



REPUBLIC OF KENYA

High Court at Mombasa

Environmental & Land Case 32 of 2013

KENYA RAILWAYS CORPORATION.....PLAINTIFF

VERSUS

SAFROSH LIMITED.....1ST DEFENDANT

EDENCAST LIMITED.....2ND DEFENDANT

MOMBASA MUNICIPAL COUNCIL.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....NECESSARY/INTERESTED PARTY

RULING

The applicants in this case have filed a civil suit against the first and second defendant claiming that the first and second defendant purport to hold title deeds issued on various dates in the year 2004 and 2006. The applicant contend that the titles are pure forgeries and were not issued by the land office. They further argue that if those title deeds were issued by the land office they contend that the first and second defendant by themselves or their agents in collusion with officers at the lands office have illegally subdivided and purported to acquire new Land Reference Number known as **Mombasa/Block/XXVI/1093, 1094, 1095, 1096, 1097 and 1098.**

They state that the defendants have purportedly acquired title as follows:

The first defendant holds title over the purported subdivision now known as Mombasa/Block XXVI/1093, 1094, 1096, 1098 vide title deeds all dated **29th November, 2006.**

The second defendant purportedly holds title over subdivisions now known as Mombasa/Block XXVI/1095, 1097, vide title deeds dated **21st October, 2004.**

The applicant corporation states that it owned the property, buildings and structures erected on the such property well before the purported subdivision or the first and second defendants purported registration of the same. The applicants allege that the registration of the first and second defendant as owners was perpetuated by fraud. This they allege was because the plaintiff applicant believes that the first and second defendant were aware of the fact that the plaintiff applicant were the registered owners.

The applicant state further that there was no way the first and second defendant could not know that the plaintiff's were the owners of the suit land in view of the fact that applicant plaintiff's have always been in exclusive occupation of the property even prior to the registration of the said properties in the names of the first and second plaintiff's.

The applicants have set other reasons for enjoining the third, fourth and fifth defendants. This application is basically for producing the parcel file dealing with subdivision of Mombasa/Block/XXVI/1093, 1094, 1095, 1096, 1097 and 1098. The allegation herein is that the subdivision was done illegally. That it was done fraudulently. That those title deeds were not genuinely obtained from the land office.

Mr. Ndegwa, learned counsel for the applicants argues that the production of this file will unravel the mystery of this case. He argues that the said file is at the heart of this case and indeed the whole dispute. He argues that the production of the file will not prejudice anyone.

Mr. Karega, learned counsel for the first and second respondents argued that on Mr. Ndegwa invoking Article 35 of the Constitution of Kenya 2010, in pursuing his right to information was an afterthought. He argued that there is nowhere where Article 35 aforesaid is mentioned in his application. He argued that one cannot obtain an injunction from the Government. That there was conflict between instructing Government and requiring information under Section 35 aforesaid. He argued that the information sought by the applicant can be obtained through an official search. That it has not been proved that the fourth defendant has declined to give such information rendering invoking Article 35 necessary.

Mr. Lumatete, learned counsel for third and fourth defendant agreed with the sentiments of Mr. Karega but said he will leave it to court. His argument was that we had not reached the stage of producing the file.

Mr. Muraya, learned counsel for the interested party, said he had no objection to having the parcel file being brought to court to assist the court and to enable the court to familiarize itself on the procedure used for issuance of the titles aforesaid. He argued that for the court to render substantial justice all facts must be availed to the court. He said that the entire application revolved around that process of issuing title and that parcel file and that it is only fair for that parcel file to be produced.

Having heard the argument of learned counsels for the parties, I must say that I agree with learned counsel for the applicant. The production of the file and/or files that were used and/or parcel files where all the original title(s), subdivisions mutations eventual transfers and current titles are held is absolutely vital in this case.

The allegation made herein is fraud. For the court to determine the real issue between the parties and the issue as to how the properties subject to this dispute were issued to the first and second defendant, it is absolutely essential that all relevant documents be placed before the court.

Indeed, that is one reason why these documents are kept in safe custody by the the Government through the relevant ministries. People in this country are free to sell their properties. As people do that, disputes and frauds do occur. Searches in lands office or other relevant offices help in exercising due diligencies against disputes and frauds. Willing buyers and sellers are able to prove to interested parties as to ownership and the presence of or absence of encumbrances. Existence of or non-existence of land itself is also established. The documents in the parcel file help in tracing back the transmission of titles by various parties. The identity of the parties transmitting title are revealed. Transparency of the process and integrity of the process of transfer is therefore revealed. To my mind there cannot be a better way of tracing back through transmission than looking at the documents kept in custody by the lands registry.

I do not think any party hereto will suffer any prejudice by having the parcel files produced in court . Production of the parcel file(s) and other relevant files and/or document will enable the court to fairly arbitrate and adjudicate the dispute between the parties.

I therefore order that the parcel file(s) and all necessary document used in subdivision of

Mombasa/Block/XXVI/1093, 1094, 1095, 1096, 1097 and 1098 be availed to this court by the Coast Registry to facilitate the determination of this case.

For the avoidance of doubt the officer in-charge of Coast Registry and/or his representative do personally avail those records during the hearing of this suit.

It is so ordered.

Dated and Delivered in open court this 12th March 2013.

S. MUKUNYA
JUDGE