IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA , SICHALE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 79 OF 2007

BETWEEN

BENJA PROPERTIES LIMITED …….....APPELLANT

AND

H.H. DR. SYEDNA MOHAMMED BURHANNUDIN SAHED …..1ST RESPONDENT

MOHAMMED FIDAALI HEBATULLAH …….....….. 2ND RESPONDENT

HUSEESINBAHAL AHEMDALI HEBATULLAH …….....….... 3RD RESPONDENT

THE ATTORNEY GENERAL ……...….....……. 4TH RESPONDENT

THE COMMISSIONER FOR LANDS ……....…… 5th RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Visram J. as he then was) delivered on 27th February 2007

in

HCCC No. 73 of 2000

****

JUDGMENT OF THE COURT

1. The issue in this appeal relates to legality of allotment and grant of alienated and privately registered land by the 5th respondent, Commissioner of Lands, to the appellant.

2. By various deeds of assignment the 1st respondent became the registered proprietor of **LR No. 209/136/269** registered in 1911 as **N64 428/1 20772** while the 2nd and 3rd respondents are registered proprietors of **LR No. 209/136/239** registered in 1907 as **N64 425/1 20769** (hereinafter referred to as the suit land or suit property).

3. The appellant company was granted and issued title to plot **LR 209/12999** under Grant **No. I.R. 72150** which plot overlaps and is part of the 1st, 2nd and 3rd respondents' parcels of land. The

appellant's title and grant was issued on 3rd December 1996.

4. The 1st, 2nd and 3rd respondents filed suit against the appellant seeking a permanent injunction to restrain the appellant by its directors, servants, agents or otherwise from transferring, charging or dealing in any way with the alleged grant No. IR 72150 which contains LR No. 209/12999 or any part thereof and from interfering with the property of the respondents. A further prayer was that the alleged Grant No. IR 72150 being LR No. 209/12999 be delivered up and cancelled and the Registrar of titles be ordered to make all the necessary entries to this effect.

5. The ground in support of the 1st, 2nd and 3rd respondents' claim was that the appellant's Grant No. IR. 2150 comprising LR No. 209/12999 was issued fraudulently and is void to the extent that the right of the President to make grants under the ***Government Lands Act Section 3 (a)*** is confined to making grants in respect of unalienated government land and the suit land had already been alienated and title granted to a one ***Col. Ewart Grogan*** from whom the respondents purchased the land.

6. The appellant filed its defence averring that it was a stranger to the respondents claim and asserted that it is the registered proprietor of LR 209/12999 which is the subject of Grant No. IR 72150 issued by the Commissioner of Lands on 3rd December 1996; that the appellant purchased the property from the original allottees thereof Messrs Charles Mwangi, David Some, Joseph Sang and P. Nzuki pursuant to an agreement for sale dated 13th June 1996; that the appellant is *a bona fide* purchaser for value without notice and its title is indefeasible under the provisions of ***section 23*** of the **Registration of Titles Act** and that there was no fraud in the acquisition of title to the property. The appellants denied that the 1st, 2nd and 3rd respondents were entitled to cancellation of its title and that ***section 24*** of the **Registration of Titles Act** (RTA) disentitled the 1st, 2nd and 3rd respondents to the orders sought at the High Court.

7. The appellant took out a Third Party Notice joining the 4th and 5th respondents and claiming damages and or indemnity plus costs and interests in the event that the court finds that the suit property LR No. 209/12999 belongs to the respondents. The appellant's claim against the 4th and 5th respondents is that it was a *bona fide* purchaser for value without notice; that the 4th and 5th respondents made the appellant believe it was entitled to the suit land and that the appellant is entitled to indemnity for issuance of an invalid title and damages for improvements made on the property. By an amended Third Party Notice, the appellant claims general damages and special damages of Kshs.22,057,537/= and or full indemnity plus costs and interest at 18% from 13th June 1996 to the date of actual payment. The appellant asserts that the 5th respondent having received stamp duty from the original allottees cannot deny validity of the appellant's title; that the 4th and 5th respondents acted negligently and are vicariously liable for acts of their servants at the Lands Office and that the appellants having been made to believe that the suit land was its property commissioned an architect to draw up a plan for a storey building.

8. The 4th and 5th respondents filed a joint Third Party Defence denying any liability to the appellant asserting that the appellant had no claim against them by virtue of ***Section 3 (1)*** **of the Public Authorities Limitation Act, Cap 39 Laws of Kenya** and that the Commissioner of Lands was not privy to any contract of transfer of the suit land between the original allottees and the appellant.

9. Upon hearing the parties, the learned judge (Visram, J. as he then was) entered judgment for the 1st, 2nd and 3rd respondents as claimed. In finding for the 1st, 2nd and 3rd respondents, the learned judge expressed himself as follows:

> ***"I accept the plaintiff's counsel, Mr. Gitonga's submissions, that the defendant's title, which came into being through a" letter of allocation" is invalid and void because the very "allotment" contravened Section 3 (a) of the Government Lands Act (GLA)***

which provides for alienation of only unalienated land. The suit land here, having been owned privately, was not GLA land and was not available for alienation. Its alienation was illegal and void abinitio."

10. As regards the Third Party Claim against the 4th and 5th respondents, the learned judge expressed himself as follows:

> ***"I accept the Third Parties submission and hold that the defendant's claim against the Third Parties is statute-barred by reason of effluxion of time; that the claim is invalid for failure to issue the mandatory statutory one month notice under Section 13 A of the Government Proceedings Act and in any event, the letter of allotment purchased by the defendant had expired and was subject to a disclaimer. In any event, the letter was worthless as it purported to allot land under the Government Lands Act that was not available for allotment. Accordingly, the defendant's claim, if any, is against the four allottees and no one else. I therefore reject the defendant's claim against the Third Parties."***

11. Aggrieved by the judgment of the trial court, the appellant has lodged this appeal citing twenty (20) grounds that can be compressed as follows:

> *"(i) That the learned judge erred in law and fact and misdirected himself and failed to appreciate that the High Court could only cancel the appellant's title on two ground namely fraud or mis-presentation under Section 23 of the Registration of Titles Act;*

ii. *The learned judge erred in failing to find that double allocation cannot be the basis of cancellation of title;*

iii. *The learned judge erred in making the appellant to suffer a wrong without a remedy and that the appellant had incurred architectural professional costs and that the Third Parties had made the appellant to change its financial position on reliance of the representations made and that the doctrine of estoppel was applicable;*

iv. *The learned judge erred in failing to find that the disclaimer clause in the letter of allotment was a derogatory clause and that the Government and Commissioner of Lands are not in the businesses of fraudulent transactions for it to probate and reprobate;*

v. *The learned judge erred in failing to hold that the 1st, 2nd and 3rd respondent's remedy was damages under Section 24 of the Registration of Titles Act and cancellation of the appellant's title without damages is not one of the remedies prescribed by statute.*

vi. *The learned judge erred in law by failing to assess damages incurred by the appellant on entry of judgment in favour of the respondent;*

vii. *The learned judge erred in law in failing to appreciate that the appellant's title was protected under Section 23 of the Registration of Titles Act and was guaranteed by the Constitution and the court could not deprive the appellant its title without adequate compensation."*

12. By its Memorandum of Appeal, the appellant urges this Court to set aside the judgment of the High Court and in the alternative enter judgment against the 4th and 5th respondents in the sum of Kshs.22,057,537/= with interest at the rate of 18% per annum from 13th June 1996 to the date of full payment.

13. At the hearing of the appeal, learned counsel, Ms Wangari Kamau, appeared for the appellants while learned counsel, Mr. Jesse Mwiti, appeared for the 1st, 2nd and 3rd respondents. The 4th and 5th respondents having been duly served with the hearing notice did not appear. Counsel for the

appellant as well as counsel for the 1st, 2nd and 3rd respondents filed written submissions in this matter.

14. In its submissions, the appellant reiterated the grounds in the memorandum of appeal. It was submitted that the learned judge erred in not awarding damages to the appellant despite suffering a wrong when its title was cancelled; that there can be no wrong without a remedy; that by failing to award damages to the appellant, a miscarriage of justice ensued; that the appellant was not found guilty of any fraud or misrepresentation and as such, its title should not have been cancelled; that the learned judge erred in failing to uphold ***section 23*** of the **RTA** which stipulates that a certificate of title is conclusive evidence that the person named is the proprietor of the property and that the appellant's title was indefeasible in the absence of fraud or misrepresentation on its part. The appellant contended that the learned judge erred in awarding costs to the respondents; that whereas costs are at the discretion of the trial court, the judge erred in failing to appreciate that the appellant was a *bona fide* purchaser for value whose title was protected under ***section 23*** of the **RTA** and having found that the appellant was innocent, costs should not have been awarded against it; the judge erred on costs by failing to take into account that it is entitled to indemnity from the 4th and 5th respondents.

15. On the issue of Limitation of Actions against the Third Parties 4th and 5th respondents, the appellant submitted that the learned judge erred and failed to note that on 15th March 2005, the appellant pursuant to ***section 13A*** of the **Government Proceedings Act** issued a statutory notice to the Government and served the same upon the 5th respondent; that the learned judge erred in holding that the cause of action against the 4th and 5th respondents arose from the date the suit by the 1st, 2nd and 3rd respondents was filed and not from the date of issuance and grant of title to the appellant in 1996; the appellant further submitted that strictly speaking, the cause of action between the appellant and the 4th and 5th respondents arose once judgment and decree was passed in the instant case and that is on 27th February 2007 when the trial court delivered its judgment; that the judge erred in applying ***section 3***

1. **of the Public Authorities Limitation Act, Cap 39 Laws of Kenya** to the extent that ***Section 3 (1)*** aforesaid is inapplicable because the cause of action against the Government arose on 27th February 2007 when judgment was delivered by the High Court. The appellant further faulted the trial court's reliance on ***section 13 A*** of the **Government Proceedings Act** which section had been declared unconstitutional in **Kenya Bus Service Limited & another -v- Minister for Transport & 2 others Civil Suit No. 504 of 2008.** In the ***Kenya Bus Case supra,*** it was held that ***section 13 A*** of the **Government Proceeding Act** is an impediment to access to justice and violates ***Article 48*** of the Constitution. The appellant further cited ***Articles 10*** and ***20(1)*** of the 2010 Constitution in support of its submissions.

16. The following cases were cited by the appellant in support of its appeal:

Wreck Motors Enterprises -v- Commissioner of Lands & Others Civil Appeal No. 71 of 1997; **Dr. Joseph N.K. arap Ngok -v- Justice Moijo Ole Keiwua Civil Application No. 60 of 1997, Pal Muria & another -v- Jane Kendi Ikinyua & 2 others ELC Suit No. 747 of 2007; Mohamed Aden Ali & 2 Others -v- Mohammed Mohamud Kassim Civil Appeal No. 4 of 2011; Barnabas N. Waihuini -v- Nyagatugu Gathama Trading Co. & Another ELC No. 314 of 2013; African Inland Church Trustees -v-Kimutei Cheron & Another** ELC at Eldoret **CS No. 1006 of 2012, Jasbir Signh Rai & 3 others -v- Tarlochan Singh Rai & 4 others**, **Petition No. 4 of 2012** and **Kenya Bus Services Ltd & Another -v- Minister for Transport & 2 others (2012) eKLR**; **Thika Coffee Mills -v- Mikiki Farmers Cooperative Society & Another (2013) eKLR** and **Macharia Mwangi Maina & 87 Others -v- Davidson Mwangi Kagiri (2014) eKLR.**

17. The 1st, 2nd and 3rd respondents filed joint written submissions. The gist of the submission is that

the appellant has no claim for damages against them; that any claim for damages or indemnity is against the 4th and 5th respondents. It was submitted that the learned judge identified the elements of fraud on the part of the original allottees when he established that the stand premium assessed at Kshs.143,000/- was not paid by the allottees but the appellant and wondered why the appellant paid the standard premium while it was the responsibility of the original allottees?; that the allotted suit property was subsequently sold to the appellant for Kshs.4 million when stamp duty was declared for a value of Kshs.1.6 million; that this undervaluation was evidence of fraud; that the learned judge did not make any error of law; that the appellant never proved its claim for damages; that although ***section 13A*** of the **Government Land Act** (GLA) had been declared unconstitutional, it had not been declared in-operational; that if there was any contract between the appellant and the Government, the Government absolved itself from liability through the disclaimer clause and that since costs follow the event, it was proper for the learned judge to enter costs against the appellant.

18. We have considered the grounds of appeal, the written and oral submissions by counsel and the authorities cited by the appellant. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**.

19. There are issues for consideration and determination in this appeal: first relates to cancellation of the appellants title; second is the appellants' appeal for general and special damages; then issues relating to limitation of action and finally, costs of the suit.

20. It is the appellant's case that its title is indefeasible under the provisions of ***section 23*** of the **RTA**. The *ratio decidendi* in the trial court's decision is in the phrase "*the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio."*

21. The foundation of the appellant's claim is that the Commissioner of Lands allotted the suit land to the original four allottees who subsequently sold it to the appellant. This may be so; however, the legal question is, was there unalienated government land capable of being allotted to the original four allottees? The trial judge answered this question in the negative. We concur with the court's finding. The 1st, 2nd and 3rd respondents' title to the suit property has its root of title to a grant and title issued in 1907 and 1911. By various deeds of assignment the 1st respondent became the registered proprietor of LR No. 209/136/269 registered in 1911 as N64 428/1 20772 while the 2nd and 3rd respondents are registered proprietors of LR No. 209/136/239 registered in 1907 as N64 425/1 20769. The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya. The appellant's title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge's finding that "the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void *ab initio*."

22. We hasten to add that the issue in this case is not a question of double allotment of land. Double allotment occurs when a specific unalienated government land is allotted to two different persons. In this case, there is no unalienated government land to be allotted. What we have is a purported allotment of private property – land that is neither government land nor unalienated government land.

23. In **Gitwany Investment Limited -v- Tajmal Limited & 2 others, (2006) eKLR,** a case whose facts are *in pari materia* with the instant appeal, the High Court in a persuasive authority expressed itself as follows:

"Having concluded that LR No. 209/3088 is in fact the same on the ground with LR No. 209/12004, this court is then confronted with really the main issue in this matter. Both Gitwany and the 2nd and 3rd Defendants were issued with title documents by the Commissioner of Lands. Gitwany's title for L.R. NO. 209/12004 WAS ISSUED ON 24.7.1995 and it is signed by Wilson Gachanja as such Commissioner in the presence of the Registrar of Titles whose name is unclear. The one in the name of Maxtowers and Njage was signed by Sammy Silas Komen Mwaita as Commissioner of Lands on 12.2.2001 in the presence of J.K. WANJAU, Registrar of Titles. The land was then transferred and is presently held in the name of the 1st defendant which transfer was registered against the title on 26.7.2001.

The position as at now is that both Gitwany and Taj Mall claim and in fact have title to the same piece of land. Which title should prevail? The one issued on 24.7.1995 or the one issued on 24.2.2001? I would agree with the submissions by counsel for the 1st Defendant that it is to S.23 (1) of the Registration of Titles Act that this court must turn to. That section reads as follows: -

"The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."

I have taken the pains in this judgment to set out exactly how each party obtained title. I have also read the submissions by all parties and sadly none has offered any evidence that Gitwany or the 1st Defendant in any way acted fraudulently or that any of them misrepresented any fact and which then led them to obtain fraudulent titles. In fact the entire mess in which those parties find themselves in is the creation of and a matter that must be put squarely at the doorstep of the Commissioner of Lands, the 3rd Party. All documents leading to the issuance of title are not prepared, kept nor issued by any other party other than that office, sometimes in conjunction with the Directorate of Survey. Any change in L.R. No. or in acreage is a matter that is always in the hands of those officers and even if a private person in a professional capacity undertakes those tasks then those offices must always approve and thereafter take responsibility for those actions.…..

Having so stated, I must return to s.23 (1) of the Registration of Titles Act. To do so I must now state that the law as regards two conflicting titles was set out in Dr.

Joseph N.K. Ng'ok vs Justice Moijo Ole Keiwua and 2 others C.A. No. 60/1997 (Unreported) where the Court of Appeal in an Application under Rule 5(2)(b) of the Court of Appeal Rules stated thus:

"Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property.

The title to such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy".

My understanding is therefore ***that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant*** **and in the**

words of the Court of Appeal in <u>Wreck Motors</u> <u>Enterprises vs. commissioner of Lands</u>, C.A. No. 71/1997 (unreported)" – *is the "grant [that] takes priority. The land is alienated already*." This decision was gain upheld in <u>Faraj</u> <u>Maharus vs. J.B. Martin glass Industries and 3 others</u> C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity….

What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in Section 23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appear, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere."

24. Guided by the decisions of this Court in **<u>Wreck Motors Enterprises vs. Commissioner of Lands</u>, C.A. No. 71/1997 (unreported) ,** which was

upheld in **<u>Faraj Maharus vs. J.B. Martin Glass Industries and 3 Others</u>**

C.A 130/2003 (unreported) and affirming the persuasive authority of

<u>Gitwany Investment Limited -v- Tajmal Limited & 2 Others</u>, (2006) eKLR, it is our considered view that the trial court did not err in upholding the 1st, 2nd and 3rd respondents' title to the suit property and cancelling the appellant's title. 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.

25. 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.

26. In its pleadings, the 1st, 2nd and 3rd respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in **<u>Ghana of Wuta-Ofei -v- Danquah</u> [1961] All ER 596 at 600**, the slightest amount of possession would be sufficient.

27. We now consider the appellant's appeal against judgment and costs entered for the 4th and 5th respondents. The appellant submitted that the learned judge erred in finding that its claim against the 4th and 5th respondents was statute-barred and caught by limitation of actions. The trial court in arriving at its decision held that the cause of action against the 4th and 5th respondents arose in January 2000 when the 1st, 2nd and 3rd respondents served the appellant with their statement of claim; that the appellant waited for five and half years before taking out a Third Party Notice

against the 4th and 5th respondents which Notice were taken out in 2005 contrary to the provisions of ***Section 3 (1) and (2)*** **of the Public Authorities Limitation Act, Cap 39 Laws of Kenya**. The sections provide as follows:

> **"3 (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.**
>
> **(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued."**

28. Taking into account the provisions of ***section 3 (1)*** **of the Public Authorities Limitation Act, Cap 39 Laws of Kenya** the trial court concluded that the appellant's claim against the 4th and 5th respondents was statute-barred by reason of effluxion of time. In addition, the learned judge held that the appellant's claim was statute-barred because the statutory one month notice required to be given to the Government under ***section 13 A*** of the **Government Proceedings Act** was not complied with.

29. We have considered the appellant's submissions on limitation period. ***section 3 (1) and (2)*** **of the Public Authorities Limitation Act, Cap 39 Laws of Kenya** expressly states that action in tort can only be commenced against the Government within one year of the cause of action. If the cause of action is founded on contract, the limitation period is three years. **Section *2 (2) (b) of* the Public Authorities Limitation Act,** provides that proceedings against the Government includes proceedings against the Attorney General or any Government department or any public officers as such**.** It is the appellant's contention that the cause of action against the Government arose on 27th February 2007 when the trial court delivered its judgment and not in 2000 when the 1st, 2nd and 3rd respondents served it with their statement of claim. The appellant's submission is equivocating, if we were to agree with the appellant that the cause of action arose when judgment was delivered on 27th February 2007, why then did the appellant issue a Third Party Notice if the cause of action had not arisen? Is this an admission that when it issued the Third Party Notice it had no cause of action or valid claim against the 4th and 5th respondents? A party is bound by its pleadings. The appellant cites the date of 13th June 1996 as the date from which it seeks damages, is this a further prevarication that a cause of action arose on 13th June 1996? It appears so.

30. Our re-evaluation of the evidence on record leads us to find that the appellant's cause of action arose when it came to its actual knowledge that a third party, in this case the 1st, 2nd and 3rd respondents were laying claim to the suit land. This actual knowledge came into being when the appellant was served with the 1st, 2nd and 3rd respondents' Statement of Claim in the year 2000. Limitation period against the 4th and 5th respondents began to run in the year 2000. We find that the trial court did not err in holding that the appellant's claim against the 4th and 5th respondents was statute-barred. It is our view that under the provisions of ***section 3 (1) and (2)*** **of the Public Authorities Limitation Act,** the appellants claim is statute barred. We see no reason to delve into discussions that ***section 13 A*** of the **Government Proceedings Act** had been declared unconstitutional by the High Court because our holding pursuant to ***section 3 (1) and (2)*** **of the Public Authorities Limitation Act,** is a bar to the appellant's claim against the 4th and 5th respondents. It is also our considered view that even if the appellant established facts in support of the doctrine of estoppel, estoppel cannot alter the provisions of statute, estoppel cannot enlarge the limitation period and estoppel is no bar to implementation of express statutory provisions. (See **Tarmal Industries Limited -v- Commissioner of Customs & Excise (1968) EA 471;** see also **Marimite Electric Co. Limited -v- General Dairies Ltd. [1937] 1 All ER 748;** see also **Henry Muthee Kathurima -v- Commissioner of Lands & Another [2015] eKLR, Nyeri Civil Appeal No. 8 of 2014** wherein it was stated that estoppel cannot be used as a shield to protect unlawfully acquired property or override express statutory procedures. And as a principal, estoppels only

applies to stated matters of fact not law.

31. We have conscientiously and extensively considered the other grounds of appeal as urged by the appellant. All these grounds cannot alter the factual and legal position that there was no un-alienated government land that could legally be allotted and transferred to the appellant. The 1st, 2nd and 3rd respondents' title being earlier in grant supersedes and ranks in priority to the appellant's title.

32. Finally, on the question of costs, the trial court awarded costs against thappellant and in favour of the 1st, 2nd, 3rd, 4th and 5th respondents. The appellant appeals against this award of costs. Ordinarily, costs follow theevent and costs are at the discretion of the trial court. In **Edward Sargent - v- Chhotabhai Jhaverbhat Patel [1949] 16 EACA 63**, it was held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the appeal court will interfere only if it be shown that the discretion has not been exercised judicially. (See also Spry VP in **Haman Singh & Others -v-Mistri [1971] EA 122, 125)**. The circumstances in which appellate courts can interfere with discretionary orders is well settled in the case of **Mbogo & Another -v- Shah [1968] EA 93,** where it was held at ***96*** that,

> **"An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice."**

33. In the instant case, we adopt the reasoning of the trial court in **Gitwany Investment Limited -v- Tajmal Limited & 2 others, (2006) eKLR** wherein the learned judge expressed himself thus:

> **"I have said that the 3rd Party (Commissioner of Lands) is the author of the misfortune that has brought the plaintiff and the 1st defendant into the corridors of justice. It is the 3rd party pursuant to Order 1 Rules 19 of the Civil Procedure Rules that must bear the costs of all parties save the 2nd and 3rd defendants who have never bothered to appear. That is the price a party that either knowingly or unknowingly, especially a public institution, acts to the detriment of innocent investors wishing to benefit from the worth of their investments especially in that now very attractive item called urban land."**

34. Persuaded by the above reasoning, we are convinced that had the trial court considered the role played by the 5th respondent and its officers in creating the facts giving rise to the litigation between the parties in un-procedurally and illegally allotting and alienating private land to the appellant, he would not have awarded any costs in favour of the 4th and 5th respondents to be paid by the appellant. For this reason, we hereby interfere with the award of costs and set aside in entirety that part of the judgment relating to costs and substitute the same with an order that the appellant shall pay costs of the 1st,2nd, and 3rd respondents only in the High Court. No costs are awarded to the 4th and 5th respondents at the High Court. Except to the extent that we have interfered with the order for costs, this appeal has no merit and is hereby dismissed. The appellant shall pay costs of the 1st, 2nd and 3rd respondents in this appeal. The 4th and 5th respondents having not appeared shall have no costs.

Dated and delivered at Nairobi this 31st day of July,. 2015.

J.W. MWERA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR