



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO.44 OF 1991

KIBUCHO LIMITED (IN LIQUIDATION).....PLAINTIFF

VERSUS

THE OFFICIAL RECEIVER.....1ST RESPONDENT

PAN AFRICAN CREDIT AND FINANCE LIMITED

(IN LIQUIDATION)THROUGH THE DEPOSIT

PROTECTION FUND BOARD.....2ND RESPONDENT

W.G. WAMBUGU AND CO. ADVOCATES.....3RD RESPONDENT

HON. ATTORNEY GENERAL.....INTENDED INTERESTED PARTY

RULING

1. This old Winding Up Cause continues to drag on. A proposed new entry seeks the following Prayers:-
 2. THAT this Honourable court be pleased to grant leave and allow the intended interested party be enjoined in the instant suit.
 3. THAT this Honourable Court do review, set aside or vacate the Court Order made on 10th February, 2015 directing that the Ministry of Lands, Housing and Urban Development do pay a sum of Kshs.114,778,548 to Court within 45 days of today.
 4. THAT the issue of compulsory acquisition of the suit land L.R No.209/9672 be determined in a hearing on merits.
 5. THAT the costs of this application be provided for.
2. As a precursor to setting out the respective positions of the parties herein, a brief background is necessary.
3. Kibucho Ltd, in liquidation (hereafter the Company) was placed under liquidation on 24th September

1992. The Officer receiver was appointed its Interim Liquidator.

4. The Officer Receiver appears to have failed in its duties and this attracted the criticism of the Court when on 24th November 2011 Mabeya J. observed as follows:-

‘One issue that had disturbed this Court is the attitude taken by the Official Receiver in this matter. The office of the Official Receiver is a public office financed and maintained by citizens of this country, the parties to this suit included. The order of Winding Up was made in or about 1992, 19 years ago! The Official Receiver seems to have done absolutely nothing after being appointed the liquidator. Both the creditors who are owed by the company as well as the shareholders of the Company are owed a duty by that officer to expeditiously administer the affairs of the Company in a manner most beneficial to the Creditors such that they do not continue to suffer. To the contrary, the Company’s file seems not to have been attended to by the Official Receiver at all. The issue of the monies alleged owed to the Company in the sum of Ksh.114,778,548/- seems not to have been pursued by the Official Receiver’.

5. The Judge then ordered the Officer Receiver to report on the following:-

a) *The steps he/she has taken in pursuance of the winding up order herein.*

b) *The status of he company’s property known a LR NO.209/9749 and*

c) *The status of the company’s claim for Kshs.114,778,548/- against the Attorney General pursuant to the order of the High Court in NBI HC Misc Application No.1259 of 1999.*

d) *Mention on 10th February, 2012 to confirm compliance.*

e) *In view of what I have said above the costs of the application will be borne by the Official Receiver.*

This was to be done within 60 days of the Court.

6. Things began to happen now, albeit slowly. On 4th April, 2014, Miss Oyugi appearing for the Officer Receiver informed Court that the Officer Receiver had written to the Commissioner of Land to pay up the decretal sum to enable the Officer Receiver distribute the same. Gikonyo J. then ordered,

“Accordingly I order the Principal Secretary, Ministry of Land to appear before me on 9th June 2014 to offer explanation of his settlement of the decretal sum herein as ordered”.

7. Fast forward to 10th February 2015 when Gikonyo Judge made then following further orders:-

‘The Ministry of Land to pay a sum of Ksh.114,778,548 to Court within 45 days of today. The responsible person in the Ministry should ensure compliance with the Order. It is so ordered. Mention on 25.3.2015’.

The payment has never been made notwithstanding promises by no less than the Principal Secretary to the Ministry.

8. The Application before Court would therefore seem to be a renege of the Ministry’s promise to pay. In an Affidavit sworn on 9th October, 2015, Mariama El Maawy, the Principal Secretary, Ministry of Lands Housing and Urban Development explains the Ministry’s change of heart.

9. She explains that what gave raise to whether or not the sum of Ksh.114,778.548/= was payable are Judicial Review proceedings being Nairobi **Hc Misc.1259/1999 Republic Vs. Attorney General and Commissioner of Lands ExparterKibucho Limited.** In it the applicant had sought for orders of

mandamus directing the Commissioner of Lands to pay Kshs.114,778.548/- with interest to the Applicant. In those proceedings a Consent Order was recorded on 19th July, 2004 in which the Commissioner of Lands was ordered to pay the Exparte Applicant a decretal sum of Ksh.144,778.548/=.

10. That Consent Order came under attack when it was challenged by the Honourable Attorney General in an application dated 27th April, 2005 seeking that it be reviewed, set aside or vacated. The Application was premised on the grounds, inter alia, that Exparte Applicant concealed important and material facts at the time the consent was entered and that it was based on a mistake on the part of the Applicant as to the true nature of the Application. The Principal Secretary further avers that the said application was compromised by a consent dated 30th May 2010.

11. This subsequent orders reads:-

“UPON READING the Application presented to this Court on 28th April, 2005 by the Counsel for the Respondent/Applicant under all the inherent powers of the Court AND UPON READING the affidavit of Abdul Agonga sworn on 27th May, 2005 and the annexure thereto; AND UPON READING Replying Affidavit of Peter Kiburi Karimi sworn on 19th May 2005, AND UPON HEARING counsel for the Applicant and in the presence of the Counsel for the Respondent: **IT IS HEREBY ORDERED BY CONSENT:-**

1. THAT an order of mandamus be and is hereby issued to compel the Commissioner of Lands to perform his/her statutory duties by perfecting the compulsory acquisition of L.R No.209/9672 and compensating the Applicant in accordance with the provisions of the land acquisition Act.

AND FURTHER IT IS HEREBY ORDERED BY THE COURT:-

2. THAT in view of the long delay and lapse of time, the process of acquisition and Compensation shall be finalized and concluded within the next 4 months.

3. THAT the Respondent shall pay costs of these proceedings”.

12. Simply stated, the position of the Principal Secretary is that the Court Order issued herein on 10th February 2015 directing the Ministry of Lands to pay a sum of Ksh.114,748,548/= to Court was issued in error as the basis had already been set aside by the Court Order issued on 30th May 2005 in the Judicial Review proceedings.

13. Annexed to the Affidavit of Mariamu El Maawy are annexures which she asserts supports the following narrative by the Ministry:-

a) THAT the applicant company parcel of land more particularly described as LR No 209/9672 measuring 0.6072 Ha was taken over by the Government for use by Moi Nairobi Girls School in 1982.

b) THAT at the time of the said take over, by the Government the same had been charge to Pan African Credit and Finance Limited (for Kshs.4,000,000.

c) THAT as an alternative to LR 209/9672, the applicant company was granted LR 209/9749 measuring 0.5375 Hectares.

d) THAT on or about 28/7/1983 the charge in L.R No.209/9672 was transferred to L.R 209/9749.

e) THAT upon the Grant of L.R 209/9749 to Kibucho Limited (in liquidation) the company complained that the same was occupied by squatters and as such was not suitable alternative.

f) THAT as an alternative to L.R No.209/9749 Kibucho Limited (in liquidation) was allocated LR No.10659 measuring 0.7073 hectares.

g) THAT Kibucho Limited (in liquidation) applied for consent to transfer and on 30.12.94 proceeded to sell the said LR 209/10659 to Mitundu Holdings Limited at a consideration of Kenya Shillings three Million (Kshs.3,000,000) vide a transfer registered as I.R 48137/4.

14. In reply to the Application, the Officer Receiver takes the position that the matters in dispute stem from the interpretation of the Orders of 19th July 2004 and 30th May 2005 issued in the Judicial Review proceedings and that issue should be referred back there for ascertainment.

15. The 2nd Respondent takes objection to the Application on the grounds that the Attorney General has been in breach of various Court Orders and should not be heard. The matters sought to be litigated are res-judicata. The application is incompetent and inadmissible under the Companies Act High Court Winding Up Rules. That it is also an affront to Judicial process.

16. Two contributories to the company swore Affidavits in opposition to the Application. Peter Karimi on 21st October 2015 and Newton K. Kiburi on 9th November 2015. The contents of the two Affidavits complement each other. Those affidavits are also supported in some material particular by the affidavit of Wanja Wambugu of W.G. Wambugu & Co. (the 3rd Respondent) sworn on 21st October 2015.

17. Read together the Affidavits take the following positions. That in the month of June 1982 the Government of Kenya, through the then office of the Commissioner of Lands stopped the company from undertaking a project on LR Number 209/967 following a Presidential Directive. The Company was offered alternative land being LR.No.209/9749 as part compensation. Also to be compensated was the expenses incurred by the Company on the project it was undertaking. It was emphasized that the company's claim for compensation was for these two distinct items.

18. In paragraphs 21 and 22 of the Affidavit of Mr. Newton Kiburi, he states as follows:-

21. THAT in response to the contents and averments in paragraph 23 of the supporting affidavit of MARIAMU EL MAAWY I ca09/9749 and L.R No.209/10659 were part compensation made by the applicant in the years 1987 and 1983 respectively. The consent orders of 19th day of July 2004 and 30th May 2005 were entered into after negotiations that factored in this allotment. The unsurveyed industrial plot Thika Municipality and letter of allotment Ref. No. 104/991/11 were offers which the applicant never perfected.

22. That Kibtegorically wish to state that LR NO.2ucho Limited has been allocated only two plots by Commissioner for Land over the years. These are LR 209/9749 in 1983 and LR 209/10659 in 1987. Both were part compensation. The company never received any compensation for work done on the original plot as agreed in 1988 and which became a subject in Misc.Appl.No.1259 of 1999. This also noted by Hon. Justice Githinji in his ruling in 2000.

19. It is the position of the contributories that the Consent Order of 19th July 2004 was never reviewed and/or set aside by the Consent Order of 30th June 2005 as the Court appreciated the two limbs of the claim. The 3rd Respondent does in fact think that it was in furtherance thereto.

20. The written submissions of parties were highlighted at a short hearing of the Application. The following emerge as issues that require resolution:-

(i) Has the intended interested party made out a good case for joinder?

(ii) Should the Court review, set aside or vacate its order of 10th February 2015?

(iii) Should the Court stay discharge and vacate the order of 22nd July 2015 and 5th October 2015?

21. These Winding Up Cause commenced under the legislative framework of the now retired Companies Act. By dint of the provisions of Section 734(2) of the Insolvency Act on Transition and Savings, the provisions of the Companies Act apply. Rule 203 of the Companies (Winding Up) Rules provides as follows:-

“In all proceedings in or before the Court, or any judge or officer thereof, or over which the Court has jurisdiction under the Act or these rules, where no provision is made by the Act or these Rules, the practice procedure and regulation in such proceedings, shall unless the Court otherwise directs, be in accordance with the rules and practice of the Court”.

22. The Winding Up Rules do not make provisions for Joinder of a party such as the current Applicant. For this reason this court must deal with the matter at hand in accordance with the Rules and Practice of the Court. The Rules that govern Civil proceedings are the Civil procedure Rules.

23. the Court has power to allow the joinder of a party into a matter is not doubted. But when should joinder be allowed? After quoting, the decisions in Departed Asian Property Custodian Board Vs. Jafter Brothers Ltd [1999]EA 55(SCU) a three Judge Bench, in Meme vs. Republic[2004] KLR 637 at page 653 held,

“The foregoing passage spawns certain principles which are opposite to the joinder of parties in a constitutional reference such as the present one: (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; (iii) joinder to preempt a likely course of proliferated litigation.”

Though made in respect to a Constitution reference, the principles would still be applicable here. Perhaps, I should add that in appropriate circumstances joinder can be allowed even very late in the day as long it serves the ends of justice and does not prejudice the already existing parties.

24. The Interested Party represents the Principal Secretary to the Ministry of Lands, Housing and Urban Development. It is common ground that on 10th February 2015 the Ministry was ordered to pay into Court a sum of Kshs.114,778.548/=. The position of the Interested Party is that to make the payment would amount to making double compensation to the company and it would be an unjustified use of Public resources. The Interested Party has set out its case through some Affidavit evidence. In that evidence the Interested Party states why it should not be held to its early promise to make the payment.

25. It seems clear to me that because of the order made against it, the Interested Party has a right which will be adversely affected by the order. The Interested Party is seeking to be enjoined so as to answer to that order. Although representatives of the Ministry have previously attended Court in obedience of Court Summons to respond to why payment has not been made, the Interested Party now seeks to be made a substantive party so as to seek some substantive Prayers in respect to the said order. I think they deserve to be enjoined and heard. Whether or not they are deserving of the substantive orders they seek is another issue.

26. The argument that the presence of the Officer Receiver makes the joinder of the Attorney General unnecessary needs to be debunked. Whilst both are Public Officers their roles in these proceedings are distinct. The Official Receiver is the appointed Interim Liquidator. The Attorney General on the other hand represents a Government Ministry which is said to be a debtor to the Company. The Official Receiver is under statutory duty to collect debts due to the Company. Whilst the two positions need not be antagonistic they are certainly distinct.

27. The request for joinder by the Interested Party is meritorious and I allow it.

28. The Court nevertheless agrees with the advocate for the third Contributory that a party intending to join a suit cannot properly apply for a substantive relief in the same Application. Counsel cites the decision in Kingori Vs. Chege and others [2002]eKLR in support of this proposition. The Applicant

herein filed an omnibus Application contemporaneously seeking joinder and three other substantive orders. Applying the rules strictly, the substantive prayers ought to be struck out because they cannot be properly sought before the enjoinder is formalized. Yet this may not be the course to take in these proceedings. This is because all parties herein, including the Third contributory, have filed responses and answers to the substantive prayers. To strike out these prayers now could amount to merely postponing their consideration to another day. This may not be prudent use of judicial time and energy. Parties herein have not only filed responses but made elaborate submissions in respect to the substantive prayers. Would it be fair to ask them to re-agitate these issues later when they suffer no prejudice if the issues were to be determined at once? It would be inconsistent with the direction of Article 159(2) of the Constitution on exercise of judicial authority if this Court were to strike out the substantive prayers.

29. The substantive prayers! The Orders sought to be stayed, reviewed, set aside, discharged or vacated are those made on 10th February 2015, 22nd July 2015 and 5th October 2015. The two later orders are simply in furtherance or implementation of the order of 10th February 2015. On that day Judge Gikonyo ordered as follows;

“The Ministry of Land pay a sum of Kshs.114,778,548/= to Court within 45 days of today. The responsible person in the Ministry should ensure compliance with this Order. It is so ordered”.

30. Two things need to be said immediately of the Application. First given the nature of the prayers sought, the Application ought to have been brought promptly after 10th February 2015 when the adverse Order was made. The Order required that Ministry makes the payment within 45 days. The Court record shows the Ministry was aware of the Court order when Mr. Ocharo attended Court on 25th March 2015 and made a promise to pay. The Ministry should have in its first appearance indicated its opposition to making the payment.

31. econdly and as correctly pointed out by the 2nd Respondent, the Interested Party’s failure to make the payment into Court as ordered by the Court on more than one occasion can be construed to be in contempt of the Court Orders. Ordinarily, anyone disobeying a Court Order does not deserve the audience of the Court. And the Courts have always taken an uncompromising stance in that respect.

32. However, there are some exceptional circumstances herein that require the Court to excuse the short delay in bringing the Application and secondly to grant audience to the Interested Party. While other reasons will become apparent shortly, the Court also bears in mind that the Application before Court is an explanation by the Principal Legal Adviser to the Government (Article 155 (4) of the Constitution) that compliance with the Order is not without difficulties and is contrary to Public interest.

33. Mariamu El Maawy, the Principal Secretary Ministry of Lands, housing and Urban Development states as follows in paragraph 23 of her supporting Affidavit of 9th October 2005,

“That the said Court order issued on 10th February 2015 directing the Ministry of Land to pay a sum of Kshs.114,778.548/= to Court was issued in error as the sum had already been set aside by a Court Order issued on 30th May 2005”.

If that were true, then to insist that the amount be paid to the Officer Receiver as a debt to the Company would be to put Public money into jeopardy. Is this assertion by the Interested Party worthy of consideration?

34. It is common ground that LR NO.209/9672 which belongs to the Company was compulsory acquired by the Government for use by Moi Nairobi Girls School in 1982.

35. The position of the Attorney General is that the Company was compensated by being allocated the following alternative land:-

(i) LR 209/10659

(ii) Unsurveyed industrial Plot Thika Municipality measuring 4.0 hectares through letter of allotment No.10499/11 of 20th July 1998.

i. (iii) 2.4 hectares through letter of allotment Ref.109/991/11

Land Reference No.209/10659 was said to be an alternative to LR 209/9749 which had been granted to the Company but was found unsuitable as it was occupied by squatters. Although it must be said that the company itself accepts that it was allocated LR 209/9749 as part compensation!

36. Further and in respect to Land Reference No.209/10689, it is said that the company sold the same to Milundu Holdings at a consideration of Kshs.3,000,000/= and a transfer made on 30th December 1994. A copy of title thereto was shown to Court.

37. The rival stance taken by the contributories of the Company is articulated in paragraphs 21 and 22 of the Replying Affidavit of Mr. Newton as follows:-

21. THAT in response to the contents and averments in paragraph 23 of the supporting affidavit of MARIAMU EL MAAWY I categorically wish to state that LR NO.209/9749 and L.R No.209/10659 were part compensation made by the applicant in the years 1987 and 1988 respectively. The consent orders of 19th day of July 2004 and 30th May 2005 were entered into after negotiations that factored in this allotment. The unsurveyed industrial plot Thika Municipality and letter of allotment Ref. No 104/991/11 were offers which the applicant never perfected.

22. That Kibucho Limited has been allocated only two plots by Commissioner for Land over the years. These are LR 209/9749 in 1983 and LR 209/10659 in 1987. Both were part compensation. The company never received any compensation for work done on the original plot as agreed in 1988 and which became a subject in Misc.Appl.No.1259 of 1999. This also noted by Hon. Justice Githinji in his ruling in 2000.

38. I understand the contention of the contributories to be that any allocation of land by the Government was only in part compensation. Further that what was outstanding became the subject of the Judicial Review proceedings (Misc Application No.1959 of 1999, Republic Vs. 1) The Attorney General 2) The Commissioner of Lands Exparte Kibucho Limited).

39. In those Judicial Review proceedings, the claim by the Exparte Applicant was presented in the Amended Notice of Motion dated 14th June 2004. The substantive prayer sought is that,

“This Honorable Court do grant an order of mandamus by way of judicial review directed to the Commissioner of Lands to pay the Applicant the sum of Ksh.114,778.548/= only together with interest to date”.

40. The facts to the application were verified by the Affidavit of Peter Kiburi Karimi. Mr. Karimi is the 2nd contributory herein and does not dispute that affidavit. The contents of that Affidavit are of some significance. In it the deponent lays a basis of the claim of Ksh.114,778.548/= by the Company.

41. Mr. Karimi deponed that at the time of acquisition of LR No.209/9672 the Applicant had plans for development acquired necessary approvals and entered into a building contract with M/s.Trans African Construction Limited at an agree sum of Ksh.8,310,000/=. The Company also sought finances for Ksh.4,000,000/= from Pan African Credit and Finance (non receivership).

42. That the Company accepted the compensation on condition that the Commissioner of Lands complied with the relevant law. Pursuant thereto the 2nd Respondent offered the Applicant an alternative plot being LR. No.209/9749 but that plot was not vacant and therefore not available for possession.

43. Karimi then deponed as follows:-

11. "THAT pursuant thereto the 2nd Respondent offered the applicant an alternative plot in Nairobi being L.R No.209/9749. The Applicant avers that the said plot was not vacant for possession by it.

12. THAT on or about March 1987 the Applicant and the Respondents entered into negotiations for its claim in a bid to establish the expenses so far incurred by the Applicant whereupon the Respondents accepted to pay the Applicant a sum of Kshs.5,272,657/= together with interest at the rate of 18% p.a compounded interest"

13. THAT the 2nd Respondent also accepted to give the Applicant an alternative plot being LR No.209/10659 which plot was also not available for allocation.

14. THAT subsequently the 2nd Respondent allocated the Applicant two parcels of land situated within the Thika Municipality referred to as PLAN NO. NRB/4/93/8 and TKA/4/97/2 vide letters of allotment dated 25th November 1996 and 20th May 1998 respectively".

44. The impression one gets from the deposition by Mr. Karimi then is that at the time of him making the Affidavit no compensation (not even part compensation) had been made. This does not seem consistent with current position of his co-contributory Mr. Newton Kiburi who unequivocally stated that LR. Nos 209/9749 and 209/10659 were allocated to the Company in part compensation (see paragraph 27) of his Affidavit of 9th November 2015. This inconsistency is not without importance. I leave it for now but will return to it shortly.

45. About a month after the Notice of Motion was amended, a Consent was entered on 19th July, 2004 between the parties as follows:-

"UPON READING the Amended Application presented to this court on 16th June 2004 by the Counsel for the Applicant Under Order LIII Rules 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the law; AND UPON READING the Affidavit of PETER KIBURI KARIMI sworn on the 14th day of June 2004 and the statement of facts dated 14th June 2004 and the annexures thereto; AND UPON HEARING Counsel for the Applicant and in the presence of the Counsel for the Respondent **IT IS HEREBY ORDERED BY CONSENT:-**

1. THAT an order of mandamus by way of Judicial Review be and hereby issued directed to the Commissioner, Ministry of Lands compelling him to pay the Applicant herein the decretal sum, interest and costs as which to date stands at Kshs.114,778,548/= together with interest and costs.

2. THAT the costs of this application are hereby granted to the Applicant.

3. THAT the order for mandamus be and is hereby suspended for a period of 30days from the date hereof"

46. That would however not end the matter because through a Notice of Motion of 27th April, 2005 the Attorney General sought to have the said consent reviewed, set aside or vacated. The Motion was premised on, among other reasons, that,

"By receiving the land parcel LR.No.209/9749 and thereby charging it to pay African Credit Finance Ltd the claimant must be taken to be fully compensated".

47. In response to that Motion, Mr. Karimi sworn an Affidavit on 9th May 2005 and in Replying the issue of LR.No.209/9749, stated,

"11. THAT in reply to paragraph 13 and 14 of the said Affidavit, the allocation to the Applicant of LR.No.209/19749 was a partial compensation as per the parties agreement alluded to in paragraph 8 hereof and the grant was thus not in full and final settlement of the Applicant claim".

48. It is common ground that the Notice of Motion of 27th April 2005 was compromised through a consent Order of 30th May 2005 which reads:-

“UPON READING the Application presented to this Court on 28th April, 2005 by the Counsel for the Respondent/Applicant under all the inherent powers of the Court AND UPON READING the affidavit of Abdul Agonga sworn on 27th May, 2005 and the annexure thereto; AND UPON READING Replying Affidavit of Peter KiburiKarimi sworn on 19th May 2005, AND UPON HEARING counsel for the Applicant and in the presence of the Counsel for the Respondent: **IT IS HEREBY ORDERED BY CONSENT:-**

4. THAT an order of mandamus be and is hereby issued to compel the Commissioner of Lands to perform his/her statutory duties by perfecting the compulsory acquisition of L.R No.209/9672 and compensating the Applicant in accordance with the provisions of the land acquisition Act.

AND FURTHER IT IS HEREBY ORDERED BY THE COURT:-

5. THAT in view of the long delay and lapse of time, the process of acquisition and Compensation shall be finalized and concluded within the next 4 months.

6. THAT the Respondent shall pay costs of these proceedings”.

49. The disputation is that Parties hereto have given competing views on the import and effect of the order of 30th May 2005. The Attorney General takes the view that it was entered pursuant to the Application to set aside the Consent of 19th July, 2004 and it had the effect of setting aside that earlier consent.

50. The Respondents on the other hand make the point that the Orders of 19th July, 2004 was not set aside. For example, Counsel for the 2nd Contributory submits:-

“The attempt by the Attorney General vide Notice of Motion application dated 27th April 2005 and filed in Court on the 28th April 2005 to set aside the Orders of 19th July 2004 did not succeed but only yielded further consent orders given of the 30th May, 2005 of mandamus issued to compel the Commissioner of Lands to perform his/her statutory duties by perfecting the compulsory acquisition of L.R No.209/9672 and compensating Kibicho Limited in accordance with the provisions of the Land Acquisition Act. It was further ordered that the process of acquisition and compensation was to be finalized and concluded within four months”.

51. For sure, the Consent Order of 30th May 2005 does not express itself to be setting aside the consent order of 19th July 2004. But can the setting aside be implied as suggested by the Attorney General?

52. It is not in the province of this Court in these proceedings to make that determination. That issue will have to be raised in the Judicial Review proceedings where the orders were made. On my part, I observe that the assertion by the Attorney General is not trivial.

53. Firstly, there is an unequivocal admission by the 2 Contributories of the Company that the Company was allocated LR No.209/9749 in 1983 and LR.209/10659 in 1987, albeit in part compensation. Yet in seeking the order for mandamus to compel the Commissioner of Lands to pay Ksh.114,778.548/=, Mr. Karimi says this in respect to LR.NO.209/9749,

- “THAT pursuant thereto the 2nd Respondent offered the Applicant an alternative plot in Nairobi being LR. NO.209/9749. The Applicant avers that the said plot was not vacant for possession by it”.

As to LR. 209/10659 he says;-

- “THAT the 2nd Respondent also accepted to give the Applicant an alternative plot being LR No. 209/10659 which plot was also not available for allocation”.

54. The impression one gets was that the Company was seeking payment of Kshs.114,478.548/= as though it had not received any form of compensation at all.

55. Secondly, once the consent order of 19th July 2004 was made directing the Commissioner of Lands to pay the Exparte Applicant Kshs.114,778,548/= then the Exparte Applicant had succeeded entirely in its motion. The impression created was that payment of Ksh.114,778,548/= plus interest up to the date of the consent represented the full claim by the Exparte Applicant. If indeed, as asserted by the Contributories and the Respondent herein, that the consent order of 30th May, 2005 did not implicate the consent order of 19th July 2004 then it does not seem clear to me why the later order required the Commissioner to perfect the compulsory acquisition and compensate the Exparte applicant in accordance with the provisions of the Land Acquisition Act. Why would there be need to ‘perfect’ the process and ‘compensate’ in accordance with statute if it was still the intention of the parties to the consent that the amount in compensation was already agreed or determined at Kshs.114,778.548?

56. What is at stake herein is the payment of Kshs.114,778.548 from the National Treasury. These are public funds. While the Court is happy to order an implementation of the order for payment once there is clarity in the matter, it would be highly irresponsible of it to insist that the payment be made when there is a lingering doubt as to whether it is indeed payable. What commends itself to this Court is to give a chance to the Attorney General to seek a clarification of the effect, if any, of the Consent Order of 30th May 2005 on the Consent Order of 19th July 2004. That clarification must be sought in the Judicial Review proceedings. But as this Court is sensitive to the old age of this Winding up Cause, it shall limit the time within which the Attorney General can move for clarification.

57. There is yet an issue that may turn out to be of great implication to the Judicial Review proceedings. This was adverted to in paragraph 18 and 19 of the Affidavit of Mariamu El Maawy in which she deposes:-

- “THAT I am advised by the state Counsel on record that Kibucho Limited was placed under liquidation and the Official Receiver appointed the interim liquidator of the company on 24th September 1992.
- THAT I am further advised by the State Counsel on record, which advise I verify belief to be true that Kibucho Limited (in liquidation) is not and was not competent to institute any legal proceedings for the benefit of the company without the sanction of Court or committee of inspection”

58. There is no dispute that the Company was placed under liquidation and the Officer Receiver appointed the Interim Liquidator of the Company on 24th September 1992. From copies of the Notice of Motion dated 21st October 1999 which are annexed to the Affidavit of Mariamu El Maawy and which were not refuted, it **does not** seem that the Official Receiver commenced or participated in those Judicial Review Proceedings. The legitimacy of those entire proceedings (and therefore the consent orders therein) may come under scrutiny in view of the provisions of Section 241 of The Companies Act which reads:-

i. The liquidator in a Winding up by the Court shall have power with the sanction either of the Court or of the Committee of Inspection;

(a) to bring or defend any action or other legal proceedings in the name or behalf of the company.

But it is not for this Court to make a decision on one way or other on that argument. The Interested Party will have to take it that up in Misc Application No. 1259 of 1999.

59. The Court allows the Notice of Motion of 9th October 2015 but only to the following extent:-

1. The Hon. Attorney General is granted Leave to join these proceedings as an Interested Party.
2. The Orders of this Court of 10th February 2015, 22nd July 2015 and 5th October 2015 are hereby stayed for 180 days to allow the Attorney General move the Court in Misc Application No.1259 of 1999 in respect to the consent orders of 19th July 2004 and 30th May 2005.
3. At the end of the stay period any party is at liberty to apply.
4. Each party to bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 27th day of October,2016.

F. TUIYOTT

JUDGE

PRESENT;

Kamau for Applicant

Ngichu for 3rd Respondent

Mulele for 1st Contributory

Akonga h/b for Mwangi for 2nd Respondent

Mwaniki for 3rd Contributory

Alex - Court clerk