



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 184 OF 2010

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

GILBERT MWANGI NJUGUNA1ST DEFENDANT

WILSON GACHANJA.....2ND DEFENDANT

R U L I N G

1. The application for consideration is the Notice of Motion dated 23rd May, 2018 brought *under Section 63 (e) of the Civil Procedure Act, order 25 Rule 5 (1) and (2) and Order 51 Rule 1 of the Civil Procedure Rules*. The plaintiff/applicant seeks orders that the suit herein has been compromised and or overtaken by events consequent to the revocation of title to Land Reference Number **Mombasa Island/Block XXV1/933** vide **Gazette Notice Number 15572** dated **26th November, 2010**, that judgment be entered against the defendants/respondents in terms of the plaint and that each party to bear own costs.

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Francis O. Makori, the advocate for the applicant sworn on 23rd May, 2018. The facts of this case are that the applicant instituted the suit herein seeking orders that:-

(a) **A declaration that the issuance of letter of allotment and lease by the 2nd defendant to the 1st defendant over Mombasa Island/Block XXV1/933 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st defendant in the first instance.**

(b) **A declaration that the registration of the lease and issuance of a Certificate of Lease over Mombasa Island/Block XXV1/933 to the 1st defendant was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st defendant.**

(c) **In the alternative to (a) and (b) above, a declaration that the 1st defendant holds the Lease and Certificate for Mombasa Island/Block XXV1/933 in trust for the public and/or the Permanent Secretary, Treasury and the land register be rectified by deleting the name of the 1st defendant and substituting its name with the name of the Government of Kenya and/or Permanent Secretary, Treasury as the proprietor.**

(d) **An order for rectification of the register by cancellation of the Lease over Mombasa Island/Block XXV1/933 and Certificate of Lease issued to the 1st defendant so as to restore the suit property to the public and/or Permanent Secretary Treasury.**

(e) **An order of a permanent injunction against the 1st defendant, its agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing, or in any manner howsoever from dealing with Mombasa Island/Block XXV1/933.**

(f) **General damages for fraud.**

(g) **Costs of and incidental to this suit together with interest**

(h) **Any other or further relief the court may deem fit and just to grant.**

3. The applicant avers that while the suit was pending, the title to Mombasa Island/Block XXV1/933 was revoked vide Gazette Notice Number 15572 dated 26th November, 2010 and that the defendants have not challenged the said revocation by way of judicial review or at

all. It is the applicant's contention that the suit herein has therefore been comprised by the revocation save for the orders of permanent injunction. The applicant further contends that the defendants shall not suffer any prejudice by the grant of the orders sought herein.

4. The 1st defendant opposed the application and filed grounds of opposition dated 11th June, 2018 and a replying affidavit sworn by Gilbert Mwangi Njuguna on 14th June, 2018. The 1st defendant argues that the application is grossly misguided, misconceived, an utter abuse of the court process and that the orders sought are legally untenable. It is the 1st defendant's contention that the application is premised on an illegality as legally, a certificate of title to land cannot be revoked by a Gazette Notice and thus any purported revocation of the title to the suit property vide Gazette Notice Number 15572 as alleged by the plaintiff was wrong and erroneous, adding that for a title to be revoked due court process must be followed and all affected persons heard. The 1st defendant avers that at the time of the purported revocation, there was already a pending case before this court over the same subject matter and therefore the revocation was of no legal effect. Citing the provisions of **Article 50 (1) of the Constitution**, the 1st defendant argues that the matter before court are weighty and deserve a full trial for the ends of justice to be met. The 1st defendant urged the court to dismiss the application with costs.

5. I have considered the application, the affidavit and grounds of opposition on record and the rival submissions. The application is premised on **Order 25 Rule 5(1) and (2) of the Civil Procedure Rules** which provides that:-

(1) Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject - matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.

(2) The court, on the application of any party, may make any further order necessary for the implementation of and execution of the terms of the decree.

6. I have carefully discerned the provisions of this order and do find that for the court to enter judgment under **Order 25 Rule (1) and (2)**, there must be an agreement which is lawful or there must be a compromise. According to the Black's Law Dictionary, an agreement is defined as a concord of understanding and intention, between two or more parties, with respect to the effect upon their relative rights and duties, of certain past or future facts or performances; the act of two or more persons who unite in expressing a mutual and common purpose, with the view of altering their rights and obligations; a coming together of parties in opinion or determination; the union of two or more minds in a thing done or to be done; a mutual assent to do a thing. The elements required for the agreement to be a legally enforceable contract are: mutual assent, expressed by a valid offer and acceptance; capacity; and legality.

7. A compromise means a settlement of differences by mutual concessions; an agreement reached by adjustment of conflicting or opposing claims and principles, by reciprocal modification of demands.

8. The Gazette Notice Number 15572 of 26th November, 2010 can neither be referred to as an agreement nor a compromise as it was made unilaterally by the minister without involving the defendants. There is no evidence that the defendants have satisfied the plaintiff in respect of the whole or any part of the subject matter of the suit. The defendants have not surrendered the property in dispute to the government and therefore **Order 25 Rule 5(1) and (2)** are not applicable.

9. I do find this application without basis and misconceived as there is no any lawful agreement or compromise and that the defendants have not surrendered the suit property to the government. The upshot is that the Notice of Motion dated 23rd May, 2018 is without merit and is dismissed with costs.

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. YANO

JUDGE