REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO.423 OF 1996

NIAZ MOHAMED JAN MOHAMED .....PLAINTIFF

Versus

1. **COMMISSIONER OF LANDS**
2. **MUNICIPAL COUNCIL OF MOMBASA**
3. **NANDLAL JIVRAJ SHAH**
4. **VIMAL NANDLAL SHAH T/A JIVACO AGENCIES**
5. **MEHUL N.SHAH..... DEFENDANTS**

RULING

NIAZ MOHAMED JAN MOHAMED (hereinafter referred to as NIAZ) has at all times material to this suit been the registered proprietor of all that freehold property measuring approximately 3.63 Acres, known as plot no.32 Section 1 Mainland North in Kisauni/ Nyali area within Mombasa Municipality.

During the construction of the New Nyali Bridge in 1979, it became necessary to construct a new access road to Kisauni and Nyali estate. When that road was surveyed it traversed Plot No.32, as it must have, other plots, and therefore the Land Acquisition Act had to be invoked to acquire the areas traversed by that road. As respects plot No.32, it was considered that an area of approximately 0.37 of an Acre would be covered by the road and therefore machinery was put in place to acquire that portion.

the acquisition was carried out through the Commissioner of Lands who published Kenya Gazette Notice on 18.5.1979. On 13.12.1979, he registered against the Title a "Notice of taking possession and vesting of land in the Government" under section 19(1) of the Land Acquisition Act and asked Niaz to surrender the documents of title to the Registrar of Titles Mombasa for rectification. The Notice was copied to amongst others the Municipal Council of Mombasa. The Director of Surveys, the Chief Engineer (Roads) Ministry of Works with a caption that "Construction of road will start with immediate effect."

And so it did and was completed in due course and handed over by the contractors. It was then opened for use by the public.

Niaz thereafter enjoyed a road frontage and direct access to that road until November 1995 when it is alleged the commissioner of lands, with the connivance, consent or knowledge of Municipal Council of Mombasa created a new leasehold Title from a small portion which remained uncovered by the tarmac road, measuring approximately 0.14 Acres and allocated this to NANDLAL JIVRAJ SHAH, VIMAL NANDLAL SHAH and MEHUL SHAH all Trading as JIVACO AGENCIES (hereinafter referred to as JIVACO). The land issued was given LR No.9665 Sec.1 MN and Grant No. CR 28028. The 99 year tenure commenced on 1.11.95.

Niaz was piqued about this discovery. He saw not only a deliberate attempt to interfere with his easement rights of access to the new road and its road reserve, but also a callous attempt to unlawfully alienate public land to private developers. The threat by the new allottees to commence development or alienate the plot to other persons despite protestation by Niaz, compelled him to come to court.

He filed a suit on 8.8.96 against the Commissioner of lands (commissioner) and JIVACO. He also joined the Mombasa municipal Council (The Council) which is the Local Authority within those jurisdictions the Kisauni / Nyali Road falls and holds the Road together with the road reserve thereto in trust for the Public, and must have known about the alienation of the portion of land. He prays for judgment and five orders in that suit:

i. A declaration that the creation and grant of allocation by the Commissioner and/ or the Council of title No. LR No.9665 Sec.1 MN to Jivaco in 1995 is null and void.
ii. A declaration that the lease of 99 years granted to Jivaco by the Commissioner and/or the council of Title No.9665 Sec.1 MN is null and void
iii. An order that Jivaco do deliver up the title No.9665 to the commissioner for cancellation.
iv. An order that the land comprised in Title No.9665 Sec.1 MN do remain a road or road reserve.
v. An injunction to permanently restrain the defendants jointly and/or severally from selling or developing the said parcel by themselves or their agents or in any other manner from dealing with the land No.9665 Sec.1 MN.

Contemporaneously with the main Suit, Niaz filed a Chamber Summons under Order 39 rule 1, 3 & 9 of the Civil Procedure Rules and Section 3A of the Act seeking a temporary order

"That Jivaco by themselves of by their agents or servants or any person whatsoever acting on their behalf be restrained from developing, erecting structures or structure, selling, assigning or transferring or in any other manner whatsoever dealing in or with or interfering, wasting or alienating plot No. LR No.9665 Sec.1 MN until the hearing and final determination of this suit or further orders from the court."

This is the application that was argued before me on 19.9.96 and 20.9.96.

I was satisfied on the outset that The Commissioner was served with the plaint, summons to enter appearance, chamber summons and affidavits but never bothered to respond thereto or attend court on the hearing date either personally or through the attorney general. The council was also served and entered appearance and filed its defence. But it made no response to the application by filing any grounds of opposition or any affidavits in reply. Their councel Mr. Iha attended court on the hearing date and was given an opportunity to address the court on any aspect of the application despite the non-filing of grounds of opposition and/or replying affidavit. Counsel declined the opportunity however and stated that he did not wish to make any submissions in respect of the application. He left the court room. That left Mr. Asige for Niaz and Mr. Gikandi for Jivaco to battle it out.

As I perceived it, Mr. Asige's case is two-proned: that Niaz has private rights to protect and, intertwined with these rights are also public rights which ought to be protected.

The private rights of Niaz arose because after the acquisition of the land and the construction of the road, Niaz became a frontager to that road and acquired absolute easement rights over the new road. He has a right to remain such frontager which has its advantages because the portion of his land was not acquired for any other purpose but for construction of a road. He ought to have direct access to the road through this portion but he will not be able to do so since a Title has been created between him and the road and there is no way of knowing what kind of construction or development will be put up there. This may well affect the value of his property. Hence the need to protect these rights, the infringement of which will lead to irreparable loss and damage. Intertwined with these rights is a public right which Niaz as a member of the public and in his own right as a user of the road feels he ought to protect. In Mr. Asige's submission, it is clear that the portion now that the subject matter of the suit was acquired solely for construction of the new Kisauni/Nyali access road. If the entire stretch of acquired land was not utilized, then any remaining portions still comprised the said Road and its Road – reserve. He cited the Public Roads of

Access Act Cap399 Section 2 (c)

"Public road means

a. ……
b. ……..
c. All roads and thorough fares hereafter reserved for public use.

And also the Streets Adoption Act Cap 406 Section 3(1) where 'street' means inter alia"

> "… a highway … road … footway … passage or any lands reserved therefore, within the area of Local Authority, used or intended to be used as a means of access to two premises or areas of land in different occupation whether the public have a right of way over it or not…."

On these two premises, submitted Mr.Asige, the area acquired became a Public road or street. Under the local government Act Cap 265, such areas are under the general control of the local authority within which they are situated, in this case. The Mombasa Municipal Council. Under Section 182(1) of the Act the council exercises trusteeship rights and has no right of alienation in breach of this trust that is intended to be contested in the main suit. It will also be contended that the Commissioner of Lands was part of this larger scheme of alienating road reserves by abusing the provisions of the land acquisition Act by compulsorily acquiring land for a specific purpose only to turn around and dish it out to individuals. It will therefore be contended that due to this abuse of the law the allocations made to Jivaco are a nullity ab initio and ought to be so declared by the court. This abuse is even more glaring considering that the new plot created traverses the new tarmac road and according to a survey map annexed to the application two of the beacons stand on the built-up tarmac road. It would mean that in exercises of their new rights Jivaco can build on top of the tarmac road if they wanted to. In Mr. Asige's submission Niaz has fulfilled all the tests set out in the Giella Vs Cassman Brown case including the balance of convenience even if it came to considering the matter on that basis. This is because no development has commenced yet and it would be more convenient to prevent its commencement than to wait until the finalization of the case when it may become necessary to demolish any construction. He invited the court to follow the legal reasoning adopted in NBI HCCC 688/96, BETH KALIA & Others –V- ROBERT MUTISO LELI (UR) where it was recently held by my brother Mbito J., on the facts of that case, that the president through the Commissioner of Lands could not lawfully alienate suit premises which had been previously alienated and had only been surrendered to the Commissioner to hold in trust for the residents of the area.

Mr. Gikandi relied on the grounds of opposition filed on 29.8.96 and basically contended that the suit did not establish any prima facie case, was flivolous, vexatious and an abuse of the court process; the plaintiff can be compensated in damages and that the balance of convenience is not in favor of granting the injunction. He also relied on the affidavits sworn by Mehul Shah for Jivaco and submitted that after the compulsory Acquisition as provided for under the Land Acquisition Act the land vested in the Government free from encumbrances. "Vesting" according to the definition provided by Stroud's Judicial Dictionary which Mr. Gikandi cited

> "Having a right to immediate of future possession and enjoyment."

The property having vested in the government therefore and their being no challenge to the compulsory acquisition since 1979, there cannot be any challenge now because the land subsequently fell to be dealt with by the government under the Government Lands act. This means that utilizing the acquired portion of 0.36 Acres the remaining portion of 0.14 Acres became "un alienated Government Land" and the government could deal with it in any way it wished under Section 3 of the Act. The remaining portion in Mr. Gikandi's submission was not a road or a road reserve as alleged. It has now become a registered parcel of land under the Registration of Titles Act Cap 281 which makes it unchallengeable save for fraud or misrepresentation. Jivaco was not part of this fraud or misrepresentation if any is found to exist.

In his further submission, the public roads and roads of access Act and the street adoption act have no application. The acts are merely for creating roads boards and providing how one can apply to have a road

or street registered or adopted. There is no evidence to show that the disputed portion was registered by the council as a street or road and therefore there is no prima facie proof that it fell on a road reserve.

As for the issue of damages Mr. Gikandi says that there is an averment in the Affidavit of his client that Niaz had approached Jivaco for sale of the land to him and he must therefore have his own interest and not the public's in filing this suit. That is why he delayed in filing the suit since he found out the new registration in June 1996 until September 1996 when the suit was filed. Niaz's rights of access have also not been interfered with since there are other approaches to his property. He cannot suffer irreparable loss.

On the allegation that Jivaco's title or part of it stands on the tamaced road, Mr. Gikandi submitted that it was not for Jivaco to ascertain where the beacons were. If any mistakes were made in placing them then these may be explained as human errors. Jivaco does not intend to build on the road. Considering therefore that Jivaco have a Title and now wish to commence development, they should not be stopped from doing so. Finally Mr. Gikandi submitted that Niaz has not even given an undertaking as to damages if the injunction is ultimately found to have been wrongly issued.

On this Mr. Asige submitted that it was for the court to consider whether to require, and if so, the nature of an undertaking to be given ion the event of an injunction being granted and confirmed that his client was ready to adhere to any terms set by the court in that respect.

The parameters within which I must consider this application are clearly set in the Giella Case cited above. I must be satisfied that the applicant has a prima facie case with a probability of success and that he would suffer irreparable injury which is uncompensable in damages; and if I am in doubt then I have to consider the balance of convenience. In considering thr first test I must also bear in mind that at this stage I have not heard any evidence on the case and that I am relying on Affidavit evidence. The matter of conclusive proof shall await evidence at the main hearing.

I have considered the submission made on both sides and it seems to me that if it can be proved that the disputed portion of land was part of land compulsorily and specifically acquired for the purpose of construction of a road and still remains as a road reserve, then the applicant would be entitled to say that his rights of access to the road through this portion are being interfered with.

There is no right of compulsory acquisition of land by the government for purposes other than those provided for in the constitution of Kenya under section 75.

"no property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except where the following conditions are satisfied:-

a. The taking of possession or acquisition is necessary in the interests of the defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit, and
b. The necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property. "

That spirit is carried forward in the Land Acquisition Act itself in Section 6.

"6(1) where the Minister is satisfied that any land is required for the purpose of public body and that-

(a)The acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit, and

(b)The necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land and so certifies in writing to the Commissioner, to acquire

the land compulsorily under this part."

If it were not so, and taken to its logical conclusion, a loophole would be created for any government whish does not mean well for its citizens, to compulsorily acquire whole sections of a city or town or other developed property on the pretext of public good, compensate the owners of the property acquired with taxpayers' money and then turn round and dish out those properties to favored citizens of its choice or the enemies of the state: parliament could not have intended such preposterous consequences.

