REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 186 of 2007

IN THE MATTER OF: THE ANTI CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003

AND

IN THE MATTER OF: RACECOURSE PRIMARY SCHOOL

AND

IN THE MATTER OF: PRESERVATION OF LANDED PROPERTY KNOWN AS L.R NO. 209/16441 I.R. 100691

BETWEEN

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

VERSUS

JUDITH MARILYN OKUNGU ……..……..…….... 1ST RESPONDENT

DAKANE ABDULAHI ALI ……..……..…. 2ND RESPONDENT

NORTHERN CONSTRUCTION COMPANY LTD…….....…. 3RD RESPONDENT

RULING

On 22nd March, 2007 Kenya Anti-Corruption Commission, the Applicant herein, filed an "Originating Motion" under Section 56 of the Anti-Corruption and Economic Crimes Act No. 3 of 2003 (hereinafter "the Act") seeking, in the main, a preservation Order in the following terms:

"***This Honourable Court be pleased to issue orders for preservation in terms of Section 56 of the Anti-Corruption & Economic Crimes Act, No. 3 of 2003 preserving the property referred to as, L.R. 209/16441 I.R 100691 and restraining the Respondents jointly and severally; their agents, servants or any other person from selling, disposing off, constructing, developing, wasting or in any other way***

dealing with the property aforesaid."

The Motion was heard ex parte by this Court on 23rd March, 2007 and the Order sought was granted as against the Second Respondent limited to six months from that date. No such orders were granted against the other two Respondents.

On 29th March, 2007, the Second and Third Respondents filed an application by way of Notice of Motion, seeking mainly the following three Orders:

"***2. That the Honourable Court do strike out, delete, remove the name of the 3rd Respondent in the proceedings before the court.***

3. That the exparte Order given 23rd March 2007 and issued by this Honourable Court be discharged and/or vacated in its entirety.

4. That the Originating Summons dated 21st March 2007 be struck out with cost to the 2nd and 3rd Respondents/Applicants."

That is the application that is presently before this Court for determination. It is based on the following grounds:

(i) THAT the Institution of the Originating Summons in order to initiate a suit purportedly under Section 56 (1) of the Anti-Corruption and Economic Crimes Act, Chapter 3 of 2003 has no basis in law.

(ii) THAT the Applicant/Respondent in coming to court and obtaining the exparte order has failed to comply with the mandatory provisions of Section 56 of Act No. 3 of 2003.

(iii) THAT the High Court of Kenya

o Jurisdiction in law to issue an exparte Prohibitory Order on the issues solely raised in an Originating Summons.

(iv) THAT no evidence of any kind was placed before the Honourable Court when the exparte Order was issued and no legal basis or justification whatsoever was pleaded and placed before the court to warrant the said Order.

(v) THAT the suit property herein L.R. No 209/16441 (I.R. 100691) was lawfully acquired and/or allotted to the 2nd Respondent who complied with all lawful procedure and process. The 2nd Respondent has an absolute and indivisible title to the suit property.

(vi) THAT the fallacious contention that the suit property L.R. No 209/16441 (I.R. 100691) was owned or acquired by Racecourse Road Primary School is false, malicious and without any legal foundation.

(vii) THAT the said school whose property is L.R. No 209/6844 and is adjacent to the suit property is intact and had never been encroached on by the 2nd and 3rd Respondents/Applicants.

(viii) THAT the joinder of the 2nd Respondent who has no dealings and relationship with the suit property is malafide abinitio and such joinder amounts to gross (sic) and is an abuse of the court process.

(ix) THAT the suit herein had been filed to support, buttress or fortify an incompetent and malicious criminal case filed against one Mr. Mohamed Koriow Nur.

(x) The suit property had being sub-divided into 87 plots all currently being sold, costing a total of Kshs. Two Hundred and Twenty Five Million Five Hundred Thousand (Kshs 225,500,000.00) and the 2nd Respondent will suffer irreparable harm and loss unless the exparte order is discharged and/or vacated.

(xi) THAT the Applicant herein Kenya Anti-Corruption Commission has deliberately concocted self-serving facts and concealed material facts and evidence and despicably misled the court in granting the exparte order.

(xii) THAT the Originating Summons in its entirety does not disclose a corrupt conduct or economic crimes by any stretch of imagination against any of the parties to the proceedings herein.

(xiii) THAT the suit herein is a cheap public relation exercise on the part of the Kenya Anti-Corruption Commission to hoodwink the public and is an abuse of the court process.

(xiv) THAT there is no evidence pleaded or placed before the court to show that the 2nd and 3rd Respondents have grabbed or illegally acquired land that belongs to Race Course Road Primary School.

