



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

AND

IN THE MATTER 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 259 OF THE CONSTITUTION OF KENYA

BETWEEN

JOHN GROSSERT & COMPANY LIMITED.....PETITIONER

VERSUS

1. KENYA PORTS AUTHORITY

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

RULING

1. By a petition dated 16th June, 2017, the Petitioner, a limited liability company incorporated in Kenya, seeks reliefs detailed at page 5 of the petition.
2. 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.
3. 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

4. The Petitioner claims that at all material times to this suit, the Petitioner is and was the registered leasehold owner of all that parcel of land known as MOMBASA/BLOCK XLVII/73 (hereinafter 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"*the said Certificate*") issued in the Petitioner's favour under the provisions of the Registered Land Act (now repealed) by the Mombasa District Land Registry on 13th April, 1984. The Petitioner allegedly derives its leasehold title to the suit property from a grant made to it by the colonial government of Kenya on 11th May, 1960 for a term of 99 years commencing 1st January, 1949. 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 16th June, 1969. 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 orders:

- 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 Wanjiru 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.**

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 23rd July, 2016.

5. By a letter dated 19th April, 2017, the 2nd Respondent wrote to African Marine and General Engineering Company (“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 25th April, 2017, 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 16th May, 2017 for a meeting with the Petitioner’s directors, a meeting was held on 24th May, 2017 where statements were recorded. On 25th May, 2017, a complete set of documents showing the details of the acquisition of shares and current status in the Petitioner was delivered to the 2nd Respondent by the Petitioner.

6. The Petitioner, having co-operated fully with the 2nd Respondent in its investigations, thereafter received a letter dated 8th June, 2017 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.

Despite the seriousness of the allegations made, the 1st Respondent failed to annex a copy of the 2nd Respondent’s letter of 19th May, 2017 to its letter of 8th June, 2017.

7. 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 19th May, 2017 nor given the assurance requested.

The refusal of the 1st and 2nd Respondents to neither provide the Petitioner with a copy of the said letter of 19th May, 2017 nor give the assurance requested is indicative of the fact that both Respondents are intent on acting *mala fides* and are clearly parties to a conspiracy to wilfully deprive the Petitioner of the suit land.

8. 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 8th June, 2017.

9. 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 unilaterally 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.

In seeking to penalize the Petitioner without giving it the opportunity to either know, consider or respond to the particulars of fraud purportedly alleged to have been made in the 2nd Respondent’s letter dated 19th May, 2017, the 1st and 2nd Respondents are alleged to have violated the principles of natural justice and the Petitioner’s legitimate expectation to be treated fairly, and for such matters to be fairly dealt with at a properly constituted hearing before a court as provided for under Article 50 of the Constitution of Kenya. The 1st and 2nd Respondents have allegedly acted, and intend to continue to act, *ultra vires* their respective powers by purporting to arrogate to themselves powers which have simply not been conferred upon them and without, in either case, following the requirements of due process. By threatening the kind of action that they have, the Petitioner avers that the 1st and 2nd Respondents are intent on causing harm by depriving the Petitioner of its constitutionally and statutorily protected right to continue to possess, occupy, and quietly enjoy the suit property without hindrance thereon in blatant and flagrant disregard of, *inter alia*, Articles 40, 47 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 relief 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 Respondent whether by itself or by 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.

10. The petition is supported by affidavit of Alnoor Habib Jiwan sworn on 16th June, 2017 together with annexures, and a Further Affidavit sworn by the same person on 9th October, 2017.

The Response

11. The 1st Respondent oppose the petition vide a Replying Affidavit sworn by **Michael O. Sangoro on 5th September, 2017**. 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 sit property was transferred to the then East African Harbour Corporation (EAHRC) by a Legal Notice Number 19 dated 16th June, 1969 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 11th March, 2014 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”.

12. 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 19th May, 2017 marked “KPA-4”. The 1st Respondent wrote to the Petitioner vide a letter dated 8th June, 2017 explaining to the Petitioner the contents of the 2nd Respondent’s letter dated 19th May, 2017 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 8th June, 2017 marked “KPA-6”).

13. That the 1st Respondent received a response from the Petitioner vide a letter dated 8th June, 2017 in which the Petitioner sought a copy of the 2nd Respondent’s letter dated 19th May, 2017 to enable the Petitioner to respond. (See copy of the Petitioner’s letter dated 8th June, 2017 marked “KPA-7”). On the 13th of June, 2017 the 1st Respondent wrote a letter to the 2nd Respondent and copied to the Petitioner requesting the 2nd Respondent to forward its letter dated 19th May, 2017 to the Petitioner. See annexure “KPA 8”. Subsequently the 1st Respondent wrote to the Registrar of Titles a letter dated 13th June, 2017 requesting the Registrar to RESTRICT any transaction on the suit parcel of land. See annexure marked “KPA-9”.

14. 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.

15. 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.

16. The 1st Respondent states that there was nothing to indicate that the letter dated 19th May, 2017 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 8th June, 2017. 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.

17. On their part the 2nd Respondent opposed the petition vide Replying Affidavit of **Sylvester Mango** sworn on **16th August, 2017**. 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.

18. The 2nd Respondent’s case is that on 11th April, 2017, 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 16th May, 2017, 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 31st May, 1950 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 1st January, 1949, 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 19th December, 2002, 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 21st January 2013, the 1st Respondent was registered as the absolute proprietor and successor of the East African Harbours Corporation, and on 1st May 2015, 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.

19. 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. The 2nd Respondent states that consequently preliminary investigations confirms 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. The 2nd Respondent further avers that the letter dated 19th May, 2017, 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 8th June, 2017, 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.

20. 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.

21. 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.

22. 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.

Submissions

23. Parties filed submissions which were highlighted in court. I have carefully considered the petition and submissions of parties. The only issue for determination I raise in this petition is whether or not this petition is premature.

24. I have carefully considered the petition. I have no doubt that the petition raises issues of fundamental right to property that this court should and must secure in all appropriate occasions. It is also clear to me that the 2nd Petitioner has a constitutional mandate to investigate all possible cases of corruption, and upon investigation to prefer criminal charges where appropriate. According to the evidence before the court those investigations are currently ongoing. This court cannot comment on the likely output of the investigations but this court notes that it has to tread cautiously to avoid a decision which may impair the said investigations. It is my understanding that the 2nd Respondent's intention is to secure the public interest and the suit property from any transactions, alienation, transfer, lease, charge and or any dealings with the suit property by the Petitioner or any other person pending the conclusion of those investigations. At the conclusion of those investigations the 2nd Respondent is expected to make appropriate recommendations and the same shall be shared with this court. Any decision from this court must therefore not appear to compromise the said investigations.

25. This court is satisfied that the suit property is secure during the period of the said investigations. The Petitioner is also not likely to suffer any prejudice during the period of the investigations provided that a limited period is provided for carrying out of the same.

26. Pursuant to the foregoing I make the following orders:

(a) The petition herein shall be stayed for a period of ninety (90) days with the interim orders fully in force during that time.

(b) The 2nd Respondent is granted the full mandate to carry out all necessary investigations on the suit property. This must be done and concluded within ninety (90) days from the date hereof and a Report of the finding filed in court on or before 5th October, 2018.

(c) The matter will be mentioned on 8th October, 2018 for further directions from the court.

(d) For avoidance of doubt if those investigations are not carried out and completed within the said ninety (90) days this court will proceed to render Judgment in the petition herein.

Those are the orders of the court.

Dated, Signed and Delivered in Mombasa this 5th day of July, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Onyango for Petitioner

Ms. Mwangi holding brief Mr. Wafula for 1st Respondent

Mr. Makori for 2nd Respondent

Mr. Kaunda Court Assistant