



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 127 OF 2017**

**RIDGEWAYS INTERNATIONAL LIMITED.....PLAINTIFF**

**VERSUS**

**DASAHE INVESTMENT LIMITED.....1<sup>ST</sup> DEFENDANT**

**DAVID SOME BARNO.....2<sup>ND</sup> DEFENDANT**

**ESTHER CHEBET SOME.....3<sup>RD</sup> DEFENDANT**

**MILICONS LIMITED.....4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....5<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....7<sup>TH</sup> DEFENDANT**

**GEORGE WANYAMA .....8<sup>TH</sup> DEFENDANT**

**DAVIS ONONO .....9<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Application dated 8<sup>th</sup> June, 2017, the 4<sup>th</sup> Defendant is seeking for the following orders:

***a. That the Plaintiff's Notice of Motion dated 23<sup>rd</sup> March, 2017 and the Plaint dated 23<sup>rd</sup> March, 2017 respectively be struck out.***

***b. That the 4<sup>th</sup> Defendant be awarded costs of this Application and the suit.***

2. The Application is premised on the grounds that the Plaint was filed in contravention of Order 4 Rule 4 of the Civil Procedure Rules; that the court's jurisdiction was wrongfully invoked and that the suit amounts to an abuse of the court process.

3. According to the Affidavit of the 4<sup>th</sup> Defendant's Director, the 4<sup>th</sup> Defendant is the registered proprietor of land reference numbers 337/4763 and 337/4762 situated in Mavoko; that the said parcels of land were compulsorily acquired by the Government of Kenya through the National Land Commission for the construction of Standard Gauge Railway Line and that the 4<sup>th</sup> Defendant was duly compensated for the said land except for the remaining acreage.

4. The 4<sup>th</sup> Defendant has deponed that the 7<sup>th</sup> Defendant heard all the parties on the issue of compulsory acquisition of the suit land and that it confirmed that the 4<sup>th</sup> Defendant's titles were lawfully acquired; that the Petitioner should have instituted Judicial Review proceedings at the High Court within six (6) months from the date of the 7<sup>th</sup> Defendant's decision and that the suit is incurably defective because administrative decisions by public bodies can only be challenged by way of Judicial Review or a Petition and not through a Plaint.

5. In addition, the Applicant's director has deponed that the suit should be struck out because the Plaintiff did not file alongside the Plaint a letter of authority from the plaintiff's Board of Directors.

6. Although the Plaintiff was served with the Application, it did not file a response. The Application is therefore undefended.
7. The Applicant's counsel submitted that the filing of the suit by the Plaintiff does not meet the requirements of Order 4 Rule 4 of the Civil Procedure Rules; that the suit is grounded on the decision of the 7<sup>th</sup> Defendant; that the Plaintiff should have moved the court to quash the decision of the 7<sup>th</sup> Defendant and that the process of acquiring land compulsorily is provided for in the law.
8. In response, the Plaintiff's advocate submitted that the Plaintiff's claim is premised on the issue of fraud; that the Plaintiff is not seeking to remedy the decision of the 7<sup>th</sup> Defendant and that the National Land Commission does not have jurisdiction to deal with private land.
9. In a detailed Plaint, the Plaintiff narrated how it applied and was allocated the suit land by the Government. The Plaintiff averred that the 1<sup>st</sup> Defendant fraudulently transferred the suit land to the 4<sup>th</sup> Defendant; that the 7<sup>th</sup> Defendant unlawfully compensated the 4<sup>th</sup> Defendant for the land to the tune of Kshs. 118,748,700 and that the 7<sup>th</sup> Defendant unlawfully failed to consider the Plaintiff's proprietary interest in the land and delved into determining title to the suit land in disregard of the law.
10. In the Plaint, the Plaintiff is seeking for a declaration that the 4<sup>th</sup> Defendant is not a *bona fide* proprietor of the suit properties and for revocation and cancellation of the 4<sup>th</sup> Defendant's title. The Plaintiff is also seeking for an order directed to the 7<sup>th</sup> Defendant annulling their determination upholding the 4<sup>th</sup> Defendant's title for the suit properties.
11. The Plaintiff has admitted in its Plaint that before the 4<sup>th</sup> Defendant was paid by the 7<sup>th</sup> Defendant for the compulsory acquisition of the suit, the 7<sup>th</sup> Defendant conducted an inquiry into the issue of ownership of the land. Indeed, one of the prayers in the Plaint is for the nullification of the decision of the 7<sup>th</sup> Defendant.
12. However, the suit before me is not only seeking to have the decision of the 7<sup>th</sup> Defendant declared null and void, it is also seeking for the nullification of the title that was issued to the 4<sup>th</sup> Defendant on the ground that the same was procured fraudulently. The Plaintiff has enumerated the particulars of fraud which can only be proved after *viva voce* evidence has been called.
13. Notwithstanding that the 7<sup>th</sup> Defendant conducted an inquiry and determined that it is the 4<sup>th</sup> Defendant, and not the Plaintiff, who was entitled to the suit land, it cannot be said that the 7<sup>th</sup> Defendant was sitting as a quasi-judicial body.
14. I say so because the only instance that the law has allowed the 7<sup>th</sup> Defendant to sit as a quasi-judicial body, and conduct hearings which are subject to review by this court, is when it sits to hear issues of proprietary and claims for compensation by persons interested in the land (*See Section 112 of the Land Act*). Upon the conclusion of the inquiry, the Commission is required to prepare a written award, which shall be final and conclusive evidence of the size of the land to be acquired, the value of the land and the amount of the compensation.
15. The other instance that the 7<sup>th</sup> Defendant can sit as a quasi-judicial body is when it is reviewing grants or disposition of public land to establish their propriety or legality pursuant to the provision of Section 14 of the National Land Commission Act.
16. The review of grants and dispositions of public land by the Commission is not the same thing as adjudicating over a dispute of land by private persons for the purpose of determining who has a better title than the other person. Indeed, if the 7<sup>th</sup> Defendant finds that a title to public land was acquired in an unlawful manner, it should direct the Registrar to revoke the title, with the result that the land reverts to the public, and not to another private entity.
17. The Report annexed on the 4<sup>th</sup> Defendant's Application shows that the 7<sup>th</sup> Defendant, after hearing the Plaintiff's representatives and the 4<sup>th</sup> Defendant's representatives, amongst other parties, found that the claim by the Plaintiff's claim was not valid and that the title to the suit property was legally issued to the 4<sup>th</sup> Defendant. That decision was not made by the 7<sup>th</sup> Defendant in its quasi-judicial capacity. The decision can only amount to a report by an investigative body, which can be challenged by way of an ordinary suit.
18. Considering that it is only the court that is mandated to cancel a title document on the basis that the same was procured by fraud or mistake, I find that the suit is properly before this court. It is only this court, and not the 7<sup>th</sup> Defendant, that can declare as to whether the 4<sup>th</sup> Defendant acquired the land fraudulently or not.
19. Although the 4<sup>th</sup> Defendant has argued that the Plaint was filed in gross contravention of the provisions of Order 4 Rule 4 of the Civil Procedure Rules, 2010, I find and hold that the issue of the Plaintiff's capacity to bring this suit can only be addressed after *viva voce* evidence has been tendered.
20. Being a legal person, the Plaintiff's capacity to sue cannot be questioned merely because it did not file a resolution of the Board at the time of filing the suit. That is an issue that should be raised during the hearing of the suit. The expression "*form*" and "*substance*" requires the court to pursue merit or substantial justice rather than undue regard to procedural technicalities like the want of the resolution by the Plaintiff's Board at the time the suit was filed.
21. As has been held in many cases, striking out of pleadings is a draconian and extreme measure which is resorted to in clearest of cases. This is not one of those cases.
22. For those reasons, I dismiss the Application dated 8<sup>th</sup> June, 2017 but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**