I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government, then the land falls to be used by the Government in any manner it desires. There is plainly no such *carte Blanche* intended in the provisions of the law cited above. The land must be used, subsequent to the acquisition, for a lawful purpose, and as I see it, the only lawful purpose is the one for which it was intended.

I am persuaded that the land in issue was acquired for a specific purpose which is consonant with the Constitution and the Land Acquisition Act, namely for the construction of a public road. It matters that the entire portion acquired was not used for that purpose. Unutilized portions in my view would remain as road reserves. And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired? The law itself in Section 23 of the Land Acquisition Act appears to imply such equity although it relates to withdrawal of acquisition before possession is taken. Perhaps it is a question that may be answered when the matter comes up for full hearing.

I am persuaded by the argument that since the acquisition was done for the purpose of making a public road, the road thus made remained a public road or street and vested in the Local Authority, The Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmaced road and the remaining portions which form part of the road reserve.

Finally I am persuaded by the government that as such trust land, neither the Local Authority nor the Government could alienate the land under the Government lands Act.

On the above premises the plaintiff/applicant was entitled to assume that the unutilized portion would remain a road reserve and he would continue to enjoy all the rights and privileges of a frontager to the road and enjoy the resultant easement of direct access to that road. I find on a prima facie basis that the plaintiff had such right and ought to be protected until this case is determined. It I no answer to the prayer sought, that the applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the applicant to the grant of the orders sought.

But objections were raised on the ground that the plaintiff has no *locus standi* to protect the public rights he purports to in alleging that a public road was unlawfully alienated. No authority was cited for this proposition. But I suppose allusion was being made to Section 61 of the Civil Procedure Act where in cases of Public Nuisance, it is only the Attorney General or two or more persons having the consent in writing of the Attorney General who may institute a suit though no special damage has been caused, for a declaration and injunction of other suitable relief's.

"a public or common Nuisance is an Act which interferes with the enjoyment of a right which all members of a community are entitled to, such as the right to fresh air, to travel on a highway etc. the remedy for a public nuisance … is by indictment information or injunction at the suit of the Attorney General" see Concise Law Dictionary –Osborn.

What if the Attorney General is the cause of the nuisance?

As I said in this courts case HCCC 1/96 BABU OMAR & OTHERS –Vs- EDWARD MWARANIA & ANOTHER (UR)

"There is nothing in the statutes relating to local authorities to exclude the courts ordinary jurisdiction to restrain Ultra Vires act or nuisance or to prevent breaches of trust. No authority has been cited to me to the contrary and am not aware of one … the applicants are members of the public. They reside and pay their rates to the Mombasa Municipal Council. They would be entitled to vote here. And they have a right to question the propriety or otherwise of the dealings of the council of the public land which the council holds in trust for the public. They may well be right that the Council is alienating a Public road reserve, contrary to the law."

I would apply the same principles here in granting the orders sought even on the limb of the application.

I am satisfied that the first two tests in Giella –Vs- Cassman Brown case have been satisfied and I need not therefore consider the balance of convenience. If I was to consider it, I would nevertheless hold in favor of the applicant. No evidence has been tendered or submission made that any development made of the portion in dispute has commenced. It would obviate heavier losses if the injunction was granted at this stage rather than waiting until the end of the case and after considerable expense has been incurred to order a demolition. Such damage as may be suffered by the Respondents if the injunction ultimately turns out to have been erroneous in law and fact can be sufficiently covered by an order which I now make, that the applicant do provide and file within the next SEVEN days, an undertaking that he will bear such damages as may be assessed by the court, consequent upon the grant of this injunction.

Subject to this qualification the application is granted with costs.

Dated at Mombasa this 9th day of October 1996.

P.N WAKI

JUDGE

9.10.96

9.10.96

Coram: Waki. J.

C/C-Mutua

Asige for plaintiff/applicant

Gikandi for defendant/respondent

Ruling delivered, signed and dated in open court.

P.N WAKI

JUDGE

9.10.96