**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAKURU**

**CIVIL SUIT 260 OF 2004**

**THE ATTORNEY GENERAL……..……PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED……..1ST DEFENDANT**

**AFRAHA EDUCATIONAL DEVELOPMENT CO. LTD…….2ND DEFENDANT**

**EZEKIEL KARANJA NDUNE..……..3RD DEFENDANT**

**ZABLON NGOTHO ISAAC…..……..4TH DEFENDANT**

**RULING**

By an Amended Plaint dated the 5th of October 2004, the Attorney General has sued the Defendants jointly and severally claiming, inter alia , for a declaration of this Court that the 2nd Defendant held parcels Number Nakuru Municipality/Block 2/488 and Subukia/Subukia/4/1(Ngamani) in trust for the Plaintiff. The Plaintiff has further sought the declaration of this Court that all that parcel of land known as Nakuru Mun icipality/Block 2/488 is the rightful property of the Plaintiff and that the 2nd, 3rd and 4th Defendants had not and never had any chargeable interest in the said parcel of land. In the said Amended Plaint which runs into fifty two paragraphs, the Plaintiff has pleaded fraud and misrepresentation on the part of the 3rd and 4th Defendants and breach of trust and illegal conduct in respect of the 2nd and 3rd Defendants. The Plaintiff has also particularised several instances that it claimed that the 1st Defendant acted in constructive or actual knowledge that the suit land in question was owned by the Plaintiff and therefore could not be dealt with in any manner whatsoever to the detriment of the Plaintiff's interest.

Contemporaneous with filing the said Amended Plaint, the Plaintiff filed an application under the provisions of Order XXXIX Rules 1, 2, 3 of the Civil Procedure Rules, Section 3A and 63(e) of the Civil Procedure Act seeking the orders of this Court that the Defendants jointly and severally be restrained from selling, disposing of, advertising for sale dealing with or interfering in any manner whatsoever with the parcel of land known as Nakuru Municipality/Block 2/488 or any parts or subdivisions including Nakuru Municipality/Block 2/696, 2/697,2/699,2/700,2/701, 2,702, 2/703, 2/704, 2/705, 2/706, 2/707, 2/708, 2/709, 2/710, 2/711, 2/712, 2/713, 2/714, 2/715, 2/716, 2/717, 2/718, 2/719 and 2/792 pending the hearing and determination of the suit. The grounds in support of the application have been stated on the face of the application. In summary, the Plaintiff claims that the said parcel of land which is the subject matter of this suit, and which two public schools have been built, namely Afraha High School and Langa Langa Secondary School, belongs to the Plaintiff who had not granted consent for the alienation of the said parcel of land to any other person, the said parcel of land having been earmarked for public purposes

and its user having never changed. The Application is supported by the annexed affidavit of Professor Karega Mutahi, the Permanent Secretary of the Ministry of Education. When the Defendants were served with the application, the 1st Defendant filed a Notice of Preliminary Objection to the Plaintiff's application. The grounds in support of the said Preliminary Objection are that the Plaintiff did not have locus standi to bring, maintain and prosecute the suit. The 1st Defendant further stated that the Plaintiff's alleged interest in the said property could not affect the 1st Defendant's contractual rights therein. The 1st Defendant further claimed that the suit filed by the Plaintiff was vexatious and in any event time barred under the provisions of the Limitation of Actions Act. Mr Chacha, Learned Counsel for the 1st Defendant was allowed to raise the said Preliminary Objection when the Application for injunction came up for hearing.

Mr Chacha submitted that the Plaintiff did not have locus standi to bring, prosecute and maintain the suit. The leasehold title in respect of the suit land was registered in the name of the 2nd Defendant which position had been confirmed in the previous proceedings in Kenya Commercial Finance Co Ltd –versus- Afraha Education Society reported in [2001]1E.A. 86. Learned Counsel submitted that the 2nd Defendant was a limited liability company with a distinct and separate identity from all other persons with powers to sue and be sued. The 1st Defendant, through its Counsel submitted that the Plaintiff could not possibly have an interest in private property owned by a limited liability company. The 1st Defendant submitted that the argument made by the Plaintiff that it could intervene to enforce what it considered to be a public right in respect of the said parcels of land did not have any basis in law as was held in the case of The Attorney General –versus- Kenya Commercial Bank Ltd Nrb HCCC No 329 of 2001 (unreported). The 1st Defendant further argued that the Court of Appeal having ruled that the said parcels of land were private land, the Plaintiff could not therefore bring a suit and claim that the parcels of land in question was public property.

The 1st Defendant submitted that once the leasehold title in respect of the said parcel of land had been issued, the only interest that the Government had over the said property was the revisionary interest. The 1st Defendant submitted that the Plaintiff was engaged in a legal misadventure as it had not deemed it fit to join the many suits that had been filed before in respect of the said parcels of land. The 1st Defendant submitted that the Plaintiff did not have any overriding interest as defined by Section 30 of the Registered Land Act and further could not interfere with the contractual obligations of the 2nd Defendant to the 1st Defendant in the charges which were duly registered. The 1st Defendant further submitted that the entire suit filed by the Plaintiff was vexatious and time barred. The 1st Defendant submitted that the allegations of fraud and misrepresentation could not be made after the expiry of three years. In the instant case, the 1st Defendant submitted, the Plaintiff is alleging that the fraud and misrepresentation occurred in 1983 which more than twenty one years to date. The 1st Defendant urged the Court to strike out the application.

Mr Omae, Learned Counsel for the 2nd, 3rd and 4th Defendants supported the submissions made by the 1st Defendant. He submitted that the two schools were managed by the Board of Governors which had power to sue and be sued. It was learned Counsel's submission that the Plaintiff could not directly sue on behalf of the said schools. Learned Counsel further submitted that the Plaintiff could not purport in this suit to disclaim the title issued to the 2nd Defendant by the Commissioner of Land yet the Government was supposed to protect and guarantee titles issued by the said Commissioner of Lands. Mr Omae submitted that the Application filed by the Plaintiff was an abuse of the due process of the Court as the Court of Appeal had made a determination of the matters in issue. He urged this Court to strike out the application.

Mr Njoroge, Learned Counsel for the Plaintiff submitted that the Plaintiff has locus standi to bring the suit as the two schools were managed by the Ministry of Education which had a duty to protect its public institutions. The Plaintiff submitted that it had pleaded in its amended plaint that the titles issued to the 2nd Defendant was issued by fraud and misrepresentations which induced the Commissioner of Land to issue the titles in question. Mr Njoroge argued that the Ministry of Education did not sanction or give consent for the said parcels of land to be registered in the name of the 2nd Defendant. It was the Plaintiff's submission that the said registration was therefore illegal, null and void. The Plaintiff further submitted that the subsequent charging of the said property to the 1st Defendant was therefore tainted

with illegality as the 1st Defendant was presumed to have constructive or actual knowledge of the lack of capacity of the 2nd Defendant to own the said property and therefore its capacity to charge the said property to the 1st Defendant. The Plaintiff submitted that it was its case that the series of transactions leading to the registration of the 2nd Defendant as the owner of the suit land was fraudulent and therefore the 1st Defendant could not have any right in law to sell the said property by public auction pursuant to an alleged charge. Mr Njoroge submitted that the Plaintiff had brought the suit on behalf of the members of the public who had built the schools in the spirit of "Harambee ". The Plaintiff distinguished the case of The Attorney General –versus- Kenya Commercial Bank Ltd (supra) by stating that the present suit involved matters of public interest unlike the above case which related to a suit involving a parastatal. Mr Njoroge further submitted that the Plaintiff had authority by virtue of Section 12 of the Government Proceedings Act to bring proceedings on behalf of any officer or department of the Government. Mr Njoroge submitted that on the said basis the Attorney General had locus standi to bring the suit. He referred the Court to the decision of Ruturi & Anor –versus- Minister of Finance & Anor [2001] 1E.A. 253 in support of submission. It was the Plaintiffs contention that where there was an interest, however remote, a party could not be locked out of the Courts on the basis of locus standi; such a party should be allowed to ventilate its case before the Courts. In the instant case, the Plaintiff submitted, the Ministry of Education had an interest in the welfare of the students and the teachers in the said two schools. For the said reason the Plaintiff submitted that it had locus standi as it had proved that it had sufficient interest in the matter.

Mr Njoroge submitted that even though a decision had been made in respect of the said parcel of land, the Plaintiff was not a party to the said suits. It was his submission that the said suits were filed as a smokescreen to conceal the fact that the said parcels of land were owned by the public. It was the Plaintiff's submission that the history of the land could not be divorced from the issues related to the administration of the schools and further that the conduct of the 1st Defendant vis-à-vis the conduct of the other Defendants were vital consideration in determining this suit. The Plaintiff further submitted that the suit filed was not vexatious as it sought to enforce a public right. Mr Njoroge further submitted that the Plaintiff's suit was not barred by the provisions of the Limitation of Actions Act, as according to the Plaintiff, the time started running when the fraud was discovered.

I have anxiously considered the rival arguments made by the parties to the Application. I have also read the pleadings filed by the parties to this Application. The issue for determination by this Court is whether the Preliminary Objection raised by the 1st Defendant has merit. The 1st Defendant has submitted that the Plaintiff did not have locus standi to bring this suit. It is the 1st Defendant's submission that the suit land is registered in the name of the 2nd Defendant and therefore the Plaintiff cannot purport to come to Court to restrain the 1st Defendant from exercising its statutory power of sale after the 2nd Defendant had failed to repay the loan amount advanced to it. The Plaintiff has submitted that it has sufficient interest over the suit land. The Plaintiff has submitted that even though the suit land is registered in the name of the 2nd Defendant, the said title was obtained fraudulently and against the public interest of the Educational Institutions on whose behalf the Plaintiff has brought the suit. Mr Chacha for the 1st Defendant submitted that a finding had been made by the Court of Appeal in respect of the suit land. It was further the 1st Defendant's submission that the Plaintiff had not demonstrated that it had a legally recognisable interest in the suit land. I have considered the said arguments made. In Kenya Commercial Finance Company Ltd –versus- Afraha Education Society Civil Appeal No. 142 of 1999 (Nakuru) reported in [2001]1 E.A. 86 the Court of Appeal held in respect of the suit land at page 89 as follows:

"In dealing with the Application before him, th e Learned Superior Court Judge skipped dealing with the first and second conditions referred to above and straight away proceeded to address himself on the third condition in regard to the Application before him. Had he sequentially addressed himself on t hese conditions he would, on the material before him, have found that the first and the second Respondents had no registered interest in the land comprised in title number Nakuru Municipality/Block 2/488 and therefore had not demonstrated that they have a prima facie case with a probability against the Appellant, third, fourth and fifth Respondents. If so, no inter locutory injunction would be available to them. In the result, we think that the Learned Judge was in error when he granted the first, and se cond Respondents an interlocutory injunction restraining the Appellant, third, fourth and fifth Respondents by themselves their agents, servants and or employees from advertising for sale and or selling or entering into the aforesaid

land pending the heari ng and determination of the Nakuru High Court Civil Suit No. 566 of 1998."

The Court of Appeal in the above referred Appeal allowed the Appeal after it found that the Plaintiffs in the said suit filed against the bank had not demonstrated that they had a registrable interest over the said parcel of land. The Plaintiff's position in this suit is similar to that of the Plaintiffs in the said suit referred to by the Court of Appeal. The Plaintiff has admitted that it does not have a registrable interest over the suit land. It is the Plaintiff's case that the title deed in respect of the suit land was fraudulently issued to the 2nd Defendant. The Plaintiff is of the view that because the said title was fraudulently issued, the 2nd Defendant could not therefore have authority to charge the same to the 1st Defendant. I do not however agree with the Plaintiff's submission.

This Court at this stage cannot look beyond the finding of the Court of Appeal that the 1st Defendant has a right to advertise the suit land and recover the defaulted amount. This Court cannot further overrule the decision by the Court of Appeal which found that the 2nd Defendant being the registered owner of the suit land could charge the same to the 1st Defendant. If this Court was to uphold the Plaintiff's argument, a bad precedent would be set where parties to a transaction in land would not only have to satisfy themselves that the land in question is registered but also trace the history of the land to establish whether or not the title of the said parcel of land was legitimately acquired. Were this Court to give such a finding, it would cause chaos in dealings related to land. It would also make nonsense of the title deeds issued and guaranteed by the Government in respect of parcels of land owned by individuals.

In the instant case, the proposition put forward by the Plaintiff in respect of the suit land cannot possibly hold. The Commissioner of Lands issued the title in respect of the suit property to the 2nd Defendant more than fifteen years ago. The 2nd Defendant charged the said property to the 1st Defendant. The 2nd Defendant then defaulted in paying the said amount advanced to it by the 1st Defendant. Several suits have been filed by various Plaintiffs in respect of the said suit land. To name but a few, the suits are The Board of Governors, Afraha High School & Others – versus- Afraha Education Society & Others Nakuru HCCC No. 566 of 1998, David Manyara –versus- Afraha Education Society Eldoret HCCC No. 107 of 1999, Republic –versus- The Attorney General & 2 others Nakuru HC Misc App No. 216 of 2002 and Loice Wangari Njuguna –versus- Afraha Education Development Co. -versus- Kenya Commercial Bank Nakuru HCCC No. 244 of 2004. During the pendacy of all the above suits, the Plaintiff in this case did not deem it necessary or appropriate to intervene as a party to the said suit. It is only after the last suit had been struck out for being Res judicata, vexatious and an abuse of the due process of the Court that the Plaintiff filed the current suit. It has not been lost to this Court that the Plaintiff only entered the fray when the other interested parties were caught in a legal limbo as a result of the decision given by the Court of Appeal.

The Plaintiff in the instant case is thus fighting a proxy war on behalf of the interested parties whom the Courts have ruled against. Mr Njoroge has raised an interesting argument that because the Ministry of Education has now joined the fray to protect the interest of the teachers and the students of the two schools, this Court should ignore previous decisions given by the Courts in respect of the said suit land as the Plaintiff was then not a party to the said suits. The Plaintiff in my view is running away from the reality of the matters in issue in this case. The matter in issue is the suit land which the Courts have already made a determination concerning its ownership and the rights of the 1st Defendant, which holds a legal charge over the said property. The Plaintiff in filing this suit is playing to the gallery so that it can be seen to have done something as regards an institution, whose land it had ceded control to the 2nd Defendant. Unfortunately the Plaintiff is attempting to undo whatever harm it deemed to have been done when it is fifteen years too late. The Plaintiff is closing the stable after the horse has already bolted off. The Plaintiff cannot purport to impeach the title which was issued by a department of Government after the due process of the law had been followed. The public interest that the Plaintiff is seeking to invoke, cannot be enforced to the detriment of the private proprietary rights which the Government itself conferred.

The Plaintiff in this suit has stated that it has brought the suit on behalf of the Permanent Secretary, Ministry of Education Science and Technology, the Commissioner of Lands and in his own name on behalf of all members of the General public in the Republic of Kenya in the public interest. I do not see

how the Plaintiff from the above description could be said to have locus standi over the suit land. It is interesting that the Commissioner of Land has been thrown in to a good measure as party to this suit, presumably to bolster the Plaintiffs contention that the title to the suit land was fraudulent obtained. This Court finds that the fact that the Commissioner of Land has agreed to be enjoined to this suit to disown the title that it issued to be rather mischievous. As the guarantor of all titles, the Commissioner of Lands could not possibly be a party to a suit against itself, that is, agreeing that it fraudulently colluded with the 2nd Defendant to have the title in respect of the suit land issued.

As stated earlier in this ruling, the Plaintiff brought this suit after all the other interested parties had failed in their quest to prevent the 1st Defendant from selling the suit land to recover the amount advanced to the 2nd Defendant. The Plaintiff has brought this suit as a proxy of litigants whom this Court and the Court of Appeal have ruled that they have no legitimate right over the suit land. The Plaintiff has no locus standi to bring this suit.

Further the Plaintiff could not purport to bring a suit on behalf of Schools which have duly established Board of Governors as provided for under Section 10 and 11 of the Education Act (Cap 211 of the Laws of Kenya). The said Sections of the Act give the Board of Governors exclusive power to have perpetual succession, with a common seal with power to hold both movable and immovable property, and power in its corporate name to sue and be sued. In the instant case, the Board of Governors of the School filed suit and sought an application for injunction which application for injunction was disallowed by the Court of Appeal when it was held that the Board of Governors of the School did not have a registrable interest in the suit property. As was held in The Attorney- General –versus- Kenya Commercial Bank Ltd Nairobi HCCC No. 329 of 2001 (unreported) the Attorney General may not bring suit on behalf of a public body which the law has specifically provided that such a body should be independently run and managed. In the present case, the Plaintiff has clearly overstepped its authority in trying to intervene in a case involving a school managed by a Board of Governors which Sections 10 and 11 of the Education Act grants authority to sue and be sued on behalf of the school.

Further the Plaintiff has brought this suit in abuse of the due process of the Court. In Mitchell and others – versus- Director of Public Prosecutions & Anor. [1987] L.R.C. 127 a decision of the Court of Appeal of Granada, Justice Hynes, the President of the Court reading the Judgment of the Court stated at page 129:

“In a civilised society legal process is the mach inery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly. It can be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior m otive, for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of that process. But the circumstances in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of Court may and usually do provide for its frustrat ion in some instances. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceeding, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the same parties : Stephenson v Garnett [1898] 1 QB 667 , or involving even a different party: Reichel v Magnath (1889) 4 App Cas 665. It has been used to strike out a civil action against a police authority for damages for assault by policemen, on proof that the plaintiff’s moti ve was not to obtain redress for his alleged injuries, but the collateral one of bringing pressure to bear on the Home Secretary to release him from a life sentence he was serving on a conviction of murder: Hunter v Chief Constable of West Midlands and Another [1981] 3 All ER 727 . It has been used to stay as an abuse of process, proceedings which were frivolous and vexatious; and in Jowitt’s Dictionary of English Law (2nd ed. 1977) it is stated that “a proceeding is said to be vexatious when the party bri nging it is not acting in good faith and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result.” This inherent judicial power, though sparingly used in earlier and more technical times, has been res orted to with even increasing freedom and with most salutary effect in modern practice.”

In the instant case this Court finds that the Plaintiff has abused the due process of the Court. The Plaintiff has not been honest in bringing this suit before Court. The Plaintiff has infact brought this suit as a proxy of litigants whom this Court had earlier had their applications for temporary injunction dismissed. The suit has been brought in contravention of statute which specifically mandates schools to be managed by Board of Governors and not by the Permanent Secretary, Ministry of Education. Apart from that, the Plaintiff has not established that it has locus standi to bring this suit against the Defendants, jointly or severally. The Plaintiff has not established, what interest if any, it has on a parcel of land which is registered in the name of an individual. The Plaintiff has further not established, what public interest it is seeking to enforce that can override an individual's proprietary right to land, as in the present case the right of the 1st Defendant to exercise its statutory power of sale of the suit land. This is one clear case where the abuse of the due process of the Court is manifest. I will invoke the inherent jurisdiction of this Court and order that the Plaintiff's suit be struck out with costs to the Defendants. The Plaintiff has no locus standi to bring this suit against the Defendants and further this suit has been filed in abuse of the due process of the Court. I will not consider the other issues raised on preliminary objection as the first ground raised suffices.

**It is so ordered.**

**DATED at NAKURU this 9th day of November, 2004.**

**L. KIMARU**

**AG. JUDGE**