



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI**

**CIVIL APPEAL NO. 206 OF 1998
BETWEEN**

**NJILUX MOTORS LIMITED.....APPELLANT
AND
KENYA POWER & LIGHTING COMPANY LIMITED
NAIROBI CITY COMMISSION.....RESPONDENTS**

**(Appeal from the Judgment of the High Court of Kenya (Mr.
Justice Mbogholi-Msagha) delivered on 21st May, 1998**

in

**H.C.C.C. NO. 1887 OF 1994
as consolidated with
H.C.C.C. NO. 892 OF 1993)

JUDGMENT OF SHAH J.A.**

Nairobi City Council (the Council) was granted a ninety-nine year lease by the Government of Kenya, from the 1st day of September, 1932, in respect of two hundred and twenty three acres of land in what is commonly known as the City Park, in Nairobi. The reference number of the said land is L.R.209/6559 and the boundaries thereof are delineated on land survey plan number 82873 deposited in the Survey Record Office at NaTihreo bis.aid grant limited the user of the said parcel of land only for open space, sports grounds and other municipal purposes to be approved by the Commissioner of Lands.

A portion of the said leased land falls on the corner of Forest Road and Limuru Road, both major roads, in Nairobi. By its letter of 20th May, 1992 the Council issued a temporary occupation certificate in respect of that corner property (the suit land) to an entity referred to as "Njilux Motors". Such licence was issued to Njilux Motors on a temporary basis terminable by one month's notice on either side. The user of the suit land as permitted by the Council was for "parking of new and second hand vehicles". It is common ground that at that time an entity known as Njilux Motors Limited was not in existence. Such a company was in fact not registered until 25th August, 1992. By its letter of 13th August, 1992 the Council, through its then Town Clerk Mrs. Z. M. Wandera, approved an application by a firm known as Njima Investments, for allocation to the firm of plot L.R. 209/11590 (original 209/6559/R) (the suit land) for the residue of the Council's lease less last three days thereof. The user approved for the suit land was commercial-cum-residential. The stand premium demanded was Shs.140,000/= and the provisional annual rent was Shs.5,000/=. Njima Investments was to pay on demand all conveyancing and registration charges, survey fees as well as development charges. Njima Investments paid the stand premium of Sh140,000/= on ground that at the material times Njima Investments was a sole proprietary concern, the sole proprietor being Mr. Peter Murigi Njirwa. It is also common ground that Njilux Motors Limited is a Limited liability company, of which Mr. & Mrs. Njirwa are the directors/shareholders.

On the 20th day of January, 1993 the Government of Kenya granted unto Kenya Power & Lighting Company (KP & L) a ninety nine (99) year lease in respect L.R. NO. 209/11590 (which is the suit land) and issued, under the Registration of Titles Act, Chapter 281, Laws of Kenya (RTA), the relevant (title) grant.

The grant issued to KP & L was primarily for erection of a power sub-station as to enable the grantee to serve the areas adjacent to the suit land with better power facilities. Effectively therefore the leasehold title to the suit land has been granted to the Council as well as to KP & L. On 29th May, 1994 KP & L filed a suit against Njilux Motors Limited (the appellant) seeking the following reliefs:-

1. An order that the defendant do forthwith vacate L.R. No.209/11390 and deliver possession thereof to the plaintiff;
2. Damages or mesne profits until possession is delivered up;
3. Costs.

The appellant filed a defence to the claim of KP & L. The substratum of that defence is that appellant was in possession of the suit land by virtue of an agreement made between it and the Council which offered to lease the suit land to the appellant; that KP & L was involved in a conspiracy with the Council to deny the appellant the use and quiet enjoyment of the suit land by fraudulently reallocating plot No. 209/115390 (the suit land) to KP&L; that it had therefore filed a suit against both, KP & L and the NCC.

The appellant in fact claimed ownership of suit land and added that it had substantially developed the said property. It added that there was no formal surrender of the suit land to the Government of Kenya as required by law.

On or about the 23rd day of February, 1993 the appellant had brought a suit against the Council and KP&L claiming the following reliefs against both of them jointly and severally:

- "(a) A declaration that on the true construction of the said agreements and the events which have happened, the plaintiff to occupy and remain in possession of the said plot L.R.209/11590 (the suit land)
- (b) A declaration that the purported reallocation of the said plot to the 2nd defendant is fraudulent (sic), illegal and therefore null and void.
- (c) An injunction to restrain the Defendants by themselves, their agents servants or otherwise howsoever from evicting, barring or in any other manner, interfering with the plaintiff's quiet occupation of the said plot.
- (d) Costs of this suit."

The Council filed a defence to the claim by Njilux Motors Limited denying any dealings with the appellant and pleading, in the alternative, to the effect that it had no capacity to create any interest in the suit land in favour of the appellant save for purposes specified in the special conditions of the grant and that special conditions numbered 3 and 4 of the grant to it, namely, holding and using the land for public purposes and facilities, was not the purpose for which the appellant was using the suit land. The Council stated that the appellant was in illegal occupation of the land. I must consider the effect of such a defence. The Council in denying any dealings with the appellant may be justified but it is not certainly justified in saying that the appellant is in illegal occupation of the suit land vis-a-vis the Council. It was the Council which allocated the suit land to Mr. Njirwa (not the appellant). It was the Council which accepted licence fees from the appellant. It was the Council which authorised M/s Njilux Motors, to use the suit land for parking of new and second hand vehicles. It was the Council which authorized Njima Investments (Mr. Njirwa) to use the suit land for commercial-cum-residential purposes. It does not lie in the Council's mouth, as Mr. Gautama has rightly pointed out, to say that occupant is using the suit land for purposes

other than those prescribed in the special conditions of the grant. Special conditions 3 , 4 and 5 in the grant are as follows:

"3.The land and buildings shall only be used for open space park sports ground and any other municipal purposes to be approved by the Commissioner of Lands in writing.

4.The grantee shall not sub-divide the land without the prior approval of the Commissioner of Lands.

5.The grantee shall not transfer or part with the possession of the land : subleases of the parts thereof shall require prior consent and approval of the terms and conditions in writing by the President."

I have set out the said limiting conditions for the reasons that Mr. Gautama was at pains to show that any breach or breaches of the special conditions by the council does not affect the appellant because such breaches do not make the assignment of a portion of the alienated land unlawful or ineffective per se unless the lease contains a condition for re-entry on breach of covenant. There is no provision in the grant for re-entry by the Commissioner of Lands if the Council breaches any of the special conditions, he urged. It is true there is no specific provision for re-entry in the grant. Special condition numbered 8 of the grant provides:

"8.The President or such person or authority as may be appointed for the purpose shall have the right to enter upon the land and lay and have access to water mains service pipes and drains telephone or telegraph wires and electric mains of all description whether overhead or underground and the grantee shall not erect any building in such a way to cover or interfere with any existing alignments of main or service pipes or telephone or telegraph wires and electric mains."

The right of entry is not what is known as right of reentry granted for breach of a condition or covenant. It is only a right to lay and have access to do the things mentioned in the said condition. What the Commissioner of Lands (the Commissioner) ought to have done was to forfeit the lease after having given due notice calling upon the Council to make good the breach by taking possession of the suit land. The Commissioner did not do so. In fact he took no action whatsoever as regards the glaringly obvious breaches of the conditions of the grant.

Mr. Gautama says that any breaches of conditions on the part of the Council is not a matter which affects the appellant. It is the Council which is the culprit, he says. But is that so? The grant to the Council is duly registered at the Lands Office, in Nairobi as number I.R. 21112/1 as from 16th day of March, 1966. Such registration is deemed to be a notice to the whole world and it is incumbent upon any intending sub-lessee to inquire, first, the conditions upon which the land is held by the grantee before he purchases any leasehold interest of any portion of that land and if he finds that the user he wishes to adopt for the land is not available, he ought to ask questions. Mr. Gautama relied upon a passage in the judgment of this Court in the case of Nairobi Permanent Markets Society & Others vs. Salima Enterprises & Others Civil Appeal No. 185 of 1997 (unreported), which passage reads:

"If the Council had breached any condition of the grant, that was a matter between the Commissioner and the Council. The appellants do not have any recourse against the council or against the Commissioner in that respect. Also if the lease in favour of the Company was not properly executed, the appellants cannot base this action upon the irregularity unless of course any legal right or interest enjoyed by them has been prejudiced."

That case turned, however, primarily on the fact that the appellants therein had prayed for a declaration that a lease registered in favour of the company was unlawful both in respect of grant thereof and registration thereof. In the instant case there is no sub-lease registered in favour of the appellant. Nor is there any allocation of the suit land to the appellant. The irregular allocation was to Mr. Njirwa who is not the same entity as the appellant. Mr. Njirwa himself took no action either to have his lease-hold interest registered or to have the same transferred to and registered in favour of the appellant so that as the suit

land now stands there are two proprietors thereof, both holding a grant under RTA. It must be remembered that the appellant has no registered title to the suit land whatsoever and that the appellant claims right to possession of suit property by virtue of allotment to it of the suit land and payment by it of the stand premium.

I have said earlier that despite the flagrant breaches committed by the Council in purporting to lease to Mr. Njirwa the suit land the Commissioner took no action. Instead he proceeded to issue a grant of the suit land to KP & L. So, in effect, as pointed out, there are two original grants by the Government of Kenya (through the Commissioner) in respect of suit land. One is to the Council and the suit land forms only a small portion of the land leased out in the grant. The other is the grant to KP & L and that is in respect of suit land. Both the grants are under RTA. Grants issued under RTA are, in common parlance, known as Government guaranteed grants and cannot be challenged by virtue of the provision in section 23(1) of RTA, which reads:

"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 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"

Mr. Gautama argued that the Council being the first allottee a later grant in favour of KP & L is illegal from its inception. Section 23 of RTA does not help Mr. Gautama. His client is not the registered proprietor of the suit land. If he had registered his title pursuant to the allocation from the Council the position may be different. He did not so register himself. He cannot therefore rely on section 23 aforesaid. If the Council was challenging the grant to KP & L then the Council could have had a better right, as, under Section 56 of RTA the court has power to make an order preferring as proprietor of land any person other than the registered proprietor. If the dispute was between the Council and KP & L as regards title the court could declare the preferred title. But the Council is not challenging the title of KP & L. Mr. Njirwa has no title to challenge the grant to KP & L. The Commissioner acted irregularly in granting the lease to KP & L but he has done it and there is no other registered proprietor who claims a better title. Hence the grant to KP & L is in keeping with the provisions in section 22 of RTA, sub-section (2) whereof reads:

"(2)Where a certificate of title is issued under subsection (1), all previous certificates of title shall be delivered up to the registrar and cancelled by him."

Whilst the grant to KP & L is not by transfer or transmission, it is a good grant as the Council has taken no steps to challenge it. In fact if it does challenge the said grant to KP & L it has to enjoin the Commissioner in the proceedings who will have a perfectly valid defence if he were to say that the Council was in flagrant breach of the conditions of the grant. Mr. Gautama says that the commissioner has no power in law to act so as to give a fresh title until such time the original grant is surrendered and there was no formal surrender by the Council. But as pointed out earlier, the issue here is: as between the appellant and the KP&L who has a better title? The answer is simple. KP &L has a grant registered in its favour. The appellant claims, at the most, a possessory right by virtue of some abstract interest passed to it by Mr. Njirwa out of the irregular and illegal allocation by the Council, of the suit land, to Mr. Njirwa.

It is possible that if Mr. Njirwa's title was registered, he himself could set up a title but the appellant cannot. As Mr. Njirwa's title is not registered and as KP & L has a grant issued to it, without demurr from the Council, now, neither Mr. Njirwa nor the appellant can claim a better title than KP & L. Mr. Gautama at one stage argued that his client wanted the Council to be compelled, to give his client a proper lease.

Only Mr. Njirwa could have sought such orders prior to registration of grant to KP & L. The appellant has no legal rights to the suit land now, even as an alleged sub-tenant of Mr. Njirwa. Mr. Gautama's argument to the effect that the letter of allotment to KP & L in 1992 and registration of grant in its favour in 1993 amount to useless pieces of paper is an argument in futility, when the grant to KP & L is being

challenged by the appellant who has no locus standi so to do. Mr. Frazer's primary argument is that KP&L has a good title which cannot be challenged by the appellant. That is a good argument and must triumph.

But what is the effect the allocation to Mr. Njirwa by the Council of the suit land? As pointed out earlier the title to the suit land is under RTA but is specifically subject to the provision of the Government Lands Act, Chapter 280 (GLA). The suit land was Government Land before the grant of lease was made to the Council and will revert to the Government when the lease expires. Hence it is subject to the provisions of GLA. Section 37 of GLA provides as follows:-

"37. The rent to be reserved under any lease or licence under this part (Disposal of Land for special Purposes), the period and the covenants and conditions of the lease (emphasis supplied) or licence shall be such as may be prescribed by rules made under this Act or as may be determined by the President."

When the suit land lease was granted to the Council the President put a fetter on the Council's powers or rights to use the land for purposes other than those stated in the special conditions. The Council breached those conditions. It acted in total disregard of the Law. There can be no waiver of the conditions prescribed by law just as there is no estoppel against a statute. For these reasons the Council could not have allocated the suit land to Mr. Njirwa for the user it authorized Mr. Njirwa. The learned Judge was right when he pointed out as follows:-

"The Kenya Power & Lighting Company Limited acquired a title to the suit premises on 20th January, 1993. All from the time the letter of allotment was issued on 6th August, 1992. A copy of the title (grant really) has been produced as P exhibit 1. It has now transpired that the allocation was effected by the Commissioner of Lands before he sought surrender of title to the piece of land by the City Council. The letter addressed to the Town Clerk, Nairobi City Council which is part of D exhibit G confirms this. It would appear however that, that was an irregularity that cannot invalidate the title to Kenya Power & Lighting Company Limited. It has not been shown that the company was a party to any irregularity and currently it holds a title issued under the Registration of Titles Act Cap 281 Laws of Kenya".

I cannot fault the learned Judge on what he said. Once again I reiterate that the question is: who has a better title? The appellant or KP & L? The answer is obvious. Obviously the Council took the stand it took in the superior court, that is, not challenging the grant to KP & L, because it knew that it had acted outside the terms and conditions of the grant in allotting a lease-hold interest to Mr. Njirwa. I cannot help but comment that the then Town Clerk was probably fully aware of the breaches she was committing in allotting lease-hold interest to Mr. Njirwa. There are many such allocations which are being questioned daily by members of the public. Public utility lands are being parcelled out depriving residents of Nairobi of their right to enjoy such facilities.

There is only one issue on which I wish to disagree with the learned Judge. He ordered that the Chief Executive of the Council do allocate to Njilux Motors Limited a suitable alternative piece of land. There was no such prayer by appellant. The appellant was not the allottee of the suit land. The Council has lodged a notice of cross-appeal on this issue and in my view the cross-appeal must succeed. The upshot of all this is that I would dismiss this appeal with costs and allow the cross-appeal. I would let orders numbered 1,2,3 and 5 made by the learned Judge stand. I would set aside order number 4. I would order that the appellant will pay to Kenya Power & Lighting Company the costs of this appeal but I would award, in respect of this appeal, no costs to Nairobi City Council which is in fact the architect of the problems I have gone into and ruled on. I would make no order for costs on the cross-appeal.

Dated and delivered at Nairobi this 31st day of March, 2000

A.B. SHAH

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JUDGE OF APPEAL