IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJA.)

CIVIL APPEAL NO. 135 OF 2012

BETWEEN

SAMUEL OTIENO OTIENO …….....…..……..…….. APPELLANT

AND

MUNICIPAL COUNCIL OF MALINDI …….....…….. 1ST RESPONDENT

VICTORY CONSTRUCTION LIMITED ……..…….....……...…… 2ND RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Malindi (Omondi, J.) dated 23rd September 2011

in

HCCC No. 42 of 2009)

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JUDGMENT OF THE COURT

In an appeal raising similar question as the one before us, the Court recently observed that:-

> ***"Along with the hunger for land acquisition and development came what was derisively christened*** *"land grabbing"* ***which was essentially alienation of land reserved for public purposes for private use and development through dubious means. Our courts became inundated with land disputes which still continue to haunt the country as alternative means of resolving them continue to be explored."***

See **Kepha Maobe & 365 others v. Benson I Mwangi & the City Council of Nairobi** Civil Appeal No. 8 of 2004.

The dispute giving rise to this appeal relates to a letter of allotment issued on 30th October 2001 to **Samuel Otieno Otieno**, the appellant, by the Commissioner of Lands in respect of **SABAKI SQUATTER UPGRADE UNS. PLOT NO. "49" – MALINDI MUNICIPALITY**, and a grant in respect of parcel No**. L.R. NO. 10899** issued pursuant to the above letter of allotment (the suit property).

The grant was issued on 1st November 2001, only a day after the letter of allotment.

On or about the 13th May 2005, employees and/or agents of the Municipal Council of Malindi (the 1st respondent) descended on the suit property and demolished structures standing on it claiming that the developments were unauthorized. These demolitions were carried out to pave way for the construction of a bus park by the Ministry of Local Government at an estimated cost of Kshs.87 million. The site where this project was to be undertaken and on part of which the appellant's development stood was formerly used by the Agricultural Society of Kenya (A.S.K.) as the showground for this region. The tender for the construction and rehabilitation of the bus park was awarded to Victory Construction Company Limited, the 2nd respondent. Following the aforesaid demolition of the appellant's development, described as residential premises comprising three (3) bedroomed stone house, the appellant brought an action, initially in Nairobi as HCCC No. 625 of 2005 (later transferred to Malindi and registered as No. 42 of 2009) against the respondents in which he contended that the demolition was illegal for the reasons that the 1st respondent did not issue a written notice of its intention to demolish the development; that it failed to obtain the permission of the President and the appellant before entering the suit property and allowing the appellant's personal effects to be vandalized; that in the process of demolition the appellant lost 4 wooden single beds, assorted clothes, kitchenware, one sofa set, one carpet, a gas cooker and three mature blue gum trees. For these actions the appellant prayed for;

i. a declaration that he is the absolute and indefeasible owner of L.R. NO. 10899 within the Municipality of Malindi;
ii. a declaration that the respondents' action amounted to an infringement of the appellant's fundamental rights under **Sections 70, 75,** and **76** of the former Constitution;
iii. a permanent injunction to restrain the respondents from carrying out further works, construction or trespassing upon the suit property; and
iv. special and general damages as well as costs and interest.

The respondents in their joint statement of defence denied that their action of demolishing the development on the suit property was illegal. They instead alleged that the appellant's title was obtained through fraud in that the suit property was part of what was once A.S.K. showground; that the letter of allotment in respect of the suit property relates to Sabaki Squatter Settlement Scheme, some 7 kilometers away from the suit property; that the law and procedure for disposal of land within a township were not followed and that the approval and allotment were deliberately superimposed and documents forged to show that the allotment of the suit property was in respect of land within the showground. The respondents further averred that the demolished development was put up in contravention of the Physical Planning Act, the Local Government Act (repealed) and the Government Land Act (repealed), hence entry thereupon and removal of the structures on the suit property was lawful and done pursuant to a statutory duty. The structures, they deposed, did not belong to the appellant but were left behind by an exhibitor when the area ceased to be part of the showground; that in any event the 1st respondent, prior to the removal of the structures in question complied with the relevant law and regulations by issuing a notice to the appellant and every person who had unauthorized development on the suit property and therefore their entry upon the suit property did not amount to trespass.

To prove these averments the appellant himself testified and called a valuer, **Edwin Otieno Oduor** while the 1st respondent's case was presented by **Caxton Mbaru**, a surveyor employed by the 1st respondent, **Patrick Lumumba Ouya**, the Town Clerk, **Joseph Taura**, the Works Officer and **Alfred Mwenda Riunga**, the District Physical Planning Officer. Besides the testimonies, the trial court also visited the *locus in quo*.

The combined effect of these testimonies may be summarized as follows. First, it is not in dispute that the suit property is situate in the area once delineated as A.S.K. showground. The appellant worked in Malindi during the same period as the Trade Development Officer in the Ministry of Trade. He was the Chairman of Trade and Planning Committee of the Malindi A.S.K. Show by virtue of which he was a member of the overall Malindi A.S.K. During the period preceding the appellant's acquisition of the suit property plans to relocate the showground from that location was conceived and executed. The

showground once relocated, the Ministry of Local Government decided to construct a bus park in the area. The very spot where the suit property stood was an exhibition stand used by Telkom Kenya Limited. Koliko Enterprises a firm name registered by the appellant wrote to the Regional Manager of Telkom Kenya Limited on 31st August, 2001 stating that;

> ***"Following your demolition/recovery of materials from your former vandalized show structure at Malindi Show Ground, I wish to inform you that I intend to construct my own structure where your former structure stood.***
>
> ***Kindly be informed of my intention."***

Two weeks later Telkom Kenya Limited replied that it had no objection to the request (which was infact a mere notification) by the firm. It was the appellant's case that following this *"no objection"* letter, the suit property was allocated to him pursuant to a letter of allotment dated 10th October, 2001 and subsequently a grant issued in his name under the repealed Registration of Title Act. It was further the appellant's case that from that point on he consistently paid to the 1st respondent land rates and rents; that he constructed a three-bedroom house whose value together with the land on which it stood was estimated at **Kshs.6,120,000**. In the appellant's understanding the project for the *"rehabilitation and reconstruction of Malindi Matatu/Bus Park"* meant the works would be carried out at the existing site where the bus park has always been away from the suit property; that the site for the project was not specified in all the documents relied on by the 1st respondent.

Edwin Otieno Oduor a registered valuer and the appellant's only witness testified how, using the letter of allotment, the survey and locational plans he identified the location of the suit property. He explained that he arrived at the value of the property, by taking into account its location, the size, the building on it and developments in the neighbouring plots.

For its part, the 1st respondent's first witness, **Caxton Mbaru Kai**, a surveyor of 14 years standing with the 1st respondent, insisted that the suit property was, before its alleged allotment to the appellant, a public land entrusted to the 1st respondent and used for a public purpose, as a showground. He further contended that the property being claimed by the appellant could not have been the suit property for the reason that the former was located at Sabaki area, some 8 kilometers away from the latter; although both are within what was then Malindi Municipality. The Town Clerk, **Patrick Lumumba Ouya** like the previous witness maintained that since the suit property was public land the transfer to the appellant was irregular as the correct procedure was not followed; that although the 1st respondent only had a letter of allotment and no other documents of title, that alone did not bar it from protecting public land entrusted to it; that the Ministry which was free to commence the bus park project on it; that as a matter of fact the property allotted to the appellant was distinct from the suit property; that apart from the appellant there were other persons who had constructed on the suit property on the strength of similar letters of allotment but who moved out upon being served with notices to remove unauthorized developments; that the bus park project was complete except that the suit property has been left standing out in the middle like an island as a result of this dispute. The witness admitted that, on his instructions the appellant's developments on the suit property was demolished.

The Works Officer for the 1st respondent, **Joseph Taura** testified that he personally took the surveyors to the suit property for purposes of marking its boundary ahead of the construction of the bus park. Once the process of survey was complete, those who had put up illegal structures were given notices to remove them or the structures would be demolished. The witness confirmed that the structure left behind by Telkom Kenya Limited, on the suit property was of a permanent nature; that following the re-planning and vacation of the showground by the exhibitors, the region no longer had a showground.

The final witness for the respondent, **Alfred Mwenda Riunga**, the District Physical Planning Officer raised doubts about the authenticity of the Development Plan relied on by the appellant in his claim of the suit property. Like the other witnesses called by the 1st respondent, he maintained that the property to which the letter of allotment held by the appellant relates is about 7 – 8 kilometers from the suit property.

The trial court (**Omondi, J.**) considered evidence by the parties as summarized above and made the following findings of fact. The appellant had a title to the suit property while the 1st respondent did not have any form of title, except a letter of allotment; that the issue before the court was not for the latter to prove its ownership of the suit property but for the appellant to prove that he is its lawful owner; that only after proof of his ownership of the suit property would the question of compensation arise; that the deed plan relied on by the appellant did not specify the actual location of the suit property; and that the letter of allotment issued to the appellant does not relate to the suit property. The learned Judge then concluded that, for these reasons, even the protection of **Section 23** of the Registration of Titles Act was not available to the appellant, stating as follows;

> ***"Having visited both the showground and the Sabaki Squatter Settlement Scheme, there is no denying that by their very locations, the two places cannot be confused for each other …. It is clear to me that the letter of (the then Town Clerk) allotment does not relate to the area within the showground but the Sabaki Squatter Scheme …. The document of title does not speak for itself as it does not specify whether the plot is at Sabaki or at the showground. The allotment letter refers to a different location and the question remains exactly where does LR No. 10899 lie? …. There is reasonable probability suspicion (sic) that given his position in the show committee, the plaintiff may have used knowledge of existence of unregistered interest to defeat it by ensuring his own registration, but that does not have a lot of bone on it."***

On the other aspects of the case the learned Judge found that as a matter of fact the structure on the suit property was left behind by Telkom Kenya Limited; that the appellant failed to present evidence to show how he constructed the structure; that if indeed the appellant built the structure he was expected to produce evidence of building material purchased, the name of the contractor and architectural drawings. The learned Judge, for these reasons, held that the appellant merely took over the structure left by Telkom Kenya Limited; that this notwithstanding the 1st respondent recognized the fact that during the period in question the development on the property was under the use of the appellant and that is why the notice for removal was directed at him. Consequently under **Section 30** of the Physical Planning Act the court held, the 1st Respondent was required to give the appellant 90 days' notice and not the 7 they gave. It followed that the demolition based on that notice was flawed and unlawful and the appellant, the trial court found, was entitled to compensation. But considering this fact alongside the fact that there was no evidence that the appellant constructed the demolished structure, the learned Judge awarded him only Kshs.100,000 in general damages and dismissed the claim for special damages. The learned Judge, however exonerated the 2nd respondent of any wrongdoing and dismissed the claim against it. She awarded ½ of the costs to the 1st respondent.

The appellant now brings this appeal against the entire decision of the High Court on ten grounds which were the subject of written submissions filed by learned counsel for the appellant and the 1st respondent as directed by court. Although when the Court gave directions on the disposal of this appeal as aforesaid, the 2nd respondent was represented by its foreman, **Mr. Lawrence Ondimu**, the 2nd respondent did not file submissions as directed.

The appellant has complained in grounds 1, 2 and 7 of the memorandum of appeal that the learned Judge failed to determine issues No. 2 and 10 which were framed and agreed by the parties. Those issues sought a determination as to whether the appellant was the registered grantee of the suit property and whether the suit property was arbitrarily disposed of. That failure, according to the appellant had the effect of leaving the two issues undetermined, hence, in his view the suit was not fully disposed of. In other words, the learned Judge failed to conclusively determine the question of ownership of the suit property.

In ground 3, the appellant contends that the learned Judge placed reliance on secondary evidence by allowing the 1st respondent to present in evidence copies of documents whose authenticity could not be established.

The appellant was also aggrieved, in ground 4, by the manner the learned Judge framed and considered

extraneous issues. That she failed to find that there was evidence in the form of photographs of the construction by the appellant of the demolished structures; that there was no evidence that the demolished structure was that left behind by Telkom Kenya Limited; and that the issue of where the suit property was located was an extraneous issue.

In ground 5 the appellant submitted that the learned Judge was in error for failing to enter judgment in his favour based on the admissions and acknowledgment by the 1st respondent's witnesses that his letter of allotment was genuine, thereby recognizing the appellant as the registered owner of the suit property; and that the 1st respondent also failed to prove that it owned the suit property. Linking this ground with ground 6, the appellant submitted that on the evidence, the learned Judge failed to find that the 1st respondent trespassed on the former's property. The only complaint against the 2nd respondent was that it failed to ascertain the site for the rehabilitation of the bus park and instead unlawfully entered the appellant's private land. As such the learned Judge was in error to absolve it from blame.

Ground 8 challenged the failure by the learned Judge to appreciate the judicial import of the sanctity of title after the respondents failed to impeach the appellant's title to the suit property on account of fraud.

The nineth ground questioned the participation of **J.A.B. Orengo**, Advocate in the proceedings before High Court. It was submitted that J.A.B. Orengo, **Advocate** filed both the notice of appointment of advocate and memorandum of appearance. However, the submissions before the High Court were filed by J.A.B. Orengo **Advocates**, a firm of advocates as opposed to an individual advocate, J.A.B. Orengo who had filed notice of appointment and memorandum of appearance; that without a notice of change of advocates, the learned Judge allowed a stranger to participate in the proceedings before her; that in any case it is a matter of public knowledge, and the Court ought to have taken judicial notice that J.A.B. Orengo, advocate, was in November 2010 a Minister for Lands and therefore a public servant who could not be in private practice of the law as a person.

Finally, submitting on ground 10 the appellant faulted the learned Judge for failing to award costs to him even after having found in his favour on the question of unlawful demolition.

Responding to these submissions the 1st respondent urged the court to dismiss the appeal arguing that the learned Judge, with finality and conclusively determined the issue of ownership of the suit property after resolving the conflicting evidence on where the suit property was located. It was further submitted that the burden was on the appellant to prove that he was the registered proprietor of the suit property and not to rely on the weakness if at all of the 1st respondent's title. On the secondary evidence in the form of photocopies, the 1st respondent's response was that such secondary evidence was not specified and that if they existed the appellant did not show how the court's reliance on them aggrieved him. The 1st respondent has further denied having made any admissions in its pleading or evidence; that the appellant failed to prove his claim against the respondents and therefore the trial court was in order to dismiss it.

On the question of representation it was submitted that this ought to have been raised *in limine* and ventilated fully and that the irregularity, if any did not vitiate the proceedings.

It is our cardinal duty as the first appellate court to approach this appeal by way of a retrial, which duty dictates that we must reconsider the evidence, evaluate it and draw our own independent conclusions, bearing in mind that we neither heard nor saw the witnesses. In performance of that duty we are also not bound to accept the trial Judge's finding of fact if we are satisfied that the Judge did not take into consideration relevant matters or took into account irrelevant matters. See **Selle & Anr** v **Associated Motor Boat Co. Ltd & others** (1968) EA 123.

In our own estimation of the matter the sole substantive question raised in this appeal is whether the learned Judge's finding regarding ownership of the suit property was in accord with both the law and evidence, of course bearing in mind that it is expressly conceded that on the instructions of the 1st respondent the development on the suit property was destroyed. The appellant in his plaint made a claim against the respondents that;

> ***"4. At all material times relevant to this suit, the plaintiff is the registered proprietor or grantee of L.R. No. 10899 situate within the municipality of Malindi (Hereinafter referred to as the "suit premises").***
>
> ***5. On or about the 13th May 2005, the defendants jointly and severally or the 1st defendant thereof, authorized, instructed, mandated and/or caused it's agents, officers, servants, employees or associates to enter upon the suit premises without any lawful excuse, order or justifiable reasons, consequently causing or allowing loss and damage to the plaintiff's property and thereby demolishing or destroying the plaintiff's residential premises."***

Save for the fact that no specific claim was made against the 2nd respondent in the entire plaint, it is clear that the appellant specifically stated that he was the registered owner or grantee of the suit property identified as L.R. No. 10899 and situate within the then Municipality of Malindi. The uncontroverted evidence is that that property is the one on which the house destroyed by the 1st respondent stood. It is equally true that that property was located within the former A.S.K. Malindi showground where the bus park was subsequently constructed. The basis of the appellant's claim is a letter of allotment issued on behalf of the Government of Kenya by the Commissioner of Lands and dated 30th October 2001. The property in respect of which it was issued is described as "*SABAKI SQUATTER UPGRADING UNS. PLOT NO. 49 MALINDI MUNICIPALITY*". It is further identified by a red mark in development plan **No. 55/MLD/5/2001** attached to the letter of allotment. The letter of allotment was issued and was infact issued subject to the Government Lands Act (Cap 280), while title was to be issued under the Registration of Titles Act (Cap 281) – both have been repealed following the enactment of the Land Registration Act, 2012.

In terms of **Section 3** of the Government Lands Act, the President in exercise of a function delegated to the Commissioner of Lands had the power to make grants or disposition of any estate or interest over unalienated Government land for various purposes. Relevant to this appeal, the President through the Commissioner could offer unalienated Government Land (plots) to individuals who meet the general terms and conditions of the advertised auction sale. See **Section 3(a)** explanation **(9)**. Unalienated Government land is defined in **Section 2** to mean Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued letter of allotment.

It appears to us that two activities were taking place at the same time in 2001. There was the re-planning of the Malindi showground and the designing of a squatter scheme also within Malindi. Two separate development plans were drawn for this dual purpose. The plan relating to the showground was developed first – on 12th June 2001. It created 96 subplots whose numbers ranged between

1 – 96. The plan relating to the squatter settlement scheme drawn on 26th June 2001 was divided into seven broad categories, residential, educational, recreational, public purpose, public utility, commercial and transportation. Under recreational purpose were a stadium and a showground. There were two areas earmarked for residential purpose marked 0_1 and 0_2. The former (0_1) had several plots numbered between 248 and 469, while under 0_2 were more residential plots with numbers running between 18 and 107. Plot No. 49 therefore fell within 0_2.

It is also clear that according to the two development plans two distinct plots bearing No. 49 were created, both in the squatter scheme for residential purpose as well as in the showground. The decision of the trial court turned on the question of where exactly plot No. 49, the subject of letter of allotment was located in relation to the suit property. The appellant maintained that it was where his house was demolished, that is within the showground, while the 1st respondent argued that it was somewhere on the way to Sabaki bridge – some 7 – 8 kilometers away from the showground.

On a preponderance of probability the burden was on the appellant to prove that indeed Plot No. 49 was within the "*Sabaki Squatter Upgrading Unsurveyed*" land within Malindi Municipality; that it is the same one as L.R. No. 10899 the subject of the grant. That is the import of **Sections 107, 108** and **109** of

the Evidence Act. It is the appellant who wished the court to believe that he was the lawful owner of the suit property. It cannot be the burden of the 1st respondent to demonstrate that the suit property did not belong to the appellant. Likewise the appellant cannot build his case on the weakness of the respondent's title. He cannot plead *just tertii*. We reiterate the statement of this Court in that;

> "***The council is the owner and can recover the land from the defendant, if indeed it has not divested itself of any part of its title by making a lease …. But the plaintiff cannot attack the relative weakness of the defendant's title by pleading just tertii. The plaintiff can only attack the position of the defendant on the strength of some title of its own. (See the Law of Real Property, by Meggcry & Wade, 4th Ed. pp 1005 - 1009."*** See James Henry Mundiar v Tradewheel (K) Ltd Civil Appeal No. 120 of 1987**.**

The development plan attached to the appellant's letter of allotment, apart from showing the neighbouring plot does not, show, as it should, that it was drawn by the Ministry of Lands & Settlement, the Department of Physical Planning, the area it relates to, the date it was drawn, the scale, the persons who drew and prepared it, the reference number, the signatures of the Director of Physical Planning (certifying) and that of the Minister (approving), the date the signatures were appended and a certificate that the plan was prepared and published in accordance with the requirement of **Physical Planning Act, 1995**. But comparing it with development plan for the proposed re-planning of Malindi showground, we have no doubt that it is merely a copy of that plan depicting only plot numbers and deliberately omitting these other aspects enumerated above. It is such details that would help one to ascertain the location of the parcel and prove the authenticity of the plan. This was a critical factor considering the disputed evidence that Sabaki area where Plot No. 49 is found is some 7 – 8 kilometers from the suit property at the former showground. We bear in mind the evidence of the 1st respondent's surveyor – Caxton Mbaru Kai (DW1) that in contrast to Sabaki Squatter Settlement Scheme, there is also Sabaki Squatter Upgrading. He explained that:

> ***"There is a place known as Sabaki Squatter Upgrading. This is where the old showground (sic) was. It is not the same as Sabaki Squatter Settlement Scheme. It is not one and the same thing."***

It is our view, however, that the copy of letter of allotment issued to the 1st respondent in respect of the showground on 17th July 1995, and the development plan annexed to it, depict the correct position of the showground. It only identified the parcel it related to as "*UNS. SHOWGROUND – MALINDI*". The development plan annexed to the letter of allotment is, by dint of **Section 89(1)** of the Evidence Act presumed to be accurate. The section provides that maps or plans purporting to be the made by the authority of the Government or any department of the Government shall be presumed to have been so made and are accurate. Once more it was the duty of the appellant to show how the "*UNS. SHOWGROUND-MALINDI*" became "*SABAKI SQUATTER UPGRADING – UNS. PLOT NO. 49*". We reiterate our earlier observation that there were two Plot Nos. 49, one in the area reserved for human settlement categorized "*residential"* and another within the showground, we suppose , the one meant to be a stall. It follows that no residential structure could have been developed in an area earmarked for recreational purpose specifically as a showground.

Section 9 as read with **Sections 12** through to **17** of the Government Lands Act only permitted the Commissioner to dispose off public land within a township which is not required for public purpose through an auction after an elaborate procedure of notification in the Kenya Gazette, auction and finally sale to the highest bidder. Having found that the showground area was within a township within the definition in **Section 2**, if (and only if) sub plot No. 49 was alienated to the appellant the onus was on him to prove that he complied with the above procedure. This he failed to do. Even if he proved it, he would only be entitled to Plot No. 49 within the category of "*residential*".

What is our view regarding the appellant's claim to this property (within the former showground)? There is evidence that, as far back as 1998 there were proposals spearheaded by the Trade & Planning Sub-committee of the A.S.K., Malindi to re-plan the showground. The Trade & Planning Committee was

chaired, as we have earlier observed, by the appellant. In 2001 differences began to emerge as reflected in the minutes of the meeting of the main Malindi A.S.K. Committee of 9th January 2001, which was attended by the appellant, where it was noted that there was disquiet between the Municipal Council and the Committee regarding the "*grabbing*" of 2½ acres of the showground by private individuals who had sub-divided it into 16 plots; that those individuals had developed some of these plots. It was at that meeting that the need to relocate the showground to an alternative identified site was mooted for the first time. The most accurate explanation for the re-planning is captured in Minute No. 5, where the Mayor at the time, is recorded as having said;

> ***"….hosting a show in Malindi might not be easy given the current situation. His Worship noted that the showground currently stands on a prime area due to pressure for development and congestion within the town, there was need for relocating the showground. The Municipal Council has been able to identify another site at <u>Sabaki</u> for the showground. Resolutions had been passed and forwarded to the Commissioner of Lands and the council has received authority to re-plan the showground, he said. On the existing structures within the showground, he said the council can work out ways …"*** (Emphasis ours)

This should also explain the origin of the two development plans that were drawn six months after this meeting. It would appear that following these developments, a decision was reached to convert the grounds into a bus park. There was evidence that the area was re-planned for this purpose in August 2001. It is therefore apparent to us that the appellant, in his capacity as Chairman of one of the focal committees of the Malindi A.S.K., was aware of the fact of the relocation of the showground and took advantage to benefit from it. Although **Section 23** of the Registration of Titles Act (repealed) guarantees the sanctity of certificate of title and was before the enactment of **Section 26** of the Land Registration Act taken to be conclusive evidence that the person named therein as the proprietor, was the absolute and indefeasible owner thereof, the appellant's action in the whole matter amounted to misrepresentation, if not outright fraudulent conduct. The learned Judge ought to have been bold enough to declare so instead of blaming the imagined confusion on the anomalies on documents.

The appellant staked a claim to Plot No. 49 SABAKI SQUATTER UPGRADING which is clearly not the same place as the former showground. Using subplot No. 49 of the proposed re-planned showground contained in the Sabaki Squatter Settlement Scheme development plan, the appellant purported to obtain a letter of allotment, annexing development plan that was incomplete. This was in contravention of Part IV of the Physical Planning Act which requires such plans to contain certain basic information such as the fact that it is prepared by the Director of Physical Planning and all the other requirements stipulated in **Sections 24** and **25** thereof, to which we have alluded. He then through his firm, Koliko Enterprises prompted Telkom Kenya Limited to relinquish its interest on the plot for him to take over in choreographed arrangement. In the letter to Telkom Kenya Limited the appellant informed the latter that "*he intended to construct my own structure where your former structure stood*". This was in August 2001. Where did he get the authority in August to construct his structure when from his own evidence the plot was allotted to him in October 2001?

In his own affidavit sworn on 24th May 2005 he relies on a letter addressed to the District Surveyor, Malindi by the Town Clerk asking the former to consider reducing the survey fees for the allotees of plots at **Sabaki Squatter Settlement Scheme** and not the **Sabaki Squatter Upgrading – UNS. plots**. It follows that the grant issued in respect of Parcel No. 10899 within Malindi Municipality, if it relates to the plot at the former showground was a nullity for the reasons stated.

Regarding the demolished structure, no evidence was presented that it was put up by the appellant. The letter of allotment at **Clause 2** of the Special Conditions required the appellant to submit to the local authority within 6 months of the registration of the grant, plans and drawings of the building he intended to erect on the land. All applications for development within the area of a local authority must, by dint of **Sections 30, 31, 32** and **33** of the Physical Planning Act, get approval from the Director of Physical Planning. Indeed it is a criminal offence punishable with a fine not exceeding Kshs.100,000/- or 5 years imprisonment or both, to undertake development within a local authority without such approval. No evidence of such application or approval was present by the appellant. His explanation that they were

destroyed during the demolition is incredible as by his own admission, he made no such application. In cross examination he stated that "*I put up a three bedroomed structure. I did not know that I was required to seek approval from Municipal Council of Malindi and I did not seek any approval ...*"

Section 30(4) (b) of the Physical Planning Act which requires a notice of 90 days before a local authority could remove developments made without approval of the director, only protects lawful landowners. Although the notice in question cited Section 30 aforesaid, in our view the correct provisions in the circumstances ought to have been **Sections 38** and **39** (Enforcement Notice) which allowed the council to give a notice, the length of which it was free to specify in the notice itself, to any person, a developer, owner or to an occupier of land who without permission carries out any development, before demolishing such development.

As a matter of fact the showground reverted and became unalienated Government land whose unlawful occupation would under **Section 142** of the Government Lands Act attract a criminal sanction in the form of a fine not exceeding Kshs.100,000/-. Without proof that the appellant expended funds to put up the demolished structure coupled with the evidence that the property on which the structure stood was illegally acquired, we come to the conclusion that the learned Judge erred in awarding to the appellant Kshs.100,000/- for what she considered to be insufficient notice. That finding and award are hereby set aside as they were arrived at in error. Apart from this single misdirection we cannot find any other error in the learned Judge's findings on the other aspects of the dispute.

The question of representation of the 1st respondent by J.A.B. Orengo Advocate and J.A.B. Orengo Advocates is of no moment and cannot change our overall decision in this appeal. The result is that this appeal fails and is dismissed with costs to the 1st respondent. We also award costs in the High Court to the 1st respondent.

Dated and delivered at Mombasa this 24th day of September, 2015

ASIKE-MAKHANDIA

…….

JUDGE OF APPEAL

W. OUKO

…….

JUDGE OF APPEAL

K. M'INOTI

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR