



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 310 OF 2014

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

NJUGUNA MACHARIA.....DEFENDANT

RULING

The Application

The Plaintiff filed an application by way of a Notice of Motion dated 11th March 2014 expressed to be brought under Order 40 Rules 1, 4 and 10 and Order 51 Rule 1 of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act. The Plaintiff is seeking injunction orders to restrain the Defendant whether by himself, his servants, chargees or assigns from selling, advertising for sale, transferring, charging, further charging, leasing, taking possession, subdividing, wasting or in any manner howsoever from dealing with L.R. No. 209/14712 (hereinafter referred to as the suit property), situated along Waiyaki Way, Nairobi, pending the hearing and determination of this suit. The Plaintiff is also seeking in the alternative, an order for preservation of the suit property pending the hearing and determination of this suit.

The application is supported by an affidavit sworn on 11th March 2014 by Jeremiah Buchianga, who has stated that he is an investigator working with the Plaintiff having been duly appointed pursuant to the provisions of section 23 of the Anti-corruption and Economics Crimes Act. The deponent has contended that he was a member of a team which conducted investigations concerning the legality or otherwise of alienation of part of land from plot no. 209/9323 situated along Waiyaki Way reserved for the establishment of an orthopaedic clinic, with a view of recovering the same on behalf of the Republic of Kenya and in the public interest.

It has been averred that investigations revealed that parcel no. 209/9323 was initially allocated to the Ministry of Health and reserved for the establishment of an orthopaedic clinic. According to the Plaintiff, the Ministry of Health through Kenyatta National Hospital established an orthopaedic clinic on parcel 209/9323 to serve patients in need of artificial limbs. The Plaintiff as stated that in 1977, the Defendant who was working as a casual labourer at the orthopaedic clinic applied to the Ministry of Health to operate butchery and a shop on parcel no. 209/9323.

While stating that the Defendant's request was granted, the deponent averred that the Defendant began

paying rent and correspondences dated 13th July 1994, 22nd July 1994, 13th September 1991 and 3rd August 1994 have been annexed as evidence. The deponent further averred that the shop and butchery which the Defendant operates to date were on parcel no. 209/9323 which belonged to the government, and that other tenants also operated businesses on the premises alongside the Defendant.

It is the deponent's averment that the running of the clinic was thereafter placed under the Ministry of Culture and Social Services run by the Commissioner of Social Services, and a copy of a lease dated 11th November 1997 entered into by the Department of Social Services and the Defendant for the lease of the shop and the butchery has been annexed as evidence. The deponent also exhibited copies of letters dated 8th February 1999, 20th September 1996 and 26th October 1995 and contended that the Defendant's application to the Commissioner of Lands, the Permanent Secretary Ministry of Culture and Social Services and the Minister of Culture and Social Services requesting to be allocated a plot on parcel no. 209/9323 has not been granted to date. A copy of a letter dated 1st October 1996 from the Permanent Secretary Ministry of Culture and Social Services informing the Defendant that parcel No. 209/9323 which had been earmarked for development of a center for the disabled was not available for allocation was also exhibited.

It is alleged that in circumstances that smack of fraud and corruption, the Commissioner of Lands purported to allocate to the Defendant a parcel measuring 0.05 hectares which was hived off from parcel no. 209/9323 belonging to the government. A copy of an allotment letter dated 6th January 1999 issued in favour of the Defendant was annexed, and the deponent averred that the same was received by the government officers copied in the letter on 15th April 2002 and 13th December 2001.

It is also averred that a month after the purported allocation, the Defendant wrote a letter dated 8th February 1999 whose copy was exhibited, requesting the Minister of Culture & Social Services to allocate him a plot in parcel no. 209/9323. While contending that the special conditions listed in the letter of allotment required the Defendant to communicate his acceptance of the allocation within 30 days of the date of offer, the deponent stated that the Defendant accepted the offer on 22nd October 2001 after a period of about 2 years and 10 months from the date of offer and therefore, that the offer had lapsed.

The deponent exhibited a grant for plot no. 209/14712 allocated to the Defendant as well as a copy of a title issued in the name of the Permanent Secretary to the Treasury for plot no. 209/9323 under a new number being LR 209/15006 measuring 1.972 hectares. The deponent alleged that alienation of plot no. 209/9323 and the subsequent registration of a new grant no. 209/14712 was done fraudulently under corrupt circumstances.

Evidence of letters dated 29th January 2003, 15th February 2002 and 26th February 2002 complaining about the irregular allocation of the suit property to the Defendant and calling for revocation of his grant were attached by the deponent. According to the deponent, the Commissioner of Lands had previously cancelled an allocation of LR No. 209/12800 to N. Mberia, Anthony Kimetto and W. Kibet for reasons that the said land was part of LR No. 209/9323 belonging to the Ministry of Culture and Social services and he availed a copy of a letter to this effect.

It is contended that Nairobi ELC No. 270 of 2008 in which the Defendant herein has sued three of the tenants who operate business in the suit premises claiming vacant possession is pending before this court. The Plaintiff has maintained that since investigations have revealed that the land constitutes government land reserved for the establishment of an orthopaedic clinic, the same was not available for allocation to private persons.

It is on this basis that the Plaintiff is contending that there is urgent need for an order of injunction to restrain the Defendant from dealing with the suit property so as to preserve the same. According to the Plaintiff, the public on whose behalf it has brought this suit will suffer irreparable loss and damage if the orders sought are not granted.

The Response

In response to the application, the Defendant filed grounds of opposition, a notice of preliminary objection dated 11th March 2014 as well as a Replying Affidavit sworn on 7th April 2014 by Margaret Njoki Njuguna, the Defendant's guardian *ad litem*. The Defendant contended that this suit has been filed partly on behalf of the Defendants in Nairobi ELC No. 270 of 2008 to pre-empt the trial of that suit and partly on behalf of governance activists who disapproved his allocation of the suit property in 1999.

According to the Defendant, the Plaintiff who is an emanation of the Kenyan State cannot dissociate itself from the actions of the Ministry of Lands and Settlement, Ministry of Finance, the Commissioner of Lands as well as the Director of Surveys. It is the Defendant's averment that pursuant to Article 159 of the Constitution, the Plaintiff lacks jurisdiction to investigate matters of which the judiciary is seized and therefore, that the suit is a nullity for investigating the subject matter when ELC No. 270 of 2008 is pending.

While contending that the suit is barred by section 7 of the Limitation of Actions Act, the Defendant also stated that the application and the suit are based on purported investigations carried out in usurpation of the powers of the National Land Commission under Article 68(v) of the Constitution and section 14 of the National Land Commission Act. According to the Defendant, pursuant to Article 156 of the Constitution, the Plaintiff lacks *locus standi* to institute this suit as a purported agent of the Attorney General and further, that since no *prima facie* case with a probability of success has been established against him, the suit is an abuse of the court process.

Further, the Defendant averred that the application has not been made in good faith since the purported investigations do not cover the circumstances in which the President of the Republic of Kenya, the Commissioner of Lands and the Director of Surveys who have not been joined as Defendants, came to be involved in issuance of his title and that of the Permanent Secretary-Treasury. While stating that he is a holder of a grant IR No. 83481 issued to him on 15th April 2002, the Defendant contended that the same embodies a contract made by him and the Republic of Kenya and therefore, that the Plaintiff who was not party to the contract lacks capacity to sue.

Further, the Defendant averred that since the government was the owner of the land from which the suit property was hived from, the government was entitled to deal with the land in any manner it deemed fit including alienating the same to him. According to the Defendant, the repealed Government Lands Act vested administration of government land in the Commissioner of Lands and therefore, that government ministries had no role in administration of government land.

While contending that the suit property had for a period of over 40 years been used by the government as commercial premises let to tenants to provide servants with a convenient supply of foodstuffs, the Defendant stated that there was a fundamental change in the use of the land surrounding the suit property. According to the Defendant, the relocation of the orthopedic and dental sections of Kenyatta Hospital in the 1980s was followed by the re-planning of the government land whereof it was subdivided into two portions.

It is the Defendant's averment that title LR No. 209/51006 was reserved for use by the military and the Ministry of Social Services while the suit property was alienated to him. While denying that the suit property had been reserved for the establishment of an orthopaedic clinic, the Defendant also contended that the public land had been alienated to him after the public purpose for which it was reserved had expired.

The Defendant averred that since he was issued with a title in 2002 whose copy has been exhibited, the same can only be taken away through compulsory acquisition as set out in part 8 of the Land Act. He contended that he complied with all the conditions that were set in his letter of allotment that preceded the issuance of his title and receipts dated 26th January 1998, 18th March 1999, 23rd January 2001, 14th March 2005 and 22nd October 2001 were annexed as evidence.

