



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

Civil Case 104 of 2007

1. Land and Environmental Law Division

2. Subject of main suit: Environmental/Land

Land – LR 209/12274

i) Forest Reserve Land

ii) Karura – exercised and allocated to M/s Kitusuru Ltd.

iii) M/s Kitusuru Ltd sold and on 45.5 acres to M/s National Social Security Fund for Ksh.350,000,000/- (paid Ksh.292,500,000/-)

iv) Change of government

v) Forest Department notifies M/s National Social Security Fund Land is no longer and was never available to be allocated.

vi) M/s National Security Fund files suit against Kitusuru Ltd. The two directors and the Kenya Government thro' the Commissioner of Lands and the Attorney General.

vii) Later discovered M/s Kitusuru Ltd who were paid Ksh.292,500,000/- was deregistered six months after receipt of payments.

viii) M/s National Social Security Fund removes name of 1st M/s Kitusuru ltd from suit. Pursues two original directors.

ix) Note 3rd party proceeding taken out against H. Kiplangat and Former President arap Moi. Service awaited to be effected.

x) Parties participate in pretrials ready for trial.

3. Application 6 November 2007, prayer

i) Plaint be struck out.

No reasonable cause of action

ii) In alternative

1st defendant name Geoffrey Chege Kirundi be struck out.

iii) Costs be paid.

4) Argument by 1st defendant

i) Limitation of action

ii) Suit brought 9 years later instead of within 6 years.

ii) Corporate personality

Unveiling the company is a Judicial Process

iv) Sale of Land

Caveat Emptor buyer beware.

5) Support by 2nd defendant

i) Limitation of Actions

ii) Land that was sold not capable of being sold.

6) Supported by state consent for Attorney General

i) The Kenya Government supports the striking out of plaintiff.

ii) Suit – Limitation of action.

7) Plaintiff National Social Security Fund

i) Issue of fraud alleged

ii) National Social Security Fund.

Hold title that is not their to use.

Title that has seen plaintiff part with 292,500,000/-.

workers money to defendants, amount to double enrichment.

iii) Directors – former to be held accountable.

8) Held:

9) Case law.

7a) Mapis Investment (K) Limited v Kenya Railways Corporation CA 14 of 2005 court of Appeal, Nairobi.

7b) G.G. Somaiya & Co. Ltd & Another v Govidji Popatlal (1957)EA30

7c) Issa and Suleiman v Michael & Company (1948) 23 KLR 12.

7d) Ultimate Laboratories v Tasha Bioso Ltd.

7e) Corporate Insurance Co. Ltd v Savemax Insurance Brokers Ltd.

8) Statute Law.

8a) The Company Act Cap. 486 Laws of Kenya

Civil Procedure Act 21 Laws of Kenya

8c) Limitation of Actions Act Cap.22 Laws of Kenya

8d) The Transfer of Property Act 1885

8e) The Forest Act Cap 385

9) Advocates

D.O. Owang of Kirundi & Co. Advocates for the 1st defendant/applicant – present

Mwaniki of A.G Chamber for 3rd and 4th defendants – present

E.N. Mwangi of Macharia Mwangi & Co. Advocates for the plaintiff/respondent – present

J.K. Kuria of Kuria Kiraitu & Co. Advocate for the 2nd defendant/respondent – present

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES.....PLAINTIFF

VERSUS

GEOFFREY CHEGE KIRUNDI1ST DEFENDANT

MIKE MAINA KAMAU2ND DEFENDANT

COMMISSIONER OF LANDS3RD DEFENDANT

THE HON ATTORNEY GENERAL4TH DEFENDANT

RULING

I: Application to strike out plaint, alternatively to strike out Geoffrey Chege Kirundi from the suit dated 6 November 2007.

1: PROCEDURE

1. I would easily call this case the Karura Forest Land case which is of public interest. It was coming for trial before this new Land and Environmental Law division on 12 November 2007, when Geoffrey Chege Kirundi, the 1st defendant named herein filed this application to be struck out of the suit and or the whole plaint to be completely struck out.

2. Originally this suit filed by the National Social Security Fund Board of Trustees was before the Milimani High Court of Kenya as a Commercial matter (2004). Warsame J ordered that the file be

transferred to the Land and Environmental Law division of the High Court on 7 May 2007, as the matter was really an issue of land. This case original court file number Milimani Hccc147/2004 was allocated a new number ELC No.104 of 2007.

3. Before the commercial courts, an application by the 2nd defendant Mike Maina was made for third party proceeding to enjoin Hosea Kiplangat and the former Head of state His Excellency Daniel Arap Moi to this suit. This was granted by Njagi J (27 July 2007). The 2nd defendant attempted to serve the two proposed parties but failed to do so. He applied to court for substitutive service which application was heard by Ochieng J (19 June 2006) and rejected on grounds that there was no sufficient demonstration by the 2nd defendant to show that he was unable to trace the two defendants.

4. When the case came before this new division and placed before me by the duty judge (K. Kihara 16 May 2007) (for formal mention 21 May 2007). The parties proceeded to undertake pretrial before the main suit. This they were to do under their own supervision. To this end they appeared before me on 26 July 2007 to confirm the pretrial made was now ready and they took dates for 12 November 2007. On 6 November 2007, an application under certificate of urgency was filed by the 1st defendant Geoffrey Chege Kirundi to strike out the whole suit alternatively to strike out his name from this suit.

II: Background of the main case

5. From the pleadings, affidavits filed in this file the following facts are alleged which facts I am aware are subject to proof in the main suit:-

5.1. Mike Maina the 2nd defendant was the proprietor of a company known as Pelican Engineering construction Company. He used this said company to obtain allocation of the Karura Forest in Nairobi whereby approximately 45.5 acres was demarcated for his use. He instructed the 1st defendant to act for him as his advocate. He is further allegedly instructed the 1st defendant to incorporate a company known as Kitusuru Ltd. This company was to have two directors G.C. Kirundi, the 1st defendant to hold and act as trustee for Mike Maina. Mike Maina was to be the second director. He was to hold the said directorship in trustee of one Hosea Kiplangat the proposed third No.1 party.

5.2 This company Kutusuru Ltd was incorporated on 19 October 1994 and was allocated 45.5 acres of Karura Forest which land laid between Old Muthaiga and the Kitusuru Estate. It was prime land. Pelican Engineering Construction Company therefore had nothing more to do with the land save that its proprietor Mike Maina was a director of Kitusuru Ltd.

5.3. The 1st defendant, presumably on instruction, approached the plaintiff National Social Security Fund Board of Trustee with an offer to buy the Parcel of land demarcated to 5 acres of land or thereabout each and to be sold as residential property. A proposed “ Sarit centre” like mall was to be constructed next to the “Rib Shack” restaurant, presumably to enhance the value further of the property. A price offer of Ksh.350,000,000/- was made. The National Social Security Fund accepted this offer.

5.4. The Kitusuru Ltd obtained title from the Government of Kenya. They were allocated the 18.41 hectares (or 45.5 acres) on 1 April 1995. Kitusuru Ltd was incorporated and registered as a Limited Liability company as stated above on 19 October 1994. The plaintiff National Social Security Fund bought the property land that was registered under The Registration of Titles Act (Cap.281) Grant LR 66195 for a term of 99 years from April 1995 being LR 209/12274. They paid for the title land, which was issued by the Registrar of Titles on

21 June 1995 in the Lands Department, a total sum of Ksh.292,500,000/-. The land was transferred to them on 5 October 1995 by the Kitusuru Ltd.

5.5. The sum of Ksh.292,500,000/- was workers money held in trust by the Trustee of the National Social Security Fund.

5.6 In 2003, a new Government came into power. The Forest Department wrote to the plaintiffs Board of trustee that they infact do not own the land they have title for. The reasons being that the said Forest in which LR 2009/12274 had been excised was gazetted a Forest Reserve by a Proclamation No.44 of 1932. It was further declared a central Forest under Legal Notice 174 of 30 May 1964. Thus according to the Forest Act Cap.385, only the Minister in charge of Government Forests is permitted to alter the Forest boundary. The procedure therefore of issuing the 28 days notice and to further gazettee the proposed alternation of the Forest boundary through the Kenya Gazzettee had not been complied with by law (Section 4 (1) (2) Forest Act Cap.385 refers).

5.7. The plaintiffs of the Board of trustee were in a dilemma. Here they held a title that was issued by the Government of Kenya in the former regime that was worth nothing. They require to accounts as trustees to Ksh.292,500,000/-. Their conclusion was to file suit. They did so against the Kitusuru Ltd, the only two directors in the said company Geoffrey Chege Kirundi an advocate of the High Court of Kenya and whose firm undertook the conveyance, Mike Maina Kamau the proprietor of Pelican Engineering Construction.

5.8. The suit had been filed on 17 March 2004. The 1st defendant Geoffrey Chege Kirundi entered appearance under protest. The plaintiffs discovered then that the Kitusuru, limited company had been dissolved after being struck out the registration. Namely,

i) The company Kitusuru Limited was registered on 19 October 1994.

ii) The company was registered as owner of the title in question on

22 June 1995 with a lease running from 1 April 1995 for 99 years under the Registrar of Titles Act Cap.281 Laws of Kenya.

iii) The company sold the property and transferred the same to the plaintiffs Board of Trustees on 5 October 1995 for a consideration of Ksh.292,500,000/-

iv) The company was struck out of the register and dissolved on

26 July 1996 Kenya Gazette 4287 of 2006 Ref. No.61662. This was ten months after transfer of property being made.

5.9 Because Kitusuru Ltd had been dissolved, the plaintiff amended their plaint and sought leave of the court to strike out M/s Kitusuru Ltd from this case which was duly granted by Mutungi J (23 April 2004).

5.10. The other salient fact is that the title deed LR209/6776 was issued with authority from the Ministry of Environment and National Resources in 1994 authorizing the excise of 18.41 hectares (45.5 acres) from Karura Forest. The Commissioner of Lands issued a title deed in the name of Kitusuru Ltd giving it an indivisible title that is not to be questioned.

III: Application 6 November 2007.

6. The 1st defendant filed under a certificate of urgency the application of 6 November 2007 that sought the following orders:-

6.1. “The plaint filed herein be struck out on the ground that it discloses no reasonable cause of action.

6.2. That in the alternative, the first defendants name be and is hereby struck out from the plaint herein.

6.3. _____ . . . costs.”

7. The grounds of this application is:-

- 7.1. "That the plaintiff is non-suited and there is no cause of action against the 1st defendant applicant herein.
- 7.2. That the suit discloses no cause of action and is in any event un maintainable/untenable and therefore incompetent.
- 7.3. The plaintiffs suit is statute barred under Limitations of Actions Act Cap.22 Laws of Kenya.
- 7.4 That the suit as filed is vexatious and an abuse of the legal process of the court."
8. This application is not supported by any affidavit. I am therefore unable to know why the chamber summons is being sought.

I nonetheless will summarize the arguments by parties.

9. Geoffrey Chege Kirundi was present to court to argue the application personally. I did direct that another advocate argues the application as he was represented by his same firm. It would have been a suitable situation if another firm of advocate had defended him and not his firm in this matter. Nonetheless the arguments in brief were as follows:-

A) Argument by the applicant.

10. The applicant main concern was that the suit was brought 9 years after the cause of action arose instead of the required six years.

10.2. Secondly, the lifting of the corporate personality and or the unveiling of the company was a judicial process.

10.3. Thirdly, the maximum Caveat Emptor or buyer beware applies to this sale of land. The Board of Justices advocate was negligent by not confirming the facts in question before entering into the sale transaction.

B) Arguments by the 2nd defendant.

11. The 2nd defendant Mike Maina argued that indeed this suit is time barred and accordingly supports the 1st defendant case.

11.1. Secondly, the land that was sold was not capable of being sold.

11.2. Authorities dealing with fraud were relied on.

C) Arguments by the Government of Kenya through the Attorney General.

12. That the Government of Kenya supports the application of striking out the plaintiff and the 1st defendant from this cause.

12.1. Secondly, this suit indeed is time barred although the state admits as having been property served with this suit.

12.2. No mention was made on the issue of the workers money of Ksh.292,500,000/-.

D) Arguments by the plaintiff, national Social Security Fund.

13. The allegation brought by the plaintiffs in this case is one of FRAUD. The plaintiffs hold title that is not theirs to use. The plaintiffs have parted with Ksh.292,500,000/- of workers money and require the

defendants to refund these sums of money. If they do not, it would amount to double enrichment.

13.1. Authorities dealing with lifting the veil at execution stage were relied on.

Finding

14. This case as stated earlier is of public importance. It is a case whereby fraud is alleged on the part of the 1st and second defendant. It is a matter concerning land under the Registration of Titles Act Cap.281 Laws of Kenya. At the same time there are contractual obligation raised by the parties whether indeed there was a sale of land and or whether that land was being capable of being sold. These and other factors would part and parcel of evidence before his court.

15. The issue now before me concerns the 1 defendant. He is an advocate of the High Court of Kenya and was involved in the conveyance proceeding of this matter. If he was only an advocate to this matter it would have been understandable that his locus in this suit would be questioned. In this case he not only was the advocate but also the director of the company in question M/s Kitusuru Ltd. He states he is not correctly enjoined and should be struck out. Surprisingly the Government of Kenya supports this application but does not discloses how it intends to deal with the Ksh.292,500,000/- before the court that has been duly paid out.

16. I believe the issue of fraud on matters touching land may not have a limitation period. Nonetheless this may be raised in the main suit and as stated by the plaintiffs the same issue arises within the agreed issues.

17 I hereby dismiss this application with costs to the plaintiff respondent.

Dated this 19th day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

D.O. Owang of Kirundi & Co. Advocates for the 1st defendant/applicant – present

Mwaniki of A.G Chamber for 3rd and 4th defendants – present

E.N. Mwangi of Macharia Mwangi & Co. Advocates for the plaintiff/respondent – present

J.K. Kuria of Kuria Kiraitu & Co. Advocate for the 2nd defendant/respondent-present