



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 70 & 71 of 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

CHEMBE HOLDINGS LTD.....1ST DEFENDANT

MUSK-DEER LIMITED.....2ND DEFENDANT

**SAMMY KOMEN MWAITA.....3RD
DEFENDANT**

RULING

The plaintiff has instituted this suit pursuant to the provisions of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (hereinafter “the Act”) against Chembe Holdings Limited, the 1st defendant, presently registered as lessee of Mombasa Island Block 1/529 (hereinafter “the suit property”), Musk-Deer Limited the 2nd defendant and Sammy Komen Mwaita the 3rd defendant. The 3rd defendant was at the time of registration of the said lease the Commissioner of Lands appointed under the Government Lands Act Chapter 280 Laws of Kenya. The plaintiff has pleaded that the suit property is part of land previously vested in the General Manager of the defunct East African Harbours Corporation and subsequently the Kenya Ports Authority. The plaintiff has further pleaded that the 1st defendant wrongfully and fraudulently procured from the 3rd defendant the said lease and then purported to transfer the same to the 2nd defendant. Particulars of fraud and illegality are stated. As against the 2nd defendant, it is averred that as the registration of the 1st defendant was fraudulent, illegal, null and void, *ab initio*, a valid title would not be transferred to it. In those premises, the plaintiff seeks, *inter alia*, declarations that the issuance of the lease by the 3rd defendant to the 1st defendant over the suit property was null and void and that the transfer of the same lease to the 2nd defendant was ineffectual. The plaintiff further seeks rectification of the relevant register and a permanent injunction restraining the 2nd defendant from leasing, transferring, charging, taking possession, entering upon, or in any other manner, howsoever from dealing with the suit property.

Simultaneously with the filing of the plaint, the plaintiff lodged this application vide which it seeks an interlocutory injunction to restrain the 2nd defendant from alienating, transferring, charging, leasing, subdividing, entering upon or taking possession of the suit property and from undertaking any construction or development thereon or from howsoever dealing with the suit property, pending the hearing and determination of this suit. The grounds for the application on the face of the application and in the supporting affidavit recite the averments in the plaint. Annexed to the supporting affidavit, sworn by the

plaintiff's investigator, Abraham Kemboi are copies of surveys, Legal Notices and numerous documents giving the background of the plaintiff's claim. On the basis of those averments, the plaintiff contends that the people of Kenya would suffer irreparable damage and hardship which cannot be adequately compensated in damages unless the injunction is granted.

The plaintiff appeared before me ex-parte and on my being satisfied with the prima facie merits of the application, I granted a temporary injunction against the 2nd defendant pending hearing of this application inter partes.

The application was then served and Ms Anjarwalla & Khanna Advocates entered appearance for the 2nd defendant. One Yakatali Amirali Lamuwalla, the 2nd defendant's Finance Manger, also filed a replying affidavit. The 2nd defendant has also delivered a defence in which the plaintiff's claim as against the 2nd defendant is denied. It is further averred that the 2nd defendant has acquired the suit property for valuable consideration and its title is absolute and indefeasible. The 2nd defendant further contends that the plaintiff's suit and application are misconceived, and incompetent as they are premised on alleged abuse of office and fraud of the defendants before subjecting them to the criminal process and that as the 2nd defendant acquired its title for valuable consideration without notice, the plaintiff's claim and application have no basis. In the premises, the 2nd defendant prays that the application be dismissed with costs.

When the application came up for hearing before me on 6th May 2009, counsel agreed to file written submissions which were in place by 17th June 2009.

I have considered the application, the affidavits filed both in support of and in opposition to the application. I have also considered all the annexures exhibited by the parties. I have also considered the pleadings, the submissions and all the arguments advanced in support and in opposition to the application. Having done so, I take the following view of this matter. At this interlocutory stage, the plaintiff seeks a temporary injunction which is a remedy available to a party to a suit to protect his/its legal rights where the rights are being or are threatened with violation by unlawful acts of another party. At this stage, the court is not expected to, indeed it should not, determine with finality the rights and obligations of the parties. The duty of the applicant at this interlocutory stage is to establish a prima facie case with a probability of success at the trial. Normally, the remedy is not available to an applicant unless he/it shows that he/it will suffer irreparable injury, which could not adequately be compensated by way of damages and where the court is in doubt, it should decide the application on a balance of convenience. The locus classicus with regard to those principles is of course Giella – v – Cassman Brown & Company Limited [1973] E.A. 358.

The plaintiff is not a private individual pursuing private interests. It is a public body and seeks not only to advance its objects under the Act which establishes it but also to protect the public interest. Has it shown a prima facie case with a probability of success at the trial? The plaintiff has given a detailed background of the suit property. It has alleged fraud against the 1st and the 3rd defendants. Particulars of fraud have been furnished in the plaint. The supporting affidavit has, annexed to it, numerous documents including correspondence over the suit property and statements of the original allottees. Those documents show that the suit property may not have regularly been alienated by the 3rd defendant to the 1st defendant. The 3rd defendant and the 1st defendant are yet to file their pleadings. The allegations of fraud, forgery and illegality made against them remain unchallenged.

On the documents availed to the court, I am persuaded that the plaintiff will probably establish the fraud and illegality against the 1st and 3rd defendants at the trial. A final and definitive finding on the fraud and illegality cannot however be made at this stage. That will have to await the trial. It is significant that the 2nd defendant derives title from the 1st defendant. The very foundation of that title is in question. The primary argument of the 2nd defendant is two fold. The first main contention is that it has acquired the title to the suit property for valuable consideration without notice of the fraud, forgery or illegality alleged against the 1st and 3rd defendants. The 2nd defendant has invoked the provisions of the Registered Land

Act, Cap 300 Laws of Kenya, for its contention that it was not required to inquire or ascertain the circumstances or the consideration for which the 1st defendant was registered as proprietor of the suit property. It has also invoked section 28 of the same Act for the contention that once it was registered as proprietor as aforesaid, its title is not liable to be defeated except as provided in the Act and the register cannot be rectified under the provisions of section 143 (1) of the same Act.

The second main contention is that having failed to join the Commissioner of Lands to this suit, the plaintiff has not established a prima facie case since some of the actions complained of were committed by that office and orders cannot issue against the office as the office has not been joined. To buttress, that argument, the 2nd defendant cited several decisions including the case of Pushito Holdings Limited and Another – v – Paul Nderitu Ndungu & Others [CA No. 138 of 1997 (UR)] which restate the sanctity of title as enshrined in various land statutes.

Section 143 of the Registered Land Act Cap 300 Laws of Kenya is in the following terms:-

“143 (1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

My plain reading of sub-section (1) of section 143 of the Registered Land Act, leads to my prima facie conclusion that the sub-section does not limit or describe the party whose fraud, or mistake will attract a rectification of the register. Sub-section 143 (2) sufficiently describes the party whose fraud, omission or mistake will attract a rectification of the register. To my mind, the proprietor who is protected is one who is in possession. Such a proprietor can only be affected by rectification if he had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or that he caused such omission, fraud or mistake or substantially contributed to the same by his act, neglect or default.

The plaintiff has alleged fraud and illegality against the 1st and 3rd defendants. The 2nd defendant as already observed derives title from the 1st defendant.

In the event that the plaintiff establishes the fraud and illegality at the trial, there is a probability that the registration of the 2nd defendant as proprietor will be affected. I am not at this stage persuaded that the title of the 2nd defendant is absolute as against the whole world despite the fraud and illegality alleged against the 1st and 3rd defendants.

With regard to the failure to join the Commissioner of Lands, I am of the prima facie view that that failure is not fatal given the facts of this case. The plaintiff has sued the 3rd defendant whom it describes as being at all material times to this suit the Commissioner of Lands appointed under the Government Lands Act, Chapter 280 of the Laws of Kenya. It is the 3rd defendant against whom the allegations of fraud and illegality have been made. At this interlocutory stage, I do not find the naming of the relevant and concerned Commissioner of Lands improper. To the contrary, I find the decision to sue the 3rd defendant prudent.

This case is therefore not on all fours with the case of Pashito Holdings Limited & Another – v – Paul Nderitu Ndungu & Others (supra) upon which the 2nd defendant placed substantial reliance. In that case, there was total failure to join both the office of the Commissioner of Lands and the holder at the material time. There are other important facts distinguishing that case from the facts in our case for instance, the dispute as framed could not be resolved unless the Commissioner of Lands was a party. This case does not suffer from that default. Further the dispute was over property which was alleged to have been

reserved for public purposes. The reservation was not even certain. That is not the position in this case where there is prima facie evidence that previously the suit piece of land was indeed vested in a public body.

On the same issue of omission to join the Commissioner of Lands, the plaintiff on his part placed reliance upon the case of Chauhan – v - Omagwa [1985] KLR 656 where it was held that once the court is satisfied that the registration was obtained by fraud of the vendor, it was authorized to order rectification even if the plaintiff did not disclose a cause of action against the purchaser. The court held as follows:-

“The provisions of section 143 (2) did not prevent the Learned Judge from making an order for rectification of the register for even if the appellant did not acquiesce in the fraud by the first defendant or even if he was a bonafide purchaser for value without any knowledge of the previous transaction between the first defendant and the respondent, the appellant was not in possession of the land as stated in subsection (2) which is a prerequisite to immunity against rectification of the register.....the respondent’s principal cause of action was against the first defendant to whom the Learned Judge appropriately referred to as a dishonest crook; it was necessary to join the appellant as a party as the registered owner of the land. The Learned Judge having been satisfied that the registration in favour of the appellant was made by fraud by the first defendant he was authorized by section 143 to order rectification even if the plaintiff did not disclose a cause of action against the appellant provided the appellant was not in possession of the land which was not as I have pointed out. It was the registration made by fraud of the first defendant which permitted an order for rectification by the court under section 143 (1).”

The 2nd defendant also placed reliance upon the case of Dr. Joseph N. K. Arap Ng’ok – v – Justice Moiwo Ole Keiwa & Others Criminal Application No. 60 of 1997 (UR) in which it was held that as no fraud on the part of the registered proprietor had been alleged the applicant had no arguable appeal. An injunction under rule 5 (2) (b) of the Court of Appeal Rules was therefore declined.

That case is distinguishable from the present case. First, the property therein was registered under the Registration of Titles Act Cap 281 of the Laws of Kenya which has section 23 (1) which gives an absolute and indefeasible title to the owner of property. The suit property herein is registered under the Registered Land Act which does not have an equivalent section. Besides the applicant was laying a claim over the property therein on the basis of his letter upon which there was an endorsement by the President that the applicant’s application for land had been approved. That claim was found, and quite properly so, to be inferior to that of a registered proprietor. Those circumstances are quite different from the circumstances obtaining herein where the suit property, as already stated, was vested in a public body.

Further reliance was placed on the case of George Cheyne & 20 others – v – Robin Munyua Kimotho and others [CA No. 272 of 1998 (UR)] for the proposition that registration confers an absolute and indefeasible title of property to a proprietor which title can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party.

The facts in that suit are however distinguishable from the facts herein. The court in that case applied the provisions of section 23 (1) of the Registration of Titles Act. As already stated, such a section is not in the Registered Land Act under which this suit property is registered. Besides, the plaintiff in that case had absolutely no claim known in law against the defendants and could not therefore successfully resist the defendants’ application to strike out the plaintiff. That is not the position here. On a consideration of the plaintiff herein alone, there can be no dispute that the same discloses a cause of action. In any event I am not considering an application to strike out the plaintiff. The case of George Cheyne & 20 others – v – Robin Munyua Kimotho and others does not therefore advance the 2nd defendant’s case at all. As already stated, the 2nd defendant derives title from the 1st defendant. The very foundation of that title is in question as discussed above.

In the premises, I am satisfied that the plaintiff has established a prima facie case with a probability of success at the trial. With regard to the second condition for the grant of an interlocutory injunction, I have found, prima facie, that the unlawful acts of the 3rd and 1st defendant violated the plaintiff’s

statutory right with respect to the suit property previously vested in a public body. As already observed, the further interest being protected is a public interest. Unless the interlocutory injunction is granted, the likely loss is public and that cannot be quantified. In the premises, I am persuaded that unless the temporary injunction is granted, the plaintiff and the public will suffer an injury which cannot be compensated by damages.

If I were to determine this application on the balance of convenience, in my view, the same tilts in favour of granting the injunction. The allegations of illegality, forgery and fraud are not allegations that lend themselves to definitive and final determination on contested affidavit evidence. Oral evidence tested by cross examination remains the best mode of determining such allegations. Besides, unless the interlocutory injunction is granted, the property may change hands which event would compound the dispute. The balance of convenience therefore tilts in favour of granting the injunction.

In the results the plaintiff's application dated 9th March 2009 is allowed in terms of prayer 3 thereof. The order of injunction is granted on condition that the plaintiff files an undertaking as to damages within the next 7 days.

Costs to be in the cause.

This order to bind the parties in HCCC No. 71 of 2009.

DATED AND DELIVERED AT MOMBASA THIS 22ND DAY OF JULY 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Angote holding brief for Angima for the Plaintiff and Mr. Okongo for the 2nd Defendant.

F. AZANGALALA

JUDGE

27TH JULY 2009