



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1115 OF 2015

DYNO HOLDINGS LIMITED..... PLAINTIFF

VERSUS

NATIONAL LAND COMMISSION.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

Background

1. From the documentary evidence and previous court findings presented as evidence in this suit, the dispute relating to the status of the suit land in this matter dates back to 1979 when a Mr R M Shah wrote to the Commissioner of Lands on 24/1/1979 requesting for amalgamation of the suit property with his piece of land, Land Reference Number 209/75/14. The proposal met opposition from among others, the Director of City Planning & Architecture and one Mr R M Malde. In response, the Director of City Planning and Architecture wrote to Mr Shah on 22/8/1985 as follows:

This is to inform you that after careful scrutiny of the Commissioner of Lands Records and that of the Director of Survey, it has been observed that the portion of 0.03 hacters of Greenway Road proposed to be amalgamated with L. R. 209/75/14 has been existing as a Government Road and has not yet been alienated. In view of the above, you are, therefore informed that the proposal of amalgamation is not possible.

2. About 11 years later, on 2/4/1996, one P N Mutwiwa, on behalf of the Commissioner of Lands, issued a Letter of Allotment, Ref No. 30120/IX, to an allottee named **Komakos Investment, P.O. Box 1019 Kericho**. The suit property was described in the Letter of Allotment as Land Reference Number 209/13002. It is not clear if this Komakos Investment was a legal entity with capacity to hold land in its own name. Special Condition No 2 of the Letter of Allotment required the allottee to prepare and submit building plans to the local authority within six months from the date of registration of the Grant. It further required the allottee to complete erection of buildings and related amenities on the suit land within 12 months from the date of registration of the Grant.

3. On unknown date, an unnamed person wrote an undated letter on behalf of Komakos Investment to the Commissioner of Lands, seeking consent to transfer the suit land to an unnamed “sister company” which the author of the letter described as “financially able and ready to develop the plot to the required standard”. The letter bears a “no objection” endorsement dated 15/10/96. The said letter is reproduced here below:

Komakos Investments

P.O. Box 1021

KERICHO

The Commissioner of Lands

P. O. Box 30089

NAIROBI.

Dear Sir

RE: CONSENT TO TRANSFER L.R. NO. 209/13002

We write this application seeking consent to transfer the above plot to a sister company. The company is financially able and ready to develop the Plot to the required standard.

Yours faithfully

Signed

For: KOMAKOS INVESTMENTS

4. Prior to the preparation of the Grant (Title), on 2/2/1996, an unnamed person signed an informal transfer form dated 2/12/1996 informally transferring the suit property from **Komakos Investment to Dyno Holdings Limited** (the Plaintiff). The informal transfer form was neither sealed nor stamped by the vendor. Similarly, the legal capacity of Komakos Investment was not disclosed in the informal transfer form. The form bears a supposed consent of the Commissioner of Lands, authorizing informal transfer of the suit property from Komakos Investment to the plaintiff, Dyno Holdings Limited.

5. Subsequently, on 20/12/1996, the Commissioner of Lands executed Grant Number I R 71827 in favour of the plaintiff, conferring upon the plaintiff a leasehold interest for 99 years from 1/4/1996. The Grant was subsequently registered in the Inland Land Registry on 23/12/1996 as Number I R 71827/1 and issued to the plaintiff. Attached to the said Grant was a Deed (Survey) Plan dated 7/8/1996.

6. On 28/1/1997 (35 days from the date when the Grant was registered as a title) , the same P N Mutwiwa who had signed the Letter of Allotment wrote a Letter Ref. No. 183642/18 to the Principal Registrar of Titles contending that the allocation of the suit property was suspect and was under investigation. He requested the Principal Registrar of Titles to place a caveat against the Title in order to ensure there were no dealings in the Title. The Letter reads as follows:

Ref. 183642/18

28/1/1997

The Principal Registrar of Titles,

Nairobi.

RE; LR. NO. 209/13002 – L.R. NO. 71827/1 – NAIROBI CITY

Please note that the background to the allocation of the above plot is suspect and the same is being investigated.

I have therefore been directed to request you to place a caveat against the title in order to ensure that no transaction pertaining to the same is undertaken in the meantime.

Treat the matter as urgent.

Signed

P N Mutwiwa

for COMMISSIONER OF LANDS

7. On 3/3/1997, the same P N Mutwiwa wrote a Letter Ref No. 183642/20 to the directors of the plaintiff company notifying them that the Government suspected foul play in the issuance of the letter of allotment, transfer and the subsequent preparation of the title in the name of the plaintiff. The letter reads as follows:

Ref: 183642/20

3rd March 1997

“REGISTERED”

The Directors

Dyno Holdings Limited

P O Box 69952

NAIROBI

RE: L.R. NO. 209/13002 – L.R.NO.71827 –

NAIROBI CITY

I refer to grant Number I. R. 71827 for L. R. No. 209/13002 registered in the name of a one Dyno Holdings Ltd of P.O. Box 69952, Nairobi.

Please note that the government suspects foul play in the issuance of Letter of Allotment Ref. No. 30120/IX of 2nd April, 1996 to a one Komakos Investment of P.O. Box 1019, Kericho, transfer and subsequent preparation of title in your favour.

You are therefore hereby kindly requested to call on the undersigned as a matter of urgency with all the relevant documents pertaining to the subject plot.

Investigations are underway on the subject plot hence your involvement as title holder and or purchaser of the same from the purported original allottees will be highly appreciated.

Treat the matter as urgent.

Signed

P N Mutwiwa

for COMMISSIONER OF LANDS

8. A reminder was done to the plaintiff's directors on 14/3/1997, requiring them to call on the writer as requested in the preceding letter. It is not clear if the directors of the plaintiff company acceded to the request to meet Mr Mutwiwa.

9. There appears to have been a lull between March 1997 and February 2000. Subsequently, on 21/2/2000, a Mr J M Gitau, on behalf of the Commissioner of Lands, wrote to the Director of Physical Planning a letter Ref No. 183692/25 forwarding to the latter a survey plan and requesting him to give his comments on the survey plan. On 23/2/2000, a Mr V K Liyai, on behalf of the Director of Physical

Planning, replied to the said Letter stating that the suit property was located along Chiromo Road between Chiromo Lane and Mpaka Road and that it was part of Green Way at the point where it meets Chiromo Road. The letter is reproduced below:

Ref:PPD/42/29/XIV/244

23rd February 2000

The Commissioner of Lands

P.O. Box 30089,

NAIROBI

RE: L.R. NO. 13002 –NAIROBI

Your letter ref; 183692/25 of 21st February, 2000 refers.

The above mentioned plot is located along Chiromo road between Chiromo Lane and Mpaka road. The plot is part of Green Way at the point where it meets Chiromo Road. At this point there is a tarmac diversion of the vehicles from Riverside Drive heading to town centre. Because of the nearness of the Diversion and the junction; the Freeway was not opened through leaving the area overgrown with shrubs. If the road was opened it would likely have created a black-spot in the area. So far the whole stretch of Greenway has been tarmacked leaving the site where the plot is untouched, and the same is fenced.

V.K. Liyai

for: DIRECTOR OF PHYSICAL PLANNING

10. From the minutes endorsed on Mr Liyai's Letter, officers in the Department of Lands used the letter as a basis for removing the existing caveat.

11. This triggered a complaint from Mr R M Malde dated 30/5/2000 and addressed to the Permanent Secretary, Ministry of Lands and Settlement resulting into a reinstatement of the caveat on 6/7/2001 through Entry No 4. Five years later, a withdrawal of the caveat registered as Entry No.4 was registered as Entry No. 5 on 12/5/2005. And on 22/4/2008, a provisional title was prepared and registered as Entry No. 6. Subsequently, on 8/4/2011, a caveat by the Registrar of Titles was again registered as Entry No.7. The defendants contend that this caveat exists to-date.

12. On 18/11/2013, the Director General of Kenya Urban Roads Authority (KURA) wrote to Mr Mohan Galot, a director of the plaintiff company, advising him that the suit land was hived out of a road reserve and any developments thereon were considered an encroachment on the Chiromo Lane Corridor and should be removed immediately.

13. On 3/11/2015, the plaintiff through a plaint dated 2/11/2015 instituted this suit against the National Land Commission and the Chief Land Registrar

seeking the following orders:

- a. A declaration that the plaintiff is the lawful owner (proprietor) of L R No. 209/13002.**
- b. A declaration that the plaintiff is entitled to put the said land to such use as the law allows.**
- c. Damages as pleaded in paragraph 18 hereinabove.**
- d. In the alternative ONLY that if found so the Defendants do acquire the suit property under Section 107 to 133 of the Land Act No. 6 of 2012.**

e. Any other, further or alternative relief that this Honourable Court may deem fit to grant.

14. I have noted from the documents presented by the plaintiff that the plaintiff filed two other suits relating to the suit land. The first suit was **Nairobi HCCC Misc. Application No. 457/2001; Dyno Holdings Limited v The Director of City Planning Department, Nairobi City Council**, in which the plaintiff herein sought an order of *certiorari* quashing the respondent's refusal to approve the plaintiff's development plans on the suit land. The City Council of Nairobi had declined to approve the development plans on the ground that the suit land was a road reserve. Judgment was rendered in this suit and the plaintiff's plea was dismissed on the grounds, *inter alia*, that the plaintiff ought to have filed an appeal before the Nairobi Physical Planning Liaison Committee.

15. The plaintiff's appeal to the Nairobi Physical Planning Liaison Committee (NPPC) was similarly declined, with the Committee holding, *inter alia*, that the issue of the suit land being a road reserve is grounded on the records in the area base maps; though this was not enough to substantiate that the City Council of Nairobi was right in declining to grant the approval and that the validity of the allocation and private ownership of the suit land was beyond the jurisdiction of the Committee.

16. The second suit was **Nairobi HCCC No 1316/2005; Dyno Holdings Limited v City Council of Nairobi**, seeking *inter alia*, an injunction restraining the City Council of Nairobi from interfering with, trespassing on, encroaching on, and constructing on the suit land. A ruling was rendered in this second suit by Justice Njagi on 1/9/2006. While declining to grant the injunction, the court made the following observations.

“As I have no doubt about condition 1 and 2 as laid down in Giella Case, I find no need to consider the balance of convenience. But if I have to do so, I would find the applicant's title is earmarked for cancellation. Secondly, the disputed plot is being developed as a road by the interested party with the full backing of the respondent. If the applicant wins the main suit, and if by then its title will not have been cancelled by the Government, the road will still be there and the applicant can have it then.”

17. I have deliberately set out the above detailed background because the context in which this court has been invited to make pronouncements on the key issues in this dispute is an integral part of the pronouncements.

Plaintiff's Case

18. The plaintiff's case is contained in its pleadings, evidence on oath and submission by its Counsel, Mr A B Shah and Mr Kelly Odiwour. In summary, the Plaintiff's case is that the suit property was allocated to Komokos Investment through Allotment Letter Ref. 30120/IX dated 2/4/1996. This Allotment aggrieved one Mr Malde who then complained to the President of the Republic of Kenya, resulting in a directive from the Permanent Secretary and Secretary to the Cabinet to the Permanent Secretary in the Ministry of Lands and Settlement to cause the allocation to be cancelled. Meanwhile, a Grant was issued to Dyno Holdings Ltd, described as a sister company to Komokos Investment, to whom the latter had informally transferred the Allotment. Since then, the Plaintiff has been paying land rent and land rates to the relevant authorities.

19. The plaintiff further contends that in August 2005, it lost the original Grant through an act of burglary in its office and the Registrar of Titles duly issued a provisional Title in place of the lost Grant.

20. Lastly, the plaintiff contends that it is a bonafide purchaser for value and in possession of the suit property. Through the orders sought, it seeks to enjoy the proprietary rights conferred by the Grant it holds.

Defendants' Case

21. The defendant's case is contained in the statement of defence filed on 25/5/2016, the evidence

tendered by its two witnesses, Mr Gordon O Ochieng and Mr Edwin Munoko Wafula, and the written submissions by Senior State Counsel, Mr Njoroge Allan Kamau, filed on 16/11/2017.

22. In summary, the defendants' case is that the plaintiff's title is not valid because the suit property is part of a road reserve and this information was available to the plaintiff at all material times. Secondly, the defendants contend that the plaintiff is not entitled to any protection because the suit property is a road reserve. Similarly it contends that, for the same reason, the plaintiff is not entitled to damages and or compensation.

Issues

23. Parties framed the following four issues and submitted on the four limbs:

a. Was the suit land a road reserve?

b. If so, was Dyno Holdings Limited aware that the suit land was a road reserve?

c. Dyno Holdings having been issued with a title deed (a grant) is the defence of the suit land being a road reserve available to the defendants?

d. What remedies including costs is Dyno Holdings entitled to?

Submissions

24. On whether the suit land is a road reserve, the plaintiffs' lead counsel, Mr A B Shah, submitted that the suit land is not a road reserve because there is no evidence to indicate that it is a road reserve. He added that the suit land is neither registered nor gazetted as a road reserve. He further submitted that the Director of Surveys authenticated the Deed Plan attached to the Grant and that if it were a road reserve, the Director of Surveys ought to have endorsed on the Deed Plan. Lastly, Mr Shah submitted that the Director of Physical Planning had stated that if a road is constructed on the suit land, it would create a black spot and that would hurt the public interest.

25. Mr. Shah further submitted that the plaintiff having been issued with a Grant, the defence that the suit land is a road reserve is not available to the defendants. He argued that issuance of the Grant by the Commissioner of Lands was a representation by the Commissioner of Lands that the Government did not need the land for public use. He added that alienation of the suit land removed it from being public land and converted it into private land.

26. On the question of the remedies available to the plaintiff, Mr. Shah submitted that the plaintiff was a bona fide purchaser for value and that the seller, Komakos Investment, had fully complied with the conditions in the Letter of Allotment. He added that the acts of the Government in receiving rent from the Plaintiff and issuing the provisional title was an acknowledgment that the Grant was lawful. On this ground, Counsel submitted that the Plaintiff is entitled to the prayers sought in the Plaint. Mr Shah urged the court to be guided by the decision in **Republic v Kenya Urban Roads Authority; Exparte Tamarind Village [2015]eKLR**.

27. On part of the defendants, Senior State Counsel, Mr Allan Kamau, submitted that the title held by the plaintiff is not a valid title because the suit land is a road reserve. He added that the Commissioner of Lands had impugned the title. He further submitted that there were various correspondence and caveats indicating that the title had been impugned by the Commissioner of Lands.

28. Mr. Kamau further submitted that as early as 1979, Mr R M Shah had written to the Commissioner of Lands seeking an amalgamation of his piece of land with the suit land. A response to the request from the Director of City Planning & Architecture confirmed that the suit land was part of Green Way Road. Amalgamation was declined on this ground. He added that allocation to Komakos Investment attracted immediate complaint to the then President who directed that the allocation be revoked.

29. Counsel further submitted that the Deed Plan attached to the plaintiff's Title confirms that the suit land is located within the junction of two roads. He added that the letter from the Director of Physical Planning and the letter from the Director of City Planning and Architecture at the City Council of Nairobi also confirm that the suit land was a road reserve. Mr Kamau added that the caveats lodged against the title were necessitated by the fact that the legitimacy of its allocation process was in question.

30. On whether the plaintiff was aware that the suit land was a road reserve, Mr Kamau submitted that on 28/1/1997, the Commissioner of Lands wrote to the plaintiff's directors notifying them that there was foul play in the issuance of the Letter of Allotment and the resultant Title and by the time the previous shareholders of the plaintiff company were selling their shares in the company, a caveat existed against the title but the new purchasers nonetheless proceeded to buy the shares of the company. He added that the records at the Lands Office clearly indicated that the land was a road reserve and was not available for allocation for private use.

31. Mr Kamau added that although the plaintiff's title was processed by the Ministry of Lands, the Lands Office realized the anomaly and placed a caveat on the title at the earliest. He added that by the time the shareholding of the plaintiff company was changing, the suit land was encumbered.

32. On the remedies available to the plaintiff, Mr Kamau submitted that the Plaintiff had not discharged the burden of proof on a balance of probabilities. He argued that the plaintiff had not tendered evidence to controvert the assertion by the Director of Physical Planning that the suit land was a road reserve. He contended that the plaintiff's title is impugned because of this fact.

33. Mr Kamau further submitted that the prayer for compulsory acquisition under **Section 107 to Section 133** of the **Land Act** is not merited because the suit land is a road reserve. Lastly, he submitted that whereas the Grant to the plaintiff runs from 1/4/1996, the Plaintiff Company's Certificate of Incorporation was issued on 6/6/1996.

34. Mr. Kamau invited the court to be guided by the decisions in the following cases on the issues under consideration : **(i) Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 others [1996]eKLR (ii) Republic v Minister for Transport & Communication and 5 Others Ex-parte v Ship Garbage Collector and 15 Others, (iii) Mombasa HCMCA No. 612 of 2003 [2006] KLR (E&L) 563 (iv) Civil Appeal No. 239 of 2001 Mungyu Main Vs. Hiram Gathiha Maina**

Determination

35. Parties to this suit framed the following four issues for determination by the court: (i) was the suit land a road reserve; (ii) if so, was the plaintiff aware of the suit land being a road reserve?; (iii) the plaintiff having been issued with a title deed (grant), is the defence of the suit land being a road reserve available to the defendants?; and (iv) what remedies, including costs, is the plaintiff entitled to?