According to the Defendant, the instant suit is bad in law since the state could only impeach his title before 2012 and further, it raises similar issues as those raised in HCCC No. 270 of 2008. It is the

Defendant's contention that the two suits should either be consolidated or the instant suit stayed pending the hearing and determination of HCCC No. 270 of 2008. Lastly, the Defendant averred that since the National Land Commission is the one seized with power to investigate the legality of a title and recommend revocation, the Plaintiff lacks powers to conduct investigations.

The Submissions

The application was canvassed by way of written submissions. The Plaintiff in submissions dated 22nd August 2014 reiterated the facts of the case and argued that the suit property which was allotted to the Defendant was hived off from plot no. 209/9323 which was government land occupied by the Ministry of Culture and Social Services. Counsel for the Plaintiff submitted that the alienation of the suit property from plot 209/9323 which was reserved for the establishment of an orthopaedic clinic was illegal, null and void since the said parcel was not available for allocation.

While urging the court to cancel the illegal allocation to the Defendant, the Plaintiff argued that the Commissioner of Lands had cancelled the allocation of LR No. 209/12800 to N. Mberia, Anthony Kimetto and W. Kibet for reasons that the said parcel was part of LR No. 209/9323 belonging to the Ministry of Culture and Social Services.

In further submission, the Plaintiff contended that parcel no. 209/9323 measuring 2.0 hectares was allocated to the Permanent Secretary Treasury, Department of Social Services as a public utility on 27th September 1999. Counsel submitted that the President was only empowered under the repealed Government Land Act to alienate unalienated land. It is the Plaintiff's submission that the land which was alienated and allocated to the Defendant was already alienated and allocated to the Permanent Secretary Treasury, Department of Social Services as a public utility and was therefore not available for alienation or allocation.

Reliance was placed on the case of **James Joram Nyaga & Another vs. Attorney General & Another H.C. Misc Appl. No. 1732 of 2004** for the submission that the Commissioner's power to execute leases or conveyances on behalf of the President limits the president's power to alienate unalienated land. The court was also referred to the case of **Robert Mutiso Lelli vs. Betty Kahia & 5 Others, Nairobi HCCC No. 704 of 1996** where it was held that since the subject matter was not unalienated government land, the President had no power to alienate it and that any purported grant by the President was therefore null and void. Reference was also made to the case of **Macfoy vs. United Africa Company Ltd (1961) All ER 1169** for the submission that an act which is void is a nullity in law.

Further, the Plaintiff argued that the even if the land was available for allocation, the power to alienate unalienated government land was vested in the President only and was only delegated to the Commissioner of Lands in limited circumstances under section 3 of the repealed Government Lands Act. It is the Plaintiff's submission that none of the exceptions set out under section 3 empowered the Commissioner of Lands to alienate the property to the Defendant and therefore, that the Commissioner's actions were *ultra vires*, null and void *ab initio*.

While submitting that a title is indefeasible and sacrosanct if the process of allocation is done in accordance with the law, Counsel for the Plaintiff argued that the allocation of the suit property was done by the Commissioner of Lands when he did not have authority to do so. Reliance was placed on the case of **Town Council of Ol' Kalou vs. Nga'nga' Hardware, Nairobi CA 269 of 1987** and **Champakalal Ramn Shah vs. The Attorney General & anor, Mombasa HCCC No. 145 of 1997** for the submission that the Commissioner of Lands has a duty to cater for public rights.

The court was also referred to the case of **Milankurman Shah & 2 others vs. city Council of Nairobi & others Nairobi HCCC No. 1024 of 2005** where in addition to holding that public rights takes precedence over private rights, the court declared that the 3rd Plaintiff did not have an absolute and indefeasible title having acquired the same through a process which was in violation of the Government Lands Act. The Plaintiff also cited the case of **Dr. Syedna Mohammed Burhannudin Saheb & 2 others vs. Benja Properties Ltd, Nairobi HCCC No. 73 of 2000** where the court held that the allotment letter was invalid

and void for contravening section 3(a) of the Government Lands Act which provides for alienation of only unalienated land.

Further reliance was placed on the case of **Shiva Mombasa Ltd vs. Kenya Revenue Authority & Another, Mombasa HCCC No. 171 of 2004** where the court held that section 23(1) of the Registration of Titles Act only protects legally acquired rights and that since the land had been reserved for public use, there was nothing to allocate. The Plaintiff also cited the case of **Kenya Anti-Corruption Commission vs. James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008** where the court found that the President had no powers under section 3 of the Government Lands Act to allocate land already allocated. According to the Plaintiff, since the suit property was not unalienated land but had been set aside for public use, it was not available for allocation to the Defendant for private use and therefore, that the Defendant's title to the suit property was a nullity.

While placing reliance on the doctrine of public interest, the Plaintiff made reference to the case of **John Peter Mureithi & Another vs. The Republic Nairobi Misc. Civil Application No. 158 of 2005** for the proposition that under the English common law, ownership of common properties vested in the sovereign could not be granted to private owners where the effect of such a grant was to interfere with the public interest, since the resources were held by the sovereign in trust for the benefit of the public.

In further submission, the Plaintiff argued that if the registration of the suit property was fraudulent and unlawful, a *prima facie* case with probability of success as set out in the case of **Giella vs. Cassman Brown & Co. Ltd (1973)EA 358** had been established. Counsel for the Plaintiff submitted that the loss of a public property cannot be adequately compensated by an award of monetary damages in the event it were to succeed at the trial. The Plaintiff relied on the case of **Kenya Anti-Corruption Commission vs. James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008** where the court found that the loss to the Kenyan public where land set aside for public use was taken away from the public could not be adequately remedied by an award of damages.

While submitting that the balance of convenience tilts in favour of granting the orders, the Plaintiff argued that public interests should always take precedence over private interests. Counsel referred the court to the case of **Shivabhai Patel vs. Manibhai Patel (1959)EA 107** for the submission that it is not only right that the court should attempt to preserve property which may be in issue, but that the court has a clear duty to do so.

In respect to the Defendant's objection that the suit was barred by section 7 of the Limitation of Actions Act, the Plaintiff argued that Act No. 7 of 2007 amended section 42 of the Limitation of Actions Act by introducing section 1(k) and (2) which provides *inter alia* that the Act does not apply to actions in which recovery or compensation in respect of loss or damage to any public property is sought.

Counsel submitted that since there was no dispute that the Plaintiff sought to recover lost public property, the 12 year limitation period provided by section 7 of the Act was not applicable and as such, that the instant suit was not time barred and was therefore properly before the court. The Plaintiff relied on the case of **Kenya Anti-Corruption Commission vs. J.S.K(Cargo) & Another Mombasa HCCC No. 40 of 2009** where the court held that since the Plaintiff had brought the action to recover public land, section 7 of the Limitation of Actions Act was inapplicable.

On the issue that it lacked jurisdiction to investigate matters which were pending investigation by the court in HCCC No. 270 of 2008, the Plaintiff submitted that it was mandated by section 11(1)(d) and 13(2)(c) of the Ethics and Anti-Corruption Act to conduct investigations into allegations that the suit property had been illegally alienated and thereafter, to institute recovery proceedings.

In respect to the Defendant's assertion that it lacked *locus standi* to institute the suit as a purported agent of the Attorney General, the Plaintiff submitted that section 11(1)(j) of the Ethics and Anti-Corruption Act mandated it to institute and conduct proceedings in court for purposes of the recovery or protection of public property. The Plaintiff relied on the findings of the cases **Kenya Anti-Corruption Commission vs. Sammy Komen Mwaita & Another, Nakuru HCCC No. 43 of 2008** and **Kenya Anti-Corruption**

Commission vs. J.S.K (Cargo) & Another Mombasa HCCC No. 40 of 2009 where the court held that section 7(1)(h) of the Anti-Corruption and Economics Crimes Act gives the Plaintiff *locus standi* to bring proceedings on behalf of the general public.

In response to the Defendant's contention that investigation of allegedly acquired land is vested in the National Land Commission and not the Plaintiff, Counsel submitted that the Plaintiff is empowered by section 11(1)(d), 11(1)(j) and 13(2)(c) of the Ethics and Anti-Corruption Commission Act to investigate the conduct of any person who in its opinion constitutes corruption or economic crime. It was submitted that the Plaintiff was therefore performing its statutory mandate and was not usurping the powers of the judiciary or the National Land Commission.

In further submission, the Plaintiff argued that the suit cannot be defeated by reason of non joinder of the Commissioner of Lands and the Director of Survey as Defendants. Counsel for the Plaintiff submitted that failure to join the said parties was not fatal to the suit and reliance was placed on Order 1 Rule 9 of the Civil Procedure Rules and the case of **Beatrice E. J. Yagan vs. Joseph Yator Civil Application No. 367 of 1996** for the submission that an adverse party who has a claim against a party can also add the party. The Court was also referred to the case of **Kenya Anti-Corruption Commission vs. Abel Sangonde Momanyi, Kisii HCCC No. 120 of 2008.**

The Defendant filed submissions dated 21st October 2014 where the facts of his case were reiterated, and it was argued that Article 159 of the Constitution vests the task of making investigations in the course of hearing suits to the judiciary. Counsel for the Defendant submitted that the instant suit and the application which were based on investigations conducted on similar issues which the court is seized of in ELC No. 270 of 2008 were incompetent and a nullity since the Plaintiff had usurped the judiciary constitutional mandate to investigate in the course of hearing suits.

It was also submitted that the investigations by the Plaintiff were carried out in usurpation of the powers of the National Land Commission under Article 67(2) (e) of the Constitution and section 14 of the National Land Commission Act. Counsel argued that since Article 67(2) of the Constitution mandates the National Land Commission to establish the propriety and legality of grants, any law that deems to vest upon any other authority or body the power to review grants and dispositions of public land is null and void for being inconsistent with the Constitution. It was the Defendant's submission that even if the Plaintiff had power to investigate alleged illegal acquisition of public assets, the Plaintiff had contravened Article 10 of the Constitution and section 12 of the Ethics and Anti-Corruption Act for failing to observe the rules of natural justice.

Counsel for the Defendant made reference to the case of **Fletcher vs. Peck** and submitted that the grant which was made by the President in 2002 constitutes a contract and that having made the grant, the state cannot re-assert its right over the property which it alienated. The Defendant made reference to the meaning of ownership as set out in the treatise **Jurisprudence** by **R.W.M Dias, 5th Edition** at page 292 and **Black's Law Dictionary 7th Edition** at page 1131. According to the Defendant, the Plaintiff who is a component of the state cannot disown other agents of the state such as the Commissioner of Lands, the Director of Survey and the Treasury.

Reliance was placed on the case of **Commissioner for Local Government Lands vs. A Khandambi & Another (1929-1930) 12 KLR 12** and it was submitted that since the President owned the land before alienation in 2002, the President gave a grant while exercising the state's right of ownership. It is the Defendant's submission that when the land was alienated to the Defendant in 2002, the state lost all claims to its former land which is comprised in the suit property.

According to the Defendant, the government which was the owner of the land from which the suit property was hived from was entitled to deal with it in any manner it deemed fit including alienating the same to the Defendant. It is the Defendant's submission that following issuance of title to him in 2002, the suit property could only be taken away through compulsory acquisition following strict adherence of the procedure as laid down in the case of **Commissioner of Lands & Another vs. Coastal Aquaculture Ltd KLR (E&L) 1 264.**

While admitting that the suit property was hived from plot 209/9323 which was government land prior to the subdivision, the Defendant submitted that the subdivision did not constitute an illegality pursuant to section 3(a) of the Government Lands Act. It was submitted that the user of the suit property did not change even after subdivision and that in November 1977, the Defendant was granted a lease to operate his butchery on the suit property where a building used for exclusive commercial ventures stood.

Counsel argued that the lease agreement dated 11th November 1977 identified the building as Kabete Orthopaedic Shop premises connoting commercial user. The Defendant submitted that the orthopaedic clinic was never located on the suit property prior to its re-location to Upper Hill in the 1980s before the suit property was alienated to him, but that instead, the orthopaedic clinic was on a portion of land which now constitutes LR No. 209/51006. Counsel argued that in the circumstances of the case, alienation of the property to the Defendant cannot constitute grabbing of the orthopaedic clinic.

The Defendant relied on the provisions of section 3 of the Government Lands Act and argued that the suit property was never granted to him by the Commissioner of Lands as argued by the Plaintiff. According to the Defendant, the Commissioner of Lands only issued a letter of allotment and that the actual grant was made by the President on 15th April 2002 in conformity with section 3 of the Government Lands Act. It is the Defendant's submission that the issuance of a letter of allotment by the Commissioner of Lands is not a grant or disposition and cannot be said to be contrary to section 3 of the Government Lands Act.

While arguing that government land in use by a government agency is unalienated government land within the meaning of section 2 of the Government Lands Act, Counsel submitted that the Plaintiff's allegation that allocation of LR No. 209/2323 to the Permanent Secretary Treasury, Department of Social Services constituted alienation was wrong. It was therefore submitted that the suit property was available for alienation by issuance of a letter of allotment.

Counsel sought to distinguish the case of **James Joram Nyaga & Another vs. Attorney General & Another HC Misc Appl. No. 1732 of 2004** cited by the Plaintiff by submitting that the property involved had been compulsorily acquired and the court held that it could only be used for the purpose for which it was compulsorily acquired. The case of **Robert Mutiso Lelli vs. Betty Kahia & 5 others, Nairobi HCCC No. 704 of 1996** was also distinguished on grounds that the court held that the Commissioner did not have power to alienate the land which had been set aside for a certain purpose and was therefore not available for alienation.

It is the Defendant's submission that no such situation has obtained in this case since following the re-location of the health department to Kenyatta in the 1980s, the government re-planned its land and decided to alienate the suit property to him to continue rendering the services he had rendered over the years. While submitting that the Plaintiff had no cause of action against the Defendant and that the suit was an abuse of the court process, Counsel argued that the Plaintiff had not established a *prima facie* case as set out in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358**. Lastly, the court was urged to strike out this suit owing to its incompetence having been brought without the requisite *locus standi* and with respect to a subject matter which was *subjudice* in order to pave way for adjudication on the issue of ownership which is pending in ELC No, 270 of 2008.

The Issues and Determination

I have read and carefully considered the pleadings filed and submissions made by the parties herein. I will first address the preliminary objections raised by the Defendant's preliminary objection as to whether this suit is time barred and whether the Plaintiff has *locus standi* to bring this suit.

I find in this regard that the Defendant's objection that the suit is barred by section 7 of the Limitation of Actions Act is not merited in light of the provisions of section 42(1)(k) which provides that the Limitation of Actions Act does not apply to actions in which recovery or compensation in respect of the loss of or damage to any public property is sought. In addition, to the extent that the issue as to whether the suit property is public land or not is one that will have to be determined by establishing certain facts, then the objection does not raise a pure point of law as required by the decision in **Mukisa Biscuit**

Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696.

The Defendant also contested the Plaintiff's *locus standi* to investigate the legality or otherwise of the allocation of the suit property arguing that the National Land Commission was the one seized with power to investigate the legality of a title and recommend revocation. This Court notes that the Plaintiff's mandate as provided by section 11(1)(j) of the Ethics and Anti-Corruption Commission Act empowers it to institute and conduct proceedings in court for purposes of the recovery or protection of public property. In addition, Article 79 of the Constitution grants the Ethics and Anti-Corruption Commission similar status and powers as other Constitutional Commissions under Chapter Fifteen, when performing its mandate. The objection on the Plaintiff's *locus standi* thus has no merit and fails.

Equally, the Defendant's challenge of the suit herein on the ground that the Plaintiff had usurped the Judiciary's constitutional mandate to make investigations in the course of hearing suits under Article 159 of the Constitution is not merited since the Plaintiff is exercising its statutory mandate under section 11(1) (j) of the Ethics and Anti-Corruption Commission Act.

The substantive issue that remains to be determined is whether the Plaintiff has met the threshold for the grant of temporary orders of injunction sought. This issue will be determined on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiff in its Plaint dated 11th March 2014 is seeking declarations that the alienation and registration of LR. No 209/14712 in the Defendant's name was null and void, a cancellation of the lease issue with respect to the said property, and orders of vacant possession and of a permanent injunction as against the Defendant restraining him from possessing and dealing with the said property.

It is not contested in this respect that the suit property was hived off from LR No. 209/9323 which the Plaintiff has claimed was government land prior to its subdivision and subsequent allocation to the Defendant. What is in contention is whether the suit property was available for alienation and allocation.

The Plaintiff gave a chronologic account detailing why the suit property was not available for allocation. It exhibited a Part Development Plan dated 30th July 1970 and averred that the same was used to allocate parcel 209/9323 to the Department of Social Services. The Plaintiff averred that the Defendant was working as a casual labourer at the orthopaedic clinic which was later established on parcel no. 209/9323. According to the Plaintiff, the Defendant's request to operate butchery on the parcel no. 209/9323 was approved by the Minister of Health before the running of the clinic was placed under the Ministry of Culture and Social Services. There is a copy of a lease dated 11th November 1997 entered into by the Department of Social Services and the Defendant for the lease of the shop and the butchery for a five-year renewable term.

The Plaintiff also availed copies of letters dated 8th February 1999, 20th September 1996 and 26th October 1995 seeking to establish that the Defendant's application to the Commissioner of Lands, the Permanent Secretary Ministry of Culture and Social Services and the Minister of Culture and Social Services requesting to be allocated a plot on parcel no. 209/9323 was not granted. In particular, there is a letter

dated 1st October 1996 from the Permanent Secretary Ministry of Culture and Social Services informing the Defendant that parcel No. 209/9323 which had been earmarked for development of a center for the disabled was not available for allocation.

Following the alienation and allocation of the suit property which was hived off from parcel no. 209/9323, the Commissioner of Social Services in a letter dated 29th January 2003 complained about the irregular allocation to the Defendant and requested the Permanent Secretary, Ministry of Gender, Sports, Culture and Social Services to facilitate the revocation of the irregular allocation. The United Disabled Persons of Kenya Advocacy and Action Programme also expressed similar sentiments in its letter dated 19th February 2002 addressed to the Commissioner of Social Services.

The Commissioner of Social Services voiced her concerns on the issues through a letter dated 15th February 2002 to the Permanent Secretary Office of the Vice President, Ministry of Home Affairs, Heritage and Sports and called for reversal of the Defendant's allocation. The Permanent Secretary Office of the Vice President, Ministry of Home Affairs, Heritage and Sports in turn wrote a letter dated 26th February 2002 to the Commissioner of Lands requesting the nullification of the Defendant's allocation on among other grounds that the parcel had been allocated to his ministry on 27th September 1999.

The Plaintiff also brought evidence of a letter referenced 174310/(18) from the Commissioner of Lands revoking LR No. 209/12800 which had been excised from LR No. 209/9323 and allocated to N. Mberia, Anthony Kimetto and W. Kibet. The Commissioner of Lands revoked the said title on the basis that the parcel was not vacant government land, but was part and parcel of LR No. 209/9323 which belonged to the Ministry of Culture and Social Services. In my view, this letter is evidence of the position by the Plaintiff that parcel no. 209/9323 was not vacant government land as submitted by the Defendant, and was therefore not available for alienation as provided by section 3(a) of the Government Lands Act (now repealed).

The Defendant's allegation that the government re-planned its land and decided to alienate the suit property to him following the re-location of the health department to Kenyatta in the 1980s was not supported by any evidence. No material was presented to court to suggest that the land had become available for alienation to private persons. I therefore find from the foregoing reasons that a *prima facie* case with probability of success has been established by the Plaintiff.

The Plaintiff in addition must satisfy the court that if the orders sought are not granted, irreparable loss which cannot be compensated by an award of damages will be suffered. I agree in this regard with Plaintiff's submissions and the decision in the case of **Kenya Anti-Corruption Commission vs. James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008** that the loss to the Kenyan public where land set aside for public use is taken away cannot be adequately remedied by an award of damages.

It has also been held that where there is a conflict between the public interest and the private interest, the public interest must prevail. See **Susan Waithera Kariuki & 4 others vs. Town Clerk, City Council of Nairobi & 2 Others (2011) eKLR**. The balance of convenience therefore tilts in favour of granting the orders sought to ensure preservation of the suit property pending the final determination of this suit.

The Plaintiff's Notice of Motion dated 11th March 2014 is accordingly allowed in the terms of the following orders:

1. The Defendant be and is hereby restrained whether by himself, his servants, chargees or assigns from selling, advertising for sale, transferring, further charging, leasing, subdividing, wasting or in any manner howsoever disposing of L.R. No. 209/14712 situated along Waiyaki Way, Nairobi, pending the hearing and determination of this suit or until further orders.
2. The costs of the Plaintiff's Notice of Motion dated 11th March 2014 shall be in the cause

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____29th____ day of ____January____, 2015.

P. NYAMWEYA

JUDGE