



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC MISCELLANEOUS APPLICATION NO. E002 OF 2021

IN THE MATTER OF THE ANTI CORRUPTION AND

ECONOMIC CRIMES ACT NO. 3 OF 2003

AND

IN THE MATTER OF AN APPLICATION BY THE ETHICS & ANTI

CORRUPTION COMMISSION FOR AN ORDER

UNDER SECTION 56 OF THE ANTI CORRUPTION AND

ECONOMIC CRIMES ACT NO. 3 OF 2003 TO PROHIBIT

THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS

(HOWSOEVER DESCRIBED) GARISSA BLOCK III/503

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

OMAR SHERIFF MOHAMMED.....RESPONDENT

JUDGEMENT

1. The applicant herein filed a motion dated 15th June 2021 seeking the following Orders;

a. Spent.

b. A preservation Order do issue prohibiting and/or restraining the Respondent, his agents or servants from construction, transferring, disposing off, wasting, transfer, disposal or in any other way dealing with the parcel of land particularly described as Garissa III/503 (initially part of Garissa III/438) for a period of six (6) months.

c. The Respondent by himself or through his servants or agents or nominees or through any person claiming any right through or under them, be restrained by an order of preservation from developing further or in any other way dealing with the parcel of land particularly known as Garissa III/503 (initially part of Garissa Block III/438) for a period of six (6) months.

d. The Garissa Police County Commander to ensure compliance of the Orders issued herein.

e. Costs in the cause.

2. The application was supported by the sworn affidavit of **David Mukhwana** an investigator attached to the Ethics & Anti- Corruption Commission who deponed that he is a part of the team investigating the illegal and irregular allocation of the suit property of the Respondent. That the commission commenced investigations into the illegal and irregular survey alienation and subsequent allocation of Garissa Block

III/503. That they have so far revealed that;

- i. The parcel of land particularly described as Garissa Block III/503 (measuring 1.252 Ha) was initially part of Garissa Block III/438.
- ii. Garissa Block III/438 according to records at the survey of Kenya indicate was part of District Cooperatives Headquarters. (He annexed as **DM-1 a copy of the Registry Index Map**)
- iii. That Garissa Block III/503 is a designated area designated as zone 4₄₅ in the approved development plan No. 17 (Development Plan Reference No. 326/81/12).
- iv. The zone is designated for District Co-operative Office and is a Public purpose according to the Garissa Development Plan No. 17.
- v. That the Garissa Plot allocation committee held a special committee meeting on 3rd June 1998 at the Provincial Commissioner's Boardroom in Garissa. He annexed as **DM-2 a copy of the minutes**)
- vi. The plot allocation committee irregularly and without following due process resolved that the area proposed for the District Headquarters marked as Co-operative office was too small and allocated the land to private individuals.
- vii. A letter dated 9/9/1998 was subsequently written to the Commissioner of lands forwarding Part Development Plan No. 326/98/109. (He annexed as **DM-3 and DM-4 a copy of the letter and Development Plan**)
- viii. That the physical planning office has indicated that the Ministry of lands and Physical planning has no records of any drawing that may have been prepared and approved as a basis for creation of Garissa Block III/503. (He annexed as **DM-5 a copy of the letter from the Physical Planning**)
- ix. The Director of Physical planning noted that according to the approved plan No. 17 (Development Plan Ref. 326/81/2) the subject site was designated for District Cooperative Office and is not aware of any decision to change it to private property.
- x. The Records at survey of Kenya indicate that Garissa Block III/503 originated from parcel No. Garissa III/438 which is part of District Cooperative Headquarters.
- xi. The Respondent herein has AN allotment letter for Block III/503 referenced 34826/XV/82.

3. He further averred that the investigations by the commissions are not yet completed as they involve collecting documents relating to the transaction that occurred a decade ago. That a prohibitory/restraining Order should issue against the Respondent so as to enable the Commission to complete its investigations, to obviate a situation whereby the investigations and the intended recovery/restitution proceedings may be rendered nugatory. That the Respondent will not suffer any prejudice as a result of the prohibition and/or restraining order.

4. The Court considered the Application and on 17th June 2021 granted the preservative Orders as prayed.

5. The Respondent opposed the application vide Replying Affidavit dated 2nd August 2021 sworn by **Omar Shariff Mohammed**.

6. It was his averment that he bought the suit property in 2003 from **Omar Mahat**. That at the time the suit premises did not have any title but he conducted due diligence to ascertain that the suit premises was owned by Omar Mahat.

7. He restated that indeed the land previously belonged to the District Cooperative headquarters and vide a meeting held on 3rd June 1998 the committee followed due process in allocating the land to private persons.

8. The Respondent took issue with the fact that the members of the Plot allocation committee are not enjoined as parties to this suit. He opined that there was no defect on the side of the Physical Planning Office in Garissa and he failed to comprehend how he as an individual could be adjudged to have irregularly obtained Garissa Block 3/503 whereas there is no evidence to that effect.

9. The Respondent averred that he is a *bonafide* purchaser of the suit property without any notice of any defect in the title, he paid good money for the title and he is innocent of any guilt by a person who held the property before him may have conducted and/or participated in during its acquisition.

10. In support of his averment the Respondent annexed **Minutes of the Committee dated 3rd June 1998, Letter By the Physical planning Officer dated 9th September 1998, Receipt dated 3rd November 2000, Application for Plot Transfer dated August 2003, Letter from the Municipal Council of Garissa confirming transfer from Osman Mahat to Omar sheriff Mohammed dated 28th August 2003, Letter of allotment dated 13th October 1998.**

11. On 19th August the applicant filed supplementary affidavit sworn by **Derick Mukhwana**. He averred that the rights under Article 40 do not extend to property that has been unlawfully acquired. That the title in the hands of the innocent third party can be impugned if it is proved that the title was obtained illegally, un-procedurally or through a corrupt scheme. That members of the public are not the correct authority to establish ownership of land. That the suit is public land and resources on trust for the needs of the society.

12. On 26th July 2021 this Court directed the parties to canvass the application through written submissions. Both parties have since filed their written submissions.

13. On its part the applicant submitted that the investigations has revealed that the suit property was hived off land that is public land alienated for District Co-operatives headquarters, the Respondent has clearly admitted that he did not conduct proper due diligence on the suit property. That the Director of Physical Planning confirms that according to the approved Development Plan No. 17 (Development Plan Ref. 326/81/12) the subject site was designated for the District Cooperative office Zone 445 and are not aware of the decision to change it to private property. That the application meets the threshold of reasonable suspicion. He urged the court not to vary the preservation Orders. In support of its submissions the applicant cited the following authorities **Ethics and Anti-Corruption Commissions v Moses Kasaine Lenokulal & Another [2019] eKLR**, **Emmanuel Suipenu Siyanga v R (2013) Eklr**, **Farooq Imtiaz Mohamed Malik v Director of Police Investments & 3 Others [2018] e KLR**.

14. The Respondent submitted that the applicant has been brought prematurely. That the applicant has failed to produce any tangible proof that the land was obtained irregularly and the illegal action the Respondent took to obtain the land.

15. The Respondent cited the provisions of Section 23-26 of the Land Registration Act No. 3 of 2012 (now repealed) that the title though subsequently acquired there was no indication of fraud or misrepresentation. That such burden of proof is upon the applicant. He cited the cases of **Koinange & 13 Others vs Koinange [1986] KLR 23**, **Kuria Kiarie & 2 Others vs Sammy Magera (2018) e K.L.R & Central Bank Kenya Limited v Trust Bank Limited & 4 Others [1996] e KLR**.

16. The Respondent further submitted that his right to acquire property is guaranteed under Article 40 and 65 of the Constitution and that such enjoyment of his rights cannot be restricted/limited by the Anti-Corruption and Economic Crimes Act 2003.

17. Lastly that he conducted due diligence prior to purchase of the suit premises and that the applicant has failed to show any irregularity by the Principal Commissioner's Boardroom.

ANALYSIS AND DETERMINATION

18. I have considered the application, the responses, affidavits filed by the Respective parties and the submission of the parties. I discern the following as the issues for determination i.e. a. **Whether the Applicant herein established to the required threshold that Parcel 503 was obtained through a corrupt scheme/conduct? Whether the preservation Orders of 17th June 2021 issued at the instance of the applicant herein breaches and/or infringed the Respondent's Rights?**

a. Whether the Applicant herein established to the required threshold that Parcel 503 was obtained through a corrupt scheme/conduct?

19. **Article 252(1) (a) and (d) of the Constitution and Section 11(d) and (1) of the Ethics and Anti-Corruption Commission Act 2011** mandates the Commission to investigate corruption, economic crimes and related offences and to institute and conduct proceedings in court for purposes of the recovery, or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption.

20. Section 56 (1) of ACECA provides that:

“On an ex parte application by the commission, the High Court may make an order prohibiting transfer or disposal of or order dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct”.

21. Section 56 (4) provides that -

“A person served with such an order under this section may within 15 days after being served apply to the court to discharge or vary the order and the court may after hearing the parties, discharge or vary the order or dismiss the application”.

22. Under Section 56 (5) of ACECA, such orders can be varied or discharged only if the court is satisfied that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct. See also **Ethics and Anti-Corruption Commission v Moses Kasaine Lenokulal & another [2019] e KLR**.

23. In **Ethics & Anti-Corruption Commission v Noyasu Construction Company Limited [2021] e KLR**, the Court made the following Observation;

“The only statutory duty imposed upon the Commission is to prove to the court that the property in question is reasonably suspected to have been obtained through illegitimate means or corrupt conduct. The court is also duty bound to examine and interrogate the materials placed before it and to be satisfied that indeed there is a prima facie case established to warrant exercise of its discretion before issuing an ex parte order.

24. The minutes held on June 1998 by the Provincial Commissioners board at Min 10/98 was to the effect that the Physical Planner was to prepare PDF 326/98/2 and the land was to be granted to private individuals. A Letter dated 9/9/1998 by the Provincial Physical Planning Officer confirms that Osman Mahat as one of the beneficiaries of the Plot. The Part Development plan clearly shows subdivision of the Plot in alphabetical A-J. The Registry Index Map shows that the land was divide into Plot No. 503-511 with a 300m road and 15 metres road at

both ends.

25. The Respondent herein has deponed that he bought the land from Osman Mahat. The same has been attested by a letter dated from 28/8/2003 from Municipal Council of Garissa which states that the land was initially owned by Osman Mahat but later on transferred legally to Omar Sharriff Mohammed. On 13th October 1998 the Respondent was issued a letter of allotment by Garissa Municipal Council.

26. From the facts deponed by the parties as enumerated herein above, it is not in dispute that the suit property belonged to the District Cooperative Headquarters before the same was allocated to private persons.

27. The applicant has deponed that their team are still investigating how a property belonging to the District Cooperative Office which is a public property could have been allocated to private individuals without due process being adhered to.

28. Since the applicant is alluding to fraud and the illegal transfer of the suit property which initially belonged to the District Cooperative Headquarters, I find the application for conservatory Orders as being reasonable.

29. It is therefore my finding that the Notice of Motion dated 15th June 2021 as merited and the same is hereby allowed as prayed.

30. The conservatory Order shall be valid for six (6) months commencing from the date of this Ruling.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 1ST DAY OCTOBER, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s Ndinda for Applicant

2. Mr. Nura for Respondent

3. Fardowsa; Court Assistant.