



IN THE HIGH COURT OF KENYA
AT KITALE
Misc Civil Appli 27 of 2007

KENYA ANTI-CORRUPTION COMMISSION.....APPLICANT.

VERSUS

BETTY ALISON CHEBET KIPSAITA.....1ST RESPONDENT.

DAVID KIPLAGAT KIPSAITA.....2ND RESPONDENT.

R U L I N G.

These proceedings were commenced by way of an Originating Motion, pursuant to the provisions of section 56 of the Anti-Corruption and Economic Crimes Act, No. 3 of 2003.

After giving consideration to the certificate of urgency which was filed alongside the Motion, the court did certify the application as urgent. The court also directed that the hearing of the application could proceed exparte.

Having been given the greenlight to prosecute the application, Mr. Angote, learned counsel for the applicant took the court through the history of the title to the property which is the subject matter of this action. In that regard, I find that it would be appropriate to set out the said historical background, in the manner that it was set out by the applicant.

First, it was pointed out that there were two parcels of land, being L.R. No. 2329, measuring 172.5 acres; and L.R. No. 2073/1, measuring 135.5 acres. Those two parcels of land are said to have been set aside by the government of Kenya

the purposes of constructing the Kitale Airstrip.

Copies of the survey maps for each of the two parcels were annexed to the affidavit of Dedan O. Okwama, which was filed in support of this application.

Mr. Dedan Okwama is an investigator working with the applicant. He says that he had been duly appointed as an investigator pursuant to section 23 of the Anti-corruption and Economic Crimes Act, and also that he was in the team which was conducting investigations into the propriety or otherwise of the alienation of land belonging to the Kenya Airports Authority. The investigations are intended to ultimately lead to legal action for the recovery of the suit property on behalf of the Kenya Airports Authority and the public. Mr. Okwama also says that the team of investigators expect that at the close of their investigations, they will be in a position to make appropriate recommendations to the Attorney general, in accordance with the law as prescribed.

Reverting to the evidence which was annexed to the supporting affidavit, it is noted that these include an Agreement dated 24/11/1953, as between the Government of Kenya and the then County Council of Nzoia. By that agreement, the government was allowed to take over the property measuring 172.5 acres.

Clause 1 of that Agreement stipulated as follows;

“THAT, if the said piece of land should at any time cease to be required for the purposes of a government aerodrome it shall be offered to the Council for a term of ninety-nine years at the rent and subject to the conditions contained in the said Grant and also such additional conditions as the governor may then consider it reasonable and necessary to impose.”

Clearly therefore, if the Government were to conclude that it no longer needed that portion of land for the purposes of an aerodrome (or an airstrip, as the smaller sized airports are more commonly known nowadays), the land was to have reverted to the Council.

In effect, even if it were established that the land in question was no longer needed for purposes of an airstrip, the government would have been bound, by the Agreement, to offer it to the Council.

It is noteworthy that on 14th March, 1961, there was published a gazette notice No. 1161, which, inter alia, stated as follows:-

“Kitale Aerodrome. An area of approximately 172.5 acres, being

Land Reference No. 2329, situated about four miles south-west of Kitale Municipality, the boundaries of which are more particularly delineated edged red, on Boundary Plan No. 451 deposited in the Survey Records Office, Survey of Kenya, Nairobi, a copy of which may be seen at the District Commissioner’s Office, Trans Nzoia District (Kitale).”

That area was declared to be an aerodrome, by the then Minister for Commerce and Industry.

As at present, there has not been provided any evidence or even a suggestion either that the gazette notice in question was revoked or that the government changed its mind about the use to which the piece of land in question was to be put.

Come 1991, the Kenya Airports Authority Act (Cap 395) of the Laws of Kenya, was enacted.

By virtue of section 4 of that Act, the Minister responsible for aerodromes was empowered to transfer property belonging to the Government, which appears to him to be necessary or useful to the Authority for the performance of its functions under the Act. Upon the transfer of such property to the Authority, the same would vest in the Authority without any further assurance.

By an order made on 7th June, 1994, the Hon. Jackson Kalweo, Minister of State, Office of the President caused to be published Legal Notice No. 201, in exercise of his powers under section 4 (1) and (2) of the Kenya Airports Authority Act.

Through that order, the Minister transferred all government property previously administered by the erstwhile Department of Aerodromes, Office of the President, to the Kenya Airports Authority.

Two years later, on 1st September, 1993, the Authority wrote to the Commissioner of Lands, drawing his attention to the fact that over and above the two parcels of land which had been reserved for the development of Kitale Airport, the Authority needed to acquire more land. One of the two parcels cited in that letter was the suit property herein.

To my mind, that letter was a manifestation of the continued desire to utilize the property as an airstrip, aerodrome or airport.

In response to the request by the Authority for more land, the Commissioner of Lands wrote back on 10th December, 1993, indicating that there had been an approval for the allocation of the suit land to Major General S.K. Kipsaita. The Commissioner of Lands sought the confirmation of the Director of Aerodromes that the authority would relinquish the said land, to facilitate its allocation to the applicant.

By a letter dated 28th December, 1993, the then Managing director of the Kenya Airports Authority, Mr. B.A. Omuse informed the Commissioner of Lands that the authority did not have an objection to the intended allocation.

However, he sought to know the use to which the intended allottee would put the land, as that would have a bearing on future airport use and controls.

Interestingly, Mr. B. A. Omuse also reminded the Commissioner of Lands that the Kenya Airports Authority needed some additional 8.23 hectares of land, in the neighbourhood of the existing Kitale Airport Land, for future extension of the runway and other facilities.

Why therefore he was not objecting to the giving away of some land which already belonged to the Authority, whilst seeking yet more land, would, in my view, be a mystery that should be interesting to resolve.

On 24th January, 1995, the Commissioner of Lands issued a Letter of Allotment to Major General S.K. Kipsaita, for an unsurveyed agricultural plot in Kitale.

One of the terms of the said letter of allotment was that if acceptance and payment were not received within 30 days from the date of the letter, the offer contained in it would be considered to have lapsed.

The payments in question were Ksh. 260,000/= in respect of stand premium; and Ksh. 6,520/= in respect of Annual Rent.

According to the documents made available to the court, one, Anne J. Kiptui paid to the Commissioner of Lands the sum of Ksh. 280,560/=-, through a banker's cheque which was forwarded to the Commissioner under cover of a letter dated 1st July, 2002.

On a prima facie basis, by the time the said payment was being made, the offer to Major Kipsaita had long lapsed, as per the express terms of the Letter of Allotment.

Notwithstanding the lapse of the offer, the Director of Survey approved the survey plan prepared on behalf of the allottee, for purposes of preparing a title for the portion that had been allotted.

The applicant has told the court that through its investigations, it has become aware of the intention to sell the land in issue to Mr. Luke Obiri. The applicant therefore fears that if that were allowed to happen, land which had been alienated for purposes of the Kitale Airstrip would have been disposed of irregularly.

The first question that needs to be addressed is as relates to the locus of the applicant in this matter.

The Kenya Anti-Corruption Commission (KACC) is a body corporate, established under section 6 of the Anti-Corruption and Economic Crimes Act, 2003.

Pursuant to Section 7 of that Act, one of the functions of KACC is to investigate any matter that, in the Commission's opinion, raises suspicion that conduct constituting corruption or economic crime had or was about to occur.

Pursuant to the provisions of section 45, a person is guilty of an offence if the person fraudulently or otherwise unlawfully acquires public property or a public service or benefit.

In the assessment of the applicant, the acquisition of the property herein constituted an economic crime, as the property was public property, and also because the acquisition was irregular.

In the case of **JAMES J. NYAGA & ANOTHER VS. THE HON. ATTORNEY GENERAL & ANOTHER, NBI. HIGH COURT MISC. APPLICATION NO. 1732 OF 2004**, Nyamu and Wendo JJ held as follows;

“The court recognized the fact that the land was held in trust by the Government on behalf of its citizens. All the authorities considered above do recognize the public trust doctrine and so do we.”

In this case, the Authority, in whom the property had been vested, held the property in trust. And the property was only to be used for an aerodrome, airstrip or airport. It would therefore appear that the land was not available for alienation to a private citizen, or for any purpose other than that for which it was set aside.

Whether the respondents would be liable for prosecution for economic crimes or not, for the role they have played in the process under investigation, is not for this court to determine.

However, it is evident to me that the court has a duty to safeguard the property in its present state of ownership until the applicant will have completed its investigations.

Initially, I was worried about the fact that the hands of the respondent could be tied up for as long as six months, whilst they had not been given a hearing on the matter as by virtue of the provisions of Section 56 (3) of the anti-Corruption and Economic Crimes Act, 2003, a prohibition would have effect for six months.

However, the person served with the order of prohibition is expressly empowered by Section 56 (4) of the Act, to apply to court to discharge or vary the order.

In the circumstances, as it appears to me, on a prima facie basis, that the property in issue was not available for alienation to Major General Kipsaita; and also that the offer contained in the letter of allotment had lapsed; and that the allotment did not comply with the law, I am satisfied that the applicant has made out a case to warrant the issuance of an order of prohibition.

Accordingly, prayer 2 of the Originating Motion dated 15th June, 2007 is hereby granted. This order shall be served together with the application, on the respondents, immediately, and not later than seven days from today. Costs to the applicant.

Dated and Delivered at Kitale, this 25th day of June, 2007.

FRED A. OCHIENG.

JUDGE.