



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 52 of 2010

THE KENYA ANTI CORRUPTION COMM.....PLAINTIFF

VRS

1. JIMMY NURU ANGWENYI

2. MICHAEL NJENGA NJOROGEDEFENDANTS

3. BARCLAYS BANK OF KENYA LTD

4. WILSON GACANJA

RULING

The plaintiff filed the application dated 19/4/2010 seeking the following orders:

1. That the honourable court be pleased to issue an order of injunction restraining the 2nd and 3rd defendants whether by themselves, their servants, agents, charges or assigns from selling, advertising for sale, transferring, charging, further charging, leasing, taking possession, or in any manner howsoever from dealing with **LR NO. KAKAMEGA TOWN/BLOCK II/64** pending the hearing and determination of this suit.

2. That in the alternative the honourable court be pleased to issue an order for preservation of **LR NO. KAKAMEGA TOWN/BLOCK II/64** pending the hearing and determination of this suit.

The application is supported by the affidavit of Oscar Angote sworn on the 19/4/2010. Parties agreed to have the application determined by way of written submission. The plaintiff in its submissions filed on 30/9/2010 contends that plot number **KAKAMEGA MUNICIPALITY/BLOCK II/64** was Government property and was not available for alienation by the Commissioner of lands. The property was registered in the names of the County Council of Kakamega and the council held the property in trust for the benefit of the public. The suit property had been reserved for the Government and a residential house had been erected thereon. The property was alienated in contravention of the previous constitution and laws relating to trust land. The 4th defendant unlawfully sub-divided the land yet it was reserved for public use.

The plaintiff further contends that it has established a prima facie case with a probability of success. The suit land was public land that was unlawfully acquired under the New Constitution; Article 40 (6) is an exception to the right to own land and provides for the recovery of land that has been found to have been

unlawfully acquired.

All the defendants herein were served. The 1st and 2nd defendants entered appearance and filed their respective defences but filed no replying affidavits to the application. The 3rd defendant did respond to the application and filed a replying affidavit sworn by Allan Onyango, its legal officer and also filed its submissions. The 4th defendant entered appearance, filed its defence and grounds of opposition to the application.

The position of the 3rd defendant is that the 2nd defendant was the registered owner of the suit land at the time the 3rd defendant advanced financial assistance to him. The 3rd defendant duly conducted an official search and found that the 2nd defendant was the lawfully registered owner. The property was initially registered in the names of the 1st defendant. No fraud was committed during the transfer of the property to the 1st defendant as well as to the 2nd defendant. The 3rd defendant is holding a charge against the suit land and the 2nd defendant has defaulted in paying the financial assistance advanced to him. The 3rd defendant should be left alone and exercise its rights under the charge.

The 3rd defendant further submit that the property was initially registered in the names of the County Council of Kakamega. The council is not a party to the suit and therefore the plaintiff lacks locus standi to institute this suit. Further, there is no evidence to support the plaintiff's claim that the property was trust land. The extract from the land registry only indicates that it was registered under the name of the County council of Kakamega and later transferred to the 1st defendant. There is no indication that the property was trust land. The 3rd defendant has a valid charge over the suit property and its remedy is to sell the charged property. The property was transferred long time ago and the chargee is the 3rd beneficiary and all along no damage or loss has been demonstrated to have been suffered.

In his grounds of opposition, the 4th defendant contends that there is no proper cause of action against him, the plaintiff lacks locus standi to institute these proceedings and that the application is frivolous, vexatious, scandalous and an abuse of the court process.

The main issue for determination at this stage is whether the plaintiff has established a prima facie case with a probability of success and whether the plaintiff will suffer irreparable damage or loss if the orders being sought are not granted.

It is the plaintiff's contention that plot number **KAKAMEGA/MUNICIPALITY/BLOCK II/64** was reserved for the use of the public. There is a government house standing on the suit land. Having been reserved for the use of the Government, then the land was already alienated and was not available for alienation by the Commissioner of Lands. The plaintiff further maintain that the County Council of Kakamega was only holding the suit land in trust for the benefit of the public. The plaintiff is seeking to recover the land from the defendants and return it for public use.

The above position is countered by the defendant's contentions that the land was lawfully transferred to the 1st defendant by the 4th defendant- the Commissioner of lands. The 1st defendant then lawfully transferred the property to the 2nd defendant. The 2nd defendant used the property as security to service a loan from the 3rd defendant. A charge and a further charge were created over the suit land. The 2nd defendant, having defaulted in settling the loan facility, the 3rd defendant is at liberty to exercise its statutory power of sale.

With regard to the issue of locus standi, I do find that the plaintiff being an institution created by statute with the powers to pursue property that has been fraudulently or unlawfully acquired has the locus standi to bring these proceedings. The fact that the original lessee, the County Council of Kakamega, is not a party to this suit does not bar the plaintiff from bringing this suit.

The plaintiff's contention is that the land was not available for alienation. The annexures to the affidavit of Oscar Angote include extracts from the Kakamega land registry as well as correspondences from the

office of the president relating to the allocation of a Government house number **KAK/HOU/MG/T/1** to a Government officer, **JUDITH SHIRO TSA** for residential purposes. The property was registered in the names of the County Council of Kakamega on 28/12/1974. It was approximately 0.1045 hectares. On 18/9/1996 the property was transferred to one **JIMMY NURU ANGWENYI** the 1st defendant who later transferred it to the 2nd defendant on 29/4/1997. The subsequent title to the 1st defendant does indicate that the plot is approximately 0.090 Hectares. Two months from 29/4/1997 when the 2nd defendant got registered as the owner, he used the property to secure a loan from the 3rd defendant. On 2/2/2000 a second charge was registered but the amount for both charges is not indicated.

The plaintiff also annexed photographs showing a house standing on the land. It can be presumed that the house on the land is the one allocated to the Government officer, Judith Shirotsa. The pleadings herein do not show how the land was sub-divided into two portions, who authorized the sub-divisions and whether the County Council of Kakamega, the original lessee from the Government was involved in the sub-division and subsequent transfer to the 1st and 2nd defendant. The plaintiff contends that the transfer to the 1st defendant was fraudulent as the property was not available for alienation.

From the pleadings on record, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. Although the court recognizes the sanctity of a title deed, the same court is empowered to interrogate the process through which a title deed was obtained and if it is to be found that the title deed was obtained through the use of unlawful means, the court can cancel such a title deed. I do find that this is one case where the process used by the defendants to transfer the suit property to the 1st and 2nd defendant has to be interrogated through a court process. This can only be done through the hearing of oral evidence and production of the relevant documents. Before that is done, the plaintiff has proved that an injunction ought to be granted restraining the defendants from dealing with the suit land. Further, the property was in the process of being auctioned by Garam Investments Auctioneers and if that is to proceed, a 5th party will be brought in and will claim to have bought the property at an auction for value without notice.

I have noted the various authorities provided by the plaintiff and the 3rd defendant. However, for purposes of determining this application, I've seen no need to refer to the authorities but do appreciate the effort by both counsels in providing them.

I do not wish to dwell on the issue of irreparable loss or damage but it is clear that if it is proved in the end that the property was unlawfully acquired yet no order of injunction is granted at this stage, it will be the Kenyan Public that will suffer the irreparable damage.

In the end, the application dated 19/4/2010 is merited and the same is granted as prayed. Costs shall follow the outcome of the main suit.

Dated, signed and delivered at Kakamega this 29th day of May, 2013.

SAID J. CHITEMBWE
JUDGE