



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Application 1135 of 2007

REPUBLICAPPLICANT

VERSUS

THE SENIOR RESIDENT MAGISTRATE MILIMANI
COMMERCIAL COURTS.....1ST RESPONDENT

THE REGISTRAR OF GOVERNMENT LANDS.....2ND RESPONDENT

THE ATTORNEY GENERAL ON BEHALF OF
THE GOVERNMENT AND PERMANENT SECRETARY,
OFFICE OF THE PRESIDENT PROVINCIAL ADMISTRATION
AND INTERNAL SECURITY.....3RD RESPONDENT

AFRISON EXPORT IMPORTS LIMITED.....1ST INTERESTED PARTY

HUELANDS LIMITED2ND INTERESTED PARTY

CITY COUNCIL OF NAIROBI.....3RD INTERESTED PARTY

OFFICIAL RECEIVER OF PROVISIONAL
LIQUIDATOR CONTINENTAL CREDIT
FINANCE LTD.....4TH INTERESTED PARTY

STEPHEN NJOROGE WAWERU, GERALD WARUI
AND LEE MUCHIRI ON BEHALF OF MATHARE AREA 1
OUTERIGN ROAD SELF HELP GROUP.....5TH INTERESTED PARTY

EX-PARTE:RAFIKI ENTERPRISES LIMITED

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RULING

On 14th September, 2007 the Senior Resident Magistrate, *Milimani Commercial Courts in CMCC No.1239 of 1993 City Council of Nairobi -vs – Afrison Export and Import Limited and Huelands Limited* set aside the vesting order dated 16th December, 1994 which vested the property known as LR.No.7879/4 absolutely in the applicant.

There is now before me a Notice of Motion brought by the ex-parte applicant against the respondents and interested parties for an order of certiorari to issue by removing into the High Court and quash the decision of the Senior Resident Magistrate aforesaid.

There is also an order of mandamus sought directing the 2nd respondent to cancel the registration of the order of 14th September, 2007 from the register of the property LR.No.7879/4 and instead direct the 2nd respondent to register the vesting order made in favour of the applicant in CMCC No.1239 of 1993 aforesaid.

Additionally, the applicant seeks two other orders of prohibition, to prohibit the 2nd respondent from registering against the register of property LR.NO.7879/4 any document or conveyance presented for registration in respect of the said property by, on behalf of, for the benefit of the 3rd respondent, 1st, 2nd and 4th interested parties or any party claiming title through or from the said 1st, 2nd and 4th interested parties. The other order for prohibition sought is against the 3rd respondent from acquiring the property LR.No.7879/4 otherwise than by way of purchase from the applicant or through compulsory acquisition upon payment of compensation.

There are several grounds which have been set out in the said Motion alongside statutory the statement and verifying affidavit sworn by Zainab A.L. J. Vaiani. My 1st observation is that there have been a multiplicity of suits in respect of this dispute, but that I notwithstanding, I have been able to pick the salient points in addressing this particular Motion.

Counsel appearing herein have filed submissions in respect of the said Motion and cited several authorities. I have related the said submissions, pleadings and authorities to the present Motion and observe as follows:-

There are two substantive suits that are still pending for determination in respect of the same dispute wherein the issues raised in the present Motion and the said suits are intertwined. The first is **High Court Civil Case No.1536 of 1995 between Afrison Export Import Limited and another – versus - Nairobi City Council and another** which seeks to nullify the sale of the subject property to the applicant herein. The other is **Nairobi High Court Case No.243 of 2008 Rafiki Enterprises Limited -vs – Afrison Export and Import Limited and Others**. The pleadings therein directly touch on the issues canvassed in the present Motion.

With particular reference to HCCC No.243 of 2008 aforesaid paragraph 14 states *inter alia* as follows;

“On 22nd March, 1995 and 5th April, 1995 the plaintiff lodged the raising order and the stamped vesting order respectively at the office of the 6th defendant for registration but the office of the 6th defendant has without any justification failed or refused to register the vesting order or communicate to the plaintiff the reasons if any for the failure and or refusal”. The 6th defendant in that suit is the Commissioner of Lands.

It is also pleaded in the said plaint that there exist other suits in respect of the suit property relating to the ownership thereof and which still remain to be determined.

The Civil Suit that led to the vesting order sought to be registered by the applicant in this Motion has been termed to be fraudulent in view of the fact that, that suit was instituted without the authority of the City Council of Nairobi, the 3rd interested party herein. That averment has not been seriously challenged by the applicant in any of the rejoinders that have been made.

In one of the annexure presented by the applicant and in particular the 1st defendant's defence in **High Court Civil case No.1536 of 1995 Afrison Export Import Limited – vs – City Council of Nairobi and Rafiki Enterprises Ltd** paragraph 5 thereof reads as follows; **“the 1st defendant further avers that it never authorized and/ or instructed any advocates to sue and recover rent arrears in Civil case No.RMCC no.1239 OF 1993. The 1st defendant also avers that, it never instructed and or authorized any advocates and/ or auctioneers to sell the premises known as LR.7879/4 Thika Road, Nairobi.”** The 1st defendant further contends that the alleged sale price of Ksh.18,500,000/= was never paid and or remitted to the 1st defendant.

Among many affidavits filed in this dispute there is an affidavit by one Patrick Thoithi Kanyuira as Senior Principal State Counsel in the office of the Official Receiver named as the fourth interested party in these proceedings sworn on 5th March, 2008 in addressing the Notice of Motion in this matter. I consider it important to set out in detail some of the paragraphs of the said affidavit.

Paragraph 4 reads as follows; **“that at all material times to the present proceedings, the 4th interested party held a legal mortgage over property LR.No.7879/4 Nairobi. (The subject property) to secure a credit facility extended to the registered proprietors thereof being the 1st and 2nd interested parties in the sum of Kshs.21,000,000/=)**

“5. That the 3rd interested party herein filed a suit for recovery of land rates in its capacity as the Local Authority within whose jurisdiction the subject property lies, being RMCC NO.4 OF 1991, Nairobi City Council – vs - Afrison Export Import Ltd and another; The honorable court issued a decree for rates outstanding in the sum of Kshs.15,969,923.50 on 28th January, 1994

6. That I am aware that the said decree was settled by way of payment made to the 3rd interested party by the 3rd Respondent herein on behalf of the 1st and 2nd interested parties, on 3rd September, 1997 in the sum of

Kshs.19,681,000/-and a further payment made by the Kenya Postal and Telecommunications Corporation (as it then was) in the sum of Ksh.6,000,000/- through the firm of Meenye and Company Advocates who had been instructed to act for the 3rd interested party, in the said suit.

7. That it is not true that the 4th interested party sold the subject property to the applicant herein in execution of a decree issued in CMCC No.1239 of 1993, City Council of Nairobi – vs – Afrison Export and Import Ltd and Huelands Limited.”

The deponent then gives the reasons why the 4th interested party could not have sold the property to the applicant. In particular paragraph 7(d) reads as follows; ***“the entire proceedings, judgment and decree issued in CMCC No.1239 of 1993, City council of Nairobi –vs – Afrison Export Import Limited and Huelands Limited were unsustainable and void ab initio by dint of the mandatory provisions of Section 7 of Civil Procedure Act, Cap 21 Laws of Kenya. The Honourable Court had already heard and established the claim for land rates as against the 1st and 2nd interested parties in RMCC No.4 of 1991, Nairobi City Council – vs – Afrison Export and Import Limited and two others and issued a decree in that respect. As such, to the extent that the issues raised in CMCC No.1239 of 1993 were directly and substantially in issue in RMCC 4 of 1991, then the latter proceedings were a nullity and could not found bona fide the alleged sale of the subject property to the applicant. It would constitute double jeopardy on the 1st and 2nd interested parties- part***

It is worth noting, the applicant withdrew its suit as against the 4th interested party by Notice dated 19th May, 2008.

When the foregoing averments are read alongside the defence of the 1st defendant in HCCC NO.1536 of 1995 aforesaid, which I cited earlier, then the substratum of the applicants case collapses. This is because it has now been established there was no basis whatsoever for any counsel to have filed RMCC 1239 of 1993 because RMCC NO.4 of 1991 had already settled the issues and the rates paid in full.

As at the time leave was granted to apply for judicial Review orders set out in the Notice of Motion at hand, High Court Civil Case No.1536 of 1995 had not been determined and since the matters in issue for which leave was granted were directly and substantially in issue in the said suit, which is yet to be determined, then, with respect ,the Motion before me amounts to an abuse of the process of the court.

It will be observed up to this point I have confined myself to the pleadings I believe touch on serious triable issues between the parties herein. This is deliberate. The matters raised in the Motion cannot be resolved without the calling of evidence between the parties herein and which have been pleaded in HCCC No.1536 of 1995 and HCCC NO.243 of 2008 aforesaid. And so, after going through the material before me I have come to the conclusion that the Notice of Motion dated 22nd October 2007 is misplaced in view of the pending litigation touching on the same issues. The same is therefore dismissed with costs to the respondents and the interested parties.

Orders accordingly.

Dated, signed and delivered at Nairobi this 28th day of October, 2010.

**A. MBOGHOLI MSAGHA
JUDGE**