REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 551 OF 2009

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

VERSUS

GEMINI PROPERTIES LIMITED…....…..……..1ST DEFENDANT

JAMES RAYMOND NJENGA……..……2ND DEFENDANT

ZABLON AGWATA MABEA……...…….3RD DEFENDANT

BARCLAYS BANK OF KENYA……..……4TH DEFENDANT

RULING

The plaintiff brought this suit against the four defendants claiming several orders therein as set out in the plaint. The basic prayer however, centers on a parcel of land known as L.R.209/9295 which the plaintiff wants declared as public property. As a result, the plaintiff seeks to have an order of restoration and rectification to cancel the grant of the suit property to the first defendant and to bar all the defendants from dealing with the same.

Alongside the plaint, there was filed an application by way of Chamber Summons under Sections 63 and 3A of the Civil Procedure Act and Order XXXIX Rules 1,2, 2(A),3 and 9 and Order V Rules 17(1) and (3) of the Civil Procedure Rules basically seeking injunction orders against the first and fourth defendants from alienating, transferring, charging, letting, leasing, sub-leasing, entering, taking possession or in any manner whatsoever from dealing with the suit property herein.

The application is opposed and learned counsel appearing for the parties herein have filed their submissions and cited several authorities. There is no dispute that the first defendant is the registered proprietor of the said parcel of land. It has been so registered from 1979 or thereabout. The material before me also shows that there has been substantial development thereon comprising of a commercial building which has been occupied by several tenants.

This suit was filed on 29th October, 2009. There is a point that has been raised by the 1st defendant to the effect that this suit is time barred. Under the Limitation of Actions Act Chapter 22 Laws of Kenya Section 7 thereof, an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued. That provision alone would dis-entitle the

plaintiff from the orders being sought. I am however aware of the provisions of Section 42 of the Limitation of Actions Act which was amended by Act No.7 of 2007 to provide that this Act does not apply to actions in which recovering or compensation in respect of the loss of or damage to any public property is sought.

Even if we were to rely on that amendment, the same came too late to be able to salvage the suit filed by the plaintiff. This court would have no jurisdiction to entertain this suit if the same were to be founded on those provisions. There is another point which has been raised by the 1st defendant to the effect that the 2nd and 3rd defendants who were Commissioners of Lands should not have been sued in their individual capacities. This is a serious point of law because it also impacts on the procedure adopted by the plaintiff. If the two defendants were to be cited in their official capacities then the plaintiff's suit would not have been brought by way of a plaint, but through the provisions relating to Judicial Review.

The observation I make here is that, the plaintiff wanted to circumvent the need for bringing Judicial Review proceedings against the two defendants.

That notwithstanding, I have noted that there are particulars of fraud attributed to the 1st and 2nd defendants in the plaint. Section 23 of the Registration of Titles Act, Chapter 281 protects the registered proprietor of such piece of land because the title is conclusive evidence of ownership and is indefeasible subject however, to being challenged on the ground of fraud or misrepresentation to which the party is proved to have been a party. Nowhere in the plaint has it been alleged that both the 1st and 2nd defendants or any defendant for that matter was a party to the alleged fraud.

However, on the merits of the application, we have to consider the present status of the subject matter. It has not been disputed that the same has been substantially developed. Indeed, Lady Justice Sitati, has had occasion to visit the site and made several observations on an application of similar nature. In her ruling in Civil Case ELC No.266 of 2009 the learned Judge observed at paragraph 55 as follows;

"the applicants have not demonstrated to this court what damage if any, they are likely to suffer, which damage is not compensated by damages, if the orders sought are not granted. The 4-storey building has been around since the late 1980's. The said building has been let out to tenants with the applicant's knowledge; and they cannot now be heard to allege they will suffer irreparable damage if the building is turned into commercial premises. The building is already operating as commercial premises. The court also finds that the balance of convenience in this case would tilt in favour of the defendants."

It would appear most of the orders sought by the plaintiff have been over taken by events.

The learned judge's ruling followed an application by one Mohan Dhariwal and another suing on behalf of New Muthaiga Residents Association – vs – Gemini Properties Limited & another.

There is also evidence on record that this property has been charged to the 4th defendant for millions of shillings, as indicated in the sworn affidavit of David Swao filed in court on 10th February, 2010.

The issues raised in the said affidavit are instructive. The plaintiff has purported to file the suit on the basis of complaints received but the complainants are not party to this suit. The plaintiff also has purported to commence these proceedings on behalf of the Ministry of Lands or the City Council of Nairobi, yet these two are not parties to the present suit. The plaintiff/applicant has not stated that the fourth defendant was a party to any fraud or misrepresentation, and has not shown what injury if any may be suffered in the suit property. Above all, the plaintiff cannot and should not be allowed to interfere with contractual obligations of third parties.

For the plaintiff to benefit from the orders sought it must be shown that there is a *prima facie* case with a probability of success and that if the order sought is not given then irreparable loss shall be suffered which is not capable of being compensated by an award of damages. If the court is in doubt it

shall decide the matter on a balance of convenience.

I have already made observations in respect of the Limitation of Actions Act. I have also observed and in concurrent with Lady Justice Sitati, that the property has been developed substantially. There is also evidence that a charge exists in favour of the 4th defendant. All these factors mitigate against the plaintiff and in favour of the 1st and 4th defendants.

My position is that, and without prejudice to the judge who will handle the main trial, the plaintiff/applicant has not shown a *prima facie* with a probability of success. It is not necessary to address the issue of damages. And I am not in any doubt in respect of the said finding, but even if I were, the scales of justice would tilt in favour of the 1st and the 4th defendants in view of the observations above.

It follows that the plaintiff application dated 29th October, 2009 is hereby dismissed with costs to the defendants.

Orders accordingly.

*Dated, signed and delivered at Nairobi this **9th day** of **July, 2010.***

A. MBOGHOLI MSAGHA

JUDGE