

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Case 113 of 2004

JAMES MWANGANGI & 64 OTHERSAPPLICANT

VERSUS

WOTE TOWN COUNCIL.....RESPONDENT

R U L I N G

The suit is brought by 65 plaintiffs against Wote Town Council. The suit was filed along with the application dated 6/10/04 which is brought pursuant to Section 3 A of the Civil Procedure Act, Order 39 Rules 1 and all other enabling provisions of law. The application was filed under Certificate of Urgency and the applicant seeks an order of injunction to restrain the defendant, its agents, servants from replanning, alienating, selling, transferring or otherwise disposing of any portion of the land reserved for Wote Bus Park which is known as *MAKUENI/UNOA/1574*. They also pray for costs of the application.

The grounds upon which the application is brought are found in the body of the application. The grounds are that the defendant is acting contrary to the provisions of the constitution of Kenya, Government Land Act, Trust Land Act, Physical Planning Act, to the detriment of the applicants; that the suit land is vested in the defendant/Respondent as trust land within the meaning of Section 114 and 115 of the constitution and disposal of the land can only be done for the benefit of the applicants and inhabitants of Wote town; that the Respondent has drawn a local development plan for the said park which alters the original plan by demarcating plots and offering them for sale to the public despite the applicants' objection; that the applicants have a locus standi to bring the suit and will suffer irreparable loss and damage if the orders of injunction are not granted as the plans will defeat any future expansion and lastly that the balance of convenience favours the plaintiff.

A supporting affidavit was sworn by the 2nd applicant one Francis Mutisya Kitungo a resident of Wote who has sworn it on behalf of the other plaintiffs and himself.

In addition to the grounds the deponent avers that the Bus Park in question is a public utility, which was bought from one Major Nzomo using public funds and land in trust for the general public but that on 5/8/04, the Respondent decided to replan the Bus Park by excising a portion of it for demarcation and sale to members of public in order to raise revenue to pay debts. The decision was confirmed by the full council on 22/9/04 and that the said decision did not comply with constitution and other laws of the land. The applicants were not invited to give their views and the council in execution of the said decision has given notices to traders at the Bus park open air market to relocate as the plots are secretly sold to the public. It is also deponed that there has been a struggle between members of public and the Respondents over this park and that the only reason for sale of the park is to raise money to pay debts and yet there is in place machinery for paying of debts. On 5/10/04, the Respondent sent its agents to demolish kiosks and structures on the disputed land and cleared the land for demarcation and that is why the applicants brought this application.

Mr Wambua Kilonzo represents the Respondent. He filed grounds of objection and a replying affidavit was sworn by John Mosongo the clerk to Wote Town Council. It is avered that the court lacks jurisdiction to grant the orders; that application is incompetent, bad in law and a non starter; that the applicant lacks the locus standi in this suit; that the suit is overtaken by events and orders of injunction cannot issue. The affidavit in opposition reiterated the grounds and added that the Respondent is performing its statutory duties under the Local Government Act and replanning is one of its duties and cannot be challenged as the applicants purport to do. It is claimed that the park is not trust land but private land and the Respondents can do with it what it wishes and the applicants have failed to show

what loss they will suffer. It is avered that the land was purchased from one Major Nzomo for Ksh. 2.8 million and that the transfer of the land is not yet to be effected because the whole purchase price has not been paid and the idea of replanning of the Bus park was to enable the council raise money to pay for the purchase price and that at the time of the decision to replan, the seller of the plot wanted payment of 1,760,000/= and that the planned replanning has been approved by the relevant arms of Government, Public Health and Physical Planner. That the applicants are only concerned with their own personal interests and not those of the public.

It is the contention of the Respondent that the suit is non starter because the wrong party has been sued. The applicant describes the Respondent as **WOTE TOWN COUNCIL**. Indeed Section 28 (3) of the Local Government Act provides that every County or town council shall be referred to as “the town council of ...” “the county council of” The defendant/Respondent is not properly described but mere misdescription of a party cannot render a suit incompetent. This matter has just been filed and the court has wide discretion under Order 1 Rule 10 of the Civil Procedure Rule to order an amendment of the parties on its own motion or upon an application.

The issues that stand out in the arguments before this court are: whether the applicants have a locus standi in the matter; whether the land in question is trust land and whether the orders of injunction can issue as prayed.

