



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

ACEC NO. 16 OF 2017

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

KANYI JOSEPH KARANJA T/A KANYI & COMPANY ADVOCATES...1ST DEFENDANT

KIKAMBALA DEVELOPMENT COMPANY LIMITED.....2ND DEFENDANT

EPHRAHIM MAINA RWINGO.....3RD DEFENDANT

JANE NJERI KARANJA.....4TH DEFENDANT

SELINE CONSULTANTS LIMITED.....5TH DEFENDANT

FREDRICK OTIENO OYUGI.....6TH DEFENDANT

JOY KAVUTSI ASIEMA.....7TH DEFENDANT

JOAN ZAWADI KAREMA.....8TH DEFENDANT

JUMA RENSON THOYA.....9TH DEFENDANT

HARRY JOHN PAU ARIGI.....10TH DEFENDANT

RULING

1. The Plaintiff filed an application by way of a Notice of Motion dated 21st June, 2017 expressed to be brought under **Section 1A, 1B, 3A, Order 40(1) and Order 51(1) of the Civil Procedure Act and Rules**. The Plaintiff sought orders of temporary injunction to restrain the Defendants by themselves, their agents, servants and/or employees or any other person whosoever be restrained from alienating, selling, charging, or further charging, leasing, developing, sub-dividing, transferring, disposing or in any other way dealing with a parcel of land **C. R. No. 19534 Subdivision Number 5043 (Original Number 405/4 Section 1 Mainland North** or dealing with Kshs. 5,000,000/= held in British American Asset Managers Limited Portfolio code: **WMFO229** in the name Karanja Kanyi.

2. The Application is supported by an Affidavit sworn by Mulki Abdi Umar dated 21st June, 2017 wherein he deponed that the Plaintiff commenced investigations into allegations that the Trustees of Kenya Ports Authority Retirement Benefit Scheme, 2012 (KPARBS, 2012) illegally/fraudulently and or corruptly entered into a Sale Agreement for the purchase of 100 acres of vacant agricultural plots namely

L.R Nos. 5025/1191-1192-2294-2297, 1200, 1206 and 1224-1230 in Kikambala area, at a purchase price of Kshs. 7,000,000/= per acre.

3. Mr. Mulki deponed that KPARBS, 2012 executed a Sale Agreement on 18th December, 2014 with the 2nd Defendant who was not the legitimate owner of the vacant agricultural plots and a deposit of Kshs. 70,000,000/= was paid to the 2nd Defendant. The 2nd Defendant entered into a simultaneous sale agreement with the actual owners of the land, Amkeni Farm Limited and later failed to meet its obligation rendering itself unable to honor its agreement with KPARBS, 2012. The 1st, 2nd, 3rd and 4th Defendants have since failed to refund the sum of money after the rescission of the contract.

4. It has been averred that investigations by the Plaintiff have revealed the following transactions were made using the deposit:

i. Purchase of property known as C. R. No. 19534 Subdivision Number 5043 (Original Number 405/4) for the 4th Defendant, who is one of the directors of the 2nd Defendant.

ii. Kshs. 5,000,000/= was deposited in British American Asset Managers Limited Portfolio Code: WMF0229 in the name of Karanja Kanyi who is the 1st Defendant.

5. For the foregoing reasons, the deponent averred that the Plaintiff is reasonably apprehensive that the Defendants may dispose of or transfer part of the properties listed in the Application in order to frustrate any decree passed against them.

6. In response to the Application, a Replying Affidavit sworn on 10th July, 2017 by Mr. Joseph Karanja Kanyi, the 1st Defendant was filed. Mr. Kanyi deponed that he incorporated the 2nd Defendant to act as a special purpose vehicle where he would be represented by a proxy, who is the 4th Defendant.

7. Mr. Kanyi contended that the 1-5th Defendants made full disclosure to KPARBS, 2012 Trustees that they only had an equitable interest in the vacant agricultural plots and that the Professional Undertakings issued to the advocate of KPARBS, 2012 allowed the Defendants to utilize the deposit to facilitate completion.

8. The deponent averred that the 2nd Defendant exercised its contractual rights and rescinded the agreement with KPARBS, 2012 after KPARBS, 2012 failed to pay the balance of the purchase price upon issuance of a completion notice. Thereafter KPARBS, 2012 forfeited its deposit.

9. Mr. Kanyi further contended that the orders sought in the instant application are the same orders sought in **Mombasa Constitutional Petition No. 24 of 2015** by the Trustees of KPARBS, 2012, which Petition is yet to be heard, the instant suit therefore offends the *sub judice rule*.

10. The application was canvassed by way of written submissions. The Plaintiff in its submissions contended that the application does not offend the *sub judice rule* as argued by the 1st-5th Defendants. The Plaintiff argued that the parties to the Mombasa Petition No. 24 of 2015 are the 8th-10th Defendants. The 1st-5th Defendants and the Plaintiff in the instant application are not parties to the said Petition. The Plaintiff submitted that it filed the instant suit against the Defendants jointly and severally for the recovery of Kshs. 70,000,000/= from the Defendant pursuant to its mandate.

11. The Plaintiff argued that the sale agreement between the 2nd Defendant and KPARBS, 2012 was tainted with illegality and was part of a fraudulent scheme to embezzle public funds. That a prima facie case with probability of success as set out in the case of **Giella vs. Cassman Brown & Co. Ltd (1973)EA 358** had been established.

12. The Plaintiff submitted that the 2nd Defendant was incorporated on 10th December, 2014 and was

only 8 days old when it concluded the Sale Agreement with KPARBS, 2012. The 2nd Defendant at the time of signing the agreement, was not the registered owner of the vacant agricultural plots.

13. It was submitted that the 1st Defendant had issued a Professional Undertaking to hold the deposit of Kshs. 70,000,000/= for the sole purpose of facilitating the said sale. Investigations by the Plaintiff however revealed that the funds were utilized to purchase the property known as C.R. No. 19534 for the 4th Defendant. As expressed by the 1st Defendant in a letter dated 4th March, 2015 (Defendants Annexure marked JKK-4), the 1st Defendant clearly understood that it could not possess and was not in a position to pass good title to KPARBS, 2012 before the title was transferred to it be Amkeni Farm Limited.

14. The Plaintiff submitted that out of the Kshs. 70,000,000/= paid by KPARBS, 2012 as deposit to the 2nd Defendant, it was only able to trace Kshs. 5,000,000/= which was deposited in British American Asset Managers Limited Portfolio Code: WMF0229 in the name of the 1st Defendant and a property known as CR. No. 19534 Subdivision Number 5043 (Original Number 405/4) in the name of the 4th Defendant. The remaining amount has not been traced as the monies were withdrawn severally and used for personal benefits.

15. The Plaintiff submitted that the said issues raised herein are serious questions to be tried and in the circumstances, the prospects of success at the trial are favourable to justify an injunctive order being made. It was the Plaintiffs averment that it will be the most inconvenienced if the orders sought are not granted as it would have to trace the assets of the Defendants herein to recover the money and the economic costs would be borne by the Government of Kenya.

16. In support of its submissions, the Plaintiff cited the following cases:

a. **Nairobi HCC No. 33 of 2016 Ethics and Anti Corruption Commission v Jimmy Mutuku Kiamba (unreported)** where on the issue of balance of convenience, Seron J found that the Plaintiff would be more inconvenienced as it may be forced to file multiple suits in pursuit of properties already transferred to third parties.

b. **Kenya Anti Corruption Commission v Stanley Mombo Amuti [2011] eKLR** where the court rendered itself thus:

“An order for forfeiture can only be made if the property was still available for such forfeiture and it follows that if there was no conservatory order, the property may well have ceased to exist thus rendering the success of the appeal pyrrhic.”

c. **Shivabhai Nathabhai Patel v Manibhai Hathibhai Patel [1959] E.A. 907** where the court stated:

“... it is not only right that the court should attempt to preserve property which may be in issue, but it is the clear duty of the court to do so.”

17. The 1-5th Defendants in their submissions contended that the Sale Agreement between the 2nd Defendant and KPARBS, 2012 was properly secured by the terms of the agreement. The Professional Undertakings given by the 1st Defendant dated 17th December, 2017 and 4th March, 2015; and the 2nd Defendant's equitable interest in the property.

18. The 1st-5th Defendants submitted that the parties in both Sale Agreements agreed on the specific completion periods which the parties were to adhere to strictly. Where either party could not comply with the agreed terms of the completion period, the terms of the agreement allowed the innocent party to forfeit the deposit paid by the purchaser.

19. It was submitted that the 1st Defendant in normal conveyancing practice sought for and obtained

consent of his client, the 3rd Defendant, to incorporate a limited liability company (the 2nd Defendant) through which the transactions would be channelled and whereof, he could retain the seal and certificate of incorporation so as to safeguard his professional undertaking in the transaction.

20. The 1st-5th Defendants cited the case **DOMB v ISOZ [1980] 1KB 76** at 81, cited by the court of Appeal in **Arthur K. Igeria t/a Igeria and Company Advocates v Michael Ndaiga [2017] eKLR** where the court held as follows:

“Conveyancing is a complicated business. A chain of transactions is frequently involved where no vendor will sell until he can purchase and no purchaser will buy until he can sell. Each client as vendor and purchaser needs time to make up his mind and change his mind after studying surveys and legal reports and other related matters and each client expects everyone else to be ready when he is ready. Skillful conveyancers are required to forge the chain, to see that no bargain is lost and that no one is left without a home. Binding and enforceable undertakings between professional men play an essential part at different stages.”

21. The 1st-5th Defendants submitted that the necessity of a Professional Undertaking in conveyancing matters is that the same acts as a bond by the advocate giving it on authority of his client. In **Muiruri v Credit Bank & Another (C.A No. 263 of 1998)** the court of Appeal stated:

“An undertaking is a solemn thing. In enforcing undertakings, the court is not guided by considerations of contract, but the court aims at securing the honesty of its officers.”

22. The court was urged to strike out this suit as it is *sub judice*, premature and meant to obscure the issues raised in Mombasa Constitutional Petition No. 24 of 2015 wherein the main issue for determination is whether the KPARBS, 2012 Trustees had locus to enter into the sale agreement dated 18th December, 2014.

23. The 1st-5th Defendants in their submissions argued that the 1st Defendant was an agent of the 1st Principal and thus could not be lawfully sued. The court was referred to the case of **Anthony Francis Wareheim & 2 Others T/a Wareheim and 2 Others v Kenya Post Office Savings Bank [2014] eKLR** where the court held:

“it was also *prima facie* imperative that the court should have dismissed the Respondent’s claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is not to be sued.

24. Counsel for the 1st-5th Defendants submitted that the Plaintiff having sued both the 2nd and 5th Defendants, could not again have instituted the suit against the 3rd and 4th Defendants without first being subjected to the rule of law and heard on allegations that they incorporated the 2nd and 5th Defendants with the purpose of committing fraudulent activity.

25. It was submitted that the Kshs. 5,000,000/= subject matter of these proceedings was part of a loan granted to the 1st Defendant by Kenya Women Finance Trust Loan. Counsel argued that the balance of convenience tilts in the favour of not granting the orders sought by the Plaintiff as it is the 1st-5th Defendants who stand to suffer irreparable damages in the event that the orders sought are issued.

26. The 6th Defendant submitted that the Plaintiff’s application was misplaced and ought to be dismissed with costs. The 6th Defendant argued that the transaction in the instant suit was contractual, governed by terms and conditions which were clear as to the available remedies in the event of breach and or non-performance.

Issues for Determination:

27. I have considered the application, the response thereto and the submissions filed by the parties herein. From the foregoing the issues for determination are:

- a. Whether the application offends the *sub judice* rule
- b. Whether the Plaintiff has met the threshold for the grant of temporary injunction sought

28. Counsel for the 1st-5th Defendants has urged this court to strike out this application as it is *sub judice*, premature and meant to obscure the issues raised in Mombasa Constitutional Petition No. 24 of 2015. The Plaintiff retorted that **Section 6** of the **Civil Procedure Act** was not applicable as the suits were not similar.

29. For the sub-judice rule in **Section 6** aforesaid to apply, there must be an existing suit or proceeding in which the matter in issue in the current suit is directly and substantially in issue in the previous suit or proceeding; and the parties in both suits must be the same. **Section 6** of the **Civil Procedure Act** states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

30. I have critically looked at the petition filed in Mombasa Constitutional Petition No. 24 of 2015. The petitioners in Mombasa Constitutional Petition No. 24 of 2015 are the 8th, 9th and 10th Defendants herein. The Plaintiff and the 1st-5th Defendants in the instant suit are not and have never been parties to the Petition. Briefly stated, the issues the Petition seeks to address are allegations regarding violation of the constitutional rights of the 8th, 9th and 10th Defendants who contend that under the KPARBS, 2012 they had, as trustees, the absolute discretion to manage the scheme and to invest any money forming part thereof without interference from the founder, sponsor or employees. Accordingly, they pray for declarations to that effect and a permanent injunction to restrain the Board, the Managing Director and the General Manager Board & Legal Services of Kenya Ports Authority from interfering or meddling in the transactions.

31. The instant application originates from a suit filed by the Plaintiff for the recovery of public property Kshs. 70,000,000/= from the Defendants jointly and severally for illegally/fraudulently and or corruptly entering into a Sale Agreement for the purchase of the said vacant agricultural plots. The Plaintiff seeks orders to preserve monies and property mentioned in the application to avoid the same being dissipated, transferred, withdrawn and/or disposed.

32. This Court notes that the Plaintiff's mandate as provided by **Section 11(1)(j)** of the **Ethics and Anti-Corruption Commission Act** empowers it to institute and conduct proceedings in court for purposes of the recovery or protection of public property. The allegation that the instant suit offends the *sub judice* rule is not merited as the issues and pleadings in Mombasa Constitutional Petition No. 24 of 2015 are not similar to this suit.

33. In the motion the Plaintiff is seeking for temporary orders of injunction. The principles to be considered in determining such applications are well settled. The principles of granting an injunction as stated in **Giella -Vs- Cassman Brown [1973]EA 358** are as follows-

- a. **The Applicant must show a prima facie case with probability of success.**
- b. **An interlocutory injunction will not normally be granted unless the Applicant might**

otherwise suffer irreparable injury which would not be adequately compensated by an award of damages.

c. If the Court is in doubt it will decide an application on the balance of convenience.

34. It was the Plaintiff's submission that the Sale Agreement between the 2nd Defendant and KPARBS, 2012 was tainted with illegality, was null and void and was part of a fraudulent scheme to embezzle public funds. The Plaintiff contended that the 2nd Defendant presented itself as the legal owner of the vacant agricultural plots, yet Amkeni Farms Limited was the legitimate owner. The Plaintiff referred the court to clause 3.1 of the Sale Agreement between the 2nd Defendant and KPARBS, 2012 dated 18th December, 2014 which reads as follows:

“The Vendor hereby agrees to sell as the legal owner and the Purchaser agrees to purchase the property at the Purchase Price and upon the terms and conditions set out in this Agreement.”

35. The Plaintiff made reference to a letter dated 4th March, 2015 from the 1st Defendant after the execution of the above mentioned Sale Agreement and Kshs. 70,000,000/= deposit had been paid. The Plaintiff submitted that in the letter, the 1st Defendant gave a Professional Undertaking of good passage of title to Kikambala Development Ltd and thereafter to KPARBS, 2012 knowing that the 2nd Defendant could not transfer what it did not possess. The rescission of the agreement between Amkeni Farms Limited and 2nd Defendant brought to an end the transaction.

36. Investigations by the Plaintiff revealed that 1st Defendant did not intend to honor the Professional Undertaking issued to the Advocates of KPARBS, 2012 to hold the deposit of Kshs. 70,000,000/= for the sole purpose of facilitating the sale. Immediately after receiving the deposit sum, the same was utilized for other purposes among them purchasing property known as C.R. No. 19534 for the 4th Defendant.

37. The 1st-6th Defendants have contested the Plaintiff's assertion. Defendants submitted that the parties in both Sale Agreements agreed on the specific completion periods which the parties were to adhere to strictly. Where either party could not comply with the agreed terms of the completion period, the terms of the agreement allowed the innocent party to forfeit the deposit paid by the purchaser. Counsel for the 1st-5th Defendants submitted that the Plaintiff having sued both the 2nd and 5th Defendants, could not again have instituted the suit against the 3rd and 4th Defendants without first being subjected to the rule of law and heard on allegations that they incorporated the 2nd and 5th Defendants with the purpose of committing fraudulent activity. On the face of it, there are serious issues which can only be determined through a trial.

38. The Plaintiff herein has listed the properties which should be preserved by issuance of a prohibitory order of injunction. It was the Plaintiffs averment that it will be the most inconvenienced if the orders sought are not granted as it would have to trace the assets of the Defendants herein to recover the money and the economic costs would be borne by the Government of Kenya. On the other hand, counsel for the 1st -5th Defendants argued that the balance of convenience tilts in the favour of not granting the orders sought by the Plaintiff as it is the 1st 5th Defendants who stand to suffer irreparable damage in the event that the orders sought are issued.

39. In my humble view, the party which will be more inconvenienced in the circumstances is the Plaintiff as opposed to the Defendants. In my assessment of the competing arguments, I find that the Plaintiff has shown that unless the order is granted the Plaintiff will suffer irreparable loss, since the Defendants will be at liberty to deal with the mentioned properties in the manner stated on the face of the motion. This will mean that the Plaintiff will have nothing to recover in furtherance of its statutory mandate should it succeed.

40. For the foregoing reasons I find that the Plaintiff has made out a prima facie case with a probability of

success. The orders sought in the motion dated 21st June, 2017 are therefore merited and are accordingly granted as prayed.

DATED and DELIVERED at NAIROBI this 19th day of December, 2017

L. A. ACHODE

JUDGE