REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 127 OF 2019

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

VERSUS

WILSON GACANJA.....1ST DEFENDANT

JOSEPH MUTUKU MUIA.....2NDDEFENDANT

FAMILY BANK LIMITED.....3RD DEFENDANT

RULING

Introduction:

1. In the Notice of Motion dated 19th November, 2019 and filed on an even date, the Plaintiff has sought for the following orders:

   a) Spent.

   b) Spent.

   c) That pending the hearing and determination of this suit, the 2nd and 3rd Defendants/Respondents by themselves, their agents, servants and/or employees or any other person interested in the suit property be restrained from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing, construction, development or in any similar manner dealing with the parcel of land known as Machakos Block 1/623, situate in Machakos county.

   d) That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's Forensic Investigator who has deponed that his investigations revealed that Machakos Block 1/623 *(initially part of L.R. No. 909/536) (the suit property)* was alienated government land and was reserved for public purpose, namely, government housing and therefore the same was not available for allocation.

3. The Plaintiff's Forensic Investigator deponed that investigations revealed that the suit property was allocated to one Ramesh Chandra Nathoo Shah on 22nd January, 1968 by the Town Council of Masaku, then known as Masaku Urban Council, for a terms of 33 years from 1 st January, 1968 pursuant to an approval granted by the Commissioner of Lands on 4th May, 1968.

4. It was deponed by the Plaintiff's Investigator that subsequently, the suit land and nine (9) other plots were allocated to the Ministry of Health for institutional housing; that the Town Council of Masaku, through the Commissioner of Lands, allocated Mr. Shah an alternative parcel of land being L.R. No. 909/701 after surrendering the suit property and that upon acquiring the land, the government developed on the land a house registered at the Ministry of Housing as Mach/House/HG. 14 currently housing the Sub-County Police Commander.

5. It is the deposition of the Plaintiff's Forensic Investigator that in unclear circumstances, the Machakos Municipal Council allocated plot numbers 3 and 4 in a meeting held on 20th May, 1992 to one Peter Ndunda and Mutua Kilaka respectively vide PDP number MKS 56/92/6 and that as a result, L.R. No. 909/536 was sub-divided into three portions known as Machakos Municipality Block 1/622, 623 *(the suit property)* and 624.

6. It was further deponed by the Plaintiff's Investigator that despite the lack of legal authority, and the fact that the land was reserved for public purpose and therefore not available for allocation, the 1st Defendant allocated parcel of land known as Machakos Municipality Block 1/623 *(the suit property)* to the 2nd Defendant.

7. The Plaintiff's Investigator finally deponed that the Director of Surveys has indicated that the Part Development Plan attached on the letter of allotment was never approved; that the 1st Defendant charged the suit property to the 3rd Defendant to secure a sum of Kshs. 8,000,000 and that unless the orders sought are granted by this court, the Government of Kenya and the general public will suffer irreparable loss.

8. The Application was opposed by the 2nd Defendant who deponed that the Plaintiff has not met the conditions required for the grant of injunctive orders; that the contents of the Application and the Affidavit are made out of ignorance of the procedure used to allocate land and that the suit land was allocated to his father.

9. The 2nd Defendant wondered why the Plaintiff had neither sued the Municipal Council of Machakos through their successor, the Machakos County Government, as the head lessor nor the Estate of the initial allottee, Peter Ndunda and that the Municipal Council of Machakos could allocate land to individuals.

10. The 2nd Defendant deponed that this court cannot cancel the title in respect to the suit land without hearing the Machakos County Government; that the Plaintiff has not produced a duly signed surrender document by one Rameshchandra Shah surrendering the original land to the Ministry of Health and that the Plaintiff has not produced Minutes showing that the Plot Allocation Committee allocated the suit property to the Ministry of Health or any other government entity for pooling.

11. It was deponed by the 2nd Defendant that the Plaintiff's Investigator has not attached the plans approved by the department of Public Works and Housing for the construction of the alleged house known as Mach/House/HG.14; that the letter dated 16th March, 1974 is not signed by the alleged author as required by government procedures and that from the Minutes, the Part Development Plan which allocated the impugned plots was 56/92/16 and that the letter of allotment for Rameshchandra Nathoo Shah, the letter by Ministry of Health and the letter dated 2nd October 1975 are all not signed thus fake and fraudulent.

12. The 2nd Defendant deponed that the name appearing on the letter dated 2nd October, 1975 is Ramesh Oxendra Nabhoo, who is a different person from Rameshchandra Nathoo Shah; that the fake and fraudulent letter dated 7th August, 2018 refers to house number 14 and not 4 as alleged; that the Ministry of Interior and Coordination was created after the 2013 General Election and not in the 1970s when it was known as the Ministry of Home Affairs and that the head lessor to the suit property is not complaining.

13. The 2nd Defendant finally deponed that the Plaintiff had not demonstrated how construction of a house on land can interfere with it or its alleged interests; that he had secured a loan and part of the repayment plan were the proceeds from the rent collected from the house and that if the orders sought are granted, he stood to lose income and risk being listed by the Credit Reference Bureau (CRB) as a defaulter.

14. The 3rd Defendant's Small and Medium Enterprises Officer deponed that the suit property was registered in the name of the 2nd Defendant; that the 3rd Defendant did not play any role in the acquisition of the suit property by the 2nd Defendant and that the relationship between the 2nd and 3rd Defendants is that of a banker and its customer.

15. The 3rd Defendant's officer deponed that since the 3rd Defendant has a valid and duly registered Charge over the suit property, the court should not issue any order that will compromise its statutory power of sale over the property in the event the 2nd Defendant defaults in the repayment of the loan.

16. In response to the 3rd Defendant's Affidavit, the Plaintiff's Investigator deponed that there was evidence of fraud in the allocation of the suit property; that the 2nd Defendant's father was part of the said fraudulent scheme and that the plot was not available for allocation having been set aside for government purposes.

17. It was deponed by the Plaintiff's Investigator that the 2nd Defendant did not have a good title to the suit land and hence there was no valid charge that could be created on the suit property. The 2nd Defendant filed a Further Affidavit which I have considered.

Submissions:

18. The Application was canvassed vide written submissions. Counsel for the Plaintiff submitted that Peter M. Ndunda was the Mayor for Masaku Town and was also a member of the Machakos Plot Allocation Committee; that the said Peter M. Ndunda was allocated plot number 3 *(Land Parcel Machakos Municipality 1/623)* in 1993 and that the said allocation amounted to conflict of interest and abuse of power.

19. It was submitted that Peter Ndunda transferred the suit land to his son, the 2nd Defendant, and that the plot was not available for allocation because it had been reserved for public utility.

20. Counsel submitted that the suit property was not available for alienation in terms of Section 3 of the Government Lands Act *(repealed).* Counsel relied on the case of *Milankumarn Shah & 2 Others vs. City Council of Nairobi & 2 Others HCCC 1024 of 2005* where it was held that land reserved for a particular purpose could not be available for re-alienation.

21. It was submitted by the Plaintiff's counsel that the 1st Defendant did not pass a good title to the 2nd Defendant. Counsel relied on the case of *Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others [2015] eKLR* where the Court held as follows:

> *"However, there is no harm in going the extra mile and digging deeper into the title. In fact, it is probably advisable to do so, given the fact that this country is notorious when it comes to land scams, and land fraudsters have continuously been in the kitchen,*

creating new recipes for land con schemes. I would inform any prudent person wishing to deal with land, to go beyond the legal obligation of conducting an official search, and always prod a little more to find out if the person has good title to the land. It is not easy, but it is advisable to do so."

22. It was submitted that the Application should be allowed because the suit property was part of land that was reserved for public purposes.

23. The 2nd Defendant's advocate submitted that the 2nd Defendant is a Lessee of the suit property, with Municipal Council of Machakos, *(now County Government of Machakos)* being the lessor; that the County Government of Machakos still holds the reversionary interest in the lease yet it has not been sued and that the 2nd Defendant/Respondent has been holding the title to the said suit land having acquired it lawfully and legally.

24. Counsel for the 2nd Defendant submitted that the title to the suit land remains indefeasible until the court states otherwise and that the Plaintiff's allegations that the suit property was fraudulently acquired are unfounded, baseless, malicious and intended to deny the 2nd Defendant the use of the land he legally acquired from his late father.

25. It was counsel's further submissions that allegations of fraud must be strictly proved by calling of evidence at trial. Reliance was placed on the case of *Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd & Another (1979) KLR 76,* where the Court held as follows:

"Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required."

26. The 2nd Defendant's counsel submitted that the Applicant has not demonstrated to the court that it has a *prima facie* case with chances of success; that the Plaintiff has not backed up its claims with proof despite stating that it has completed its investigations and that the Applicant has not demonstrated to the court how or what it stands to suffer if the orders of injunction are not issued. According to counsel, it is the 2nd Defendant who will suffer irreparable loss if the injunctive orders are granted as he continues to lose income and the use of the suit property.

27. Counsel submitted that the 2nd Defendant applied for and was granted a loan of Kshs. 8,000,000 by the 3rd Defendant to develop the suit property; that through malice and vendetta, the Plaintiff has been frustrating his attempts to complete the development of the suit property and that the 2nd Defendant/Respondent has incurred a lot of expenses in carrying out the construction works on the suit property.

28. The 3rd Defendant's counsel submitted that the Plaintiff has not established a *prima facie* case against the 3rd Defendant to warrant the issuance of an injunction against the 3rd Defendant from exercising its statutory power of sale over the suit property or to warrant an order declaring the charge registered over the suit property as null and void.

29. It was submitted by the 3rd Defendant's counsel that the pleadings filed by the Plaintiff confirm that the 3rd Defendant did not play any role in the acquisition of the suit property by the 2nd Defendant; that no allegations of fraud have been made against the 3rd Defendant in the acquisition of the suit property by the 2nd Defendant and that the Plaintiff has not provided any evidence to show that the legal charge registered over the suit property was registered or procured by any corruption or illegal means by the 3rd Defendant.

30. On the necessity of proving irreparable harm before an injunctive order can issue, the 3rd Defendant's advocate relied on the Court of Appeal case of *Nguruman Limited vs. Jan Bonde Nielsen & Another Civil Appeal No. 77 of 2012 [2014] eKLR* that rendered itself as follows:

"If the applicant establishes a Prima facie case that alone is not sufficient basis to grant an Interlocutory Injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no Interlocutory Order of Injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap frogging" by the applicant to injunction directly without crossing the other hurdles in between."

31. It was counsel's argument that the Plaintiff has not demonstrated that it cannot be compensated by damages if an injunction is not granted; that the Plaintiff has not demonstrated that there is any danger of the suit property being alienated during the pendency of the suit and that the Application should be dismissed.

Analysis and findings:

32. The Plaintiff is seeking for an order of injunction restraining the Defendants from dealing with land known as Machakos Block 1/623 in any manner whatsoever pending the hearing and determination of the suit.

33. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Fellowes and Son vs. Fisher [1976] I QB 122).*

34. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as

follows:

> *"...in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

35. The main purpose for issuance of a temporary injunctive order is the preservation of the suit property and the maintenance of the *status quo* between the parties, pending the disposal of the main suit. It is trite that interlocutory orders are granted without full investigation of the merits of either side's case. However, to be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. (See *Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435).*

36. In *Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892,* Sir John Donaldson MR, while criticizing the expression *'balance of convenience'*, an expression posited in the House of Lords decision in *American Cynamid vs. Ethicon, [1975] AC 396*, said this about the purpose of interim injunctions:

> *"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."*

37. The other factor that is relevant in an Application for injunction is the extent to which the determination of the Application, at an interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in *NWL Limited vs. Woods [1979] WLR 1294* by Lord Diplock as follows:

> *"Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other."*

38. The Plaintiff's case is that land known as Machakos Block 1/*623 (the suit property),* was initially part of L.R. No. 909/536 and was allocated to one Rameshchandra Nathoo Shah on 22nd January, 1968 by the then Town Council of Masaku. The Plaintiff annexed on its Investigator's Affidavit a letter of allotment in the name of the said Rameshchandra Nathoo Shah dated 22nd January, 1968.

39. The Plaintiff's Investigator informed the court that in 1974, L.R. No. 909/536, and nine (9) other plots, were allocated to the Ministry of Health for institutional housing and that the then Town Council of Masaku, through the Commissioner of Lands, allocated Mr. Shah an alternative parcel of land being L.R. No. 909/701 after surrendering L.R. No. 909/536.

40. The Plaintiff produced in evidence a copy of the letter dated 16th March, 1974 which shows the ten (10) parcels of land, including L.R. No. 909/536, that the Ministry of Health was allocated by the Machakos Plot Allocating Committee. The Plaintiff also exhibited a letter dated 2nd October, 1975 authored by the Clerk of the Town Council of Masaku and addressed to the Commissioner of Lands.

41. In the said letter, the Town Council of Masaku informed the Commissioner of Lands about the allocation of an alternative land to one Ramesh Oxendra Nabhoo, who, according to the letter, initially owned L.R. No. 909/536. According to the letter of 2nd October, 1975, the said Ramesh was allocated an alternative land known as L.R. No. 75387.

42. According to the Plaintiff, upon acquiring L.R. No. 909/536, the government developed a house registered at the Ministry of Housing as Mach/House/HG. 14, currently housing the Sub-County Police Commander, and that in unclear circumstances, the Machakos Municipal Council allocated plot numbers 3 and 4 in a meeting held on 20th May, 1992 to one Peter Ndunda and Mutua Kilaka respectively vide PDP number MKS 56/92/6, which allocation occasioned the sub-division of L.R. No. 909/536 into three portions known as Machakos Municipality Block 1/622, 623 *(the suit property)* and 624.

43. The Minutes purportedly allocating a portion of L.R. No. 909/536 vide PDP No. 56/92/ [1]6 dated 20th May, 1992 and 24th July, 1992 have also been exhibited by the Plaintiff. Those Minutes, according to the letter dated 24th July, 1992 by the then Machakos Municipal Council, were forwarded to the Commissioner of Lands. Plot number 3, which the Plaintiff alleges was surveyed as parcel of land known as Machakos Block 1/623, was allocated to the 2nd Defendant's father, one Peter M. Ndunda.

44. The Plaintiff's Investigator annexed on his Affidavit a letter dated 5th July, 2018 in which the Director of Surveys has indicated that the PDP No. 56/92/6 attached on the 2nd Defendant's letter of allotment was never approved. Indeed, the copy of the said Part Development Plan has also been exhibited by the Plaintiff.

45. The Certificate of Lease annexed on the 3rd Defendant's Affidavit shows that the 2nd Defendant was registered as the proprietor of Machakos Municipality Block 1/623 on 13th October, 1996 for a term of 99 years. The 2nd Defendant then charged the suit property to the 3rd Defendant on 7th April, 2018.

46. Although the 2nd Defendant and his late father have been accused of having acquired the title to the suit property unlawfully, the 2nd

Defendant has not produced a copy of the letter of allotment together with an approved Part Development Plan (PDP) that gave rise to the title to enable the court ascertain if he acquired the suit land procedurally.

47. Indeed, the process of acquiring unalienated government land is paramount. In the case of *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR,* this court held as follows:

> *"130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister of Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved Part Development Plan is then issued to the allotee.*
>
> *131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural requirement was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Company Limited vs. The Hon. Attorney General, Mombasa HCCC No. 276 of 2013."*

48. While dismissing the Appellants' Appeal in the case of *Nelson Kazungu Chai & 9 others vs. Pwani University College (2017) eKLR,* the Court of Appeal held as follows:

> *"Worth noting as well is that no Part Development Plan was produced to back the Appellants' claim that due process had been followed as alleged."*

49. The Plaintiff has produced documents showing that the suit property is a portion of the land that had been allocated to the Ministry of Health. The Plaintiff has further produced documents showing that the land that had been reserved for the Ministry of Health by the then Town Council of Masaku was sub-divided, and a portion thereof allocated to the 2nd Defendant's father.

50. It is trite that where land is reserved for public purposes, then the same cannot be available for allocation. In the case of *Farooq Imtiaz Mohamed Malik vs. Director of Police Investments & 3 others [2018] eKLR,* this court held as follows:

> *"The suit land was set aside for a public purpose, that of putting up government houses as and when funds were available. It could not be allocated to a private person at the whim of the Commissioner of Lands, who was mandated by the Constitution to hold it in trust for the public. When the Commissioner of Lands, or any other public body purports to allocate land set aside for a public purpose, the court will not hesitate to cancel such a title."*

51. The Plaintiff having shown, *prima facie,* that the suit property was part of the land that was reserved for government houses, and that the said land was allocated to the 2nd Defendant's father and the 2nd Defendant on the basis of an unapproved Part Development Plan, it is my finding that the Plaintiff has established a *prima facie* case with chances of success.

52. Indeed, the 2nd Defendant has admitted that he has not only charged the suit property to the 3rd Defendant, but is also in the process of developing the suit property. That being the case, the continued development of the suit property will change the status of the property to the detriment of the public in the event the Plaintiff succeeds in its claim.

53. Furthermore, unless an injunction is issued, the 3rd Defendant is likely to dispose of the suit property in the exercise of its statutory power of sale, which will occasion the public irreparable injury that cannot be compensated by damages in the event the Plaintiff succeeds in its claim.

54. For those reasons, I allow the Plaintiff's Application dated 19th November, 2019 as follows:

> ***a) Pending the hearing and determination of this suit, the 2nd and 3rd Defendants/Respondents by themselves, their agents, servants and/or employees or any other person interested in the suit property be restrained from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing, construction, development or in any similar manner dealing with the parcel of land known as Machakos Block 1/623, situate in Machakos county.***
>
> ***b) The costs of this Application to be in the cause.***

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE