



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 42 OF 2014

IN THE MATTER OF THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT

AND

IN THE MATTER OF METEOROLOGICAL LAND

**AND IN THE MATTER OF PRESERVATION OF LANDED PROPERTY KNOWN AS L.R.
209/13559**

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION.....APPLICANT/RESPONDENT

VERSUS

SAYANI BROTHER & CO(K)LTD.....1STRESPONDENT/APPLICANT

SANJAY SHAH.....2NDRESPONDENT/APPLICANT

CREATIVE INNOVATIONS LTD.....3RDRESPONDENT/APPLICANT

KINGSWAY TYRES LTD.....4THRESPONDENT/APPLICANT

RULING

The brief facts leading to the applications for determination are as follows:- The Ethics and Anti-corruption Commission filed an ex-parte Originating Motion dated 6th February 2014 seeking an order for preservation of property known as LR No. 209/13559 belonging to the meteorological department and restraining the respondents jointly and severally, their agents, servants or any other person from entering, encroaching, constructing, developing, occupying, selling, wasting or in any other way dealing with the suit property. The applicant also sought to have the order remain in force for a period of six months in terms of section 56(3) of the Anti Corruption and Economic Crimes Act.

The application was allowed by the court on 12th February 2014 and the order was issued on 14th

February 2014. Aggrieved by the said order, the 1st, 2nd, 3rd and 4th Respondents filed Notices of Motions dated 27th February 2014, 25th February 2014, 27th February 2014 and 28th February 2014 respectively all seeking to discharge, vacate or set aside the ex parte orders made on 14th February 2014. In addition, the 2nd Respondent sought to have his name struck out as party to the application dated 6th February 2014 as well as an order restraining the Applicant from filing suits against him without a just cause.

In a nutshell, the grounds upon which the applications are premised are that the Applicant instituted HCCC No. 275 of 2009 seeking to recover the suit property which was allegedly illegally allotted to Beacon Towers Ltd on 1st November 1997. The Respondents have averred that they are not parties to the said suit and have maintained that they have no relationship with Beacon Towers Ltd whatsoever. They stated that they did not acquire any property through corrupt practices and had no intention to transfer all in any way deal with corruptly obtained property. According to the Respondents, no prejudice will be suffered by the Applicant if the orders are set aside.

In response to the applications, The Applicant filed a replying affidavit sworn by Fred Lolkurum on 7th April 2014 where he stated that he was an investigator with the Applicant duly appointed pursuant to section 23(1) of the Anti-corruption and Economic Crimes Act. The Applicant contended that their investigations on allegations that the suit property had been illegally alienated to a number of companies revealed that on 12th November 1997, a PDP in respect to the property was prepared and signed by then Commissioner of Lands in which the land was divided into 5 portions

The Applicant has annexed as evidence a copy of the plan and has averred that on 21st November 1997, Bacon Towers Ltd, Pamba Properties Ltd, Brentwood Traders Ltd, Varun Industrial Properties Ltd and Hilbrow Properties Ltd which companies have a common directorship and shareholding were allocated the meteorological land. According to the Applicant, among the grants created was L.R 209/13559 which was granted to Beacon Towers Ltd and which has been partly taken over by the Respondents.

While stating that their although their investigations have not revealed any link between Beacon Towers Ltd and the Respondents, the Applicant has stated that its claim against Beacons Towers Ltd is pending in court. It is the Applicant's case that the Respondents have continued with construction of a wall on the suit property despite failure to produce proof of ownership necessitating these proceedings.

The Applicant has exhibited a letter dated 6th March 2014 from the Registrar of Companies showing that the 3rd and 4th Respondents share a common director while the 4th Respondent is a shareholder of the 3rd Respondent. It is the Applicant's averment that workers of the 1st Respondent who was behind the construction of the wall informed them that they had been instructed by the 3rd Respondent. Lastly, the Applicant averred that it is upon visiting the premises of the 3rd Respondent that they were directed to the offices of the 4th Respondent and in particular, to the 2nd Respondent.

The application was canvassed by way of written submissions and the Applicant filed submissions dated 31st July 2014 where it was argued that although the Respondents were on the one hand denying responsibility for construction of the wall, on the other hand they appeared to admit responsibility for intrusion on the suit property. Counsel for the Applicant submitted that the Respondents contended that the action should be directed against the known registered proprietor who is Beacon Towers Ltd and also argued that since the property had not been lost, the Applicant lacked jurisdiction.

It is the Applicant's submission that if they had mandate to recover lost or damaged property against parties who have attempted to obtain legal instruments, they had mandate against those who blatantly attempted to grab without any colour of right. Counsel stated that the 1st Respondent's submission that the construction was not wastage but beneficial was demonstration of impunity since any intrusion into the land of another constitutes tresses and any activity which is not of the owner's choice is waste.

In respect to the Respondents' claim that the Applicant did not have proof that the suit property belongs to the meteorological department, it was submitted that there was documentary, physical and historical

evidence that the land belonged and was in actual use by the department. It was also submitted that the said argument could only be made by Beacon Towers Ltd and not strangers to the land who had no better title.

While stating that the Respondents were jointly and severally involved in the alienation of land belonging to the meteorological department by constructing a wall cutting off part of the land, the Applicant submitted that none had demonstrated a good title to the property or at all. It is the Applicant's submission that the orders for preservation were rightly issued and that no sufficient reason had been offered why they should be lifted.

The 1st Respondent filed submissions dated 8th May 2014 where facts of the case were reiterated and it was contended that since the Originating Motion was founded on section 56 of the Ethics and Anti-corruption Commission Act, the threshold has not been satisfied and therefore, that the application cannot be maintained. Counsel for the 1st Respondent argued that whereas the Applicant alleged that the suit property belonged to the meteorological department, there was no prove of ownership or previous ownership by the said department.

It was submitted that the Applicant who was not the owner of the suit property had pursued an action under the Trespass Act. The 1st Respondent argued that without title to the suit property, the Applicant lacks locus standi to commence these proceedings. Reliance was placed on Article 64 of the Constitution and it was submitted that since the suit property was private land, it was only the owners of that land who can commence the action of the nature instituted by the Applicant.

While submitting that the Anti-corruption and Economic Crimes Act provides that the Applicant may apply to preserve the property of a person under investigations, the 1st Respondent stated that it was not under investigations. Counsel argued that there was no evidence produced to prove that any of the Respondents had been involved in corrupt conducts.

In further submission, the 1st Respondent's stated that whereas section 56 of the Ethics and Anti-corruption Commission Act is intended to preserve property from wastage or disposal, the Applicant had stated that the property was being improved or developed by way of construction of a fence. According to the 1st Respondent, the land was allocated by the president and the Commissioner of Land witnessed the grant which was registered by the registrar of lands. Counsel submitted that none of these officials had been enjoined in these proceedings.

While submitting that the orders were issued without the 1st Respondent being heard, Counsel argued that this was an affront to the right to fair hearing enshrined under Article 50 of the Constitution which is non derogable pursuant to Article 24 and 25. Reliance was placed on the case of **Tiwi Beach Hotel -vs- Stamm (1990-1994)EA 565** and **Owners of the Motor Vessel "Lillian S"-vs- Caltex Oil (Kenya) Ltd [1989] KLR 1** for the proposition that orders procured through material non-disclosure will be set aside.

The court was also referred to the case of Richard **Leiyagu -vs- IEBC & anor Nyeri CA no. 18 of 2013** where it was stated that the right to hearing was protected in the Constitution and was the cornerstone of the rule of law. Lastly, Counsel urged the court to restrain the Applicant from pursuing further or future proceedings without the requisite threshold since they were violating the right to property enshrined under Article 40 of the Constitution.

Through submissions dated 8th May 2014, the 3rd Respondent contended that the orders should be set aside for reasons that the Applicant had failed to disclose to the court that it had earlier on filed HCCC No. 275 of 2009 which it had failed to pursue. It was also submitted that the orders were issued against a wrong party who was not the registered proprietor of the suit property and further, that the Applicant who is not a proprietor of the property cannot purport to litigate on behalf of a party whose rights had been infringed.

The 3rd Respondent submitted that the Applicant was abusing the court process by filing this

miscellaneous application while at the time of filing HCCC No. 275 of 2009, the Applicant was aware that suit property was owned and registered under Beacon Towers Ltd. Counsel submitted that the 3rd Respondent was not a director, shareholder or in any way connected to or associated with Beacon Towers Ltd. The court was referred to the case of **Tiwi Beach Hotel -vs- Stamm (1990-1994) EA 565** for the submission that an applicant seeking relief on an ex parte application has a duty to make full disclosure of all the facts material to the application which are known to him or her.

In further submission, the 3rd Respondent stated that since the suit property was duly and validly registered in the name of Beacon Towers Ltd, the Applicant lacks locus to institute any recovery proceedings. It was further submitted that the 3rd Respondent had no claim in the suit property and that it had no relationship with the registered proprietor. Lastly, it was submitted that no proof was tendered by the Applicant to show that the 3rd Respondent was involved in any corrupt conduct while acquiring the suit property.

The 4th Respondent filed submissions dated 13th May 2014 where it was submitted that no investigation report had been attached to show that the suit land is meteorological land and that the same was in actual use and occupation by the meteorological department. Counsel submitted that the 4th Respondent had not been sued by the meteorological department for unlawful encroachment and/or trespass.

While submitting that the 4th Defendant had no relationship with Beacon Towers Ltd who was the registered owner of the suit property, Counsel argued that attempts to seek ownership documents from the 4th Defendant were misguided since the registered owner of the property was known. It is the 4th Respondent's submission that depositions as to the sharing of common directorship had no bearing to the issues germane to the application and were of no relevance.

Lastly, the 4th Respondent relied the case of **James Kariuki Ng'ang'a T/A Ndarugu Merchants -vs- Joseph Ngae Njuguna & anor, Milimani HCCC No. 575 of 2003** for the submission that the ex parte orders obtained through concealment of material facts should be discharged and the court was urged to discharge the orders secured on the basis of non-disclosure of material facts.

The issue for determination is whether the Respondents have satisfied the requirements of section 56(5) to enable the court discharge or vary its orders issued on 14th February 2014.

The Respondents argued that the Applicant who was not the owner of the suit property lacks jurisdiction to institute these proceedings. This submission is however misplaced since under section 7 (1) (h) of the Anti-Corruption and Economic Crimes Act, the Applicant has power to investigate the extent of liability for the loss of or damage to any public property and to institute civil proceedings against any person for recovery of such property or for compensation.

These proceedings were also objected to by the Respondents who contended that they were an abuse of the court process in view of the fact that the Applicant had instituted HCCC No. 275 of 2009 seeking to recover the suit property which was allegedly illegally allotted to Beacon Towers Ltd.

The proceedings herein have been brought under section 56 of the Anti-Corruption and Economic Crimes Act which provides that :-

"on an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct."

The marginal note to section 56 refers to such an order as an "order preserving suspect property." The court has held in the case of **Kenya Anti-Corruption Commission -vs- Judith Marilyn Okungu & another(2013)eKLR** that an order under section 56 (1) of the Act is merely intended to preserve the property and that the decision ensuing therefrom is not a final decision. Considering that none of the

Respondents is party to HCCC No. 275 of 2009, there is no bar to the Applicant instituting proceedings under section 56(1) seeking to preserve the suit property where they have believe that the same is in danger of being illegally alienated.

The Applicant's averments that the Respondnets were illegally constructing a wall on the suit property were not denied by the Respondents who sought to demonstrate that only the registered proprietor could sustain an action of the nature instituted by the Applicant. The 1st Respondent's averment in the supporting affidavit that it was improving the property by constructing a fence and its submission that the property is private land within the meaning of Article 64 of the Constitution is in my view an admission of the Applicant's contention that the said Respondent was constructing the wall.

Since the Applicant's evidence that the Respondents have a common directorship and shareholding was not rebutted, it is in the interest of justice that the orders issued on 14th February 2014 remain in force for the preservation of the suit property. In my view, sufficient reasons why the court should discharge or vary its orders issued on 14th February 2014 have not been demonstrated and the applications should thus be dismissed with costs.

Ruling dated, signed and delivered this12th..... day of**March**.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

.....**for the Plaintiff**

.....**for the Defendants**