IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 183 OF 2014 BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION.....APPELLANT

AND

JUDITH MARILYN OKUNGU.....1ST RESPONDENT

DAKANE ABDULAHI ALI.....2ND RESPONDENT

(An appeal from the ruling and order of the High Court of Kenya

at Nairobi, (Mutungi, J.) dated 15th November, 2013

in

E.L.C. Civil Case No. 8 of 2008)

****

JUDGMENT OF THE COURT

The appeal was provoked in the main by the upholding by the High Court (Mutungi, J) of a preliminary objection by **Judith Marilyn Okungu** (the first appellant) against her impleading in a suit filed before that court by the Ethics and Anti-Corruption Commission (formerly the Kenya Anti-Corruption Commission), the appellant herein. The suit in question, which is still pending before the High Court, concerned the allocation of property known as L.R. No. 209/16441 (I.R. 10069) by the 1st respondent, who was at the material time the Commissioner of Lands, to the 2nd respondent a private individual. The suit alleged that the alienation was illegal, fraudulent, null and void and *ultra vires* the powers and functions of the 1st respondent the particulars whereof were pleaded but all revolving around the fact of the said property having been public property which had already been allocated to Racecourse Primary School, a public educational institution run and maintained by the City Council of Nairobi. It was therefore not available for alienation by the 1st respondent to the 2nd respondent. The appellant averred in the alternative that the 1st respondent as Commissioner of Lands was the custodian of all government land and was in breach of her fiduciary duties in allocating the property to the 2nd respondent, which acts were null and void and incapable of conferring any interest to the 2nd respondent.

Accordingly the appellant sought the following prayers;

> **"(a) A declaration that the allocation and issuance of grant of L.R. No. 209/16441 (I.R 10069) by the 1st defendant to the 2nd defendant is null and void and incapable of conferring any**

estate, interest or right.

b. An order that the registration of the 2nd defendant as the grantee of L.R. No. 209/16441 (I.R. 10069) be cancelled.

c. A mandatory injunction directing the 2nd defendant or agents, to vacate L.R. No. 209/16441) forthwith.

d. An order of permanent injunction to restrain the 2nd defendant by himself, his servants, agents or any other person whatsoever, from occupying, encroaching, leasing, charging, sub-dividing, developing, wasting, transferring, or in any other manner dealing with L.R No. 209/16441 (I.R 10069).

e. Costs of and incidental to the suit."

The appellant simultaneously filed a chamber summons application by which it sought the following injunctive orders against the 2nd respondent;

"2. The 2nd defendant be and is hereby restrained by himself, his agents, servants or any other person whatsoever from selling, leasing, charging, sub-dividing, developing, wasting, transferring or in any other way dealing with the property referred to as, L.R. 209/16441 I.R 100691 pending the hearing of this application inter partes.

3. The 2nd defendant be and is hereby restrained by himself, his agents, servants or any other person whatsoever from selling, leasing, charging, sub-dividing, developing, occupying, encroaching, wasting, transferring or in any other way dealing with the property referred to as L.R. 209/16441 I.R 100691 pending the hearing and determination of this suit.

4. A mandatory injunction directing the 2nd defendant, his servants or agents, to vacate L.R. 209/16441 I.R 100691 forthwith pending the hearing and determination of this suit.

5. Costs be provided for."

In answer to the suit and the application aforesaid the 1st respondent filed a written defence and a replying affidavit. She then filed a notice of preliminary objection on 28th January 2008 on the basis that the suit violated her constitutional rights and should therefore be dismissed with costs. This was followed by the filing on 22nd April 2008 of particulars of preliminary objection raising the following grounds;

"1. That the suit against the 1st defendant violates provisions of the Government Proceedings Act Cap. 40 of the Laws of Kenya.

2. That the suit against the 1st defendant violates the provisions of the Government Lands Act Cap. 280 of the Laws of Kenya.

3. That the suit against the 1st defendant is statute barred.

4. That the suit against the defendants violates the provisions of Anti-Corruption and Economic Crimes Act No. 3 of 2003.

