



REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 164 of 2004

SATRYA INVESTMENTS LIMITED.....APPELLANT

AND

J. K. MBUGUA.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Aganyanya, J.)
dated 13th February, 2002

in
HCCC No. 762 of 1995

consolidated with

HCCC No. 587 of 1995 & HCCC No. 2716 of 1995)

JUDGEMENT OF THE COURT

This appeal arises from three suits that were consolidated and heard together regarding the ownership of the parcel of land previously known as L.R. No. 1870/IX/54 and now L.R. No. 2009/12132 measuring approximately 0.0341 Ha in Westlands, Nairobi (*hereafter "the suit property"*).

High Court Civil Case No. 587 of 1995 was filed by the present respondent against the appellant seeking among other orders, a permanent injunction to restrain the appellant from evicting him from the suit property. **High Court Civil Case No. 762 of 1995** was filed by the present appellant seeking an order for eviction of the respondent from the suit property and a permanent injunction to restrain him from re-entering or interfering with the suit property. Lastly **High Court Case No. 2716 of 1995** was filed by the current respondent against the Attorney General and the appellant seeking declarations that the grant of the suit property to the appellant was illegal, unlawful and fraudulent and ultra vires the Registration of Titles Act, Cap 281 Laws of Kenya and that on account of the respondent's long possession, he was entitled to a leasehold of the suit property. The consolidated suits were heard and determined in **High Court Civil Case No. 762 of 1995**.

The respondent died on 22nd December, 2006 during the pendency of this appeal. By a consent letter dated 5th August 2008 and filed in Court on 14th August, 2008, he was substituted by the administrators of his estate, namely **FLORENCE WAIRIMU MBUGUA**, **GRACE WANJIKU MBUGUA**, **PETER CHEGE KIARIE** and **SYLVIA MURUGU MBUGUA**.

In its plaint dated 9th March, 1995 in **High Court Civil Case No. 762 of 1995**, the plaintiff pleaded that it was the sole registered proprietor of the suit property as leasee for 99 years from 1st July, 1993. The grant in favour of the plaintiff under the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed) was registered on 24th June, 1994. The plaintiff further pleaded that its attempts to take possession of the suit property were thwarted by the respondent, who did not have any legal claim to the suit property. The plaintiff therefore prayed for orders that the respondent vacates or in the alternative be evicted from the suit property and a permanent injunction to restrain the defendant and his agents and servants from re-entering or interfering with the suit premises.

By a defence dated 10th May, 1995, the respondent pleaded that he was in occupation of the suit property, having been granted a temporary occupation license by the City Council of Nairobi on 9th January, 1979 at a monthly rent of Kshs.7,000 and on 4th October, 1979, a 99 year lease from 1904 for a consideration of Kshs 117,500. The respondent further pleaded that due to the above dealings with the City Council of Nairobi, his occupation of the suit property, the doubtful legal personality of the appellant and other pleaded facts, the grant and registration of the appellant as proprietor of the suit property was fraudulent.

In its reply to defence dated 16th May, 1995, the appellant pleaded that it had acquired the grant and registration of the suit property as a bona fide purchaser for value without notice having purchased the same from the original grantee, a **Mr. Stephen Kipkering Sugut** and that the respondent had never acquired a valid leasehold over the suit property since the City Council of Nairobi did not have any title to or interest in the suit property that it could pass to the respondent. The allegations of fraud were also denied.

On 13th February, 2002, the High Court, (*Aganyanya J, as he then was*) dismissed the appellant's suit (*HCCC No. 762 of 1995*) and allowed the respondent's suit (*HCCC No. 587 of 1995*). Each party was ordered to bear its costs. That judgment provoked the present appeal.

Although the memorandum of appeal lists 8 grounds of appeal, the grounds could be reduced to four as follows:

1. ***That the court erred in failing to appreciate that the appellant had lawful and indefeasible title to the suit premises;***
2. ***That the court erred in disregarding the law and the evidence in finding in favour of the respondent who had no legal title whatsoever to the suit property;***
3. ***That the court erred in finding for the respondent when no fraud was proved against the appellant in order to vitiate its title to the suit property; and***
4. ***That the court erred by taking into account irrelevant considerations and thereby reaching a wrong decision.***

Before delving into the grounds of appeal, we need to dispose of an objection taken by **Ms Nduta**, learned counsel for the respondent. When **Mr. Nyawara**, learned counsel had finished arguing the appellant's case and Ms Nduta was called upon to argue the respondent's case, she stated that the appeal was filed out of time and should be struck out. She added that the appellant had earlier filed an application for extension of time, which was dismissed by a single judge. Subsequently it had referred the matter to the full Court, but withdrew the application before it was heard and determined. Mr. Nyawara conceded that he had filed the application for extension of time which was dismissed and that he had withdrawn the appellant's reference to the full Court. He explained that he took that course of action after realizing that the appeal was filed within time. In any event, he argued, it was too late in the day for the respondent to raise the objection.

The judgment and decree appealed from is dated 13th February, 2002. The Notice of Appeal was filed on

22nd February, 2002, while within 14 days as required by **rule 75(2)** of the Court of Appeal Rules. On the same day the appellant applied for certified copies of the proceedings and duly copied the request to the respondent's advocates, thus complying with **rule 82**. The certificate of delay in the record of appeal shows that the proceedings were collected on 27th May, 2004. The record of appeal was filed on 29th July 2004. The appeal was therefore filed 63 days after collection of the proceedings, meaning the appeal was filed 3 days out of time.

The proviso to **rule 84** required the respondent to have raised the objection that he was raising within 30 days of the service of the record of appeal. The rule precludes the raising of this objection after 30 days of service. The respondent was alive to the question of whether the appeal was filed within the prescribed time, having participated in the two applications for extension of time; yet he took none of the actions available under **rule 84**. As we have pointed out, the respondent did not raise this issue until after the appellant had finished arguing its appeal. Under **rule 84**, the respondent's objection has no merit and is overruled.

The first two issues for determination in this appeal may be conveniently addressed together i.e. whether the appellant had legal and indefeasible title to the suit property and whether the respondent had any legal title to the suit property.

The appellant called only one witness in the High Court, **Dipak Anand**, one of its directors. His evidence was that the suit property was purchased by the appellant from a **Mr. Stephen Kipkering Sugut** on 18th March, 1994. On 22nd July, 1992, Mr. Sugut applied in writing to the former President of the Republic of Kenya to be allocated the suit property, which application was granted on 12th September, 1992. Vide a letter of allotment dated 22nd July, 1993 the Commissioner of Lands allocated the suit property to Mr. Sugut. Subsequently Mr. Sugut applied to the Commissioner of Lands for consent to transfer the suit property (erroneously referred to in the proceedings and judgment as consent from the Land Control Board), which consent was given vide a letter dated 1st March, 1994. It was then that by a transfer dated 18th March, 1994 that Mr. Sugut transferred the suit property to the appellant for Kshs.1,200,000, to the intent that the grant in respect thereof would be issued directly to the appellant. On 4th July 1994, grant No. 62591 was issued under the Registration of Titles Act, Cap 281 Laws of Kenya in respect of the suit property in the name of the appellant. When the appellant attempted to take possession of the suit property, it met stiff resistance from the respondent, ending up in the suit before the High Court.

For his part, the respondent's evidence, as far as it is material, was that he owns a property next to the suit property and that in 1973 he started using the suit property to repair motor vehicles. By a letter dated 9th January, 1979, he was granted a temporary occupation license by the City Council of Nairobi to occupy the suit property. By another letter dated 4th October, 1979, the Council advised the respondent that it had approved that its interest in the suit property be sold to him for Kshs.117,200 upon stipulated terms and conditions. The respondent duly paid the said sum of Kshs.117,200 on 8th October, 1979 and continued making various other payments to the Council.

On 25th April, 1986, the Nairobi City Commission (*which had by then temporarily replaced the City Council of Nairobi*) wrote to the Commissioner of Lands advising him that it had resolved that the suit property be sold to the respondent. The letter concluded as follows, ***"it has now transpired that in view of the nature of this open space the Council/Commission never had a transferable title. Consequently it would be highly appreciated if you could arrange for a new grant to be issued either to the Nairobi City Commission or direct to Mr. J. K. Mbugua"***.

It would appear that the Commissioner did not act as requested and on 9th September, 1986, the City Commission again wrote to the Commissioner of Lands stating that the suit property ***"is vested in the City Commission but it appears that no title has been issued to us"***. The Commission again requested the Commissioner of Lands to ***"let us have its title document so that we can make the necessary arrangements regarding the allocation of the plot to Mr. J. K. Mbugua without further delay"***.

At the trial, the respondent, on cross examination, told the court that he had not obtained any lease in respect of the suit property and that he knew the Council had no title to the suit property though they continued to demand rent and rates from him. Two witnesses DW1 and DW2 testified for the respondent that they were his tenants on the suit property where they were carrying on business from 1980 and 1985 respectively.

The learned trial judge resolved the competing claims of the appellant and the respondent to the suit property by holding that the agreement between the appellant and Mr. Sugut was entered into on 18th March, 1994. As of that date the appellant did not exist as a legal entity, having been incorporated on 17th June 1994. Hence, Mr. Sugut transferred nothing, let alone the suit property to the appellant. As regards the respondent's claim, the learned judge found that from the evidence the suit property was vested in the City Council of Nairobi and that the Council was willing and did indeed allocate the suit property to the respondent **"but the Commissioner of Lands did not release the documents to the Council as requested"**. The learned judge concluded that the Commissioner of Lands was not vested with the title to the suit land to allocate it to the appellant and that the allocation of the suit property to Mr. Sugut came "after the proper authority, Nairobi City Council" had already validly allocated the respondent the same plot seven years earlier.

Mr. Nyawara attacked the judgment relying on **section 23(1)** of the Registration of Titles Act which provided 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"

He further relied on the ruling of the Court of Appeal in *Joseph Arap Ng'ok vs. Justice Moiwo ole Keiwua* (Nairobi Civil Application No. 60 of 1997, unreported), where the Court stated:

"Section 23(1) of the Act [RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be challenged 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 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 will be placed in jeopardy"

In *Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) vs. J. B. Martin Glass Industries & 3 Others*, Mombasa Court of Appeal **Civil Appeal No. 130 of 2003**, the appellant was challenging a decision of the High Court that had struck off his suit for being frivolous, vexatious and an abuse of the process of the court, because his claim was based on a prior occupation license as against the respondent's later registration under **section 23** of the Registration of Titles Act. In dismissing the appeal, the Court of Appeal observed:

"The temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The appellant does not possess title under the Act. It is indeed settled law in Kenya that a temporary occupation license to occupy Government land is not sufficient to create or transfer title to the grantee or his personal representative."

We find that the learned judge erred in totally disregarding the appellant's title to the suit property under the Registration of Titles Act and in particular the provisions of **section 23**. The learned judge overlooked the fact that the City Council of Nairobi never held any title to the suit property which it could validly allocate or transfer to the respondent, and even if it had any title, at most what it had given the respondent was a temporary occupation licence which could not override the appellant's title under the Registration of Titles Act. A breach of the law cannot entitle or give an advantage to an individual. To deprive a

person of his title must be done in accordance with law and procedure.

The next issue for consideration is whether any fraud was proved against the appellant so as to vitiate its title to the suit property under the Registration of titles Act.

Fraud was pleaded in paragraph 4 of the defence dated 10th May, 1995 as follows:

“4. The defendant avers that the plaintiff has acquired grant and registration to LR No. 209/12/32 fraudulently for the following reasons:

(a) The defendant was granted a temporary occupation licence (TOL) on 9.1.79 for a monthly rent of Shs.7,000/- for land parcel LR 1870/1X/54.

(b) The defendant was later on 4.10.79 awarded a lease of the said premises by the Nairobi City Council for a period of 99 years effective from 1904 and the defendant duly paid the requisite fees of Shs.117,500/- and to wrap it up, the said Council did on 15.2.85 promise to release the leasehold documents for the said property.

(c) The defendant complied with all the requirements as to payments and has been in possession and occupation for the last sixteen (16) years.

(d) The defendant has partially developed the suit premises and consequently established a business enterprise thereon for the last sixteen (16) years.

(e) The defendant learnt sometimes in 1993 that the Nairobi City Council was intending to dispose off the suit premises to another 3rd party and the defendant lodged a suit in the High Court of Kenya viz Nairobi HCCC No 5728 of 1993 J. K. Mbugua vs. Nairobi City Council to which this Honourable Court granted an injunction restraining the said Council from transferring plot No LR. 1870/1X/54 to one ARAP MARITIM or any other person, organisation or company other than the defendant herein (J.K. Mbugua) until the final determination of the suit; which orders are still subsisting.

(f) The defendant later learnt that on or 24th June, 1994 the commissioner of lands with the connivance of the plaintiff purported to circumvent the court injunction by purporting to grant the plaintiff herein Satya Investments Limited a new grant of all that parcel of land known as LR. No. 209/12132 measuringly (sic) 0.0341 ha Westlands which purported to expunge from the register the defendant's grant known as LR/1870/1X/54.

The appellant responded to the alleged fraud in paragraph 3 of its reply to defence dated 16th May, 1995. The said paragraph stated as follows:

“3. In the alternative and without prejudice to the foregoing generality of paragraph 2 above, the plaintiff replies to each and every allegations contained in paragraph 4 of the defence as herein below:-

(a) The plaintiff denies the allegations contained in paragraph 4 of the Defence and avers that it (the plaintiff) acquired the grant and registration of the same in respect of L.R. No. 209/12/32 as a bona fide purchaser for value without notice having legally purchased the same from the original grantee one Stephen Kipkering Sugut who was granted the same by the President of Kenya under the powers conferred to him by law to award such grant.

(b) The defendant (sic) denies the allegations contained in paragraph 4(a), (b), and (c) combined of the defence and avers that the defendant is a mere speculator and had never acquired any valid leasehold as alleged and if he did acquire any leasehold, which is denied, the Nairobi City Council had no authority to grant the same as the said Council did not have any title or any interest at all in the said land and therefore could not pass any valid title or grant.

(c) The plaintiff denies the contents of paragraph 4(d) of the defence and more particularly denies that the defendant has developed the suit premises or established any business enterprises thereon at any given time and avers further that the suit premises is still vacant possession.

(d) The plaintiff denies the contents of paragraph 4(e) of the defence more particularly that he instituted civil suit No. HCCC No. 5728 of 1993 against Nairobi City Council as the cited case number was instituted by one Jane Wanjiru against City Council of Nairobi, and even if the defendant did institute such suit the same was of no legal consequence by reason of paragraph 3(b) above, that is to say Nairobi City Council was not the legal owner of the suit property and further that the Commissioner of Lands was never served with the said injunction and was/is therefore not aware of the said orders.

(e) The plaintiff denies the allegations contained in paragraph 4(f) of the defence in toto and more particularly denies that the Commissioner of Lands connived with the plaintiff to circumvent the court injunction and purported to grant a new grant to the plaintiff and puts the defendant to strict proof thereof.”

The plaintiff's evidence, as far as the allegations of fraud are concerned, was that he did not know the plaintiff or Mr. Sugut. The **High Court Civil Suit No. 5728 of 1993** in which an order was allegedly issued to stop the transfer of the suit property was against the City Council of Nairobi, and the appellant, Mr. Sugut and the Commissioner of Lands were not parties to the suit. We have already held that the City Council of Nairobi never held any title to the suit property which it could validly allocate or transfer to the respondent or to any other person for that matter.

The learned judge never made any finding of fraud on the part of the appellant as pleaded in paragraph 4 of the plaint. To vitiate the title of a registered proprietor under the Registration of Titles Act, it must be established that there was fraud or misrepresentation to which the proprietor was a party. From the evidence adduced before the learned judge, we do not find any evidence of fraud or misrepresentation to which the appellant was a party.

The learned judge was certainly not impressed by the fact that the transfer of the suit property from Mr. Sugut to the appellant was dated 18th March, 1994 whilst the appellant was incorporated on 7th June, 1994. The plaintiff's evidence was that prior to incorporation as a limited liability company under the Companies Act, the appellant was operating as a partnership. As we understand it, the transfer between Mr. Sugut and the appellant was to facilitate issuance of the grant in respect of the suit property directly in the name of the appellant. The critical issue therefore is whether, on the date the grant in respect of the suit property was registered in the name of the appellant under the Registration of Titles Act, the appellant was incorporated. The evidence on record shows that the appellant was incorporated on 7th June, 1994 and the grant in its favour registered on 4th July 1994. As of the date of registration of the grant, the appellant had a legal personality. In **Richard Akwesera Onditi v Kenya Commercial Finance Company Limited [2010] eKLR (Court of Appeal Civil Appeal 329 Of 2009)**, this Court stated that **“fraud is a serious accusation and requires a very high standard of proof, certainly above mere balance of probability”**. And in **Gudka vs. Dodhia, Civil Appeal No. 21 of 1980**, the Court expressed the same view that **“fraud is an allegation that must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities.”**

The last issue raised by Mr. Nyawara was that the learned judge took into account irrelevant considerations thereby reaching a wrong decision. This complaint was directed at the following words in the judgment:

“It is common knowledge that land and plot grabbers and /or speculators have stopped at nothing to acquire and sell plots, even Government houses, which are occupied purporting that they are either vacant or condemned. Sugut is one such person because in the face of correspondence between the Commissioner of Lands, the City Council and the defendant over the suit plot dating as far back as 1979 it cannot be true to say that in 1993 this plot was vacant. It is high time land grabbers and/or speculators are told that they have enriched themselves enough through such loot and caused innocent

people a lot of suffering and courts cannot continue to condone such practices when evidence emerges that the acts, as in our present case, were all wrongful and unlawful”.

This Court ***in Benjoh Amalgamated Ltd & Another vs. Kenya Commercial Bank Ltd*** (Civil Appeal No. 239 of 2004) stressed that trial judges must limit their comments to matters relevant to the case and to their decision on the issues raised. (See also ***Sheikh t/a Hase Hauliers vs. Highway Carriers Ltd (1982) KLR 306***).

In the present case the fact of past irregular and illegal allocation of public land in Kenya cannot be denied. The national outcry against malpractices touching on public land led to the fundamental changes brought about by Chapter Five of the Constitution of Kenya, 2010 and the virtual overhaul of legislation on land ante-dating the Constitution. Whilst the learned judge was justified to express the above sentiments, nevertheless there was no running away from the provisions of **section 23** of the Registration of Titles Act and the fact that in law, the City Council of Nairobi had no valid title over the suit property that it could lawfully transfer to the respondent.

Ultimately, this appeal is allowed with costs to the appellant. The respondent shall vacate the suit property within forty five days. Failure to do so the respondent shall be evicted.

Dated and delivered at Nairobi this 22nd day of March, 2013

D. K. MARAGA

.....
JUDGE OF APPEAL

M. WARSAME

.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR