



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A)

CIVIL APPEAL NO. 27 OF 2014

BETWEEN

BONIFACE KATANA KALAVERI.....APPELLANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION..... 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

(Being an Appeal from the Ruling and Decisions of (Mukunya, J.) in the High Court of Kenya at Mombasa, delivered on 5th day of June, 2014

in

ELC. CASE NO. 218 OF 2013)

JUDGMENT OF THE COURT

The appellant **BONIFACE KATANA KALAVERI**, who was the applicant in ELC. Case No. 218 of 2013 being aggrieved by the decision of Mukunya, J delivered on 5th June, 2015 filed this appeal.

The background to the appeal is that the Ethics and Anti-Corruption Commission (the 1st respondent herein) filed ELC. Case No. 218 of 2013 against the appellant as well as the Commissioner of Lands (the 2nd respondent herein). The 1st respondent’s cause of action was premised on what it referred to as an illegal allocation to the appellant of Mombasa Block XLVIII/145 and Mombasa Block XLVIII/146 (hereinafter the suit properties). In the plaint the 1st respondent averred that African Marine & General Engineering Company Limited (hereinafter the Company) was a grantee of a lease by the then Colonial and Protectorate Government of Kenya in respect of LR 1149/45/XLVIII for a term of 89 years with effect from 1st January, 1960; that after Kenya’s Independence the said parcel of land was vested in the East African Harbours Corporation, the predecessor of K.P.A that vide a vesting order of 1969 and an allotment letter dated 9th September, 1986 issued by Government of Kenya, K.P.A became the beneficial owner and a registered lessee of the suit properties; that the Company upon agreement with KPA and at its own expense reclaimed Mombasa Island Block XLVIII/45 and 146 measuring 0.5215 hectares and 1.085 hectares respectively; that K.P.A granted subleases of the suit properties to the Company for a term

of 59 years with effect from 1st January, 1990 and finally that the 2nd respondent illegally allocated the suit properties to the appellant for a term of 99 years with effect from 1st November, 2012.

Contemporaneously with the filing of the plaint the 1st respondent filed a Notice of Motion on 27th September, 2013 and sought to restrain the appellant from interfering and/or dealing with the suit properties in anyway. On 3rd October, 2013, Mukunya, J. issued interim injunctive orders against the appellant and the 2nd respondent. The learned Judge further directed that the **“application to be served and heard inter partes (sic) within 14 days.”**

It would appear that the Notice of Motion application was not heard *inter partes* but on 20th November, 2013 the appellant filed a Notice of Motion under **Articles 79 and 80** of the Constitution and Rule 23 of the Constitution of Kenya High Court Supervisory Jurisdiction Rules 2006. The motion was supported by the affidavit of the appellant herein sworn on 25th November, 2013 in which he deponed that he is the registered owner of the suit properties; that it was irregular for the 1st respondent to engage himself in a private matter between two private entities, namely the appellant and the Company. He deponed that the dispute (if any) was between two private entities and hence outside the ambit of

“ Chapter 6 of the Constitution to which the plaintiff (now the 1st respondent) is mandated to ensure compliance with and enforcement of the provisions of the chapter.”

The appellant sought the following orders:

- “(a) The Ethics & Anti-Corruption Commission as a Commission established under Article 79 of the Constitution, with powers of a commission under Chapter Fifteen of the Constitution, has no locus standi pursuant to those provisions to institute any proceedings, including the present suit, against the 1st defendant herein.**
- (b) Consequent upon (a) above, a declaration that the present suit by the plaintiff against the 1st Defendant is a nullity for lack of locus standi on the part of the plaintiff to institute the same against the 1st Defendant/Applicant.**
- (c) The suit as well as the Notice of Motion filed herein all of which are dated and filed in Court on the 27th September, 2013 in so far as the same relate to and touch on the 1st Defendant/Applicant be struck out.**
- d. Alternatively, and without prejudice to the preceding prayers, a declaration that this Court has no jurisdiction to determine any issues pertaining to matters arising from Chapter six of The Constitution in so far as the same relate to and affect persons/individuals who are not either State Officers or Public Officers within the meaning ascribed to those offices by Article 260 of the Constitution.**
- e. An order/declaration that the true and correct application of Section 11 (1) (k) of the Ethics & Anticorruption Commission Act 2011, is that the same can only be applicable to persons who under Chapter Six of the Constitution qualify the test of being State or Public Officers and therefore the same does not give the plaintiff herein any extra mandate so as to include the 1st Defendant/Applicant in that category.**
- f. Accordingly, for lack of locus standi on the part of the plaintiff, and lack of jurisdiction on the Court; all proceedings in this suit against the 1st Defendant are a nullity.**
- g. The costs herein, and the suit, be borne by the plaintiff.”**

