



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

***(Coram: Ojwang, J.)***

**CIVIL SUIT NO. 300 OF 2007**

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

**-VERSUS-**

1. AHMED KARAMA SAID

2. ASSOCIATED ELECTRICAL &

HARDWARE SUPPLIES

..... DEFENDANTS/RESPONDENTS

3. THE ADMINISTRATOR OF THE

## ESTATE OF MUTUMA ANGAINE

**RULING**

Against the background of the suit by plaint dated **23rd November, 2007**, the applicant moved the Court by Chamber Summons of even date, brought under Order XXXIX, Rules 1, 2, 2A, 3 and 9 of the Civil Procedure Rules. The application carried one substantive prayer, that \_

***“The defendants by themselves, their agents, servants or any other person whosoever be restrained from selling, leasing, charging, sub-dividing, wasting, transferring or dealing in the parcel of land described as Mombasa Island/Block XI/839 pending the hearing and final determination of this suit.”***

The application rests on the following general grounds: the plaintiff has a *prima facie* case against the defendants with a probability of success; unless the orders sought are granted, the Government of Kenya and the general public shall suffer irreparable injury that cannot be compensated by an award of damages; the defendants will not suffer any prejudice if the orders sought are granted; the balance of convenience stands in favour of granting the orders sought; the parcel of land described as Mombasa Island/Block XI/839 was excised from the road reserve abutting on Tom Mboya Avenue (formerly Tudor Road), and alienated to 1<sup>st</sup> defendant in contravention of the Local Government Act (Cap. 265, Laws of Kenya), the Registered Land Act (Cap. 300, Laws of Kenya), and the Government Lands Act (Cap. 280, Laws of Kenya).

In support of the application is the affidavit of **Dedan Okwama**, an investigator with the plaintiff, appointed pursuant to s. 223 of the Anti-Corruption and Economic Crimes Act, 2003 (Act No. 3 of 2003).

The deponent avers that he had been on the investigation team that investigated the allegations of corruption giving rise to the instant suit; that, through corrupt conduct, the suit property which was a road reserve, was excised and alienated; that Tom Mboya Avenue is vested in the Municipal Council of Mombasa, to hold in trust, and maintain for the use and benefit of the people; that the portion of Tom Mboya Avenue from which the suit premises was excised has not been closed and remains a road to-date, as shown in the Registry Index Map; that the Council, by Gazette Notice No. 1099 of **25<sup>th</sup> February, 1994** published a proposal to close the road reserve abutting on plot Nos. 160, 572 and 573

(Section XI, Tom Mboya Avenue), and invited those with objections to make their objections, and there was a public outcry, in consequence of which closure of the road reserve was not effected, and there are no Council resolutions nor Ministerial consent authorizing the said closure; that the suit premises was unlawfully allocated to 1<sup>st</sup> respondent, by letter of allotment dated **13<sup>th</sup> January, 1994**; that Survey Plan F/R 264/121 was prepared to facilitate the alienation of the suit premises to 1<sup>st</sup> respondent; that 3<sup>rd</sup> defendant unlawfully alienated the suit premises to 1<sup>st</sup> defendant, by lease dated **17<sup>th</sup> October, 1994** and registered on **19<sup>th</sup> October, 1994**; that 1<sup>st</sup> defendant transferred the lease so obtained to 2<sup>nd</sup> defendant on **18<sup>th</sup> November, 1994**; that the Court, in Mombasa High Court Miscellaneous Application No. 258 of 2007, brought under s. 56 of the Anti-Corruption and Economic Crimes Act, 2003 (Act No. 3 of 2003), had issued an order prohibiting the transfer or disposal of, or other dealings with the property known as Mombasa Island/Block XI/839 for a period of six months, and that order having lapsed, it is apprehended that, without injunctive orders, transactions may be completed and registered rendering this suit nugatory; that it is meet and just to grant the interlocutory orders sought, pending the hearing and final determination of the instant suit.

M/s Cootow & Associates, Advocates for 2<sup>nd</sup> defendant filed grounds of objection on **10<sup>th</sup> December, 2007** asserting that —

**(i) the application is based on a fatally defective and incompetent suit;**

**(ii) the plaintiff has no cause of action against 2<sup>nd</sup> respondent;**

**(iii) the suit seeks remedies which do not lie as against 2<sup>nd</sup> defendant;**

**(iv) the applicant has failed to demonstrate 2<sup>nd</sup> defendant's culpability, and so the application is *mala fide*;**

**(v) the suit and application are time-barred.**

When this matter was mentioned before this Court on **6<sup>th</sup> October, 2010**, learned counsel, **Mr. Murei** for the plaintiff stated that only two parties, the plaintiff and 2<sup>nd</sup> defendant, are directly concerned; thus the submissions on record are from the two parties only.

**Mr. Murei** stated from the evidence that the suit premises, a **road reserve**, was curved out by the Town Clerk and Mayor of the Municipality of Mombasa, and land parcel No. Mombasa/Block XI/839 created and alienated to 1<sup>st</sup> defendant; the lease was registered and a certificate duly issued; and 1<sup>st</sup> defendant thereafter transferred the suit property to 2<sup>nd</sup> defendant. There was no evidence that the annexation of the road reserve and subsequent alienation of the same to 1<sup>st</sup> defendant was authorized in full Council meeting. Besides, the alienation of the suit property to 1<sup>st</sup> defendant was not approved by the Minister for Local Government in terms of s. 144 of the Local Government Act (Cap. 265).

Learned counsel submitted that it was absolutely clear, the suit property was created out of a road reserve; equally clear, the law regulating the closure of a road was not complied with; and also clear that, by s. 182 of the Local Government Act, every Municipal authority is empowered to provide general maintenance and control of all public streets within its area of operation; this power is not for advancing private gain, but is to be exercised in trust, for the public benefit. By virtue of s. 185 of the Act aforesaid, the Municipal Council has the power, upon fulfilling certain conditions, to permanently close any street or road vested in it; and such conditions include **giving notice**, and addressing any **objection**.

Counsel urged that the Council, though empowered to close a road permanently, may not do so partially by allocating part of the road: *"the power is with respect to the entire road and not a **road reserve** as happened in this case"*; the Town Clerk had invoked the Council's authority to close a road, but then to privatize the same. This, counsel urged, *"was an abuse of the powers conferred by the Local Government Act, particularly [ss. 182 and 185] thereof."*

Counsel submitted that the Council's power to close a road *"must be exercised in good faith, according to [the] legitimate needs of the public."*

Who is the "owner" of the land occupied by a road" Learned counsel submitted that such land, though entrusted to the Municipal Council, to be used for the benefit of the public, remains **Government land** that has been alienated; the Municipal Council has no power to further alienate that land; and should the Council take the decision to close that road permanently, the Council will remain the holder of this land in **trust for the public**, or else, this land will revert to the Government as *"Government land"*; *"it does not become Council land."*

On those principles, counsel urged that the Town Clerk and the Mayor did not have the power to create new property (the suit property), register it in the name of the Council, and then purport to lease it to 1<sup>st</sup> defendant.

The guiding principles have been clarified in case law; and the relevant authority cited by counsel is **Italian Engineering Works v. Glory Car Hire Limited** [1990] KLR 218, in which the following passage in the judgment of **Bosire, J.** (as he then was) is pertinent (at page 222):

*“Liwatoni Road is a public street by dint of s. 16 (9) (a) of the Street Adoption Act (Cap. 406, Laws of Kenya). By dint of s. 182 of the Local Government Act (Cap. 265, Laws of Kenya), it is one of those streets respecting which the Municipal Council of Mombasa has power of control and care. The power vested in it in that regard is to keep and maintain it for the benefit of the public at large. They have no power to close it or utilize it for any other purpose except upon prior compliance with the provisions of s. 185 of the Local Government Act and after publication of a notice in the Kenya Gazette notifying all members of the public of the intention to close it, even temporarily. The decision to close down a public street, or even to divert it to change its user requires a resolution of the Council to which power has been vested by legislation (s. 182 of the Act). Its chief officers have no power to make decisions which under the law must be made by the Council ....”*

To 2<sup>nd</sup> defendant’s claim of **indefeasibility of title** to the suit property, learned counsel submitted that there was no exception to the legal position as above-stated, created by the provisions of the Registered Land Act (Cap. 300): for the provisions of the Registered Land Act were not intended to cure illegality, or to validate actions that were void in law. Section 4 of the Registered Land Act, indeed, has a significant proviso, which would validate the plaintiff’s claim, in this instance:

*“Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.”*

Counsel urged that the concept of indefeasibility of title cannot be used to legitimize illegality; and that the title held by 2<sup>nd</sup> respondent is a nullity, having been issued without legal authority. This very point had been considered by a three-Judge Bench (**Nyamu Wendo** and **Emukule, JJ.**) in **Milankumarn Shah & Two Others v. City Council of Nairobi & Another**, Nairobi HCCC No. 1024 of 2005 (O.S.), in which the following passage occurs:

***“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accord with the applicable law and, secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest.”***

The same principle is expressed in **Champaklal Ramji Shah & 3 Others v. The Attorney-General & Another**, Mombasa HCCC No. 145 of 1997 (**Waki, J.**), in which the following passage occurs:

***“... the concept of indefeasibility should not indiscriminately be allowed to camouflage unlawful activities towards the acquisition of such title, in the process courting disorder in planning ...”***

Counsel submitted that 2<sup>nd</sup> defendant cannot plead the concept of *“innocent purchaser for value without notice of irregularity”*: because the whole transaction was void *ab initio*; and a void act confers no rights upon anyone. In **Macfoy v. United Africa Company Limited** [1961] 3All ER 1169, **Lord Denning, M.R.** provided explanations on the various categories of irregularity of actions, in terms of the law:

***“The defendant here sought to say therefore that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado ...”***

Counsel’s point, as I understand it, is that this is not one of those cases in which, for good cause, the Court treats the innocent purchaser for value and without notice of any irregularity in the title, as **the darling of equity**; for the whole transaction was wholly null and void.

Counsel urged, besides, that 2<sup>nd</sup> defendant *“cannot successfully plead innocence”*. For no special skills were necessary to realize that the suit property **was** a road reserve; and counsel thought attribution

of common sense, enabling a party such as 2<sup>nd</sup> defendant to recognize defect of claimed ownership, was a principle established in the case law, in **Chauhan v. Omagwa** [1985] KLR 656.

To the plaintiff's distinct line of submissions, learned counsel, **Mr. Weloba** made responses which I now examine, on the merits.

Counsel contended that the 3<sup>rd</sup> respondent's appearance in this cause amounted to a misjoinder — and that this factor was prejudicial to 2<sup>nd</sup> respondent; that the grant of title to 2<sup>nd</sup> respondent was by reason of an administrative decision of 3<sup>rd</sup> respondent not in his private capacity, but as Town Clerk of the Municipal Council of Mombasa. Of this fact, counsel urged, the plaintiff was well aware — and this is why blame had mainly been ascribed to the Town Clerk, and the Municipal Council.

Council submitted that 2<sup>nd</sup> defendant had not been privy to the decisions and actions of the Town Clerk, and the Municipal Council; 2<sup>nd</sup> defendant *“does not have any legal or contractual nexus with the said Council .... and is not in a position to depone to what transpired or the legality thereof.”*

**Mr. Weloba** urged that, insofar as the local authority is not enjoined in the suit, *“no conclusive and fair trial can proceed, and the 2<sup>nd</sup> respondent would be prejudiced.”* Counsel submitted that it was not for 2<sup>nd</sup> respondent to have the Municipal Council enjoined, since 2<sup>nd</sup> respondent *“is not aware of any illegality or fraudulent conduct on their part ...”*, but a decision made in the absence of the Municipal Council would still be binding on 2<sup>nd</sup> respondent.

Counsel submitted that if the plaintiff's prayers are granted, it would amount to a nullification of the relevant decision, for *ultra vires*; and that such a prayer should only have been sought through an application for judicial review.

Counsel submitted that no cause of action had been stated, as against 2<sup>nd</sup> defendant: because the only reason 2<sup>nd</sup> defendant is sued is that it is registered as the owner of the suit premises; and no particulars of fraud or breach are alleged, as against 2<sup>nd</sup> defendant. Consequently, it was urged, the suit does not disclose a *prima facie* case on the basis of which orders may at this stage be granted.

Counsel submitted that since damages are part of the remedy sought in the suit, *“the plaintiff is aware of the availability of the remedy, and therefore injunctive orders should not issue”*. It was urged too, that the plaintiff had given no proof of **damage to the public**.

Counsel contested the applicability of the authorities cited for the plaintiff, on indefeasibility of title; on the ground that *“the parties in the cited authorities were proved to have either colluded [with], actively participated in, or acquiesced in the fraudulent activities — and hence the order [rejecting] the defence of indefeasibility.”*

In contrast to the plaintiff's stand, **Mr. Weloba** urged that, from the governing statute and the authorities cited, *“Municipal Councils do have power to close roads and alienate land, provided they follow the procedures ...”*; and the implication is that *“failure to enjoin the Municipal Council and the Clerk by the plaintiffs means this suit will be futile as no orders can issue against a party who has not been heard.”*

Learned counsel brought two authorities to the attention of the Court, though without canvassing them in a specific way: **Mary Njeri Ngowi v. Housing Finance Company of Kenya Limited & Two Others**, Nairobi MCCCC No. 1864 of 2000 [**Onyango Otieno, J.**]; and **Peter Kimonye v. Barclays Bank of Kenya Limited**, Nairobi MCCCC No. 403 of 2004 [2005] eKLR [**Azangalala, J.**]. On examining these two cases, it has become apparent to me that all they demonstrate is that the applicants there, had acquired title to the suit properties innocently. The two cases do not relate to a claimed public interest in a Municipal road reserve, nor to the protections for the public interest in such road reserves provided for under the Local Government Act (Cap. 265).

The essence of the judicial task is to resolve each dispute in terms of the applicable law, and the applicable evidence — and the instant matter is no exception.

While the authorities brought on behalf of 2<sup>nd</sup> respondent have not availed this decision-making, **Mr. Weloba** has raised a pertinent procedural issue which should be noted; he has built on the substantial degree to which the plaintiff's case turns on acts of the **Municipal Council**, to urge, quite meritoriously, with respect, that non-joinder of the Municipal Council of Mombasa was in error. This is a matter to be acted upon by the plaintiff, in respect of the conduct of the suit.

The other objection raised by 2<sup>nd</sup> defendant was as to form of action: whether this should have been a normal suit by plaintiff, or judicial review proceedings. As this issue was not much canvassed, and the plaintiff's claim is sufficiently clear from the plaint filed on **26<sup>th</sup> November, 2007**, there is no basis for an order affecting the course of the plaintiff's claim.



From the evidence at this stage, the suit land was a **road reserve**, but the Municipal Council converted it to privately-owned land, contrary to the provisions of the Local Government Act (Cap. 265), s. 185. It is the unlawful conversion which led to subsequent “*transfer*” of the suit land to 2<sup>nd</sup> defendant.

Although 2<sup>nd</sup> defendant has taken the position that it was an “*innocent purchaser for value without notice of irregularity*”, that principle is, in my opinion, incapable of protecting the land acquisition. Generally, as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity, and will be allowed to retain ownership. But this is subject to the qualification that the creation of the title itself is not in flagrant **breach of statute law**, so that it amounts to a nullity *ab initio*. The Municipal Council, which is a public authority, ought to have complied with the governing law, and its **non-compliance with the Local Government Act**, led to the creation of a **void** property title; the Municipal Council could not breathe life into that title by purporting to pass it on to 2<sup>nd</sup> defendant who **could only claim title on equitable principle**. The ground was not set, in this instance, for the play of equity in favour of 2<sup>nd</sup> defendant. It follows that 2<sup>nd</sup> defendant, in these circumstances, **cannot** claim an indefeasible title by virtue of the Registered Land Act (Cap. 300), or any other property statute.

The principles above-stated, as I conceive the matter, are to be strictly applied where property title has passed from the hands of a public authority holding a trust for the benefit of members of the public; and even more strictly must this rule apply — and in this regard, I take judicial notice — where the property in question is for the planning and installation of fixed structures serving as amenities of civilized life in a space-starved urban area.

There is a clear *prima facie* case, with a probability of success, in favour of the plaintiff herein; and on that basis I will make orders as follows:

**(1) The defendants by themselves, their agents, servants or any other person whosoever, shall be restrained from selling, leasing, charging, sub-dividing, wasting, transferring or dealing in the parcel of land described as Mombasa Island/Block XI/839 pending the hearing and final determination of the suit.**

**(2) The plaintiff shall, within 21 days of the date hereof, amend the plaint to enjoin the Municipal Council of Mombasa in the suit.**

**(3) A hearing date for the suit shall be given on the basis of priority.**

**(4) Costs shall be in the cause.**

**DATED and DELIVERED at MOMBASA this 18<sup>th</sup> day of March, 2011.**

**J. B. OJWANG**

**JUDGE**

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Plaintiff/Applicant: **Mr. Murei**

For the Defendants/Respondents: **Mr. Weloba**



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