36. I have considered the parties' pleadings, evidence tendered in support of the parties' respective cases, and the illuminating submissions and authorities cited by counsel for the parties. I have also considered the applicable constitutional and statutory framework on ownership of public roads and alienation of government land. The first issue for determination is whether the suit land was a road reserve.

37. Among the documents which the plaintiff relies on is a letter dated 3/4/2001 from the Director of City Planning and Architecture at the Nairobi City Council which reads as follows:-

Ref:CPD/FP/0959/209/13002

3/4/2001

Satish Shah,

P. O. Box 14468

NAIROBI

RE: PROPOSED DEVELOPMENT ON PLOT 209/13002 FOR DYNO HOLDINGS LIMITED-NAIROBI

Your letter of 20th February, 2001 regarding the above matter refers.

Please note that the creation of a plot is not acceptable because it obstructs a vital and planned future link with Chiromo road. In this regard, your application cannot be accepted to.

P T ODONGO

FOR: DIRECTOR CITY PLANNING

38. Similarly relied on by the plaintiff is a letter dated 4/10/2005 from the Town Clerk of City Council of Nairobi to the Chairman of Dyno Holdings Ltd (**page 49 of the plaintiff's bundle**) which reads as follows:-

CE/3246/SMM/SW/LR/209/13002

4th October, 2005

The Chairman

Dyno Holdings Ltd

P O Box 5787-00200

NAIROBI

REF: STATUS OF PLOT LR 209/13002

Your letter ref GG/D/009/2000 dated 22nd September 2005 and the attached documents from Lands Office on Plot LR 209/13002 refers.

We would like to inform you that the Plot was curved out of a road reserve in Westlands Area and the normal procedures of closing a road reserve were not followed, such as gazettelement for closure for any objection from the public.

We are therefore not in a position to allow any development on this plot since our records show that it is a road reserve.

Yours faithfully

ENG C M CHIURI

FOR TOWN CLERK

CC

Commissioner of Lands

P O Box 30089

Nairobi

39. On their part, the defendants produced, among other documents, a letter dated 23/2/2000 from the Director of Physical Planning which reads as follows;

Ref: PPD/42/29/XIV/244

23rd February 2000

The Commissioner of Lands

P.O. Box 30089,

NAIROBI

RE: L.R. NO. 13002 –NAIROBI

Your letter ref; 183692/25 of 21st February, 2000 refers.

The above mentioned plot is located along Chiromo road between Chiromo Lane and Mpaka road. The plot is part of Green Way at the point where it meets Chiromo Road. At this point there is a tarmac diversion of the vehicles from Riverside Drive heading to town centre. Because of the nearness of the Diversion and the junction; the Freeway was not opened through leaving the area overgrown with shrubs. If the road was opened it would likely have created a black-spot in the area. So far the whole stretch of Greenway has been tarmacked leaving the site where the plot is untouched, and the same is fenced.

V.K. Liyai

for: DIRECTOR OF PHYSICAL PLANNING

40. In addition, evidence has been tendered by the plaintiff [**page 146 of the plaintiff's bundle**] to indicate that as early as 22/8/1985, the Director of City Planning and Architecture at the City Council of Nairobi objected to a proposed amalgamation of the suit property through a letter dated 22/8/1985 which reads as follows:

This is to inform you that after careful scrutiny of the Commissioner of Lands Records and that of the Directors of Surveys, it has been observed that the portion of 0.03 hectares of Greenway Road proposed to be amalgamated with Land Reference 209/75/14 has been existing as a Government Road and has not yet been alienated. In view of the above, you are therefore informed that the proposal of amalgamation is not possible

41. Also tendered by the plaintiff as part of its evidence is a letter dated 5/10/2000 from P.T. Odongo, Director of City Planning & Architecture to the Commissioner of Lands. It reads as follows:

Date: 5/10/2000

The Commissioner of Lands

P O Box 30089

NAIROBI

RE; ALLOCATION OF A ROAD RESERVE – LR 209/13002, GREENWAY ROAD, WESTLANDS

I refer to the various correspondences between the owners of Plot Land Reference Number 209/75/14 and your Office and between Nairobi City Council and your Office. Also refer to a letter from the Permanent Secretary, Office of the President to Permanent Secretary, Ministry of Lands and Settlement Reference Number OP 40/1/1A/IV dated 19th February 1997 in respect of the above.

I wish to reiterate that the decision made regarding the said allocation was to have the same cancelled and the land revert back to the original user as a road. As far as the planning is concerned, this position still prevails. As such, this Council will treat allocation of the same as of no

consequence as far as land use is concerned.

In the circumstances, the Nairobi City Council will not approve/allow any development on the site other than a road for public use.

P T Odongo

For: DIRECTOR CITY PLANNING & ARCHITECTURE

CC

1. Mr Kanmal M. Malde

P.O. Box 45429

NAROBI

2. Dyno Holdings Limited.

42. From the above evidence presented by the parties in this suit, it is clear that the suit land was part of a public road prior to its alienation by the Commissioner of Lands on 2/4/1996. Because both parties have presented evidence to this effect, this court takes the view that it is common ground that prior to 2/4/1996 when the suit land was alienated, the suit land was a public road forming part of Green Way at the point where it meets Chiromo Road.

43. Prior to the enactment of the Kenya Roads Act (**Act No. 2 of 2007**) all urban roads in Nairobi were wholly vested in the City Council of Nairobi by dint of the framework in **Section 182** of the now repealed **Local Government Act** which contained the following provisions:-

182 (1) Every municipal council or town council shall have the general control and care of all public streets which are situated within its area, and the same are hereby vested in such local authority in trust to keep and maintain the same for the use and benefit of the public.

(2) A municipal or town council may make, construct, alter, and repair and for any such purpose temporarily close or divert any such street, and may make new streets.

(3) A municipal council or town council may, subject to any law relating to road traffic, by order, prohibit the driving of vehicles on any specified road otherwise than in a specified direction:

Provided that no such order shall be made unless notice of the intention to make the same shall be published in the Gazette at least fourteen days before the date on which it is intended to make such order, and before making such order, there shall be taken into consideration:-

i. Any objection which may have been made to the making thereof; and

ii. The existence of alternative routes suitable for the traffic which would or might be affected by the order

44. **Section 185** of the repealed **Local Government Act** vested in municipal council powers to permanently close or divert or alter any line of any street or road vested in the council subject to the procedure set out within the same framework. It provided thus:

185 (1) Subject to this section, a municipal council may permanently close or divert or alter the line of any street or road vested in it under this Act.

(2) Before any such closing or diversion or alteration is carried out, the municipal council shall—

a. prepare a plan showing the nature thereof; and

b. not less than one month before the proposed commencement of the work, give notice in the Gazette and in one or more newspapers (if any) circulating in its area, as well as by a sufficient number of placards posted on or near the street or road which it is proposed to close, divert or alter, of the proposed work and of a place where the said plan may be inspected at all reasonable hours; and

c. serve a copy of the said notice on the owners or reputed owners, lessees or reputed lessees, and occupiers of all property abutting upon the said street or road or appropriate part thereof and, where it is proposed to divert or alter the line of such street or road, of all property which abut upon the street or road if diverted or altered as aforesaid, whose address can after reasonable inquiry be ascertained; and

d. if the proposed closure, diversion or alteration will affect land not vested in the municipal council, serve a copy of the said notice on the Commissioner of Lands; and

e. in the case of a proposal to close a road, serve a copy of such notice upon the Minister for the time being responsible for town planning.

(3) If the Commissioner of Lands or any person interested as owner, lessee or occupier in any property abutting on the street or road which it is proposed to close, divert or alter under this section, or any other person aggrieved by such proposed closure, diversion or alteration, shall at any time within the period of one month from publication of the notice in the Gazette and in one or more newspapers (if any) as aforesaid, or, where such notice is published on different dates, within the month from the last date of publication, serve written notice on the municipal council of any objection to such closure, diversion or alteration, then, unless such objection is withdrawn, such closure, diversion or alteration shall not be carried out without the sanction of the Minister who may, on the application of the municipal council and after such inquiry (if any) as he may deem necessary, make an order disallowing or allowing the proposed work or allowing it with such modifications as he may deem necessary.

(4) On completion of any work to which this section applies the municipal council shall give notice thereof to the Minister and shall forward a plan thereof, prepared by a registered land surveyor or by some other person approved in writing by the Commissioner of Lands, to the Commissioner of Lands, showing all details of such closure, diversion or alteration, and the Commissioner of Lands shall cause such amendments as may be necessary to be made in his plan (if any) of the area.

45. It is clear from the framework in **Section 182** and **Section 185** of the repealed **Local Government Act** that the suit property was vested in the City Council of Nairobi by dint of the fact that prior to 2/4/1996 it existed as part of an urban public road (street). For the public road to be alienated by the Commissioner of Lands, the elaborate procedure spelt out in **Section 185** of the repealed **Local Government Act** had to be complied with. Invariably, this would have included: (i) preparation of a plan by the Council; (ii) gazette and newspaper notification of the intention to alter the road; (iii) service of notice on all affected parties; (iv) service of notice on the Minister; (v) inquiry, in the event of any objection; and (vi) forwarding of land surveyor's plans to the Commissioner of Lands showing the survey plans after completion of the closure.

46. Upon compliance with the mandatory procedure set out in **Section 185** of the repealed **Local Government Act**, the Council would be required to pass a resolution surrendering to the Commissioner of Lands the portion of the road which had ceased to be a public road. Only then would the public road be available for alienation as an unalienated government land within the framework of the now repealed

Government Lands Act.

47. In the present suit, no evidence has been presented to indicate that the mandatory procedure spelt out in **Section 185** of the repealed **Local Government Act** was followed. Similarly, no resolution of the City Council of Nairobi has been presented as evidence that the City Council of Nairobi surrendered that portion of the public road to the Commissioner of Lands for alienation within the framework of the now repealed **Government Lands Act**. What conspicuously appears are concerted efforts by the City Council of Nairobi and its successor in mandate, the Kenya Urban Roads Authority, to assert the status of the suit land as a road reserve. Without saying much, my finding on this issue, based on the above evidence presented in this matter, is that on 2/4/1996, the day when the Commissioner of Lands purported to alienate the suit land, and to-date, the suit land was and still is a road reserve. It is this court's finding therefore that Grant No. I.R. 71827 in which Land Reference No 209/13002 is comprised, registered in the name of Dyno Holdings Limited was registered and issued unprocedurally and in contravention of the statute and is therefore a nullity in law. This position is fortified by the following recent pronouncement by **the Court of Appeal (Makhandia, Gatembu & M'Inoti JJA)** in **Chemey Investment Limited v Attorney General & 2 Others [2018] eKLR** on the validity of a title that is obtained in violation of the statute:

However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the statute is and was not sacrosanct and did not enjoy protection of the law

48. I would add that Parliament recognized the probability of the existence of titles that were or are obtained unprocedurally or in violation of the statutes and came up with the following legal framework in Section 26 (1) of the Land Registration Act 2012 which denies such titles the sanctity which a clean title would ordinarily enjoy.

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

49. I now turn to the question as to whether the plaintiff in this suit was aware that the suit land was a road reserve. The plaintiff acquired the impugned title pursuant to an informal transfer dated 2/12/1996 at a consideration of Kshs 650,000. This informal transfer is what formed the basis upon which the title was prepared in the name of the plaintiff. Had the informal transfer not been executed by the undisclosed persons, the impugned title would have come out in the name of Komakos Investment. Key to the question under consideration is the undated letter requesting the Commissioner of Lands to consent to the informal transfer of the suit property to a sister company to Komakos Investment. It reads thus:

P.O. Box 1021

KERICHO

The Commissioner of Lands,

P. O. Box 30089,

NAIROBI.

Dear Sir,

RE: CONSENT TO TRANSFER L.R. NO. 209/13002

We write this application seeking consent to transfer the above Plot to a Sister Company. The company is financially able and ready to develop the Plot to the required standard.

Yours faithfully,

Signed

For: KOMAKOS INVESTMENTS

50. From the information in the subsequent informal transfer form, the “sister company” that was “financially able and ready to develop the plot” turned out to be the plaintiff, Dyno Holdings Limited. Based on the above description and justification given by Komakos Investments, it is clear that Dyno Holdings Ltd was a sister company to Komakos Investment. Secondly, the Plan attached to the Letter of Allotment and the Deed (Survey) Plan attached to the Grant clearly showed that the suit property formed part of the junction of two roads. It is therefore clear that the plaintiff in this suit either knew or had reasonable opportunity to know that the suit property was a road reserve.

