IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), WARSAME, MUSINGA, KIAGE & ODEK JJ.A)

CIVIL APPEAL NO. 276 OF 2008

CONSOLIDATED WITH

CIVIL APPEAL NO. 6 OF 2009

BETWEEN

EMBAKASI PROPERTIES LIMITED.....1ST APPELLANT

SAFE CARGO LIMITED.....2ND APPELLANT

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Nairobi (Ang'awa, J.) dated 29th May, 2007

in

HCCC No. 411 of 2003)

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JUDGMENT OF THE COURT

This Court in the case of **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others,** Civil Appeal No.246 of 2013, aptly described the risks of transacting in land, especially in Kenya without conducting due diligence. It said;

> **"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future."**

This appeal follows that pattern of double allocation of land and the following background will assist in appreciating how the dispute arose in this appeal.

In an action instituted by a plaint that was subsequently amended, Embakasi Properties Limited, the 1st appellant, challenged a decision made on or about 21st June, 1993 by the Commissioner of Lands, (the Commissioner) the 1st respondent, to excise about 0.400 hectares from the former's parcel of land known as L.R. Number 9042/224 measuring 1.575 acres and granting it to Safe Cargo Limited, (Safe Cargo) the 2nd appellant, as L.R. 9042/290 (the suit property). Embakasi Properties contended that the grant to Safe Cargo was fraudulently obtained and as such, was invalid *ab initio*. According to Embakasi Properties, the Commissioner, being the keeper of land records in Kenya in trust for and on behalf of the Government, knew and ought to have known that a grant over the suit property had already been issued to it and therefore was not available for further allocation; that Safe Cargo fraudulently conspired with the Commissioner in acquiring the property in question when they knew of the lawful existence of Embakasi Properties' title.

For these reasons Embakasi Properties asked the court below to:

> i. restrain Safe Cargo by an order of an injunction from alienating, developing or in any manner dealing with the land comprised in Title No. 9042/290;
>
> ii. declare that the excision of a portion of L.R. No. 9042/224 and the granting of the resultant title to the Safe Cargo was unlawful as such null and void; and
>
> iii. direct the Commissioner to cancel the grant issued to Safe Cargo.

It also applied to be awarded damages and *mesne* profits from 21st June, 1993 up to the date of vacation of the suit property at the following rates; Ksh.445,000 per month between 1/9/1996 and 31/8/1998; Ksh. 534,000 per month between 1/09/1998 and 31/8/2000; and Ksh. 640,800 per month between 1/9/2000 and 31/8/2002.

Safe Cargo, the Commissioner and the Attorney General in their statements of defence denied these allegations and maintained that the suit property was properly and legally acquired by Safe Cargo; that in the alternative and without prejudice to the foregoing, that Embakasi Properties was not only guilty of laches but also failed to abide by the special conditions annexed to the grant in that, upon registration of the grant, Embakasi Properties failed to submit to the Commissioner, within twenty four months of registration of the grant, building plans for the building(s) to be constructed on the leased property; that as a result of that failure, the lease lapsed and was determined by forfeiture; and that at the time the property was acquired by Safe Cargo there were no developments on the suit property, hence the Commissioner was entitled to re-enter and cancel the grant issued to Embakasi Properties.

Safe Cargo maintained that, as the rightful owner of the suit property, it had the legal authority to occupy and develop it; and that on the strength of the grant, it occupied the suit property and proceeded to develop it. Those developments included the construction in 1994 of three go downs which it leased to Schenker & Company Limited for a term of six years.

Safe Cargo gave a Third Party notice to the Commissioner and the Attorney General for indemnity jointly and severally in the sum of Kshs. 75,000,000, interest, costs, special and general damages arising or that may arise from the outcome of the suit brought by Embakasi Properties against it.

The Commissioner and the Attorney General for their part insisted that they were not to blame in effecting the transfer of the suit property to Safe Cargo as they relied on survey and deed plans submitted to them by the latter's privately appointed surveyors, M/s Geometre Surveyors; that the Commissioner merely registered the same and therefore was not liable by virtue of **section 21(1)** of the Survey Act. For all the foregoing reasons, Safe Cargo, the Commissioner and the Attorney General asked that the suit against them be dismissed or struck out for not disclosing a reasonable cause of action.

Parties presented evidence before the trial court with the Director of Embakasi Properties (PW1) producing the original title deed for L.R 9042/224 confirming that the grant was issued in its favour on 19th January, 1990. He insisted that the grant had not been cancelled when the Commissioner purported to allocate the suit property to Safe Cargo. PW2, a land surveyor, confirmed that he made a ground inspection of the entire property and found that the original beacons were missing and had instead been re-established. He also noted in the report that there were two overlapping operational developments and two overlapping vacant underdeveloped portions. Upon conducting a search for the particulars of the original title to L.R 9042/224, he found that the overlapping, or encroaching beacons were missing in the inland registry records office. It was his opinion that once alienated by the Government the suit property was not available for fresh or further alienation; and that the original title had first to be cancelled before a new one could be issued.

Both the Commissioner and Safe Cargo in their evidence admitted that the latter had submitted to the former survey and deed plans prepared by a private surveyor in respect of the suit property; and that the Lands Department only came to learn from the case before the trial court that another title had been issued. The Commissioner through a senior officer, Gordon Odeka Ochieng, admitted the mistake, in effect confirming that the grant to Embakasi Properties was intact, but blamed the mistake on the private survivor engaged by Safe Cargo for submitting misleading reports.

On the other hand, Safe Cargo through its director testified that the suit property had been allotted to M/s Horticultural Exporters (1977) Ltd on 23rd March 1993. Unable to meet the conditions of the letter of allotment, it sought and was allowed to transfer its rights to Safe Cargo. The grant was accordingly issued to Safe Cargo and registered on 21st June, 1993. Within 24 months of registration, Safe Cargo was able to construct godowns as required by law. It was not until 1st November, 1999 that Safe Cargo became aware of the title to Embakasi Properties.

After considering the pleadings, evidence, submissions and authorities cited by counsel for the parties, the learned Judge (Angawa, J. applied **section 23** of the Registration of Titles Act and held that, since the suit property was already alienated by the Government to Embakasi Properties, it was not available to be allocated to Safe Cargo, the former being the absolute and indefeasible owner.

The learned Judge also found as follows on the material presented to her that Safe Cargo's title was obtained fraudulently.

> **"29. .....Yes, the plaintiffs may have been guilty of latches** (sic) **but the Commissioner of Lands, as stated earlier, did not take any action.The land had never been forfeited by the Commissioner of Lands and/or the Government of Kenya. The Commissioner of lands was entitled to enter onto the said land but did not do so.**

.....

34. The title once issued, the Commissioner of Lands has no legal powers to issue a subsequent grant to the first defendant.

.....

36. Yes, the Commissioner of Lands was in the wrong to issue a title against a fraudulently acquired letter of allotment. The defendant No.3 was wrong to acquire title before confirming that the original title had been forfeited and was available for alienation and the plaintiff was not diligent in ensuring that he complied with the Special Condition.

.....

38. I find that the plaintiffs are entitled to the declaratory orders as prayed namely:

> ***'1. That the excise of a portion of the plaintiffs land LR No.9042/224 and granting of the same to the first defendant is null and void.***
>
> ***2. That the grant number IR 59414/2 made to the first defendant by the Commissioner of lands, the second defendant is null and void.'***

39. The Commissioner of land is hereby ordered to cancel the second grant IR59414/1".

In dismissing the claim by Embakasi Properties for *mesne* profits, the Judge was of the view that the same was not proved and that, in any case Embakasi Properties had gone to sleep from 1993 to 1998, having failed to develop the property. However, the learned Judge noted that had she not rejected Safe Cargo's claim in the Third Party Notice to be compensated, she would have awarded it Ksh.70,000,000 in damages against the respondents. With that, the learned Judge entered judgment for Embakasi Properties in the terms set out in the preceding paragraph.

Both Safe Cargo and Embakasi Properties were aggrieved in equal measure and filed two separate appeals being Civil Appeals Nos. 276 of 2008 and 6 of 2009, respectively. The appeals were subsequently consolidated.

The Court (Visram, Azangalala and Sichale, JJA) being persuaded by Mr. Oraro, learned Senior Counsel for Safe Cargo that, the appeal raises serious, weighty and novel legal issues, directed that a bench consisting of five Judges be constituted.

In their appeal Embakasi Properties contends that the learned Judge ought to have awarded it damages and *mesne* profits which she erroneously found not to have been proved. Safe Cargo on the other hand has asked us to;

i. allow its appeal with costs;

ii. declare the grant issued to it lawful and valid;

iii. set aside and cancel the grant issued to Embakasi, and in the alternative, that the Court be pleased to;

a) order Embakasi Properties, the Commissioner and the Attorney General to pay to it full indemnity in the sum of KSh.70,000,000 with interest from the date of approval of the building plans at a commercial rate of 18% per annum and costs until actual payment; that an inquiry be made to ascertain the current market valued of the development and investment under the grant; and that the cost of that inquiry to be paid by Embakasi Properties, the Commissioner and the Attorney General;

b) order a retrial of the suit before another judge with specific instructions to summon the Commissioner to explain how 4 new grants were issued by its department without a formal cancellation of Embakasi Properties' grant.

Safe Cargo has also complained that the learned Judge failed to appreciate that a grant by the Commissioner under the Registration of Titles Act is a solemn instrument whose sanctity and authenticity is guaranteed by the Government; that it confers an indefeasible and unimpeachable title, except where it is proved that it was obtained fraudulently and the proprietor was a party to the fraud; that the learned Judge erroneously blamed Safe Cargo for the confusion when it was an innocent party, instead of finding the Commissioner liable for issuing a second grant to Safe Cargo without first cancelling the one issued to Embakasi Properties; that the Judge erred in cancelling Safe Cargo's grant; that she ought to have entered judgment in favour of Safe Cargo in the sum of KSh.70,000,000 as compensation for the acquisition of

the property, payment of rates and for the erection and completion of buildings and improvements on the suit property; that the Judge failed to appreciate that the suit property was indeed unalienated Government land that was available and capable of being granted to Safe Cargo; that the learned Judge was in error in holding that the suit property was not procedurally and legally excised and granted; that **Section 21 (1)** of the Survey Act was irrelevant and could not assist the respondents to escape liability; and that the learned Judge in error and *suo moto* ordered the demolition of modern storied building erected by Safe Cargo on the suit property valued at KSh.70,000,000. Safe Cargo also faulted the learned Judge for overlooking the Third Party notice which was not controverted by the respondents.

For their respective submissions, parties relied on the provisions of **section 23** of Registration of Titles Act, the decisions in **Gitwany Investment Limited V. Tajmal Limited and 3 Others,** Nairobi HCCC No. 1114 of 2002, **Swordheath Properties Ltd. V. Tabet & Others** (1971) I All ER 240, **Inverugie Investment Ltd. V. Hackett** (1995) 3 All ER 841, **Ratilal Gordhanbhai Patel V. Lalji Makanji** [1957] E.A 314, **Wreck Motors Enterprise V. Commissioner of Lands** C.A. No. 71 of 1997 and **Faraj Mharus vs J.B. Martin Glass Industries and 3 others** C.A. 130 of 2003.

As stated in the celebrated case of **Selle & another V. Associated Motor Boat Co. Ltd.& others** (1968) EA 123, this Court is not bound necessarily to accept the findings of fact by the court below. A first appeal to this Court is by way of retrial. As such the Court must reconsider the evidence, evaluate it itself and draw its own independent conclusions, always bearing in mind that it has neither seen nor heard the witnesses. See also **Peters V Sunday Post Limited** [1958] EA 424.

We have considered the arguments in the two consolidated appeals. The bare uncontested facts of this dispute can be summarized like this. Embakasi Properties was allocated property in question, LR No.9042/224 measuring 1.575 hectares under the Registration of Titles Act with effect from the 1st February, 1982 for a term of 99 years. A title deed was subsequently issued to it on 19th January, 1990. The grant contained a special condition which required it, one, to use the property for "*inoffensive light industrial purpose with ancillary offices and stores";* two, to submit plans of development of the property within six months of the registration of the grant, and three, to erect a building on the property within 24 months of the date of registration. It was a corollary condition of the grant that should Embakasi Properties fail to comply with these conditions, the Commissioner ***"or any person authorized by him on behalf of the President"*** would be permitted to ***"re-enter into and upon the land"*** and the term of the grant so created would cease to apply, but ***"without prejudice to any right of action or remedy of the President or the Commissioner of lands in respect of any antecedent breach of any condition herein contained."***

It is also a statement of fact to say that Embakasi Properties did not comply with the above condition and explained it away on lack of funds and on the fact that its director, being a resident and businessman in Mombasa, did not inspect the property after it was transferred to it; that the property sat vacant until December 1998 when Embakasi Properties discovered that part of the property measuring about 0.400 hectares had been hived off and a new grant issued to Safe Cargo on the 21st June, 1993.

The main issue in this appeal as indeed it was before the trial court is whether the Commissioner could alienate the property in question in the manner he did. Put differently as a question, did the subsequent alienation of Embakasi Properties' land to Safe Cargo extinguish the former's absolute and indefeasible ownership of it?

Both titles in this dispute were issued under the Registration of Titles Act (repealed) and were expressly made subject to the following three conditions;

a) the lessee was required to pay annual rent in the sum of Kshs. 23,160;

b) the provisions of the Government Lands Act (also repealed) were to apply, and

c) some 16 "special conditions" were also to be satisfied.

We shall shortly return to these conditions.

While it is common factor that Embakasi Properties' grant was the first in time, having been issued on 19th January, 1990 it was contended by Safe Cargo that the Commissioner issued the second grant to it after Embakasi Properties failed to honour special condition No. 2 of the first grant requiring it, upon registration of the grant to submit to the Commissioner building plans and subsequently, to commence the actual construction within twenty four months of the registration of the grant. We reiterate that indeed Embakasi Properties did not satisfy this condition. The proviso cautioned that if there be default in the observance of any of the requirements under that condition the Commissioner would be at liberty to re-enter upon the property.

Where, like here, the lessee has failed to satisfy any of the condition of the grant, the lessor is, by **section 77** of the repealed Government Lands Act required to give the lessee notice before moving the High Court for an order declaring the lease forfeited. It is only upon that declaration that the Commissioner may re-enter to recover the property. The section states;

> **"77. (1) If the rent or royalties or any part thereof reserved in a lease under this Act is at any time unpaid for the space of thirty days after the same has become due, or if there is any breach of the lessee's covenants, whether express or implied by virtue of this Act, the Commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the High Court for the recovery of the premises, and, on proof of the facts, the High Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the Commissioner may re-enter upon the land.**
>
> **(2) In exercising the power of granting relief against forfeiture under this section, the Court shall be guided by the principles of English law and the doctrines of equity".**

Some of the reliefs that would be available to a lessee under the English law and the doctrines of equity include an order of injunction or judicial review. The suit by Embakasi Properties was for an order of injunction as explained earlier in this judgment.

The procedure under **section 77** aforesaid is in consonance with **section 75** of the former Constitution and **Article 40** of the present Constitution, both of which stress that no private property can arbitrarily or compulsorily be acquired except in the interest of defence, public safety, public order, public morality and / or public health, and that a person whose title is so affected is entitled to prompt payment of full compensation and to a right of direct access to the High Court to challenge the acquisition.

From our own assessment of the evidence on record, the irresistible conclusion we come to on this question is that the procedure set out under **section 77** aforesaid was not followed. In the first place, Embakasi Properties was not given a notice of or reason for the intended forfeiture. The Commissioner could only re-enter and recover the property, and Embakasi Properties could only forfeit it on proof that it violated a condition of the lease and only after the High Court so declaring.

The learned Judge, no doubt, and with respect, had this requirement in her mind and properly applied it when she stated that;

> **"29. It is true that the plaintiff was guilty of latches** (sic) **by not developing the said land. By the time they were ready to develop the land in 1998 the 24 months period to develop the same had lapsed. Yes, the plaintiffs may have been guilty of latches** (sic) **but the Commissioner of Lands, as stated earlier, did not take any action. The land had never been forfeited by the Commissioner of Lands and or the Government of Kenya. The Commissioner of lands was entitled to enter onto the said land but did not do so".**

So, with our conclusion that the suit property still belongs to Embakasi Properties, the two questions that inevitably arise are, was Embakasi Properties entitled to damages and *mesne* profits? Secondly, what is the fate of Safe Cargo's lease and is Safe Cargo entitled to compensation?

We start with the second question. While it is not in doubt that Safe Cargo's grant was issued by the Commissioner, the learned Judge was of the persuasion that since it was issued fraudulently, Safe Cargo was not entitled to any relief. She said;

> **".....28. It can therefore be safely stated and it is**
>
> **hereby concluded that the grant issued in favour of the first defendant in absence of any proof of the special condition being effected that was in favour of the first defendant in respect of the excised portion of the plaintiffs original land was so fraudulently issued.**
>
> **.....**
>
> **36. Yes, the Commissioner of Lands was in the wrong to issue a title against a fraudulently acquired letter of allotment. The defendant No.3 was wrong to acquire title before confirming that the original title had been forfeiture and was available for alienation and the plaintiff was not diligent in ensuring that he complied with the Special Condition".**

With respect, the Judge did not specify how the fraud she was alluding to was committed and how Safe Cargo participated in it. There was no proof, not even on a preponderance of evidence, of the particulars of fraud pleaded in the amended plaint. For this reason, we are unable to agree with the learned Judge's conclusion on fraud.

The predecessor of this Court in **Ratilal Gordhanbhai Patel V. Lalji Makanji** (1957) E.A 314, at 317 explained the importance of proving, to the required standard an allegation of fraud;

> **"There is one preliminary observation which we have to make on learned Judge's treatment of this evidence; he does not anywhere in the judgment expressly direct himself of the burden of proof and or on the standard of proof required. Allegations of fraud must be strictly proved; although standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."**

In the absence of fraud it must of necessity follow that the grant to Safe Cargo was issued in error and irregularly as a result of which Safe Cargo blamed the Commissioner, Director of Survey and the Attorney General by issuing a Third Party notice to both the Commissioner and the Attorney General jointly and severally asserting that, should the action by Embakasi Properties succeed and the grant to Safe Cargo revoked, it would seek to be indemnified in the

sum of Kshs. 75,000,000, with interest, costs, special and general damages arising or that may arise therefrom; that on behalf of the Government, the three offices were guilty of misrepresentation that led Safe Cargo to believe that the grant and the title issued to it were valid and indefeasible.

It will be recalled that even as the Commissioner permitted Kenya Horticultural Exporters (1977) Limited to transfer to Safe Cargo the suit property, it was part of the larger Embakasi Properties' property. **Section 20** of the Registration of Titles Act, now repealed, states:

> **'After the commencement of this Act and subject to the provisions of subsection (2) of section 1 thereof, all land which is comprised in any grant issued after the commencement of this Act, shall be subject to this Act, and shall not be capable of being transferred, transmitted, mortgaged, charged or otherwise dealt with except in accordance with the provision of this Act, and an attempt to transfer, transmit, mortgage, charge or otherwise deal with it, except as so provide, shall be void and of no effect."** (Our emphasis).

All the actions based on the excision and allocation to Safe Cargo of the suit property were, to borrow the famous words of Lord Denning in **Macfoy vs United Africa Ltd** [1961]3 ALL E.R. 1169, in law a nullity and everything **"founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

Although it has been held time without end that the certificate of title is; **"...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof"**, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See **section 23** of the repealed Registration of Titles Act. **Section 26** of the Land Registration Act, 2012 though not as emphatic as **section 23** aforesaid on the conclusive nature of ownership, confirms that the certificate is *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired **"illegally, unprocedurally or through a corrupt scheme"**. No doubt the grant to Safe Cargo was irregular. Safe Cargo did not demonstrate that it conducted due diligence before committing itself. The director of Safe Cargo himself before the trial court confirmed that they did not ascertain by way of official search or any other means the status of the suit property before committing themselves. They only assumed that the title to Embakasi Properties had been forfeited. He said in cross examination that; **"We saw no evidence of title being cancelled…"** The statement points to an impulsive and injudicious purchaser. Like this Court said in **Arthi Highway Developers Limited** (supra) to purchase land is not like buying potatoes. Although under the Registration of Titles Act there are several provisions that protect a purchaser of property, caution through self-help is the best protection and one must do due diligence before buying land. Clear title to a property is one of the most important factors to be considered before purchase.

Section 31 of the repealed Registered Land Act demands that;

> **"31. Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition".**

This ensures that there is no more than one certificate of title in respect of one parcel of land. For example **sections 32 and 30 of the Registered Land Act** and the **Land Registration Act,** respectively underscore this point. Both reads thus in identical language;

> **"30. (1) The Registrar may, if requested by a proprietor of land whose name appears in the register or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.**
>
> **(2) Notwithstanding subsection (1)—**
>
> **(a) only one certificate of title or certificate of lease shall be issued in respect of each parcel or lease..."** (Our emphasis).

Related to this edict is **section 3** of the Government Lands Act that demands that the President or the Commissioner, on his behalf may only **"make grants or dispositions of any estates, interests or rights in or over unalienated government land".** (Our emphasis).

In a case bearing striking similarities to this appeal, the Court explained this point saying;

> **"… The alienation to the 1st, 2nd and 3rd respondents is the grant [that] takes priority; at the time another grant was being made to the appellant, the suit land had already been alienated; there was nothing for the 5th respondent to allot and alienate to the original allottees.**
>
> **In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in *rem* attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in *rem* to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum."**

See **Benja Properties Limited V. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR.**

We emphasize this position by once more quoting from the famous passage in the Court's decision in **Wreck Motors Enterprises vs. Commissioner of Lands,**

[1997] eKLR where it was expressed that:

> **'....Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by mistake that is admitted, the Commissioner of Lands issued two titles in respect of the same parcel of land, then if both are apparently and on the face they were issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail....."**

On behalf of the Commissioner of Lands, Gordon Odeka Ochieng, the Senior Lands Official confirmed to the trial court that;

> "**Our position is that deed plan L.R. No. 9042/290 should not have been produced because the land is not available… I confirm the existence of the subsequent grant and deed plan is of no consequence… The land was not available for alienation....**
>
> **The Commissioner of Land recognizes title issue L.R 9042/2. We have come to learn after this case was instituted there was another title issued and whose deed plan over lapsed (sic). Our position is deed plan L.R 9042/90 should not have been produced because land is not available."**

The muddle in which Safe Cargo found itself originated from the survey. A survey conducted on land already alienated should disclose the fact of an earlier allocation. Yet, according to the Commissioner and Safe Cargo they respectively relied on the surveyor's report to grant a lease and to acquire and register the suit property. The licensed surveyor, M/s Geometre Surveyors, was privately engaged by Safe Cargo.

Section 21 of the Survey Act emphasizes the need for assiduity and competence of surveyors whether Government or licensed. With regard to a licensed surveyor, and on the basis of this expectation, the Government cannot be held liable for transgressions committed by such a licensed surveyor. The section states that:

> **"(1) Every surveyor shall carry out every survey undertaken by him in such a manner as will ensure that the survey accords in all respects with the provisions of this Act and any regulations made thereunder, and shall be responsible for the correction and completion of every survey carried out by him or under his supervision:**
>
> **.....**
>
> **(2) Neither the Government nor any public officer shall be liable for any defective survey or any work appertaining thereto, performed by a licensed surveyor, notwithstanding that any plan relating to such survey or work has been authenticated in accordance with the requirements and provisions of this Act or accepted for registration under any written law for the time being in force relating to the registration of transactions in or of title to land."** (Our emphasis).

We are, of course alive to the fact that under the Act, all survey plans, field notes, computations and records must be deposited with the Director, and that the plans so deposited can only be altered or amended with the permission of the Director; that the Director, or a Government surveyor, at their sole discretion may undertake such checks on the survey work of a licensed surveyor to correct, at the latter's expense any error made by him in the survey. But all these do not take away the licensed surveyor's duty to undertake the survey with due diligence, competence and the skill expected of a professional. The role of the Director is to authenticate the plan by appending his signature or by the affixing of the seal of the Survey of Kenya. However, **"where the plan is found to be inaccurate by reason of any error or omission in the survey"** the Director is, authorized to cancel the authentication of plan and recall any copies which may have been issued. See **section 33**. Contrary to Safe Cargo's argument, the mere

authentication or the acceptance for registration by the Commissioner of any plan relating to a survey or work cannot assign liability upon the Commissioner.

From the totality of the evidence on record, upon our own analysis and from the conduct of Safe Cargo, we do not think that the Commissioner or by extension the Attorney General were wholly to blame for the error leading to the excision of the suit property. But as the custodian of all land records, in the absence of fraud, the Commissioner owed a duty to the parties and even to the court to explain the existence of two different titles in respect of the same property. The Government has the full responsibility to ensure the accuracy of the register of titles and the authenticity of titles issued consequent upon registrations. This is why **section 144(I)** of the Registered Land Act and **section 24** of the Registration of Titles Act (both repealed) made elaborate provisions as to indemnity. Those or similar provisions are now found in **section 81** to **section 84** of the Land Registration Act, 2012.

On the facts and in the circumstances of this matter, therefore, we are convinced by the argument that the Torrens system of registration was applicable. It will be recalled from what we have said previously in this judgment that on 11th November, 2015 the Court directed that this appeal be heard by a bench of five (5) Judges on the argument that it raises novel and weighty issues, in particular the applicability of the Torrens system of land registration in Kenya. With respect, there has been no confusion on the application of the Torrens system in Kenyan land law. Since the enactment of the repealed Registration of Titles Act and the Registered Land Act, it has consistently been acknowledged in countless judicial decisions that the law on registration of titles in Kenya is based on the Torrens System. **Souza Figuiredo V Moorings Hotel**, [1960] EA 926; **Cross V Great Insurance Company Limited of India**, [1966] EA 94 and **Charles Karathe Kiarie & 2 others V Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others** [2013] eKLR are some of the authorities that have unequivocally applied the principles of Torrens system.

The three main principles of the Torrens system were aptly summarized by the Canadian Court of Appeal in the case of **Regal Constellation Hotel Ltd Re** 2004 Can LII 2006 Ontario C.A.) Page 13 para 42 as follows:

> **"42. The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy."**

We reiterate that under the insurance principle the State guarantees the accuracy of all registered titles through the register; and that there would be indemnity in case a registered proprietor is deprived of his title or is prejudiced by a correction of any mistake in the register. The mirror principle is a guarantee that the register is a perfect mirror of the state of title while the curtain principle holds that a purchaser need not worry about the history of the title so long as from the register it is clear that whoever is transferring the property to him has the capacity. We repeat that, although Safe Cargo substantially contributed to the mess by its negligent omission to conduct due diligence and by relying on a flawed survey, the Commissioner, by issuing to Safe Cargo a grant without first recovering the property from Embakasi Properties, as demanded by **section 77** aforesaid, made a misrepresentation to Safe Cargo that the suit property was available for alienation, thereby guaranteeing the accuracy of the register. It is therefore as baffling as it is unconscionable for the Commissioner through his officer, Gordon Odeka Ochieng, to disown his own action and then purport, during the pendency of the case in the High Court to extend to Embakasi Properties time to comply with Condition No. 2, by issuing a deed of variation dated 4th October, 2001. We expected the Commissioner to admit that he had made an error instead of resisting the claim by Embakasi in his defence and then turn around at the hearing to support its case and denounce Safe Cargo's title. The Commissioner through his witness was categorical that, though Embakasi Properties had not complied with some of the lease conditions, he had not invoked the provisions of **section 77** aforesaid by commencing an action in the High Court for the recovery of the property; and that the High Court had not declared the lease forfeited thereby granting leave to him to re-enter upon the suit property. That evidence only confirms that the Commissioner had no power to issue a second grant to Safe Cargo without first revoking that of Embakasi Properties. In the case of **Said Bin Seif V. Shariff Mohammed Shatry**, (1940)19 (1) KLR 9, it was stated that an action taken by the Commissioner without legal authority is a nullity; that such an action, however, technically correct, remains a nullity, and not only voidable but void with no effect. It is for this reason that **section 60** of the repealed Registration of Titles Act allows the Registrar to call for correction of any title wrongfully or erroneously issued. It states that;

> **"60 (1) Where it appears to the satisfaction of the registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected".** (Our emphasis).

The question that follows is whether, upon the facts and the law the learned Judge erred in dismissing Safe Cargo's Third Party notice for indemnity. In dismissing the claim, the Judge said that Safe Cargo;

> **"44.....did not plead any damages due to him** (sic). **There is on record a valuation report of the property put up of Ksh.70,000/-** (sic). **This was not pleaded as special damages against the 2nd defendant and 3rd defendants. Nonetheless this case was determined upon fraud. That the 1st defendant cannot be remedied in equity for a wrong that he may have done. I say so as the procedure of obtaining the allotment letter was irregular and unprocedural. If it was regular I would have been inclined to have awarded** (sic) **them Ksh.70,000,000/- to be paid by the 2nd and 3rd defendants. As it stands the issue of damages against the 2nd and 3rd defendant be and is hereby dismissed."**

We reiterate that there was no basis for the conclusion that the letter of allotment was fraudulently obtained, hence the learned Judge erred in dismissing the Third Party notice on that ground. But while this may be so, we are of the considered view that Safe Cargo did not deserve to be indemnified. First, it substantially contributed to the damage it suffered as we have repeatedly explained. Although the Land Registration Act, which repealed both the Government Lands Act and the Registration of Titles Act became operational on 2nd May, 2012, after this dispute had been heard and determined by the High Court, it is our view that **section 81**thereof is an amplification of the point that the principle of indefensibility of title under **section 23** of the repealed Registration of Titles Act is subject to the proprietor having not committed any transgressions. It says;

> **"81. (2) No indemnity shall be payable under this Act to any person who has caused or substantially contributed to the damage by fraud or negligence, or who derives title, otherwise than under a registered disposition made bona fide for valuable consideration, from a person who caused or substantially contributed to the damage".**

Secondly, **Section 71** of the repealed Government Lands Act provides for what should happen to developments on a leased property upon termination by whatever means. It states that;

> **"In the absence of special provisions to the contrary in a lease or licence under this Act, all buildings on Government lands leased or occupied under a licence, whether erected by the lessee or licensee or not, shall, on the determination of the lease or licence, pass to the Government without payment of compensation".**

Where, however, the lease is for a term not exceeding thirty years, the lessee may within three months of the termination (otherwise than by forfeiture) of the lease**, "remove any buildings erected by him on the leased land during the lease, unless the President elects to purchase those buildings; and, in the event of disagreement as to the purchase price of the buildings, the same shall be determined by arbitration".** We bear in mind that the lease involved here was for 99 years. While the constitutionality of passing to the Government without payment of compensation buildings on a leased Government land is doubtful in view of **section 75** of the former Constitution which guaranteed protection from deprivation of property, **section 146** of the Government Lands Act recognizes that disputes may arise with regard to the question of compensation.

This is our third point. **Section 146** provides for the manner of resolving issues of compensation thus;

> **"All claims for compensation in respect of any matter arising under this Act or any Act shall, unless the sum to be paid is agreed upon between the person claiming and the Commissioner, be referred to arbitration".**

Even though the question whether or not the High Court was the proper forum for the resolution of the issue of indemnity was not before the trial court or before us, being a jurisdictional question we stress that Safe Cargo ought to have invoked these provisions. This Court has stated before and it bears repeating here as was done in **the Speaker of the National Assembly V James Njenga Karume** Civil App. [1992] eKLR **Kipkalya Kones V Republic & Another Ex parte Kimani Wanyoike & others** (2006) eKLR, and several other cases, that as a general proposition of law, where a special procedure has been provided by statute it ought to be strictly followed.

Our final reason why Safe Cargo is not entitled to compensation is this. Even though the Commissioner, in error allocated the suit property to Safe Cargo, and the latter acting on that assurance developed the suit property, the fact remains that the allocation was a nullity and *"ex Nihilo Nihil fit"* (out of nothing comes nothing). This notwithstanding, Safe Cargo went ahead and constructed godowns which it leased for valuable consideration estimated at an average of Kshs. 500,000 per month, translating to roughly Kshs.6,000,000 per year. In its own admission, the godowns are leased to Schenker & Co. Ltd. for six (6) years since 1996. We also note that Safe Cargo continues to be in possession of the suit property following orders of stay of execution issued by the High Court on the 25th September 2007. In all fairness it is safe to say that Safe Cargo has adequately been compensated. Given the aforesaid handsome rent it collects, Safe Cargo has received approximately Ksh. 132,000,000 over the past 22 years or so it has been leasing the go downs.

We turn finally to consider Embakasi Properties' claim for *mesne* profits. *Mesne* is a French word for intermediate. Therefore plainly speaking *mesne* profits are financial gains or benefits which have accrued while there is a dispute over ownership of land. If it is found that the party using the land did not have legal ownership, the true owner can sue for some or all of the profits made in the interim by the person in unlawful occupation.

The law defines *mesne* profits in **section 2** of the Civil Procedure Act to mean;

> **"...in relation to property, ... those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence have received therefrom, together with interest on such profits, <u>but does not include</u> <u>profits due to improvements made by the person in wrongful possession".</u>** (Our emphasis).

To begin with, and contrary to submissions by counsel representing Safe Cargo, it is not necessary to prove that there was a landlord- tenant relationship between Embakasi Properties and Safe Cargo for the former to claim from the latter *mesne* profits. There is no such inference from the above definition and the case law.

Secondly, although we are satisfied that Embakasi properties specifically pleaded and provided evidence for their claim of *mesne* profits, relying on the rent Safe Cargo was allegedly receiving from it we, wish to say the following two things. One, it must be remembered that the general purpose for awarding damages is to ensure that the victim is put back in his original state. *Mesne* profits are, in the result awarded to compensate the actual owner of the property for all the loss he has suffered by being kept out of possession and deprived of enjoyment of his property by a wrongdoer.

In our view, and on the evidence, Embakasi Properties was not kept away from the suit property by Safe Cargo. The reason, according to its Director, for failing to develop the property was partly because they reside and carry on business in Mombasa and partly for lack of finances. The Director was equally categorical that they did not know that a third party had been allocated the suit property until December 1998. Clearly from January 1990 when the property was leased to Embakasi Properties, it did not have any immediate use for it.

Secondly, arising from **section 2** aforesaid, *mesne* profits is defined as those profits and interest which the person in wrongful possession of a property received or might have received exercising ordinary diligence. Expressly excluded from the definition are profits that may arise from improvements on the property made by the person in wrongful possession. Accordingly, *mesne* profits must be drawn from the land itself, rather than those improvements on it made by the party in wrongful occupation.

The figures presented by Embakasi Properties are alleged rents from developments made on the suit property by Safe Cargo, the party in wrongful occupation. It is on this score that we have resolved in the previous paragraphs that it has benefited from its own development by receiving rent for the entire period it has remained in wrongful occupation of the suit property.

Having found, like the trial court that Safe Cargo was a trespasser on the suit property, the next question is what should happen to the structures unlawfully erected on the property. In law, as Lord Denning said in **<u>Macfoy</u>** (supra), everything founded on the title issued to Safe Cargo is just as bad and incurably bad. Nothing can be built on it.

For her part, and relying on **<u>Gitwany Investment Ltd</u>** (supra), the learned Judge agreed that the Commissioner was to blame for the confusion and inconvenience, for which the Judge thought he ought to be ordered to bear the cost of removing the structures from the suit property.

We cannot fault her for that conclusion, save to add that, since both Safe Cargo and the Commissioner together dug the hole, both of them must clear their mess. We order that within ninety (90) days from the date of this judgment, unless parties mutually agree on what should happen to the structures, Safe Cargo and the Commissioner to remove from the suit property all the structures constructed by the former.

The parties may be guided by the spirit of **Section 71** of the Government Lands Act to consider how to deal with the structures on the suit property.

These being our views, we find no merit in both appeals and accordingly dismiss them. Each party will bear own costs of the appeal.

Dated and delivered at Nairobi this 5th day of February, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

OTIENO – ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR