



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 247 OF 2018

ETHICS & ANTI-CORRUPTION COMMISSION..... PLAINTIFF

VERSUS

JOHN N. GACIVIH & 10 OTHERS.....DEFENDANTS

RULING

(Application for injunction; plaintiff filing suit claiming that the disputed properties were irregularly allocated and they are public land; plaintiff in the suit seeking to have the properties revert back to the Government; application for injunction allowed)

1. This suit was commenced through a plaint which was filed on 22 October 2018. It is the case of the plaintiff that the 1st defendant was irregularly allocated Government land then described under the title Mombasa Municipality/Block XXVI/748 sometime in the year 1995. The 1st defendant then sold that land to the 2nd defendant. The 2nd defendant subsequently subdivided the land into two plots bearing the descriptions Mombasa Municipality/Block XXVI/868 and 869. These plots were transferred to the 3rd to 7th defendants, and later the plot No. 869 was transferred to the 8th defendant. The 9th and 10th defendants were the Commissioners of Lands when these transactions took place. It is the position of the plaintiff that the dealings herein were fraudulent as the property was not meant to be alienated into private hands. In this suit, the plaintiff wishes to have orders inter alia to restore the land back to the Government.
2. Together with the suit, the plaintiff filed an application seeking orders to have the defendants restrained from alienating the plots No. 868 and 869, or undertaking any construction on the same pending hearing of this suit. That application was amended on 18 October 2019 and it is that amended application which is the subject of this ruling.
3. Only the 3rd, 4th, 5th, 6th, and 7th defendants opposed the application by filing Grounds of Opposition. It is contended that the plaintiff has not shown that it has a prima facie case with a probability of success; that the plaintiff has not shown that it will suffer irreparable injury; that the balance of convenience lies in favour of dismissing the application; and that it is in the interests of justice that the application be dismissed.
4. Mr. Makori, learned counsel for the plaintiff filed written submissions to support his application and I have taken note of these submissions. In his submissions, Mr. Noorani, learned counsel for the 3rd, 4th, 5th, 6th and 7th defendants, inter alia referred me to the witness statements filed by the plaintiff and he pointed out that the same aver that the land was regularly allocated and surveyed, and the plaintiff cannot therefore allege that the properties in dispute were fraudulently allocated.
5. It will be observed that in this case the plaintiff alleges that Government land was fraudulently acquired. In the supporting affidavit sworn by Regina Ng'ang'a, an investigator working with the plaintiff, she has inter alia annexed a letter dated 22 January 2016 from the Director of Physical Planning, which inter alia places doubt on the Part Development Plan that was used in the first allocation of the land. In as much as Mr. Noorani submitted that some of the plaintiff's witnesses appear to authenticate the allotment and titles, I think so long as there is some evidence of an irregular allocation, which has been provided by the letter above, it cannot be argued that the plaintiff has not demonstrated a prima facie case with a probability of success. It was further set out in the grounds of opposition that no injury will be caused to the plaintiff. This suit has been brought on behalf of the public and if it is the case that the land was public land that was wrongfully allocated, the public stand to suffer loss. In any event, when I consider the balance of convenience, the same tilts towards preserving the properties in dispute until the case is heard and determined.
6. Given the above reasons, I allow the application. I order the defendants not to sell, enter into any lease that requires to be registered, charge, or in any way deal adversely deal with the properties in dispute. They are also restrained from proceeding with the development of any structures on the disputes parcels of land or undertaking any activity that would change the character of the land from what it is at present. I further issue an order restricting the registration of any disposition in the register of the land parcels Mombasa Municipality/Block XXVI/ 868 and 869 until this case is heard and determined.

7. The costs of this application shall be to the plaintiff.

8. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 4th day of February 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr Makori for the plaintiff/applicant.

Defendants/respondents ; absent

Court Assistant; David Koitamet.