5. That the High Court has no jurisdiction to entertain the suit.

6. That the suit against the defendants violates their constitutional right to protection of law.

7. That the suit against the 1st defendant violates her constitutional rights as a public officer."

After hearing submissions from the parties, the learned Judge upheld the 1st respondent's preliminary objection on the basis; first, that she was acting in her official capacity as Commissioner of Lands and could not therefore by dint of **section 40** of the Government Proceedings Act Cap 40, be personally sued for any mistakes or tortuous acts and; second; that the suit against her during the pendency of a criminal case over the same transaction before the Anti-Corruption Court was a double-edged sword and prejudicial to the respondents as it smacked of harassment.

The learned Judge granted a prohibitory injunction as prayed but declined to grant the prayer for mandatory injunction pending the hearing and determination of the suit. The appellant is aggrieved by that rejection as well. The memorandum of appeal filed raises complaints which are to the effect that the learned Judge erred in law and in fact by;

- ***Failing to appreciate that the 1st respondent was a necessary party to the suit and was properly impleaded.***

- ***Finding that a public servant can only be sued if found to have personally benefited from a transaction.***

- ***Failing to find that a public servant can be held personally liable for acts contrary to the law, in excess of authority and in breach of fiduciary duties.***

- ***Misapprehending the basis upon which the 1st respondent was sued and limiting the appellant's claim against her to certain only of the provisions of the Anti-Corruption and Economic Crimes Act.***

- ***Finally determining contentious issues at preliminary stage including whether the 1st respondent acted in good faith, and that she acted lawfully in alienating the land and that civil servants are not liable for their tortuous acts, which was res judicata.***

- ***Failing to find that the suit property ought to be used by Racecourse Primary School pending determination of the suit.***

- ***Finding that proceeding with civil and criminal matters amounted to harassment and staying the suit.***

In written submissions as well as in oral highlights made before us by its learned counsel **Mr. Murei**, the appellant condensed those grounds into three themes as follow. On the question of the 1st respondent's joinder in the suit, it was urged that in view of the plea in the plaint that the 1st respondent acted in excess of her powers as Commissioner of Lands, and was in breach of her fiduciary duties, added to the pleading that there was illegality and fraud on her part in allocating land that was not available for alienation, she was properly impleaded. Thus her defence and objection that she was insulated from personal liability for acting in her official capacity ought not to have been upheld and only rendered the issue contested and therefore unfit for a preliminary objection as set out in the case of ***MUKISA BISCUITS MANUFACTURING CO. LTD vs. WESTEND DISTRIBUTORS LTD*** **[1969] EA 696**. Pressing the propriety of the 1st appellant's impleading for acting unlawfully and in excess of her authority, counsel cited ***STANDARD CHARTERED BANK vs. PAKISTAN NATIONAL SHIPPING CORP & OTHERS*** (NO 2)[2002] UKHL 43, and ***M vs. HOME OFFICE & ANOR*** **[1993] 3 ALL ER 537**, decisions of the former House of Lords of England. He added that the same issue had in any event been raised before Visram J (as he then was) who decided that the 1st respondent was rightly sued. The matter therefore was *res judicata*.

The second limb pursued was that the learned Judge was wrong not to issue a mandatory injunction which was merited as the case presented special grounds in that the land had previously been alienated to the school on the basis of which previous other attempts to alienate the land had been rejected. The school had in fact been seeking the issuance of a title deed to itself when the 1st respondent suddenly issued a grant to the 2nd respondent. Referring to this Court's decision in ***KIPSIRGOI INVESTMENT vs.***

KENYA ANTI-CORRUPTION COMMISSION Eldoret Civil Appeal No. 288 of 2010 which affirmed the High Court's adoption of summary process and entering judgment in a case involving public land unlawfully alienated, the appellant contended that there was a compelling reason for issuance of a mandatory injunction herein so that the land which has been used by children of the school since the 1970's, be committed to their continued use in the public interest.

The last aspect of the case that **Mr. Murei** addressed was the learned Judge's *suo motu* order staying the suit on the basis of the existence of criminal proceedings. This was termed erroneous in that no party asked for a stay and the appellant was not given an opportunity to comment on the same. He pointed out that the suit predated the criminal proceedings and should not have been stayed.

