



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL CASE NUMBER 1204 OF 2006**

**KENYA ANTI-CORRUPTION COMMISSION. .... PLAINTIFF/APPLICANT**

**VERSUS**

**KIMUMU SERVICE STATION LIMITED. ... 1<sup>ST</sup> DEFENDANT/RESPONDENT**  
**PHEOBE AMIANI..... 2<sup>ND</sup> DEFENDANT**  
**WILSON GACANJA. .... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

Before me is an application dated 13<sup>th</sup> May 2008 filed on behalf of the plaintiff. The application was brought under section 3A of the Civil Procedure Act (**Cap 21 Laws of Kenya**), as well as Order 6 rules 13 (b) (c) and rule 16 of the Civil Procedure Rules. The prayers in the application are four, as follows: -

- a) The 1st defendant's statement of defence dated 1<sup>st</sup> February 2007 be struck out.***
- b)The 3<sup>rd</sup> defendant's statement of defence dated 14<sup>th</sup> February 2007 be struck out.***
- c) Judgement be entered against the defendants jointly and severally as prayed for in the plaint.***
- d)Costs be provided for.***

The application has grounds on the face of the Chamber Summons. The grounds are six in number and I will produce them here under. They are as follows:-

- 1. On or about 24<sup>th</sup> July 1996, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, acting in concert, purported to make a grant of that land known as L.R. No. 20927 (IR No. 5356) situate in North East of Eldoret Town (hereafter the "suit property") to the 1<sup>st</sup> defendant.***
- 2. The suit property constitutes a public road and was not available for alienation and the purported grant by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant was illegal, fraudulent, null and void and ultra vires the statutory powers and functions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.***
- 3. The process of alienation was patently illegal and incapable of conferring any rights or benefit to***

*the 1<sup>st</sup> defendant or any other person whatsoever.*

*4. The 3<sup>rd</sup> defendant had no legal authority to alienate public property to private persons.*

*5. There are no triable issues meriting the full trial of this suit.*

*6. It is just and expedient to grant the orders sought.*

The application was filed with a supporting affidavit sworn by Yuvinalis Angima, an investigator with the plaintiff Commission. It was deponed in the said affidavit, inter alia, that the plaintiff had pursuant to powers under the provisions of the **Anti-Corruption and Economic Crimes Act No. 3 of 2003** carried out investigations on L.R. No. 0927 (IR No. 5356) situated in North East of Eldoret Town which was illegally alienated by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant in conjunction with the 2<sup>nd</sup> defendant who was a Senior Officer in the office of the 3<sup>rd</sup> defendant. It was deponed that the investigations revealed that the suit property was curved out of a road or a road reserve at the junction of Eldoret – Iten and Chepkoilel Campus road. It was further deponed that no Presidential approval was obtained prior to the alienation of the land to the 1<sup>st</sup> defendant. That one Japheth Magut sought permission from the President to construct a Petrol Station at his plot at Kimumu and the purported approval was used as authority to alienate the land to the 1<sup>st</sup> defendant. It was deponed that the allotment letter was issued to the 1<sup>st</sup> defendant on 10<sup>th</sup> May 1994, while the 1<sup>st</sup> defendant was actually incorporated on the 8<sup>th</sup> June 1994. It was further deponed that the grant was finally purported to be issued on behalf of Wareng County Council though the said Council did not issue any instructions to the 3<sup>rd</sup> defendant to make the grant on its behalf. It was deponed that the subject property being part of a public road, was not available for alienation at the instance of the 3<sup>rd</sup> defendant or any other person. It was deponed that the 2<sup>nd</sup> defendant had recorded a statement with the plaintiff but opted not to defend this suit. The said 2<sup>nd</sup> defendant however, admitted in her statement that she issued the letter of allotment on the instructions of the 3<sup>rd</sup> defendant. That she did not know why the title was issued in the name of Wareng County Council. That she merely assumed that at the time of issuance of the letter of allotment, the 1<sup>st</sup> defendant was in existence as a company.

It was deponed also that the advocate on record for the plaintiff had advised the deponed of the affidavit that there was no single triable issue necessitating viva voce hearing of this suit. That, among other reasons, the suit property being a public road was not available for alienation and that the offer of allotment was purportedly accepted long after the validity period had lapsed.

The plaintiff also filed a further affidavit sworn on 3<sup>rd</sup> February, 2009 by Dedan Okwama. It was deponed in the said affidavit, inter alia, that the suit property was L.R. No. 20927 (IR No. 5356) not LR No. O927 (IR No. 5356). It was also deponed that what was stated in paragraph 8 of the replying affidavit sworn by Mr. Japheth Magut that there was in existence Eldoret High Court Civil Case No. 94 of 1999 was not true, as investigations had revealed that the said suit was transferred to the lower court and registered as Eldoret CMCC No. 538 of 2003 and was dismissed for want of prosecution on 7<sup>th</sup> September, 2006. It was deponed, therefore, that Mr. Magut was lying on oath and thereby misleading the court.

The plaintiff also filed written submissions to the application on 25<sup>th</sup> October 2010. It was contended in the said submissions that the subject property was not available for alienation and that the procedure for acquiring the same was pertinently illegal. That even if, for argument's sake it was available for alienation, the required procedure for alienation was not followed.

It was contended that the plan from the Chief Roads Engineer showed that the property was a road reserve. The said Chief Roads Engineer had complained in a letter dated 31<sup>st</sup> January 2000 against this alienation. In any case, the 2<sup>nd</sup> defendant who was a Senior Officer from the Office of the Commissioner of Lands had admitted that the suit property constituted of a road reserve and that it was a mistake to alienate the same.

It was contended that investigations had revealed that no Presidential approval was obtained prior to the alienation of the land to the 1<sup>st</sup> defendant. That Mr. Japheth Magut merely sought Presidential permission to construct a petrol station at his plot at Kimumu. The 1<sup>st</sup> defendant had not attempted, in his pleadings, to explain that the Commissioner of Lands had the authority to allocate the land even after the Part Development Plan (PDP) was circulated to various government departments and received positive appraisal. It was contended that the 3<sup>rd</sup> defendant had merely pleaded in his defence that he had obtained the President's approval prior to the allocation, but without giving further information. It was contended that under Section 3 of the Government Lands Act (Cap 280) only the President had the power to allocate Government land. That power was delegated to the Commissioner of Lands in certain limited circumstances such as where the said allocation was for charitable, educational, sports or religious purposes. Therefore, the allocation of the suit property to the 1<sup>st</sup> defendant by the 3<sup>rd</sup> defendant could not be deemed to a legitimate exercise of delegated power as it was not for any of the above purposes. Reliance was placed on **Nairobi HC Misc. Appl. No. 1732 OF 2004 JAMES JORAM NYAGA & ANOTHER Versus ATTORNEY GENERAL & 2 OTHERS** wherein the court in referring to section 3 and 7 of the Government Lands Act (Cap 280) observed that the two sections limited the power of the Commissioner to executing leases or conveyances on behalf of the President, and that the Commissioner of Lands had no authority to alienate the disputed plot.

It was contended also that the letter of allotment was issued to a non existent person. Therefore, it could not be a valid letter of allotment. Reliance was placed in **Nairobi Civil Appl. No. 60 OF 1997 DR. JOSEPH NGOK Versus MOIJO KEIWUA** where the Court of Appeal stated, inter alia, that it was trite that title to landed property could only come into existence after issuance of a letter of allotment, and also after meeting the conditions stated in such letter.

It was the contention that the conditions on the letter of allotment issued on 10<sup>th</sup> May 1994 herein required the 1<sup>st</sup> defendant to accept the allotment and make payments of Ksh.85,302.00 within 30 days from the date of the letter, failure to which the offer would lapse. The said letter of allotment could not generate title firstly, because the allottee was not in existence, and secondly, the charges were not paid within 30 days.

It was the contention that the 1<sup>st</sup> defendant had admitted that at the time when the land was being allocated, it had not been incorporated. The 1<sup>st</sup> defendant however, attempted to justify the allocation on the ground that the name of the Company had already been reserved at the Registrar's Office. It was argued that the company did not exist and the reservation of the name per se did not give rights to an unborn child to own property.

It was contended that the letter of allotment, in any case was purportedly accepted on 5<sup>th</sup> September, 1994 which was four months after it was issued. It was the contention that, in terms of the conditions on the letter of allotment, acceptance could not be made after the lapse of the 30 days period. Reliance was placed on the case **SYEDNA SAHEB & 2 OTHERS -Versus- BENJA PROPERTIES & 2 OTHERS HCCC No. 73 of 2000** - wherein the court observed, inter alia, that the letter of allotment relied upon by the defendant had itself expired and therefore was invalid and that the said letter of allotment could not be revived by conduct.

It was further submitted that the doctrine of indefeasibility of first registration did not apply in cases of nullity or where there was no legal authority or right. Reliance was placed on the case of **MILANKUMARN SHAH & 2 Others Vs CITY COUNCIL OF NAIROBI, HCCC (O.S) No. 1024 of 2005** wherein the court stated that title to land was absolute and indefeasible to the extent that it was created in accordance with the applicable law and where it was demonstrated that such registration was not procured by a fraud where the claimant himself was part of the scheme to disregard the law.

It was in response to Mr. Magut's affidavit, it was contended that survey was a precise science. Therefore, the suit property herein could not be a remainder of the property surveyed for public purposes, as alleged in the said affidavit.

It was contended that the title herein was issued under the Registration of Titles Act (Cap 281) as Trust Land on behalf of Wareng County Council. However, investigations had revealed that the said Council was not involved at all in the process of allocation. In addition, as both the 1<sup>st</sup> and 3<sup>rd</sup> defendants contended that the suit property was Government land, it meant that the title was a nullity as the same should have been issued under the provisions of Government Lands Act, which was not the position herein.

The application was opposed. The 1<sup>st</sup> defendant filed an affidavit sworn on 23<sup>rd</sup> June, 2008 by Japheth Magut described as its Director. It was deponed in the said affidavit, inter alia, that the correct number of the plot was No. LR. 20927 (IR 5356) and that there was no evidence that the same was a road reserve. It was also deponed that the said plot was a remainder of a surveyed plot, and was lawfully allocated to the 1<sup>st</sup> defendant. It was also deponed that the initial applicant for the plot was one Wilfred Kimalat and that there was no procedural irregularity in the application and offer of allotment of the plot in the 1<sup>st</sup> defendant's name. It was further deponed that it was the 3<sup>rd</sup> defendant, as Commissioner of Lands, to accept payment of allotment fees outside the 30 days period. That Commissioner of Lands having accepted such late payments, created a valid contract and hence the allotment was valid in law. That the findings of the plaintiff contradict initial findings by Government Officers in various departments, thus the need for the court to make a full inquiry into the matter. That there was another case **Eldoret High Court Civil Case No. 94 of 1999** wherein the same matters were being addressed and that the statements by Phoebe Amiani, the 2<sup>nd</sup> defendant herein, were of no evidential value.

The 3<sup>rd</sup> defendant through their advocate Ms Kangethe & Company filed grounds of opposition on 25<sup>th</sup> June 2008. It was their position that the application against the 3<sup>rd</sup> defendant was totally misconceived both in law and facts, that the suit and this application are frivolous, vexatious, scandalous, and an abuse of court process; that the orders prayed for in the application could not be granted due to the circumstances of the matter. That the suit and application did not disclose a cause of action against the 3<sup>rd</sup> defendant. That the 3<sup>rd</sup> defendant's defence raised material triable issues which could not be determined summarily by affidavit evidence, and that the supporting affidavit to the application contained inadmissible material.

The 3<sup>rd</sup> defendant through their counsel also filed written submissions on 29<sup>th</sup> October, 2010. It was contended that the 3<sup>rd</sup> defendant's defence filed raised triable issues as he had denied the allegations that the suit land was not available for alienation and stated that the allocation of the land to the 1<sup>st</sup> defendant was legal, valid and intra vires within his then statutory authority. In addition, the 3<sup>rd</sup> defendant had denied in his defence the allegations of fraud and illegality and raised the issue of Constitutionality of him being sued in this suit.

It was contended that the application could not be granted because the 3<sup>rd</sup> defendant was sued in his personal capacity 8 years after he had left office. It was contended that under section 7 of the Government Lands Act, the Commissioner of Lands was deemed to have acted on behalf of the President. Reliance was placed on the case of **KINGS ESTATE LIMITED Versus AMOS NGATA KAMAU High Court Civil Case No. 103 of 2007** where the court held that the Commissioner of Lands acts under the direct authority of a disclosed principal, that is the President. It was contended that it was necessary for the office of Commissioner of Lands to be joined as a party to these proceedings. Reliance was placed on the case of **PASHITO HOLDINGS LIMITED Versus PAUL NDERITU NDUNGU Civil Appeal No. 138 of 1997** where it was held that only the Commissioner of Lands could resolve the issue as to whether legal authority to alienate the land was granted and that could be done only if the Commissioner was a party to the proceedings.

It was therefore contended that, in enjoining the 3<sup>rd</sup> defendant personally, the plaintiff had sued the wrong party. Reliance was placed on the case of **KENYA ANTI-CORRUPTION COMMISSION-Versus-BHANGRA LIMITED**, Mombasa High Court Civil Case No. 201 of 1997 where the court held that the Commissioner of Lands was wrongly sued in his personal capacity, and where in a subsequent application, the Court of Appeal in Civil Application Nos. 185 and 186 of 2009 stayed the proceedings in

High Court, pending hearing of the appeals. Therefore, it was argued that this court must decide the issue of wrong joinder of the 3<sup>rd</sup> defendant before it makes the decisions requested in this application.

It was emphasized that the defence of the 3<sup>rd</sup> defendant raised triable issues and therefore the matter should proceed to hearing on merit. Reliance was placed on a number of cases including **KENYA TRADE COMBINE LIMITED Versus M M SHAH Civil Appeal No. 193 of 1999** which was cited with approval in the case of **FIVE CONTINENTS LIMITED Versus MPATA INVESTMENT LIMITED Nairobi Civil Appeal 306 of 2000** wherein the Court of Appeal stated that all that the defendant was required to show was that a defence on record raised triable issues which ought to go for trial.

It was contended also that the supporting affidavit to the application was fatally defective as it contained inadmissible evidence such as the statement of Phoebe Amiani which had no probative value. That the affidavit contravened the provisions of section 35(1) of the Evidence Act (Cap 80 Laws of Kenya). It was contended that the statement by said Phoebe Amiani, the 2<sup>nd</sup> defendant, had not yet been produced as evidence nor had it been made on oath. Therefore, it had no evidential value.

Lastly, it was contended that the plaint did not have any prayer sought against the 3<sup>rd</sup> defendant. Therefore, the court was not capable of granting the orders sought in the present application.

On the hearing dated, Mr. Murei for the applicant made submissions in support of the application. Mr. Njuguna made submissions in opposition to the application on behalf of the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant was not represented in court.

I have considered the application, documents filed, and the submissions both written and oral and the authorities cited as well as the law. This matter was commenced by way of a plaint filed on 15<sup>th</sup> November, 2006. The plaint seeks several orders. On the 1<sup>st</sup> February, 2007, the 1<sup>st</sup> defendant filed a defence through Manani, Lilan & Company Advocates. On 14<sup>th</sup> February, 2007 the 3<sup>rd</sup> defendant filed his defence through Kangethe & Company Advocates. The plaintiff on 19<sup>th</sup> February, 2007 filed a reply to the 3<sup>rd</sup> defendant's defence.

On 13<sup>th</sup> May 2008 this application was filed. It is an application for striking out the defences of the 1<sup>st</sup> and 3<sup>rd</sup> defendants. It is also an application that judgment be entered against the three defendants jointly and severally. It is apparent that the 2<sup>nd</sup> defendant did not file a defence to the suit. Her statement is being used in this application to support the request by the plaintiff for striking out the defences of the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

In the case of **FIVE CONTINENTS LIMITED VS MPATA INVESTMENT LIMITED Civil Appeal No. 306 of 2000** the Court of Appeal adopted with approval what was stated in **UAP PROVINCIAL INSURANCE LTD Versus M KIVULI Civil Appeal No. 216 OF 1996**, wherein the Court of Appeal had stated thus: -

***“In an application for summary judgment even one triable issue if bona fide would entitle the defendant to have unconditional leave to defend.”***

I am in full agreement with what was stated by the Court of Appeal above.

The plaintiff/applicant herein states that this case is straight forward and does not have any triable issues. Having considered documents filed and the contentions of the parties herein, I am of the view that there are indeed triable issues.

First of all, two defendants have filed defences, necessitating the plaintiff to file a defence to the 3<sup>rd</sup> defendant's defence. The defences seem to raise matters both of law and fact. They are not mere

denials. The plaintiff/applicant seems to rely on investigations carried out by itself or its agents, which investigations are in the form of evidence. That evidence will have to be proved in court after it is tested through cross-examination. The investigating officer has to testify. The identified witnesses, who are not necessary parties in these proceeding, will also have to testify and their evidence tested through cross-examination. The statement of the 2<sup>nd</sup> defendant falls within the statements or evidence which will have to go through the test of cross-examination. That is the first reason why I think that there are triable issues.

Secondly, there are issues of law and fact raised in the defences. The law will have to be applied and interpreted in light of the particular circumstance and the evidence which will be tendered in court. At this stage, it is not possible for the court to determine the truth of any statement because there is no unequivocal admission. Therefore, in my view, this is a matter for full trial, for the court to determine the same on the merits after hearing the evidence and submissions on the law applicable. That is the second reason why I think there are triable issues.

In addition to the above, the requirements of fair hearing under Article 50(1) of the Constitution of Kenya 2010 are very clear. It provides: -

***“50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body.”***

All the parties in contest herein are not independent or impartial tribunals or bodies. They are genuine contesting parties before court who have a right to be heard by an independent and impartial court. Because the plaintiff, the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendants have raised triable issues in their pleadings, they each have a Constitutional right to be heard in a fair and public manner through tendering evidence as well as giving their respective interpretation of the law. This provision of the Constitution fortifies the position that this is a matter that should go to full trial on the contested issues between the parties.

In my view therefore, there are triable issues raised in these proceedings between the plaintiff and the 1<sup>st</sup> and 3<sup>rd</sup> defendants. It is only the 2<sup>nd</sup> defendant who, up to now, has not filed a defence. It is her right to keep quiet, if she chooses to do so. Her keeping quiet per se, does not give the result that there are no triable issues raised in the pleadings filed between the plaintiff and the other two defendants. If she chooses to be a witness for any of the parties, that does not deprive other parties their right to substantive hearing. In my view, both the 1<sup>st</sup> and 3<sup>rd</sup> defendants have raised triable issues in their defences and have a right to be given an opportunity to substantively defend themselves. I will therefore decline to strike out their defences and dismiss the application. Costs of the application will be in the cause.

Consequently, the application dated 13<sup>th</sup> of May 2008 is hereby dismissed. Costs in the cause.

Dated and delivered at Nairobi this 10th day of March 2011.

.....  
**GEORGE DULU**  
**JUDGE**

**In the Presence of**

Mr. Machira holding brief for Mr. Murei for the plaintiff/applicant  
Mr. Wandati holding brief for Mr. Njuguna for 3<sup>rd</sup> defendant/respondent  
Catherine Muendo - court clerk