



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 263 OF 2019**

**FIDEL HOLDINGS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated the 25<sup>th</sup> of October 2021, the 1<sup>st</sup> Defendant/Applicant has sought for the following Reliefs;

*(a)The Honourable court be pleased to stay the Proceedings in this suit.*

*(b)Cost of the Application be in the cause.*

2. Upon being served with the subject Application the Plaintiff/Respondent filed Grounds of Opposition, whereby same opposed the Application seeking of stay of Proceedings.

3. On the other hand, the 2<sup>nd</sup> Defendant did not file any Response to the subject Application.

**DEPOSITION BY THE PARTIES:**

**DEPOSITION BY THE 1<sup>ST</sup> DEFENDANT/APPLICANT**

4. Vide Supporting Affidavit sworn by One, Christen Macharia, the Applicant has averred as hereunder;

5. That the gist of the subject suit revolves around a Group of Companies which the Plaintiff is part of, relating to acquisition of various plots of land located at Embakasi area by the Defendants to facilitate construction of Nairobi/Mombasa Standard Gauge Railway.

6. It has further been averred that upon the acquisition of the subject plots, the 1<sup>st</sup> Defendant herein received a letter dated the 20<sup>th</sup> **December 2018**, from the 2<sup>nd</sup> Defendant, whose purport was advising the 2<sup>nd</sup> Defendant to refrain from paying and/or releasing the compensation in respect of the standard Gauge Railway project.

7. Further, the deponent has averred that the Letter under reference indicated that it had been established that a number of unauthorized persons were seeking compensation from the 1<sup>st</sup> Defendant/Applicant.

8. Besides, the deponent has also averred that the 2<sup>nd</sup> Defendant also forwarded to the 1<sup>st</sup> Defendant a copy of a letter dated the 20<sup>th</sup> **December 2018**, whereby the Ethics and Anti-corruption Commission indicated that same were carrying out and/or conducting investigations on irregular compensation touching on and/or concerning various parcel of lands within Embakasi Area.

9. Pursuant to the foregoing, the deponent has averred that the 1<sup>st</sup> Defendant was therefore advised to withhold any payments in respect of the said parcel of lands until the Investigations are complete.

10. Further, the deponent has averred that the Ethics and Anti-corruption Commission have not reverted with their advise as pertains to the

outcome of the investigations. Consequently, the Applicants are awaiting the direction and/ or guidance of the said Commission, before discerning the way forward.

11. Owing to the foregoing, the Applicant has thus averred and implored the court to order and/or direct a Stay of the subject proceedings pending the outcome and/or conclusion of the investigations being done by the Ethics and Anti-corruption Commission.

### **RESPONSE BY THE PLAINTIFF**

12. The Plaintiff/Respondent herein, filed Grounds of opposition whereby same contended as hereunder;

*I. The subject Application is an abuse of the due process of the court.*

*II. That the Court process cannot be held hostage pending investigations by the Ethics and Anti-corruption Commission, whose time lines are uncertain and unknown.*

*III. The 1<sup>st</sup> Defendant has Neither established nor laid down any lawful cause to warrant the grant of the orders sought.*

### **SUBMISSIONS:**

13. The subject Application came up for Mention on the **8<sup>th</sup> November 2021**, on which date the court issued directions pertaining to and/or concerning the filing of the responses thereto, as well as the filing of written submissions in respect thereof.

14. Following the directions of the court, the Plaintiff/Respondent, proceeded to and indeed filed Grounds of opposition to the Application.

15. However, neither of the parties herein filed their written submissions and after two (2) adjournments which were granted to enable the parties to file their submissions, the court proceeded to and reserved the matter for Ruling, notwithstanding the absence of submissions by the parties.

### **ISSUES FOR DETERMINATION:**

16. Having reviewed the Notice of Motion Application dated the **25<sup>th</sup> October 2021**, as well as the Supporting Affidavit thereto and having also taken into account the Grounds of opposition filed by and/or on behalf of the Plaintiff/Respondent, the following issues are germane for determination;

*I. Whether the investigations being carried out by and/or at the instance of the Ethics and Anti- Corruption commission have any bearing on the hearing of the subject matter.*

*II. Whether the 1<sup>st</sup> Defendant has established any lawful basis and/or cause to warrant of grant of Stay of proceedings in the subject matter.*

### **ANALYSIS AND DETERMINATION:**

#### **ISSUE NUMBER 1:**

***Whether the investigations being carried out by and/or at the instance of the Ethics and Anti-corruption Commission have any bearing on the hearing of the subject matter.***

17. It appears that the 2<sup>nd</sup> Defendant, namely the National Land Commission commenced and/or conducted the process of compulsory acquisition in respect of a property known as **Plot No. 15053**, (hereinafter referred to as the suit property) and which property was being acquired on behalf of the 1<sup>st</sup> Defendant/Applicant herein.

18. Similarly, it is also evident that the process of compulsory acquisition was concluded and/or completed and thereafter the 2<sup>nd</sup> Defendant generated an award vide letter dated the **14<sup>th</sup> October 2016**, whereby the sum of **Kenya Shillings Sixty-Nine Million (Kes.69, 000, 000/=)** was awarded to and in favor of the Plaintiff/Respondent.

19. Be that as it may, it appears that there was a delay in the payment of the compensation and owing to the delay, the Plaintiff herein was compelled to file and/or lodge the subject suit, whereby same is seeking for the release of the monies in question.

20. Nevertheless, the 1<sup>st</sup> Defendant/Applicant, on whose behalf the land was being acquired, has now filed the subject Application, seeking to stay the suit and the release of the payment pending Investigations by the Ethics and anti-corruption Commission.

21. First and foremost, it is important to note, that the process of compulsory acquisition is ordinarily undertaken by the 2<sup>nd</sup> Defendant, who is obliged to exercise due diligence, in authenticating and/or establishing the ownership details in respect of the land that is sought to be compulsorily acquired.

22. Secondly, by the time the 2<sup>nd</sup> Defendant arrived at and/or reached the conclusion that the suit property was suitable for compulsory acquisition, it is deemed that all the governmental bodies and/or commissions, had been consulted, with a view to arriving at the decision pertaining to compulsory acquisition.

23. Thirdly, even though the Ethics and anti-corruption Commission, is authorized and/or allowed to carry out and/or undertake investigations, including investigations into the propriety leading to the acquisition of various land and properties, such investigations, cannot themselves form a basis to derail and/or otherwise suspend lawful court process before the court.

24. Fourthly, the outcome of the investigations by and/or on behalf of the Ethics and Anti-Corruption Commission, though important, are nevertheless not an end in themselves. For clarity, such investigations can only lead to the commencement of some suit or proceedings, before a court of law, to warrant the grant of some orders.

25. As pertains to the subject matter, there is no saying as to when, if at all, those investigations would be concluded. Besides, the Applicant herein has not indicated how far and/or what stage those investigations have reached.

26. Fifthly, the letters by the Ethics and anti-corruption Commission, which is alluded to as the basis of the Investigations has indicated that the investigations are being carried out and/or undertaken in respect of **L.R No. 209/12060**, which however, appears to be separate and distinct from the suit property.

27. Having made the foregoing observations, I must now point out that whatever investigations that are being carried out by the Ethics and anti-corruption Commission, as concerns alleged irregular compensation touching on **L.R No. 209/12060**, same have no relevance and/or bearing on the hearing and prosecution of the subject matter, which touches on a separate and distinct Title.

28. Notwithstanding the foregoing, the Ethics and anti-corruption Commission can very well proceed and undertake the investigations and once same are concluded, same will be knowledgeable of what actions to take, one way or the Other.

29. In short, the court proceedings herein cannot be halted, suspended and/or otherwise held in abeyance, to await the completion of a separate and a parallel process, in respect of which the court has no control.

30. Simply put, the allegations that the Ethics and anti-corruption Commission are carrying out investigations in respect of allegations of irregular compensation, does not, in my humble view, found a basis for Stay of proceedings.

#### **ISSUE NUMBER 2:**

#### **Whether the 1<sup>st</sup> Defendant has established any lawful basis and/or cause to warrant grant of Stay of proceedings in the subject matter.**

31. Before venturing to answer the second issue, it is important to note and/or observe that the process of compulsory acquisition is grounded in the Constitution, 2010, which provides the parameters against which such acquisition must comply with and/or adhere to.

32. In this regard, it is important to take cognizance of the provision of **Articles 40 (3) of the Constitution of Kenya 2010**, which provides as hereunder;

***(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—***

***(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or***

***(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—***

***(i) requires prompt payment in full, of just compensation to the person; and***

***(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.***

33. From the foregoing provisions, it is apparent that whenever compulsory acquisition is carried out and/or undertaken, the acquiring authority, is obliged and/or obligated to render prompt payment in full of just compensation to the designated person, whose land and/or property has been compulsorily acquired.

34. Consequently, the Defendants herein having commenced the process of compulsory acquisition and having generated the award, are thereby obliged to abide by and/or comply with the constitutional provisions.

35. Nevertheless, it is worth noting that if there arises any illegality, that will impeach the award in question, then the acquiring authorities are at liberty to implead the illegalities, *albeit* at the appropriate time. Besides, the Acquiring Authority may also commence proceedings for

purposes of Quashing the award, which is not the case herein.

36. On the other hand, it must also be noted that upon the filing of proceedings before the court, the court is enjoined to hear and/or dispose of such proceedings without undue delay. Consequently, diligent and timeous disposal of Suits, is now a constitutional imperative.

37. In view of the foregoing observation, it is important to take cognizance of the provisions of **Article 159 (2) (b) of the Constitution of Kenya** which provides as hereunder;

**(b) justice shall not be delayed;**

38. Based on the foregoing, I must state that where a party is seeking to stay and/or suspend proceedings before a court of law, cogent and plausible reasons, must therefore be provided and/or supplied.

39. It is also worth noting that an order for stay and/or suspension of proceedings, will impact on and/or negate the enjoyment of a Constitutional right in terms of **Article 159 (2) (b) of the Constitution, 2010**, and hence such negation must be granted, *albeit* with necessary circumspection.

40. Suffice it to say, that no credible basis has been laid to warrant the Stay or suspension of the subject proceedings and in this regard, the 1<sup>st</sup> Defendant/Applicant is not entitled to the orders sought.

41. As pertains to the import of expeditious disposal of Suits once same are filed, it is important to take note of the decision in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, where the honourable court of appeal observed as hereunder;

***“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes.***

42. In any event, the grant of an order of stay of proceedings will militate against the expeditious hearing of the subject matter and therefore the court must balance the interest of both parties and take into account whether or not, a claimant has laid a basis to warrant of exercise of discretion.

43. Simply put, the grant of otherwise of an order of stay of proceedings is discretionary and same therefore can only be granted once sufficient ground and/or basis has been laid out. Unfortunately, in the subject matter, the Applicant has not endeavored to do so.

44. In this regard, it is worthy to take cognizance of the observation obtaining in **Halsbury Law of England, 4<sup>th</sup> Edition, Vol. 37 pages 330 and 332**, which provides as hereunder; that

***“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”***

***“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”***

***“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”***

45. In a nutshell, the grant of the order of stay shall militates against the expeditious disposal of the subject matter and shall therefore occasion serious and grave violation of the Plaintiff’s constitutional rights under **Article 159 (2) (b) of the Constitution 2010**.

#### **FINAL DISPOSITION:**

46. Having addressed the issues set out for determination, it is now appropriate to render a determination as pertains to the subject Application.

47. Consequently, it is my finding and holding that the Notice of Motion Application dated the **25<sup>th</sup> October 2021**, has not met the requisite threshold for the grant of the Orders sought. Consequently, same is Devoid of Merits.

48. In the premises, same be and is hereby Dismissed with costs.

49. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>th</sup> DAY OF FEBRUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**IN THE PRESENCE OF;**

**JUNE NAFULA COURT ASSISTANT**