order made by the learned Judge on 18th April, 1997. We award the costs of the appeal as well as the costs in the High Court to the appellants.

Dated and delivered at Nairobi this 14th day of November, 1997.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR