



THE SUPREME COURT OF KENYA

**ASHMI INVESTMENT LIMITED v RIAKINA LIMITED & NATIONAL LAND
COMMISSION**

PETITION NO. E014 OF 2023

DATE OF JUDGMENT: 28TH JUNE 2024

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.

Orders: The Petition of Appeal struck out for want of jurisdiction

The appellant and the 1st respondent were allotted Unsurveyed Industrial Plot 'D' off Mombasa Road (*hereinafter "the Suit Property"*) by the Commissioner of Lands through Letters of Allotment dated 28th July 1998. Both the appellant and 1st respondent sought to assert their position by claiming ownership of the Suit Property. The appellant alleged that it proceeded to take up possession, paid the prerequisite fees in respect of ground rent, rates, standard premium, and survey fees on 20th February 2013 as evidenced by copies of Department of Land Fee Receipts adduced and sought approvals from the pertinent government offices. That thereafter, the Director of Surveys caused Plots 'C' and 'D' to be surveyed and given L.R. Numbers. The appellant alleged that due to the dispute between the National Land Commission and the Ministry of Land Housing and Urban Development at the time, no land officer had been appointed to sign new titles and as such the titles were pending registration and issuance as at the time of institution of the suit before the Environment and Land Court (ELC). That the 1st respondent invaded the Suit Property in an attempt to forcefully take possession of the same prompting the appellant to institute a suit at the ELC contemporaneous with an application for interim relief. The ELC allowed the application granting a temporary injunction restraining the 1st respondent from evicting and or trespassing, alienating, leasing, selling, charging and or committing acts or otherwise from interfering with the appellant's possession of the Suit Property pending the hearing and determination of the suit.

In response, the 1st respondent filed a defense and counterclaim. It stated that it accepted the offer contained in the Letter of Allotment on 4th August, 1998. That upon realizing the Suit Property size was smaller than indicated, it unsuccessfully attempted to negotiate payment of a reduced sum. That it then proceeded to pay the required fees of on 3rd April 2001 and a further payment on 15th October 2001, and was issued with Department of Land Fee Receipts. Thereafter, it took possession, erected a fence around it, and commenced processing of the title with the Director of Surveys approving the Deed Plan for the Suit Property and assigned it an L.R. Number which was sent to the Commissioner of Lands for execution of the grant. That the Director of Surveys caused another survey to be undertaken in favour of the appellant. The 1st respondent averred that it raised complaints through its

letters in 2014 and 2015 but the Director declined to correct the fraudulent position, necessitating it to seek the redress set out in its counterclaim. The counterclaim sought to nullify the titles issued in favour of the appellant as being unlawful and fraudulent and instead declare the 1st respondent's title as legal with the attendant amendment of the survey record, and issuance of the title in its favour.

The 2nd respondent affirmed the appellant's allotment of the Suit Properties and the process towards issuance of the title. It justified the appellant's title on the fact that there was no objection from the defunct Nairobi City Council in allocation of the properties, and the Kenya Airport Authority having confirmed that the properties did not encroach on airport land given their proximity to Jomo Kenyatta International Airport.

In its judgment, the ELC observed that the appellant had gone ahead to process the title issued in its name on 4th March 2015, while the suit was pending. It held that: by 2013, when the appellant accepted the offer, the suit property was no longer available, as it had already been allotted to the 1st respondent by the Commissioner of Lands; the 1st respondent had demonstrated on a balance of probabilities that it was in possession of the suit property; and no evidence was adduced to show that either the 1st respondent or the surveyor who undertook the 1st respondent's survey was notified of the cancellation of the 1st respondent's Deed Plan. In the end, the court dismissed the appellant's suit and allowed the 1st respondent's counterclaim. The 2nd respondent unsuccessfully sought to review the judgment.

Aggrieved, the appellant appealed against the decision of ELC. The Court of Appeal, in dismissing the appeal, agreed with the ELC's finding that by the 2013 when the appellant paid for the requisite fees for the Suit Property, it was no longer available having already been allotted by the Commissioner of Lands to the 1st respondent, who had paid for it, taken possession, and was in the process of procuring a certificate of title over it. The appellant, dissatisfied with the decision, sought to review and vary/set aside the judgment. The Court of Appeal dismissed the application, the appellant having failed to demonstrate that its case fell within the instances that call for review.

Undeterred, the appellant instituted this appeal, where this Court in its Ruling dated and delivered on 4th August 2023, addressed the preliminary challenge to its jurisdiction, framing the following issues:

- (i) *Whether the applicant was a bona fide owner of the suit properties within the provisions of Article 40 of the Constitution; and*
- (ii) *Whether the Court of Appeal misapplied the doctrine of lis pendens and thereby denying the applicant a right to property.*

Upon consideration, the Supreme Court determined that it was not persuaded that it was seized of the requisite jurisdiction as the parameters of reviewing a judgment by the Court of Appeal are well settled. The appellant had failed to construe a constitutional argument arising out of such parameters to necessitate the appeal particularly in so far as it relates to the issues framed in the Court's Ruling; and had proceeded to submit on the issues as if the appeal was against the substantive judgment, which was an outright affront to scarce judicial time, resources, process and procedure.

Orders of the Court:

The Petition of Appeal dated 4th May 2023 failed and was struck out for want of jurisdiction with no order as to costs.

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