



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 40 of 2009

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

J.S.K. (CARGO) LIMITED 1ST DEFENDANT

JAMES RAYMOND NJENGA 2ND DEFENDANT

RULING

Before court is the Chamber Summons dated 20th April 2009 filed by the Defendant/Applicants seeking the following orders:-

“1. THAT this Honourable court be pleased to

strike out the plaint filed herein and dated

13th February 2009 herein together with

the chamber summons application of even

date with costs to the Applicant.

2. THAT the costs of this application be

provided for.”

The application is supported by the grounds listed in the application itself. I have perused and considered the grounds so raised and in my view at this stage I need only to consider two of these in coming to a decision as to whether or not to allow this application. These are the grounds V and VI as follows:-

“V The Kenya Airports Authority is a creature of Cap 395 Laws of Kenya with authority under seal to sue and to be sued in its own name and to the extent that this suit seeks the recovery of the parcel of land registered under Land Reference Number MN/VI/3448 as per Grant No. CR16268 contended to belong to it, this suit is incompetent for want of locus on the part of the Plaintiff/Respondent.

VI) In so far as this suit seeks to recover the suit parcel of land the claim is barred by Section 7 of the Limitation of Action's Act Cap 22 of the Laws of Kenya as the Applicant's proprietorship rights accrued on 1st March 1981, now more than 28 years."

This application came up for hearing before me on 8th July 2009. Mr. Angote appeared for the Applicant whilst Mr. Tiego

was on record for the Respondent. Parties agreed to put in written submissions which were duly filed in court by 5th August 2009. I have given careful consideration to the written submissions filed by learned counsel as well as the authorities and attachments thereto. I am grateful for the same and will now proceed to render my ruling in this matter.

The Defendant/Applicants have asked that the Defendant's suit be struck out. Striking out is an extreme measure under any circumstance and generally will only be considered by the courts where a suit is found to be totally untenable and the Plaintiff's case found to be so weak as to be totally beyond redemption. In the case of **DT DOBIE & COMPANY (KENYA) LTD -VS- MUCHINA K.L.R. [1982]** 1 Madan J.A. (as he then was) held obiter that:-

"The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out."

Indeed it is the practice of the courts to sustain a suit rather than striking it out as the courts ought not to turn a party away from the seat of justice before he or she is granted a hearing. As I court I will take into account and be guided by these principles as I consider the merits of this present application.

At the centre of this suit is the property known as **LR/NO.MN/VI/3448** (hereinafter referred to as the "***suit property***") measuring approximately 1.183 acres, and situated in the Municipality of Mombasa.

In the instant suit the Plaintiff alleges that the suit property was illegally and fraudulently registered by the 2nd Defendant in favour of the 1st Defendant for that reason the 1st Defendant

cannot be now held to be the lawful proprietor of the suit premises. The Plaintiff further maintains that the suit property is public land which has at all material times been reserved as part of the **MOI INTERNATIONAL AIRPORT** (previously known as Port Reitz Aerodrome) and the same was never available for allocation to the 1st Defendant nor for that matter to any other person. The Plaintiff has brought the present proceedings seeking orders to have the suit property surrendered back to the Kenya Airports Authority and/or the Government of Kenya.

It is this that the 1st Defendant challenges arguing that the Plaintiff who is the **KENYA ANTI-CORRUPTION COMMISSION** have no locus standi to bring this suit for or on behalf of the Kenya Airports Authority. Counsel for the Applicant argues in his written submissions that any dispute concerning the proprietorship of the suit property ought to have been properly instituted by the Kenya Airports Authority which is a body corporate established by Statute under Cap 395, Laws of Kenya. He quotes S. 3(2) of Cap 395 which provides that:-

“The Authority shall be a body corporate with a perpetual succession and a common seal and shall have capacity in its corporate name to sue and be sued and to acquire, hold and dispose of movable and immovable property ...”

The Respondent on the other hand argues that it does have the requisite locus to bring this suit by virtue of its mandate under the provisions of the **Anti Corruption and Economic Crimes Act, No. 3 of 2003** (hereinafter referred to as “***The Act***”). The Respondent specifically relies on S.7(1)(h) of the Act which gives the Commission the mandate to –

“investigate the extent of liability for loss or damage to any public property and –

(i) to institute civil proceedings against any person for the recovery of such property or for compensation, and

(ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya”

What then is the meaning of what is known in law as “***locus standi***”. This is a legal principle which literally means “***place of standing***”. In the case of **NJAU –VS- CITY COUNCIL OF NAIROBI, KLR (1983) 625** the Court of Appeal defined the term locus standi in the following manner:-

“Locus standi literally means a place of standing and refers to the right to appear or be heard in court or other proceedings and to say that a person has no locus means that he has no right to appear or be heard in such and such proceedings”

Does the Plaintiff have the right to appear and be heard in the present proceedings, or put in a different way does the Plaintiff have a “***legal leg***” to stand on in these proceedings or is the Plaintiff a mere busy-body. Like the 1st Defendant the Plaintiff is a body corporate lawfully established under the **ACEC Act No. 2** of 2003. The main mandate of the Plaintiff under this Act is to investigate and take action including civil proceedings as per S.7(1)(h) of the said Act in cases where an Economic Crime is suspected to have been committed. The term **ECONOMIC CRIME** is defined in S. 2 of the ACECA as “***an offence under S. 45 of the Act***”. S. 45 of the said Act provides that –

“A person is guilty of an offence if the person fraudulently or otherwise unlawfully –

(b) acquires public property or a public service or benefit”

S. 45(3) defines Public Property thus:-

“Public property means real or personal property, including money, of a public body or under the control of, or consigned or due to a public body”

The Applicants have conceded that Kenya Airports Authority is a public body and therefore falls under the ambit of **S. 2 ACECA**. The Applicant argues that these proceedings ought to have been brought by the allegedly **“aggrieved party”** the Kenya Airports Authority. However I am convinced that the Plaintiff commission is empowered by the **ACECA** to bring action on behalf of the public and for the public good in cases of suspected Economic Crimes. The Act does not make it a requirement that the commission liaise with any other person or body in the exercise of this clear mandate. The fact that the Kenya Airports Authority to whom the suit property is alleged to belong has not taken any legal action to recover the same does not in my view preclude the KACC from taking action on behalf of the public. The **ACECA** gives the Plaintiff the mandate to take action by way of institution of **Civil Proceedings** to recover any public property which has been unlawfully and/or fraudulently acquired. The Plaintiffs have in paragraph 8 their plaint listed the particulars of the alleged **‘IRREGULARITY, ILLEGALITY AND FRAUD ON THE PART OF THE 1ST DEFENDANT.’** These are allegations which will be properly tested and determined at the trial of the suit. On this question of locus standi I am further guided by the case of **KENYA ANTI CORRUPTION COMMISSION –VS- SAMMY SILAS KOMEN MWAITA AND ANOTHER HCCC 43 OF 2008** where Hon. Justice D. Maraga held at page 8 of his ruling as follows:-

“The main point raised by Mr. Bosek is that this suit is incompetent mainly because the Plaintiff has no locus standi in this matter – with respect to counsel this point clearly has no legal basis. S. 7(1)(h) of the Anti Corruption and Economic Crimes Act inter alia authorizes the Plaintiff:-

“to investigate the extent of liability for the loss of damage to any public property and –

(1) to institute civil proceedings against

any person for the recovery of such

property or for compensation ...”

The learned Judge in that case faced similar arguments as faced by myself in this present application. I find myself in total agreement with his sentiments. A clear mandate has been given to the Plaintiff by virtue of the **ACECA** specifically S. 7(1)(h) to institute this suit. The question of whether the suit property was actually public land and the question as to whether the same had been fraudulently acquired by the Defendants is in my view a triable issue to be determined at the trial of the suit, and are not the purview of this application to strike out. I have considered the several authorities cited by the Applicant in their submissions on this point but I find them to be distinguishable in that those authorities all concerned parties who were purporting to act for corporate bodies without any mandate at all. The Plaintiff here has express mandate by virtue of the **ACECA** to act on its own as a commission on behalf of the general public. Based therefore on the foregoing I find that the Plaintiffs do have requisite locus standi to bring these proceedings and I dismiss this ground of the present application.

The second ground of the present application which I intend to consider is the Applicant’s argument that the present suit being an action to recover land, is time-barred by virtue of S. 7 of the Limitation of Actions Act Cap 22 Laws of Kenya which provides that:-

“7 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 to him or, if it first accrued to some person through whom he claims , to that person.”

In this case Title for the suit land was first issued to the 1st Defendant by way of a **Grant No. LR16268** dated 1st **March 1981**. Taking into account the provisions of S. 136(1) Government Lands Act this cause of action therefore accrued on 1st March 1982. As such based on the provisions of S. 7 of Cap 22, this suit ought to have been filed within a period of twelve years from that date. As it is the Plaintiffs filed their suit on **17th February 2009** which is a full **twenty-seven** years **after** the cause of action accrued. It would therefore appear that this action is indeed barred by statute. However as pointed out by learned counsel for the Respondent the **Limitation of Actions Act** has been amended by **Act No. 7 of 2007** and the amendments made therein are relevant to these particular circumstances. Act No. 7 of 2007 effectively amended S. 42 of Cap 22 to introduce new provisions one of which was S. 42 (1)(k) which provides that -

“This Act does not apply to actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.”

A further amendment introduces a new S. 42(2) which provides that –

“Subsection (1) (k) shall apply retroactively”

Since as I have already found the Plaintiff has brought this action to recover public land – then the effect of these new amendments is to render S. 7 of the Limitation of Actions Act inapplicable. As such the twelve year limit provided in S. 7 is not applicable therefore I find that the present suit is in fact not barred by limitation of time and is properly before court. As such I do hereby dismiss this ground of the application.

The Applicant did raise several other grounds in their submissions but in my considered opinion these were not relevant to the application to strike out the suit. In my view those were issues to be properly ventilated at the hearing of the suit, when evidence will be called.

The upshot of my findings are that this suit is not so **“hopeless”** as to be incapable of saving. Infact I find that the grounds advanced in support of the striking out motion have no legal basis at all. As such I find that this suit is properly before court and I do hereby dismiss in its entirety the application to strike out the same. Costs in the cause.

Dated and Delivered at Mombasa this 30th day of October 2009.

M. ODERO

JUDGE

Read in open court in the presence of:-

Mr. Abdalla holding brief for Mr. Irege for Respondent

No appearance by Applicant

M. ODERO

JUDGE

30/10/2009