



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

LAND CASE NO. 81 OF 2013

KENYA RAILWAYS CORPORATION PLAINTIFF

- V E R S U S -

KIZINGO APARTMENTS LIMITED 1ST DEFENDANT

KIZINGO CONDOMINIUMS LIMITED 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

ETHICS AND ANTI-CORRUPTION

COMMISSION INTERESTED PARTY

RULING

[1] The applicant filed this notice of motion and prayed that this Court do restrain the defendants by themselves, their servants, employees and/or agents from disposing the Kenya Railways suit property, entering into, occupying evicting the plaintiff tenants demanding rent from tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development or in any other way interfering with property and or/plaintiffs quiet possession and enjoyment of the suit property now registered as Island Block XXVI/1137 pending the hearing and determination of this application and/or suit.

The application also applied that the Ethics and Anti-corruption Commission be joined in this suit as a plaintiff or interested party with an order that the Commission investigates and report to the court the legitimacy of the circumstances under which the defendant without a sale from Kenya Railways Corporation or following mandatory procedures of the Government Lands Act and Public Procurement Act, became registered owners of the land of the plaintiffs land which had been occupied by the Kenya Railways from 1950's to date.

[2] This matter came up for hearing on 5th June 2013. Learned Counsel Mr. Sitonik appeared for the applicant while learned counsel Mr. Koech appeared for Mr. Buti for the second defendant. Mr. Kaguchia Learned Counsel appeared for the interested party. There was no appearance for the 1st defendant. Mr. Koech applied for adjournment on behalf of Mr. Buti who he said was held up at Malindi conducting an election petition. The application was vehemently opposed by Mr. Sitonik and Mr. Kaguchia. The two Counsels said they were ready to proceed. I made a ruling and declined to allow the adjournment.

[3] Mr. Sitonik, argued that the main reason why he filed the application is that the plaintiff which is a state corporation owns the suit land and all the structures thereon. He stated that this property was inherited from its predecessors the East African Harbours Corporation through a vesting order. The Corporation constructed residential houses on the suit property in the 1950's. Those houses have been leased to various tenants. He said that in his application he had annexed various tenancy agreements. He argued that the corporation had not transferred its interest to any person. Mr. Sitonik further stated that despite the absence of such consent the defendant subdivided the suit property and that now they have title as LR Mombasa Island, Block 26/1137. That the defendants purport to hold title dated 13th December 2011. The Learned Counsel argued that there is foul play since the land was not free land that could legitimately be disposed off to the respondent or any other person under any law or by any authority including the Commissioner of Lands since the corporation had not surrendered the land to the Commissioner. The Counsel argued that the respondent has tried to wrestle the land from the applicant by using unscrupulous means. That the 2nd defendant purportedly filed Mombasa CMCC. 351/2012 on 24th February 2012 against fictitious individual over the said land and obtained eviction orders. Armed with those eviction orders, they stormed into the suit premises and demolished a one storey building belonging to the plaintiff corporation. That eventually further demolitions were stopped by the Court and the applicant regained possession. The applicant argues that the respondent has started being seen in the premises trying to get access. The applicant is now apprehensive that the 2nd defendant may transfer the land to unsuspecting third parties. Learned Counsel prayed for Order No. 3 and 4 of their application.

[4] Mr. Kagucia Learned Counsels for the interested party relied on the affidavit sworn by George Kariuki Njamwitha sworn on 31st May 2013. The Counsel said that they received a complaint regarding this matter on 9th May 2012. He said that since they were aware of the eviction orders against a public building emanating from Mombasa CMCC. 351/2012 they joined the proceedings. He told the Court that the Ethics and Anti-corruption Commission is mandated to pursue to recover public property by Anti Corruption and Economic Crimes Act 2003 as well as Ethics and Anti- corruption Act 2011.

The learned counsel said that the investigation regarding this suit property is that there was a letter of allotment issued on to the defendant dated 12th January 1998. It was also revealed that there was no Part Development Plan (P.D.P) to support the alienation of the suit property. He said the property belonged to the plaintiff since there was no evidence to show how it was alienated to the 1st defendant. Mr.Kagucia said that from the Director of Survey it was established that the suit property was excised form a larger parcel of land referred as MSA Island Block 26/434. The Registry Index Map disclosed a larger piece of land before Kizingo Light House. He said that the maps that are attached show how it was systematically subdivided and allotted to individuals. Some of the parcels are in this Court, parcels 1093,1094,1095,1096,1097,1098 and 1138. He said that all those parcels issued are before this Court and that there is a larger problem.

Counsel stated that of particular interest is parcels 1138 in which there was a suit number HCC. 20 of 2013 between the plaintiff in this case, teltex and the defendant herein. The defendant herein surrendered the plot on recognizing that this was public land.

The interested party argued that if the application is not granted his prayers herein there will be a larger loss of public land.

[5] The first and second defendant did not attend the Court.

The Court therefore did not have any input from their side.

This application will then go down as unopposed.

[6] Having considered what the applicant herein has said and the response by the interested party I am convinced that the prayers by the applicant are merited.

I, therefore grant them prayers No. 3 and 4 of their Notice Of Motion dated 2nd May 2013. The applicants shall also have the costs of this application.

Dated and delivered in open Court at Mombasa this 23rd day of August, 2013.

S.N. MUKUNYA

JUDGE

In the presence of

Sitonik Advocate for the plaintiff

Paul Buti for the 2nd defendant