



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M'INOTI, J.J.A)

CIVIL APPEAL NO. 184 OF 2013

BETWEEN

KENYA HOTEL PROPERTIES LIMITED.....APPELLANT

AND

WILLESDEN INVESTMENTS LIMITED.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

(An appeal against the Ruling of the High Court of Kenya at Nairobi (Musinga, J) dated 27th January, 2012 in Nairobi Petition no. 13 of 2011)

JUDGMENT OF THE COURT

1. This is an appeal from a ruling of the High Court (Musinga, J, as he then was) delivered 27th January 2012 dismissing the appellant's application for interim relief pending the hearing and determination of the appellant's constitutional Petition No. 13 of 2011 before the High Court at Nairobi. In that application, dated 31st January 2011, the appellant had sought interlocutory orders, pending the hearing and determination of its petition, for an injunction to prevent the Development Bank of Kenya Ltd from paying to Kenya Revenue Authority an amount of Kshs. 61,979,918.37 under a bank guarantee; a conservatory order, a stay of execution of the decree and proceedings in HCCC No. 367 of 2000, Willesden Investments Limited vs. Kenya Hotel Properties Ltd; an order directing Kenya Anti-Corruption Commission, to carry out investigations to establish if Willesden Investments Limited, the 1st respondent, failed to pay taxes to the Government; an order directing Kenya Revenue Authority to investigate and ascertain the tax revenue that was not remitted to the Government by the 1st respondent; an order directing the Commissioner of Lands to investigate and ascertain the total land rent owed to the Government by the 1st respondent in respect of the suit property LR No. 209/12748.

Background

2. At the center of the controversy leading to the present appeal is a property situated in the City of Nairobi known as LR No. 209/12748 (the property). It is claimed that the property was previously a section of a public road, namely, Kaunda Street, located between Nyayo House (L. R. No. 209/10467) and Hotel Intercontinental (L. R. No. 209/6835) and linking Uhuru Highway to the central business district of Nairobi. The main protagonists in the controversy are Kenya Hotel Properties Ltd (the

appellant), Willesden Investments Limited, the 1st respondent (Willessden) and the now defunct City Council of Nairobi (the City Council). Other actors for present purposes are the Ethics and Anti-Corruption Commission and its predecessor Kenya Anti-Corruption Commission (the Commission), the Commissioner of Lands, Kenya Revenue Authority (KRA), Development Bank of Kenya Limited (DBK) and the Attorney General (AG).

3. The property is registered in the name of Willessden under a Grant for a term of 99 years from 1st September 1994 issued by the Commissioner of Lands on 15th September 1995 under the Registration of Titles Act (now repealed). According to the City Council the property was irregularly and illegally excised from a road reserve and the title in favour of Willessden should be revoked. That view is shared by the appellant as well as by the Commission.

4. According to the Commission, the circumstances under which the property was allotted and a Grant in respect thereof issued are dubious and illegal; that on 13th January 1994, the then Commissioner of Lands allocated the property, then a public road, to a “phony”, non-existent private company with the name Center Park Ltd; that although the allotment was to Center Park Ltd, the Grant was issued to the Willessden; and that the Grant is nullity *ab initio*.

5. On its part, the appellant asserts that it occupied the property as a tenant of the City Council under a lease in the honest belief that the City Council was the lawful owner of the property.

6. Against that background, there has been extensive litigation over the property between the parties. The first of the many cases seems to be High Court Civil Case No. 84 of 1997 in which Willessden sued the appellant complaining that the latter had wrongfully taken possession of the property and was using the same as a public car park and charging motorists parking fees. It sought a declaration that it is the lawful owner of the property; that the occupation of the property by the appellant was unlawful; an order of vacant possession; mesne profits and damages for trespass. In its defence to that case, the appellant pleaded that it had entered into possession of the property prior to 1994 with the approval and as a tenant of the City Council before Willessden had any claim to the property. Subsequently, Willessden discontinued that suit.

7. In the year 2000, Willessden instituted High Court Civil Case Number 367 of 2000 against the appellant complaining that the latter had trespassed on the property. It sought judgment for mesne profits; general damages for trespass; damages for loss of business opportunity as well as special damages. The appellant defended that suit. In a judgment delivered in that suit on 14th December 2006, the High Court found in favour of Willessden and awarded it mesne profits of Kshs. 54,902,400.00 and general damages of Kshs. 10,000,000.00 and damages for loss of business of Kshs. 6,000,000.00. That judgement was stayed by this Court in Civil Application NAI. 322 of 2006 pending the hearing and determination of an appeal from the judgment. The order of stay was however conditional upon the appellant providing a bank or insurance guarantee for the amount of Kshs. 70,902,400.00. Pursuant thereto, DBK provided the guarantee.

8. Thereafter, the appeal lodged by the appellant, being Civil Appeal Number 149 of 2007, was partially successful in that the awards of Kshs. 10,000,000.00 and damages for loss of business of Kshs. 6,000,000.00 were set aside and the award for mesne profits of Kshs. 54,902,400.00 reduced to Kshs. 22,729,800.00 in a judgment of this Court delivered on 2nd April 2009.

9. By a plaint dated 10th March 2008, Willessden filed suit against the City Council before the High Court in Civil Suit Number 24 of 2008 complaining that on 20th September 2004, the City Council had sent a contingent of city councils askaris and parking attendants to the property and wrongfully taken possession of the same. It sought judgment for mesne profits and general damages for trespass. In its defence, the City Council averred that the allocation of the property to Willessden was null and void as the same is situated on a road reserve and that the alleged excision of the property had never been gazetted. It is not clear from the record whether that suit was ever prosecuted or what became of it.

10. In February 2010, the Commission filed suit in the Environment and Land Division of the High Court at Nairobi in Civil Case Number 35 of 2010 in which Willesden, the appellant, the Commissioner of Lands amongst other persons were joined as defendants. It sought declarations that the allotment of the property to Centre Park Limited and the Grant of the property in favour of Willesden are null and void and also sought orders for cancellation of the same. That suit was however “*dismissed and/orstruck out*” *in limine* in a ruling delivered by the High Court (Muchelule, J) on 27th May 2010 on the grounds that the issues raised in that suit were *res judicata* having been adjudicated upon in High Court Civil Case Number 367 of 2000. An appeal from that ruling, being Civil Appeal No. 325 of 2013, is awaiting hearing and determination before this Court.

11. On 31st January 2011, the appellant filed constitutional Petition No. 13 of 2011 before the High Court at Nairobi seeking revocation of the title to the property. At the same time, the appellant filed the application giving rise to the impugned ruling. The appellant pleaded in the petition that the property is public property that was illegally acquired; that the question of illegal acquisition of the property had not been determined in the previous cases; that Willesden should not benefit from an illegality; that the revocation of the title over the property would result in the nullification of the decree obtained by Willesden in High Court Civil Case Number 367 of 2000; that the appellant is entitled to protection and to exercise of its fundamental constitutional rights to institute proceedings in the public interest, right to injunction and conservatory order, greater access to justice and the right to seek a declaration that the property is a public road and therefore public land that was illegally excised from Kaunda Street, Nairobi.

12. In the petition, the appellant sought relief by way of a permanent injunction to prevent Willesden from executing the decree in High Court Civil Case Number 367 of 2000 or enforcing the bank guarantee issued by DBK to secure the decretal amount pending the determination of intended proceedings to be instituted before the National Land Commission (the Land Commission) for revocation of the title; a declaration that it would be against public policy and against the Constitution for Willesden to derive any benefit from the decree in the said suit; a declaration that the appellant is entitled to protection under the Constitution to safeguard its property from attachment; an order directing the Commission, KRA and the Commissioner of Lands to investigate what taxes and land rents have not been paid by Willesden to the Government regarding the property.

13. As we have indicated, the appellant filed, alongside the petition, the application by way a Chamber Summons dated 31st January 2011 which application gave rise to the ruling the subject of the present appeal in which the main prayers were:

“4. Pending the determination of the petition an injunction do issue preventing the Development Bank of Kenya Limited from paying the sum of Kshs. 61,979,918.37 secured by a bank guarantee to the 2nd respondent, [Willesden] its servants or agents or any other Respondents through their servants or agents.

5. Pending the hearing and determination of the petition there be a conservatory order, by way of stay of execution of the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited by the 2nd Respondent, [Willesden] its servants or agents or any other Respondents through their servants or agents.

6. An order do issue directing the 3rd respondent [the Commission] to carry out an investigation under section 45 (1) (d) of the Anti-Corruption and Economic Crimes Act- Act No. 3 of 2003 and establish if the 2nd Respondent [Willesden] failed to pay any taxes to the government.

7. An order directing the 4th Respondent [KRA] to investigate and ascertain the tax revenue that was not remitted to the Government by the 2nd Respondent [Willesden] and to file an Affidavit setting out the investigation report within 30 days of the issuance of the order setting out the tax unpaid by the Respondent.

8. An order directing the 5th Respondent [the Commissioner of Lands] to investigate and

ascertain the total land rent owed to the Government by the 2nd Respondent [Willesden] in respect of L. R. No. 209/12748 L. R. No. 66986 and to file an Affidavit within 30 days of the order of the court setting out the outstanding land rent together with penalties and interest.”

14. In support of that application, the appellant reiterated that the question of legality of the title over the property issued to Willesden had never been determined on merits in any judicial proceedings; that under Article 62 of The Constitution of Kenya, 2010 (the Constitution) all roads are public land that cannot be privately alienated; that Article 67 of the Constitution allows a party to lodge a complaint with the Land Commission to investigate historical land injustices and thus obtain an appropriate recommendation that can lead to the nullification of the decree in favour of Willesden; that the appellant intended to exercise its constitutional right to lodge a complaint with the Land Commission upon its establishment.

15. That application was opposed. Willesden filed notice of preliminary objection challenging the jurisdiction of the court to entertain the petition and the application. It asserted that the application was an abuse of the process of the court and an abuse of the Constitution to the extent that all the issues raised had been determined in previous proceedings.

16. That application was heard *ex parte*, in the first instance, before Musinga, J on 1st February 2011 when he granted temporary orders for a period of 7 days restraining, by injunction, DBK from paying the amount of Kshs. 61,979,918.37 secured by its guarantee to Willesden. He also granted temporary conservatory order, stay of execution and proceedings of the decree in High Court Civil Case Number 367 of 2000.

17. In a detailed replying affidavit in opposition to both the petition and the application, a director of Willesden, one Ben Muli, set out in detail the litigation history over the matter urging that litigation must come to an end and that the petition and the application was one of the many frivolous attempts by the appellant to avoid the consequences of justice.

18. Having heard the parties, the learned Judge delivered the impugned ruling on 27th January 2012 and declined to grant the injunction or conservatory orders that had been sought.

19. The Judge also ordered that out of the decretal sum secured by the bank guarantee issued by DBK, a sum of Kshs. 37,567,717.00 be paid to KRA “*to hold the same until the issue of Willesden’s tax assessment is finalized*” and that the balance of the decretal sum should be paid forthwith to Willesden. The appellant was aggrieved and lodged this appeal.

The appeal and submissions by counsel

20. In its memorandum of appeal, the appellant complains that the Judge should have allowed the application because it had established a prima facie case; that the Judge failed to consider overwhelming evidence showing that the property had been illegally acquired; that the Judge did not consider that the Constitution had provision for enactment of legislation to establish the Land Commission with power to investigate historical land injustice; that the Judge failed to consider the evidence that Willesden had no income or assets and would enter into voluntary liquidation upon payment of the decretal amount and would not be in a position to refund the same; that the Judge erred in finding the matter was *res judicata*; and that conservatory orders should in the circumstances have been granted.

21. During the hearing of the appeal, Mr. Kigata appeared for Mr. Gichuhi for the appellant; Mr. Onyiso appeared for the AG and the Commissioner of Lands; Mr. Kirugi appeared for KRA, while Mr. D. K. Ruto appeared for the Commission. Counsel relied on written submissions which they highlighted. Though served with notice of hearing, there was no representation for Willesden, the City Council or for DBK.

22. Counsel for the appellant Mr. Kigata condensed the 9 grounds of appeal contained in the memorandum of appeal into four complaints: that a prima facie case for the grant of conservatory orders was made out; that the Judge did not taken into account overwhelming evidence that the property was

illegally acquired; that there was evidence that Willesden would never be in a position to refund the decretal amount once payment is made; and that the Judge wrongly held that the matter was *res judicata*.

23. On the contention that a *prima facie* case had been made out and that a conservatory order should have been granted, Mr. Kigata referred to a decision of the Supreme Court of Kenya in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014]eKLR** and a decision of this Court in **Alfred N. Mutua vs. Ethics & Anti-Corruption Commission & 4 others [2016]eKLR** urging that conservatory orders should be granted in public interest; that bearing in mind that the legality of the title to the property was an issue, the Judge should have granted the conservatory order on account of public interest.

24. As to the claim that the property was illegally acquired, counsel argued that the Judge failed to consider that the Constitution provided for enactment of legislation for establishment of the Land Commission with the mandate of managing public land and initiating investigations into present and historical land injustices; that pursuant to Article 68 of the Constitution, the National Land Commission Act had since been enacted and the Land Commission established with powers to direct the revocation of titles. To the extent that Willesden did not adduce evidence to prove that the property had been de-gazetted as a road reserve, counsel argued, it was not available for alienation. In that regard, counsel referred us to Article 62(4) of the Constitution and to a decision of this Court in **Funzi Island Development Limited & 2 others vs. County Council of Kwale & 2 others [2014] eKLR**.

25. As to the assertion that the decretal amount, once paid to Willesden, would not be recoverable, counsel submitted that there was evidence that Willesden was not registered as a tax payer; was not tax compliant; and had no Personal Identification Number (PIN) certificate. Therefore, the Judge should not have ordered payment of the decretal amount and should have granted conservatory orders pending determination of the legality of title.

26. Finally, counsel faulted the Judge for finding the matter was *res judicata*. According to counsel, all previous cases had not determined the issue of the legality of the title; that this Court had indeed said as much in its ruling in this matter, in **Kenya Hotel Properties Limited vs. Willisden Investments Limited & 4 others [2013] eKLR**, when it granted an injunction pending the hearing and determination of this appeal. Counsel concluded that it would be a travesty of justice to expose the appellant to execution of the decree in the face of overwhelming evidence showing that the property was illegally acquired.

27. Supporting the appeal, Mr. Ruto submitted that the Commission had established through its investigations that the property is a road reserve; that it then instituted suit against Willesden, among other parties, namely HCCC 35 of 2010 seeking cancellation of Willesden's title over the property but the suit was struck out, and that an appeal challenging that decision to strike out its suit, Civil Appeal No. 325 of 2013, is pending hearing and determination in this Court. In his view, the main issue in the petition below, is the question of unlawful alienation of public property, which has not been canvassed in previous cases. Consequently, counsel submitted, the test in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 others [1996] eKLR**, and **Ukay Estate Ltd and another vs. Shah Hirji Manek Ltd and 2 others [2006] eKLR** as to what amounts to *res judicata*, was not met in this case. Counsel expressed surprise that parties who had supported the application for conservatory orders in the High Court had turned around to oppose the appeal.

28. Opposing the appeal, Mr. Kirugi for KRA highlighted his written submissions in which he set out the history of litigation over the matter urging that in light of that history, the learned Judge correctly held that the matters raised in the petition are *res judicata* having, in particular, been adjudicated upon in HCCC No. 367 of 2000.

29. Counsel argued that the order by the Judge directing that an amount of Kshs. 37,567,717.00 out of the decretal sum be paid to KRA is also well founded. In that regard counsel submitted that every person has an obligation under Section 52(b) of the Income Tax Act to furnish the Commissioner of Income Tax with a return of income; that Willesden has not been paying taxes since September 1995 when it acquired

the property and that the Judge correctly stated that Willesden had not demonstrated that it was paying taxes.

30. Also opposing the appeal was Mr. K. Onyiso for the AG and for the Commissioner of Lands. In his written submissions, he submitted that the matter has been the subject of a series of cases that have been litigated in the High Court and in this Court and the Judge was right in holding that the issues raised are res judicata; that the threshold for the grant of conservatory order, being a prima facie case with a high probability of success, was not met in this case; that the issue of illegal acquisition of public land can only be dealt with by the Land Commission; that the parties are at liberty to approach the Land Commission to have the issue of legality of the title addressed instead of pursuing the matter in the wrong forum. He submitted that litigation must come to an end and urged us to dismiss the appeal.

Determination

31. We have considered the appeal and submissions by learned counsel. The appeal arises from a decision of the High Court made on an interlocutory application in exercise of judicial discretion. The circumstances in which this Court can interfere with the exercise of discretion by the lower court are circumscribed. This Court may interfere with the exercise of such discretion when, in the words of the predecessor of this Court in **Mbogo and Another vs. Shah [1968] E A 93** it is satisfied that the decision of the lower court is clearly wrong:

“...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

32. To succeed in this appeal therefore, the appellant must demonstrate that the learned Judge took into account matters that he should not have or that he failed to take into account matters that he should have or that his decision is clearly wrong.

33. Based on the grounds of appeal in the memorandum of appeal as amplified in the submissions, there is essentially one issue for our consideration, namely, whether the lower court correctly rejected the appellant’s application for a conservatory order. Closely linked with that issue is the question whether the Judge erred in taking the view that the application was an abuse of the process of the court. In addressing the matter, we are alive to the fact that the petition in the High Court is yet to be heard. We are also aware that Civil Appeal No. 325 of 2013 by the Commission where the issue of res judicata is live, is pending before this Court. We must therefore exercise restraint in the pronouncements that we make in this judgment to avoid embarrassing the lower court that will hear the petition and the bench of this Court that will hear Civil Appeal No. 325 of 2013.

34. We begin with the question whether the appellant had satisfied the threshold for the grant of a conservatory order. The appellant’s grievance in that regard is that the Judge erred in failing to find that it had made out a prima facie case for granting of conservatory orders pending determination of the petition. The appellant’s contention is that there was more than adequate material before the court to demonstrate, far beyond establishing a prima facie case, that the property is public land within the meaning of Article 62(1)(h) of the Constitution that was irregularly and illegally alienated; that by reason of Article 40(6) of the Constitution, Willesden has no protection of right to property in relation to the property.

35. Undoubtedly, the Judge considered that the test for the grant of an interlocutory injunction or a conservatory order should be predicated on the existence of a prima facie case with likelihood of success. In his words:

“In an application for injunction and/or a conservatory order the applicant must demonstrate that there exists a prima facie case with likelihood of success and that unless the orders sought are granted irreparable loss is likely to be occasioned.”

36. In effect, the Judge applied the criteria for the grant of interlocutory injunctions in **Giella vs Cassman**

Brown [1973] E. A. 358 when considering whether to grant interim relief in the nature of conservatory orders to redress denial, violation or infringement of fundamental rights or freedoms. There is, however, more to consider beyond the criteria in **Giella vs Cassman Brown** when considering an application for conservatory orders. In **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others** (above) the Supreme Court of Kenya expressed itself on the matter as follows:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as

“the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

37. Such considerations as public interest should therefore be borne in mind by the court when considering whether to grant relief in the form of a conservatory order, whether at an interlocutory stage of the proceedings or upon full hearing.

38. In our view, the Judge was not blind to the public interest factor. He was evidently aware of the claims regarding alleged irregular and illegal alienation of public land. He stated:

“While I entertain some doubt as to whether the suit property was not actually part of Kaunda Street that was illegally carved out before it was allocated, in light of the Court of Appeal decisions, I cannot grant the injunction sought on the speculative argument that the National Land Commission, as and when it becomes operational, may favourably determine the intended complaint by the petitioner regarding legality of Willesden’s title to the suit land. The new Constitution does not envisage a situation where Kenyans ought to be stopped from enjoying vested proprietary rights over their land until the National Land Commission is formed and investigates whether those rights were lawfully acquired. We can only cross the bridge when we get there. Prayers 4 and 5 of the petitioner’s application must therefore fail.”

39. The overriding considerations in the Judge’s mind, it would seem, that militated against allowing the appellant’s application was the consideration that the grant of relief could not be predicated upon the prospect that the Land Commission might, on a future occasion, determine that Willesden’s claim or right over the property would be vitiated. The other consideration expressed by the Judge was *“that similar applications for stay of execution have been made by the [appellant] before the Court of Appeal and in this court”*. In his words:

“I also agree with Mr. Nowrojee’s submission that the petitioner’s application amounts to collateral attack on the decisions by both the Court of Appeal and the High Court rejecting similar applications for stay of execution.”

40. In effect therefore, the reason the Judge declined to grant the orders that had been sought by the appellant was not on the basis that a prima facie case had not been made out, but on account of his finding, that the application was an abuse of the process of the court. We are unable to fault the Judge for reaching that conclusion. Prior to instituting Petition No. 13 of 2011 on the basis of which the appellant made the application to stay execution of the decree in HCCC 367 of 2000, the appellant had previously endeavored, though unsuccessfully, to have that decree stayed in that suit and in subsequent proceedings on appeal to this Court.

41. In the application before the High Court dated 31st January 2011 giving rise to the impugned ruling, one of the reliefs that the appellant had sought was “a conservatory order, by way of stay of execution of the decree in **Milimani HCCC No. 367 of 2000 Willesden Investments Limited vs Kenya Hotel**

Properties Limited” pending the hearing and determination of the appeal. In effect, the appellant was seeking, in a different suit, to stay execution of a decree issued by the High Court in another suit. The approach taken by the appellant in seeking to stay execution of a decree obtained in one suit, namely HCCC No. 367 of 2000, by instituting a different action, Petition No 13 of 2011, and seeking the orders of stay of the decree in HCCC No. 367 of 2000 under that action goes against Section 34(1) of the Civil Procedure Act, Cap 21 provides that:

“all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.” [Emphasis]

On those grounds alone, the Judge was right in rejecting the appellant’s application.

42. The matter does not, however, end there. Counsel addressed us at length on the doctrine of *res judicata*. It was argued that the question whether the property was public property that was unlawfully alienated had already been litigated and therefore *res judicata*.

43. We have already stated above what HCCC No. 367 of 2000 was all about. It bears repeating that that suit (HCCC 367 of 2000) was instituted by Willesden against the appellant in 2000. Willesden complained that the appellant had trespassed on the property. It sought mesne profits, general damages, and damages for loss of business opportunity. The court, in its judgment delivered on 14th December 2006, found the appellant liable for trespass and awarded Willesden mesne profits of Kshs. 54,902,400.00; general damages for trespass of Kshs. 10,000,000.00; and Kshs. 6,000,000.00 as damages for loss of business.

44. The appellant lodged a notice of appeal from the High Court decision and on that basis applied for, and was granted a conditional order for stay of execution by this Court in a ruling delivered on 9th March 2007 in Civil Application No. 322 of 2006 pending the hearing and determination of the intended appeal. The condition attached to the order for stay of execution was that the appellant would provide a bank or insurance guarantee for the amount of Kshs. 70,902,400.

45. It was on the basis of the condition placed by the Court in the ruling delivered on 9th March 2007 that DBK, at the behest of the appellant, in compliance with the ruling of 9th March 2007, issued a Security Bond/Guarantee binding itself to the Court that in the event that the judgment of the High Court is not set aside, DBK “*shall stand as guarantors for the payment by the said appellant for any damages suffered and costs incurred by the said respondent provided however our total liability...shall not in any event exceed the sum of Kshs. 70,902,400/=*”

46. Thereafter the substantive appeal from the judgment of 14th December 2006 to this Court was lodged in Civil Appeal No. 149 of 2007. As we have mentioned, that appeal was partially successful. In a judgment delivered by this Court on 2nd April 2009 in that appeal, the awards of general damages for trespass of Kshs. 10,000,000.00; and Kshs. 6,000,000.00 as damages for loss of business were set aside. The award for mesne profits of Kshs. 54,902,400.00 was reduced to Kshs. 22,729,800.00.

47. The question of the legality of the Willesden’s title to the property or the manner in which the property was alienated did not arise in either HCCC 367 of 2000 or in Civil Appeal No. 149 of 2007. In other words the question of revocation of the title to the property was not an issue in the High Court in HCCC 367 of 2000 nor in the subsequent appeal therefrom to this Court in Civil Appeal No. 149 of 2007. The cause of action on the basis of which that suit was instituted was the tort of trespass. The question of whether the property was public land that was irregularly and illegally alienated was not raised or litigated. Indeed, the learned Judge was conscious of this when he stated in the impugned ruling that:

“It is instructive to note that in the said appeal the appellant did not challenge the manner in which the suit land had been allocated to Willesden. In Milimani Commercial Case Number 367 of 2000 the two broad issues that were determined by Mutungi, J. were whether there was

trespass by the petitioner on the suit land and if so, whether damages were payable. The Court ruled that the issue of legality of title in respect of the suit land was not before it and further stated that revocation of the title could be done in other proceedings.”

48. In Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1996] eKLR this Court summarized the ingredients of the principle of res judicata as follows:

“In order to rely on the defence of res judicata there must be:

- i. a previous suit in which the matter was in issue;**
- ii. the parties were the same or litigating under the same title.**
- iii. a competent court heard the matter in issue;**
- iv. *the issue has been raised once again in a fresh suit.*”**

Consequently, we are not satisfied that the matters raised in Petition No.13 of 2011 are res judicata by reason of the proceedings in the High Court in HCCC 367 of 2000 nor by reason of the subsequent appeal therefrom to this Court in Civil Appeal No. 149 of 2007.

49. In HCCC No. 35 of 2010, the Commission filed suit against Willesden and 6 other parties including the appellant. In that suit the Commission sought declarations that the allotment of the property and subsequent grant of the same to Willesden was null and void; that the allotment and the grant over the property should be cancelled or revoked; and a permanent injunction restraining dealings and interference with the property. The Commission pleaded in that suit that the property was previously a section of Kaunda Street, a public road that was irregularly, illegally and fraudulently alienated.

50. HCCC No. 35 of 2010 was however “*dismissed and/or struck out with costs*” in a ruling delivered by the High Court (Muchelule, J) on 27th May 2010 on the basis that it was “*raising issues which have been determined by the High Court and the Court of Appeal. The issues are res judicata.*” The High Court and Court of Appeal cases to which the Judge was referring was HCCC 367 of 2000 and Civil Appeal No. 149 of 2007. As we have stated, an appeal from the ruling of 27th May 2010 dismissing and or striking out HCCC No. 35 of 2010 is pending hearing and determination before this Court in Civil Appeal No. 325 of 2013. Whether Muchelule J was right in striking out HCCC No. 35 of 2010 on grounds of *res judicata* is a matter that will have to await determination in that appeal.

51. The result of the foregoing is that for reasons stated above, the Judge correctly dismissed the appellant’s application dated 31st January 2011.

52. There is one last matter. Having dismissed the appellant’s motion, the Judge went ahead to make an order for payment of part of the decretal sum in HCCC 367 of 2000 amounting to Kshs. 37,567,717.00 to be paid to KRA. In doing so, the Judge stated that there was no evidence that Willesden had been paying income tax. With respect, we do not think that it was open to the Judge, having dismissed the appellant’s application to make orders unconnected with the application that was before him and which had the effect of varying a decree in a suit that was not before him. That order must therefore be, and is hereby set aside.

53. The overall result is that the appeal partially succeeds to the extent only that we hereby set aside the order directing that an amount of Kshs. 37,567,717.00 to be paid to KRA from the decretal sum in HCCC 367 of 2000. The appeal is otherwise devoid of merit and is accordingly dismissed. We further order that each party shall bear its own costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 16th day February, 2018.

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR