



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**LAND AND ENVIRONMENTAL LAW DIVISION**

**CIVIL SUIT (ELC) NO.322 OF 2008**

**KENYA ANTI-CORRUPTION**

**COMMISSION.....PLAINTIFF**

**VERSUS**

**JOHN F. KINYUA.....1<sup>ST</sup> DEFENDANT**  
**CHARLES KINUTHIA GICHANE.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. What is before me is a notice of motion dated 20<sup>th</sup> March, 2011, brought by the Kenya Anti-Corruption Commission (hereinafter referred to as the applicant). The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 2 Rule 15(b) & (d), and Order 51 Rule 1 of the Civil Procedure Rules. The applicant who is the plaintiff in this suit seeks to have the defences and counterclaim filed by John F. Kinyua and Charles Kinuthia Gichane (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively), struck out and judgment entered for the applicant against the respondents jointly and severally as prayed in the plaint. The applicant further seeks an order that the 2<sup>nd</sup> respondent do vacate L.R. No.209/10611/06 (hereinafter referred to as the suit property).

2. The application is anchored on grounds stated on the motion, as well as an affidavit sworn by Evah Wacuka who is an investigator appointed under Section 23(1) of the Anti-Corruption and Economic Crimes Act No.3 of 2003. In short, the facts alleged are as follows: The applicant has carried out investigations regarding the transfer to the 2<sup>nd</sup> respondent of the suit property, which formerly belonged to Kenya Reinsurance Corporation (hereinafter referred to as Kenya Re).

3. The investigations revealed that there was collusion between the 1<sup>st</sup> respondent who was the financial controller of Kenya Re, and the 2<sup>nd</sup> respondent who was a senior manager with Heritage Insurance Company Ltd (hereinafter referred to as Heritage). As a result a cheque for Kshs.3,196,896/= which was issued by Heritage in favour of Kenya Re for settlement of a claim in respect of Fire Insurance, was used

by the 2<sup>nd</sup> defendant as payment to Kenya Re for purchase of the suit property. The cheque issued by Heritage was therefore credited to the account of 2<sup>nd</sup> respondent thereby reflecting that the 2<sup>nd</sup> respondent had paid Kshs.3,196,896/80 for purchase of the suit property. Accordingly, a transfer document was prepared, duly signed and registered, transferring the suit property from Kenya Re to the 2<sup>nd</sup> respondent.

4. This transfer was fraudulent as the 2<sup>nd</sup> respondent did not provide any consideration; the cheque relied upon having been issued by Heritage. As a result of the fraudulent transaction, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were charged and tried in the Anti-Corruption Court. The trial resulted in the 1<sup>st</sup> respondent being convicted with the offence of abuse of office, and the 2<sup>nd</sup> respondent being convicted with the offence of fraudulent acquisition of public property. In exercise of powers given under Section 54(1) (b) of the Anti-Corruption and Economic Crimes Act, the trial magistrate ordered that the suit property be given back to the Corporation. The applicant therefore maintains that the defences and counterclaim are an abuse of the court process, as there are no triable issues raised to warrant the suit proceeding to trial.

5. In response to the application grounds of opposition were filed on behalf of the 1<sup>st</sup> respondent, while the 2<sup>nd</sup> respondent filed a replying affidavit. For the 1<sup>st</sup> respondent it was submitted that the applicant's motion was misconceived and bad in law as the orders sought in the plaint and application are spent. This is because the court had made an order in the criminal case that the suit property be given back to Kenya Re. It was further submitted that the issue of liability of the 1<sup>st</sup> respondent is distinct and will have to be determined by the court. This included the issue whether the acts of an employee should be visited upon that employee or the employer.

6. In his affidavit, the 2<sup>nd</sup> respondent averred that he has developed the suit property and has 7 tenants staying in seven different houses. He contended that this could only be established by way of valuation report and oral evidence. The 2<sup>nd</sup> respondent maintained that he had been contracted to work for Kenya Re and was paid on commission basis. He explained that he had instructed the financial controller of Kenya Re to remit part of his commission towards the purchase of the suit property. He denied having asked Heritage to pay for purchase of his house or having asked Kenya Re to convert into commission earnings towards the house. He deponed that the applicant had given contradictory figures and urged the court to dismiss the application for striking out the defence. He pointed out that he has been granted leave to contest the judgment of the lower court.

7. Counsel for the 2<sup>nd</sup> respondent argued that no application to nullify the title given by the 2<sup>nd</sup> respondent had been made. It was submitted that the 2<sup>nd</sup> respondent is dissatisfied with the judgment of the magistrate in the criminal trial and intends to appeal. Therefore that judgment cannot be relied upon. It was argued that the plaintiff having filed a statement of agreed issues, it was apparent that the defence filed raises triable issues. The court was urged to dismiss the application and award costs to the 2<sup>nd</sup> respondent.

8. In response, counsel for the applicant argued that the orders the applicant is now seeking are different from the orders which were issued in the criminal trial. It was noted that the judgment in the criminal trial was delivered when this suit was pending before the court. It was submitted that fraud was both a criminal offence and a tort, and therefore the respondents cannot escape personal liability.

9. I have carefully considered the application, the affidavit in support and in reply as well as the submissions made by counsel. I do note that in the plaint filed on 9<sup>th</sup> July, 2008, the applicant has sought judgment against the respondents jointly and severally for the following:

(a) *A declaration that the transfer purported to have been executed on 7<sup>th</sup> October, 2003 between Kenya Reinsurance Corporation and the 2<sup>nd</sup> defendant over property L.R. No.209/10611/106 are illegal, fraudulent, null and void.*

(b) *An order for cancellation of the transfer registered in favour of the 2<sup>nd</sup> defendant in respect of Land Reference No.209/10611/106, City of Nairobi and registered as I.R.77511/1 under entry presentation Number 775 of 20<sup>th</sup> April, 2004.*

(c) *In the alternative the 2<sup>nd</sup> defendant be ordered to execute such documents or deeds as are necessary to transfer the property referred to as Land Reference Number 209/10611/106, City of Nairobi back to Kenya Reinsurance Corporation Limited or upon his refusal or neglect to do so, the Deputy Registrar of this Honourable Court do execute the deeds or documents aforesaid.*

(d) *A permanent injunction restraining the defendants, their servants and/or agents from alienating, encumbering, disposing off, wasting, and trespassing upon or in any other way interfering with the land parcel referred to as Land Reference Number 209/10611/106.*

(e) *Costs of this suit*

(f) *Any other relief that this Honourable court may deem fit to grant.*

10. The applicant's claim is anchored on alleged illegal and fraudulent transactions carried out by the 1<sup>st</sup> and 2<sup>nd</sup> respondents resulting in the fraudulent transfer to the 2<sup>nd</sup> respondent of the suit property which belonged to Kenya Re which is a Public Corporation. The 1<sup>st</sup> respondent filed a statement of defence on 10<sup>th</sup> September, 2008. The main thrust of the defence is that the 1<sup>st</sup> respondent denies that there was any misrepresentation on his part in the transaction or that he was involved in any fraud when dealing with the sale of the suit property. The 1<sup>st</sup> respondent further maintains that he had the powers to commission the 2<sup>nd</sup> respondent as a consultant to fast track debt recovery.

11. The 2<sup>nd</sup> respondent also filed a statement of defence and counterclaim. He maintained that the transaction involving the suit property complied with all the legal requirement of a willing seller and a willing buyer as the agreed consideration was duly paid. The 2<sup>nd</sup> respondent maintained that he is the rightful owner of the suit property. He counterclaimed a sum of Kshs.5,202,150/=, which he used to develop an extension on the suit property. He urged the court to dismiss the applicant's claim with costs and enter judgment in favour of the 2<sup>nd</sup> respondent for Kshs.5,202,150/=, and an order restraining the applicant, his agent or servants from claiming, trespassing or interfering with the suit property.

12. The annexures to the affidavit in support of the applicant's motion have clearly supported the averments which were made in the plaint. The cheque for Kshs.3,196,896/= drawn on the account of Heritage which was used by the 2<sup>nd</sup> respondent as consideration for the transfer of the suit property has been exhibited. Neither the 1<sup>st</sup> respondent nor the 2<sup>nd</sup> respondent has offered any credible explanation as to why the cheque which was in the name of Kenya Re was used for the benefit of the 2<sup>nd</sup> respondent. The intimation that the payment was in respect of commissions due to 2<sup>nd</sup> respondent arising

from a consultancy agreement between the 2<sup>nd</sup> respondent and Kenya Re, cannot hold. This is because there was no payment flowing from Kenya Re to the 2<sup>nd</sup> respondent which can be regarded as commission. Instead, payments due to Kenya Re in respect of Fire Insurance were diverted to the 2<sup>nd</sup> respondent's property account.

13. In short, there was no consideration paid by the 2<sup>nd</sup> respondent for the transfer of the suit property. The complicity of the 1<sup>st</sup> respondent to the fraudulent transaction is evident as the cheque was forwarded to Kenya Re by a letter which was for the special attention of the 1<sup>st</sup> respondent. There is no way the cheque which according to the forwarding letter was for settlement of Fire Insurance Claim could have ended up in the 2<sup>nd</sup> respondent's property account, without the 1<sup>st</sup> respondent's involvement.

14. Both the 1<sup>st</sup> and 2<sup>nd</sup> respondents were convicted of criminal charges arising from this transaction. Although the respondents have maintained that they intend to appeal against the finding of the criminal court, no grounds of appeal have been exhibited, even though the criminal court judgment was delivered over six months ago. The averments of the respondents in the defences are nothing more than mere denials which cannot hold in the light of the evidence exhibited by the applicant, and the respondents' conviction in the criminal court.

15. The 2<sup>nd</sup> respondent's counterclaim for Kshs.5,202,150/= also cannot hold as the suit property having been fraudulently transferred to him, he had no genuine title to the suit property. Thus, the 2<sup>nd</sup> respondent had no authority to carry out any developments on the suit property and cannot recover the value thereof from the applicant or Kenya Re. This court has an obligation to facilitate the just and expeditious resolution of this dispute. It would be a waste of valuable judicial time to allow this suit to proceed to full trial when they are really no triable issues.

16. Although the Criminal Court directed that the suit property be given back to Kenya Re, that order is insufficient as there is need to have the fraudulent transactions which were registered declared null and void and the register rectified. In the circumstances, the prayers sought by the applicant in the plaint are not a duplication of the orders issued by the magistrate in the Criminal trial. The upshot of the above, is that I do hereby allow the notice of motion dated 30<sup>th</sup> March, 2011 and issue orders as prayed. Orders accordingly

**Dated and delivered this 15<sup>th</sup> day of June, 2011**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Machira H/B for Murei for the plaintiff/applicant

Tollo for the 1<sup>st</sup> respondent

Bwomote for the 2<sup>nd</sup> respondent

B. Kosgei - Court clerk