REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1388 OF 2014(FORMERLY HCCC NO. 2457 OF 1996)

VOI SISAL ESTATES LIMITED.....PLAINTIFF

-VERSUS-

ATTORNEY GENERAL.....DEFENDANT

JUDGMENT

The plaintiff filed this suit against the defendant on 27th August, 1996. The defendant was sued in his capacity as a representative of the Commissioner of Lands. The plaintiff averred that it was the registered proprietor of L.R No. 1956/1/1 and L.R No. 1956/1/2 out of which portions measuring 2.43 hectares (hereinafter referred to as "the suit property") were surrendered by it to the Commissioner of Lands in exchange with a suitable plot free of squatters and/or claims by the local people. The plaintiff averred that on 25th August, 1994, it received from the Commissioner of Lands a letter of allotment of unsurveyed residential plot measuring 2.43 hectares which turned out to be a fully developed slum with vested political interests. The plaintiff accused the Commissioner of Lands of breaching the exchange agreement between them and sought the following reliefs against the defendant:

1. An order directing the defendant to specifically perform his part of the exchange agreement by providing the plaintiff with a suitable plot of equal value to the plaintiff's plot surrendered to the government;

2. In the alternative, compensation equivalent to the market value of its plot;

3. Further in the alternative, an order for the cancellation of the surrender, transfer, possession and all documents executed by the plaintiff to vest the suit property in the Commissioner of Lands and;

4. Costs of the suit.

The defendant filed a statement of defence which was struck out by Khamoni J. (as he then was) on 16th January, 1998. The suit proceeded to formal proof before Amin J. (as he then was) when the plaintiff called one witness and closed its case. The parties thereafter made closing submissions in writing. In a judgment delivered on 31st January, 2000, Amin J. stated that he was unable to determine the compensation payable to the plaintiff before the suit property was transferred to the defendant. The judge stated as follows:

> **"However in the court's view prior to a finding is made on the claim for the plaintiff it is a pertinent plea for the defendant to be legally vested in the land subject of the claim. Ex. ZAM2(a) and (b) explains the inadequacy of the plaintiff's claim. As it is seen PW1, Mr. Visram conceded that the land is still to be transferred. In the circumstances, the court has to come to the conclusion that prior to the determination of the issue what valuation to be accepted, it is directed that the parties agree to the modality of transfer of land to satisfy the defendant on this aspect. For this purpose, this matter is adjourned to establish this aspect of the case to be resolved so that two issues of transfer and the vital compensation are simultaneously determined. To do otherwise would amount to an exercise in futility"**

Amin J. directed the parties to agree on the modalities of having the suit property transferred to the defendant after which he would determine the issue of compensation payable to the plaintiff. He gave the parties liberty to apply. There is no evidence from the record that the parties made any attempt to agree on the issue of transfer of the suit property to the defendant as they were directed to do by Amin J.

Through an application dated 27th May, 2014, the plaintiff sought leave of the court to amend its plaint. By a ruling delivered on 16th December, 2014, the court declined the application noting that the defendant would be prejudiced. In the ruling, the court observed that the plaintiff would not be prejudiced if the application was denied as it was at liberty to bring in further evidence for the purposes of resolving the issue of transfer of the suit property to the defendant and compensation as directed by Amin J. on 31st January, 2000.

The suit set down for further hearing on 17th November, 2017 for the purposes of determining the issues that remained unresolved before Amin J. The plaintiff called one more witness, Mohamed Samji (PW2) who produced a valuation report by Redfearn International Limited

dated 29th September, 2015 as PExh. 3. PW2 also produced certificates of search on the titles of L.R No. 1956/1/1 and L.R No. 1956/1/2 (hereinafter referred to as "the two plots") as PExh. 4. PW2 stated that the two plots were valued at Kshs. 225,000,000/-. In cross-examination, PW2 stated that he was a chartered surveyor and the Chief Executive of Redfearn International Ltd. He told the court that he was not a registered valuer. He stated that he carried out the valuation exercise with another person. He stated that he visited the site in September, 2015 and found the two plots subdivided and occupied. He stated that he valued the two plots rather than the portions thereof that were surrendered by the plaintiff to the Commissioner of Lands (the suit property).

He stated further that he did not find any surrender registered against the titles of the two plots. With regard to how he arrived at the value that he gave to the two plots, PW2 stated that they did not obtain reliable sales evidence to inform the valuation and that they never made inquiries with the Chief Government Valuer on the values of the properties in the area. He stated that his valuation was based on estimates. He stated further that the value he attached to the two plots was based on the assumption that the plots were vacant which was not the case.

The defendant whose defence had been struck out did not have a right to adduce evidence. After the evidence of PW2, the parties made further submissions in writing. The plaintiff filed its submissions on 8th March, 2018 while the defendant filed his submissions in reply on 8th June, 2018. In its submission, the plaintiff reiterated that it was the registered owner of L.R 1956/1/1 and 1956/1/2 (the two plots). The plaintiff submitted that pursuant to an agreement between it and the Commissioner of Lands, it agreed to transfer to the Commissioner of Lands portions of the two plots measuring a total of 2.43 hectares (the suit property) in exchange for another parcel of land of equal value and measurement and, which was vacant. The plaintiff submitted that pursuant to the said agreement, the Commissioner of Lands (hereinafter referred to only as "the defendant") took possession of the suit property and developed the same. The plaintiff submitted that the defendant in disregard of the said agreement failed to honour his part of the bargain.

The plaintiff argued that although the suit property had not been transferred to the defendant, the defendant had not denied taking possession of the same and the fact that the plaintiff had honored its part of the agreement. The plaintiff cited section 114(2) of the Land Act, 2012, the case of Mtana Lewa *v* Kahindi Ngala Mwagandi [2015] eKLR, Article 40(3) of the Constitution, Article 75 of the repealed Constitution and Article 17 of the Universal Declaration of Human Rights and submitted that it could not be arbitrarily deprived of its property.

The plaintiff submitted that there was no contention that the suit property lawfully belonged to it before being transferred to the defendant without compensation. The plaintiff submitted further that the defendant had not contested that it was entitled to compensation and that the amount of compensation was the only issue in controversy. The plaintiff submitted that the defendant failed to file its own valuation report and urged the court to rely on the valuation report that was produced by the plaintiff which puts the value of the two plots at Kshs. 225,000,000/- to calculate the value of the suit property which was surrendered to the defendant. The plaintiff submitted that based on the said valuation report, it was entitled to Kshs. 65,636,254.50 as compensation for the suit property that it surrendered to the defendant. In support of this submission, the plaintiff cited the case of Five Star Agencies Ltd. *v* National Land Commission [2014] eKLR. The plaintiff submitted that under Article 23(3) (c) of the Constitution, the court has power to grant compensation for violation of the plaintiff's rights under Article 40 of the Constitution and Article 75 of the repealed Constitution. The plaintiff relied on the case of Patrick Musimba *v* National Land Commission (2016) eKLR where the court stated that the use of statutory authority to terminate proprietary rights require careful scrutiny.

In his submission in reply dated 7th June 2018, the defendant argued that the plaintiff neither surrendered nor transferred the suit property to the defendant as alleged in the plaint. The defendant submitted that all the documents filed in court showed that the plaintiff was the registered proprietor of the two plots and that the plaintiff even secured loans with the two plots as security. The defendant argued that the manner in which the Commissioner of Lands is alleged to have approached the plaintiff was not the laid down procedure for compulsory acquisition of land. The defendant referred to section 6(2) of the Land Acquisition Act, Chapter 295 Laws of Kenya (now repealed) and submitted that there was no gazette notice or letter indicating the Commissioner of Land's intention to acquire the suit property. The defendant submitted that the prayer for compensation should not be entertained since the plaintiff had failed to demonstrate that the procedures prerequisite to compulsory acquisition were followed in the alleged acquisition of the suit property.

The defendant submitted that the plaintiff's claim against the defendant should be limited to the alleged breach of contract which was also never completed. The defendant reiterated that there was no transfer of the suit property from the plaintiff to the defendant and that the plaintiff continued to be the registered owner of the suit property and even used the two plots to secure a loan of Kshs. 20,000,000/- on 9 th September 1996. The defendant submitted that by its conduct, the plaintiff was not keen on taking steps to have the suit property transferred to the defendant. The defendant cited section 26 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) and argued that in light of the statutory protection accorded to the plaintiff as the owner of the suit property and the failure on the part of the plaintiff to show any evidence of transfer, the plaintiff had no cause of action against the defendant.

The defendant relied on sections 107 and 109 of the Evidence Act, Chapter 80 Laws of Kenya and argued that the plaintiff failed to prove that there existed a land acquisition process which culminated in the transfer of the suit property in the defendant's favour. The defendant relied on the case of Susan Mumbi *v* Kefala Grebedhin, Nairobi HCCC No. 332 of 1993 cited with approval in Sanganyi Tea Factory *v* James Ayiera Magari, Nyamira HCCA No. 60 of 2015,[2016]eKLR in support of its the submission that the plaintiff bore the burden of proving its case on a balance of probabilities and that failure by the defendant to adduce any evidence was immaterial.

In his further submission, the defendant argued that specific performance was not available to the plaintiff as the plaintiff had not performed its part of the bargain there being no transfer of the suit property in the defendant's favour. For this submission, the defendant relied on the case of Gurdev Singh Birdi & another *v* Abubakar Madhbuti CA No. 165 of 1996. With respect to the alternative prayer seeking cancelation of the surrender and transfer of the suit property to the defendant, the defendant submitted that the relief could not be granted since the plaintiff was asking the court to cancel its own title. The defendant urged the court to dismiss the plaintiff's suit with costs.

Determination:

I have considered the plaintiff's claim as pleaded together with the evidence that was adduced in proof thereof both before Amin J. and before this court. I have also considered the submissions by the respective advocates for the parties and the authorities cited in support

thereof. The defendant had filed a defence which was struck out by Khamoni J. on 16th January, 1998. The striking out of the defendant's statement of defence meant that the factual averments in the plaintiff's plaint dated 27th August, 1996 remained uncontroverted. The fact that the defendant had entered into an agreement with the plaintiff in 1992 whereby the plaintiff had agreed to exchange the suit property with the Commissioner of Lands with a parcel of land of equivalent value and size but without squatters to be allocated to it by the Commissioner of Lands was not controverted. The fact that following that agreement portions measuring 2.43 hectares (the suit property) were excised from the two plots for use by Voi Municipal Council to upgrade Tanzania/Bondeni Village Estate which was the project for which the suit property was acquired from the plaintiff was not denied. The fact that the defendant allocated to the plaintiff a parcel of land on 25th August, 1994 measuring 2.43 hectares in fulfilment of his obligations under the said agreement that it entered into with the plaintiff was also not denied. It was also not denied that the said parcel of land that was allocated to the plaintiff turned out to be a fully developed slum contrary to the terms of the agreement which the plaintiff entered into with the defendant. The plaintiff's contention that the defendant had breached the agreement between them was also not denied.

I am of the view that after the striking out of the defendant's defence, what remained for this court to determine was the appropriate relief to give to the plaintiff. The defendant submitted at length that the plaintiff had not proved on a balance of probabilities that its property had been compulsorily acquired so as to be entitled to compensation. Following the striking out of the defendant's defence, the issue as to whether or not the plaintiff's land was acquired by the defendant was laid to rest. It was not an issue for determination at the trial. In any event, the plaintiff's claim against the defendant was not for compensation for land that was compulsorily acquired. The plaintiff's suit was for specific performance of the agreement that it entered into with the defendant for exchange of land. The plaintiff contended that it fulfilled its part of the bargain by surrendering its land to the defendant. The plaintiff contended that in purported performance of his part of the bargain, the defendant allocated to it land that did not meet the conditions that were agreed upon in the land exchange agreement. The defendant did not deny this fact.

What I need to determine is whether the plaintiff is entitled to the reliefs sought. The main relief sought by the plaintiff is specific performance of the agreement that it entered into with the defendant. In the case of Gurdev Singh Birdi & Another *v* Abubakar Madhbuti [1997]eKLR, that was cited by the defendant, it was held that a party seeking an order for specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he has not acted in contravention of the essential terms of the said agreement. While striking out the defendant's defence, Khamoni J. was satisfied that the plaintiff had already surrendered the suit property to the defendant. It is not in dispute therefore that save for the formal transfer of the said parcel of land to the defendant, the plaintiff had performed its part of the agreement between it and the defendant. I am satisfied therefore that the plaintiff has met the conditions for grant of an order for specific performance. However, specific performance is a discretionary remedy. It follows therefore that even where a plaintiff has satisfied all the conditions for grant of the relief, the court can decline to grant the same for good reason. In the case of Amina Abdulkadir Hawa *v* Rabinder Nath Anand & Another [2012] e KLR, the court cited Chitty on Contracts, 28th Edition (Sweet & Maxwell, 1999), Chapter 28 paragraphs 027 and 028 where the authors stated as follows:

> **"Specific performance is a discretionary remedy. It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence) although damages are not an adequate remedy and although the contract does not fall within group of contracts discussed above which will not be specifically enforced. But the discretion to refuse specific performance is not arbitrary discretion but one to be governed as far as possible by fixed rules and principles…….specific performance may be refused on the ground that the order will cause severe hardship to the Defendant where the cost of performance to the Defendant is wholly out of proportion to the benefit which performance will confer on the claimant and where the Defendant can put himself into a position to perform by taking legal proceedings against the third party…..severe hardship may be a ground for refusing specific performance even though it results from circumstance which arise after the conclusion of the contract which effect the person of the Defendant rather than the subject matter of the contract and for which the claimant is in no way responsible."**

I am of the view that this is not an appropriate case in which to order specific performance. It is on record that the defendant had already allocated to the plaintiff land equivalent in size to the land that was surrendered to it by the plaintiff. The plaintiff found the land not to be ideal. There is no evidence that the defendant would be in a position to find another parcel of land to allocate to the plaintiff. The plaintiff had sought compensation as an alternative prayer. I am of the view that this would be the most appropriate remedy for the plaintiff in the circumstances.

As I have stated earlier, this case was fully heard by Amin J. The plaintiff gave evidence and submitted valuation reports in respect of the two plots. The defendant did not submit any valuation report even after being given an opportunity to do so. The hearing that proceeded before me was not afresh hearing but a continuation of a hearing that took place before Amin J. At the trial before Amin J., the plaintiff produced in evidence two valuation reports that put the value of the two plots at Kshs. 35, 060,000/- as at 15th April, 1998. The two plots measured 8.33 hectares. The portions that were surrendered to the defendant (the suit property) measured 2.43 hectares the value of which would come to Kshs. 10,227,587/- based on the two valuation reports dated 15th April, 1998 aforesaid. When the matter came before me, the plaintiff submitted another valuation report dated 29th September, 2015 in which the value of the two plots was assessed at Kshs. 225,000,000/- which brings the value of the suit property that was surrendered to the defendant to Kshs. 65,636,254.50. I find no justification for this second valuation report. In any event, the witness who produced the report did not give any basis for their valuation of the two plots. I find the valuation given in the second valuation report exaggerated. Due to the foregoing, for the purposes of assessing compensation due to the plaintiff, I will adopt the valuation reports that were produced in evidence by the plaintiff before Amin J. On the basis of those reports, it is my finding that the plaintiff is entitled to compensation in the sum of Kshs. 10,227,587/-.

In conclusion, I hereby enter judgment for the plaintiff against the defendant in the sum of Kshs. 10,227,587/-. The said amount shall be paid to the plaintiff within 30 days from the date when the plaintiff shall hand over to the defendant a duly executed instrument of transfer of the suit property together with all documents necessary to enable the defendant register the said parcel of land in its name in default of which the said amount shall attract interest at the rate of 12% per annum from the date of default until payment in full. The defendant shall undertake the survey required for the purposes of excising the suit property from the two plots or shall reimburse the plaintiff of the expenses incurred by the plaintiff in that regard. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 7th day of March 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Isiji h/b for Mr. Tollo for the Plaintiff

Mr. Kamau for the Defendant

Catherine-Court Assistant