(xv) THAT it is in the interest of justice and the maintenance of the Rule of Law that the illegal exparte order be discharged.

(xvi) THAT the court in granting the exparte order on the basis of the issues raised in the originating summons and the annexed affidavit violated the express provision of the Constitution and specifically the 2nd and 3rd Respondents' right to a fair hearing under Section 77(9) of the Kenya Constitution.

(xvii) THAT no evidence has been adduced by the Applicant to show that it had satisfied the mandatory pre-conditions set out in Section 7(i) (h) of the Anti-Corruption and Economic Crimes Act before it could institute the Originating Motion, and the suit herein is incompetent abinitio.

Let me begin by noting that grounds no. (v) to (xiv) are based essentially on "**facts**" that are best suited for determination by way of viva voche evidence at the inter-partes hearing. They cannot possibly be determined on affidavit evidence. Accordingly, I will confine myself at this time on issues of law and procedure which, in any event, represented the bulk of submissions made by Counsel.

Mr. Ahmednasir, Counsel representing the second Respondent, presented six major arguments to demonstrate that the Originating Motion filed herein was incompetent and void abinitio.

First, he argued that the proceedings herein are against the "**Government**" based on the fact that the First Respondent was, at the material time, the Commissioner of Lands, and acted as the servant or agent of the Government. Accordingly, the Court had no jurisdiction to make injunctive Orders against the Government, (see ***Gailey & Roberts v. Commissioner of Customs*** (HCCC No. 77 of 1980 Msa) and ***Kidayu Ole Lepet v. Nkuruna Ole Masikonde*** (2005) e KLR; and in any event the mandatory 30-day statutory notice to the Government required under Section 13A (1) of the Government Proceedings Act had not been issued and served (see ***James Orengo v. Attorney General, HCCC No. 207 of 2002***).

On this particular issue, I uphold the Submission of the Counsel for Kenya Anti-Corruption Commission, Mr. Murei, that the proceedings herein are instituted against the First Respondent in her **personal** capacity, for abuse of office, under Section 46 of the Act, which together with Section 51 creates personal liability for wrongs committed while in office or in official capacity. Having been sued in her personal capacity, there was no requirement to issue the statutory 30-day notice under the Government Proceedings Act.

Mr. Ahmednasir's second objection relates to Kenya Anti-Corruption Commission's competency to bring proceedings on behalf of the public to enforce a public right. According to Counsel, that right belongs to the Attorney General. The answer to that argument is in Section 6 of the Act which establishes Kenya

Anti-Corruption Commission as a body corporate having perpetual succession and a common seal capable of suing and being sued in its corporate name. In my view, Kenya Anti-Corruption Commission has a very clear and undisputed right to bring proceedings in its own name.

Thirdly, Mr. Ahmednasir argues that this suit having been brought under Section 56 of the Act is incompetent because "**a suit cannot originate under Section 56"**; that only an "**application**" (for an Order preserving suspect property) may be brought under Section 56; that Section 56 **presumes** that a suit has been filed (under Section 7(h) (i)) for **recovery** of property. He asks whether what is before the Court is an "**application**" under Section 56, or a "suit". If it is an "**application**", it is unsustainable without an underlying suit. If it is a "suit", then there is **no** application for Orders preserving the property. He argues that the condition precedent to filing a suit is found in Section 7(h) (i) which requires that Kenya Anti-Corruption Commission "**investigate**" the extent of liability for loss of or damage to any public property and then institute civil proceedings for recovery of such property. Here, according to Counsel, there have been no such investigation to warrant the filing of the suit. What is before the Court, is an "**application**" which the Court has no jurisdiction to entertain. Jurisdiction, he submits, is everything (see ***M.V. Lillian 'S' v. Caltex Oil*** (1989) KLR 1 and ***Geoffrey Ndungu Theuri v. Law Society of Kenya*** (CA No. 33 of 1984 Nbi).

In answer to this argument, Mr. Murei, for Kenya Anti-Corruption Commission, has relied on the decision of this Court in ***Kenya Anti-Corruption Commission v. Lands Limited*** (HC Misc. Appl. No. 587/06) to argue that Section 56 creates a **new jurisdiction** giving Kenya Anti-Corruption Commission the power to file an application without a suit, and without reference to Section 7(h) (i); that not all actions are necessarily suits (see ***Mansion House v. John Stansberry Wilkinson*** (C.A. 46 of 1953); and that a procedural defect does not oust the jurisdiction of the Court (see ***Welcome Properties v. Karuga*** (2001) KLR 402).

The argument advanced by Mr. Ahmednasir is attractive, and I have given it anxious consideration. Yes, on first blush, it is easy to come to the conclusion that Section 7(h) (i) of the Act requires that a suit for the recovery of property be instituted, before Section 56 is invoked to seek an Order preserving the property sought to be recovered. That is logical. But I must go well beyond the logical analyses presented by Counsel; I must look at the intention of Parliament in enacting this important legislation; I must consider the mischief that this law intended to address; and I must give it a purposeful interpretation that I believe coincides with the intent of the legislature.

In ***Kenya Anti-Corruption Commission v. Lands Limited*** (supra) I observed as follows;

"***Section 56 (1) empowers this Court to prohibit the transfer or disposal or any dealing with property which "on evidence" was acquired as a result of corrupt conduct. The "application" may be made ex-parte, and the Order of prohibition "shall" have effect for six months.***

This Section clearly envisages that an application will, in the first instance, be "ex parte", and where the Court is satisfied that there is "evidence" to support the grant of the Orders sought, may make the Orders preserving the property for six months (subject to further extensions).

Ordinarily, under the Civil Procedure Rules the Court would grant ex parte restraining Order for only 14 days initially, and direct that the matter be heard inter-partes. Section 56 of the new Act does not envisage an inter-partes hearing but shifts the burden on the aggrieved party to apply to the Court to discharge or vary the Order {Section 56 (4)}.

I am satisfied that this Section creates a new jurisdiction, with a new remedy, and a new procedure. And where it deviates from the Civil Procedure Act and Rules, I must apply and follow the Act. In Syedna Mohamed Burhannudin Saheb vs Mohamedally Hassanally Civil Appeal (No 28 of 1980, Nairobi), the Court of Appeal stated:

"***In construing an Act as this, the ordinary rule as laid down by Esher, M R in R V Judge of Essex County Court (1887) 18 Q B 704, must be applied i.e. … In the case of an Act which creates a new***

jurisdiction, a new procedure, new forms or new remedies, the procedure, forms or remedies there prescribed, and no other, must be followed until altered by subsequent legislation."

I reiterate the same here. I am of the view that the Act allows the use of new procedure. This new procedure, of itself, does not in any way prejudice the Respondents. **Nor can procedure alone invalidate suits**. In the ***Welcome case*** (supra) Ringera, J. (as he then was) stated:

"***The proceedings herein have been initiated by way of originating Notice of Motion. The motion does not purport to be made under any order or rule in the Civil Procedure Rules. Instead it invokes the Companies Act, the Companies Winding Up Rules and the Banking Act. This is not to me surprising for the Civil Procedure Act does not purport to be exhaustive on procedural law in civil matters. Indeed, as Mr. K'Owade pointed out, section 3 of the Act expressly saves special jurisdiction and powers including procedural rules and forms under any other law in force. Such saved laws include, for instance, the Law of Succession Act (cap 160) and the Companies Act (cap 486). The procedure invoked in the instant matter is that under the Companies Act. And I can see nothing in the procedural rules invoked which require that a motion, originating or otherwise, be signed by the Court. But even if the originating process herein were to be viewed as being within the ambit of the Civil Procedure Rules, and in my view it is decidedly not, I would reject the submission that it is nullified by want of signature by Court."***

Justice Ringera then went on to say (at page 409) as follows:

"***I am in agreement with the main thrust of Mr. K'Owade's submissions that a procedural defect does not oust the jurisdiction of the Court and that unless injustice or prejudice is shown defects of form and other procedural lapses cannot vitiate the proceedings. In the instant case, the respondents do not complain of any prejudice or injustice."***

In this case before me, too, the Respondents have not demonstrated any prejudice because of the "procedure" adopted by the Applicant. So, assuming, that a suit had indeed been filed for recovery under Section 7(h) (i) together with an application under Section 56, in my view the Respondent would still be responding to the same issue: whether an Order to preserve the property should issue.

Mr. Ahmednasir argued strongly that Section 7(h) (i) creates a condition precedent which must be complied with before Section 56 can be invoked to issue preservation Orders. He submitted that the Court can exercise its powers under Section 56 only after "investigations" have been completed under Section 7(h) (i). I would respectfully disagree with that proposition. Section 56 states as follows:

"***Section 56: On an ex-parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property on evidence that the property was acquired as a result of corrupt conduct."***

It is instructive to note that the legislature has not used the word "**investigation**" in Section 56. Instead the word "**evidence**" is used. Clearly, in my view, Parliament intended to give the Court the power to "**prevent**" further disposition of property on evidence that it had been acquired by corrupt conduct. Parliament did not say "**on investigation under the Act**". It simply said "**on evidence**". As I stated before, I must provide a purposeful interpretation of this Act, taking into account the mischief it sought to suppress.

In **Interpretation of statutes** by Maxwell, 12th Edition, at page 137 the learned authors state, and I quote:

"***On the other hand, there is no doubt that the office of the judge is to make such construction as will suppress the mischief, and advance the remedy, and to suppress all evasions for the continuance of the mischief . To carry out effectively, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that it has prohibited or enjoined."***

The mischief the legislature intended to suppress was to prevent people from acquiring public property by

corrupt conduct, and to stop the wrong-doers from enjoying their ill-gotten assets.

The fourth and related argument presented by Mr. Ahmednasir is that a suit cannot be commenced by way of an Originating Motion, and the proceedings before the Court are a nullity. I have already addressed this issue in part in the preceding paragraphs. Let me repeat, however, what I said in the **Lands case** (supra).

"***In Saint Benoist Plantations Ltd vs Jean Emile Adrien Felix (CA No 25 of 1954) the Court of Appeal for Eastern Africa said that where a local statute law does not provide a forum of procedure for a particular proceeding, it could be by an Originating Motion. "Originating Motion", the Court said, "means a motion which is not interlocutory but originates the proceedings in question."***

Addressing a similar issue, Justice Rawal, in ***Kenya Anti-Corruption Commission v. Pattni*** (2003) KLR 643 stated:

"***I shall consider the submissions of Dr. Kuria, the learned counsel for the plaintiff, who submitted that if there is no procedure prescribed and there is a right created, then a litigant can come before this court in any manner prescribed by law. He added that procedure of Originating Summons is one of those procedures. He relied on the case of Olive Casey Jaundo & Attorney General of Guyana (1971) AC 972 to support his contention. At page 983 thereof the following observation by Warrington J in Re Meister Lucious and Bruuning Ltd (1914) 31 TLR 3, 8, 29 were adopted with approval, Viz:***

"***Where the Act '(S C Constitution) merely provides for an application and does not say in what form that application is to be made, as a matter of procedure it may be made in any way in which the Court can be approached."***

I can and do take judicial notice of the fact that till the rules of procedure under the Constitution of Kenya were prescribed, our courts were accepting and determining the applications made thereunder by way of Originating Summons which procedure is now prescribed by the Constitution of Kenya (protection of fundamental rights & freedom of individual) Practice 7 Procedure Rules.

Here I reiterate my observations made on the provisions of section 55(3) and section 55(4) of the Act.

In the premises, I cannot find and do not find that these proceedings are one of the three classes of proceedings which can be termed as nullities as observed in the case of In Re Pritchand [1963] 1 All ER 873 and adopted in the case of U Kafuma v Kimborva Builders & Contractors (1974) EA (U) 91.

Thus the proceedings which have been brought before this court are not nullity as I find that there is no fundamental defect in issuing these proceedings, and thus find that the same is properly before the court at this stage.

The chamber summons and orders in pursuance thereof are therefore not vitiated and are not nullities."

I would adopt, and apply here the same reasoning.

The fifth argument presented to this Court was that the Act related to "public" property; that such property had not been defined in the Act; and that there was no evidence that the suit property here was "public". In my view, there is sufficient credible evidence before this Court that the suit land was Government land reserved for public utility for educational purposes. However, this is a matter that requires proper adjudication at the inter-partes hearing, and I will say no more on it at this time.

Finally, Mr. Ahmednasir's sixth and last argument relates to breach of provisions of several statutes relating to limitations of time – e.g. the statutory notice under the Government Proceedings Act, Sections 8(1) and 136(1) of the Government Lands Act. I am not persuaded that there has been such a fundamental breach of any other statutes as to render these proceedings void. However, the validity of

that argument may be tested at the appropriate time when the "**suit**" is filed. For now we are dealing with an Originating Motion under Section 56 of the Act.

With respect to the Third Respondent, Mr. Kamau, its Counsel, argued that the said Respondent was not a necessary party to these proceedings; that the case against it was based on mere allegations; and that it should be struck out. As I said, at the beginning of this Ruling, all issues based on facts, ought to be adjudicated upon at the trial. I cannot do this on affidavit evidence which is diametrically opposed. And because there are no Orders issued against the Third Respondent, and it has not shown what prejudice it stands to suffer, I will not make any Orders for or against it at this time.

Accordingly, and for reasons outlined, this application is dismissed with costs to Kenya Anti-Corruption Commission.

Dated and delivered at Nairobi this 16th day of October, 2007.

ALNASHIR VISRAM

JUDGE