So, is the land in question trust land as alleged by the applicant on one hand and yet denied by the Respondent. Section 114 of the constitution of Kenya confers the status of trust land to, inter alia, all land which was in the special areas or reserves and which was registered in the name of the Trust Land Board, or land which was situated outside the Nairobi (area as of 12/12/1964) the free hold title to which was registered in the name of a county council. Section 115 (2) of the constitution goes on to provide that each county council holds the trust land vested in it for the benefit of the persons who ordinarily reside on that land. If the land in issue is trust land then the applicants who claim to be residents of Kitui and doing business on it would have an interest in what the council does with the land. The question of whether or not the land in dispute is trust land is, therefore, a triable issue best dealt with at a full hearing. That notwithstanding, the court was told that the land in question was bought by the council from one Major Nzomo. The court has not had the benefit of seeing the sale agreement to know the exact terms. It seems that the land has not yet been transferred into the name of the council. It is the same land that the council wants to sell to offset the purchase price. The Respondent claims that it is private land but minutes of the council’s development committee dated 10/11/99 at minute 17/99, the council was supposed to give Major Nzomo six plots in exchange for the said piece of land in dispute. What the court cannot tell is whether the seller was to be paid both cash and the six plots in exchange of the one plot. If six plots were given to Major Nzomo it means that the land disposed of to Major Nzomo which was trust land held in trust for the residents of the council. The Respondents admit that they are selling the land in a replanning scheme. In my view I do find that the applicants have an interest in the said land and have, therefore a locus standi in the matter. Unlike the case of **KARIUKI** versus **COUNTY COUNCIL OF MOMBASA** where the court held that the applicant had no locus. Justice Ringera in **FRANCIS NJENGA & ANOTHER** versus **KIAMBU and KIKUYU COUNTY COUNCILS**. It was 2996/95 and Justice Mwera in **High Court Civil Case 164/00 MAKUENI COUNTY COUNCIL** versus **ALOIS MWAIWA** held that the applicants had locus standi as residents of the land which would be proved at trial. I hold same view.

It is the contention of the applicants that the Respondents are divesting themselves of council land by selling it off to private individuals in order to raise money to pay off debts which has been done unprocedurally. Under Section 166 of Local Government Act, the council has a right to replan and carry out development projects; it can acquire and sell land under Section 144 of the same act; Section 177 (2) of Local Government Act disposal of land is subject to conditions. The Respondent has not shown that it has the consent of the minister to dispose of the land as provided by Section 144 of Local Government Act. Even if they had this consent, the same is subject to the provisions of the constitution which sets out the manner and objects for which land can be divested of by the council (Section 117 of the constitution). No notice has been given for such sale of land in the Kenya Gazette. As submitted by the counsel for applicant, the Respondents have also not complied with Section 13 (2) (b) of Trust Land in that they did not give notice to the residents of the area of the date of the meeting to consider the proposal of alienation

of land following which the residents would give their views. The residents were totally locked out. It is apparent that the procedure granted under the constitution and the Trust Land that has been flouted by the Respondents. I have above found that the applicants have a locus standi in that matter and hence, they have made a prima facie case with probability of success at the trial.

If the land is sold off the substratum of the suit will be destroyed and it may put the land out of reach of the applicants and they would, therefore, suffer irreparable loss. The probable injury to be sustained is a community injury that is unlikely to be compensated by way of damages as the services rendered in the Bus Park will have been done away with. As to where the balance of convenience tilts, I believe it favours the applicants because if the prayer of injunction is not granted and the sale proceeds, the land will have been put totally out of reach of the Respondents which excise cannot be undone.

The Respondents urged that the applicants should have come by way of Judicial review because the issue is one of administrative law and involved public interest. The cases of **MAKUENI COUNTY COUNCIL** versus **ALOIS MWAIWA & FRANCIS NJENGA KARANJA** versus **KIAMBU COUNTY COUNCIL** were all brought by way of plaint. A plaintiff may have two remedies available in law and the court cannot force the applicant to come in a particular way. There is nothing to bar the court from granting prayer of injunction in such a case and I am satisfied that the applicants have satisfied the conditions necessary for grant of temporary injunction as propounded in the case of **GIELA** versus **CASSMAN BROWN LTD 1973 E.A. 358** and for the above reasons, I hereby restrain Kitui County Council by themselves, their agents or servants from replanning, alienating, selling, transferring or otherwise disposing of any of the portion of land reserved for Wote Bus Park i.e. **MAKUENI/UNOA/1574** pending hearing and determination of this suit. Costs to be in cause.

Dated at Machakos this 2nd day of December 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE