REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(*Coram: Ojwang J.)*

CIVIL SUIT NO.38 OF 1997

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

-VERSUS-

1. AERIAL DEVELOPERS LIMITED
2. ENOCK TUITOEK.....DEFENDANTS/ RESPONDENTS
3. SAMMY SILAS KOMEN MWAITA

RULING

The plaintiff filed suit by plaint dated ***9th June, 2009*** and simultaneously filed an application by Chamber Summons, brought under s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Orders XXXIX [Rules 1(a), 2, 2A(1)] and V [Rules 17(1), (3)] of the earlier edition of the Civil Procedure rules.

The outstanding prayers in the application are as follows:

(i) that, a temporary injunction be issued against the defendants/respondents, jointly and severally restraining them, their servants and/or agents from alienating, encumbering, disposing of, wasting, damaging or in any other way interfering or dealing with the land referred to as Parcel No. MN/I/2398 also known as house No. HG 145 pending the disposal of the suit;

(ii) that, the application herein, together with summons-to-enter- appearance in this suit, and any orders this Court may deem fit to grant, be served upon the defendants through advertisement in the *Daily Nation* ***or the*** *East African Standard* ***newspapers, and the defendants be ordered to enter appearance within 15 days of the date of the advertisement, or within such time as this Court will deem appropriate;***

(iii) the costs of this application be provided for.

The application is founded on certain grounds, as follows:

(a) on or about ***16th December, 1974*** the Government of Kenya, through the then East African Community, reserved 20 plots each measuring half an acre or thereabouts, situated in Nyali Estate, for use by the following Government Departments: Department of Customs (now Kenya Revenue Authority); Directorate of Civil Aviation; Directorate of Meteorology;

(b) a licensed surveyor appointed by the Government completed the survey of the said 20 plots for senior staff housing, and submitted the survey to the Director of Surveys for approval and registration;

(c) the said 20 plots were allocated land reference numbers MN/I/2396 to MN/I/2415 by the Director of Surveys in 1975 – the suit property being one of them;

(d) sometime in 1977, the Government, through the East African Community, completed the construction of four-bedroom bungalows, with servant-quarters, on the 20 parcels of land (including the suit property) for the purpose of housing the senior staff of the Department of Customs, the Directorate of Civil Aviation, and the Directorate of Meteorology;

(e) the said 20 houses were entered into the Government building register as HG 1 – 20; this numbering later changed to HG 143 – HG 162; the suit property whose land reference number is MN/I/2398 was referred to as HG 3, and later on, this changed to HG 145; this house has always been in the possession and occupation of a member of staff of the then Directorate of Civil Aviation (now Kenya Civil Aviation Authority);

(f) in 2000, the suit property had been allocated to 1st defendant; and at that time the house built on the suit property had been reserved and set aside for use, and was being used by, the then Director of Civil Aviation;

(g) the suit property was, and is still reflected in the Government building register as an institutional house; and it has at all material times been used to accommodate staff members of the then Directorate of Aviation, now the Kenya Civil Aviation Authority;

(h) ***in the premises, the suit property was not available for allocation to 1st defendant at all;***

(i) ***the purported allocation and registration of lease in favour of 1st defendant by 3rd defendant in respect of parcel No. MN/I/2398 are illegal, null and void***;

(j) it is meet and just, in the circumstances, to have the purported allotment and registration and transfer of the lease on the suit property, cancelled, and the property restored to the public;

(k) before such cancellation, it is necessary that the defendants be restrained from selling, wasting, alienating or in any other way interfering with the suit property, pending the hearing and determination of the suit herein.

Evidence to support the application is set out in the affidavit of ***Dedan Okwama***, an investigator with the Kenya Anti-Corruption Commission appointed as such under s.23 of the Anti-Corruption and Economic Crimes Act, 2003 (Act No. 3 of 2003).

The firm of ***M/s. Kadima & Co. Advocates*** entered appearance for the defendants on ***23rd June, 2009***; but the responses filed in Court were only in respect of 3rd defendant, who filed a notice of preliminary objection and two affidavits on ***13th July, 2009***. In one of these affidavits, 3rd defendant averred: ***"I verily believe to be true that the plaintiff herein has sued the wrong parties and the suit ought to be dismissed with costs."***

In the second affidavit, which is marked as the replying affidavit, 3rd defendant mainly attributes the information he has to his Advocate, and avers that ***"the plaintiff/applicant has selectively chosen to file this suit without including all the parties jointly and severally;"*** and that ***"the plaintiff has not shown a prima facie case to warrant the orders sought both in the Chamber Summons and the suit."***

On the basis of the supporting affidavit and its annexures, learned counsel, ***Mr. Angote*** for the applicant, submitted that the house in question was built for the Kenya Civil Aviation authority, an organization that handles airspace matters, and that is classified as a security organ of the State. Counsel urged that all the defendants have not denied the fact that the house in question is situated on the suit property, nor have they claimed they purchased the house on the suit property at market rates: they only say they were allocated the said house, and the property was alienated by the Government.

Counsel submitted that the titles to the suit property which were prepared in the 1998 – 2000 period, based on the deed-plans of 1976, were void ***ab initio***: the reason being that the law was not followed when the titles were issued to the defendants. In the words of counsel: "***A title is an end-product of a process; if title was obtained without following process, then the title is null and void."*** By s.3 of the Government Lands Act (Cap.280, Laws of Kenya), only the ***President*** can alienate unalienated Government land; and, as regards ***town plots***, the lawful mode of disposal is set out in ss.9 and 12 of the Government Lands Act. The lawful mode of disposal, counsel urged, is regulated by certain principles of law: (i) the President can only allocate ***unalienated*** Government land; (ii) the Commissioner of Lands cannot exercise powers reserved to the President, on the alienation of unalienated Government land; (iii) registration of title to land is absolute and indefeasible only so long as the creation of title was in accordance with the applicable law. Counsel submitted that s.23 of the Registration of Title Act (Cap. 281, Laws of Kenya) only protects titles to land that have been legally acquired: and where the land in question is reserved for a particular mode of user, there is nothing for the President to allocate – and any allocation of land in these circumstances is "an exercise in futility." Such reservation of land for a particular mode of user can take different forms***: usage; survey plans; or allotment.***

Counsel submitted that the scope of ***"unalienated Government land"*** has been expanded by ***s.3 of the Physical Planning Act, 1998 (Cap. 286, Laws of Kenya)*** which provides that the reservation of land for a particular purpose makes that land ***alienated.***

On that basis, counsel urged that the 3rd defendant's act of issuing title for the suit land to 1st defendant was a nullity.

Mr. Angote relied on a High Court decision, ***John Peter Mureithi & Three Others v. Attorney-General & Five Others*** [2006] eKLR (***Nyamu, J***.) to support the argument that 1st defendant has been holding the suit property as a constructive trustee, and "the public, who are the beneficiaries…are entitled to the same." Counsel called in aid Goff and Jones, ***The Law of Restitution***, 5th ed. (London: Sweet & Maxwell, 1998), pp. 743 -744:

"A stranger will be so liable if he received the property for his own benefit, with the knowledge that it was transferred to him in breach of trust. Certainly he will be liable as a constructive trustee if he had

actual knowledge of the breach of trust, if he wilfully shut his eyes to that obvious fact or if he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would have made and which would have led him to conclude that property had been transferred to him in breach of trust. He may also be deemed to be a constructive trustee 'if the circumstances are such that an honest and reasonable man would have inferred that the moneys were probably trust moneys and were being misapplied' [Eagle Trust plc v. Securities Ltd. [1992] 4 All ER 488, 509 – *Vinelott, J.**] or if he ought to have known that the moneys were transferred in breach of trust."***

In the argument that 1st defendant was a constructive trustee of public property, learned counsel urged that the property, being already surveyed and a Government house constructed upon it, was not unalienated Government land, and it was ***"not available for alienation to any private entity***": and consequently, 3rd defendant, who was Commissioner of Lands, had no authority in law to issue the grant to 1st defendant, and his acts were ***ultra vires*** and void ***ab initio***.

Counsel submitted that while it is trite law that title to land is indefeasible, this position remains valid only where ***"the process of allocation…is done in accordance with the law"***; but "***allocation of the suit property herein was done by 3rd defendant when he did not have the authority in law to do so."***

In ***James Joram Nyaga & Another v. Attorney-General & Another***, Nairobi H.C. Misc. Civil application No. 1732 of 2004 (***Nyamu & Wendoh, JJ***) the applicant had contended that, by virtue of s.23 of the Registration of Titles Act, the title he had was sacrosanet and indefeasible; but the Court declined this argument, holding that:

"….the land in dispute is public land, held by the government on behalf of the public and the Commissioner of Lands could not purport to pass any title to the applicants under the Registration of Titles Act. The applicants were not therefore entitled to any of the declaratory prayers sought."

Learned counsel relied on still another High Court decision, ***Milankumarn Shah & Two Others v. City Council of Nairobi & Others***, Nairobi HCCC No. 1024 of 2005 (OS) (***Nyamu, Wendoh, Emukule, JJ***), in which the Court considered the question of wrongful alienation by the Commissioner of Lands of a road reserve and a road by-pass. The applicants challenged the actions of the relevant Local and Central Government authorities in demolishing their structures on the land so allocated, alleging a violation of their constitutional rights to property; but their actions failed because, as it was held, the Commissioner of Lands had no authority in law to alienate land which had already been reserved for a different purpose.

