



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT NO. ELC 646 OF 2014

ASHMI INVESTMENT LIMITED.....PLAINTIFF

VERSUS

RIAKINA LIMITED.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff seeks a permanent injunction vide the plaint dated 23/5/2014 to restrain the 1st Defendant from evicting the Plaintiff or trespassing, alienating, leasing, selling, charging or otherwise interfering with the Plaintiff's possession of two parcels of land known as L.R. Numbers 29955 and 29957 situated in Nairobi. The Plaintiff also seeks a declaration that it is the bona fide owner of these two parcels of land.

2. On its part, the 1st Defendant counterclaims against the Plaintiff for a declaration that survey plan being F/R No. 391/24 (computation number 64318) in respect of L. R. Numbers 29955, 29556 together with deed plan numbers 358614, 358615 and 358616 issued by the Director of Surveys are unlawful and fraudulent and ought to be cancelled; and a declaration that the 1st Defendant's survey plan F/R number 285/11 (computation number 41474) in respect of L. R. No. 24091 together with deed plan number 246792 be declared as legal and that the Director of Surveys should amend the survey records accordingly.

3. The 1st Defendant also counterclaims for an order directing the Chief Land Registrar to issue a title to the 1st Defendant in respect of the plot with file number 210323, F/R number 285/11, computation number 41474 being L. R. Number 24091 and deed plan number 246792.

4. The Plaintiff's case is that it was allocated two plots described as UNS.INDUSTRIAL C & D situated off Mombasa Road vide a letter of allotment dated 28/7/1998 bearing reference numbers 51776/XV1/158 & 159. The Plaintiff paid the requisite fees for the certificate of title, registration, conveyance, survey, ground rent, standard premium, stamp duty and other approval fees on 20/2/2013 and was issued with receipt numbers 3195263 and 3195261. The Plaintiff claims that it has been paying rates at Nairobi City County and that its building plans were approved by the Nairobi City County on 27/2/2014. The Plaintiff claims that the 1st Defendant's servants or agents or unknown hooligans invaded its property on 19/5/2014 and attempted to take possession of the land.

5. The plot in dispute is what was described as Un-surveyed Plot number D ("the Suit Property") which both the Plaintiff and the 1st Defendant claim to have been allocated. The plot is situated off Mombasa

Road in Nairobi.

6. The Plaintiff claims it accepted the offer of allotment when it made payment and was issued with receipt number 3195263 on 20/7/2013. It claims that its allocation was based on the part development plan dated 11/6/1998 which was approved by the Commissioner of Lands on 25/6/1998. The Plaintiff maintains that the Director of Surveys caused plots C and D to be surveyed and given L.R. numbers 29955 and 29957 respectively once the Plaintiff had paid the requisite fees.

7. On its part, the 1st Defendant claims that it accepted the offer of allotment through its letter dated 4/8/1998. The plot was surveyed in 1998. When the 1st Defendant realized that the plot size was smaller than what was indicated in the letter of allotment, it tried to negotiate with the Lands office to pay a reduced sum for stand premium and other costs. Having been unsuccessful, the 1st Defendant paid the requisite fees including the stand premium for plot D on 3/4/2001 and 15/10/2001 and was issued with receipt numbers E773014 and E774210 by the Commissioner of Lands. The 1st Defendant maintains that it immediately took possession of the plot, fenced it and put up a guard house on it.

8. The 1st Defendant avers that it commenced processing title over the Suit Property and that the documents were prepared and sent to the Commissioner of Lands to execute the grant. The Director of Surveys initially approved the deed plan no. 246792 for L.R. No. 24091 on 25/2/2003 but that the Director of Surveys caused another survey through F/R No. 391/24 to be undertaken over plot D which resulted in L.R. No. 299557 based on deed plan no. 358616 which the Plaintiff claims.

9. The 2nd Defendant's witness admitted at the hearing that cases of double allocation of the same parcel of land exist in its offices. The witness who is a Principal Land Administration Officer working with the National Land Commission explained that letters of allotment are issued in a general file. After the allotment of a plot, the records office opens individual plot files for the plots allotted. He stated that to avoid duplication file numbers are never repeated. He stated that the file numbers are issued sequentially and that they are given before payment of stand premium.

10. After the records are opened they are taken to the plan record office to verify that there was no double allocation. He stated that noting would be done three (3) days after the date of issue of an allotment. The witness conceded that the letters of allotment issued to both the Plaintiff and the 1st Defendant were issued by the Commissioner of Lands.

11. The witness confirmed that the letter of allotment issued to the Plaintiff was from their records office. He produced a copy of the title that was issued to the Plaintiff together with a copy of the lease. These were issued on 4/3/2015 after this suit had been filed in court. The witness conceded that titles are issued by the Chief Land Registrar and not the National Land Commission. He stated that he was not aware of any other allocation of plot number D from the records that were available.

12. The main issues for determination in this suit are:

- i. Whether there was fraud in the allocation of the Suit Property to the Plaintiff;
- ii. Who is the bona fide allottee of the Suit Property?
- iii. Who is in possession of the Suit Property?
- iv. Who should pay the costs of this suit?

13. It is clear from the evidence that both the Plaintiff and the 1st Defendant were issued letters of allotment over the same piece of land. This being a case of double allocation of land, the question then becomes between the Plaintiff and the 1st Defendant, whose claim over the Suit Property is superior to the other? The court has to discern on a balance of probabilities based on the documents placed before it

whether the Plaintiff established its case or the 1st Defendant had proved its counterclaim.

14. Before delving into the dispute, the court notes that the Plaintiff went ahead to process the title deed which was issued on 4/3/2015 while this suit was pending in court. The court agrees with the observation made in the case of **Rose Wakanyi Karanja & 3 Others** (Suing as the legal representatives of the Estates of the late Walter Karanja Muigai) **V. Geoffrey Chege Kirundi**, Civil Appeal No. 172 of 2010 that parties should not deal with the Suit Property when it is the subject of contentious litigation pending in court. The court referred to the case of *Bellamy V Sabince IDeG & J 566* it was held:

“The doctrine of lis pendens intends to prevent not only the Defendant from transferring the Suit Property when litigation is pending but it is equally binding on those who derive their title through the Defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the Suit Property during the pendency of the suit so as to defeat the rights of the other party...”

15. The Plaintiff ought not to have processed the title over the Suit Property while this suit was pending. This action was intended to defeat the rights of the 1st Defendant and its counterclaim.

16. The 1st Defendant’s file number indicated on the receipt dated 15/10/2001 when it paid the stand premium is 210323 while the Plaintiff’s file number indicated on its receipt dated 20/2/2013 is 242742. Based on the 2nd Defendant’s witness evidence that file numbers are given by the lands office sequentially, it must be that the 1st Defendant’s file number was opened before the Plaintiff’s file number. The Plaintiff’s letter of allotment bears the reference number 51776/XVI/158 while the 1st Defendant’s letter of allotment bears the reference number 51776/XVI/154.

17. The Plaintiff’s letter of allotment dated 28/7/1998 indicated that the Plaintiff was required to pay Kshs 258,630 yet from the documents the Plaintiff produced in court it paid the sum of Kshs. 174,750 on 20/2/2013. No explanation was given for the delay of almost fifteen years in making payment. The letter of allotment states that the sum indicated in the letter should be paid within thirty days.

18. All the correspondence and documents that the Plaintiff relies on bear dates in 2013 and 2014. The Plaintiff avers that it had been paying rates. The only receipt it attached is dated 27/2/2014 for the payment of Kshs. 63,175/=. The Plaintiff’s advocates issued a demand letter to the 1st Defendant on 20/5/2014.

19. The 1st Defendant contends that by paying a sum lesser than what the Commissioner of Lands had demanded, the Plaintiff failed to comply with the conditions set out in its letter of allotment. The 1st Defendant argues that this amounts to defrauding the Government of Revenue that is due to it and that it shows that the Plaintiff corruptly participated in a scheme to deny the Government revenue.

20. The 1st Defendant contends that since its file was opened first before the Plaintiff’s and based on the fact that it paid the sums demanded in the letter of allotment in 2001 while the Plaintiff paid in 2013, the certificate of title that was issued to the Plaintiff should be presumed to be illegal and to have been unprocedurally issued through a corrupt scheme.

21. The 1st Defendant also takes issue with the Director of Surveys for allowing the approved part development plan reference number 42:14:98:03A which was used to process and authenticate survey plan number F/R 285/11 on 15/11/1998 to be used again fifteen years later to authenticate F/R number 391/24 on 13/9/2013 for un-surveyed industrial plots B C & D as a result of which new land reference numbers 29955, 29956 and 29957 were created that fall directly on land reference numbers 24091, 24089 and 24090. Looking at these numbers, the former land reference numbers must have been issued subsequent to the latter ones.

22. The 1st Defendant contends that since the Director of Surveys keeps and maintains these records, they

are available and should be used for checking any new jobs within the same location to avoid overlaps of existing surveys before the Director gives his approval and authentication.

23. Both the letters of allotment issued to the Plaintiff and the 1st Defendant over the Suit Property stipulated that acceptance of the conditions attached to the letter of allotment together with the banker's cheque for the amount set out in the letter had to be received by the Commissioner of Lands within 30 days of the postmark. The Plaintiff's letter of allotment in respect of UNS. Industrial Plot D off Mombasa Road is dated 28/7/1998. There is no evidence that the Plaintiff ever accepted this offer. The Plaintiff relied on the copy of the receipt issued to it on 20/2/2013 when it paid Kshs. 174,750 as evidence of the acceptance of the offer of allotment of the suit plot. The amount the Plaintiff paid for the plot is far less than the sum demanded by the Commissioner of Lands. The Plaintiff therefore accepted the offer for allotment of the Suit Property in 2013.

24. After the Defendant was issued with its letter of allotment dated 28/7/1998 which demanded payment of Kshs. 260,563, it accepted the offer of plot D vide its letter of 4/8/1998 and stated that it was making arrangements to pay the sum stated in the letter of allotment. It paid Kshs. 20,000 and Kshs 240,563 on 3/4/2001 and on 15/10/2001 respectively. The 1st Defendant paid the sum of Kshs 260,563 stated in the letter of allotment in full. The court also notes that going by the evidence of the 2nd Defendant that file numbers are given sequentially, the 1st Defendant file number 210323 must have been opened before file number 242742 in respect of which the Plaintiff's payment was received for plot D on 20/2/2013.

25. Upon payment of the sum demanded in the letter of allotment the 1st Defendant took possession of the Suit Property and developed it by erecting a boundary wall around it. The Plaintiff did not provide any evidence to show that it had been in occupation of the Suit Property. The 1st Defendant produced photographs of the Suit Property and the fence it put up. The 1st Defendant has proved on a balance of probabilities that it has been in possession of the Suit Property.

20. The court notes that the 2nd Defendant participated in getting the title over plot D issued to the Plaintiff. The 2nd Defendant wrote to the Director of Surveys on 2/11/2013 stating that it had noted irregularities in the preparation of deed plans for un-surveyed Industrial Plots B C and D Mombasa Road. The letter stated that according to its records, grants had been registered over plots A and B based on F/R 285/11 while the grant in respect of plot D being L.R. 24019 deed plan number 246792 was in the process of being registered. The letter further states as follows: -

“having issued new deed plans for plots B (358615), C (358616), D (358614) I am forwarding back to you, two deed plans (358614 for L.R. 29955 and 246792 for L.R 24091) which are overlapping on plot D for you to cancel the one you consider irregular and return the one that I should use for registration.”

26. This letter contradicts the position taken by the 2nd Defendant's witness who testified that he was not aware of any other allocation of plot number D from the records that were available. The letter states that the grant in respect of plot D being L.R. 24019 deed plan number 246792 was in the process of being registered.

27. The 1st Defendant's advocate wrote to the Director of Surveys on 24/3/2014 complaining that file number 210323 opened in respect of plot number D allotted to the 1st Defendant had disappeared after this plot had been surveyed as F/R 285/11 and deed plan No. 246792 processed and given L.R. No. 24091. It is evident that the 1st Defendant's deed plan No. 246792 was prepared before the Plaintiff's survey was carried out and its deed plan number 358614 prepared which was the basis for the Plaintiff being issued with the title over L.R. No. 29955 on 4/3/2015.

28. The 1st Defendant also contends that the Director of Surveys ignored its letters dated 24/3/2014 and 29/9/2015 raising concerns over the survey of the Suit Property and proceeded to aid and abet the Plaintiff with the participation of the 2nd Defendant to circumvent the law and process a title in the Plaintiff's

name.

29. The 2nd Defendant wrote to the Director of Surveys on 25/10/2013 requesting him to verify the authenticity of the three different sets of surveys in respect of Uns. Industrial Plots B, C and D on Mombasa Road. The letter noted that the allottee of parcel numbers 29955-29957 (the Plaintiff) was already in occupation. This contradicts the defence at paragraph 4 where the 2nd Defendant states that it has no knowledge whether the Plaintiff took up possession of the suit properties upon allocation.

30. The Director of Surveys responded to the 2nd Defendant's letter on 8/11/2013 and confirmed that no deed plan was prepared and no registration made following the first survey done by B.A. Rabuku licensed surveyor over the Suit Property. He confirmed that J.K. Yego, a licensed surveyor did the second survey which was registered as F/R. 285/11 for one plot being L.R. No. 24090 and that two other plots being L.R. No. 24089 and 24091 were purported to be approved on 15/11/1998. The letter confirmed that deed plan number 24692 for L.R. No. 24091 purported to have been prepared on 15/11/1998 could not be traced from their records.

31. The letter confirms at paragraph 4 that Opiyo and Associates licensed surveyors submitted F/R No. 391/24 for L.R. No. 29955-7 which was authenticated on 24/9/2013 and deed plan numbers 358614-6 were prepared on 25/9/2013. The letter states that the survey was supported by approval letters from Kenya Airports Authority dated 2/9/2013, Nairobi City Council dated 24/7/2013, the indent dated 20/9/2013 from the Commissioner of Lands and the letter of the Principal Registrar on the status of the parcels L.R. Nos. 20358-60 dated 6/6/2013. The Director of Surveys recommended that upon validation of the documents in its custody and subsequent registration, the Director was to be advised on the cancellation of any other surveys over the same area.

32. From this letter it is clear that the Suit Property was allotted to the Plaintiff in 2013. This is confirmed by the documents presented by both the Plaintiff and the 2nd Defendant. The 2nd Defendant wrote to Kenya Airports Authority on 28/8/2013 stating that the plots B C and D had been allotted to the Plaintiff while seeking information on whether the plots encroached on the airport land or if developments on the plots would be on the path of the flight funnel.

33. Under Section 33 of the Survey Act, the Director of Surveys can cancel the authentication of deed plans and recall copies in certain circumstances including inaccuracy because of errors or omissions in the survey, or where the survey does not conform to the conditions given for the subdivision.

34. Regulation 109 of the Survey Regulations of 1994 stipulates that the Director of Surveys must cancel any deed plan which he withdraws. There was no evidence to show that the 1st Defendant's deed plan number 246792 prepared on 4/3/2003 was withdrawn or cancelled by the Director of Surveys. The Director of Surveys only states in his letter of 8/11/2013 that the 1st Defendant's deed plans could not be traced in their records.

35. Even where the Director of Surveys cancels the survey plans, the Director has to notify the registered owner, the surveyor who did the work and the land registrar of the cancellation pursuant to Section 33 of the Survey Act. No evidence was adduced to show that the 1st Defendant or the surveyor who undertook the 1st Defendant's survey was notified of the cancellation of the 1st Defendant's deed plans.

36. The 1st Defendant's deed plan and survey plan disappeared at the Lands Office at the time it was processing its title which was before the Plaintiff commenced the processing of its title. This is confirmed by the 2nd Defendant's letter of 2/11/2013 to the Director of Surveys seeking clarification on which deed plan it should use for registration. It is also confirmed by the 1st Defendant's Advocates letter of 24/3/2014 complaining that the 1st Defendant's deed plan had disappeared at the Lands Office while the 1st Defendant's grant was being processed.

37. No explanation was given as to why the Plaintiff paid a sum less than the sum indicated in the letter of

allotment. This amounts to defrauding the government of revenue.

38. The court finds that by 2013 when the Plaintiff paid for plot D it was no longer available as the plot had already been allotted by the Commissioner of Lands and to the 1st Defendant who had paid for it and taken up possession and was in the process of procuring a certificate of title over it. The Director of Surveys ought to have cancelled the deed plan number 24692 for L.R. No. 24091 if there was any inaccuracy because of errors or omissions in the survey or if the survey did not conform with the conditions given for the subdivision. On cancellation, the Director should have informed the 1st Defendant before undertaking the subsequent survey that resulted in the preparation of the deed plan which was used to prepare the Plaintiff's grant over the Suit Property.

39. Once plot D was allotted to the 1st Defendant and it paid the requisite fees in 2001 and took possession, the plot was not available for allocation to the Plaintiff in 2013 (see the case of **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others** [2015] eKLR. The Plaintiff's suit is dismissed with costs.

40. The court allows the 1st Defendant's counterclaim and grants prayers (i), (ii) and (iii) of the counterclaim.

Dated and delivered at Nairobi this 25th day of September 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Ndege for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court Assistant