



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 28 OF 2017

IN THE MATTER OF: ARTICLES NO. 22(1) OF THE CONSTITUTION OF KENYA

MJK, M NBAAND

**IN THE MAATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 40, 47, 50 AND 64 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: ARTICLES 2, 3, 10, 23, 165(6) & (7) AND 250 OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN GROSSERT & COMPANY LIMITED.....PETITIONER

VERSUS

1. KENYA PORTS AUTHORITY

2. ETHICS & ANTI-CORRUPTION COMMISSION.....RESPONDENTS

JUDGMENT

1. On 5.7.18 this court was set to deliver a Judgment in the petition herein when it realized from the 2nd Respondent's submissions that the 2nd Respondent was still investigating the Petitioner on matters before the court. The court then suspended the expected Judgment and by its Ruling on even date, the court directed that the suit premises herein being MOMBASA/BLOCK XLVII/73 be preserved pending the investigations to be carried out by the 2nd respondent and a report be filed on the outcome thereof. The said report was filed on 5/10/18 paving way for this Judgement.

The petition

2. By a Petition dated 16.6.17 the Petitioner, a limited liability company incorporated in Kenya, seeks reliefs detailed herein below.

3. The 1st Respondent is a body corporate established under section 3 of the Kenya Ports Authority (Cap 391) Act, with the statutory mandate of providing and maintaining port systems in Kenya.

4. The 2nd Respondent is an independent constitutional commission established under the provisions of Article 79 of the Constitution and section 3 of the Ethics and Anti-corruption commission Act, 2011 with the mandate to fight corruption and ensure compliance with Chapter 6 of the Constitution on Leadership and Integrity.

The Claim

5. The Petitioner claims that at all material times in this suit, the Petitioner is and was the registered leasehold owner of all that parcel of land

known as MOMBASA/BLOCK XLVII/73 thereafter referred to as “**the suit property**” and entitled to possession and occupation thereof. The petitioner’s said interest in the suit property is evidenced by a Certificate of Lease (hereinafter “**the said Certificate**”) issued in the Petitioner’s favour under the provisions of the Registered Land Act (now repealed) by the Mombasa District Land Registry on 13.4.84. The Petitioner allegedly derives its leasehold title to the suit property from a grant made to it by the colonial government of Kenya on 11.5.60 for a term of 99 years commencing 1.1.49. Following Kenya’s independence, the freehold interest in the land comprising the property was transferred to the East African Harbours Corporation (hereinafter “**the EAHRC**”) by virtue of legal notice number 19 dated 16.6.69. The EAHRC is now defunct and its proprietary interests and obligations were transferred to the Kenya Ports Authority (hereinafter “**KPA**”) under the provisions of section 74 (1) of the Kenya Ports Authority Act (Cap 391). The Petitioner avers that under the provisions of Section 27 (b) of the Registered Land Act (as substituted by ‘section 26(1) of the Lands Registration Act) the said Certificate constitutes, and continues to constitute, conclusive evidence that the Petitioner was and is the indefeasible owner of the leasehold interest comprised in the suit property. The suit property is the subject of pending litigation in the Environmental and Lands division of the High Court in Mombasa HCCC No. 158 of 2013, namely, **John Grossert & Company Limited vs. Jane Rose Wanjiru & Another** (“the civil proceedings”) in which the Petitioner has, *inter alia*, sought declaratory order:

(i) That the Petitioner is and continues to be the lawfully registered leasehold owner of the suit property; and

(ii) That the registration of a forged transfer purporting to be a transfer of the leasehold interest in the suit property in favour of Jane rose from the Petitioner dated 4th November, 2004 (“the forged transfer”) registered by the Lands Registry on 8th November, 2004 is null and void and of no effect.

6. There are interim injunctive orders preventing any trespass or dealing with the suit property until the civil proceedings are heard and determined. The said Jane Rose Wanjiru has also been criminally charged with various offences including forgery, making documents without authority and uttering a false document in criminal case No. 2685 of 2013 (“**the criminal proceedings**”). These proceedings are also ongoing. The 1st and 2nd Respondents are, and have been for some time, fully aware of both sets of proceedings. The 1st respondent, through its present legal manager, is a witness in the civil proceedings on behalf of the Petitioner and the 2nd Respondent was advised of the criminal proceedings by virtue of the Petitioner’s complaint dated 23.7.16.

7. By a letter dated 19.4.17, the 2nd Respondent wrote to African Marine and General Engineering Company (“**the AMGECO**”) stating that it was investigating alleged fraudulent acquisition of the suit property and that it required information regarding the ownership of the suit property and corporate and other information regarding both AMGECO and the Petitioner. AMGECO is a separately incorporated legal entity currently having two common directors, and no common shareholders, with the Petitioner. The Petitioner, in its response dated 25.4.17, confirmed that it was the registered proprietor of leasehold interest in the suit property and gave the 2nd Respondent full and complete details as requested including the history of the suit property and the circumstances surrounding the acquisition of the Petitioner’s shares. Pursuant to a further written request from the 2nd Respondent dated 16.5.17 for a meeting with the Petitioner’s directors, a meeting was held on 24.5.17 where statements were recorded. On 25.5.17, a complete set of documents showing the details of the requisition of shares and current status in the Petitioner was delivered to the 2nd Respondent by the Petitioner.

8. The Petitioner, having co-operated fully with the 2nd Respondent in its investigations, thereafter received a letter dated 8.6.17 from the 1st Respondent in which it stated:

(i) The 1st Respondent had received a letter dated 19th May, 2017 from the 2nd Respondent allegedly claiming that the Petitioner’s current directors had fraudulently transferred and acquired the Petitioner’s shares

(ii) The 2nd Respondent had allegedly issued a “directive” to the 1st Respondent to take urgent measures to secure the suit property by lodging a caveat at the Lands Office and to “recall” the certificate of Lease held by the Company through its “parent company”, AMGECO, for “revocation”.

(iii) In accordance with the directive issued to it by the 2nd Respondent, the 1st Respondent demanded that the Petitioner returns the said certificate of lease within seven days or, alternatively, “to give satisfactory reasons to the contrary” to the directive given by the 2nd Respondent in its letter dated 19th May, 2017.

9. Despite the seriousness of the allegations made, the 1st Respondent failed to annex a copy of the 2nd Respondent’s letter of 19.5.17 to its letter of 18.6.17.

10. Notwithstanding letters written by the Petitioner’s advocates to the 1st and 2nd Respondents dated 12th and 13th June, respectively, requesting:

(i) A copy of the 2nd respondent’s said letter of 19th May, 2017 to enable the Petitioner to ascertain and consider the basis of the allegations made against its directors and/or to respond to them; and

(ii) That assurances be given by both Respondents that, in the interim, no action would be taken against the Petitioner’s interests in the suit property as threatened;

it is alleged that neither Respondent has either provided the Petitioner with a copy of the said letter of 19.5.17 nor given the assurance requested. The Petitioner states that refusal is indicative of the fact that both Respondents are intent on acting mala fides and are clearly parties to a conspiracy to willfully deprive the Petitioner of the suit land.

11. The Petitioner claims that the 1st Respondent has no authority, power or jurisdiction either under the Kenya Ports Authority Act (Cap 391) and/or any other law to demand the return of the Certificate of Lease to the suit property or to revoke the Petitioner's title to the suit property or to place any caveat or other restriction against the said title in the absence of a demonstrable breach of covenant under the Petitioner's lease in the manner threatened by the 1st Respondent in its letter dated 8.6.17.

12. The Petitioner also claims that the 2nd Respondent has no authority power or jurisdiction either under the Constitution of Kenya, the Ethics and Anti-corruption Act 2011 and/or any other law to unilateral determine for itself and without following due process what constitutes fraudulent conduct or to involve itself in the affairs of a private limited liability company or to "**direct**" the 1st Respondent to | recall" and/or "**revoke**" the certificate of lease held by the Petitioner and to "**secure**" the suit property by lodging a caveat or other restriction against the title.

13. The Petitioner avers that in seeking to penalize the Petitioner without giving it the opportunity to either know, consider or respond to the allegations of fraud aforesaid, the 1st and 2nd respondents have violated the principles of natural justice and the Petitioner's legitimate expectation to be treated fairly, through due process under relevant statutes and the constitution of Kenya. These include the abrogation of principles of due process of the law and fair hearing and administrative process under Article 47 and 50 of the constitution, as well as violation of Petitioner's proprietary rights guaranteed under *inter alia*, Articles 40 and 64 of the Constitution of Kenya and section 27 (b) of the Registered Land Act (as substituted by section 26(1) of the Lands Registration Act). In the premises the Petitioner has been left with no alternative but to institute, and claim the reliefs sought in this Petition. The Petitioner prays for the following orders:

(a) A declaration that the certificate of title that the Petitioner holds in respect of the suit property, namely, MOMBASA/BLOCK XLVII/73, constitutes conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property.

(b) A declaration that the demands made and threats of actions intended to be taken by the 1st Respondent in its letter of 8th June, 2017, namely, to demand the return of the Certificate of Lease to the suit property or to revoke the Petitioner's title to the suit property or to place any caveat or other restriction against the said title are invalid; null, unlawful and/or ultra vires the powers of the 1st Respondent and therefore of no purpose or effect.

(c) A declaration that the actions of the 2nd Respondent in purporting to unilaterally determine for itself and without following due process what constitutes fraudulent conduct or to involve itself in the affairs of the Petitioner or to "direct" the 1st Respondent to "recall" and/or "revoke" the certificate of lease held by the Petitioner and to "secure" the suit property by lodging a caveat or other restriction against the title are invalid, null, unlawful and/or ultra vires the powers of the 2nd Respondent and therefore of no purpose or effect.

(d) An injunction to restrain the 1st and 2nd Respondents whether by themselves or their agents or servants or otherwise howsoever in giving effect or implementing in any manner whatsoever the matters raised in the 1st Respondent's letter dated 8th June, 2017 addressed to the Petitioner, or by hindering, alienating or in any other manner interfering with the Petitioner's ownership, possession and quiet enjoyment of the suit property, namely, MOMBASA/BLOCK XLVII/73.

(e) An injunction to restrain the 2nd Respondents whether by itself or its agents or servants or otherwise howsoever from hindering or impeding its business in any way including (but not limited to) interfering with the Petitioner's corporate structure and/or shareholding without following due process.

(f) An order awarding compensatory damages payable by the 1st and 2nd Respondents to the Petitioner for the breach of the Petitioner's constitutional and statutory rights.

(g) An order that the 1st and 2nd Respondents be condemned to pay costs of this Petition.

14. The Petition is supported by affidavit of Alnoor Habib Jiwan sworn on 16.6.17 together with annexes, and a further Affidavit sworn by the same person on 9.10.17.

The Response

The 1st Respondent

15. The 1st Respondent oppose the petition vide a replying affidavit sworn by Michael O. Sangoro on 5.9.17. The 1st Respondent's case is that it is the owner of the fee simple interest in the suit property, which was leased to the Petitioner by the colonial government. However, following the independence, the fee simple interest in the suit property was transferred to the then East African Harbour Corporation (EAHRC) by a Legal Notice Number 19 dated 16.6.69 and subsequently transferred to the 1st Respondent pursuant to section 73(1) of the Kenya Ports Authority Act and Legal Notice No. 160 of 2001. The terms upon which the Lease was granted to the Petitioner are that the parcel of land is for building boats, marine engineering and workshops and that Clause 1 of the Special Conditions of the Lease required the Petitioner to construct buildings complete for occupation on the parcel within two (2) years from the date of commencement of the Lease. The 1st Respondent's policy also requires that the parcel be developed within two years of the Lease. The 1st respondent inspected the property on 11.3.14 and found an old structure on the parcel of land and that the Petitioner has been paying ground rent to the 1st Respondent. However, sometime in June, 2017 the 1st Respondent became aware that one Jane Rose Wanjiku of Post Office Box Number 89438 Mombasa was claiming to be the owner of the suit property and was allegedly offering the same for sale. Pursuant to this discovery the 1st Respondent published a Notice in three daily newspapers with a national circulation warning members of the public against dealing

with the property. The 1st Respondent annexed a copy of the “**CAVEAT EMPTOR**” Notice published marked “**KPA-3**”.

16. In relation to the current suit/petition, the 1st Respondent became aware of the investigation being undertaken by the 2nd Respondent regarding the alleged fraudulent transfer and acquisition of shares by the directors of the Petitioner relating to the suit property and the 2nd Respondent advised the 1st Respondent to “**move with speed and secure the property and also put a caveat to the Land Register in Mombasa to avoid any form of delay in regard to the parcel of Land**”. The 2nd Respondent further directed the 1st Respondent to withdraw the Lease vide the letter dated 19.5.17 marked “**KPA-4**”. The 1st Respondent wrote to the Petitioner vide a letter dated 8.6.17 explaining to the Petitioner the contents of the 2nd Respondent’s letter dated 19.5.17 and requested the Petitioner to return the Lease within Seven (7) days of the letter or give satisfactory reasons why the Lease should not be returned. (See a copy of the 1st respondent’s letter dated 8.6.17 marked “**KPA-6**”).

