



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 215 OF 2000**

ANTI CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

FRANN INVESTMENT LTD & OTHERS.....DEFENDANT

**RULING**

1. The 7<sup>th</sup> defendant filed the application dated 5<sup>th</sup> October 2015 brought under section 1 A, 1 B and 2 A of the Civil Procedure Act and Order 2 rule 15 (1) & (2) of the Rules. The 7<sup>th</sup> defendant (hereinafter called the applicant) sought the orders that the plaintiff's suit as against him be struck out for disclosing no reasonable cause of action.
2. The motion is supported by six grounds on its face. The grounds include inter – alia that the applicant was a public servant and performed his duties at the material times in his capacity as the commissioner of lands. Further that pursuant to the provisions of the Government Proceedings Act, the suit ought to have been brought against the Attorney General or the relevant government department. Lastly that the functions were conferred or imposed upon the 7<sup>th</sup> defendant by virtue of instructions lawfully given by the Government.
3. The application is opposed by the plaintiff through the grounds of opposition filed on 8<sup>th</sup> December 2015. The plaintiff states that the application is frivolous vexatious and an abuse of the Court's process. Secondly, the applicant acted illegally and as such his acts were not the acts of the Commissioner of Lands therefore personally liable. Thirdly that the liability of the applicant is personal and cannot be transferred to his office and once he broke the law, he went outside the protection of his office.
4. The parties tendered oral submissions for and against their application. Mrs Umara for the applicant submits that section 8 of the Government Lands Act (repealed) provided for suits to be commenced against the Commissioner of Lands. Further that section 3 of Cap 2 defines who a public officer is and the applicant being a public officer cannot be sued in person. Counsel supported this submission by reliance on the case of **Rwigara Assinapol vs Commissioner of Lands, Nairobi HCC No 2786 of 1992 ; Kidayy Ole Lepet & 9 others vs Nkuruma Ole Masikonde & 11 others (2005) eKLR**. Mrs Umara also cited **KACC vs Judith Okungu & Another (2013) eKLR** where the Court found that Mrs Okungu was not a proper party. She urged the Court to grant the orders sought.
5. Mr Murei for the Respondent on his part submitted that the question is whether the applicant was acting within or outside his mandate. It is his submission that the applicant acted contrary to the provisions of section 3 of the Government Lands Act thus taking himself outside the protection of his

office as pleaded in the plaint. He continued that they are claiming damages against the 7<sup>th</sup> defendant personally for misfeasance and urged the Court to dismiss the motion so that parties can be heard on merits of the suit. In support of his submissions the Respondent relies on the following cases ;

- **D. T Dobie vs Muchina (1982) KLR 1**
- **KACC vs Judith Manilyn Okungu & 2 others (2007) eKLR**
- **M vs Home Office & Another (1993) 3 ALL E.R 537 at  
page 551**
- **Chartered Bank vs Pakistan National Shipping  
Corporation & 2 others (No. 2) 1 ALL ER 173**

From the pleadings filed and submissions rendered, this Court is tasked to determine whether the 7<sup>th</sup> defendant/applicant having been personally sued is not a proper party to this case and therefore he ought to be struck off the suit. His key argument for seeking to be struck out is based on the argument that the illegalities he is alleged to have committed were done in the course of his employment as the Commissioner of Lands. The Respondent however argues that having breached the law by acting outside his mandate, he lost the protection of his office therefore he is personally liable to this claim.

6. In the plaint filed, the Respondent pleaded at paragraph 14 fraud and illegality on the part of the 2<sup>nd</sup> to 7<sup>th</sup> defendants. Particulars of fraud, breach of statute and Malfeasance against the Applicant is set out in paragraphs 19, 20 and 23 of the plaint. In his defence at paragraph 7, the Applicant relied on section 8 and 130 of the Government Lands Act. This line of defence was not pursued in this application so I will reserve my findings on it for a later time in these proceedings.

7. In paragraph 7 of the Plaint, it is pleaded thus

**“The 7<sup>th</sup> defendant is an adult male of sound mind residing in Nairobi within the Republic of Kenya and was at material times the Commissioner of Lands appointed under the Government Lands Act Cap 280.”**

8. From the wordings of paragraph 7 it is inferred that the Applicant is sued for actions he did while he was the commissioner of lands. There are two decisions of this Court in **KACC vs Judith Okungu** cited by both sides. The 1<sup>st</sup> one quoted by the Applicant has some similarity to the current suit as Ms Okungu then sued in her personal capacity successfully applied to have the suit struck out.

9. The second case was with regard as to whether the plaintiff needed to serve notice proceedings under Government Act before filing the suit and the Court found that the defendant having been sued personally no notice was required to be issued. It is distinguishable to the present orders sought in this case. The D.T Dobie case relates to general principles to be considered before striking out a suit i.e **“That a Court of Justice should aim at sustaining a suit rather than terminating it by summary dismissal.”**

10. In the case of **R vs Home Offrie & Another supra**, the Court was dealing with disobedience of an order issued to restrain the deportation of an applicant before his suit/appeal was heard. The result is that none of the cases cited by the Plaintiff/Respondent support the argument that if the Applicant acted ultra – vires then he lost the protection of his office. The Plaintiff/Respondent has powers to prosecute the Applicant for abuse of office and/or wrongful conduct. However I do not think such prosecution can be done in a case such as this. Before such a step is taken, I do agree with the plaintiff that he can sue the Applicant personally for acts done while he was the Commissioner of Lands if he can prove such a claim. Moreover, although the **Judith Okungu (2013) eKLR** case relied on by the Applicant is not

binding on me, it quoted section 4 of the Government Proceedings Act in regard to liability of the government and its employees.

11. In this instance, the plaintiff has pleaded specific actions for which the defendant/Applicant is asked to respond. The provisions of section 4 can be used by the defendant during as a defence the full trial. The allegations put forth against him are quite detailed and the same cannot be determined without adduction of oral evidence. The plaintiff is entitled to be given an opportunity to prove his case whether the allegations of fraud or malfeasance were committed by the defendant took him outside the protection of his office or not. If the plaintiff's suit fails, he can always be compensated by way of payment of costs. To avoid filing of applications, this Court on its own motion direct the plaintiff to deposit as security for costs in favour of the 7<sup>th</sup> defendant/applicant a sum of Kshs 150,000= within 90 days in a joint interest earning account to be opened by the plaintiff's counsel and the 7<sup>th</sup> defendant's advocate. I make this order on the basis of the special circumstances of this case. In the circumstances, I find the application dated 5.10.2015 as premature and dismiss it. I order that each party to bear their costs of the application.

**Ruling dated and delivered in Mombasa this 19th day of February 2016**

**A. OMOLLO**

**JUDGE**