



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 61 of 2008

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JAMES RAYMOND NJENGA.....1ST DEFENDANT

KIPSIRGOI INVESTMENTS LTD.....2ND DEFENDANT

RULING

By a Chamber Summons taken out by the Plaintiff/Applicant under section 3A of the Civil Procedure Act and Order VI Rule 13(b) and (c) and Rule 16 of the Civil Procedure Rules the Applicant prays for orders that the 1st and 2nd Defendants' statements of defence dated 28th May 2008 and 16th June 2008 respectively, be struck out and judgment be entered for the Plaintiff against the Defendants jointly and severally as prayed in the plaint. That Chamber Summons prays for costs of the application to be provided for.

The grounds upon which that application are based are that the applicant as mandated by the **Anti-Corruption and Economic Crimes Act, No.3 of 2003** investigated allegations that land parcel **Eldoret Municipality Block 3/28** had been illegally alienated by the 1st Defendant to the 2nd Defendant. That the suit property was planned and set aside as a public open space and that the allocation of the same to the 2nd Defendant on 7th May 1987 was illegal and this illegality was facilitated by the 2nd Defendant's director one Joseph Arap Leting who at the material time was the permanent secretary in the office of the President, secretary to the cabinet and the Head of Civil Service. That the acquisition of the suit land was fraudulent and illegal and the defences raise no triable issue. The supporting Affidavit sworn by Yuninalis Angima an investigator with the Plaintiff/Applicant reinforces the grounds.

On behalf of the 2nd Defendant there is filed a Replying Affidavit in opposition to the application which is sworn by **Mrs. Cecilia Chepkeoch Arap Leting** a Director of the 2nd Defendant. She depones that the application ought to be dismissed as the prayers sought ought to be proved in court through the production of evidence and cross-examination of witnesses and the only intent of the application is to avoid a full trial of the suit. She adds further that she has witnesses to call in support of the 2nd Defendant's case who include the former President of the Republic His Excellency Daniel Toroitich Arap Moi who personally approved the allotment of the parcel of land in issue to the 2nd Defendant. In her further averments she denied fraud and illegality in the allocation of the suit land to the 2nd Defendant and added that the President had power and authority to allocate land as he did in this case. There is also a further affidavit sworn by Joseph T. Arap Leting in opposition to the application.

At the hearing of the application it was submitted for the Applicant that there was no land available for allocation and there was no authority to allocate it. For the 2nd Defendant it was submitted that striking out of pleadings is a draconian measure, a short cut to getting rid

of cases and it is an action of driving away parties from coming to court to adduce evidence so that matters can be adjudicated on merit. This was said not to be a clear and obvious case where the defence should be struck out and on the contrary it was a case that infringes on the rights of an individual to property and the case ought to proceed to trial.

The 1st Defendant did not file a Replying Affidavit and did not attend court at the hearing of the application.

I have perused the plaint, the defences of the 2 Defendants, the application and the Replying Affidavits and have read the authorities referred to by both counsel and have considered the rival submissions by both counsel and I am now in a position to consider this application. My duty is to determine whether the defences as filed raise issues which must be determined at trial or they are such that no purpose will be served by calling evidence and so they should be struck out at this stage of the proceedings.

The plaint prays for an order declaring that the allocation and grant of lease of land parcel number **Eldoret Municipality Block 3/28** by the 1st Defendant to the 2nd Defendant is null and void and incapable of conferring any estate interest or right and for a further order that the registration of the 2nd Defendant as the grantee of the suit land be cancelled. In answer thereto in the 1st Defendant's statement of defence he stated that he had long left service as the commissioner of lands and had no access to records relevant to the suit land and adds that he could not and did not allocate government land as he had no authority to alienate any government land except with the authority direction and order of the President. He denied that the suit land was reserved for Public use and denied any illegality on his part in dealing with the suit land. In the 2nd Defendant's defence it was averred that there was no illegality or fraud in the allocation of the suit land to it and that its title to the suit land is indefeasible and cannot be nullified.

To the application was annexed and marked "KACC (A)" a letter dated 2nd August 1974 addressed to the clerk to council, Wareng County Council from the Commissioner of Lands allotting an eyed plot (Later LR.NO. 778/245) to the Wareng county Council. In another letter dated 21st November 1977 marked "**KACC/3(A)**" written by the County Council of Wareng to the Commissioner of Lands the county council sought to utilize the suit land which was an open land in front of the Council's above land for own use but in a letter dated 31st January 1978, marked "**KACC/4**" the Commissioner of Lands declined the council's request stating that that open space being LR. No.778/246 (later Block 3/28 Eldoret Municipality) now the suitland was planned for Public utility and as such it was not available for allocation. It is this same plot that was sought to be allocated to the 2nd Defendant, the suit land herein, on 7th May 1987.

From the above it is clear that the suit land was alienated and reserved for use as Public Utility during 1974. Once that was done it was not available again for re-allocation on 7th May 1987 and not even the President has power under **Section 3 of the Government Lands Act cap.280 of the laws of Kenya** to allocate land already allocated. It therefore follows that the act of 7th May 1987 was a nullity and no amount of evidence adduced even by the former President can change that, it is the Law as it is today, and as it also was on May 7th 1987. An illegality is an illegality and no amount of evidence can validate it in my humble view. The allocation of the suit land to the 2nd Defendant is the central issue for determination in the suit herein. Having found as I find above, what then remains for determination by the trial court and what is the evidence to be called to change the law as is provided in Section 3 of the Government Lands Act cap. 280 of the Laws of Kenya? None. In my considered view therefore there is nothing remaining of this suit to go for trial. A trial is not an academic exercise, it is a way of resolving real issues and I find no real issue for determination at trial in this case. Nothing stated in the defences raises an issue for trial and it is patently clear that no useful purpose could ever be served by a trial on the merits of this case. There is no magic in going through a trial where there really exists no defence as in the words of the court of Appeal in **Machira t/a Machira & Company Advocates V Wangechi Mwangi & Nation Newspapers CA No.179 of 1997**.

It is true that striking out is draconian but striking out is the only available remedy where the defence is a sham, as in this case. For all the above reasons I find that the defences as filed are a sham raising no triable issue and I order them struck out and judgment be entered for the Plaintiff as prayed in the plaint. The Plaintiff will have costs of the application.

It is ordered accordingly.

DATED SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF JULY 2010.

P.M.MWILU
JUDGE

IN THE PRESENCE OF

N/A - Advocate for Applicant
Chege - Advocate for 2nd Defendant
Andrew Omwenga - Court Clerk

P.M.MWILU
JUDGE