The appellant’s Notice of Motion was heard on 27th November, 2013 and in a reserved ruling delivered on 5th June, 2014 the High Court (Mukunya, J) dismissed it. It is the said dismissal that precipitated this appeal. In his memorandum of appeal the appellant listed no less than 7 grounds of appeal. These can be summarized as follows, that the learned Judge erred in not finding that the 1st respondent had no *locus*

standi by limiting his evaluation on the issue of *locus standi* on **Article 252 (1) (d)** of the **Constitution** without considering other mandatory provisions in the Constitution to wit **Articles 79 and 80** as well as **Chapter Six** of the **Constitution**; that the learned judge failed to find that under **Section 11 (1) (k)** of the **Ethics and Anti-corruption Commission Act 2011, (EACCA)** the 1st respondent had no mandate to institute proceedings on behalf of or against private individuals such as the appellant; that the trial Court failed to find that the appellant is neither a state officer or public officer and finally that **Section 11(1) (k)** of the **EACCA** was unconstitutional.

In his submissions, Mr. Buti learned counsel for the appellant invited us to find that the suit filed by the 1st respondent on 27th September, 2013 was essentially a suit between the Company which is a private entity and an individual, the appellant who is not a state officer or a public officer and hence the dispute (if any) was outside the mandate of the 1st respondent; that the Company's sublease of 59 years with effect from 1st January, 1990 given to it by Kenya Ports Authority was challenged by the appellant who had certificates of leases issued to him on 1st January, 2012 by the 2nd respondent for a period of 99 years with effect from 1st November, 1998. He contended that the 1st respondent had no *locus standi* to sue the appellant and the 2nd respondent as this was a dispute between private parties.

It was Mr. Buti's postulation that **Section 7 (h)** of the **Anti-Corruption & Economic Crimes Act (ACECA)** which gave the defunct Kenya Anti-Corruption Commission, the predecessor of the 1st respondent *carte blanche* power to recover public property was repealed by **Act No. 22 of 2011**, namely the **Ethics and Anti-Corruption Commission Act (EACCA)** which came into force on 5th November, 2011. Section 7 thereof had provided that the Kenya Anti-Corruption Commission, had the power "**to investigate the extent of liability for the loss of or damage to any public property and -**

i. ***to institute civil proceeding against any person for the recovery of such property or for compensation***

and

ii. ***to carry out any other functions conferred on the Commission by or under this Act or any other law.***"

The appellant contended that **Section 7 of ACECA** therefore was replaced with **Section II (d)** of **EACCA** which obligates the 1st respondent to investigate and recommend to the Director of Public Prosecution acts of corruption by providing as follows:-

"II (d) to: "Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution."

He bolstered his argument by stating that the Director of Public Prosecutions in **Article 157(6)(9)** of the Constitution "**--- may a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.**"

He further submitted that the 1st respondent's powers are contained in **Section 11(k)** of **EACCA** which provides as follows:-

(ii) "institute and conduct proceedings in court for purposes of recovery or protection of public property or for freeze or confiscation of proceeds of corruption, or the payment of compensation or other punitive and disciplinary measures."

However, Mr. Buti was quick to add that this power has to be exercised in liaison with the Attorney-General who is enjoined by **Article 156 (6)** of the Constitution "**--- to promote, protect and uphold the**

rule of law and defend the public interest.” He was of the view that the 1st respondent could only recover land owned by private citizens through the Attorney General, as a defender of the public good.

The appellant relied on the Supreme Court advisory opinion in the matter of the Interim Independent Electoral Commission and Boundaries **Constitutional Application No. 2 of 2011**, in which the Supreme Court stated that **“independence does not mean ‘detachment,’ ‘isolation’ or ‘disengagement’ from other public players**” and argued that in spite of the independence of the 1st respondent, it needed to perform its functions in liaison with the Director of Public Prosecution and/or the Attorney General.

Mr. Kagucia for the 1st respondent opposed the appeal. It was his contention that the mandate of the 1st respondent was not lessened by the 2010 Constitution but if anything it was expanded by **Article 79** of the Constitution which mandated Parliament to enact legislation to establish a Commission to deal with not only issues of corruption but to also include matters of ethics. He submitted that under **Article 252(d)** of the **Constitution** the 1st respondent was to perform functions prescribed by legislation in addition to the powers conferred upon it by the Constitution. He refuted the contentions advanced by Mr. Buti that the 1st respondent should channel all its cases through the Director of Public Prosecutions as, according to him, this requirement applies only to criminal cases. Further, that to argue that the 1st respondent should recover land from a private entity through the Attorney General was a misconception of the law. Counsel submitted that the suit properties are not private land but public land, over which the 1st respondent is mandated to recover if illegally acquired. He concluded his submissions by reiterating that the *locus standi* of the 1st respondent had been greatly expanded in the 2010 Constitution. He cited the case of **Mumo Matemo V Trusted Society of Human Rights Alliance & 5 Others SC [2014] eKLR** to support this contention.

When the matter came before us on 12th February, 2015 for plenary hearing, Mr. Ngare for the 2nd respondent opted not to make any submissions but adopted those of Mr. Kagucia learned counsel for the 1st respondent.

We have painstakingly considered the rival submissions, the pleadings as well as the law. On the onset, it was the appellant’s case that the dispute herein involved two warring private parties namely the African Marine and General Engineering Company and the appellant, the latter having been issued with certificates of leases by the 2nd respondent on 1st November, 2012 for a period of 99 years. On the other hand, the company traces its claim to the suit properties vide a sub-lease granted to it by KPA, (the holder of the lease), for 59 years with effect from 1st January, 1990. KPA is a State Corporation and is not a private entity and neither is the 2nd respondent (who was also sued by the 1st respondent). Suffice to state that the appellant traces his claim to title to the leases given to him by the 2nd respondent, a public entity, whilst the Company traces its claim to title to the sub-leases granted to it by a public body to wit, the K.P.A. Needless to state K.P.A has a reversionary interest on the sub-leases granted to the Company as it is expected that on expiry of the 59 year lease, the suit properties would revert to K.P.A, which as we have stated above is not a private entity but a public entity. To this extent we find that the appellant’s submission that the dispute involved two private entities is factually incorrect. The Company and the appellant may be private entities but the suit properties, the subject matter of the High Court case and this appeal are not private property and neither is the 2nd respondent who purportedly granted leases to the appellant.

As to the contention that the 1st respondent had no *locus standi*, it is our view that the Promulgation of the 2010 Constitution enlarged the scope of *locus standi*, in Kenya. In the **Mumo case** (supra) the Supreme Court took cognizance of the history of *locus standi* in Kenya and stated as follows: **“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi in Kenya.”** In so doing the Supreme Court cited **Article 258** which provides:

1. ***Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”***

2. ***In addition to a person acting in their own interest court proceedings under Clause (1) may be instituted by***

(a)

(b)

(c) a person acting in public interest”

Suffice to state that **Articles 22 and 258** have empowered every person, whether corporate or non-corporate to move the courts, contesting any contraventions of the Bill of Rights, or the Constitution in general. The enlargement of the scope of *locus standi* was also considered in the case of **John Wekesa Khaoya v Attorney General, Petition No. 60 of 2012; [2013] eKLR** wherein the High Court expressed the principle thereof as follows:- (paragraph 4):

***“The locus standi to file judicial proceedings, representative or otherwise has been greatly enlarged by the Constitution in Articles 22 and 258 of the Constitution which ensures unhindered access to justice*”**

In the **Mumo Matemu** case (supra) the Supreme Court further expressed itself as follows:

“Locus standi had operated, in the earlier constitutional dispensation, to limit the scope for litigants to pursue causes in the public interest. Articles 22 and 258 of the current Constitution opened the doors for such litigants to lodge causes on constitutional matters.”

Suffice to state and contrary to the appellant’s submissions the scope of *locus standi* was greatly enhanced to the extent that a litigant pursuing causes in public interest cannot be thrown out on the basis of *locus standi*. However the parameters for what constitutes public interest has been set out in the **John Wekesa Khaoya vs Attorney General** (supra) to include:

“(h) the intended suit must be brought in good faith and must be in the public interest and

iii. the suit should not be aimed at giving any personal gain to the applicant.”

Public interest is defined in Black’s Law Dictionary 9th Edition (page 350) as **“the general welfare of the public that warrants recognition and protection”** or **something in which the public as a whole has a stake especially an interest that justifies governmental regulation.”**

In our view we do not discern any personal interest on the part of the 1st respondent and hence had the necessary *locus standi* to initiate and prosecute the suit.

As to the contention that the 1st respondent has to recover public land through the Director of Public Prosecution, it is our view that this is factually and legally not correct. The involvement of the Director of Public Prosecution is only in respect of criminal acts of corruption but not recovery of public land illegally acquired. Section II (d) of **EACCA** provides as much. It states that the 1st respondent shall:

(d) investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under this Act or any other law enacted pursuant to Chapter Six of the Constitution.

The role of the Director of Public Prosecution is spelt out in **Article 157(6)** of the **Constitution** to wit, ***“..... (a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.” (b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or***

authority; and (c) subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

Accordingly, the powers of the Director of Public Prosecution do not include the power to recover illegally acquired property as **Article 157(6)** of the Constitution specifies those powers and limits them to institution and undertaking criminal proceedings, taking over and continuing any criminal proceedings and also the discontinuance of any criminal proceedings.

It was Mr. Buti's further argument that in the Constitutional Application No. 2 of 2011, in the advisory opinion, the Supreme Court held that the independence of a Commission such as the 1st respondent does not mean detachment. That may well be so but in the same advisory opinion the Supreme Court went further to state that the cooperation anticipated is not in the execution of a Commission's mandate. Indeed in the same advisory opinion the Supreme Court elaborated that "independence" was "**by design, configured to the execution of their mandate and performance of their functions as prescribed in the Constitution and the law.**" We are thus not persuaded by the argument that the appellant is enjoined in law to recover illegally acquired public land either through the Director of Public Prosecution or the Attorney General as each of these organs of state has clearly defined mandates.

The other argument advanced by Mr. Buti is that the powers of the 1st respondent had been whittled down by the repealing of **ACECA**. However, in our humble view **Article 79 of the Constitution** mandated Parliament to enact legislation for the establishment of an ethics and anti corruption Commission. It provides as follows:

"Parliament shall enact legislation to establish an independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a commission under Chapter fifteen for purposes of ensuring compliance with, and enforcement of the provision of this chapter."

The 'chapter' being referred to herein is **Chapter Six** of the **Constitution** and whereas **Chapter six** deals with "leadership and integrity" of state officers, the Constitution mandated Parliament "**..... to establish an independent ethics and anti-corruption commission**" It is our considered view that apart from enforcement of Chapter Six the new outfit, in this case the 1st respondent would not only deal with matters of ethics but would also be "an anti-corruption commission."

It is by virtue of this that Parliament enacted **EACCA** which gave the 1st respondent the statutory powers contained in the Act as well as the enforcement of **Chapter 6** of the Constitution. Indeed, the heading of **Section II** of the **EACCA** is "**Additional functions of the Commission.**" **Section II (1)** thereof provides as follows: "**In addition to the functions of the commission under Article 252 and Chapter six of the Constitution, the commission shall:**

(k) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures."

This in our view was not a curtailment of the powers of the 1st respondent but an expanded mandate that includes the protection of public property, in addition to the powers vested in **Chapter 6** and **Article 252** of the Constitution. It should be remembered that the Kenya Anti-Corruption Commission, the predecessor of the 1st respondent was not anchored in the Constitution but in an Act of Parliament i.e. **ACECA**. As the title of that Act suggests, the focus was on corruption and economic crimes. However, in the 2010 Constitution we find that the 1st respondent was anchored in the Constitution to wit Chapter 6 wherein the 1st respondent was given the mandate to check on integrity of public officers and the law enacted in pursuance to Article 79 of the Constitution gave the 1st respondent additional powers. It is therefore incorrect to state that the 1st respondent's powers had been whittled down and that it could not

file suit for recovery of public property illegally acquired by private citizens.

Furthermore, **Article 252** of the **Constitution**, provides that a commission such as the 1st Respondent:

a. ***“may conduct investigations on its own initiative or on a complain made by a member of the public;***

and

d) may perform any functions and exercise any powers prescribed by legislation, in addition to the function and powers conferred by this Constitution.”

The 1st respondent by dint of **Article 252** of the Constitution is mandated to conduct investigations on its own initiative and secondly it has the mandate to perform functions prescribed by legislation, in this case **EACCA**; as well as the enforcement of Chapter 6 of the Constitution. We find that the 1st respondent’s mandate was greatly enhanced by the enactment of the 2010 Constitution and by the formulation of an Act of Parliament by dint of Article 79 of the Constitution.

The other argument advanced by Mr. Buti was that **Section 11 (k)** of the **EACCA** is unconstitutional as it is not in keeping with **Chapter 6** of the Constitution. In our view, this cannot be correct as we have demonstrated above that under **Article 79** of the Constitution Parliament was mandated to enact legislation to deal with issues of ethics and corruption. The enactment of the **EACCA** was in fulfillment of the dictates of **Article 79**. We therefore reject the invitation by the appellant to hold that this section is unconstitutional. But even assuming that there was credence to this argument, our rejoinder would be that this is not the forum to challenge the constitutionality or otherwise of **Section 11(k)** of the **EACCA**.

We believe we have said enough to show that the appellant’s appeal is unmeritorious. It is dismissed with costs.

Dated and delivered at Malindi this 17th day of July, 2015.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

