



THE SUPREME COURT OF KENYA

FANKIWA LIMITED & 3 OTHERS V. SIRIKWA SQUATTERS GROUP & 17 OTHERS

SC PETITION NOS. 32(E036), 35 (E038) & 36 (E039) OF 2022 (CONSOLIDATED)

DATE OF JUDGMENT: 15TH DECEMBER, 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Court allows the consolidated appeal in this matter.

Background

The dispute in this matter revolves around the ownership or entitlement to parcels which were registered as LR. Nos. 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in the former Uasin Gishu District (the suit parcels). These suit parcels were registered under the repealed Registration of Titles Ordinance. The titles to the suit parcels were first issued in favour of Plateau Wattle Company Ltd. between 1958 and 1962 as leaseholds for periods ranging from 946 to 951 years. During the period of leasehold, Plateau Wattle Company transferred the suit parcels on 26th March, 1965 to East Africa Tanning Extract Company. The East Africa Tanning Extract Company changed its name multiple times. Eventually, in 2000 it became Lonrho Agribusiness (East Africa) Limited (Lonrho Agribusiness). On 2nd November 2000, Lonrho Agribusiness surrendered the titles to the suit parcels to the government. The purpose of the surrender is a matter contested between the parties and marks the genesis of the dispute before the Court. Nonetheless, upon the surrender, the suit parcels were subsequently registered under the repealed Registered Land Act and freeholds titles issued thereto in favour of Lonrho Agribusiness. Thereafter the suit parcels were sub-divided and the sub-divisions transferred to third parties.

The sub-division of the suit parcels and the subsequent transfer of the sub-divisions caused Sirikwa Squatters Group (Sirikwa) to file a petition in the High Court, which was transferred to the Environment and Land Court (ELC). Overall, Sirikwa argued that the sub-division of the suit parcels and transfer thereof to third parties violated its members' right to property and was not only illegal but also void. The ELC found that; firstly, the titles to the suit parcels reverted to the government upon surrender and were to be managed under the repealed Government Land Act as opposed to being registered under the repealed Registered Land Act; and secondly, that the members of Sirikwa had a legitimate expectation to be registered as owners of the suit parcels. Therefore, the ELC canceled all the resultant titles issued and/or emanating from the suit parcels to Lonrho Agribusiness, Mark Too and all other third parties. Notwithstanding these findings, the court went on to find that Mark Too was entitled to 27 hectares of the suit parcels.

Fanikiwa Limited, who was not a party in the ELC, appealed to the Court of Appeal and complained that the learned judge erred by cancelling its titles which were carved out of the suit parcels without affording it an opportunity to be heard. Lonrho Agribusiness and the administrators of the Estate of the late Mark Too also filed appeals challenging the ELC's decision. The three appeals were subsequently consolidated. On its part, Sirikwa filed a cross appeal challenging the learned judge's

finding that Mark Too had legitimately acquired 27 hectares of the suit parcels. Subsequently, 78 individuals and 7 financial institutions were joined to the consolidated appeal. The 78 individuals claimed that they had purchased sub-divisions of the suit parcels. The 7 financial institutions claimed that they held charges over titles to sub-divisions of the suit parcels which had been sold and registered to third parties. The Court of Appeal dismissed the consolidated appeal and allowed Sirikwa's cross appeal. In effect, the Court of Appeal found that titles registered in favour of Mark Too and Fanikiwa could not be protected as they were obtained through fraud. However, the Court of Appeal upheld the titles held by the 78 individuals and charged in favour of the 7 financial institutions. Aggrieved, the appellants have filed this appeal.

In the consolidated appeal before the Supreme Court, the Court framed the following issues for determination:

- i) *Whether the consolidated appeal meets the constitutional threshold under Article 163(4)(a) of the Constitution.*
- ii) *Whether the appellants' right to fair hearing under Article 50(1) of the Constitution were violated by the appellate court's cancellation of their titles.*
- iii) *Whether the proceedings ought to have been through viva voce evidence at the trial court.*
- iv) *Whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels.*
- v) *Whether Sirikwa has a right to the suit parcels on account of its members being squatters on the suit parcels.*
- vi) *What was the intent for the surrender of the titles to the suit parcels?*
- vii) *Costs and available relief(s).*

Upon consideration, the Supreme Court has allowed the consolidated appeal for the following reasons:

1. **Issue 1:** The Court is being called upon to determine whether Articles 25(c), 40, 47, and 50 of the Constitution were violated. Articles 40 and 47 of the Constitution have been at the centre of the key questions for determination in the two superior courts below. This brings this cause within the remit of Article 163 (4) (a) of the Constitution. The issue of fair hearing under both Articles 25 (c) and 50, which was raised at the Court of Appeal is also integrally linked to this cause and falls for determination by the Court. Therefore, the Court has jurisdiction to hear and determine this consolidated appeal.
2. **Issue 2&3:** These issues have been considered together as they are integrally linked. There is no credible evidence to prove fraud on the part of the late Mark Too. As such, the Court of Appeal fell into error when it varied the ELC's judgment to the extent that it found the late Mark Too guilty of fraud without giving him a fair hearing. The Court of Appeal also fell in error by failing to appreciate that although directions were given for the matter to proceed through affidavit evidence, there were unique aspects of the allegations and counter- allegations in those affidavits that required to be tested through cross-examination of the deponents. Therefore, *viva voce* evidence was necessary in the circumstances of this case.
3. **Issue 4:** The subject suit parcels, being land that was at the time the private property vested in Lonrho Agribusiness do not fall within the category of 'unalienated government land' envisaged under the repealed Government Land Act and former President Moi had no legal capacity or authority to allocate or confer any legitimate interest in the subject suit parcels to members of Sirikwa or any other entity. Therefore, Sirikwa does not have a legitimate expectation to acquire and be allocated the suit parcels.
4. **Issue 5:** The evidence on record shows that no member of Sirikwa ever took actual physical possession of the suit parcels. The failure to take possession and occupy the parcels means that

members of Sirikwa were not squatters on the suit parcels and therefore have no legal basis to assert a right to the suit parcels.

5. **Issue 6:** The intent of surrender of the leasehold interest in the suit parcels was that the leasehold term to which the suit parcels were then held was to be surrendered and the same converted into a freehold interest with titles re-issued in the name of Lonrho Agribusiness as private property. There is nothing illegal or fraudulent in a process for surrender of a lease to enable the conversion of a title from a leasehold interest under the repealed Registration of Titles Act to a freehold interest under the repealed Registered Land Act. Legally, upon the execution of the surrender instruments by both Lonrho Agribusiness and the Government of Kenya, the leasehold interest was extinguished and emerged in the freehold interest in terms of Section 44 of the repealed Registered Land Act.

Accordingly, the Court grants the following orders:

- i) ***The consolidated appeal is hereby allowed.***
- ii) ***The Judgment and Orders of the trial and appellate courts are hereby set aside in their entirety.***
- iii) ***The 1st respondent herein, to wit, Sirikwa Squatters Group, its agents, members, servants, employees and/or representatives are hereby permanently restrained from entering, taking possession of and in any other manner interfering with Fanikiwa's (the 1st appellant) quiet possession of the suit properties described as LR NO PIONEER/NGERIA BLOCK 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902.***
- iv) ***We declare that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members, violated and arbitrarily deprived the 3rd appellant herein, Lonrho Agribusiness, of its rights over and interests in the suit parcels as guaranteed under Article 40 of the Constitution.***
- v) ***All parties shall bear their own costs***

.....

