



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 82 OF 2009**

**KENYA ANTI CORRUPTION COMMISSION----- PLAINTIFF
VERSUS**

**SHELDON LIVASIA MUDOGO ----- 1ST DEFENDANT
WILSON GACANJA ----- 2ND DEFENDANT**

RULING

In its application dated 29th May 2009, the Applicant is seeking restraining orders against the respondents with regard to Plot No. Kakamega Municipality/Block III/220. The application is supported by the affidavit of Nzioki wa Makau sworn on 29th May, 2009.

Mr. Ruto, counsel for the Plaintiff/Applicant submitted that the suit property is Trust land having been vested in the Kakamega County Council. Under section 118 of the Constitution trust land cannot be distributed without reference to concerned County Council. Counsel further submitted that under the Trust Land Act, Chapter 288, the Commissioner of Lands cannot allocate trust land on behalf of a County Council without reference to the local County Council which has to make a resolution. There was no resolution in the allocation of the suit property.

Counsel further submitted that under the Registered Land Act, Section 19 (2) provides that once a sub-division is done the old number ceases and the new numbers are created. The suit property is a result of a sub-division but the old number still subsists. The suit land was created from Block III/66, 67 and 69. The Municipal Council of Kakamega was given go ahead to deal with the land yet it was not the proprietor. The Applicant is empowered by Section 7 of the Anti Corruption Act to bring suits to recover public land including land owned by local councils. Counsel urged the court to grant the orders being sought as the applicant has a *prima facie* case.

Mr. Nandwa, counsel for the Respondent opposed the Application. Counsel submitted that the Applicant must first establish that an economic crime has been committed as required by section 45 of the Anti Corruption Act. The affidavit in support of the application does not establish that a crime was committed or that fraud took place. It is only the County Council that could sue or the Commissioner of Lands through the Attorney General.

Counsel further submitted that the property has already been restricted by the State and no development can take place until the restriction is removed. The allotment letter was issued by the County Council of Kakamega but the lease describes the property as Kakamega Municipality/Block III/220 and all the requirements were followed by the 1st Respondent. The property is fully developed and the local council approved the development. The land was not meant for public use and it was not created from other plots.

Order **XXXIX** provides for cases in which temporary injunctions may be granted. The spirit of the Order is that the suit property should be in danger of being wasted, damaged or alienated before a decree is passed. It is the respondent's contention that the property has already been restricted by the State. This means that the respondents cannot transfer or deal with the property. It will be of no use if the respondent demolishes the house standing on the property. However, no document was annexed to show that a restriction has been registered.

In essence, therefore, there is no danger of the property being wasted. If I were to grant the order of injunction as prayed, that might lead to the respondent vacating the property as the prayer that the Respondent should not ***"in any other manner deal with the suit property"*** is wide enough to include

residing or occupying the property.

I need not analyze the pleadings and submissions made by the parties as I am satisfied that the property is not in danger. The Respondent is resigned to the fact that a restriction is already in place. I will grant prayer 3 of the Application dated 29th May, 2009 but limited only to selling, leasing, charging, dividing or transferring the suit property pending the hearing and final determination of this suit. Otherwise the Respondent shall be at liberty to utilize the suit property pending the hearing and final determination of the suit subject to the orders herein above.

This for now will serve the interest of justice. Costs shall follow the outcome of the main suit. It is so ordered.

SAID J. CHITEMBWE
J U D G E

Delivered, dated and countersigned at Kakamega this 30th day of September, 2010

ISAAC LENAOLA
J U D G E