REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 4 OF 2017

(FORMERLY KISUMU HCC NO. 48 OF 2013)

ALI GADAFFI.....1ST APPELLANT

FARIDA A. SALIM…….....……..2ND APPELLANT

=VERSUS=

FRANCIS MUHIA MUTUNGU…….....…….. 1ST RESPONDENT

BEPHINE N. SHIRAHO & MARGARET A. SHIRAHO

(having been substituted as the personal representatives of the estate of the late

RICHARD SHIRAHO (DECEASED)….....……2ND RESPONDENT

JUDGEMENT

1. In a Plaint dated and filed on 15th July 2004 at the Resident Magistrates Court at Winam, the First Respondent Francis M. Mutungu sued the Appellants herein for a permanent injunction to restrain the agents and or any persons acting on their behalf from encroaching, trespassing upon and/or constructing any structure or fencing Plot No. 96 Kalolelni. The 1st Respondent also sought the costs of the suit. On or about 19th October 2004, following an application to be enjoined in the proceedings, Richard Shiraho the 2nd Plaintiff/Respondent was enjoined and the pleadings were amended accordingly.

2. The two Appellants Ali Gadaffi Hamisi and Farida Salim jointly and severally denied that the 2nd Respondent was the proprietor of all that unsurvyed parcel of land known as Plot No. 96 Kaloleni situated within Kisumu Municipality. It was the Appellants case that the 2nd Respondents allocation to the said Plot had been cancelled by the Commissioner of Lands and that hence the Respondents had no claim whatsoever in the disputed plot of land.

3. On or about 25th June 2013, after hearing the case placed before him by the parties the Honourable Principal Magistrate Mr. C.N. Sindani held that the Respondents had proved their case since the 2nd Respondent had produced a Certificate of Lease showing that he was the registered owner of the plot of land which had since been surveyed and registered as Land parcel No. Kisumu/Block 5/1973. It was the Learned Magistrate's findings that the 2nd Plaintiff's/Respondent's registration was a first registration

and in view of Section 27 and 28 of the Registered Land Act, (Cap 300-now repealed), the 2nd Plaintiff/Respondent had a better and superior title as compared to the Appellants who only had a letter of allotment in support of their claim.

4. Aggrieved and dissatisfied by the decision of the Learned Magistrate, the Appellants lodged the appeal herein on 9 grounds listed in the Memorandum as follows:-

1. That the Learned Magistrate grossly erred in law where without directions as required by law (he) proceeded to take over the conduct of a matter that was before another Magistrate and wrote its Judgment without (the) benefit of the litigants electing.

2. That the Learned Magistrate in his Judgment grossly misdirected himself in both law and fact by allowing the Plaintiff's suit as prayed in the Plaint.

3. That the Learned magistrate grossly misdirected himself in both law and fact in failing to consider that the Defendant's occupation of the suit property was justified by being the administrators of the estate of the deceased registered allotee of the suit property.

4. The Learned Magistrate erred in both law and fact in failing to appreciate that the Defendant's allotment letter was bon fide while that of the 2nd Plaintiff was irregular and that the Defendants' allotment letter had been paid for and survey to the suit property conducted where a beacon certificate was issued and a land registration number issued before the process was hijacked by the 2nd Plaintiff to irregularly register his title.

5. The Learned Magistrate grossly misdirected himself in both law and fact in failing to find that the allotment letter issued to the 2nd Plaintiff was a fraud and the subsequent registration of the title was irregular and as such they cannot benefit unjustly from a fraudulent registration.

6. The Learned Magistrate erred in both law and facts in granting prayers of demolition of the Defendants' structures from the suit property which prayer was never requested for by the Plaintiff in the first place.

7. The Ruling was against the weight of evidence.

8. The Learned Magistrate erred in both law and fact in failing to consider…..(unclear and incomplete)

9. The Learned Magistrate erred in law and fact by failing to find that he had no jurisdiction to handle the suit by virtue of the sheer anomalies noted in the fraudulent registration of the 2nd Defendant as the proprietor of the suit property and the value of the suit property which was way beyond the Court's pecuniary jurisdiction. The court ought to have been obliged by having the suit struck out or advised the litigants to move the High Court to determine the question of validity of the title of the suit property that was in contest.

5. During the hearing of the Appeal, the Appellant reduced the 9 Grounds into 3 in which Grounds No.s 2,3,4,and 5 were argued as the Second Ground while Nos. 6,7, and 9 were argued as the Third Ground. Ground No 1 of the Appeal was argued on its own while the incomplete Ground No. 8 was abandoned.

The First Ground

6. On their Frist Ground of Appeal, the Appellants contended that the Honourable Magistrate erred in law when he proceeded to hear the matter without directions as required under Order 18 Rule 9 of the Civil Procedure Rules and that hence the resultant Judgment was null and void.

7. It would appear to me that this Ground was based on Order 18 Rule 8 of the rules and not Rule 9 as

indicated during the oral submissions. Order 18 Rule 8 of the Civil Procedure Rules gives a Court the power to deal with evidence taken before another Judge or Magistrate. The said Order provides as follows:-

> *"18(1) Where a Judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.*
>
> *(2) The provisions of subrule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under Section 18 of the Act*.

Section 18 of the Civil Procedure Act on the other hand

> *provides:-*
>
> *'18(1)…..*
>
> *(2) Where any suit or proceedings has been transferred or withdrawn as aforesaid(under subsection 1), the Court which thereafter tries the suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn*.

8. The Appellants concern herein arises from the fact that the proceedings in the subordinate court commenced before Honourable A.M.O. Osodo, Senior Resident Magistrate who heard the 1st Plaintiff's witness. The matter then went before Honourable P.C. Biwott Principal Magistrate who heard other witnesses and were thereafter concluded before the Honourable C.N. Sindani, Principal Magistrate who pronounced the Judgment under Appeal. It was therefore the Appellant's case that he ought to have been given a choice to make an election to opt for a fresh trial or to proceed from where the previous Magistrate left it.

9. In response to this position the Respondent stated that the records show at page 166 thereof that directions were taken before the Honourable Principal Magistrate V. Wakumile, then the Head of Station who then directed that the matter be allocated to the Honourable C.N. Sindani.

10. While I do not certainly think that the failure to take such directions in a civil suit of this nature would amount to a sufficient ground to overturn the decision of the Court, I have taken the liberty to peruse the subordinate Court's record. Indeed, it is clear from a perusal of page 166 thereof that on 18th July 2012, the parties appeared before the Honourable Principal Magistrate Mr. V. Wakumile when a party (or both it is not clear whom) addressed the Court thus:-

> *"We propose that the proceedings be typed and the matter proceeds with the evidence on record"*.

11. The Hon. W. Wamukule then stated thus:-

> *"Since Hon. Sindani is comfortable with Hon. Biwott's handwriting, the matter is allocated to Court 2.*

12. Thereafter on 2nd October 2012, the parties appeared before the Hon. Sindani. The Coram shows that both Mr. Odeny, Learned Counsel for the Appellant as well as Mr. Ragot, Learned Counsel for the Respondent were present when the Court noted that directions had earlier been taken that the matter proceeds from where it was left. It is evident that thereafter the parties proceeded in Court on a number of occasions without any objection from the Appellant.

13. Arising from the foregoing, I do not find any merit on the 1st Ground of Appeal and the same is dismissed.

SECOND GROUND OF APPEAL

14. In regard to the 2nd Ground, the Appellant urged that the dispute herein revolves around the unsurvyed Plot No. 96 Kaloleni which plot had two competing letters of allotment. The issue of the double allocation came to light before the suit was instituted and the parties attempted to resolve it. It was the Appellant's case that shortly after the double allocation was discovered, the Commissioner of Lands wrote to the 2nd Respondent cancelling the letter of allotment issued to the 2nd Respondent. This paved the way for the Appellant to proceed to issue a Notice to vacate to the 1st Respondent who was then utilizing the premises as a garage. This is what led to the 1st Respondent filing the suit to which the 2nd Respondent was later enjoined.

15. The Appellant further submitted that as the case was pending before the subordinate Court, the 2nd Respondent passed on and the Administrators of his Estate went ahead and processed his allegedly cancelled Letter of Allotment and they were thereafter issued with a Certificate of Title for the land.

16. On the basis of their new possession of the Certificate of Title, the Court found that they had a better tittle and went on to grant them Judgement.

17. Responding to the Second Ground of Appeal, the Respondents contended that the Appellants were bound by their pleadings. It was the Respondents case that even though the Appellants had alleged that the 2nd Respondent's acquisition of the letter of allotment was tainted by fraud, they had failed to provide any particulars and/or evidence of the alleged fraud. The Respondent urged the Court to consider the fact that both letters of allotment were issued by the Commissioner of Lands who was not sued or joined in the proceedings before the subordinate Court. Counsel for the Respondent submitted that this Court must not condemn either the Commissioner of Lands or the Registrar of Lands who processed the title and both of whom were not parties to the suit, unheard.

18. Counsel for the Respondent further submitted that as at the time the title was registered in the name of the 2nd Respondent, there was no order stopping any dealing or processing of the same. It was Counsel's submissions that even though there may have been two allocations the Government through the Commissioner of Lands had a right to choose who of the two allotees to give title. In the end, the 2nd Respondent chose to process his letter earlier and the Commissioner accepted it and issued him with a title. Accordingly, if the Appellant's challenge was based on the validity of title, then the Commissioner of Lands ought to have been sued and enjoined in the proceedings.

19. I have considered the Appellant's Second Ground of Appeal and the Respondent's response thereto. A perusal of the Record of Appeal reveals that the 1st Letter of Allotment was issued to the Appellant on 27th April 1998(as per page 216 of the Record). He had 30 days to comply with the special conditions imposed thereon. On 6th May 1998 barely some 9 days later, another letter dated the same day was issued to the 2nd Respondent in respect of the same unsurvyed Plot No. 96, Kaloleni, in Kisumu. Having disagreed as to who was the right allotte in view of the double allotment, the 1st Respondent filed the suit against the Appellants on 15th July 2004, accusing them of illegal encroachment and/or trespass to the said parcel of land.

20. As it were the case for one reason or the other dragged long in Court and indeed both the original beneficiaries passed on and it is the Administrators of their respective estates who are continuing with the battle over the disputed parcel of land.

21. It would however appear that as the legal battle dragged on in Court, certain other processes were going on elsewhere. This culminated in the issuance of the Certificate of Title by the Registrar of Lands in the name of the 2nd Respondent. A perusal of the Certificate of Lease (at page 193 of the Record)

reveals that it was issued to Richard Shiraho Motomat on 25th March 2008, some four years after the dispute commenced in Court.

22. The 2nd Respondent's heirs produced the said Certificate of Lease as their Exhibits No. 15 when they testified in Court on 27th July 2010. On the strength of the said title, the Honourable CN Sindani, Principal Magistrate when pronouncing his Judgment on 25th June 2013 found that the 2nd Respondent had proven beyond doubt that he was the registered owner of the land which had since been surveyed and renamed Kisumu/Block 5/1973. It was the Learned Magistrates finding that the 2nd Plaintiff's registration was a first registration and in view of Sections 27 and 28 of the Registered Land Act(Cap 300- now repealed), the 2nd Plaintiff had a better and superior title as compared to the Appellants who only had a Letter of Allotment in their name.

23. It is the Appellants conviction that the Learned Magistrate was wrong in relying on the Certificate of Lease that was issued during the pendency of the case as the same was in their view fraudulent and in violation of the doctrine of **Lis Pendens**. The Respondents on the other hand contend that no fraud has been proved and that the doctrine of **Lis pendens** is a special provision applicable to titles issued under the Indian Transfer of Property Act (ITPA) and is not applicable to property registered under the Registered Land Act, Cap 300(now repealed).

24. Black's Law Dictionary, 9th Edition defines **Lis Pendens** as the jurisdictional power of control acquired by a Court over property while a legal action is pending. **Lis Pendens** is a Common Law Principle that was enacted into statute by Section 52 of the Indian Transfer of Property Act, 1882(now repealed). The said section provided:-

> *"During the active prosecution in any Court having authority in British India by the Governor General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."*.

25. It follows therefore that the purposes of the principle of **Lis Pendens** is to preserve the suit property until the suit is heard and finally determined or until the Court issues Orders and gives terms on how the suit property should be dealt with.

26. In ***Manuj –vs- U.S. International University & Another (1976-80) KLR 229,*** Justice Madan, while addressing the purpose of the principle of **Lis Pendens** adopted the findings of Turner L.J. In ***Bellamy –vs- Sabine (1957) 1 De J 566, 584*** where the English Judge had held that:-

> *"(**Lis Pendens**) is a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation **Pendente Lite** were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendant's alienating before the Judgment or decree, and would be driven to commence his proceedings **de novo**, subject again to be defeated by the same course of proceedings."*

27. In the same case of ***Bellamy -vs- Sabine (supra), Cranworth L.J.*** Observed as follows:

> *"Where litigation is pending between a Plaintiff and a Defendnat as to the right of a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the Proceedings would ever end…"*

28. Arising from the foregoing, it is clear that the doctrine of **Lis Pendens** under Section 52 of the ITPA is a substantive law of general application. Other than being on the statue, it is a doctrine equally

recognized under the Common Law. It is necessary for the final adjudication of the matters before the Court. It is good for the effective administration of justice and the contention that it does not apply to title obtained under the repealed Registration of Land Act is in my view, incorrect.

29. There was accordingly no need for the Court to have issued any orders restraining the Registrar from dealing with the land or proceeding to issuing title to either of the parties herein. From the testimony of PW2 (page 155 to 157 of the Record), it is evident that even as they were busy litigating the matter in Court, the Respondents were actively pursuing the registration of the tile in their name. That the trial Magistrate upheld their conduct and sought to give a stamp of approval to the title that was issued to them solely for the purposes of defeating the Appellants' claim is a great travesty of justice that must be corrected.

30. In my considered view, the registration of the 2nd Respondent as the owner of the disputed parcel of land four years into the pendency of the proceedings before the lower Court was extremely irregular. The Certificate of Lease that was issued **Pendente Lite** is for all intents and purposes null and void. Whatever is a nullity in law is in the eye of the law nothing and therefore the Learned Magistrate could not look at what was nothing and try to make something out of it.

31. In ***Macfoy vs- United African Co. Ltd (1961) 3 All ER 1169***, the Court held that:-

> *"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the court declare it to be so, and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".*

32. Accordingly, I need not to say more. The Certificate of Lease upon which the Learned Magistrate relied on to grant Judgment in favour of the Respondents amounted to nothing but a mere nullity. The Learned Magistrate grossly misdirected himself in relying on the same and thereby arrived at the wrong conclusion that he was barred from considering any other issue in view of Section 27 and 28 of the Registered Land Act.

33. Having said so, this Court has carefully considered the appeal herein, the grounds preferred, the submissions of the parties and the relevant authorities thereto. In so doing, I am alive to the fact that I did not hear the witnesses testify nor did I observe their demenour. It is however trite that an appeal of this nature is in a way of a re-trial and the Court must therefore reconsider the evidence, evaluate it itself and draw its own conclusions. As the Court of Appeal observed in the old case of **Peters –vs- Sunday *Posts Ltd(1958) EA 424 at page 429***:-

> *"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution, it is not enough that the appellate Court might itself have come to a different conclusion.*

34. In this particular instance, it is however clear to me that having misdirected himself on the net worth of the Certificate of Lease issued to the 2nd Respondent, the Learned Magistrate did not find it necessary to evaluate other evidence that had been placed before him by the parties. In the circumstances, I think it is fair and proper that this Court briefly looks at the evidence that was placed before the trial Magistrate in addition to the fact that the 2nd Respondent had processed title in his name.

35. It is common that the dispute in respect of unsurvyed Plot No. 96 Kaloleni arose from a double allocation of two allotment letters to two different individuals. The first allotment letter was issued to the Appellant on 27th April 1998(page 216 of the Record) while the second one was issued to the 2nd

Respondent a few days later on 6th May 1998(page 176 of the Record). It would appear that the issue of the double allocation came to the attention of the parties and an attempt was made to resolve it. By a letter dated 2nd April 2004(page 223 of the Record), the Commissioner of Lands wrote to the 2nd Respondent as follows:-

> *"Please refer to the letter of allotment Ref. 7212/XVII. of 6th May 1998 on the above subject.*
>
> *I regret to inform you that the offer contained in the said letter has been cancelled due to prior commitment. You are therefore required to surrender the original allotment together with the receipt issued to you in order to facilitate payment of refunds of the amount paid."*

36. Buoyed with knowledge about the Commissioner's letter aforesaid, the Appellant proceeded to issue notice to the 1st Respondent who was then the 2nd Respondent's tenant to vacate the suit premises. This is what led the 1st Respondent to initiate the suit in the lower court.

37. The 2nd Respondent on his part denies receipt of the Commissioner's letter purporting to cancel his allotment. They however admit that the Appellant's letter of allotment was older to their own by about 9 days. In addition, the Respondents concede that the Appellant made the requisite payments to the Commissioner of Lands ahead of the Respondents. It is however the Respondent's position that the Letter of Allotment allows the Commission to make a choice on who to give the land to. In this regard the Respondent chose to process his letter earlier and the Commissioner agreed and issued title to the Respondent. The validity of the title so-issued according to the Respondent cannot then be challenged in a case like this where the Commissioner of Lands and/or the Registrar of Lands have not been enjoined to the suit, as that would amount to condemning them unheard.

38. In my understanding, unless the Appellant failed to meet the conditions set out in the Letter of Allotment dated 27th April 1998, Plot No. 96 Kaloleni was unavailable for allocation. The Commissioner of Lands lost his powers to alienate the Plot of land the moment he allocated the same to the Appellant. As the Court of Appeal stated in ***Dr. Joseph N.K. Arap Ng'ok –vs- Moijo Ole Kiewua & 4 Others Nairobi Civil Appeal No. 60 of 1997***(unreported):-

> *"Title to landed property normally comes into existence after issuance of a letter of allotment meeting the conditions stated in such a letter and actual issuance thereafter of the title document pursuant to provisions held."*

39. In this regard, and as Warsame J (as he then was) stated ***in Rukaya Ali Mohamed –vs- David Gikonyo Nambacha & Another (Kisumu HCCA No. 9 of 2009:-***

> "Once (an) allotment letter is issued and the allottee meets the conditions therein, the land in question is nolonger available for allotment since a letter of allotment confers (an) absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud, mistake or misrepresentation, or that the allotment was outrightly illegal or it was against the public interest."

40. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled. There can never be any allocation unless the land is an unalienated land. Consequently, when the Appellant was allocated the land on 27th April 1998, he acquired a legal interest which could not and was not defeated by the purported subsequent allocation to the 2nd Respondent, on 6th May 1998. As at 27th April 1998, there was a commitment made on Plot 96. Kaloneni and it was therefore not available to the 2nd respondent for allotment. As Warsame J (as he then was) observed in ***Rukiya Ali Mohamed (Supra***), the authority who issued the 2nd Respondent's letter of allotment had no such powers to grant the same. It was an illegal transaction, it amounts to no allotment and in total there was no benefit, no interest, and no legal right which could be derived from an act which amounted to nothing.

41. The upshot of all this is that I find merit in the Appeal. Accordingly the Appeal is allowed, I set aside the Principal Magistrates Judgment dated 20th June 2013 and substitute therewith an order dismissing the Respondents' suit in Winam SRMCC No. 495 of 2004 with costs.

42. The Appellant shall also have the costs of this Appeal.

Dated, signed and delivered at Kisumu this 24th day of October, 2017.

J.O. OLOLA

JUDGE