Mr. Angote submitted that if, as is contended, the registration of the suit property in favour of the defendants was fraudulent and unlawful, then the plaintiff had established a ***prima facie*** case with a probability of success, warranting the grant of interlocutory relief.

Counsel also urged that the plaintiff stood to suffer irreparable loss and damage: because the loss of public property cannot be adequately compensated by an award of monetary damages in the event the suit succeeds.

Learned counsel ***Mr. Langat***, for 1st and 2nd defendants, submitted that the suit property had not been leased to the Directorate of Civil Aviation, neither had an allotment letter been issued "so as to confer upon them any recognizable proprietary interest; "***it was merely placed in its custody as a Department of the Government of Kenya, and this did not in any way diminish the power of the Commissioner of Lands to deal with it in accordance with the law"; "the same was available for allocation in accordance with the law."*** This contention led counsel to ask that certain 'intent-documents' of the Government should be ignored: ***"…even the circulars marked 'YA 09' that purportedly removed the houses from the pool earmarked for sale having classified them as institutional and disciplined forces' housing, [are] irrelevant in view of the clear provisions of the Government Lands Act."***

Counsel urged that, as there had been official transactions between 1st defendant and the relevant Government offices, culminating in an allotment of the suit property to his client being made, ***"the plaintiff…cannot come to Court seeking to declare all these transactions…null and void without any cogent evidence of impropriety either on the part of the 1st defendant or of officers at the Ministry of Lands."***

Counsel went further and attributed the plaintiff's claim to perceived frivolity built upon a credo, which must be kept out of the play of the law and the enforcement of rights; in his words: ***"What is being presented before the Court [is] mere general, populist statements about recovery of public assets but through a process that goes contrary to the very law they are seeking to enforce."***

Counsel impugned the non-joinder of the office of the Commissioner of Lands: ***"the fact that the office of Commissioner of Lands, under [which] all these transactions took place, was not enjoined as a party to this suit is highly suspicious as this is the office that would have shed more light on the alleged fraud and/or illegality in the allocation."***

Counsel relied on a decision of the Court of Appeal, ***Nairobi Permanent Markets Society & Others v. Salima Enterprises & Others,*** Civil Appeal No. 187 of 1997, in which the following passage appears:

"The suit land is admittedly under the operation of [the] Registration of Titles Act. Under section 23 of that Act a certificate of title issued by the Registrar to any purchaser of land is to be taken by all Courts as conclusive evidence that the person named therein as the proprietor of the land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The company as the registered proprietor of the suit land is the absolute and indefeasible owner thereof. There is no allegation that the company was a party to any fraud or misrepresentation perpetrated upon the appellants in the acquisition of the suit land….So the company's rights of ownership cannot be interfered with by the appellants.…The Order of 20th December, 1995 [requiring] the parties to observe *status quo* ***was clearly an interference with the company's rights of ownership….If the Council had breached any conditions of the grant, that was a matter between the Commissioner and the Council. The appellants do not have any recourse either against the Council or against the Commissioner in that respect."***

The same theme runs through another Court of Appeal decision, ***Michael Githinji Kimotho v. Nicholus Muratha Mugo***, Civil Appeal No. 53 of 1995:

"The issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the Commissioner of Lands and the respondent. The protected rights of the proprietor under s.28 of the Registered Land Act cannot be defeated except as provided in that Act, and certainly not at the instance of the appellant."

Counsel cited still other Court of Appeal decisions, to support his argument: ***Joseph Arap Ng'ok v. Justice Moijo Ole Keiwua & 4 Others***, Civil Appeal No. Nai 60 of 1997; ***Wreck Motors Enterprises v. Commissioner of Lands & Two Others***, Civil Appeal No. 71 of 1997.

Learned counsel contended that the suit had been brought in bad faith, and with political ends in view; in his words***: "…the plaintiff is clearly on a vendetta mission against senior members of the previous governments"; "We maintain that decisions of government bind all its arms and subsidiaries, and the plaintiff herein cannot lawfully undo what has been done by other departments in furtherance of their***

mandates as well as the prevailing government policy. For another arm of government to challenge past acts of the same government it would breed confusion and anarchy."

Counsel submitted that the plaintiff stands to suffer ***"no loss whatsoever if the orders sought are not granted"***: because the plaintiff has no proprietary interest in the suit property. And he urged that the balance of convenience "***clearly lies in favour of the defendants (particularly the 2nd defendant)"***: for 2nd defendant is in actual possession of the suit property, and he is to be treated as the absolute and indefeasible owner of the property.

On the question of safeguarding the public interest in the suit property, counsel urged that such a concept "cannot be used to defeat [the] disposal of public assets through the means prescribed under the law." Counsel submitted that: ***"If indeed the government was to be totally barred from disposing of its property to private individuals, nothing would have been easier than setting it out expressly in the law dealing with government lands."*** Counsel urged that the public interest now being pursued by the plaintiff is the wrong one: "***Indeed, the public interest that the Court ought to uphold in the circumstances is the need to ensure certainty, predictability and reliability of the laws governing dealings in land generally."***

Learned counsel, ***Mr. Magut*** for 3rd defendant, asked that the instant application be struck out: on the basis that the allegations of fraud on the part of 3rd respondent are untrue; the issuance of title for the suit property to 1st defendant "was genuinely/legitimately/legally done after compliance with all the relevant procedure/laws"; the 3rd defendant, as Commissioner of Lands at the material time, ***"had authority to issue titles under the laws of Kenya."***

The essence of the plaintiff's case is, firstly, that public land, held as public trust, has wrongly – in terms of the well-recognized rights of the members of the broad public – been privatized and turned to the special purposes of the defendants; secondly, those who effected the appropriation of the rights to the suit land, had no authority, in law, to do so; thirdly, that an abuse of trust has been committed by the defendants, and the same ought to be redressed by the Court; fourthly, that the suit land be restored to the public's ***"ownership***". These objects emerge from the specific prayers in the suit by plaint dated ***9th June, 2009,*** thus set out:

(a) a declaration that the allocation to 1st defendant by 3rd defendant and subsequent issuance of the Lease to 1st defendant of the land comprised in MN/I/2398 was irregular, fraudulent, and illegal and consequently null and void;

(b) an order for rectification of the register by cancellation of the title and all entries made on the land register in favour of the 1st defendant in respect of Land Reference No. MN/I/2398;

(c) an order of preservation and a permanent injunction against 1st and 2nd defendants, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with L.R. No. MN/I/2398 otherwise than by transfer or surrender to the Kenya Civil Aviation Authority and/or the Government of Kenya;

(d) general damages for fraud and breach of fiduciary duty as against 3rd defendant;

(e) damages as against 1st and 2nd defendants for the demolition of the 4-bedroomed bungalow on the suit property;

(f) costs.

At this interlocutory stage, pending the substantive canvassing of the case, in relation to the foregoing prayers, the plaintiff seeks injunctive relief: to the intent that the suit may not be pre-empted through alienation, disposal or waste.

It is clear to my mind, that whether or not the interlocutory prayers are to be granted, depends on ***prima facie*** perceptions of the weight of the suit itself; is this a serious suit, to be heard on the merits, and judicially determined? If yes, then the prayers are for granting, as the Court shall not hear and determine a suit in vain. If the outcome of the suit can only issue from a complex set of hearings, dealing with evidence and issues of merit, then, the very nature of landed interests will dictate a conservation of the ***status quo,*** until the matter is disposed of. Should it turn out, in that event, that a party suffers extraordinary damage on account of the interim measures of restraint, then a remedy is always available in the form of awards of damages and costs. This Court, therefore, is free in its exercise of discretion, in relation to the prayers made at this interlocutory stage.

Whereas the defendants rest their case on the fact that a title document, the indicia of ownership, is in their hands, and the same is protected by statute, the plaintiff questions the process leading to the issuance of that title, and urges that the legality of the title is dictated by the legality of the process; whereas the plaintiff contends that the suit land was properly reserved for a particular public purpose, and was thus already ***alienated,*** the defendants contend there was no such alienation, and so a private title was lawfully created; so, the concept of "***alienation"*** has to be judicially considered; whereas the plaintiff underlines the primacy of the public trust, the defendants contend this is a secondary issue, in relation to private title; what is the standing of a public interest, in relation to the requirements of the Constitution, and vis-à-vis the statutory immunities in place?

At the interlocutory stage it is not possible to resolve the foregoing questions; yet they require judicial determination. Considering the quite substantial documentation which each party has laid before this Court, with lengthy written submissions, I hold at this stage that this is a matter for a full hearing. And in view of my recorded observations herein, I hold that injunctive relief is to be given.

I will make specific orders as follows:

(1) A temporary injunction is hereby issued against the defendants/respondents, jointly and severally restraining them, their servants and/or agents from alienating, encumbering, disposing of, wasting, damaging or in any other way interfering or dealing with the land referred to as Parcel No. MN/I/2398 also known as House No. HG 145, pending the disposal of this suit; but this Order is subject to the condition that the plaintiff shall lodge a security approved by the Court, or consented to by the parties, for damages, the same to be done within 21 days of the date of delivery of this Ruling.

(2) All parties have the liberty, within 21 days of the date hereof, to file any outstanding pleadings or to effect any amendments to the pleadings on file; and within 14 days thereafter, any further pleadings in response may be filed.

(3) Upon completion of the filing of pleadings the parties shall timeously complete the pre-trial arrangements, in time for a priority schedule of hearings.

(4) Costs shall be in the cause.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 29th day of September, 2011.

H.M. OKWENGU
JUDGE