Rising to oppose the appeal, **Mr. Obura**, learned counsel for the 1st respondent asserted that she acted on her official capacity as Commissioner of Lands and was immunized from tortuous liability. All that could undo her actions would be an order of *certiorari* but two parallel proceedings, one criminal and the other civil, could not properly be brought against the 1st respondent. He charged that the appellant was using the civil process to gather evidence to use against the 1st respondent so that the learned Judge was justified to stay the proceedings as he could not stop the criminal proceedings in light of the provisions of **section 193A** of the Criminal Procedure Code. He sought to distinguish the **STANDARD CHARTERED** case (supra) as well as the ruling by Visram, J on the basis that the former involved the private individuals and the latter was ex-parte and for a period of only six months and thus lacking precedential value and incapable of founding a plea of *res judicata*.

On his part **Mr. Busaidy**, learned counsel for the 2nd respondent supported the learned Judge's refusal to grant the mandatory injunction sought on the basis that ownership of the property was highly contested as found by the Judge and that since the Constitution in **Article 40** protects the right to private property, the same is sacrosanct and cannot be denied without a finding having been made that the property in question was fraudulently acquired. He cited the decision of this Court in ***JOSEPH N.K ARAP NG'OK vs. JUSTICE MOIJO OLE KEIUWA*** **[1997] eKLR** to buttress that submission, pointing out that the learned Judge had found that the principles of ***GIELLA vs. CASSMAN BROWN [1973] EA 358*** were inapplicable. Counsel submitted that the learned Judge properly granted a prohibitory injunction to preserve the subject matter and was right to decline an order of mandatory injunction because the threshold for its grant at interlocutory stage is very high, and the appellant had not satisfied it. That exercise of discretion should not therefore be disturbed, counsel urged, adding that the **KIPSIRGOI** case (supra) relied on by the appellant addressed a different kind of application and was therefore inapplicable. He concluded that even under the new Constitution, the sanctity of title remains.

Making a brief reply, **Mr. Murei** reiterated that the 1st respondent acted in excess of authority and unlawfully and was therefore not immune from personal liability. Moreover, criminal and civil proceedings could run concurrently as the appellant is obligated to take preemptive steps to protect public property, not fold its arms and wait for criminal proceedings to be completed.

We have perused the record and given due consideration to the submissions filed and made before us, as well as the authorities cited. We have done so in keeping with our duty, as spelt out in **Rule 29** of the Court of Appeal Rules, to subject the case to a re-hearing and re-evaluating and renalysing the entire record in a fresh and exhaustive manner so as to arrive at our own independent conclusions. We pay respect to the findings of the first instance court but will not hesitate to disagree with and disturb the conclusions reached thereby, if they are based on a misapprehension of the evidence or the law or are plainly erroneous. As we deal with this appeal we are keenly aware that it is an interlocutory appeal with the suit at the High Court still pending final determination on its merits, and in fact standing stayed by the impugned ruling. That being the case, prudence dictates that we must be circumspect in our findings and guarded in our pronouncements to the end that we must eschew the temptation to express any concluded positions over contentious issues that are not before us substantively, and must first be determined on merit by the High Court.

We understand the appellant's main complaint to be the learned Judge's decision that the 1st respondent was improperly sued as she was immunized from personal liability by reason of her acting in her official

capacity at the material time. The learned Judge arrived at that conclusion upon consideration of the provisions of **sections 4** and **12** of the Government Proceedings Act, Cap 40. Section 4 is in the following terms;

> ***"4(1) Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:-***
>
> *a.* ***In respect of torts committed by its servants or agent;***
>
> *b.* ***In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and***
>
> ***c. In respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.***
>
> …
>
> ***4(3) Where any functions are conferred or imposed upon an officer of the Government as such either by any rule of the common law or by any written law and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Government in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Government."***

And Section 12 provides thus;

> ***"12(1) Subject to the provisions of any other written law, civil proceedings by or against the government shall be instituted by or against the Attorney General as the law may be.***
>
> ***12(2) No proceedings instituted in accordance with this part by or against the Attorney General shall abate or be affected by any change in the person holding the office of the Attorney General."***

It would seem, with respect, that the learned Judge misunderstood the import of the two provisions. What they do is provide that the Government can be sued for the tortuous acts of its officers in much the same way as private persons are vicariously liable for the tortuous acts of their servants or agents and that when Government sues or issued in civil proceedings, the said proceedings shall be in the name of the Attorney General. There is nothing in those two sections *per se* that provides a blanket immunity from suit for Government officers. All that can properly be deduced from them is that liability extends to the Government.

In so far as the learned Judge read in the provisions a lot more than they provide, he misdirected himself in law.

Of greater significance is that the learned Judge failed to grasp the essence of the appellant's argument before him. The appellant was not merely arguing that those sections did not absolve Government officers from personal tortuous liability as the preliminary objection had posed. Rather, the gist of the argument was that even were it to be conceded that Government bears tortuous liability for the acts of its servants who may perhaps be absolved their disclosed principal having borne liability and been sued, the case herein was not merely tortuous but one where the 1st respondent is alleged to have exceeded her authority, acted in violation of the law and engaged in fraudulent acts in breach of her fiduciary duty. Such illegalities are not only null and void, they can only attach personally to the 1st respondent and she may be sued therefor.

We are of the respectful view that the appellant's submissions on this point are not without force. There is ample authority to the effect that a person against whom fraud or illegality is alleged cannot escape personal liability (should the fraud or illegality be proved) on the basis that he was acting as an agent or

servant of another. Indeed, government functionaries of whatever seniority are not immune from personal liability for unlawful acts such as deceit, fraud or contempt of court. See ***STANDARD CHARTERED vs. PNSC*** (supra) and ***M.Vs. HOME OFFICE & ANOR*** (supra). The latter case locates this personal liability at the heart of the rule of law and quotes Prof. Dicey in the following terms;

> ***"When we speak of the rule of law as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person. (See Introduction to the Study of the Law of the Constitution (10th edn, 1965) pp193-194.)"***

The learned Judge misapprehended this or failed to appreciate this aspect of the appellant's case and that failure led him to wrongly exercise his discretion, which compels us to interfere. In doing do, we are not at all making a finding that the 1st respondent's culpability in the matters alleged against her is proven. What we must say, however, is that the issue was so contested, and requiring to be established by evidence, that it was definitely not a proper subject for a preliminary objection such as was raised by the 1st respondent. The sentiments of Sir Charles Newbold P. of the Predecessor of this Court in the **MUKISA BISCUITS** case (supra) on when a preliminary objection can properly be raised are opposite;

> ***"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice***
>
> ***should stop."*** (Our emphasis.)

We are quite clear that the matters raised by the 1st respondent could not properly be handled by way of a preliminary objection without resulting in misjustice. The legal conclusion that the 1st appellant was wrongly impleaded should not have been reached before facts were established by evidence. This failing is indicative of wrong exercise of discretion and we are entiled to interfere. See ***MBOGO vs. SHAH*** **[1968] EA 93**.

This finding ought to dispose of this appeal but we need to state also that the learned Judge was clearly wrong to conclude, as he did, that the proceedings before him amounted to harassment of the 1st respondent merely because there was a pending criminal case before the anti-corruption court. The matters forming the basis of the litigation traversed both the civil and criminal terrain. There is no law stating that the two types of proceedings cannot be carried out concurrently. It is spelt out expressly in **section 193A** of the Criminal Procedure Code that the existence of the one should not lead to a stay of the other. In this case the civil proceedings before the learned Judge in fact predated the criminal proceedings so that it was plainly wrong for the learned Judge to stay them. The error is compounded by the fact that the learned Judge made the order of stay on his own motion no party having requested for the same. Moreover, the parties were not invited to make any representations on the drastic move the learned Judge intended to take *suo motu*. Needless to say the order of stay also negated the constitutional and public policy requirement for justice to be dispensed in an efficient and expeditious manner.

On the rejection of the plea for mandatory injunction, even though we do find some merit on the arguments advanced by the appellant, we find the counter-argument to be more persuasive, namely, that since ownership or the propriety of the ownership of the subject property is highly contested, it would not be prudent to dispossess the 2nd respondent in the interim since he holds documentation that shows him, facially, to be the owner. We think that a more pragmatic approach is to hold matters in *statu quo*, as was achieved by the learned Judge, pending the determination of the suit. The legitimate concerns raised by the appellant will be addressed by ensuring that the suit gets to be heard and determined expeditiously.

The upshot of our consideration of this appeal is that it succeeds to the extent we have stated. The order striking out the 1st respondent as a party to the suit before the High Court is set aside as is the order of stay of proceedings. The suit shall proceed to hearing expeditiously before a Judge of the High Court other than Mutungi, J. The 1st respondent shall pay the appellant's costs of this appeal and of the application at the High Court giving rise thereto.

Dated and delivered at Nairobi this 21st day of July, 2017.

P. N. WAKI

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR