REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 4 of 2007

SERGIO LIEMAN……PLAINTIFF

-VERSUS-

TONICA INVESTMENTS LIMITED..……1ST DEFENDANT

NATIONAL MUSEUMS OF KENYA……..……2ND DEFENDANT

RULING

The 2nd defendant's application by Chamber Summons dated 29th June, 2009 and filed on 7th July, 2009 was brought under ss.34 and 63(c) of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order *XXXIX*, rules 1, 2, 3 and 9 of the Civil Procedure Rules. The main prayer was for:

"*an order of injunction to issue restraining the 1st defendant, its officers, agents, employees and/or servants from in any way whatsoever and howsoever interfering with the access road passing through and/or over the properties known as Plot Nos. 942/III/MN and 943/III/MN (hereinafter referred to as "suit properties), cutting the trees thereon, subdividing, transferring, developing or dealing in any way with the said suit properties contrary to any directions given by the 2nd defendant under the National Museums and Heritage Act, No. 4 of 2006 pending the hearing and determination of the suit herein*".

It is stated in the general grounds that the application is necessary in order to prevent the wasting, damaging and/or alienation of the suit properties; that the suit properties are part of the National Heritage and are thus not open to uncontrolled use and/or development by 1st defendant or anyone else; that the suit properties are protected by law and are to be preserved for cultural, archaeological and palaeontological interests and are not for private/personal use or interests; that 2nd defendant and the Kenyan public as a whole would suffer irreparable loss if 1st defendant is allowed to deal with the suit properties in any injurious manner; that consent has not been received from the National Environmental Management Authority, for the sub-division of and/or proposed development of the suit properties; that dealing with the suit properties otherwise than as a monument would be contrary to public policy; that alteration of the nature of the suit properties will render the same unmanageable causing loss of their

natural state as a monument, and this would occasion irreparable loss and damage; that the balance of convenience favours maintenance of the *status quo*.

Supporting evidence is set out in the affidavit of *Philip Jimbi Katana*, the Principal Curator for Coastal Sites and Monuments, sworn on 29th June, 2009.

It is deponed that 1st defendant is in the process of sub-dividing the suit properties, with a view to selling the sub-divisions off for development – and that this would destroy the natural forest thereon, as well as the natural state of the monuments.

It was urged for the applicant that its case fell squarely within the concept of the *prima facie* case as developed and pronounced in the well known local authority, *Giella v. Cassman Brown & Co. Ltd* [1973] E.A. 358. It was submitted that 1st defendant is to be restrained from wasting, damaging and/or alienating the suit properties which are part of the National Heritage for the Kenyan public – these properties falling within the Mtwapa Ruins, or the Mtwapa Heritage Site, and is listed as a Monument under the National Museums and Heritage Act, 2006, a fact not denied by the other parties to this cause.

Learned counsel urged that s.25 of the National Museums and Heritage Act, 2006 empowers the Minister to declare and duly gazette Monuments – and once this action is taken, the relevant item or space falls to management under the said Act; and by virtue of s. 25(1) of the Act, even property that is privately owned can be gazetted as a national monument. The suit properties host the Mtwapa National Monument and Sites, these being palaeontological sites that form part of the National Heritage. The site is a forest with indigenous trees, and it was urged that if the proposed development is allowed to proceed, the trees are liable to be felled, exposing the monuments and other artifacts which could suffer destruction.

Counsel urged that the obligations created in relation to monuments, by s.45 (1) of the Act, are mandatory and are buttressed by criminal sanctions: a person who destroys, removes, injures, alters and defaces a monument, commits an offence; and indeed, s.45(2) of the Act empowers the High Court to grant injunctions against threatened or continuing breaches of the terms of the said Act.

The curator in his supporting affidavit deponed that the suit properties form part of an endangered cultural heritage, and he produced as an annexure a letter from the World Monument Fund, indicating that the Mtwapa Heritage site (of which the suit properties are a part) has been declared to be one of the 100 endangered sites. Such averments, learned counsel urged, have not been denied by any of the parties to the suit.

While acknowledging that the suit properties are registered in the name of the plaintiff, counsel urged that these properties are not open to uncontrolled development, since they are a monument under the National Museums and Heritage Act, 2006 (Act No. 6 of 2006).

Counsel submitted that the suit properties are in danger of sustaining irreparable loss and damage, if they are sub-divided and developed as intended by 1st defendant. It was submitted that "no amount of damages can compensate the applicant which has been specifically created to conserve and protect Monuments, if this particular Monument is defaced or destroyed by 1st defendant's planned development".

Counsel submitted that 2nd defendant had shown sufficient reasons as to why the balance of convenience falls in its favour. Counsel urged: "If this application for injunction is not granted, then 1st defendant will be at liberty to waste, damage and/or alienate the suit properties, thereby causing great inconvenience to the 2nd defendant and the Kenyan public as a whole, whilst to maintain the status quo will not injure the 1st defendant in any way whatsoever".

Counsel for 1st defendant submitted that the 1st defendant was the *bona fide* registered owner of the suit properties, and urged that these properties were private property owned exclusively by 1st defendant.

Counsel recalled the content of paragraph (3) in 1st defendant's defence to 2nd defendant's counterclaim; the same reads:

"*It is denied that Plot Number MN/III/942 and MN/III/943 host Mtwapa ruins as alleged or at all. The said plots are private property owned by 1st defendant. There is nothing on, above and/or under [the] surface of the said plots which brings the said plots under the provisions of the National Museum and Heritage Act 2006 (Act No. 6 of 2006) or any other law related thereto as alleged or at all. The 2nd defendant is put to strict proof of these allegations".*

Counsel in this matter, clearly, are contesting each other's position on a pure matter of *fact*; counsel for 1st defendant states:

"*The fact of the matter is that the two plots which belonged to 1st defendant even before this Act came into existence, had never hosted anything of interest to the National Museums, and section 25 of the said Act has never been applied in respect of them."*

Counsel rested 1st defendant's case on protected rights to property:

"…..*Section 23(1) of the Registration of Titles Act (Cap. 281, laws of Kenya) provides that, the certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all Courts as conclusive evidence that the person named therein as proprietor of the land, is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."*

Counsel urged that the suit plots are freehold private land "whose owner sub-divided and sold to very many people, Tonica Investments Ltd. being one of such people". If 2nd defendant wanted to have the suit lands acquired in the public interest, counsel urged, then the governing law is to be found in the Constitution, s. 75 (1); the Land Acquisition Act (Cap. 295, Laws of Kenya); and the National Museums and Heritage Act, 2006.

Counsel urged that 2nd defendant's claim "has no legal basis but [is] brought in bad faith". It was contended that 2nd defendant had not established a *prima facie* case: the deponent in the supporting affidavit did not annex any documents showing Government decisions in respect of the suit lands. The 2nd defendant's decisions and actions in relation to the suit land, it was urged, "are manifestly unjust and amount to undue interference with the 1st defendant's enjoyment of its property".

Counsel disputed the alleged support for 2nd defendant's action by the World Monument Fund: because that letter does not refer to the suit properties, but it refers to "Mtwapa Heritage".

Counsel urged that no irreparable loss would be caused to 2nd defendant because "each person has a right to use his land as he chooses". It was urged that 1st defendant has heavily invested in the suit lands.

It was submitted that no ministerial declaration existed, touching on the suit plots, and no register had been kept by the National Museums specifying any intended action regarding these plots.

Counsel submitted that the balance of convenience lay in favour of 1st defendant: for "there is no iota of evidence [showing] that there are antiquities lying in or under the surface of these two plots".

Counsel invoked in aid the High Court decision in *Sea Star Malindi Ltd v. Kenya Wildlife Services*, Nairobi H. Court. Misc. Suit No. 982 of 1997. In that decision, which has many similarities with the facts of the instant matter, the following passage in the ruling of *Onyango Otieno, J* (as he then was) may be cited:

"*And the Land Acquisition Act is very clear on the procedure to be adopted when acquiring land. As this was…..private land, if the 1st respondent wanted to have control over it, it had to comply with the procedure clearly spelt out in the Wildlife Conservation and Management Act and the Land Acquisition Act (Cap. 295, Laws of Kenya)…..Unless and until the 1st respondent complied with those legal requirements, its actions and its decisions over the suit land……were ultra vires its powers. Not only that but the same action also went against section 75 of the Constitution. Much as I would encourage any activities that seek to preserve nature such activities must, however, comply with the laws of the land. In this case, if the 1st respondent was of the opinion that the suit land being contiguous to a Marine Park, activities on it……might interfere with the ecosystem in the area, all it needed to do was to convince the Minister concerned to have the land acquired with [the] consent of the owner who is the competent authority, or by way of [the] Land Acquisition Act. Having so acquired the land, the Minister would declare it a Marine Park and then proceed to ensure the conservation of the area".*

Learned counsel further urged that since it was the equitable remedy of injunction being sought, the applicant had an obligation to come before the Court with clean hands, but this was not the case: already, without justification, the National Museum's curator had already stationed armed guards in the suit lands.

It is well known that s.75 of the Constitution, while upholding the sanctity of private property, leaves an open window for acquisition of such property in the public interest, where the applicable procedure is followed. Short of that, private property is held sacrosanct, and the proprietor is entitled to full enjoyment of his or her property. And just as is well exemplified in *Sea Star Malindi Ltd v. Kenya Wildlife Services*, the Minister may take action to acquire private land, in the interests of environmental protection; and in the same way, the Minister, under the National Museums and Heritage Act, 2006 may publish a notice in the *Gazette* and may thereby *declare* (s.25(1)) –

(a) an open space to be a protected area;

(b) a specified place or immovable structure which the Minister considers to be of historical interest, and a specified area of land under or adjoining it which is in the Minister's opinion required for maintenance thereof, to be a monument;

(c) a specified site on which a buried monument or object of archaeological or palaeontological interest exists or is believed to exist, and a specified area of land adjoining it which is in the Minister's opinion required for maintenance thereof, to be a protected area; etc

In the applicant's application, however, it has not been stated that the suit lands have been properly *identified* as part of the Mtwapa Heritage Site; and the *role of the Minister* in initiating the process of land acquisition has not been brought out. Although there is evidence that the curator has stationed armed guards on the suit lands, there is no link brought out between his action and the procedure of acquisition under s.75 of the Constitution, under the Land Acquisition Act, and under the National Museums and Heritage Act.

It follows that the applicant has yet to arrive at the essential threshold from which a prayer in equity may be made; and it follows that this Court's duty, at this stage, is to protect and uphold the accrued property rights of the respondent.

In so far as the applicant provides no professional identification of the Mtwapa Heritage Site, in the name of which it brings this application, its annexed letter of support from the World Monument Fund, carries no persuasive credentials in the Court, because the letter itself carries no mark of identification of the land in question.

The application for interlocutory relief, therefore, must fail; and it is dismissed with costs to the 1st defendant/respondent.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 20th day of November, 2009.

J. B. OJWANG

JUDGE

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For 2nd Defendant/Applicant:

For 1st Defendant/Respondent:

For Plaintiff: