IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & KIAGE, JJ.A)

CIVIL APPEAL NO. 115 OF 2017

BETWEEN

KENYA MEDICAL SUPPLIES AGENCY (KEMSA)…..…... APPELLANT

AND

MAVJI KANJI HIRANI ……..…….…… 1ST RESPONDENT

LAII KANJI HIRANI ……..……..…….. 2ND RESPONDENT

KUVERJI GAVID PATEL & SONS LTD..... 3RD RESPONDENT

THE ATTORNERY GENERAL…….…….…… 4TH RESPONDENT

MINISTER FOR LANDS …….. 5TH RESPONDENT

NATIONAL AIDS AND STIs

CONTROL PROGRAMME (NASSCOP)……. 6TH RESPONDENT

MINISTER OF MEDICAL SERVICES ..……. 7TH RESPONDENT

THE COMMISSIONER OF LANDS …..…….... 8TH RESPONDENT

REGISTRAR OF TITLES ……. 9TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Gacheru, J.) dated 18th June 2015

in

ELC No. 937 of 2012)

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JUDGMENT OF THE COURT

By this appeal the appellant Kenya Medical Supplies Agency (KEMSA), challenges the judgment of the Environment and Land Court at Nairobi (Gacheru, J.) delivered on 18th June 2015 by which KEMSA was restrained by an injunction from entering on, constructing, or in any way dealing with all that property known as **LR No. 9094/1** and **LR No. 9094/2** (the suit property) located on Nairobi-Mombasa Road. The learned Judge also quashed the cancellation of titles to the suit property previously held by Mavji Hirani; Laii Kanji Hirani and Kuverji Gavid Patel & Sons Ltd (the respondents) and ordered that they be issued with titles to the suit property.

That judgment was the determination of a suit filed by the respondents against the Attorney General, the Minister of Lands, the Minister of Medical Services, the Commissioner of Lands, the Registrar of Titles and KEMSA. The respondents pleaded in their plaint as amended on 28th November 2013 that they were the registered proprietors of the suit property, having bought the same sometime in the year 2007. They subsequently paid to the City Council of Nairobi all rates, and to the Commissioner of Lands all the land rent. Between 2008 and 2010 they

obtained relevant approvals to build a godown, warehousing and storage facility on the suit property.

On 21st May 2016 the Registrar of Titles, acting on the directions of the Commissioner and Minister of Lands "***purported to revoke [the respondents?] title to the suit property] via Gazette Notice 5558 of 2011 (sic) without notice to [the respondent] and went further to allocate the same to [KEMSA]"***. This was arbitrary, in excess of powers and in violation of the respondents? right to private property as enshrined in the Constitution. It was followed by KEMSA?s entry onto the property where it started excavating, clearing and depositing building materials. The respondents therefore sought "*recovery of their property*" irregularly allocated to KEMSA.

The Attorney General filed a defence on behalf of the Registrar of Titles in which the respondents? title to the suit property was denied as was the allegation that such title was revoked without notice. On its part, the appellant denied the various allegations in the plaint and in particular the respondents? title to the suit property that it had trespassed upon the suit property. It then affirmatively averred that it was allocated the suit property in 2005 for the development of a distribution centre for medical commodities but, being a public institution, it did not require to be issued with title deeds and was so issued only when the respondents purported to have titles to the suit property.

At the trial the respondents called a single witness, **Laiji Kanji Hirani,** who was the second plaintiff. He described himself as a contractor and swore that the respondents bought the suit property in the year 2007 and that he had the original titles thereto which he produced. He then testified that when he started putting up a wall around the plot, he was told it belonged to KEMSA and his workers were chased away, which is why he filed the suit. He later came to know that the titles had been revoked by the Registrar of Titles. The respondents had bought the land from Pineshore Investment Limited (Pineshore) but never built on the suit land.

Gordon Ochieng, a Principal Law Administration Officer in the Ministry of Lands, testified on behalf of the Attorney General and the sued officials, in the Ministry of Lands. The suit land was allotted to Pineshore on 9th March 1999 but that allottee did not make payment of the Kshs. 390,920 required as allotment fees. From the records in the Ministry, there were no other documents that would have led to the titles the respondents had, which were never released to them. Moreover, there was no acceptance of the letter of allotment and it was subsequently cancelled and a new one issued to KEMSA on 20th December 2005. Under cross examination by the respondents? counsel, the witness maintained that the letters of allotment to KEMSA superceded the one issued to Pineshore.

The respondents? titles were revoked following "*public uproar over allotment of public land to private individuals*." In answer to questions by KEMSA?s advocate, he reiterated that Pineshore did not make payment nor accept the letter of allotment within the requisite **30 days** and that the offer therefore lapsed. There was also no evidence of an original title having been issued to the respondents respecting the original title number **9094** and that it was therefore impossible that there should have been sub-division leading to the titles held by the respondents. He maintained that there was no record of any grant issued to Pineshore. It therefore did not have and could not pass a valid title to the suit property.

For KEMSA, its Director of Legal Services and Corporation Secretary, **Fredrick Wanyonyi Simiyu**, testified that it is a State corporation with the legal mandate to procure and store medical commodities through warehousing and distribute the same to over 5000 health facilities countrywide. He swore that the suit property is public land which originally belonged to another state corporation, the Kenya Airports Authority. It was allocated vacant to KEMSA in December 2005, which took possession, placed beacons and fenced it intending to build a warehouse valued at Kshs. 2 billion. Only later on 17th March 2010 when a team of its engineers and those from Japan International Cooperation Agency (JICA) visited the suit property to test the soils did KEMSA learn that some other party was claiming ownership of the land. He asserted that KEMSA had no knowledge of the respondents. It had put up a wall around the suit land and was seeking funds for putting up the warehouse.

After taking that evidence, the learned Judge received submissions from the parties before the impugned judgment in which KEMSA alleges she erred because, it had no substratum in law; the respondents wholly failed to establish a claim over the disputed property and departed from their pleadings; she admitted the evidence of the respondents? witness, she misapprehended the law on public land; she failed to appreciate that no legitimate title could pass to the respondents; she failed to appreciate that public rights and policy trump private buccaneers also known as private developers; departed from her own reasoning in a ruling she delivered on 2nd October 2013; misapprehended and misapplied the law on validity of title deeds and proper use of public property; the judgment unjustly and corruptly enriched the respondents against the public interest; and violated principles of the law of evidence, precedent and public policy.

The parties herein filed submissions which they highlighted at the hearing of the appeal. Going first, **Mr. Kipkorir**, learned counsel for the appellant, first took issue with the competence of the suit, urging that it ought to have been struck out as it was commenced by way of a petition and a plaint at the same time. We have no difficulty dismissing this contention off hand for the reason that it was not specifically raised as a ground of appeal and was, moreover, not properly urged before and ruled upon by the court below. The proceedings proceeded on the basis of the plaint to which KEMSA filed a statement of defence without objection and it is too late in the day for it to raise that complaint on appeal.

Next, **Mr. Kipkorir** contented that the testimony of Lalji Kanji Hirani ought not to have been admitted because whereas he and Mavji Kanji Hirani asserted joint ownership over LR 9094/1, there was no nexus between him and Kuverji Gavid Patel & Sons Ltd which claimed LR 9094/2. It was therefore wrong, counsel submitted, for the said witness to have purported to testify on behalf of the other plaintiffs without written authority from them.

On the substance of the appeal, counsel submitted that the Principal Land Registrar?s testimony was conclusive that whatever title to the suit land the respondents may have had could not have been valid as the original allottee never complied with the terms of allotment. He criticized the learned Judge for departing from her own observations in the ruling on injunction where she had correctly doubted the validity of the respondents? claims to the land which KEMSA has occupied since 2005. He cast doubt on the *bona fides* of the respondents who appeared in 2009 waving titles but could not produce the parent title deed.

He concluded by urging us to give effect to the public interest and pave way to the development of the warehouse for medical supplies for which no less than Kshs. 3 billion has been set aside. To him, the interests of private developers purporting to hold dubious titles must be

subordinated to and cannot be allowed to subvert the public interest.

Rising to oppose the appeal, **Mr. Onsando**, learned counsel for the respondents, sought to clarify that this was not a case of land grabbing, the suit property having previously been allocated to a private party, Pineshore. He then submitted that all the respondents needed to show was that they had a valid title "*and no evidence was produced to refute that*." He followed it with the assertion that "*it was upon he who alleged non-payment [by Pineshore] of the required sum under the terms of allotment to prove that non-payment*." He took umbrage in the late payment by KEMSA of the requisite sums after being allocated the suit property in 2005 to suggest that non-payment by Pineshore was not fatal. He rested by contending that from KEMSA?s letter dated 17th March 2010 to the then Minister for Medical Services, Prof. Peter Nyon?go, there were people guarding the suit property on behalf of unknown persons which showed that KEMSA was not in possession and that the respondents were there before KEMSA ejected them.

On behalf of the Attorney-General and also representing the Ministers for Lands, and for Medical Services, as well as the National Aids and STI?s Control Programme (NASSCOP) and the Registrar of Titles, learned counsel, **Mr. Kamau**, supported the appeal. He submitted that from the statement and evidence of Gordon Ochieng, the Principal Land Administration Officer, dated 23rd April 2014 and the affidavit of **Edwin Munoku Wafula**, a Senior Land Registrar at the Ministry of Lands, sworn on 24th May 2013 which are on record together with the attachments thereto, the legal *bona fide* owner of the suit property was indubitably KEMSA. The land was set aside for a public purpose and was properly allocated to KEMSA. The earlier allocation to Pineshore was neither accepted nor the requisite payment therefor made. In the result, the respondents? case at the court below was not proved and should have been dismissed.

Replying, Mr. Kipkorir reiterated that the letter of allotment to Pineshore required it to make payment of stand premium, among other payments, but none was made hence the lapsing of the offer. In contrast, the letter of allotment addressed to KEMSA on 25th May 2010 required „**Nil**? Stand Premium and so the question of late payment by it is of no moment. The payment was moreover made and titles issued. Counsel further contended that no title was ever issued to Pineshore and the purported subdivision giving rise to the two titles the respondents held was inefficacious as it is impossible to sub-divide what does not exist. He insisted that KEMSA was always in occupation hence the respondents? application dated 4th December 2012 seeking to stop KEMSA from continuing with construction thereon.

We have set out the facts of the case as they emerge from the record, as well as the contending parties? interpretation thereof in their efforts to persuade us to adopt their version, in keeping with our mandate as a first appellate court which proceeds by way of retrial. We must subject all the evidence to a fresh and exhaustive re-appraisal and analysis with a view to making independent inferences and drawing conclusions of our own. We do so on the basis of the record and are cognizant of the inherent limitation of not having heard and seen the witnesses as they testified, unlike the learned Judge. We will therefore accord a measure of respect to the findings of fact by the trial court especially where they turn on credibility of witnesses. We are, however, not bound by them, being free to depart therefrom if they are not based on the evidence, proceed from a misapprehension of the evidence or, looked at as a whole they are plainly wrong or untenable. Where, as here, the case is based purely or largely on the interpretation or construction of documentary evidence as tendered before the Judge and placed before us in the record of appeal, our latitude is naturally wider.

The issue that we have to determine is whether the learned judge erred in granting the respondents? claim and essentially declaring them the rightful owners of the suit property; quashing the revocation of their titles thereto and restraining the defendants before her, including, , terming KEMSA a trespasser and injuncting its entry and construction thereon. In arriving at those determinations, the learned Judge was greatly persuaded by the fact that the respondents held two title deeds to the suit property which she found to have been first in time *vis a vis* those held by KEMSA. She felt herself fortified in that position by the decided cases and so delivered herself as follows;

> ***"Further, it is not in doubt that though KEMSA, the 7th defendant was allegedly given the letters of allotment in the year 2005, it never obtained certificates of title until the year 2010. The plaintiffs were registered as proprietors of the suit properties in the year 2007. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of Wreck Motors Enterprises vs. The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997, where the court held that:***
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> ***„Where there are two competing titles the one registered earlier is the one that takes priority.? The same position was held in the case of Gitwany Investment lts vs. Tajmal Ltd Ltd & 3 Others (2006) eKLR where the Court held that:-***
>
> ***„….the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail.?"***

It is not lost to us that in the excerpt we have just quoted, the learned Judge, for reasons that are difficult to decipher, seems to cast doubt on the fact that KEMSA did have a letter of allotment dated 20th December 2005 for the original LR No. 9094. The authenticity of that letter of allotment, which was referred to and produced by KEMSA?s witness and owned by officers from the Land?s office, was never questioned. We therefore think that the learned Judge had absolutely no basis for diminishing its import by stating that KEMSA had merely "*alleged to have been given letters of allotment*." The evidence does establish quite conclusively that KEMSA was indeed issued with a letter (not letters) of allotment on 20th December 2005, to which we shall return.

Having found that the respondents were priority title holders as aforesaid, the learned Judge proceeded to find that the revocation of the same was unconstitutional or otherwise unlawful. This was principally for proceeding from an exercise of a non-existent power and even so without notice to the respondents; and was tantamount to an abridgment of their constitutionally-protected right to property without prompt full and just compensation, and without access to the courts and due process, in violation of the right to fair administrative action, thus null and void.

The learned Judge also found, significantly, that Pineshore were possessed of a good title which they passed to the respondents with the result that the latter were the absolute and indefeasible owners of the suit property as no defect or irregularity nor fraud had been established

in both their acquisitions of title.

We now have to decide whether from the totality of the evidence, those conclusions were supportable.

First, as we have already noted, the learned Judge paid scant attention to the fact that KEMSA did have a letter of allotment way back on 20th December 2005 respecting the original LR 9094 measuring 2.0 hectares. At the bottom of that letter were the following words which the learned Judge appears to have either missed or ignored. At any rate, we do not see in her judgment an analysis of or other engagement with their import;

> ***"This letter of allotment cancels letter of allotment ref. 51776/XVII dated 9th March 1999."***

The letter of allotment referred to is the one that had been issued to Pineshore and it was produced in the court below in the bundle of documents filed by the Commissioner of Lands. We find it a curious non-direction on the part of the learned Judge that she made no reference to the said letter and definitely did not analyze or attach any value to it, and particularly to the fact that it had cancelled the earlier allotment letter in favour of Pineshore. The letter was referenced "LR No. 9094- Nairobi" and related to an acreage of 2.0 Hectates. In it the Commissioner of Lands addressed Pineshore as follows;

> ***"2. I should be glad to receive your acceptance of the attached conditions together with banker?s cheque for the amount set below within thirty (300 days of the postmark***
>
> ***(i) Stand Premium ……..… Kshs. 320,000.00***
>
> ***(ii) …***
>
> ***Total …… Kshs. 390,920.00***
>
> ***If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed.***
>
> ***…***
>
> ***The government shall not accept any liability whatsoever in the event of prior commitment or otherwise.***
>
> **"**Our emphasis]

Pineshore as the offeree of a grant of the plot described in the letter of offer was invited to accept the offer and to make payment of the stipulated sum. It is basic contract law that an offer that is not accepted by the offeree cannot possibly bring into existence a contractual relationship. Nor can a failure to avail the required consideration. It was, as it is before us, the contention of the Government Ministries and Officers who are parties to these proceedings that Pineshore neither accepted the offer nor made payment of the sums advised within the stipulated thirty ***(30) days,*** or at all. We have already set out what the witness from the Ministry of Lands stated in his statements and during testimony in court. The witness was unshaken about this aspect of the case and no evidence was produced to show that Pineshore ever paid the stand premium. Instead of drawing the logical conclusion that would flow from such absence of evidence of acceptance and payment, the learned Judge most curiously cast upon the Government offices the burden of proving a negative, namely; the non-payment by Pineshore as follows;

> ***"It was alleged by the defendants that M/s Pineshore Investment Ltd did not pay the Stand Premium as per the letter of allotment. However, no such evidence was ever produced by the parties claiming so."***

With great respect, we think the learned Judge wholly misdirected herself on this point and misapprehended the evidence. Once their titles were impeached on the basis that they proceeded from an entity that did not have a good title for not having accepted the offer of allotment nor paid the stand premium, nothing would have been easier than for the respondents to call Pineshore?s directors, officers or agents as witnesses who would then have produced evidence of acceptance and payment, if any. They did not do so and did not seek the court?s aid in summoning such witnesses. From our own assessment therefore, the evidence that there was neither acceptance nor payment was unchallenged.

Not having accepted the offered allotment and not having paid the stand premium, could Pineshore properly have obtained title to the suit property? We answer this question as well in the negative. The Lands Officer tendered unchallenged evidence that no title ever issued to Pineshore in respect of the original LR No. 9094 as none was ever processed. Without that parent title, it is a mystery how Pineshore was able to obtain two subdivisions thereof as 9094/1 and 9094/2 which were then sold and transferred to the respondents.

We find, with respect, that the learned Judge handled this critical aspect of the sequence of events in an entirely unsatisfactory manner. At page 15 of her judgment, she makes the wholly unsupported finding that certificates of title "*were first issued to M/s Pineshore*." What this finding fails to address is how the two came into being in the first place. We are quite clear that not having first complied with the terms of the letter of allotment, no title could issue and Pineshore had no right to effect sub-division and could not pass good and effective title to the respondents.

We have carefully perused the sale agreement that was produced by the respondents as proof of having purchased the suit properties from

Pineshore and what we see only adds doubts as to the propriety of the said transaction which, again, seems to have eluded the attention of the learned Judge. The agreement between Pineshore and the 1st and 2nd respondents appears on page 289 of the record and we note the following;

> ***(a) It is not dated.***
>
> ***(b) Clause (3) speaks of a price of Kshs. 7 million of which Kshs. 700,000 is to be paid to the vendor in or before execution but there is no acknowledgment of such payment.***
>
> ***(c) Clause 10 (c) which is referred to in clause (3) as indicating the balance, states the said balance as "Kenya Shillings Seven Hundred Thousand (Kshs. 700,000) to be deposited with the vendor?s advocate prior to completion and in exchange of the following completion documents …."***
>
> ***(d) Whereas there is a certificate executed witnessed by N.W. Kangethe Advocate as having been present and seen the directors of the vendor sign the agreement, the certificate to the like effect for the purchasers is unsigned.***

There is no certainty as to the date of the agreement and it is dubious what the price of the transaction was and whether it or any part of it was ever paid. These gaps ought to have caused the trial court to seek answers and to be slow to affirmatively endorse the respondents? title. Instead, we see that the learned Judge glossed over the glaring infirmities of the respondents? title and assailed that of KEMSA as follows;

> ***"Even if the plaintiffs had acquired the titles unlawfully or unprocedurally, as provided by Article 40(6) of the Constitution, due process ought to have been followed in revoking the plaintiff?s title. The 7th defendant was granted fresh letters of allotment on 25th may, 2010, after the illegal revocation of the plaintiff?s titles. The 7th defendant thereafter obtained certificates of title. The 7th defendants acquisition of the certificates of titles was predicated on an illegally and though the said certificates of titles are conclusive evidence of ownership, the same cannot sanitize the initial illegality. The 7th defendant therefore did not acquire good title on the suit properties. I will rely on the case of Mcfoy vs. United Africa Company Ltd (1987) 3 ALL ER 1169 where the Court held that:-***
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> > *„If an act is void, then it is law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad an incurably bad.?"*

With respect, that was an erroneous appreciation of the evidence and the law. From the record it is clear that even though KEMSA?s titles to the suit property issued after fresh letters of allotment that were issued on 25th May 2010, its claim to the same was based on the 20th December 2005 letter of allotment which superceded the one issued to Pineshore in 1999 which lapsed for non-acceptance. Essentially therefore, by the time Pineshore was purporting to sub-divide and sell the suit property, it was not available for alienation, having been allocated to KEMSA for a public purpose. KEMSA?s claim and interest thus dated back to 2005 and were not dependent on the revocation of the respondents? titles that occurred in 2010.

Looked at as a whole, we think that on a balance of probabilities, the case by KEMSA stood on firmer ground and ought to have been upheld and the respondents? case dismissed, not least because in a contest between private interests of dubious legitimacy and solid public interest claims, the latter ought to prevail. **Article 40(6)** of the Constitution is categorical that the rights (of protection of the right to property) in **Article 40** "*do not extend to any property that has been found to have been unlawfully acquired*." We take the view that it was unlawful for Pineshore to have proceeded to deal with the suit property as if it had valid and effective rights to it yet it did not, having not met the conditions of acceptance and payment contained in the letter of allotment. On the principle of *nemo dat quod non habeat*, Pineshore could not pass to the respondents a better title than it had itself; even assuming there was a proper sale agreement between it and the respondents, which we doubt.

We accept as good law the rather commonsensical proposition that in the tussle for supremacy between private and public interests, the latter must prevail. The courts have a duty to identify and uphold the public interest, alive to the fact that their decisions ought to conduce to the attainment of that which is for the advancement of the public good. We were of that the same view in ***DELLIAN LANGATA LIMITED vs. SIMON THUO MUIA & 4 OTHERS [2018] eKLR*** when we delivered ourselves as follows;

> ***"What is more, this appears to have been a case of an individual attempting to trump and negate the rights of the public in view of the fact that the other sub-divided plots such as sub-plot E were meant for development of schools and other public amenities. We must hold that the interest of the public overrides that of an individual. We echo the sentiments of this Court in EAST AFRICAN CABLES LIMITED vs. THE PUBLIC PROCUREMENT COMPLAINTS, REVIEW & APPEALS BOARD AND ANOTHER [2007] eKLR expressing the philosophy behind the view that public interest should take precedence in the following words:-***
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> > *"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable."*

See also ***KENYA NATIONAL HIGHWAYS AUTHORITY vs. SHALIEN MASOOD MUGHAL & 5 OTHERS*** **[2017] eKLR.**

The upshot of our consideration of this appeal is that it is meritorious and we grant it. The judgment and decree of the Land and Environment Court is set aside and substituted with an order that the plaintiff?s suit is dismissed with costs.

The appellant shall have the costs of this appeal to be paid by the 1st, 2nd and 3rd respondents.

Dated and delivered at Nairobi this 22nd day of June, 2018.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

…….....……

JUDGE OF APPEAL

P. O. KIAGE

…….....……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR