



REPUBLIC OF KENYA



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**Ashmi Investment Limited v Riakina Limited & another (Civil Appeal
384 of 2019) [2021] KECA 184 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 184 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 384 OF 2019
HM OKWENGU, F SICHALE & KI LAIBUTA, JJA
NOVEMBER 19, 2021**

BETWEEN

ASHMI INVESTMENT LIMITED APPELLANT

AND

RIAKINA LIMITED 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

(Being an Appeal against the Judgment and Decree of the Environment and Land Court at Milimani, Nairobi Hon. Lady Justice K. Bor delivered on the 25th September 2017 and issued on the 31st October 2017 at Nairobi In Environment and Land Court No. 646 of 2014)

JUDGMENT

Background

1. This appeal arises from the judgment and decree of the Bor, J delivered on 25th September 2017 in Nairobi Environment and Land Court Case No. 646 of 2014 in which the appellant, Ashmi Investment Limited, had sued Riakina Limited (the 1st respondent) and the National Land Commission (the 2nd respondent) seeking –
 - a. an order of permanent injunction restraining the 1st respondent (the 1st defendant in that suit), whether by itself, its servants or agents, employees, officers or directors, or any of them, from evicting the appellant and trespassing, alienating, leasing, selling, charging or committing such acts or otherwise from interfering with the appellant’s possession of LR No. 29955 and 29957 Nairobi, or otherwise howsoever from evicting or interfering with the properties;



- b. a declaration that the appellant is the bona fide owner of LR Nos. 29955 and 29957 Nairobi; and
 - c. costs of the suit together with interest thereon at court rates from the date of the judgment until payment in full.
- 2. The 1st respondent denied the appellant's claim and filed its defence and counterclaim against the appellant in which it sought –
 - a. leave to enjoin the Chief Land Registrar (pursuant to section 14 of the *Land Registration Act*) and Director of Surveys (pursuant to the provisions of the *Survey Act*) as parties to the proceedings, to be the 2nd and 3rd defendants respectively by reason of the fact that-
 - i. the Chief Land Registrar had delayed the issuance of the 1st respondent's/appellant's title documents whilst the Director of Surveys had caused a duplicate fraudulent Survey No. Folio Register No. 391/24 (Computation No. 64318) in respect of LR Nos. 29955, 29556 and 29557 together with Deed Plan Nos. 358614, 358615 and 358616 to be superimposed upon the 1st respondent's lawfully effected survey Folio Register No. 285/11, Computation No. 41474-LR No. 24091-Deed Plan No. 246792;
 - ii. the fraud aforesaid and the refusal by the Chief Land Registrar to issue the Grant caused the 1st respondent to suffer irreparable damage;
 - b. a declaration that the 1st respondent's Survey No. Folio Register No. 391/24 (Computation No. 64318) in respect of LR Nos. 29955, 29556 and 29557 together with Deed Plan Nos. 358614,358615 and 358616 by the Director of Surveys were unlawful and fraudulent and be cancelled, and that the 1st respondent's Survey Folio Register No. 285/11 (Computation No. 41474) in respect of LR No. 24091 together with Deed Plan No. 246792 be declared as legal and the Director of Surveys do amend the survey records accordingly;
 - c. an order that the Chief Land Registrar do issue the 1st respondent's Grant for Plot File No. 210323; Folio Register No. 285/11, Computation No. 41474 in respect of LR No. 24091 together with Deed Plan No. 246792;
 - d. costs and interest.
- 3. The 2nd respondent denied the appellant's claim and filed its defence stating that –
 - a. the appellant was merely an allottee of LR Nos. 29955 and 29957 pursuant to allotment letters dated 28th July 1998 issued by the Commissioner of Lands;
 - b. the appellant had made payment of all the requisite fees in respect of rent, rates, stand premium and survey fees to the 2nd respondent, even though the 2nd respondent did not know whether the appellant had taken possession of the suit properties upon allocation by the Commissioner of Lands; and



- c. following payment of the requisite fees by the appellant, titles for LR Nos. 29955 and 29957 in favour of the appellant had been prepared and were, AT THE TIME, awaiting execution and registration.

They prayed that the appellant's suit against the respondents be dismissed with costs to the 1st respondent.

4. We find nothing on the record before us to suggest that the appellant had filed a reply to the 1st respondent's defence or defence to its counterclaim. Neither have we seen a reply by the appellant to the 2nd respondent's defence. From the record of appeal, we can only conclude that the appellant did not defend the 1st respondent's counterclaim. Be that as it may, the suit proceeded to hearing and determination on its merits.
5. Upon hearing the parties, the ELC delivered its judgment on 12th 25th September 2017. In his judgment, K. Bor, J –
 - a. dismissed the appellant's suit with costs;
 - b. declared as unlawful and fraudulent Survey No. Folio Register No. 391/24 (Computation No. 64318) in respect of LR No. 29955, 29956 and 29557 together with Deed Plan Nos. 358614, 358615 and 358616, and directed the Director of Surveys to cancel them;
 - c. declared as legal the 1st respondent's Survey Folio Register No. 285/11, Computation No. 41474 in respect of LR No. 24091 together with Deed Plan No. 246792, and directed the Director of Surveys to amend the survey records accordingly;
 - d. ordered the Chief Registrar to issue the 1st respondent with title documents for Plot File No. 210323; Folio Register No. 285/11, Computation No. 41474 in respect of LR No. 24091 being Plot "D" together with Deed Plan No. 246792 out of which arose the subdivisions known as LR No. 29955 and 29957, which are the subject matter of the dispute; and
 - e. awarded the respondents costs of the suit and interest;

Whereupon the court issued its Decree in the terms specified above.

The Parties

6. The Appellant is a limited liability company duly incorporated in, and carrying on business within, the Republic of Kenya while the 1st respondent is a limited liability company duly incorporated and carrying on business in Kenya.

Dispute and Judgment of the ELC

7. By a plaint dated 23rd May 2014, the appellant filed suit to restrain the 1st respondent from evicting the appellant from or trespassing on, alienating, leasing, selling, charging or otherwise interfering with the appellant's possession of the suit properties known as LR Nos. 29955 and 29957 situate in Nairobi. The appellant also sought a declaration that it was the bona fide owner of the two parcels of land.
8. The appellant's case was that it was at all material times the rightful owner of the suit properties, having been purportedly allocated to it by the Commissioner of Lands vide a letter of allotment dated 28th July 1998 bearing Reference No. 51776/XVI/158 and 159 and signed "for Commissioner of Lands" by one



S. K. W. Wangila. The appellant proceeded to take possession and to pay the prerequisite fees in respect of ground rent, rates, standard premium, survey fees, fees for the Certificate of Title, Registration, conveyance, stamp duty and other approval fees on 20th February 2013 as appears from copies of two Department of Lands Fee Receipts Nos. 3195261 and 3195263 of the same date. These payments were not in contention, having been admitted by the 2nd respondent in its defence.

9. On its part, the 1st respondent denied the appellant's claim of ownership of the two suit properties and counterclaimed against the appellant inter alia for a declaration –
 - a. that Survey No. Folio Register No. 391/24 (Computation No. 64318 in respect of LR Nos. 29955, 29556 and 29557 together with Deed Plan Nos. 358614, 358615 and 358616 by the Director of Surveys were unlawful and fraudulent, and be cancelled;
 - b. that the 1st respondent's Survey Folio Register No. 285/11, Computation No. 41474 in respect of LR No. 24091 together with Deed Plan No. 246792 be declared as legal; and
 - c. that the Director of Surveys do amend the survey records accordingly.
10. In its defence and counterclaim, the 1st respondent contended that it had also been allotted the suit properties by the Commissioner of Lands vide a letter dated 28th July 1998 bearing Reference No. UNS. Industrial Plot 'D'- Mombasa Road-Nairobi and signed "for Commissioner of Lands" by one S. K. W. Wangila. Upon allotment, the 1st respondent accepted the offer vide its letter of 4th August 1998 and proceeded to take possession and pay the requisite stand premium on 3rd April 2001 as appears from Department of Lands Fee Receipt No. 773014 dated 3rd April 2001. Thereafter, the 1st respondent paid fees for Certificate of Title registration, land rent, stamp duty and other approval fees and planning fees on 15th October 2001 as appears from the Department of Lands Fee Receipt No. 774210 dated 15th October 2001.
11. It is clear to our minds that the appellant and the 1st respondent had been allotted the suit properties on the same date, being 28th July 1998. Notably, the 1st respondent accepted the offer on 4th August 1998 and paid the requisite fees to facilitate transfer and issuance of title documents in its favour on 3rd April and 15th October 2001. On its part, the appellant claimed that it had accepted the offer of allotment when it paid the requisite fees and other impositions on 20th February 2013, more than 11 years after the 1st respondent had discharged all the conditions for allotment to it of the two properties.
12. Four main issues fell to be determined at the trial of the appellant's claim and the 1st respondent's counterclaim:
 - a. whether there was fraud in the allocation of the suit properties to the appellant;
 - b. who was the bona fide allottee of the suit properties;
 - c. who was in possession of the suit properties; and
 - d. who should pay the costs of the suit.



13. Having heard the appellant and the respondents, the learned Judge dismissed the appellant's suit with costs to the respondent, allowed the 1st respondent's counterclaim and –
- a. declared as unlawful and fraudulent Survey No. Folio Register No. 391/24 (Computation No. 64318) in respect of LR No. 29955, 29956 and 29557 together with Deed Plan Nos. 358614, 358615 and 358616, and directed the Director of Surveys to cancel them;
 - b. declared as legal the 1st respondent's Survey Folio Register No.285/11, Computation No. 41474 in respect of LR No. 24091 together with Deed Plan No. 246792, and directed the Director of Surveys to amend the survey records accordingly; and
 - c. ordered the Chief Registrar to issue the 1st respondent with title documents for Plot File No. 210323; Folio Register No. 285/11, Computation No. 41474 in respect of LR No. 24091 together with Deed Plan No. 246792. For the avoidance of doubt, LR No. 24091 on Deed Plan No. 246792 comprised what the parties, the Director of Surveys and the trial court referred to as Plot "D" out of which was curved out the suit properties being LR No. 29955 and 29957.
14. Aggrieved by the decision of the learned Judge, the appellant instituted this appeal from the whole of her judgment and decree on 8 grounds, which we need not reproduce in full here. However, we take the liberty to summarise and reframe them. In our considered view, the salient grounds of the appeal before us are that the learned Judge –
- a. erred in failing to hold that the appellant is the bona fide owner of the suit properties;
 - b. failed to appreciate the evidence adduced at the trial to the effect that the suit properties were allotted to the appellant vide letters of allotment Ref: 51776/XVI/158 and 51776/XVI/159 respectively;
 - c. failed to appreciate that the suit properties had been allocated to the appellant and the same were not available for alienation, allocation or transfer to any other person;
 - d. dismissed the appellant's suit despite strong evidence tendered by the appellant;
 - e. erred in dismissing the appellant's suit to the effect of allowing the 1st respondent to unjustly enrich itself at the appellant's expense; and
 - f. failed to consider all the issues raised by the appellant in its written submissions.
15. On these grounds, the appellant requests this Court to –
- a. allow the appeal and set aside the judgment and decree of the Hon. Justice K. Bor;
 - b. grant the orders sought in the appellant's plaint; and



- c. the costs of this appeal be borne by the 1st respondent.

Appeal, Submissions by Counsel and Findings

16. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.
17. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya v R 1957 EA p.336*. In that case, the Court cited with approval the case of *Figgis v R 19 KLR p.32*, which had adopted the principle in *The Glannibanta (2) (1876) 1 PD p.283* where the Court had this to say at p.287:
- “... the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were ... material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect.”
18. *Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR* citing the case of *Selle v Associated Motor Boat Co. [1968] EA p.123* was also a case in point. In *Selle's* case (*ibid*), the Court held:
- “... this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
19. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on our findings on the following issues of law and fact in respect of which learned counsel for the appellant and the 1st respondent filed written submissions dated 10th February 2021 and 18th February 2021 respectively:
- a. What was the legal effect of double allotment of the suit properties?
 - b. Between the appellant and the 1st respondent, who was the first in time to accept the offer of allotment and pay the requisite fees, and to what effect?
 - c. After acceptance of the offer of allotment and payment in full of the requisite fees and impositions by either the appellant or the 1st respondent, were the suit properties available for allocation and transfer to the other?
 - d. Who is the rightful allottee and owner of the suit properties?
 - e. Who bears the costs of this appeal?
20. On the first issue, we find that this was a clear case of double allotment, the appellant and the 1st respondent having received letters of allotment dated 28th July 1998. It is common ground that both offers for allotment were issued from the office of the Commissioner of Lands to the appellant and



the 1st respondent, and in respect of the same Plot “D” from which the suit properties were derived bearing LR Nos. 29955 and 29957. The fact of this double allotment was not in contention. The offer, to our mind, remained open to acceptance by either party and, being conditional, acceptance thereof only took legal effect upon payment in full of the requisite fees and impositions without which the properties would not have been vested on either of them. That answers the first question.

21. The second question that we must answer is, on the evidence on record, who was the first in time to satisfy the conditions contained in the letter of allotment? Undisputedly, the 1st respondent was the first in time. It accepted the offer vide its letter of 4th August 1998 and proceeded to take possession and pay the requisite stand premium on 3rd April 2001 as appears from Department of Lands Fee Receipt No. 773014 dated 3rd April 2001. Thereafter, it paid fees for Certificate of Title registration, land rent, stamp duty and other approval fees and planning fees on 15th October 2001 as appears from the Department of Lands Fee Receipt No. 774210 dated 15th October 2001. On the other hand, the appellant claimed that it had accepted the offer of allotment when it paid the requisite fees and other impositions on 20th February 2013, more than 11 years after the 1st respondent the three receipts speak for themselves, and we need not say more. Suffice it to say that, as the first in time to pay the requisite fees and impositions, the 1st respondent was entitled to allocation and registration of the suit properties in its favour. Thereafter, the properties were no longer available for subsequent allotment or allocation to the appellant. That answers the second and third questions.
22. Curiously, though, the appellant processed title deeds in its favour, the same were issued to it on 4th March 2015 while its suit was pending in court. We agree with the learned Judge that neither party was lawfully entitled to deal with the suit properties while the suit was pending. This Court so held in *Rose Wakanyi Karanja and three others (suing as the legal representatives of the Estate of the late Walter Karanja Muigai) v Geoffrey Chege Kirundi and another [2016] eKLR*.
23. We call to mind the doctrine of lis pendens as enunciated in *Bellamy v Sabine [1857] 1 De J p.566* thus:

“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 ...
24. As the learned Judge correctly found, the appellant’s attempt to alienate the suit properties by payment of the requisite fees and impositions to facilitate transfer to it of the title documents was, in our considered judgment, unlawful and fraudulent. We agree with the learned Judge that the appellant ought not to have processed the title documents over the suit properties while a suit was pending in the trial court. Its action to that end was intended to defeat the rights of the 1st respondent and undermine its counterclaim. On this score, we agree with the 1st respondent that the certificates of title issued to the appellant in respect of LR No. 29955 and 29957 (being the derivatives of Plot “D”) so late in the day could only be presumed to have been irregularly obtained through an unlawful scheme.
25. Having examined and evaluated the evidence on record, we agree with the learned Judge’s finding that by the year 2013 when the appellant paid for Plot “D”, it was no longer available as the same had already been allotted by the Commissioner of Lands to the 1st respondent, who had paid for it and taken possession thereof, and were in the process of procuring a certificate of title over it. Indeed, once Plot “D” was allotted to the 1st respondent and it paid the requisite fees in 2001 and took possession thereof, the plot was not available for allocation to the appellant in 2013 (see *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed and 4 others [2015] eKLR*).



26. In conclusion–

- a. the appellant’s appeal is hereby dismissed;
- b. the judgment and decree of the Nairobi (Milimani) Environment and Land Court (Hon. Justice K. Bor) dated 25th September 2017 be and are hereby upheld; and
- c. costs of the appeal be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

