



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC MISCELLANEOUS APPLICATION NO. 35 OF 2019

IN THE MATTER OF: SECTION 56 OF THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, NO. 3 OF 2003

AND

IN THE MATTER OF: AN APPLICATION BY ETHICS AND ANTI-CORRUPTION COMMISSION

FOR AN ORDER TO PROHIBIT THE TRANSFER OR DISPOSAL OF OR OTHER DEALINGS

(HOWSOEVER DESCRIBED) WITH KISUMU MUNICIPALITY BLOCK 7/421, 422,

424, 425, 426, 429, 430, 433, 434, 435, 438, 439, 440 AND 414, 415, 416, 417, 418, 419,

420, 431, 432, 434, 435, 436 AND 437

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION.....APPLICANT

VERSUS

KATANGI DISTRIBUTORS LIMITED.....RESPONDENT

RULING

Ethics & Anti-corruption Commission the applicant herein has come to court against Katangi Distributors Limited praying for orders that a prohibition order prohibiting the Respondent, by itself or through his agents or servants from transferring, disposing of, wasting, constructing, demolishing, charging or in any other way dealing with KISUMU MUNICIPALITY BLOCK 7/421, 422, 424, 425, 426, 429, 430, 433, 434, 435, 438, 439, 440 AND 414, 415, 416, 417, 418, 419, 420, 431, 432, 434, 435, 436 AND 437 measuring 1.06 acres situated in Kisumu County within the Kenya Railways Corporation land, for a period of six (6) months.

The application is based on grounds that the Ethics & Anti-Corruption Commission is a body corporate established under the Ethics & Anti-corruption Commission Act, No. 22 of 2011 with the mandate to undertake investigation to establish the extent of liability for the loss of or damage to public property and in appropriate cases to institute civil proceedings against any person for the recovery/restitution of such property or for compensation under the Anti-Corruption and Economics Crimes Act 2003 (hereafter ACECA).

The Commission is investigating the matter of excision and subsequent alienation of Kisumu Municipality Bock 7/421 and other parcels of land and preliminary findings reveal that Kisumu Municipality Bock 7/421 and other parcels of land which is public land and that Kisumu Municipality Block 7/567 has already been alienated as it was reserved and set aside for the use by the Kenya Railways Corporation. The Respondent has irregularly acquired title to Kisumu Municipality Bock 7/421 and other parcels of land.

The properties in question remain and still are reserved for public utility to wit the Kenya Railways Corporation, and is thus alienated land for the purposes of Government Lands Act and physical Planning Act;

The Respondent by itself, its representatives and/or agents is currently developing the property and construction work is underway and unless orders under section 56 of the Anti-Corruption and Economic Crimes Act are granted, the respondent will continue to demolish, waste, dispose of or alienate the property to the detriment of the public.

The fear of the Applicant is real and it is necessary, meet and just for the property to be preserved as a matter of urgency to prevent the subject matter of these proceedings being wasted, disposed of or otherwise dealt with in a manner prejudicial to public interest and on-going investigations by the Applicant.

The application is supported by the affidavit of Anderson Weru an investigator with the Ethics and Anti-Corruption Commission appointed under section 23 of the Act. According to Mr Weru, the commission has received information on suspected corrupt conduct and irregular acquisition of public land by the respondent in the acquisition of the suit property. He states that according to the documents in his possession the suit properties belong to the Kenya Railways Corporation. The transfer documents were processed on the same date and that the purported consent was given by a person without authority.

The applicant concedes that he is still carrying on further investigations on the relationship between Norlake and the respondent. The applicant states that the board of management of Kenya Railways did not approve the transfer of lease to the respondent. There is no explanation as to how norlake investment got possession of the properties belonging to Kenya Railways Corporation. The respondent is carrying on construction and demolition on the suit properties and therefore jeopardising the construction on the suit properties by the government of the port within Kisumu.

In the replying affidavit of Dipak Panachand Shah, the respondent states that he is the registered proprietor of the suit properties and has annexed the certificates of lease. He States that on the 6th August 2019 and 13th August 2019, he received letters addressed to the directors of the respondent to attend their offices for purposes of an interview at Kisumu on 8th and 15th August 2019 which later changed on 5th day of September 2019 which he attended and gave Anderson all the documents. However the property was repossessed by the Kenya Railway corporation while the respondent was still at the applicants office. The respondent filed a petition in court and the same is pending hearing and determination. The applicant is a party to the petition having been enjoined by consent on the 7th of October 2019.

The applicant states and has shown some documents indicating that the property was owned by Asembo trading company in 1945 to 1948 and later Alibhai Ramji and Sons between 1948 to 1968 and Lake Investment Ltd between 1968 to 1990 and Norlake Investments Ltd between 1990 to 1998 and lastly Katangi Developers Ltd from 1998 to date.

The relevant law is in Section 56 of the act that provides as follows:-

(1) On an ex parte application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other 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.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission. No. 3 of 2003 Anti-Corruption and Economic Crimes [Rev. 2016] [Issue 3] A17 - 26

(4) A person served with an order under this section may, within fifteen 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. (5) The court may discharge or vary an order under subsection (4) only if the court is satisfied, on the balance of probabilities, that the property in respect of which the order is discharged or varied was not acquired as a result of corrupt conduct.

At this stage the court has to be careful to pre-empt a predetermination of the pending dispute in court. An order of prohibition is not automatic. The applicant has to give reasonable grounds for the court to suspect that the property was acquired through corrupt conduct.

I have considered the application, the supporting affidavit and the replying affidavit including the supplementary affidavit and do find that the application was filed when the petition was pending in court. The applicant is a party in the petition and should have directed its energies on the petition by seeking the orders sought herein in the petition. Moreover the applicant has not given reasonable grounds that the respondent obtained the suit properties corruptly, irregularly or illegally. On the other hand the respondent has given the chronological events in the history of the property since 1945 when Asembo trading company was the lease holder of the mother title and later Alibhai Ramji and Sons between 1948 to 1968 and Lake Investment Ltd between 1968 to 1990 and Norlake Investments Ltd between 1990 to 1998 and lastly Katangi Developers Ltd from 1998 to date.

Ultimately, I do decline to grant the orders sought.

DATED, DELIVERED AND SIGNED THIS 27th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This ruling is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE