



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**PETITION NO 15 OF 2017**

**POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED..... 1ST PETITIONER**

**EXCLUSIVE ESTATES LIMITED.....2ND PETITIONER**

**=VERSUS=**

**TELKOM KENYA LIMITED.....1ST RESPONDENT**

**AFTRACO LIMITED.....2ND RESPONDENT**

**ATTORNEY GENERAL.....INTERESTED PARTY**

**RULING**

1. On 24/4/2017, the Petitioners, Postel Housing Co-operative Society Limited ( **1st Petitioner**) and Exclusive Estates Limited ( **2nd Petitioner**) brought this Petition against Telkom Kenya Limited ( **1st Respondent**) and Afraco Limited ( **2nd respondent**) seeking the following orders:

- a. A declaration that the petitioners' constitutional right to property as guaranteed by Article 40 of the Constitution have been violated by the respondents, their agents, employees, representatives and/or servants.
- b. A declaration that the petitioners' constitutional right to economic and social rights as guaranteed by Article 43 of the Constitution have been violated by the respondents, their agents, employees, representatives and/or servants.
- c. A declaration that the petitioners' constitutional right to fair administrative action as guaranteed by Article 47(1) & (2) of the Constitution have been violated by the respondents, their agents, employees, representatives and/or servants.
- d. A declaration that Legislative Supplement No. 11 of 2001 issued on 23rd February 2001, purporting to delete the entry under Serial No. 166 under Legal Notice No. 154 of 1999 providing for subdivision of 60 acres to be carried out of the original title 79 acres of Land Reference Number 7656 Ngong Road for construction of residential units is irregular, illegal, null and void.
- e. An order of permanent injunction do issue restraining the respondents, their agents, servants, employees and/or representatives from selling, alienating, leasing, demarcating sub-dividing re-allocating, re-assigning and/or in any manner whatsoever interfering with the property described as Land Reference Number 7656, Ngong Road, Nairobi.
- f. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.
- g. Costs of and incidental to the application (sic) be provided for.

2. The case of the petitioners is that the 1st petitioner and the 1st respondent's predecessor in the title, Kenya Posts and Telecommunications Corporation (**KPTC**) entered into an agreement pursuant to which the 1st petitioner was to put up 2430 housing units on Land Reference Number 7656, Ngong Road ( the **suit property**).

3. Pursuant to the agreement, KPTC appointed the 2nd petitioner as an agent in the actualization of the project. Subsequently, in January 1993, the 1st petitioner and the 1st respondent executed an agreement dated 19/1/1993 pursuant to which the 1st respondent agreed to sell to the 1st petitioner 60 acres out of the suit property at Kshs 21,000,000 payable to the 1st respondent upon successful registration of the transfer in favour of the 1st petitioner and on the understanding that the 1st petitioner would develop the said 60 acres with houses for staff of the 1st respondent who were members of the 1st petitioner. The cost of the development project was to be borne by the 1st respondent. The petitioners contend that the 1st respondent breached the said agreement in that it refused to remit money for the development of the housing

project, forcing the 1st petitioner to borrow Kshs 20,000,000 to kick-start the project.

4. The petitioners contend that cognizant of the aforesaid agreement and obligations, a special gazette notice was issued under Legal Notice Number 154 of 1999 Serial Number 166 providing for the excision of the 60 acres out of the original 79 acres comprised in the title. A subsequent Gazette Notice Number 158 of 1999 acknowledged under Serial Number 130 that the 1st respondent owned only 19 acres out of Land Reference Number 7656. The petitioners add that subsequently, Legislative Supplement Number 11 of 2001 was issued on 23/2/2001 purporting to cancel Legal Notice Number 154 of 1999 which had provided for sub-division of the suit property to excise the 60 acres. It is the petitioners' case that the above action constitute a violation of the petitioners' constitutional rights under Articles 25(a), 28, 29, 43(1) and 47(2) of the Constitution.

5. Together with the petition, the petitioner's brought a notice of motion dated 20/4/2017 seeking the following orders:

**1. Spent.**

**2. That pending the hearing and determination of this application, the honourable court do and hereby issues a temporary order suspending the illegal Legislative Supplement Number 11 of 2001 issued on 23/2/2001, purporting to delete the entry under Serial Number 166 under the Legal Notice Number 154 of 1999 providing for sub division of 60 acres to be carried out of the original title 79 acres of Land Reference Number 7656 Ngong Road for construction of residential units.**

**3. That pending the hearing and determination of this petition, the honourable court do and hereby issues a temporary order suspending the illegal Legislative Supplement Number 11 of 2001 issued on 23/2/2001, purporting to delete the entry under Serial Number 166 under the Legal Notice Number 154 of 1999 providing for subdivision of 60 acres to be carried out of the original title 79 acres of Land Reference Number 7656 Ngong Road for construction of residential units.**

**4. That a conservatory order do issue restraining the respondents, their agents, servants, employees and/or representatives from selling, alienating, leasing demarcating, sub-dividing, re-allocating, re-assigning and/or in any manner whatsoever interfering with the property described as Land Reference Number 7656 Ngong Road, Nairobi, pending the hearing and determination of this application.**

**5. That a conservatory order do issue restraining the respondents, their agents, servants, employees and/or representatives from selling alienating, leasing demarcating, sub-dividing, re-allocating, re-assigning and/or in any manner whatsoever interfering with the property described as Land Reference Number 7656 Ngong Road, Nairobi, pending the hearing and determination of this petition.**

**6. That any other or further relief which this honourable court deems fit and just to grant (sic)**

**7. That costs of and incidental to the application be provided for.**

6. On 24/4/2017, this court granted an interim status quo order preserving the suit property in terms of prayer 4 of the notice of motion.

7. Subsequent to that, on 23/5/2017, Telkom Kenya (the **applicant**) brought a notice of motion dated 22/5/2017 seeking the following orders:

**1. This application be heard in priority to or at the same time as the Petitioners' application dated 20/4/2017.**

**2. The order issued 26/4/2017 be set aside**

**3. The petitioners' petition dated 2/4/2017 be struck out.**

**4. The costs of this application be awarded to the first respondent**

8. The application is the subject of this ruling. The application is premised upon the following grounds:

**a. The petition is without basis, scandalous, frivolous and vexatious and is an abuse of the court process for the reasons set out hereunder.**

**b. The second petitioner previously instituted HCCC 1477 of 1995 where its position was supported by the 1st petitioner. The subject matter of this suit is the ownership of Land Reference Number 7656, Ngong Road. This suit was referred to arbitration by consent and is pending before the arbitrator, M/S Z Janmohamed.**

**c. Neither of the petitioners was mentioned in Legal Notice Number 154 of 1999 or in Legislative Supplement No. 11 of 2011. Legal Notice 154 of 1999 erroneously awarded 60 acres out of the suit property to Teleposta Pension Scheme which is a distinct entity from the first petitioner herein. Legislative Supplement Number 11 of 2011 corrected this error and clarified that the 60 acres belong to the 1st respondent.**

**d. The petitioners' claim is based on a misapprehension that the 1st petitioner was awarded Land Reference Number 7656 through Legal Notice 154 of 1999. This is not correct. There was no right that accrued to the petitioners upon the publication of Legal Notice 154 of 2009.**

e. The documents produced before the arbitrators include the legal notices and the legislative supplement that the petitioners seek to quash. The arbitrator will consider these when determining the rightful owner of Land Reference Number 7656.

f. The petition is a thinly veiled attempt to have the court determine the matter pending before the arbitrator in a roundabout way.

g. The petitioners are forum shopping. The petitioners are raising similar claims to those pending before the arbitrator before separate fora with a view to obtaining favourable orders

h. The constitutional court is not the appropriate forum to adjudicate over the alleged illegalities raised by the petitioners as these constitute civil matters that are currently pending before an arbitrator.

i. The petitioners are guilty of non-disclosure of material facts. The petitioners did not disclose that the second petitioner has lodged a caveat over Land Reference.

9. The application was canvassed through both written and oral submissions. Mr Tugei, learned counsel for the applicant, submitted that the petition herein is an attempt at forum-shopping because at the time it was brought, there were two ongoing arbitration proceedings relating to the same issues as those raised in the petition. He contended that all the parties to this suit are parties to the arbitration proceedings. He added that the arbitration proceedings had reached submission stage. Counsel submitted further that the issue raised in this petition relates to the ownership of the suit property and the arbitration proceedings are similarly about ownership of the suit property. Counsel added that referral to arbitration was by consent of the parties to this suit and the consent was issued as a court order in Nairobi High Court Civil Case Number 443 of 2011. Mr Tugei added that ultimately, the arbitral award will be enforced in the said suit.

10. It was further submitted by the applicant's counsel that the impugned interlocutory orders were obtained without disclosure of material facts in that the petitioners did not disclose the existence of the arbitral proceedings, the existence of a caveat on the title, and the preservative order existing in HCC 443/2011. Lastly, counsel for the applicant submitted that the petitioners' claim that the corrigenda published subsequent to the initial gazette notice had a mistake is a claim intended to benefit an entity that was not affiliated to KPTC.

11. Afraco Limited, through Ms Hanan, supported the application. She contended that the petition herein is an abuse of the court process and a forum shopping exercise. She argued that there are two preceding suits relating to the same issues: (i) Nairobi HCCC 1158/2011 and (ii) Nairobi HCCC 443/2011. By consent of the parties, Nairobi HCCC 1158/2011 was referred to arbitration by Janmohammed and Nairobi HCCC 443/2011 was referred to arbitration by Mr A F Gross. She contended that the petition herein constitutes a multiplicity of suits and should be dismissed.

12. The Attorney General who was joined in this suit as an interested party on behalf of the State Department of ICT and Innovation and the Ministry of Information, Communication and Technology, through Mr Allan Kamau, similarly supported the application. The learned state counsel submitted that the order issued on 24/4/2017 should be set aside because there was non-disclosure of material facts and there was no danger to warrant issuance of the order because the Court of Appeal had reinstated a caveat in respect of the suit property. He faulted the petitioners for concealing this material fact at the time of seeking the interlocutory order. Mr Kamau further submitted that the petition herein is an abuse of the process of the court and contravenes Order 2 rule 15 of the Civil Procedure Rules because the dispute before this court is the same dispute which is pending for determination by the arbitrators. He urged the court to strike out the petition.

13. The petitioners, through Mr Makokha, opposed the application. Counsel for the petitioners argued that there was full disclosure at the time of seeking the interim ex parte orders because a copy of the caveat was attached to the application. Counsel further submitted that, similarly, there was full disclosure that arbitral proceedings were pending. Mr Makokha argued that the dispute in this suit relates to the legality of Legal Notice Number 11 of 2001 which the petitioners contend was fraudulently issued with intent to benefit a private entity, Telkom Kenya, while the dispute before Janmohammed relates to a sale agreement in respect of the suit property. He further submitted that the dispute before A F Gross relates to another sale agreement relating to the suit property. He argued that the legal notice which is challenged in this petition is not a subject of the arbitration proceedings. Counsel submitted that no arbitral tribunal has powers to make pronouncement on the legality of a legal notice. He added that there is no prejudice to any party in preserving the suit property through the interim order. He urged the court to dismiss the application.

14. I have considered the tenor and import of the application. I have also considered the responses to the application, the parties' submissions and the relevant constitutional underpinnings, legal framework and relevant jurisprudence. Two questions fall for determination. The first question is whether the petition herein should be struck out on account of being an abuse of the process of the court. The second question is whether the interim order issued herein on 24/4/2017 and extended pending further orders of the court should be vacated and/or left to lapse on account of the fact that the suit property is already properly preserved. I will make brief pronouncements on the two questions in that order.

15. The principle upon which this court exercises the draconian jurisdiction to strike out a suit are well settled. That guiding principle was outlined by Madan JA in *D T Dobie and Company (Kenya) Limited v Joseph Mbaria Muchina & Another* as follows:

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real live by amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

18. Commenting on the same principle in *YAYA TOWERS LIMITED V TRADE BANK LIMITED (IN LIQUIDATION)*, (2000) eKLR, Lakha, JA quoting verbatim the Court of Appeal in *PAOLA MURI V GIAN BATISTA MURI & ANOTHER*, CA No. 59 of 1999 observed as follows:

**“the power to strike out was one which should be exercised only in plain cases.”**

19. From the materials presented in the present application, it emerges that the dispute in this suit relates to ownership of Land Reference Number 7656 measuring 79 acres. The 1st petitioner lays claim to 60 acres of the land. The 2nd petitioner lays claim to the suit property on account of an alleged loan guarantee. The 2nd respondent claims a purchaser's interest in the suit property. The 1st respondent asserts ownership of the suit property by dint of being the successor to the defunct KPTC. It is common ground that the ownership dispute is pending determination through arbitration. Referral to arbitration was consensually procured by the parties and the parties are bound by those consents and by the eventual arbitral award.

18. The position taken by the applicant is that the present petition is an abuse of the process of the court because the petitioners have raised the same issue in the preceding suits and that the issue is pending determination by the arbitrators. They add that Gazette Supplement Number 11 of 2011 related to Teleposta Pension Scheme which is a different entity from the 1st petitioner. The petitioners' position is that the present petition challenges the legality of Gazette Supplement Number 11 of 2001 and the arbitrators have no powers to adjudicate on or annul the Gazette Supplement.

19. It is clear from the pleadings herein that the petition herein is directed against Telkom Kenya and Afraco Limited. Through it, the petitioners assert their proprietary rights in relation to the suit property. The petition is not directed against the author of the impugned Legislative Supplement and or the Attorney General. Secondly, besides seeking an annulment of the impugned Legislative Supplement, the petition seeks a permanent injunction against the respondents restraining them against dealing with the suit property. It is therefore clear that the dispute in this petition and in the preceding suits and arbitral proceedings is about ownership of the suit property. I do not therefore agree with the petitioners' contention that the issues in this petition are unrelated to the issues in the preceding suits which culminated in the pending arbitral proceedings. If the present petition is allowed to proceed in its present form, there is a real danger of the court and the arbitral tribunals arriving at contradictory findings in relation to the same issues. This has the potential of throwing the administration of justice into disrepute.

20. It is to be remembered that Article 159(2) (c) of the Constitution enjoins this court to embrace arbitration as an alternative form of dispute resolution. The parties having consensually resolved to refer the ownership dispute to arbitration, it would be improper for this court to proceed with this petition in its present form and make a determination thereon without regard to the ongoing arbitral proceedings and the expected awards of the arbitrators.

21. I have carefully reflected on the plea for striking out the entire petition. In my view, it would be premature to strike out the petition at this point and in the circumstances of this case. The order which commends itself to the justice of this case is an order staying the present suit pending the finalization of the arbitration proceedings. Upon finalization of the arbitral proceedings, parties will be at liberty to take appropriate steps to dispose this petition.

22. The second issue in this application is whether the interim order issued herein on 24/4/2017 and subsequently extended pending further orders of the court should be vacated and/or left to lapse. The applicants contend that the suit property is properly preserved through the caveat which was reinstated by the Court of Appeal. The petitioners' position is that there is no harm in maintaining the interim order because it merely preserves the suit property and it does not prejudice any of the parties.

23. I have looked at the materials presented to the court. In their application dated 20/4/2017, the petitioners in seeking the interim preservative order stated through Mr Joseph Mutugi thus:

**“29. That the petitioners are apprehensive that the 1st respondent would dispose the suit property or change its user to the detriment petitioners (sic). Unless therefore this urgently heard (sic) and determined, the intended action(s) would defeat the ongoing arbitration before a sole arbitrator and also violate their constitutional right to own and utilize property as guaranteed by article 40 of the Constitution”**

24. It has subsequently emerged, and indeed all the parties agree, that the Court of Appeal preserved the suit property through an order which reinstated the caveat which had been lodged by one of the parties to this suit and which the Land Registrar had irregularly vacated. All the parties are in agreement that the said caveat preserves the suit property and none of the parties in this petition is at liberty to deal with the suit property in a prejudicial manner during the subsistence of the caveat and the preceding suits. That being the position, it is my finding that the suit property is already duly preserved by the Court of Appeal's decree which reinstated the caveat. In the absence of evidence that the property is no longer preserved, there is no necessity for an additional court order from this court. I will therefore let the existing order issued in this suit lapse. The suit property shall remain preserved by the Court of Appeal decree which reinstated the caveat.

#### **Disposal Orders**

25. In light of the above findings, the Notice of Motion dated 22/5/2017 by Telkom Kenya is disposed in the following terms:

**a. The suit herein is stayed pending disposal of arbitration proceedings consensually initiated by the parties pursuant to the orders issued in Nairobi HCCC Number 1158/2011 and Nairobi HCCC Number 443/2011.**

**b. The interim preservative order issued herein on 24/4/2017 and subsequently extended shall not be extended further because the suit property is already preserved by the decree of the Court of Appeal which reinstated the caveat which had earlier been removed by the registrar.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Tugei for the 1st respondent

Mr Kamau for the Interested Party

Ms Gachomba for the 2nd respondent

Court clerk - June Nafula