51. The current shareholders of the plaintiff company have contended that they purchased the company and by dint of that purchase obtained the suit property as innocent purchasers for value. The evidence on record however does not support that contention. There is evidence on record that by the time the shareholding of the plaintiff company changed on 12/4/2009, the title had been impugned severally. There was a record of caveats registered by the Registrar of Titles against this Title. That record of caveats was sufficient reason to provoke the intended shareholders to seek to know the basis upon which the caveats were registered. In my view, it is precisely with the intention of circumventing the questions surrounding the suit land that the players in the irregular acquisition of the public road opted for sale of shares in the land holding company as opposed to outright transfer of the suit land. Unfortunately, for the new shareholders, Dyno Holdings Ltd as an entity remains the same legal entity that was described as a sister company of Komakos Investment. Consequently, the court’s finding on the second issue is in the affirmative; that as a sister company of Komakos Investments, Dyno Holding Limited knew that the suit property was a road reserve at the time it acquired it through an informal transfer. Similarly, those involved in the subsequent change of shareholding of the plaintiff company knew this fact.

52. The third question is whether the defence that the suit land is a road reserve is available to the defendant in view of the fact that the plaintiff was issued with a title. I have made a finding that the impugned title was obtained unprocedurally and in violation of the statute. The answer to the third question therefore is to be found in **Section 26** of the **Land Registration Act** and in a myriad of decisions in which our courts have been unequivocal in declining to recognize and protect title to land obtained illegally, fraudulently or in violation of the statute. The Court of Appeal recently summarized the prevailing jurisprudence on this question in the case of **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** as follows:

Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR: Munya Maina v Hiram

Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense

53. The answer to the third question therefore is that a title that is obtained fraudulently, unprocedurally or in violation of the statute, is in law a nullity. To that extent, the statutory defence in Section 26(1) of the Land Registration Act is properly available to the defendants in this suit.

54. The last question is on the remedies available to the plaintiff. Having found that the suit property is a road reserve and that the plaintiff as a sister company to Komakos Investment was aware of this fact at the time it acquired the suit property, it follows that prayers (a) (b) and (d) of the plaint are not available to the plaintiff. I would have considered refunds of the monies itemized in paragraph 18 and prayed for in prayer (c) of the plaint had the proper parties been enjoined in this suit. The proper party to answer the plea for refund of land rates is the Nairobi City County Government. The party to answer the plea for refund of land rent is the Attorney General on behalf of the National Exchequer which received the land rent. Regrettably, the two are not parties to this suit. Consequently, prayer (d) fails like the rest of the prayers.

55. Lastly, I would like to make some observations about the parties sued in this suit as defendants taking into account the key question, which is whether the suit land is a road reserve. I have said that prior to 2007, urban roads were vested in local authorities. With the enactment of the Roads Act, urban roads were vested in Kenya Urban Roads Authority. There is evidence that the City Council of Nairobi (predecessor to the Nairobi City County Government) and the Kenya Urban Roads Authority, have been consistent in their endeavours to protect and preserve the suit land as a road reserve. Indeed, there have been previous suits between the plaintiff and the City Council of Nairobi in which the issue of the suit land being a road reserve has featured and the plaintiff has consequently failed to obtain the orders sought against the City Council of Nairobi. Given that the plaintiff, in essence, sought a judicial sanctification of the impugned title, in my view, it was necessary for the plaintiff to bring on board as defendants, the Kenya Urban Roads Authority and the Nairobi City County Government. Because they were left out and this court has made findings on merits to the effect that the suit land is a road reserve and that Grant No. IR 71827 in which Land Reference Number 209/13002 is comprised is a nullity, I direct the Registrar of this Court to serve copies of this Judgment upon the directors in charge of city planning and roads in the Nairobi City County Government and the Director-General of Kenya Urban Roads Authority. Similarly, the Cabinet Secretary in charge of Lands and the Chief Executive Officer of the National Land Commission shall be served with copies of this Judgment for their records

Disposal Orders

56. In light of the above findings, the plaintiff's suit herein is dismissed in its entirety. Because of the role played by officers in the Department of Lands in the unprocedural and illegal alienation of the public road, I will not award the defendants costs of the suit. Parties shall bear their respective costs.

Dated, signed and delivered at Nairobi on this 28th day of February 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr. A B Shah Advocate for the Plaintiff

Mr. Allan Kamau for the Defendants

Halima- Court clerk