



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

**Civil Case 14 of 2007**

1. Land and Environmental Law Division
2. Civil Practice and Procedure
3. Locus
4. Subject Land Cases:-

Whereas any civil proceedings brought against

the Governments of Kenya is brought against the Attorney General (Government Proceeding Act Cap.40 Laws of Kenya).

Whereas in Land cases, parties have been filing suit against:-

- i) The Commissioner of Lands and or
- ii) The Registration of Titles

The question arises as to who should be the correct party to be sued:-

- i) The Commissioner of Lands or The Attorney General?
- ii) The Registrar of Titles or the Attorney General?

5. Arguments: A.B. Shah Advocates (and retired Hon. Judge)

5.1. The Commissioner of Lands can sue and should be sued alone in his own capacity

5.2. The Commissioner of Lands can be sued in his capacity as Registrar General. There is no need to enjoin the Attorney General

6. Arguments J.P. Wachira Advocate

6.i) The Commissioner of Lands must be represented by the Attorney General

a) Amendments to Section 8 of the Government Lands Act

6.ii) Registered Lands Act does not refer to Commissioner of Lands but Registrar

6.iii) If suit is filed on administrative purposes and not Registration of Title, Commissioner of Lands

may be sued

6.iv) The Registrar of Titles Act Administrative Act

The Attorney General must be sued

7. The Attorney General – State Counsel

7.1) Suits must be brought against the Attorney General

8. Held:-

8.1) Commissioner of Lands

8.i) To be sued but must be represented by the Attorney General

8.2. The Registrar of Titles

8.ii) To be sued in the name of the Attorney General

8.3. The Registrar of Lands

8.iii) To be sued in the name of the Attorney General

9. Case law preferred by A.B.Shah

a) Commissioner of Lands v Esaju Jiwaji (1978) KLR 192

b) Institute of the Blessed Virgin Mary, Kenya v The Commissioner of Lands (1980) KLR S

c) Patel v The Commissioner of Lands (1980) KLR 38 by state counsel

d) Muriithi v Attorney General 1983 KLR I

10) Statute

a) Interpretation and General Provisions Act Cap.2 Laws of Kenya

b) Government Proceeding Act Cap.40 Laws of Kenya

c) The Government Lands Act Cap.280 Laws of Kenya

d) The Registration of Titles Act Cap.281 Laws of Kenya

e) The Registered land Act Cap.300 Laws of Kenya

Others

f) The Land Titles Act Cap.282 Laws of Kenya

g) The Consolidation Act Cap.283 Laws of Kenya

h) The Land adjudication Act Cap.284 Laws of Kenya

i) The Registration of Documents Act Cap.285 Laws of Kenya

- j) The Physical Planning Act Cap.286 laws of Kenya
- k) The Land (Group representative) Act Cap. 287 laws of Kenya
- l) The Trusts Land act Cap. 288 Laws of Kenya
- m) The Survey Act Cap.299 Laws of Kenya

**NEMCHANDA LAGHHIR SHAH.....1<sup>ST</sup> PLAINTIFF**

**BABULAL NEMCHANDA SHAH.....2<sup>ND</sup> PLAINTIFF**

**MUKESHCHAND NEMCHANDA SHAH.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**APPOLLOS HIRAM MUNA.....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LAND.....2<sup>ND</sup> DEFENDANT**

**RULING**

**I: PROCEDURE**

1. The Land and Environmental Law Division was launched sometime in April 2007. This enabled all cases, falling under the subject of land and or Environmental to be dealt with in a specialized manner.

2. In land cases, majority of cases would come in by way of certificate of urgency which would seek orders to restrain the other party from transferring, encroaching or dealing in any manner with the suit land until the determination of the suit.

3. Often the person sued would be the other party where complainant lies against the Commissioner of Lands or the Registrar of Title but no mention of the latter two would be made (South Fork Investment Ltd v Pridegrove Investment Ltd (Hccc1344/06). At times the Chief Land Registrar would be sued as a defendant in future to rectify a register (Peter Kariuki Njuguna v The Chief Land Registrar) Hccc275/96. In other instance the Commissioner of Lands would be sued as a defendant (Hemchad Laghdhim Shah & 2 Others v Appollos Hirun Muna & the Commissioner of Lands) Hccc14/07

4. The discrepancy and inconsistency seen in the files was an indication that the government representative was doubtful. I therefore requested the advocates in various respective files annexed to this ruling to address me on the following problems:-

**II: The problems**

5. Whereas, any civil proceeding brought

against the Government of Kenya is brought against the Attorney General (Government Proceeding Act Cap. 40 laws of Kenya).

Whereas in land cases, parties have been filing suit against:

5.1. The Commissioner of Lands

5.2. The Registrar of Titles and or

### 5.3. The Registrar of lands

The question arises as to who should be the correct party to sue?

#### 5.1. The Commissioner of Lands or the Attorney General?

#### 5.2. The Registrar of Titles or the Attorney General?

#### 5.3. The Registrar of Lands or The Attorney General.

### III Arguments

6. A.B. Shah Advocates (& retired judge) made submission. J.P. Machira advocate made submission that did not completely agree with the former. The Attorney General represented by P.A. Mayova state counsel also made submissions.

The other advocates either concurred with one or the other lead advocates. I believe more research would have been appropriately done by the advocates to address their minds on this question.

#### a) Arguments by the State Counsel

7. The state counsel, P.N. Mayova, referred to this court the case law of Muriithi v Attorney General (1983) KLRJ Hancox J (as he then was). This case dealt with the Presidential Powers of relieving one from duty as opposed to the Public Service Commission doing so. The point the state counsel wished to make concerns the Civil Practice & Procedure – the parties proper and necessary to be sued under the Government Proceedings Act (Cap.40) is section 12 (1).

“Subject to the provisions of any other written law, civil proceeding by or against the government shall be instituted by or against the Attorney General, as the case may be

2) \_\_\_\_\_”

8. It therefore follows that when suits are brought against the Commissioner of Lands or the Registrar of Title it should be brought under the name of the Attorney General. This would mean parties are to comply with a notice under section 13A of the Government Proceeding Act Cap.40 Laws of Kenya before filing suit.

#### B. Arguments by A.B Shah advocate

9. The Commissioner of Land can sue and be sued in his individual capacity. For instances:

9.1 Under the Government Lands Act Cap.280 Section 8 state that all

“Actions suits and proceeding by or behalf of the President or Government respecting Government land . . . may commence, prosecuted and be carried out . . . in the name of the Commissioner.”

9.2 The Registration of Titles Act Cap.281, Section 5:-

“The President shall appoint an officer to be styled the Commissioner of Land, who shall be placed in control of the Land, Land Survey, Land Registration and Record of Titles Departments who shall be ex officio Registrar General under this act”

The function of the Registrar General is set out in section 6 of the same act being as per the margin note. “What land and or application by what persons can be brought under the Act”. As the Registrar General is the one who supervises all the officers in the Commission of Lands, then where land is under the Governments Lands Act or the Indian Transfer of Property Act, 1882, the party to sue and be sued is once

again the Commissioner of Lands.

9.3. There are examples in other statute, one being The Land Acquisition Act Cap.295 whereby the Commissioner of Land has been made responsible to be sued.

9.4. There are case law that show where the Commissioner of Lands have been sued they or one sued the representation has always been by the state counsel/Attorney General

9.4.1. As seen in the case law of:

Commissioner of Lands V Esaju Jiwaji

(1978) KLR

94.2. Patel v Commissioner of Lands

(1980) KLR 38

94.3. Institute of the Blessed Virgin Mary, Kenya (Registered Trustee) v Commissioner of Lands

(1980) KLR 5

10. Therefore persons to be sued under the Government Proceedings Act Cap.40, The Registration of Titles Act Cap. 281, The Government of Lands Act Cap 280 Laws of Kenya is the Commissioner of Lands who is the Registrar – General.

11. There is section 19 of the Government Proceedings Act, whereby if you have to sue the government then, a notice under section 13A must be given. If it is under section 19(3) then no notice is required to be given before filing suit namely;

“19(3) notwithstanding anything in the proceeding provisions of this section, the provisions of this part shall not have effect with respect to any of the following proceedings

a) \_\_\_\_\_

b) \_\_\_\_\_

c) \_\_\_\_\_

d) Proceeding by or against a Registrar of Titles under the Registrar of Titles Act.”

12. This applies to the Registration of Titles Act Section 64 that reads:-

“In any proceeding respecting any land or in respect of any transaction, or contract relating thereto, or in respect of any instrument caveat, memorial or other entry affecting any such land, the court may, by order, direct the registrar to cancel, convert, substitute or issue any memorial or entry in the register, or otherwise to do such acts or make such entries as maybe necessary to give effect to the judgment or order of the court”.

13. The court has powers to direct the Registrar of Titles.

14. All actions must commence within one year and prior to this 30 days S.136 (2) notice be issued.

15. In his conclusion, A.B. Shah stated there was no need to enjoin the Attorney General to land suits. This is because the Commissioner of Land can be sued in his own capacity and can be sued. That in the capacity as Registrar- General under the Registered Titles Act he can sue and be sued as the

Commissioner of Lands.

16. But, he added, that as an “abundant caution” it may be prudent to enjoin the Attorney General as a party to enable the burden be taken from the court and assist the court. Nonetheless if you sue ‘the Commissioner of Lands’ you need not sue ‘the Registrar of Lands’.

C) Arguments by J.P. Machira Advocate

17. The statute that are relevant herein are the:-

17.i. Government Lands Act Cap.280 Laws of Kenya

17.ii. The Registrar of Titles Act Cap.281 Laws of Kenya

17.iii. The Registered Lands Act Cap.300 Laws of Kenya

And 17.iv) The Registration of Titles Act for Coasts only Cap.281 Laws of Kenya.

17.i The Government Lands Act Cap.280 Laws of Kenya.

17.1.1. Under this Act Section 8 of the said act used to read

“All actions suit and proceedings by or on behalf of the President or the Government respecting Government Lands or respecting any contract relating thereto . . . may be commenced, prosecuted and carried on by and in the name of the Commissioner.”

17.1.2. This section has since been amended to read

“8(1) all actions, suit and proceedings by or on behalf of the Government respecting

a) Government Land or

b) \_\_\_\_\_

c) \_\_\_\_\_

d) \_\_\_\_\_

e) \_\_\_\_\_

f) \_\_\_\_\_

Shall be commenced, prosecuted and carried on by and in the name of the Commissioner who shall be represented by the Attorney General or by any public officer or other persons appointed by the Commissioner in any particular case.”

17.1.3. Due to this amendment which concerns now the Attorney General, the parties to be on the safe side must enjoin the Attorney General. The authorities cited by A.B. Shah had the Attorney General to defend the said Commission of Lands.

17.2. The Registration of Titles Act Cap. 281 laws of Kenya

17.2.1. This act being totally different in that the Commissioner of Lands has been brought in purely on administrative basis. The Commissioner of Land has no right to interfere with title to land. This is why Section 23, gives sanctity to title and states that the certificate of title held is conclusive evidence of proprietorship with the exception of where fraud and misrepresentations are found. Similar

sections are found in the Registered Lands Act Cap 300 Laws of Kenya Section 27 and 28. Unless the title is a first registration, it can be impeached under section 143. Therefore, the Commissioner of Lands has no powers, other than the administrative powers to interfere with the titles. All powers regarding title are given to the Registrar to cancel and rectify.

### 17.3. The Registered Lands Act Cap.300 Laws of Kenya

17.3.1. This act, argued J.P. Machira does not mention the Commissioner of Lands. It speaks of the Land Registrar and other officers. It therefore depends why you are filing suit? If it is to challenge, registration, rectification to seek orders of discharge of charge, then the person to direct your request to sue is the Chief Lands Registrar not the Commissioner of Lands.

17.3.2 Where on the other hand you are filing suit challenging the allocation of the land, or a suit dealing purely with administration then the Commissioner of Lands is sued.

18. The question he then posed is whether it is prudent to enjoin the Attorney General as a legal requirement? The court should not confine itself to Section 8 but should look at Section 5 of the Registration of Titles Act – an ex officio whom the President shall appoint as an officer. The Commissioner of Lands is a government officer. Under the Interpretation and General Provisions Act Cap. 2 a public officer means:-

“A person in the service of or holding office under the Government of Kenya whether that service or officer is permanent or temporary or paid or unpaid.”

19 Therefore the Commissioner of Lands is a Government servant, in charge of the department of Lands and therefore when being sued the Attorney General should be represented. A formal notice is required to be issued. Further the Commissioner of Lands is not exempt under Section 19(3) of the Government Proceedings Act. The exemption only applies to where there are proceedings against the Registrar of Title under the Registration of Titles Act.

#### D) Other advocate

20. The advocates who made submissions supported A.B. Shah or J.P. Machira apart from S.K. Bundotich who brought the fact that the Registered Lands Act Cap. 300 is substantial law whilst the Registration of Titles Act Cap.281 is procedural law with the Transfer of Property Act of India as amendment being the substantive law. Under the Government Lands Act, the registrar are given specific acts or roles. Therefore parties are required to sue the Registrar of Title together with the Attorney General at the same time.

#### E) A.B. Shah in reply

21. He sought to know if he were sued by the Government and raised a counter claim is he required to give notice? No notice is required.

#### IV) Finding

22. There are various acts concerning land that number 12 or thereabout. Out of these, 8 acts which are outlined in the forward have mechanism where respective officers would deal with dispute that would be dealt with on appeal before a specific panel. At times there would be appeals to the High Court at other times such as in the Land Control Board, an appeal to a second panel is final.

23. In this ruling the court is interested with the:-

- i) Government Lands Act Cap. 280 Laws of Kenya
- ii) The Registration of Titles Act Cap.281 Laws of Kenya

iii) The Registered Lands Act Cap.300 Laws of Kenya

and iv) The Government Proceeding Act Cap 40 Laws of Kenya

24. The Government Lands Act Commenced on 18 May 1917 was and is an act of Parliament to make further and better provision for regularly regulating the leasing and other disposal of Governments land for other purposes. Under section 5 of the act it provides there to be:-

“A commissioner of Lands and such other officers as may be necessary for the administration of this act who may, if so authorized by the commission either generally or specifically, perform any of the duties or do any of the cases or things required or authorized by the this act or by any law regulating the sale, letting, disposal and occupation of Government land to be done by the Commissioner.”

LN A44/99.

25. The Registration of Titles Act commenced on 21 January 1920. Part III excepting (in the Coast Province only) commenced on 1 November 1920.

Section 5 – reads that the

“President shall appoint an officer to be styled the Commissioner of Lands who shall be placed in control of the land, land survey, Land Registration and recorder of titles.” The commissioner of lands shall be ex officio Registrar General under this act.”

26. The Registered Land Act cap.300 Laws of Kenya is an act of Parliament to make further and better provision for the registration of title to land and for the regulation of dealing in land so registered and for purposes connected there with.

27. The Commissioner of Lands was originally sued and could sue on his own. He would assign an officer to sue on his behalf or some other persons including the Attorney General. The Amendments by LN44/99 under the Government Lands Act Cap.280 Laws of Kenya had made that representative to be the Attorney General. I believe in this situation the Commissioner of Land is sued but all suits must be served upon the Attorney General and not the Commissioner of Lands. The suit must nonetheless be carried out in the name of the commissioner.

28. These are suits and proceeding by or on behalf of the Government respecting:-

- “a) Government land or
- b) Any contract relating to government Land or any breach of any such contract
- c) Any trespass on Government Land on any damages accruing by reasons of such trespass; or
- d) The recovery of any rent purchase money or other monies in respect of Government Land or
- e) Any damages or wrongs , money whatsoever in any way suffered by government in respect of Government Land or any other land or
- f) The recovery of any fine or the enforcement of any penalty under this act.”

29. Therefore, under the Government Lands Act, I conclude that the proceeding may be commenced in the name of the Commissioner of Land but representative of the commissioner is compulsory, who is the Attorney General and service must be made upon the Attorney General of all proceeding. There may be a public officer or other person appointed by the commissioner in any particular cases to represent him. Suits must be brought within one year (section 136(2) Government Lands Act Cap.280

30. As to the Registration of Titles Act which as stated earlier is not a substantive law. The person to sue is the Attorney General but the Registration of Titles Act is exempt from giving a notice to the Attorney General (section 19(3) of the Government Proceeding Act Cap.40 applies).

31. Under the Registration of Lands Act Cap. 300 Laws of Kenya the act deals with the registration of lands. The persons to sue is the Attorney General but the requisite notice under section 13A is required to be issued.

32. I would not agree that the Commissioner of Lands as the Registrar General is the one to be sued as his role is administrative. His name would not appear as he has no powers to rectify the titles.

33. I accordingly find that the following should be done in filing land cases.

33.1. The land law statute under which parties claim under, must be specifically stated after the description of parties in the pleading.

For example, the Title in dispute is under the Government Lands Act Cap.280 Laws of Kenya.

Or under the Registered Lands Act Cap.300 Laws of Kenya etc.

32.2. That the Commissioner of Lands can sue and shall be sued in his name "The Commissioner of Lands" but at all times (unless otherwise sated by the Commissioner of Lands) he be represented by the Attorney General.

32.3. Under the Registration of Titles act the persons to be sued is the Attorney General. There requires no notice under section 13A of the Government Proceeding Act Cap.40 Laws of Kenya (see S.19(3)).

32.4. In the Registered Lands Act the person to be sued is the Attorney General. There requires to be 30 days notice and a suit filed within a year.

32.5. Claim against the Government alone must be field by way of Judicial review. There is no injunction against the Government that may be permitted by law.

32.6. I thank the parties for their submission on this matter.

Dated this 26<sup>th</sup> this day of June 2007 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Advocates:-

Representatives

1. Hccc No.14/07 Nemchand Laghdhir Shah & 2 Others

Versus

Appolos Hiram Muna & Commissioner of Lands

N. Mucheru instructed by

Gadhia & Mucheru & Co. Advocates (P.Machira – lead advocate)

A.B. Shah instructed by

Kimondo Mubea & Co. Advocates

2. Hccc 275/96 Peter Kariuki Njuguna v The Chief Land Registrar

A.N. Nguru instructed by A.N. Nguru & Co. Advocates

A.G. Opiyo instructed by A.G.Opiyo & Co. Advocates Attorney General – Nil

3. Hccc1344/2006 South Fork Investments Ltd

V

Pridegrove Investment Ltd

The Commissioner of Lands 2<sup>nd</sup> defendant

The Registrar of Titles 3<sup>rd</sup> defendant

C.A. Wotende instructed by

Kaplan & Stratton Advocates

Defendant not served not traced

4. Hccc55/2006 Vincent Onkoba Obino

V

Muhammed Hussein

The Registrar of Land

A.M. Omissa instructed by

OKongo Omogeni & Co. Advocates for the plaintiff

M. Munyu instructed by Iseme, Kamau & Maema advocates for 1<sup>st</sup> defendant

The Registrar of Lands not represented. 17.7.06

5. Hccc809/2003 Teleposta Pension Scheme Trustee

v

Margaret Watiri Ngugi and Land Registrar Kiambu

S.K. Bundotish instructed

Kale Maina & Bundotish & Co. Advocates for the plaintiff

A.S. Ogessa instructed by Ogessa & Co. Advocates for the 1<sup>st</sup> defendant

P.M. Mayova instructed by Attorney Genral for 2 and 3<sup>rd</sup> defendant

5 Hccc1456/2005 Benadette Wamucii Njoki.

V

Thika District Land Registrar

R.M. Nyangau instructed by

Masore Nyangau & Co. Advocates for the plaintiff

No appearance for defendant

7. Hccc84/2007 John Kahangi Kanui

V

The Chief Land Registrar & Another

John Kibe Kamoche – no appearance

Bendani Kamau instructed by S.W. Ndirangu & Co. Advocates for the plaintiff

8. Hccc154/2007 Rose Rao

Paul Schymanski

V

Donald Norrie MacDonald

Yahya Mohamemd Yusuf

Karima Yahya Yusuf

The Commissioner of Lands

The Registrar of Lands

F. Okeyo instructed by Otieno Okeyo & Co. Advocates

N. Kabaki instructed by Kabaki & Co. Advocates

C. Khamala instructed by V. Sharma & Co. Advocates

E.Kaka instructed by Attorney General