REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURTS

ELC. CASE NO. 1341 OF 2007

SATIMA ENTERPRISES……..…….…..….....……..PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY…….....1ST DEFENDANT

COMMISSIONER OF LANDS…….……2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 20th February 2013 in which the Plaintiff/Applicant seeks for an order that judgment on admission be entered against the Defendants as per the prayers in the Plaint dated 22nd June 2004 and that the costs of this Application be borne by the Defendants.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Bhupendra Chandubhai Patel, a director of the Plaintiff, sworn on 20th February 2013, in which he averred that the Plaintiff is the registered owner of the property known as L.R. No. Mainland North/I/6230 situated in Nyali, Mombasa (hereinafter referred to as the "suit property") pursuant to a letter of allotment dated 7th December 1989 and a payment of Kshs. 454,556.30 to the 2nd Defendant. He annexed a copy of his title deed. He added that upon issuance of the title deed and upon seeking to take possession of the suit property, he found that the then Department of Customs and Excise, the predecessor to the 1st Defendant, had developed the property while it had no title thereto. He stated that this occupation was illegal. He added that the Plaintiff appraised the 2nd Defendant of the status of the suit property and in the interest of an amicable settlement of the problem sought from the 2nd Defendant another piece of land in exchange for the suit property. He further averred that though the said Department had been allocated an undeveloped parcel of land adjacent to the suit property, it refused to surrender it for allocation to the Plaintiff in exchange for the suit property. He further averred that by a letter dated 5th March 1992 authored by the 1st Defendant, the Commissioner of Customs & Excise stated as follows:

> ***"This department cannot be held responsible for encroaching the plot allocated to M/s Satima Enterprises Limited …"***

He added further that by a letter dated 16th April 1992 by the Senior Lands Officer, Coast Province

representing the 2nd Defendant herein stated as follows:

> ***"Nevertheless, I am of the opinion that so long as M/S Satima are willing to surrender the existing title, it is alright if we proceed with the allocation. Thus implementing exchange proposal. After all the land on which the Customs houses stand had not been reserved to the department of Customs. It is therefore an obvious thing to try and slash an equivalent piece from their land to solve the problem at hand."***

He further added that by another letter written by the then Commissioner of Lands, Mr. W. Gacanja on 6th August 1992 addressed to the Commissioner of Customs and Excise, the 2nd Defendant stated as follows in reference to the suit property:

> ***"The above referred plot was allocated to M/s Satima Enterprises Ltd under cover of my letter Ref 08940/3 dated 7th December 1989. The allottee accepted the offer and the title deed was prepared and got registered at the Mombasa Land Registry.***
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> ***When the allottee started planning for the development of the plot they found that your Department has already encroached and developed some houses on the whole plot. I am sure you mistook the land that I had reserved to your Department and you encroached some apparent government land. The land that was reserved to your Department is clearly shown in blue mark on the attached plan. The land that was allocated to Satima Enterprises Ltd is shown marked in red on the same plan.***
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> ***Since the allottee accepted the offer and the title deed is registered in their favour there is a firm commitment in the part of the Government and it is therefore proposed to compensate this company with an equal piece out of our allocation to avoid court litigation."***

He asserted that the correspondence above clearly shows that the Defendants admit that the Plaintiff is the lawful registered owner of the suit property, the 1st Defendant has never been the owner of the said land, the 1st Defendant has clearly encroached onto the Plaintiff's land and the Defendants clearly admit the Plaintiff's claim herein. He stated that on that basis, the Defendants have no basis of resisting the Plaintiff's claim and it is only fair and just and in the interest of justice to enter judgment against the Defendants herein.

The Application is contested. The 1st Defendant/Respondent filed the Replying Affidavit of Daniel Owiti Ogola, a Senior Assistant Commissioner, sworn on 6th May 2013 in which he averred that he is charged with the administration of the properties owned by the 1st Defendant countrywide. He further averred that the suit ought to be struck out because it is time barred considering that 12 months have lapsed since the date when the purported cause of action herein is alleged to have accrued, the claim is based on trespass which is similarly time barred, the Plaintiff has not demonstrated a plain and obvious admission by the Defendants yet goes ahead to claim very drastic orders and the suit was instituted without issuing the mandatory notice under the Government Proceedings Act. He further averred that the suit property was reserved for and allocated to the then East African Community in 1975 and that prior to that the suit property was government land. He added that in 1975, the Community developed 10 bungalows and 6 maisonettes for its senior members of staff on the suit property. He added that upon the collapse of the Community in 1977, the suit property together with the developments thereon were vested in the then Department of Customs and Excise (the "Department"). He added that sometime in 1979, the Department was allocated another parcel of land adjacent to the suit property which with the approval of the Commissioner of Lands was developed with a massive institution known as the Kenya Revenue Authority Training Institute. He noted that both the suit property and the adjacent parcel were reserved and allocated to the Department and belong to it and in the premises, are not available for further allocation or allotment to the Plaintiff or to any other person. He added that the 1st Defendant was formed through the Kenya Revenue Authority Act under which all the rights, interests and estate then subsisting being enjoyed by the Department comprising the suit property and the adjacent parcel were transferred to the 1st Defendant on 1st July 1995. He added that notwithstanding that the Department was the owner of

the suit property, the 2nd Defendant issued a letter of allotment to the Plaintiff. He asserted that this was irregular, illegal and invalid *ab initio*. He stated that the purported allotment was done in favour of a non-existent entity having regard to the fact that the purported allotment was done on 7th December 1989 while the Plaintiff was incorporated on 17th January 1990. He further denied that the 1st Defendant had admitted the Plaintiff's claim herein, asserting that the 1st Defendant had filed a detailed and comprehensive Amended Defence and Counterclaim dated 4th July 2007 as well as a Reply to Defence and Defence to Counterclaim dated 6th September 2007. He further pointed out that the letter dated 5th March 1992 is not an admission but a strongly worded denial of the Plaintiff's purported rights over the suit property and that the document dated 16th April did not emanate from the 1st Defendant and does not show any admission on the part of the 1st Defendant. He also pointed that the letter dated 6th August 1992 did not emanate from the 1st Defendant and does not constitute an admission by the 1st Defendant. He also said that the solution proposed by the Plaintiff which is that the 1st Defendant do surrender the adjacent parcel so that it can be allocated to the Plaintiff was untenable since both properties belong to the 1st Defendant.

I am called upon to determine whether or not to grant the Plaintiff/Applicant judgment on admission against the Defendants as prayed in the Plaint. In **Choitram v. Nazari (1984) KLR 327**, the Court of Appeal held as follows:

> ***"It is settled that a judgment on admission is in the discretion of the court and not a matter of right. …the Court's discretion is unfettered, but … that discretion must be exercised judicially…"***

Further, in **Cassam v. Sanchania (1982) KLR 191**, the court found as follows:

> ***"The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."***

I am permitted to exercise my discretion in determining whether or not to grant the judgment on admission. Firstly, while it may not be disputed that there appears to be a concession to the allocation of the suit property to the Plaintiff by the 2nd Defendant, there is no "clear and unequivocal" admission on the level of damages sought by the Plaintiff/Applicant. The sums claimed by the Plaintiff in the Plaint as damages go into the billions of shillings. This being the case, I consider that this is not a plain case that can be determined by entering judgment on admission but rather should proceed to full trial. Accordingly, this Application is dismissed. Costs in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF MARCH 2017.

MARY M. GITUMBI

JUDGE