



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Civil Case 1294 of 2004

MUNICIPAL COUNCIL OF GARISSA PLAINTIFF

VERSUS

ADEN KEHIR ADEN 1ST DEFENDANT

MOHAMED MAHAT KUNO SUNKURI 2ND DEFENDANT

ABDI HASSAN ABUBAKAR 3RD DEFENDANT

RULING

By its Chamber Summons of the 19.11.2004 the Applicant seeks an injunction in the terms of prayer 2 of the Chamber Summons in the following terms: -

(2) “The Defendants/Respondents, their employees, agents and or servants be restrained by way of an injunction from occupying, developing, fencing or erecting structures or buildings on L.R. numbers Garissa Township/Block/314, Garissa Township Block 1/315 and Garissa Township Block 1/316 and or interfering with the authorized use of the land as a Bus Park or the development of the land as a Bus Park.” The grounds on which the application are based is that the land in question is public land and was originally known as Garissa Block 1/106 which had been wrongly acquired by the Respondents after the original piece of land had been unlawfully subdivided.

Annexed to the supporting affidavit to the application is a certificate of lease in respect of Garissa Township Block 1/315 in favour of the first Respondent, a certificate of lease in a respect of Garissa Township Block 1/316 in favour of the second Respondent, as well as a lease from the County Council of Garissa in respect of plot 316 in favour of the second Respondent.

The third Respondent is stated in the Plaint to be the owner of Garissa Township Block 1/314.

In all cases the Applicant alleges that the title documents are invalid null and void ab initio and it is for this reason that it seeks the injunction prayed for.

The Respondent also say that they have certificate of title registered under the provisions of Registered Land Act (The Act) and have indefeasible titles to the land by virtue of section 28 of the Act, which says that the right of a proprietor shall not be liable to be defeated except as provided in the Act (The Act).

Section 143 (1) and (2) states: -

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than

a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as affect the title of a proprietor who is in possession and acquired the land lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission fraud or mistake or substantially contributed to it by his act, neglect or default.

In the Plaint the Plaintiff alleges the titles obtained by the Respondent were acquired by fraud of which particulars are given and seeks declarations that the acquisition of the title deeds was fraudulent and as such they are void ab initio and that they are not the registered proprietors of the registered piece of land.

In order to succeed the Applicant must show that it has a prima facie case with a probability of success that damages would not be an adequate remedy and if in doubt on which side the balance of convenience falls.

If the Plaintiff is correct in its contentions, damages would not be an adequate remedy. This is because the suit premises were allocated to be the bus park for Garissa Town and if they have been wrongly allocated to the Respondents the town would suffer the loss of Bus Park as a result.

Mr. Mwangii for the Applicant submitted that the land in which the bus park was intended to be was land vested in the Municipal Council of Garissa. That as such the Garissa County Council, which issued the said title, documents had no right to do so as the said land from which these were created did not belong to it and that in any event the titles having been issued by way of lease to the Respondents this presupposes that the lessor had title to issue the leases in which event if the issue of the title was not a first registration and the Plaintiff is entitled to rely on section 143 of the Act referred to above.

Mr. Ahmednasir for the Respondent referred to section 115 (1) of the constitution, which states that

“All Trust Land shall vest in the County Council within whose area of jurisdiction it is situated”

It was his submission that the Applicant was not therefore the owner of the land but was vested in the county council of Garissa.

Undoubtedly prima facie the Respondent are the registered owner of the said piece of land and the onus is on the Applicant to show they were acquired through fraudulent dealings.

From a common sense point of view for a local authority to give away public land for private development is abuse of its power, which there has been much said, in the recent time. However the determination of these matters is not a matter for me in an application of this kind but to be decided on a full hearing of the case.

I do not think the Applicant have satisfied the first leg of the case of Giella and Cassman Brown. To determine the issues raised can only be done at a full hearing of the case. In view however of its importance I will set the case down for hearing on a priority basis. The balance of convenience fall in favour of the Applicant with the provision that the relief it seeks now is a matter for the past as the parcel of the land have been substantially developed. I therefore order that the status quo remain until the hearing of this case, which means neither party can do anything in connection with or relating to the suit premises until the suit is heard. Costs will be in the cause.

Dated and delivered at Nairobi this 23rd day of June 2005

P.J. RANSLEY

JUDGE