17. The 1st Respondent states that it received a response from the Petitioner vide a letter dated 8.6.17 in which the Petitioner sought a copy of the 2nd Respondent’s letter dated 19.5.17 to enable the Petitioner to respond. On the 13.6.17 the 1st respondent wrote a letter to the 2nd Respondent and copied to the Petitioner requesting the 2nd Respondent to forward its letter dated 19.5.17 to the Petitioner. Subsequently the 1st Respondent wrote to the Registrar of Titles a letter dated 13.6.17 requesting the Registrar to **RESTRICT** any transaction on the suit parcel of land. See annexure marked “**KPA-9**”.

18. The 1st Respondent states that its action was prompted by the 2nd Respondent for which the 2nd Respondent is fully liable, and that it is on record that at the time of swearing and filing this response, the 2nd Respondent is still undertaking investigations, that is, investigations are still incomplete.

19. However, the deponent to the Replying Affidavit states that from his perusal of the file and records in his possession by virtue of his position, the consent to the Petitioner to charge the property to secure a loan from Barclays Bank was procedural, stating further that the law permits the 1st Respondent to grant such consents, which should not be unreasonably withheld. However, at the time of granting the consent to charge the property as stated above, the 1st Respondent had no notice of any fraud, real or alleged, or any investigations involving the suit property, or proprietary rights of its directors over its shares. The 1st Respondent hopes that once the ongoing investigations are finalised, it will shed light whether there was collusion between directors of the Petitioners and senior officials of the 1st Respondent in consenting to the creation of the charge aforesaid and whether the said or other directors of the Petitioner forged share transfer forms.

20. The 1st Respondent states that there was nothing to indicate that the letter dated 19.5.17 was confidential. The letter directed the 1st Respondent to take action to secure the suit property and to recall the certificate of lease. Executing those directives required the 1st Respondent to officially write to the Petitioner informing it of the contents of the letter. That was done by the letter of 8.6.17. The 2nd Respondent ought to have addressed the Petitioner directly. The 1st Respondent pointed out that in the event costs are to be awarded on this matter, no adverse orders as to costs should be made against the 1st Respondent. However, favourable orders to the 1st Respondent on costs may be made.

The 2nd Respondent

21. On their part the 2nd Respondent opposed the petition vide Replying Affidavit of **Sylvester Mango** sworn on **16.8.17**. The 2nd Respondent’s case is that it is an Independent Institution established under Article 79 and have by virtue of Article 252 (1) and Section 11 (1) (d) of the Ethics and Anti-Corruption Commission Act No. 22 of 2011 been vested with powers to conduct investigations on its own initiatives or on complaint made by members of the Public and advise any persons including the 1st Respondent on matters within their functions. The 2nd Respondent is further mandated under Section 11(1)(g) and (j) of the Ethics and Anti-Corruption Commission Act 2011, to advise on its own initiative, any person on any matter within its functions and or institute and conduct proceedings in court for the purpose of recovery or protection of public property related to corruption.

22. The 2nd Respondent’s case is that on 11.4.17, it received an anonymous report that the suit property Mombasa/Block XLVII/73 allegedly belonging to the 1st Respondent has been irregularly placed under lease of the Directors of the Petition, Alnoor Habib Jiwaji and his brother Zahir Habib Jiwaji and that the current directors and shareholders colluded with the 1st Respondent officials and used the said property as a collateral to obtain loans from a bank. There were further allegations that there was a forgery in the transfer of shares from original former Directors of the Petitioner to the current Directors and shareholders which matter is pending under investigation with the 2nd Respondent. The 2nd Respondent’s case is that it was within its mandate to investigate the matter as the property herein is a public property belonging to the 1st Respondent, a public body, but leased to the Petitioner. That pursuant to its mandate, the 2nd Respondent launched investigations into the above mentioned allegations and did invite the Directors of the Petitioner in its letter dated 16.5.17, the 1st Respondent and other relevant institutions to record statements and to provide documents to facilitate the ongoing investigations and the same is yet to be completed. The 2nd Respondent submitted that preliminary investigations has established the following:

(a) *The Petitioner is a Limited Liability Company incorporated on 31.5.50 and the Directors were JOHN GROSSERT, JOHN FREDRICK CAMPBELL AND RAYMOND THOMAS RODDA of British Nationality. It is however unclear how the African Marine and General Engineering Company (AMGECO) Directors which are also the current Directors of Petitioner ceased from being the secretary of the Petitioner and started owning the shares of the Petitioner a matter which is pending the investigation.*

(b) *That sometime on 1.1.49, the Petitioner was leased*

the suit property vide a grant CR.12311 for the term of 99 years with special condition that the Petitioner shall not transfer, sublet, charge or part with possession of the land or any part thereof without prior consent in writing.

(c) That on the 19.12.02, a Director of the Petitioner

Alnoor Habib Jiwan facilitated the guaranteeing of a loan of Kshs. 16,461,000/= to AMGECO using the suit property with the assistance of the 1st Respondent's official contrary to the terms and conditions of the lease, the subject matter which is pending for investigation with the 2nd Respondent.

(d) The 1st Respondent's senior officials irregularly issued a consent to creation of the above charge between AMGECO and Barclays a matter which is being investigated by the 2nd Respondent.

(e) That on 21.1.13, the 1st Respondent was registered as the absolute proprietor and successor of the East African Harbours Corporation, and on 1.5.15, the 1st Respondent leased the suit property to the Petitioner.

(f) *The Petitioner is alleged to be a subsidiary of AMGECO and*

there are transactions that AMGECO is carrying out in the name of the Petitioner that are not clear and which forms part of the ongoing investigations that the 2nd Respondent requires to establish.

(g) That some of the information required is still being gathered through investigations, and that this suit is pre-mature.

23. The 2nd Respondent is fully aware of the Criminal Case Number 2685 of 2013 and the High Court Case Number 153 before the Environment and Lands Division, John Grossert & Company Limited vs. Jane Rose filed by the Director of the Petitioner on allegation of forgery and transfer of the suit property to Jane Rose. The subject matter is still pending hearing and determination before the court.

24. The 2nd Respondent states that consequently preliminary investigations confirm that there is no injunction or caveat that has been registered by the Land Registrar, 1st Respondent, the Petitioner or any other person against the suit property hence making the suit property susceptible to illegal dealings and it is therefore necessary for steps to be taken to protect the said property and public interest. The 2nd Respondent annexed marked "SM3" a copy of the green card to prove the same. The 2nd Respondent states that it is conducting investigations of fraudulent acquisition of the suit property and the Petitioner is fully aware of the same and its directors recorded statements with the 2nd Respondent. In the cause of the ongoing investigations, it received documents from the Petitioner which documents form part of the preliminary investigations and the 2nd Respondent states that it is still gathering more evidence in relation therefore and the evidence by the Petitioner cannot be conclusive to the issue raised in the complaint.

25. The 2nd Respondent further avers that the letter dated 19.5.17, was confidential between the 1st and 2nd Respondents and the same was purposely administrative and advisory in nature and was meant to secure and protect the suit property from any transactions and or dealings that might jeopardize the ongoing investigations. The 2nd Respondent's case is that the contents of the letter of the 1st Respondent dated 8.6.17, are very clear that the 1st Respondent's intention was to take urgent measures to secure the property including lodging a caveat at the Land registry and both the 1st and the 2nd Respondents actions were not ultra vires and or unlawful but are within their mandate. The 2nd Respondent further states that to the foregoing the 1st Respondent invited the Petitioner to give satisfactory reasons as to why a caveat should not be lodged, or the lease of the suit property should not be revoked, but instead the Petitioner decided to run to this court to obstruct both the 1st and 2nd Respondents from exercising their mandate and safeguarding public interest pending completion of the investigation by the 2nd Respondent.

26. The 2nd Respondent states that since the Petitioner indicates that there were interim orders in relation to the suit property in the High Court Case Number 153 before the Environment and Land Division, **John Grossert & Company Limited vs. Jane Rose**, a caveat if lodged to the suit property would secure the suit property pending the completion of the investigations and would not in any way affect the ownership of the suit property.

27. It is the 2nd Respondent's case that the Petitioner has not demonstrated any specific rights that have been violated or breached or is about to be violated to warrant the court's intervention, and that the Petitioner is using the constitutional court to subvert and or frustrate the 1st and 2nd Respondents from putting rightful measures to secure the property from any dealings pending the investigations and from instituting the civil recovery proceedings in the event the investigations outcome warrant the same; and lastly, that the action by the Petitioner herein is premature.

28. The 2nd Respondent states that it shall at the conclusion of the investigations make appropriate recommendations and the same shall be shared with the court. The 2nd Respondent avers that it is not under the direction or control of any person or authority and that in executing its mandate the commission is guided by the constitution and the applicable law, and that the Petition is frivolous and vexatious and does not disclose any *prima facie* cause of action against the 2nd Respondent.

The Report

29. It was on the strength of the alleged pending investigations by the 2nd Respondent that this court halted the proceedings in this matter and allowed the 2nd Respondent to conclude the said investigations and to file a report of the same to this court. That report was filed in this court on 5/10/18. The report finds as follows: -

a) The Kenya Ports Authority was formerly named the East African Harbours Corporation before the break of East African

Community and all assets and liabilities of the Kenya Ports Authority were registered in the name of East African Harbours Corporation up until the issuance of vesting orders as captured in the legal notice No 160 dated 11.10.01.

b) The land parcel number **MSA/BLOCK XLVII/73** measuring 3.2 acres is the property of Kenya Ports Authority and leased to a company trading as John Grossert and Company Limited for a period of 99 years from 1.1.49 at rent of Kshs. 2,464/= which was varied to Kshs. 140,000/= per annum. Considering that as at 30/08/2017 the land parcel number **MSA/BLOCK XLVII/73** measuring approximately 3.2 acres was valued at Kshs. 450,000,000/= it is apparent that there is no value for money in respect to the lease of the said property to John Grossert Company Limited.

c) John Grossert and Company Limited is a limited liability company incorporated in Kenya on 31.5.50 with its founding directors being: John Grossert Engineers (1 share), R. Rodda Engineers (1 share) and John Fredrick Camphil (1 Share). The current shareholders of John Grossert and Company Limited are Cariton Holdings Limited with 29,400 shares and Multilink Holding Limited with 600 shares. Both the companies are owned by Alnoor Habib Jiwan, Nasrin Alnoor Jiwan and Iran Habib Jiwan.

d) In the year 1978, Al Noor acquired African Marine and General Engineering Company Limited (AMGECO) which had a subsidiary company registered as John Grossert and Company Limited and at the time of buying the company John Grossert and Company Limited, it already had a lease for a parcel of land: **MSA/BLOCK XLVII/73** for a period of 99 years.

e) The lease for the land parcel number: **MSA/BLOCK XLVII/73** held by John Grossert and Company Limited commenced from 1.1.49 way before the company John Grossert and Company limited was registered on 31.5.50 hence at the time it could not sue or be sued. Further the said company did not have the mandate to own the said property or transact as it did. The lease was therefore illegally acquired.

f) Contrary to the conditions of the lease, clause 1 on the special conditions of the lease John Grossert and Company limited contravened the terms of the lease agreement, particularly by its failure to develop the land within the 2 years stipulated period. Further in breach of clause 8 on the special conditions of the lease John Grossert Company Limited sub-let the land parcel number: **MSA/BLOCK XLVII/73** to steel Billet Casting Limited on 12.4.84 and Steel and Scrap Metal Supplies Limited without the approval of the Lessor (KPA).

g) African Marin and General Engineering Company (AMGECO) is an independent company capable of suing and get sued, it does not have any agreement or obligation with Kenya Ports Authority (KPA) to get any consent to obtain a loan courtesy of a third party – John Grossert and Company Limited. It is established that it was irregular and unlawful for AMGECO to deal with land parcel number: **MSA/BLOCK XLVII/73**

h) The managing Director and the Corporation Secretary of Kenya Ports Authority at the material time unlawfully gave African Marine and General engineering consent to obtain a loan from the Barclays bank of Kenya in the year 2002 using the lease document for John Grossert and Company Limited in respect to land parcel number: **MSA/BLOCK XLVII/73** without the approval of the Board of Directors contrary to sections 12(2) (k) and 19(5) of the Kenya Ports Authority Act.

i) The institute of Certified Public Secretaries of Kenya only registers individuals with a background in accounting under section 24(1) of the accountant's act; and advocates of the High Court of Kenya and not companies such as Equatorial Registries (K) Limited and African Marine and General Engineering company Limited.

j) Equatorial Registries Limited and African Marine and General Engineering Company which are listed by John Grossert Company Limited as the Company secretaries for the period between 1950 and 1978 both were not registered with this Institute of Certified Public secretaries of Kenya neither their directors were registered by the body and therefore not mandated to undertake the roles company secretary do.

k) There are no official or registered documents to show how African Marine and General Engineering Company Limited (AMGECO) acquired the shares in John Grossert and Company Limited to enable it enjoy the benefits of its lease. There exist no official supporting documents to establish how AMGECO acquired 14,600 shares of John Grossert and company Limited. Although the directors of the said companies were given an opportunity to explain this issue under inquiry, however the company nor its directors have given any reliable, verifiable and/or satisfactory factual explanation; considering that at the material time AMGECO was curiously listed as the Company secretary of John Grossert and Company Limited.

l) Land parcel number: **MSA/BLOCK XLVII/73** was unlawfully charged for purposes of obtaining a private loan from Barclays bank of Kenya using a consent that was fraudulently obtained. Further it was noted that the said purported consent did not have the approval of the board of directors at KPA and that the same consent is not dated rendering it invalid.

m) There have been attempt by fraudsters to register and transfer the land parcel number: **MSA/BLOCK XLVII/73** to private individuals at the expense of the Kenya Ports Authority. This fact led to a matter that is now pending before the Chief Magistrate Court Mombasa Ref. criminal case: **NO 341/692/2013 – CF 2685/2013**. This puts public land into real risk of unlawful alienation hence **EACC** should promptly act to protect the public interest and proprietary interest in land parcel number: **MSA/BLOCK XLVII/73**.

n) Directors of African Marine and General Engineering Company Limited cannot reliably and satisfactorily explain how they acquired shares and ownership of John Grossert and Company Limited. Documents arising from investigations reveal that the management of African Marine and General Engineering Company Limited have made concerted attempts to transfer the lease for land parcel number: **MSA/BLOCK XLVII/73** held by John Grossert and Company Limited to themselves without any success.

30. The report concludes that KPA being a public body entrusted with the suit asset has duty to protect and manage land in a prudent manner and to safeguard the public interests, and it is for this reason that the Board of Directors is the only body permitted to give consent for any transactions touching on land matters in accordance with all applicable laws and regulations.

The Submissions

31. Parties filed submissions to the petition and to the report which I have carefully considered.

The issues for determination by this court are as follows:

- i) Whether there was fraud in the allocation or procurement of the suit premises by the Petitioner.
- ii) Whether the investigations report by the 2nd Respondent filed herein on 5.10.18 reveal any fraud by either the Petitioner or the 1st Respondent.
- iii) Whether the petitioner's rights to property have been or are being threatened.

32. **Mr. Inamdar**, Learned Counsel for the Petitioner submitting generally, and specifically on the said report filed in court by the 2nd Respondent on 5.10.18, said that there is nothing in the entire report challenging the material already in court, and that the said report is empty of relevance. Further, Counsel submitted that there is nothing in the said report indicative of fraud, and that the test for fraud has not been fulfilled. Mr. Inamdar submitted that under section 107 of the Evidence Act, he who alleges must prove. If fraud is being alleged, sufficient evidence must be adduced to prove the same.

33. **Mr. Wafula**, learned Counsel for the 1st Respondent also dismissed the said report as lacking any incriminating evidence. Counsel submitted that the report does not address the issue of transfer of shares or letter dated 19.05.17. Counsel submitted that there is no dispute between KPA and the Petitioner, and that if there are any changes in shareholding rights, that has no relevance to the lease or the period for which the lease was given.

34. On his part **Mr. Makori**, learned counsel for the 2nd respondent submitted that what they filed is not the report which the court directed to be filed, but rather a summary of the same with the original report being forwarded to the Director of Public Prosecutions (DPP) for his action after an inquiry file was opened. The reason why the 2nd Respondent filed a summary of the investigations is to secure the identity of witnesses and the documents should the DPP prefer to take any action. Counsel submitted that the merits of the findings of the investigations cannot be revealed or discussed in this court.

The determination.

35. The Petitioner claims that its ownership, occupation and enjoyment of the suit property is under threat by the 1st and 2nd Respondents who have questioned how the Petitioner acquired the suit property, and also how the current ownership of the Petitioner's company came into being.

36. From the pleadings which were not challenged, the Petitioner has provided information on how it acquired the suit property. The Petitioner derives its leasehold title to the suit property from a grant made to it by the colonial government of Kenya on 11.5.60 for a term of 99 years commencing 1.1.49. Following Kenya's independence, the freehold interest in the land comprising the property was transferred to the East African Harbours Corporation (EAHRC) by virtue of Legal Notice Number 19 dated 16.6.69. The EAHRC is now defunct and its proprietary interests and obligations were transferred to the Kenya Ports Authority under the provisions of Section 74(1) of the Kenya Ports Authority Act (Cap 391). In response to this claim, the 1st Respondent has stated that the Petitioner, in its response dated 25.4.17, confirmed that it was the registered proprietor of leasehold interest in the suit property and gave the 2nd Respondent full and complete details as requested including the history of the suit property and the circumstances surrounding the acquisition of the Petitioner's shares.

37. The net effect of the 1st Respondent response is that the suit property is lawfully leased to the Petitioner, and that the Petitioner is in lawful occupation. As far as the directorship of the Petitioner company is concerned, it is the 1st Respondent's case that the alleged changes in directorship or shareholding of the Petitioner company does not affect the lease or the period for which the lease was granted. The net effect of the 1st Respondent's case is that they support the Petition and blame the 2nd Respondent for the tribulations of the Petitioner.

38. It is the finding hereof that the 2nd Respondent has no authority, power or jurisdiction either under the Constitution of Kenya, the Ethics and Anti-Corruption Act 2011 and/or any other law to unilaterally determine for itself and without following due process what constitutes fraudulent conduct. However, it has the mandate to investigate economic crimes where there is *prima facie* evidence of criminal conduct. It was on the strength of the 2nd Respondents allegation that it was still investigating the matter that this court ordered for a report on the investigations. The 2nd respondent filed a summary of the said report in court on 5.10.18, but insisted that the contents of the entire report which was forwarded to the DPP, cannot be discussed in this court. With that kind of submission, the 2nd Respondent denied this court the benefit of the outcome of the said investigations. However, I have carefully considered the summary of the aid report but it is not availed in a form which can be taken as evidence. There is no affidavit anchoring the said report, and therefore, its contents cannot in any way bind this court. But this assertion is not news at all because Mr. Makori, learned counsel for the 2nd Respondent, expressly submitted that the contents of the report cannot be discussed in this court.

39. However even from what is filed in this court, a cursory look thereof shows that the report makes several sweeping and unsupported allegations about the ownership of the suit property, the period of lease, the changes in directorship and shareholding of the Petitioner

company. These allegations are in direct conflict to the real records before the court which document ownership, lease and directorship of the company. Under section 107 of Evidence Act whoever alleges the existence of any set of fact is obligated to prove the same. There has been no attempt at all by the 2nd Respondent to prove any one of the allegations made against the Petitioner. This may be due to the fact that the DPP may prefer an action after perusing the said report, and hence the need to protect identity of witnesses. However, that is an area where this court cannot stray into. This court is bound by the pleadings before it, and those pleadings do not support the allegations by the 2nd Respondent.

40. It is to be noted that the claim before the court is a civil claim which is to be determined on a balance of probability. This Court is satisfied that the Petitioner has proved its case on a balance of probability that its property is under real threat. It may as well be that the investigations by the 2nd Respondent reveal a criminal intention. Wherever such intention is established, even in this matter, nothing stops the 2nd Respondent from taking proper and appropriate criminal action against those that could be found culpable. In this Petition however, there is no evidence to suggest that the Petitioner is not the lawful owner of the leasehold under reference. There is also no evidence that the changes in shareholding or directorship of the Petitioner are unlawful. This court does not conduct criminal investigations, and will not therefore speculate about such possibilities.

41. In the upshot, the petition succeeds and orders are granted as follows:

(a) A declaration that the certificate of title that the Petitioner holds in respect of the suit property, namely, MOMBASA/BLOCK XLVII/73, constitutes conclusive evidence of ownership and that the Petitioner is the absolute and indefeasible owner of the suit property.

(b) A declaration that the demands made and threats of actions intended to be taken by the 1st Respondent in its letter of 8th June, 2017, namely, to demand the return of the Certificate of Lease to the suit property or to revoke the Petitioner's title to the suit property or to place any caveat or other restriction against the said title are invalid; null, unlawful and/or ultra vires the powers of the 1st Respondent and therefore of no purpose or effect.

(c) A declaration that the actions of the 2nd Respondent in purporting to unilaterally determine for itself and without following due process what constitutes fraudulent conduct or to involve itself in the affairs of the Petitioner or to "direct" the 1st Respondent to "recall" and/or "revoke" the certificate of lease held by the Petitioner and to "secure" the suit property by lodging a caveat or other restriction against the title are invalid, null, unlawful and/or ultra vires the powers of the 2nd Respondent and therefore of no purpose or effect.

(d) An injunction to restrain the 1st and 2nd Respondents whether by themselves or their agents or servants or otherwise howsoever in giving effect or implementing in any manner whatsoever the matters raised in the 1st Respondent's letter dated 8th June, 2017 addressed to the Petitioner, or by hindering, alienating or in any other manner interfering with the Petitioner's ownership, possession and quiet enjoyment of the suit property, namely, MOMBASA/BLOCK XLVII/73.

(e) An injunction to restrain the 2nd Respondents whether by itself or its agents or servants or otherwise howsoever from hindering or impeding its business in any way including (but not limited to) interfering with the Petitioner's corporate structure and/or shareholding without following due process.

(f) As for costs, this court directs parties to bear own costs. The 2nd Respondent engages in public interest litigation and unless it is absolutely necessary, it will not always suffer any costs in such matters.

Dated, Signed and Delivered at Mombasa this 5th day of November,

2019.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Mwaka holding brief Somin for Petitioner

Mr. Wafula for 1st Respondent

Ms. Abdulrahman for 2nd Respondent

Mr. Kaunda Court Assistant