



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 131 OF 2013**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**YELAN INVESTMENTS AND OTHERS.....DEFENDANTS**

**RULING**

*(Application seeking orders of inhibition and preservation of the disputed properties pending hearing of the suit; applicant filing suit claiming that the disputed property belongs to the Government and that it was wrongly alienated to the respondents; this disputed by the respondents; court persuaded that there is need to issue preservatory orders pending hearing of the suit; application allowed)*

1. The application before me is that dated 2 December 2019 filed by the plaintiff. The plaintiff seeks orders of inhibition, pending hearing of this suit, restraining the 3<sup>rd</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup> defendants whether by themselves or through their agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, consolidating, disposing of, wasting, or undertaking and construction or development of any nature thereon or part thereof on the following properties:- Mombasa/Block XXVI/681 and Mombasa/Block XXVI/681 (Leasehold) Flats Numbers 1, 2, 3, 4, 5, 6 and 7. These are in prayers (2) to (10) of the application.

2. The background is that the plaintiff commenced this suit vide a plaint dated 24 June 2013 which was later amended on 2 December 2019. The plaintiff is a body corporate established under Section 3 of the Ethics and Anti-Corruption Act, and one of its mandates is to institute and conduct proceedings in court for purposes of the recovery or protection of public property, confiscation of proceeds of corruption, and payment of compensation. Pursuant to its legal mandate, the plaintiff launched investigations into allegations regarding corrupt, fraudulent and illegal alienation of parcel of land described as Mombasa/Block XXVI/681 (hereinafter, 'the suit property') with a view of recovering the same on behalf of the government.

3. The case of the plaintiff is that the suit property was excised from a larger parcel of land, to wit, Mombasa/Block XXVI/234 which it asserts belonged to the Government and had been alienated for construction of government staff houses and upon which seven housing units had already been developed. It is alleged that this illegal excision was done by the 4<sup>th</sup> defendant (Wilson Gachanja) who then served as the Commissioner of Lands. Upon excision, the suit land was allotted to the 1<sup>st</sup> defendant on 26 April 1994. The 1<sup>st</sup> defendant then transferred her interest to the 2<sup>nd</sup> defendant on 16 August 1994 who was then issued with a title deed. In January 1995, the 2<sup>nd</sup> defendant transferred her interest to the 3<sup>rd</sup> defendant. Subleases for 7 flats were subsequently issued and transferred variously to the 5<sup>th</sup> to 26<sup>th</sup> defendants. One is charged to the 27<sup>th</sup> defendant (Standard Chartered Bank Limited). The plaintiff impugns all these downstream transactions on the contention that the land remained Government land and was not properly alienated. What the plaintiff wants in the suit is to have the property revert back to the Government and for the titles and subleases issued to be cancelled.

4. It will be seen that in this application, the plaintiff seeks orders to stop any dealings on the properties pending hearing of the suit.

5. The 3<sup>rd</sup> defendant filed a Replying Affidavit sworn by Naushad Hussein Mohammedali Jiwa, a director of the 3<sup>rd</sup> defendant, to oppose the application. He inter alia deposed that the 3<sup>rd</sup> defendant purchased the suit property on 12 November 1994 at Kshs. 1,250,000/=. The leasehold interest was then transferred to the 3<sup>rd</sup> defendant, and a certificate of lease dated 2 February 1995 was subsequently issued. He avers that the 3<sup>rd</sup> defendant is a bona fide purchaser for value. He deposes that upon purchase, the 3<sup>rd</sup> defendant constructed 3 offices and 8 residential apartments between the year 1995 and 1997 and that approvals for the developments were obtained. He added that in July 2017, the government issued a Gazette Notice pursuant under the provisions of the then applicable Anti-Corruption and Economic Crimes Act 2003, whereby the plaintiff's predecessor confirmed that the 3<sup>rd</sup> defendant's title to the suit property was lawfully acquired and that there was no element of fraud in the transaction. Mr. Jiwa deposed that from the year 1999 the 3<sup>rd</sup> defendant sold 7 residential flats and one office (units) to the 8<sup>th</sup>, 10<sup>th</sup>-17<sup>th</sup>, 24<sup>th</sup>, and 26<sup>th</sup> defendants. He further deposed that prior to the sale of the units, the 3<sup>rd</sup> defendant sought and obtained consent to issue subleases to the owners of the units from the District Land Office, Mombasa. He deposed that the owners of the units are a bona fide innocent purchasers for value and without notice of any irregularities and have been in lawful continuous occupation of

the suit property for over 20 years. He deposed that the 3rd defendant only retained exclusive and continuous possession of 2 offices and 1 residential flat. He deposed that the plaintiff's allegations that there is reasonable apprehension or likelihood of real danger that the 3rd defendant would dispose of the suit property is false. He was of opinion that the plaintiff's application is an abuse of the court process because it is seeking interlocutory orders of inhibition 6 years after the suit was instituted and the plaintiff has not given any reasonable explanation for the delay. Mr. Jiwa further deposed that the plaintiff has failed to demonstrate how they would be prejudiced if the orders sought are not granted. He added that in the unlikely event that the plaintiff succeeds in the suit, they will ultimately take possession of the suit property and any loss that they may suffer is easily compensable in damages. Conversely, Mr. Jiwa deposed that it is the 3rd defendant and the owners of the units who incurred major expenses on the development of the suit property and who have been in contentious possession of the suit property for over 24 years that stand to suffer great prejudice and harm if the application is allowed.

6. The 27<sup>th</sup> defendant also opposed the application vide Grounds of Opposition. It is stated that the plaintiff has not met the settled threshold and principles for granting interlocutory injunctions as set out in *Giella vs. Cassman Brown & Co. Ltd (1973) EA 358* therefore it ought to be dismissed. It is further stated that the application is an afterthought having filed the suit 7 years ago, hence, the plaintiff is guilty of laches. It is contended that the plaintiff is not keen to prosecute the application as the same is being prosecuted over 12 months from 4th December 2019 which is outside the lifespan of an injunction order and the delay disentitles the plaintiff to any equitable relief in particular orders of injunction. Lastly, it is claimed that the application is bad in law, an abuse of the court process and the same ought to be dismissed.

7. I have considered the above alongside the submissions filed by counsel.

8. I will be very brief in my decision because it is clear to me that there is need to have orders to preserve the property in dispute pending hearing of the suit. First, the plaintiff's case cannot be regarded as frivolous. There are allegations of fraud and wrongful disposal of Government property that need to be tried. On the need to preserve the suit land, I have seen that over the course of time, several transactions over the suit property have been undertaken and there are subleases over the flats erected thereon. These have been transferred from one party to another and also charged as security for financial accommodation. Unless an order is issued preserving the status quo and stopping any further dealings and developments, additional transactions and developments may be undertaken which may not only change the character of the land and also the character of the case.

9. I am aware that the respondents raised issue that the application is coming rather late in the day. I actually do not think so because the amended plaint that brought all parties on board was filed on 4 December 2019 and this application was filed contemporaneously with the amended plaint on the same day. True, some time passed before the application was heard but this was due to challenges in serving all defendants. I have taken note that the respondents, especially the 3<sup>rd</sup> respondent, contends that the property was properly sold to her and that her title is not impeachable. She has also referred me to the Gazette Notice where the predecessor of the plaintiff is said to have confirmed that the title of the 3<sup>rd</sup> defendant is a good title. All these are matters that the 3<sup>rd</sup> respondent, and the other respondents as well, will have an opportunity to ventilate at the full hearing of the case and I do not wish to go too deeply into the same at this stage of the proceedings.

10. My assessment is that the applicant is asking for nothing more than that the status quo be maintained. I have already mentioned that the applicant's case is not frivolous and it is important that the subject matter of the suit be conserved. Any prejudice to the defendants is greatly outweighed by the need to have the properties preserved pending hearing and determination of the suit.

11. I therefore allow the application in terms of prayers 2 to 10 which are the prayers seeking inhibitory and preservative orders. On costs, the same shall be in the cause.

12. Orders accordingly.

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF APRIL 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**