



**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**VERSUS**

**BHANGRA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CASTLE DOM PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DIM AGENCIES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**LILLY WHITES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**WILSON GACANJA ..... 5<sup>TH</sup> DEFENDANT**

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### **RULING**

Before court is the Chamber Summons dated 18<sup>th</sup> January 2008 by which the Applicant, The Kenya Anti Corruption Commission seeks inter alia the following orders:-

***“3. The Defendants by themselves, their agents, servants or any other person whosoever be restrained from selling, leasing, charging, sub-dividing, wasting, transferring or dealing in the parcel of land described as Mombasa Island/Block XI/934 pending the inter parties hearing and determination of this application.***

***4. The Defendants by themselves, their agents, servants or any other person whosoever be restrained from selling, leasing, charging, sub-dividing, wasting, transferring or dealing in the parcel of land described as Mombasa Island/Block XI/934 pending the hearing and final determination of this suit.***

***5. That costs of this application be provided for”.***

The application was certified as urgent by my learned senior brother Hon. Justice Sergon on 28<sup>th</sup> April 2007. Interim orders were duly granted pursuant to prayer (3) of the application which may now be considered spent. I will therefore now proceed to consider the merits of this present application with respect only to prayers (4) and (5) thereof.

At the centre of both this suit and application which were filed simultaneously on 24<sup>th</sup> January 2008,, is a parcel of land described in the suit papers as Mombasa Island/Block XI/934 (hereinafter referred to as the ***“suit property”***). The Applicant claims that this land was excised from a road reserve and was wrongfully allocated to the 1<sup>st</sup> Defendant by the 5<sup>th</sup> Defendant who was the Commissioner of Lands at the material time. The 5<sup>th</sup> Defendant thereafter without any transfer registered a lease with respect to the suit property to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant subsequently sold and transferred the suit property to the 3<sup>rd</sup> Defendant who in turn told and transferred the same to the 4<sup>th</sup> Defendant. At the present time the suit property is registered in the name of the 4<sup>th</sup> Defendants being **LILLY WHITES LIMITED**. The

ground relied upon by the Applicant in support of their application are those that appear on the face of the application dated 18<sup>th</sup> January 2008 as well as the supporting affidavit of **DEDAN OKWAMA** an investigator with KAAC, as well as the various annexures thereto. I have considered all of the above. I have also given due consideration to the affidavits and annexures filed by the Respondents in opposition to this application. By consent the parties filed written submissions before the court which were to be highlighted on 17<sup>th</sup> September 2009. On that date Mr. Nzioki appeared for the Applicant whilst Mr. Okong'o appeared for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. There was no appearance for either the 2<sup>nd</sup> or 5<sup>th</sup> Defendants. I note from the record that both the 2<sup>nd</sup> and 5<sup>th</sup> Defendants were properly served with hearing notice.

At this stage the Applicant herein has come to court seeking a temporary injunction. This is a remedy which by law is available to a party who seeks to protect his/her legal rights where such rights are being threatened with violation by the unlawful acts of another party. At this stage a court is not expected to, and indeed ought not, to proceed and make a determination with respect to the final rights and obligations of the parties to the suit. The locus classicus with regard to the principles to be observed in awarding a temporary injunction are very well elucidated in the case of **Geilla –vs- Cassman Brown & Company Ltd [1973] E.A. 358**. At page 360 of that celebrated ruling it was held that:-

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an Applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience ....”***

The Applicants herein have come to court seeking interlocutory orders as against the Respondents. The question is whether their application satisfies the test in the **Geilla Case**.

Firstly have the Applicants established a prima facie case. The Applicant is not an individual but is a public body and seeks to protect the public interest in the suit premises which they allege was set aside as a road reserve. I am mindful of the fact that as is claimed by the Respondents in their written submissions the 4<sup>th</sup> Defendant is a proprietor of the suit property under the Registered Land Act Cap 300 Laws of Kenya which the Respondent submits is indefeasible. At the present time the 4<sup>th</sup> Defendant is not in possession of the suit premises. As such S.143 of the Registered Land Act comes into play. S. 143(1) provides that:-

***“(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 ...”***

In their plaint dated 18<sup>th</sup> January 2008 the Plaintiffs have in paragraph 7 alleged that the suit property was not available for alienation by the 5<sup>th</sup> Defendant, making any issuance of lease by the 5<sup>th</sup> Defendant to the 2<sup>nd</sup> Defendant fraudulent, illegal and null ab initio. The Plaintiff proceeds to give particulars of said **FRAUD AND ILLEGALITY** in paragraph 7(1) to XIII of its plaint. Therefore the very foundation of the 4<sup>th</sup> Defendant's title to the suit property is under challenge by the Plaintiff. I will not at this point make a determination of whether fraud or mistake has been proved. This is a matter which ought properly be canvassed and decided at the trial of the main suit. Suffice to say I have perused the particulars as listed in paragraph 7 of the Plaint and I do find the same to be weighty enough to disclose a cause of action.

The suit property is alleged by the Applicant to be part of a road reserve. A road reserve is a public facility. As indicated in the annexed maps it is located within a residential area and obviously provides critical access into and out of the residences located within its vicinity. I am convinced that loss of such a road reserve cannot be adequately compensated for by way of monetary damages. Indeed the public would stand to suffer irreparable harm if the injunction sought is not granted. It would best serve the interests of justice by preserving this public facility pending the hearing and final determination of the

main suit.

Mr. Okong'o for the Respondents appeals to this court to be guided by the case of **KACC –vs- Ahmed Mwidani and 4 others HCCC 203 of 2007**. I have perused that cited authority and I do find it to be distinguishable from the present case in several regards not least of which that case concerned an application to strike out a Plaintiff whereas this case seeks interim orders. The remedies sought in the two cases are entirely different. I am on the other hand persuaded by the authority of **KACC –vs- Chembe Holding and two others HCC 70 & 71 of 2009** cited by Mr. Nzioka for the Applicant. I find this case to stand on all four with the current suit. In the Chembe case Hon. Justice Azangalala facing somewhat similar facts ruled that a prima facie case had been established. I see no reason to deviate from his reasoning. I am likewise convinced that the Applicant in this case has indeed shown a prima facie case. Unless the interlocutory injunction sought is granted the public stands to suffer irreparable harm for which monetary damages would not be an adequate remedy. Finally I find that the balance of convenience tilts in favour of the granting of this application. It is prudent to preserve the status quo pending the full hearing and final determination of the main suit. Based on the foregoing I do hereby allow this present application in terms of prayer (4) thereof. Costs in the cause.

**Dated and Delivered at Mombasa this 16<sup>th</sup> day of October 2009.**

**M. ODERO**

**JUDGE**

Read in open court in the presence of:

Ms. Kavere holding brief for Mr. Okong'o for 1<sup>st</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants

No appearance by Applicant

**M. ODERO**

**JUDGE**

**16/10/2009**