



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT & LAND COURT

PETITION NO. 28 OF 2020

(FORMERLY H.C PETITION NO 13 OF 2011)

KENYA HOTEL PROPERTIES LIMITED.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

WILLESDEN INVESTMENT LIMITED.....2ND RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

KENYA REVENUE AUTHORITY.....4TH RESPONDENT

THE COMMISSIONER OF LANDS.....5TH RESPONDENT

CITY COUNCIL OF NAIROBI.....1ST INTERESTED PARTY

DEVELOPMENT BANK OF KENYA LTD.....2ND INTERESTED PARTY

RULING

Introduction

1. In the Notice of Motion dated 11th November 2020, the Petitioner has sought for the following orders;

a) The Petition be consolidated with ELC Number 35 of 2010 Kenya Anticorruption Commission vs Willesden Investment Ltd & 6 Others.

*b) Pending the determination of the application and Petition an order of *lis pendens* do issue restraining the 2nd Respondent, its servants or agents from executing the decree in Milimani High Court Civil Case No. 367 of 2001 and calling up the bank guarantee issued by Development Bank of Kenya Limited derived from the 2nd Respondent's title L.R. No. 209/12748.*

c) Pending the determination of the application and Petition an injunction do issue restraining the 2nd Respondent, its servants or agents from executing the decree in Milimani High Court Civil Case No. 367 of 2001 and calling up the bank guarantee issued by Development Bank of Kenya Limited.

d) Costs be in the cause.

2. The Application is supported by the Affidavit of the Petitioner's Director who has deponed that in the interest of justice, the Petition should be consolidated with ELC Number 35 of 2010, which seeks identical reliefs over the suit property for the nullification of an illegally acquired title, just as in the present Petition.

3. According to the Petitioner's Director, the Court of Appeal has on two occasions confirmed that the issue of the validity of the title to the suit property has never been determined, which is the subject of both suits; that the Court of Appeal granted a stay after the 2nd Respondent

failed to adduce evidence that it was capable of repaying the decretal amount and that the doctrine of *lis pendens* applies in this case and an automatic stay should be granted pending the determination of the suit.

4. It is the Petitioner's case that the suit land is public property belonging to the City Council of Nairobi; that a question of public policy is in issue as a party cannot benefit from an illegality; that any proceedings or decree based on an illegality are null and void *ab initio* and no benefit can accrue to Willesden (the 2nd Respondent) once the property reverts to the public and that the 2nd Respondent does not hold an indefeasible title as the suit land was irregularly and illegally acquired from a portion of a public street.

5. In response to the Application, the 2nd Respondent filed a detailed Replying Affidavit sworn by its Director. According to the 2nd Respondent's Director, the 2nd Respondent is the rightful registered owner of the subject property; that the application is *res judicata* as the issues raised therein were determined by Musinga J. (as he then was) in Petition number 13 of 2011 and that the Petitioner's Appeal against the Ruling of Musinga J. (as he then was) was dismissed by the Court of Appeal.

6. According to the 2nd Respondent, Petition number 13 of 2011 was transferred to this court as Petition number 28 of 2020; that the fresh Notice of Motion application seeking stay of execution amongst other orders does not disclose to this court that the said orders were denied by the court and that various courts have declared themselves on the same issue.

7. The 2nd Respondents' Director deponed that the Petitioner filed another petition being Petition Number 438 of 2015 to restrain the 2nd Respondent from executing the decree in HCCC No. 367 of 2000; that the Petition was accompanied by an Application for stay of execution pending the determination of the Petition, which prayer was later abandoned by the Petitioner and that on 28th September, 2018, Mwita J. dismissed the Petition.

8. It is the 2nd Respondent's case that it filed in the Court of Appeal Civil Application Number 322 of 2006 seeking the release of the bank guarantee; that the said Application has not been heard by the Court of Appeal and that the Petitioner filed a Petition in the Supreme Court under Petition number 16 of 2020 challenging the decision of the Court of Appeal and also sought for a stay of execution of the decree in HCCC No. 367 of 2000.

9. The 2nd Respondent's Director deponed that the Petitioner's Application was dismissed by the Supreme Court on 20th November, 2020; that by virtue of the Ruling of the Supreme Court, this court cannot purport to entertain the current application by the Petitioner and that the Petitioner in collusion with others are hell-bent towards restraining the 2nd Respondent from executing the decree in HCCC No. 367 of 2000.

10. The 2nd Respondent's Director finally deponed that the current application seeks to stay execution pursuant to the Judgment and orders of the Court of Appeal in Civil Appeal No. 149 of 2007; that such an order will offend the judgmental principles of the Constitution on hierarchy of courts and that the application should be dismissed.

11. On the issue of consolidation, the 2nd Respondent deponed that the prayers that are in the current Petition are similar to the prayers sought in Petition number 438 of 2015 which has since been heard and determined by a court of concurrent jurisdiction and that the Respondent in Petition number 438 of 2015 entered into a consent with the 2nd Respondent herein in Civil Suit number 24 of 2008 on 6th February 2012.

12. The 2nd Interested Party's Legal Manager deponed that the Petitioner approached the 2nd Interested Party for a guarantee to secure payment of the Judgment sum of Kshs 70,902,400 as directed by the court on 9th March 2007 in Civil Application number 322 of 2006 and that the 2nd Interested Party gave the said guarantee.

13. The 2nd Interested Party's Legal Manager deponed that the Court of Appeal heard and finally determined Civil Appeal number 149 of 2007 on 2nd April, 2009 in which the court set aside the Judgment of the superior court; that despite the clear decision of the Court of Appeal, the 2nd Respondent continues to demand from the bank payment of Kshs. 70,902,400 and that the 2nd Respondent's title to the suit property remains questionable.

14. It is the 2nd Interested Party's case that the substratum of the Bank Guarantee has been eroded by the challenges of the 2nd Respondent's title to the suit property; that there is need to give priority to the cases on the legitimacy of the 2nd Respondent's claim to the suit property and that the 2nd Interested Party will suffer irreparable financial loss were it to pay the sum under the guarantee and it later transpires that the 2nd Respondent's title to the property was fraudulent.

Submissions

15. In his submissions, the Petitioner's advocate submitted that the Court of Appeal has on three occasions confirmed that the issue of legality of the title acquired by the 2nd Respondent in respect of LR No. 209/12748 has never been determined, hence the reinstatement of ELC number 35 of 2010.

16. It was submitted that the present suit and ELC No. 35 of 2010 both seek identical reliefs over the suit property for the nullification of an illegally acquired title and should be considered together; that the original allottee, Centre Park Limited, is a non-existent entity and the 2nd Respondent could not in law have acquired a valid title from a ghost and that having established a *prima facie* case, the Applicant will suffer irreparable harm if the 2nd Respondent is allowed to execute the decree when it has not adduced any evidence to controvert the fact that the title was unlawfully acquired. The Petitioner's counsel referred the court to numerous decisions which I have considered.

17. On his part, the 2nd Respondents' advocate submitted that the prayers sought in the Petition do not touch on the ownership of the suit property; that the Petition seeks a stay of execution of the decree in HCCC No. 367 of 2000 and that the issue in respect of the execution of the decree in HCCC No. 367 of 2000 by the 2nd Respondent has since been determined and finalized by several courts exercising both original and appellate jurisdiction.

18. Counsel for the 2nd Respondent submitted that the Petitioner is a party in ELC No. 35 of 2010 in which the 2nd Respondent's ownership of the suit property has been challenged by the 3rd Respondent herein and that the prayer for consolidation should be declined.

19. It was submitted that the Application dated 31st January, 2011 under Petition number 13 of 2011 seeking for stay of execution was dismissed by the High Court and the Court of Appeal in Civil Appeal number 184 of 2011 and that the prayer for stay of execution is *res judicata*. Counsel relied on numerous authorities which I have considered.

20. On his part, the 2nd Interested Party's advocate associated herself with the submissions of the Petitioner's advocate. Counsel submitted that there are suits pending in this court on the root and legitimacy of acquisition of the suit property.

21. It was submitted that the said suits challenge how the suit property was excised from Kaunda Street in 1995; that the said suit property was allocated to Center Park Limited which purportedly transferred the land to the 2nd Respondent that the Petitioner has demonstrated a *prima facie* case with chances of success.

22. The 2nd Interested Party's advocate finally submitted that it would be necessary that the issue of the legality of the suit property be determined first as the substratum of the bank guarantee has been eroded by the challenges of the 2nd Respondent's titles to the suit property and that there is need to give priority to the cases pertaining the legitimacy of the 2nd Respondent's claim to the suit property as the decision of the court will have an impact on the guarantee sought to be released.

Analysis and Findings;

23. The two issues for determination in the present application is whether, firstly, this court should restrain the 2nd Respondent from executing the decree in Milimani High Court Civil case number 367 of 2000 and call up the bank guarantee issued by Development Bank of Kenya, and secondly, whether this Petition should be consolidated with ELC No. 35 of 2010.

24. This Petition was commenced in the High Court as Petition number 13 of 2011. The Petition acquired the current number after it was transferred from the High Court to this court. While filing the Petition in the High Court in the year 2011, the Petitioner also filed a Notice of Motion dated 31st January, 2011. In the said Application, the Petitioner herein sought for the following orders;

a) Pending the determination of the Petition, an injunction do issue preventing DBK from paying the sum of Ksh 61,979,918.37 secured by a bank guarantee to the 2nd Respondent.

b) Pending the hearing and determination of the Petition there be a conservatory order by way of stay of execution of the decree in HCCC No. 367 of 2000.

25. The filing of the Petition, together with the Application dated 31st January, 2011 for conservatory orders, seems to have been prompted by the Judgment of the High Court in HCCC No. 367 of 2000, which suit sought for a declaration that the Petitioner is a trespasser on L.R. No. 209/12748 and damages for the said tort.

26. It is not in dispute that the Judgment in HCCC number 367 of 2000 was delivered in favour of the 2nd Respondent on 14th December, 2006. In its Judgment, the High Court held that the 2nd Respondent was entitled to *mesne* profits in the sum of Kshs. 54,902,400 with interest, and general damages for trespass of Kshs 10,000,000 with interest from the date of the Judgment. The trial court also awarded the 2nd Respondent Kshs 6,000,000 in damages for loss of business opportunity, with interest.

27. The Petitioner herein challenged the decision of the High Court in HCCC No. No. 367 of 2000, in the Court of Appeal. While allowing the Application for stay of execution pending Appeal, the Court of Appeal directed the Petitioner to provide either a bank guarantee or insurance guarantee for the amount of Kshs 70,902,400. It is on the basis of this order that the 2nd Interested Party herein issued a bank guarantee for the said amount.

28. The Court of Appeal then proceeded to hear the main appeal challenging the Judgment of the High Court in Civil Appeal number 149 of 2007. In the said Appeal, the Court of Appeal set aside the awards of Kshs. 10,000,000 and Kshs. 6,000,000. The award of *mesne* profits of Ksh54,902,400 was reduced to Kshs 22,729,800 in a Judgment that was delivered on 2nd April, 2009. It is after the Judgment of the Court of Appeal that the then Kenya Anti-Corruption Commission sued the 2nd Respondent herein and the Petitioner herein in Nairobi HCCC No. 35 of 2010.

29. In addition to the suit that was filed by the then Kenya Anti-Corruption Commission, being HCCC No. 35 of 2010, and which suit is still pending in this court, the Petitioner filed the current Petition in the year 2011. As I have stated above, the Petitioner contemporaneously with the Petition filed an application for conservatory orders in respect of the decree in HCCC No. 367 of 2000.

30. The application that was filed in this Petition for conservatory orders in respect of the decree in HCCC NO. 367 of 2000 was dismissed by Musinga J. (as he was then) on 27th January, 2012.

31. The Petitioner herein filed an Appeal challenging the Ruling of Musinga J. (as he was then) being **Civil Appeal number 184 of 2013**. While dismissing the Appeal, the Court of Appeal held as follows;

“40. In effect therefore, the reason the judge declined to grant the orders that has been sought by the appellant was not on the basis that a prima facie case had not been made out, but on account of his finding that the application was an abuse of the process of the court. We are unable to fault the judge for reaching that conclusion... In effect, the appellant was seeking, in a different suit, to stay execution of a decree issued by the High Court in another suit. The approach taken by the appellant in seeking to stay execution of a decree obtained in one suit, namely HCCC No. 367 of 2000, by instituting a different action, Petition No 13 of 2011, and seeking the orders of stay of the decree in HCCC No. 367 of 2000 under the action goes against section 34 (1) of the Civil Procedure Act, Cap 21... On those grounds alone, the judge was right in rejecting the appellant’s application.”

32. From the above decision of the High Court and the Court of Appeal, it is clear that the issue of stay of execution of the decree in HCCC number 367 of 2000 was heard and determined by both the High Court and the Court of Appeal. Furthermore, and as observed by the High Court and the Court of Appeal, such an application could only succeed, if at all, if it was filed in the parent suit, and not in a separate suit.

33. Bearing in mind that the application dated 31st January, 2011 filed in Petition number 13 of 2011 seeking for a stay of execution of the decree in HCCC No. 367 of 2000 was dismissed by the High Court and the Court of Appeal, it is my finding that the Petitioner’s application seeking for an order of stay of execution of the decree in Milimani High Court case number 367 of 2000 is *res judicata*.

34. The issue of whether the 2nd Respondent can call up the bank guarantee issued by Development Bank of Kenya Limited is not only pending before the Court of Appeal, but cannot also be raised in the current Petition. That issue can only be raised in HCCC number 367 of 2000. To that extent, this court cannot grant an order staying the calling up of the said bank guarantee.

35. The Petitioner has prayed for an order consolidating this Petition and ELC number 35 of 2010. The law pertaining to consolidation of suits was set out by the Supreme Court of India in the case of **Prem Lala Nahata & Another vs Chandi Prasad Sikaria (2007) Supreme Court cases 55** at paragraph 18 as follows;

“It cannot be disputed that the court has power to consolidate suits in appropriate cases ... The jurisdiction to consolidate arises where there are two or more matters or cause pending in the court and it appears to the court that some common questions of law and fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reasons, it is desirable to make an order consolidating the suits.”

36. In the case of **Law Society of Kenya vs Centre for Human Rights and Democracy and 12 others (2014) eKLR**, the Supreme Court of Kenya held as follows;

“The essence of consolidation of suits is to facilitate the efficient and expeditious disposal of disputes, and to provide a frame work for a fair and impartial dispensation of justice to parties.”

37. The High Court of India in **P. P. Gupta vs East Asiatic Company, AIR 1960 All 184**, held as follows;

“The very nature of the principle if consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court at once and for all. The object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”

38. An order for consolidation of this Petition with ELC number 35 of 2010 can only issue if the two matters involve the same questions of law or fact; or if the reliefs claimed arise out of the same transaction.

39. The Kenya Anti-Corruption Commission (herein after referred to as KACC) filed HCCC number 35 of 2010 against the 2nd Respondent and six others. The Petitioner herein is the 6th Defendant in that suit, while the 2nd Respondent herein is the 1st Defendant.

40. In HCCC Number 35 of 2010, KACC has sought for cancellation and/or revocation of the grant in respect of the suit land arguing that the grant for L.R. No. 209/12748 was issued to the 2nd Respondent herein unlawfully. In addition, KACC has sought for the payment of KShs. 22,729, 800 being the sum that was awarded to the 2nd Respondent herein in Appeal number 149 of 2007. That suit is coming up for hearing on 7th, 8th and 9th March 2022.

41. Earlier on, the 2nd Respondent had sued the Petitioner herein in HCCC No. 367 of 2000 seeking for damages for trespass to land and *mesne* profits. In the said suit, Judgment was entered in favour of the 2nd Respondent. However, the said Judgment did not determine the legality of the 2nd Respondent’s title *viz-a-viz* the claim by the Petitioner and KACC, that the suit property (LR No. 209/12748) was illegally allocated to the 2nd Respondent.

42. In the present Petition, the Petitioner has alleged that its right to a fair hearing under **Article 159 (2) (a) and (b)** of the **Constitution** was breached because the superior courts (HCCC No. 367 of 2000) failed to appreciate that the suit land had been acquired unlawfully, and that a party cannot be allowed to benefit from an illegality.

43. It is instructive to note that when this Petition was filed, the High Court had struck out HCCC number 35 of 2010 for being *res judicata*.

However, by way of a judgment delivered on 22nd March, 2019, the Court of Appeal reinstated HCCC number 35 of 2010.

44. The perusal of the Petition shows that other than seeking for an order for the nullification of the title in respect of L.R. No. 209/12748 held by the 2nd Respondent, the following declaratory order:

“2. A declaration that it would be against public policy and the Constitution for the 2nd Respondent to derive any benefit from the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited until after the determination of the legality of the issuance of the certificate of title over L.R. No. 209/12748 IR No. 66986 by the National Land Commission under Article 67 of the Constitution.”

45. Considering that the Plaintiff in ELC number 35 of 2010 is seeking for nullification of the title in respect of L.R. number 209/12748, for allegedly being public land, and for the sum of Kshs 22,729,800 that was awarded to the 2nd Respondent, which claims have also been raised in the Petition, it is my finding that the issues in ELC number 35 of 2010 and this Petition raise common points of law and facts that should be determined by this court.

46. That being the case, it is in the interest of justice that both this Petition and ELC number 35 of 2010 be consolidated to enable this court determine with finality if indeed L.R. Number 209/12748 is public land and if Ksh22,729,800 awarded to the 2nd Respondent by the Court of Appeal is refundable.

47. For those reasons, the Petitioner’s application dated 11th November, 2020 is partially allowed as follows:

a) The Petition be and is hereby consolidated with ELC number 35 of 2010, Kenya Anti-Corruption Commission vs Willesden Investments Limited and 6 Others.

b) The prayer for stay of execution of the decree in HCCC number 367 of 2000 and calling up the bank guarantee issued by Development Bank of Kenya Limited derived from the 2nd Respondents’ title L.R. No. 209/12748 is declined.

c) Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Gichuhi for Petitioner

Mr. Ochieng h/b Oyatta for 2nd Respondent

Mr. Ojiambo 2nd Interested Party

Court Assistant- John Okumu