



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
PETITION 11 OF 2010

BETWEEN

UKAMBA AGRICULTURAL INSTITUTE LTD.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

SOUTH EASTERN UNIVERSITY COLLEGE...2ND RESPONDENT

RULING

Introduction

1. After hearing this matter, I reserved this matter for judgment however, it shall become evident why I have to deliver a ruling instead. It is for this reason that I shall set out the matters I consider material to the determination I am about to make.
2. This case concerns the Ukamba Agricultural Institute (“UKAI”). It was one of Kenya’s Harambee Institutes of Technology developed in the early 1970’s to meet the need for country’s skill and semi skilled human power in the area of technology. It was started by Kamba leaders in 1972. The County Councils of Masaku and sponsoring districts donated land for the purpose of the UKAI’s objectives.
3. The UKAI was registered initially as an unaided school under the Ministry of Education in 1976. Throughout the 1980’s and 1990’s it had management problems and it was officially closed in the year 2000. It only re-opened in October 2004 under management of a Board of Governors appointed by the Minister of Education.
4. Prior to incorporation in 1983, the UKAI existed as an incorporated association with a governing council. Incorporation as a company limited by guarantee gave UKAI a firm legal footing. According to its Memorandum of Objects and Articles of Association (referred to “memorandum and articles of association”), the UKAI has several operational bodies;
 - (a) The Governing Council

- (b) The Executive Committee of the Council
 - (c) The Board of Trustees of the Institute
 - (d) UKAI college of Agricultural Science and Technology (UKAI College).
 - (e) UKAI Centre for research on Agricultural and Domestic Sciences and technology (UKAI Centre).
 - (f) UKAI support office Committee of the Institute.
5. All the bodies have specific roles within the organisation and part of the dispute between the parties is the jurisdiction of these bodies in dealing with UKAI's property.

The Properties

6. It is not in dispute that UKAI is the owner, legal or beneficial, of three immovable properties. These are as follows;

- (a) LR NO. 13529 (IR No 5739) situated in Yatta, Kitui and measuring 4047.7 hectares. This is a lease granted to the petitioner by the County Council of Kitui for a term of 99 years from 1st October 1976. According to the special conditions it is to be used for Agricultural Educational purposes.
- (b) LR No. 209/10350 (Grant IR 52199) in the name of petitioner and is situated at the junction of Haile Selassie Avenue and Chyulu Road in Nairobi and measuring 0.78315 of a hectare. This is a lease for a term of 99 years from 1st May 1985 and is intended to be used for a social hall and nursery school.
- (c) LR No. 12970 (IR No. 4109) in the name of the trustees of UKAI; David Muoka Mutiso, Kyale Mwendwa, Musembi Mbathi and Mathew Muli. This is a lease from the County Council of Masaku for a term of 99 years from 1st February 1985. According to the special conditions it is to be used for educational purposes only.

The South Eastern University College Order, 2008

7. Pursuant to **Legal Notice No. 102 of 2008** dated 15th July 2008, His Excellency the President in exercise of the powers conferred upon him by the **University of Nairobi Act (Chapter 210 of the Laws of Kenya)** made the **South Eastern University College, Order 2008** ("the SEUCO Order") which established the **South Eastern University College** ("SEUCO") as a constituent college of the University of Nairobi.

8. **Sections 3 and 4** of the SEUCO Order provided as follows;

3. The University College shall be the successor to Ukambani Agricultural Institute (UKAI).

4. All rights liabilities and assets held by Ukambani Agricultural Institute, existing at commencement of this Order, shall be automatically and fully transferred to the University College.

Petitioner's Case

9. The petitioner as the owner of the three properties is aggrieved by the order and its petition dated 16th July 2010, it seeks the following declarations;

(i) *This petition be certified urgent and be heard ex-parte in the first instance.*

(ii) *A declaration be issued that the petitioner herein, being the person in whose name and or on whose behalf the title to the suit properties is registered, is the legal proprietor of the suit properties.*

(iii) A declaration be issued to the effect that the Legal Notice Number 102 of 2008, issued under the hand of the president of the Republic of Kenya and Sections 3(3) and (4) of the South Eastern University College Order 2008 are, to the extent that they purport to make the 2nd respondent the successor of the petitioner and to alienate and transfer the petitioner's property to the 2nd respondent, unconstitutional, illegal, unlawful, ultra-vires, malafides null and void and the purported transfer of the suit properties and the entry into and occupation of the suit properties by the 2nd respondent are unlawful null and void to the extent of their inconsistency with the constitution.

(iv) A declaration be issued by this Honourable Court that the decision of the President of the Republic of Kenya conveyed vide legal Notice No. 102 of 2008 issued on the 15th July 2008, purporting to transfer the suit properties and the petitioner's College to the 2nd respondent did not comply with sections 70, 75, 82, 84 and 123 of the Constitution as read together with section 23, of the Registration of Titles Act, Chapter 281 of the Laws of Kenya and sections 3, 6, 8, 19 and 33(d) of the Land Acquisition Act Chapter 295 of the Laws of Kenya and is therefore null and void.

10. The petitioner's case is that as a company limited by guarantee entitled to own land in its own name and its property and as the indefeasible and registered proprietor of the suit properties under the **Registration of Titles Act (Cap 280 of the Laws of Kenya)**, it is entitled to the constitutional protection against arbitrary acquisition of its property without complying with the provisions of the **Land Acquisition Act (Chapter 295 of the Laws of Kenya)** as provided under section 75 of the former Constitution.

11. According to the petitioner, the promulgation of the SEUCO Order, the vesting of rights, assets and liabilities held by or on behalf of "*Ukambani Agricultural Institute prior to publication of the Orders were fully vested in the 2nd respondent College, SEUCO. Though the petitioner is registered as "Ukamba Agricultural Institute" and not Ukambani Agricultural Institute, the purport and effect of the Order was to dispossess it of its property without consultation and compensation as required by the Land Acquisition Act.*"

12. The petitioner contends that SEUCO have now taken over its property and its acts constitute a flagrant breach of the law, is unlawfully, arbitrary, made in bad faith and against the petitioner's lawful legitimate and rightful expectation.

13. The petitioner's case is supported by the Affidavit of Eric Mutinda Mutisya sworn on 16th July 2010 which sets out the facts as are stated in the petition.

Respondents' Case

14. SEUCO opposes the petition. Its principal, Professor Geoffrey Muluvi, has filed an affidavit sworn on 9th June 2011. The affidavit raises three broad areas of contention.

15. The first issue is that there is in existence a civil suit relating to the LR No. 209/10350 ("the Upper Hill property") between the parties namely; **UKAI v South Eastern University College and Nairobi City Council Nairobi Nairobi HCCC 136 of 2009** ("the civil suit"). In that suit UKAI sought an interlocutory injunction restraining SEUCO from interfering with the Upper Hill property and a mandatory injunction compelling SEUCO and its officers to vacate the premises. The application was dismissed by Hon. Lady Justice Nambuye on 21st April 2011.

16. The second ground of attack is that under **Article 57** of the **Articles of Association of UKAI**, the power to sue and be sued in respect of the property of UKAI is vested in the Board of Trustees. The Article provides that, "**The properties of the institute real or personal, moveable or immovable shall be vested in the Board of Trustees on behalf of the Institute Council and the Institute's other bodies and institutions.**"

17. The third ground is that the process of converting UKAI into a constituent college of the University of

Nairobi involved stakeholders and was consultative. These consultations involved stakeholders and members of UKAI and leaders from the Ukambani region who approved the conversion of the institute to a University College. Prof. Muluvi contends that the various meetings between stakeholders and the leaders of the Ukambani show that the properties of UKAI were granted to the Government of Kenya for purpose of promoting education and related activities for the benefit of the Kamba community.

18. One of the members of the Board of Trustees, David Muoka Mutiso, has sworn an affidavit on 25th July 2011 which he has opposed the petition.

19. The 1st respondent has opposed the petition through the affidavit of Professor Crispus Kiamba, Permanent Secretary of the Ministry of Education, sworn on 16th December 2011. Professor Kiamba has set out the history of UKAI which is uncontested and which I have narrated above.

20. The affidavit of Professor Kiamba essentially supports the 2nd respondent's case. He denies that there was a breach of the petitioner's constitutional rights as alleged or at all.

Issues for Determination

21. This petition was filed under the provisions of **section 84** of the former Constitution **section 84** provides a direct and independent procedure for the enforcement of fundamental rights and freedoms protected by the bill of rights. It is a special jurisdiction for a specific purpose and it is not intended to be for the purposes of evading the normal process of dispute settlement or determining matters which are not related to the enforcement of fundamental rights and freedoms.

22. What is clear from the facts I have outlined and the arguments I have heard it is clear that there is a dispute between the directors of UKAI, the trustees, members of the Board of Governors and Stakeholders of UKAI regarding the conversion of the UKAI College to a constituent college of the University of Nairobi. This dispute culminated in the civil suit relating to the Upper Hill property.

23. The civil suit in my view is critical in resolving some of the issues between the parties particularly the issues regarding the capacity of the petitioner to agitate this petition, in respect of the suit properties *vis-a-vis* the power vested in the trustees. This issue is inextricably linked to Memorandum of Objects and Articles of Association of the Company of which there appears to be a dispute regarding the authentic version. I shall therefore consider the effect of the civil suit on these proceedings.

Existence of the Civil Suit

24. Though this civil suit concerns the Upper Hill property, the issues that arise in this case are the subject of that case. In that case by the plaint dated 27th March 2009, the UKAI sought the following orders from the court;

(a) A permanent injunction be issued restraining the 1st and 2nd defendants whether by themselves, employees, agents, assignees, successors, servants or otherwise howsoever from evicting or in any way whatsoever interfering with the possession enjoyed by the plaintiffs over all that parcel of land or property known as LR 209/10350 situate in Upper Hill Nairobi.

(b) A permanent injunction be issued restraining the 1st and 2nd Defendants whether by themselves, employees, agents, assignees successors, servants or otherwise howsoever from trespassing, occupying, alienating, selling, transferring and or dealing in any manner whatsoever with all that parcel of land or property known as LR 209/10350 situate in Upper Hill Nairobi.

(c) An Interlocutory Injunction restraining the defendants, their employees, agents, servants and or officers from obstructing, interfering, trespassing and or committing injury to the plaintiff's proprietary rights in respect of LR 209/10350 situate in Upper Hill Nairobi.

(d) *An Interlocutory injunction restraining the Defendant, its employees, agents servants and or officers from encroaching or in any way interfering with the quiet possession enjoyed by the Plaintiff over its property on LR No. 209/10350 Upper Hill Nairobi.*

(e) *A Mandatory injunction compelling them to vacate from LR 209/10350 Upper Hill Nairobi with immediate effect and restore the possession and ownership of the parcel of land to the plaintiff.*

(f) *A declaration that LR 209/10350 situated in Upper Hill Nairobi is the exclusive property of the Ukamba Agricultural Institute and is not subject to Legal Notice 102 of 2008 and therefore not transferred and or vested in South Eastern University College.*

(g) *General Damages.*

(h) *Costs of this suit and interest. [Emphasis mine]*

25. According to the plaint, the UKAI averred that as a distinct legal person from the purported Ukambani Agricultural Insitute, it has no relationship with the institution and that its properties are not subject to the SEUCO Order. It specifically averred that the Upper Hill property was not subject to the Order.

26. SEUCO, the 1st defendant on the civil suit, lodged its defence and counterclaim. The defence denied the substance of the plaintiff's claim and in the counterclaim it sought the following reliefs;

(a) *Amended plaint dated 5th June 2009 be dismissed with costs.*

(b) *A declaration that the said property No. 209/10350 Upper Hill Nairobi is an asset of the 1st defendant, as per Gazette Notice No. 102 of 2008 dated 15th July 2008.*

(c) *An order be issued directing the plaintiff to deliver physical possession of the said property No. LR 209/10350 to the 1st defendant.*

(d) *In the alternative an order be issued directing the plaintiff its agents/servants, tenants or whomsoever to vacate the property LR No. 209/10350 forthwith.*

(e) *Inquiry as to the damages be ordered on the commercial activities conducted on the said property by the Plaintiff and its agents from 15th July 2008 to date of judgement.*

(f) *An order be issued to the Plaintiff, his servants, agents or assigns to deliver all books of accounts, balance sheets, bank accounts, schedules of assets and liabilities to the 1st defendant.*

(g) *A mandatory injunction be issued to the plaintiff, its servants, agents or whomsoever from charging, letting, interfering, alienating or any act whatsoever inconsistent with the terms of the Title No. 209/10350 and Legal Notice No. 102 of 2008, dated 15th July 2008.*

(h) *Costs of the suit*

(i) *Interest at court rates*

(j) *Any other remedies the court might deem fit to grant. [Emphasis mine]*

27. In the defence, SEUCO stated that the reason for demolition of the structures of the Upper Hill property was that ownership had been transferred by reason of the SEUCO Order. Furthermore it was contended that Board of Governors, which is the decision making organ in respect of the property under the Articles of Association, had approved the conversion of UKAI to SEUCO and that the stakeholders, in several meetings, approved this course. The issue of the capacity of the plaintiff to institute that suit

was also raised.

28. After hearing an application for injunction lodged by the the plaintiff, Hon. Lady Justice Nambuye delivered a ruling where she dismissed the application for injunction. The learned judge made certain observations which I think are pertinent to this determination. The learned judge after setting out the rival arguments and principles for the grant of an interlocutory injunction, observed;

This court has applied the above ingredients to the rival arguments herein, the court, is of the opinion, that the plaintiff/applicant has not satisfied those ingredients for the following reasons:-

(1) The authority to file the suit has not been annexed to the verifying affidavit, verifying the content of the plaint.

(2) The grieving gazette notice number 102/2008 which sparked off the proceedings herein stands unfaulted on the one hand. On the other hand there is also no plea in the reliefs to have it declared of no consequence.

(ii) As long as it stands the property sought to be protected is already vested in the 1st defendant short of the documentation.

(3) Both sides agree the plaintiff is a company whose transaction with third parties are governed by its Articles and Memo of Associations. As per the content of the copy exhibited, protection of property is the mandate of the Board of trustees. The Plaintiff has not disputed the authenticity of this document annexed by the respondents. The documents alleged to have revised the said contents has been exhibited by the Plaintiff's deponent. Contains some clauses which have been struck out but there is no indication that the same is authentic. By Authentic we mean that the document has been approved by the relevant authority and registered with the Registrar of Companies. For this reason, its existence notwithstanding the mandate to protect the plaintiff's property lies with the Board of trustees of the plaintiff whether constituted or not.

(4) Though the complaint has been that Ukamba Agricultural College Limited and Ukambani Agricultural College Limited are distinct personalities no effort has been made by the deponent of the plaintiff's supporting affidavit to exhibit documentation from the Registrar of Companies to show that Ukambani Agricultural Institute Limited exists as a legal personality. In the absence of its existence, it does not rival the Plaintiff.

(5) As found under general observations; prayers 2, 3 and 4 which are interim reliefs have been sought pending the determination of the application. It means that the applicant can only get what he asked for, namely an interim relief pending the hearing and determination o the application. This means that even if the applicant would have established the existence of a prima facie case with a probability of success, it would only have enjoyed a reprieve pending the determination of the application which determination ends with the delivery of this ruling.

(6) Even if it can be stated that the Board of Directors and or board of governors had the mandate to protect the institutions property, it cannot be said that they can prevent an institution with a legal personality from transitioning itself into something else.

(7) No explanation has been given as to why only one property is sought to be protected and not the rest of the other properties of the Plaintiff.

(8) If it is true that the plaintiff needs to be compensated by way of damages, it has not been demonstrated that the 1st defendant will not be in a positions to compensate the plaintiff by way of damages should the suit succeed.

(9) The balance of convenience does not tilt in favour of the applicants by reason of what has been stated in number 1-8 above.

(10) By reason of what has been stated in number 1-9, the applicants' application dated 27th March 2009 and filed the same date stands faulted and the same is dismissed with costs to the defendants/respondents.

29. It is abundantly clear that the issues in the civil suit are similar to the issues I am required to resolve in this case notwithstanding that only the Upper Hill property is involved. From the prayers I have cited and emphasized above, the issue of the SEUCO Order is at the centre of consideration. Though the Hon. Lady Justice Nambuye concluded that there was no prayer specifically attacking it, it will be necessary for the court considering the legality or otherwise of the defendant's action to address itself to the legality of the SEUCO Order and its effect on the property of the defendant.

30. A determination of the legality or otherwise of the defendant's actions in the civil suit will no doubt affect the other properties which are not subject to that suit. It would be embarrassing for this court to adjudicate on the properties separately given that they are all subject of the SEUCO Order as it is possible that this court may reach different conclusions on the matter.

31. It is now apparent from the matter I have outlined that this petition required me to pronounce on matters which are directly and substantially in issue between the same parties in a pending suit between the parties.

32. This is not the first time this Court has found itself in a situation where there is a pending suit dealing with the same or similar matter as a matter concerning enforcement of fundamental rights and freedoms. In the case of ***Retired Major Shadrack Mutia Muia v Prof Kivutha Kibwana and Others Nairobi Petition No 281 of 2006 (Unreported)*** the Court observed as follows, “**[26]Section 84 of the Constitution is a separate right, the right for a person whose rights are violated, infringed or threatened to move the High Court unhindered. The Court should exercise great circumspection in interfering with the gateway of enforcement lest the rights guaranteed under the Constitution become worth the paper they are written on. [27] This view is not inconsistent with the power of the Court to prevent abuse of its process or do justice. Allowing of abuse to take root in our system breeds impunity and the direct result is that the efficiency of Court orders is lessened thereby undermining the same rights that are to be enforced. [28] Under section 84, the Court is entitled to take into account the issue of subjudice and consider whether indeed, it affects the rights to be enforced. The Court is not powerless and cannot gloss over the abuse of its process merely because the matter before it is dressed an enforcement of fundamental rights action. It must act when called upon to halt an abuse of its process in appropriate circumstances.**”

33. To proceed to determine the issues which are clearly pending before another court is to be avoided particularly where a decision has already been made by Hon. Lady Justice Nambuye. Permitting this such a course would amount to a collateral attack on that decision. I must therefore decline to consider the matters which are squarely for consideration by the court in the civil case.

34. I am cognizant that these are proceedings to enforcement of fundamental rights and freedoms and this court should be slow to shut out a litigant. In the case of ***Fleur Investment Limited v Permanent Secretary Ministry of Roads & Others Nairobi Petition No. 173 of 2011 (Unreported)***, the court expressed the view that, “**[38] Bearing in mind that these are proceedings for the enforcement of fundamental rights and freedoms under the Constitution, I think the most important consideration is whether, holding that the suit is an abuse if the court process impedes the petitioner's right of access to this court to vindicate its property rights. In *Chokolingo v The Attorney General of Trinidad and Tobago [1981] 1 WLR 106, Lord Diplock warned that, “It would be undesirable to stifle the grant of constitutional relief when a claim for relief is established and such relief is unavailable through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument.”***”

35. **Section 84** of the former Constitution and **Article 22** of the Constitution are not the exclusive manner of enforcing fundamental rights and freedoms, the High Court as the Court with jurisdiction to deal with matters concerning the Constitution is entitled to exercise this jurisdiction in all matters before it. Moreover, the Court, by exercising its ordinary jurisdiction to resolve property disputes is protecting

the property rights of the parties. Thus in this case, I am satisfied that the petitioner rights will not be prejudiced by this court insisting that the prior civil suit be prosecuted before embarking on the prosecution of this case.

Disposition

36. Since this petition involves a determination of the issues that are alive in ***Nairobi High Court Civil Case No. 136 of 2009***, the only course open to this Court is to order a stay of this suit pending hearing and determination of ***Civil Case No. 136 of 2009***.

37. The order that commends itself to this Court in the circumstances is as follows;

(a) Petition No. 11 of 2010 be and is hereby stayed pending the hearing and determination of Nairobi High Court Civil Case No. 136 of 2009.

(b) The costs of this petition reserved pending determination of this matter.

DATED and DELIVERED at NAIROBI this 25th day of May 2012.

D. S. MAJANJA
JUDGE

Mr S. Adere instructed by Adere & Company Advocates for the petitioner.

Mr Mutinda, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Mr Kilonzo Junior, instructed by Kilonzo and Company Advocates for the 2nd respondent.