



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 217 OF 2014**

**AZZURI LIMITED.....PLAINTIFF**

**=VERSUS=**

**GEORGE KADENGE ZIRO (as legal Advisor of the Estate**

**of the late Lawrence Kadenge Ziro.....1<sup>ST</sup> DEFENDANT**

**KAMBI KADENGE ZIRO.....2<sup>ND</sup> DEFENDANT**

**VALERIO BUSSICARELLI.....3<sup>RD</sup> DEFENDANT**

**KADZIRO BEACH LIMITED.....4<sup>TH</sup> DEFENDANT**

**SETTLEMENT FUND TRUSTEES.....5<sup>TH</sup> DEFENDANT**

**KILIFI LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Application before me is the Notice of Motion dated 2<sup>nd</sup> February 2017. It was almost impossible to trace it in the file given the numerous applications that have been filed by both sides since this case was instituted in 2014. Indeed there are at least two more applications pending as at now including one that sought to arrest this Ruling.

2. Be that as it may, in this application, Azzuri Limited, the Plaintiff herein is seeking orders as follows:

**1. THAT the 1<sup>st</sup> Defendant's Defence dated 25<sup>th</sup> January 2017 and the 4<sup>th</sup> Defendants' Defence dated 24<sup>th</sup> January 2017 be struck out and dismissed for being scandalous, embarrassing, vexatious and otherwise an abuse of the process of this Honourable Court.**

**2. THAT the costs of the suit and of this application be awarded to the Plaintiff**

3. The application is supported by the annexed affidavit of the Plaintiff's Managing Director, Anthony Safari Kitsao sworn on 2<sup>nd</sup> February 2017. The application is premised on a number of grounds which may be summarized as follows:-

(a) That Article 67 (2) of the Constitution of Kenya vests in the National Land Commission (NLC) the function of initiating investigations into alleged present and historical injustices and recommend appropriate redress.

(b) That on an unspecified date the National Land Commission recently advertised an invite in all the local dailies for all interested parties to make written representations on the properties listed, which properties included those within Chembe/Kibabamshe Settlement Scheme in which the suit property, Chembe/Kibabamshe/356 lies

(c) That the Plaintiff duly appeared before the National Land Commission and made legitimate representations supported by documentary evidence and so did other parties that were interested in the same.

(d) On 12<sup>th</sup> January 2017, the National Land Commission determined that the Plaintiff is the lawful owner of the suit property having purchased for valuable consideration all that interest in the said allotment that was jointly held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who in turn held the allotment in trust for their family, known as the Ziro Family.

(e) That the National Land Commission further found that the 1<sup>st</sup> Defendant's Title Deed was secured through fraud and collusion of the 6<sup>th</sup> Defendant, the Land Registrar Kilifi.

(f) That the National Land Commission then directed the Chief Land Registrar to expunge all or any records that pertain to the subject property at the Kilifi Land Registry whether in the sole name of Lawrence Kadenge Ziro (1<sup>st</sup> Defendant) or in the name of Kazdiro Beach Limited (4<sup>th</sup> Defendant)

(g) Accordingly the Chief Land registrar by letter dated 13<sup>th</sup> January 2017 addressed to the 6<sup>th</sup> Defendant –the Kilifi County Land Registrar directed the said 6<sup>th</sup> Defendant to the attention of the holding by the National Land Commission, further directing him to immediately implement the National Land Commissions' recommendations.

(h) Consequently neither the 1<sup>st</sup> Defendant's Defence nor the 4<sup>th</sup> Defendant's Defence and counterclaim filed herein can stand before this court in light of the National Land Commission's determination.

(i) That neither the 1<sup>st</sup> nor the 4<sup>th</sup> Defendant has any legal or proprietary interest capable of being adjudicated upon in the proceedings herein in light of the determination of the National Land Commission expunging whatever records that bear their names including the purported 4<sup>th</sup> Defendant's title.

(j) That the decision of the National Land Commission is only amenable to Judicial Review or a Constitutional Petition and is not amenable in the proceedings herein that are private claims of defendants.

(k) That in the alternative; the whole of the 4<sup>th</sup> Defendant's evidence is devoid of proof of requisite documentation to prove the process behind its own purported acquisition of title, to wit, evidence of payment of stamp duty, land rates and land rents which are essential in proving its own claim.

(l) That the 1<sup>st</sup> and 4<sup>th</sup> Defendants Defences and counterclaim are bare and their only claim to ownership is a purported Title Deed that is itself the product of the Deceased 1<sup>st</sup> Defendant's fraudulent registration which fact was established and determined by both the National Land Commission and the Ministry of Lands and the Land Adjudication Department even prior to the latest determination by the National Land Commission.

*(m) That the 1<sup>st</sup> and 4<sup>th</sup> Defendants Defences are vexatious and embarrassing, and act to scandalize the Plaintiff into grave loss and damage while at the same time taking up precious judicial time and therefore an abuse of the process of this Honourable Court.*

*(n) Otherwise the Plaintiff is imprisoned by the Common Law doctrine of lis pendens and cannot freely use, deal and enjoy its property as is guaranteed by the provisions of Article 40 of the Constitution as a direct result of the Defendants ulterior defences and counter claim respectively.*

4. The Application is opposed. By Grounds of Opposition dated and filed in court on 6<sup>th</sup> February 2017, the 1<sup>st</sup> and 4<sup>th</sup> Defendants oppose the application to strike out the defences on grounds inter alia, that:-

*1. The present application, grounded on the twin plea that the suitland was Public Land, and therefore within the purview of Article 67 of the Constitution, is misconceived an abuse of the court process, for the reasons that:-*

**(a) The suitland was registered private land in 2001**

*(i) Kilifi/Chembe Kibabamshe/356 was first registered in August 2001, in the name of Lawrence Kadenge Ziro(deceased);*

*(ii) That title vesting the suitland in Lawrence Kadenge Ziro (deceased) has never been cancelled, recalled or nullified, either by a competent court or tribunal*

*(iii) The said Lawlence Kadenge Ziro (deceased) sold and conveyed the land to the 4<sup>th</sup> Defendant in March 2015.*

**(b) Jurisdiction of the National Land Commission**

*(iv) The National Land Commission has no jurisdiction over private land;*

*(v) The proceedings, if any, taken before the National Land Commission and its recommendation relied upon by the Plaintiff, in support of the present application cannot nullify a private title;*

*(vi) In any event, Kilifi/Chembe/Kibabamshe/356 has never been public utility land, nor a subject of any proper and competent inquiry into historical land injustices;*

**(c)Sub -Judice Principle**

*(vii) The National Land Commission acted without jurisdiction, by inquiring into the proprietor of the title relative to the suitland, at the instance of the Plaintiff, yet this case was to the Plaintiff's knowledge, then pending before the court.*

5. In addition to the elaborate Grounds of Opposition the 1<sup>st</sup> Defendant filed an Affidavit in reply sworn by George Kadenge Ziro, the 1<sup>st</sup> Defendant herein on 13<sup>th</sup> February 2017 re-emphasizing the issues as stated in the Grounds. The 4<sup>th</sup> Defendant has also filed a Replying Affidavit sworn by its Director Kenneth Mwige on 7<sup>th</sup> March 2017 disputing the facts enumerated by the Applicants.

6. I have considered the application and the Grounds of Opposition as well as the Affidavits in Reply as filed by the 1<sup>st</sup> and 4<sup>th</sup> Defendants. Given the long and chequered history of this matter, I deem it opposite it to delve into a brief background thereof.

7. By a Plaint filed herein on 19<sup>th</sup> November 2014, the Plaintiff/Applicant Azzuri Ltd filed this suit against 3 Defendants, namely Charo Lawrence Kadenge Ziro, Kambi Kadenge Ziro and Valerio Buciareili. It was the Plaintiff's claim that on or about 14<sup>th</sup> June 2014, it had executed a Sale Agreement

with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for sale of land reference No. Chembe/Kibabamshe/356 at a consideration of Kshs 18,900,000/=. It was further the Plaintiff's claim that after paying a sum of Kshs 13,500,000/= to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant colluded with the 3<sup>rd</sup> defendant to frustrate the contract and deny the Plaintiff vacant possession of the land by instituting another suit being Malindi ELC Case No. 198 of 2014. The Plaintiff therefore sought an order of a permanent injunction to restrain the defendants from selling, alienating, trespassing and/or obstructing it from taking vacant possession of the suit property. In addition they sought an order of specific performance directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to honour the contract of sale.

8. By an application filed on the same 19<sup>th</sup> November 2014, the Plaintiffs sought temporary orders of injunction against the Defendants. Having heard arguments on the application, the Honourable Justice Angote determined on 19<sup>th</sup> June 2015 that the Plaintiff had established a prima facie case and allowed the application in the following manner:-

*“That pending the hearing and determination of the main suit, the Hon. Court be pleased to issue temporary injunctive orders restraining the Respondents, their servants, agents, employees, beneficiaries and/or any person acting on their behalf from obstructing the Applicant (from) taking vacant possession, disposing off, transferring, alienating, changing and/or interfering, in any manner with parcel of land reference No Chembe/Kibabamshe/356.*

9. By another application dated 1<sup>st</sup> April 2016, Messrs Kadziro Beach Ltd sought orders to be enjoined in the suit together with the Settlement Fund Trustees as necessary parties. On 14<sup>th</sup> November 2016, the court agreed to enjoin the two parties as defendants together with another new entrant, the Land Registrar Kilifi. In the meantime, Lawrence Kadenge Ziro who had been sued as the first Defendant passed away on 13/12/2015 and his son George Kadenge Ziro was joined in the suit in his place.

10. Subsequently on 2<sup>nd</sup> December 2016, the Plaintiff filed a new comprehensively amended Plaint to represent the changes and to reflect the claim against all the 6 Defendants. On 15<sup>th</sup> December 2016, the 4<sup>th</sup> Defendant Kadziro Beach Ltd filed an application herein contending that the Plaintiff had since the order allowing their being enjoined in the suit embarked on construction of a coral boulders perimeter fence around the suitland. The 4<sup>th</sup> Defendant therefore sought an order of inhibition and/or injunction to bar the Plaintiff from erecting or continuing to erect the perimeter fence. Before the 4<sup>th</sup> Defendant's application could be heard, the Plaintiff filed this present application seeking to have the 1<sup>st</sup> and 4<sup>th</sup> Defendants Statement of Defence struck out as outlined and on the basis of the grounds herein before.

11. It would appear that as all these activities were going on in court, the National Land Commission put out a Public Notice in the Local Dailies under the banner

*“Review of Grants and Disposition (Titles) to Public Land in Nairobi and Kilifi Counties”*

12. The Notice went on to state that the Commission would conduct public hearings in Nairobi and Kilifi counties for the affected plots and all interested parties were required to appear before the Commission on the date and venues indicated in a schedule therein. Plot No. 356 Chembe Kibabamshe Settlement scheme- the suit property is among those shown to have been unattended from a previous hearing and was thus listed to be dealt with on Friday 5<sup>th</sup> February 2016.

13. By a letter dated 12<sup>th</sup> January 2017 (marked ASK 3” in the Applicant's Affidavit), the Chair of the National Land Commission wrote to the concerned parties communicating the Commission's findings. The said findings, prompted the current application.

14. Under Article 67 (2) (e) of the Constitution one of the functions of the National Land Commission(the Commission”) is:-

*“to initiate investigations, on its own initiative or on a complaint, into present or historical land*

*injustices, and recommend appropriate redress.”*

15. As an independent Commission under Chapter 15 of the Constitution and given its functions as outlined under Article 67 of the Constitution aforesaid, the Plaintiffs now contend that the Commission’s findings can only be overturned by way of Judicial review and/or a Constitutional Petition and that in the absence of any decision overturning the findings, the same is valid and the 1<sup>st</sup> and 4<sup>th</sup> Defendants’ defences consequently collapse.

16. While it is clear to me that the Commission is independent and no person or authority may control them, they are in my view still subject to the Constitution and the law. In **Re the matter of the Interim Independent Electoral Commission** (Sup. Ct. Application No. 20 of 2011; (2011) eKLR, the Supreme Court in an Advisory Opinion on what comprised the independence of such Commissions observed as follows:-

*“While bearing in mind that the various commissions and independent offices are required to function free of subjection to ‘direction or control by any person or authority’, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit... For due operation in the matrix, independence does not mean “detachment” isolation’ or “disengagement” from other players in public governance. Indeed for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonise its activities with those of other institutions of Government, or other Commissions to maximize results in the public interest. Constant consultation and coordination with other organs of Government with Civil Society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead ‘independence’ as an end in itself; for public governance tasks are apt to be severely strained by possible “clashes of independences”.*

17. As the Honourable Justice G.V. Odunga observed in **Republic –vs- National Land Commission & Another Ex-parte Fidelity Commercial Bank(2016)eKLR**

*“the doctrine of independence must be read in the context of our Constitutional framework and where the adoption of the doctrine would clearly militate against the Constitutional principles that doctrine or principle must bow to the dictates of the spirit and the letter of the Constitution and the enabling legislation and it is not only the role of the courts to superintend the exercise of such powers but their Constitutional obligations to do so. In effect, the Commission’s independence given by Article 249(2) only remains valid and insurmountable as long as it operates within its legislative and constitutional sphere. Once it leaves its stratosphere and enters the airspace outside its jurisdiction of operation, the courts are then justified in scrutinizing its operations.*

18. Thus while Article 67 empowers the National Land Commission to carry out certain tasks in relation to land, one of the cardinal principles of our legal system is that it is the role of the courts to deal with legal issues that are before it. As I understand it, the term sub-judice literally means “under judicial consideration”. This rule governs what public statements can be made about ongoing legal proceedings before the court and applies where court proceedings are ongoing and through all the stages of appeal until the matter is completed. This rule is not limited to parties in a case or their lawyers. It applies to the public and to statements made by Public officials. The sub-judice rule is breached by public statements that risk prejudging matters or issues that are before the courts.

19. The proceedings herein were commenced on 19<sup>th</sup> November 2014. While it would appear that both sides in the litigation were compliant in bringing up the matter at least in the initial stages with the National Land Commission, it is clear in my mind that when the Commission purported to hear the dispute on 5<sup>th</sup> February 2016 and to issue a Ruling thereon on 17<sup>th</sup> February 2017, the dispute was pending consideration by this court and was therefore unavailable for discussion by the Commission.

20. Indeed while nothing was placed before me to demonstrate that the Commission was aware of the pending Judicial proceedings, I think it was incumbent upon the Commission as advised by the Supreme Court herein-above to establish first and foremost whether that was a matter in which they could legitimately proceed with their inquiry. As it is evident from the material placed before this Court the proceedings and determination by the Commission were made while these proceedings were pending before this court. Those proceedings in my considered view amount to nothing but an affront to the powers granted to this Court under Article 162 of the Constitution. To the extent that the Commission proceeded to deal with a matter pending consideration, their findings are but a nullity and of no consequence in law.

21. As Lord Justice Cranworth stated while commenting on the doctrine of lis pendens in **Bellamy –vs- Sabina (1857)1 De J. 566:-**

*“Where litigation is pending between a plaintiff and Defendant as to the right of a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding’ not only on the litigating parties but also on those who derive title under them by alienation pending the suit whether such alienees had or had no notice of the proceedings. If that were not so, there could be no certainty that the proceedings would ever end.”*

22. The Plaintiff herein seeks to benefit from a process that was clearly and pertinently sub-judice. In as much as the proceedings before the Commission were conducted in disregard of the fact that the matters were pending determination before this court they are of on legal consequence.

23. Accordingly, I do not find merit in the Plaintiff’s application dated 2<sup>nd</sup> February 2017. The same is dismissed with costs.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of July, 2017.**

**J. O. OLOLA**

**JUDGE**