



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.48 OF 2019

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLES 1,2,10,19,20,21,22,23,25,27,35,40,46,48,50,60,67,156,165,249 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NUMBER 5 OF 2012 OF THE LAWS OF KENYA

AND

IN THE MATTER OF CONTRAVENTION AND THREATENED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1,2,10,19,20,21,22,23,25,27,28,35,40,46,48,50,60 AND 67 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

DELMONTE KENYA LIMITED.....PETITIONER/APPLICANT

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KANDARA RESIDENCE ASSOCIATION.....1ST INTERESTED PARTY

CANNERIES ENVIRON RESIDENCE ASSOCIATION...2ND INTERESTED PARTY

COUNTY GOVERNMENT OF MURANG'A.....3RD INTERESTED PARTY

COUNTY GOVERNMENT OF KIAMBU.....4TH INTERESTED PARTY

RULING

1. The Petitioner/Applicant through a certificate of urgency dated 4th April 2019 sought an application dated 4th April 2019 be certified urgent and be heard on priority basis. On 5th April 2019 the same was certified urgent and directions were given for the same to be served and mentioned on 8th April 2019.

2. On 8th April 2019 prayer No.8 was granted and Respondents and Interested parties granted 14 days to file and serve their responses and as the matter is for hearing before Hon. Justice W. Korir, the same was set down for mention before Hon. Justice W. Korir on 26th June 2019.

3. On 17th May 2019 the petitioner filed certificate of urgency seeking, that the petitioner's Notice of Motion Application dated 4th April 2019 be certified urgent due to extreme urgency which has been caused by fresh events which have occurred since the last court attendance. The grounds of urgency are listed in the certificate of urgency. The same is further based on supplementary affidavit of Stergios Gkalamoutsas dated 17th May 2019.

4. On the matter being placed before Hon. Justice Mativo on 17th May 2019 he directed the matter be mentioned before a Judge in Constitutional and Human Rights Division for further directions.

5. On 21st May 2019 all parties in this matter were represented by their respective Counsel save the 4th Interested party.

6. The petitioner sought prayers numbers 2, 3 and 4 in the Notice of Motion dated 4th April 2019 be granted on the interim basis so as to preserve the subject matter following alleged trespass into the petitioner's Land Reference No. 12157/2, 12157; 12157/3; 12157/4; 12157/5; 12158; 12203/1; 12203/2 and 13289; urging the orders were being sought due to new developments as enumerated in the supplementary affidavit attached to certificate of urgency. The counsel urged if the orders are not granted, even for a limited period, there will be breach of peace and the purpose of the petition would be defeated by the delay.

7. All the Respondents opposed the application on various grounds. The Counsel for first Respondent objected to granting prayers Nos. 2 and 3 due to delay in service of the certificate and supplementary affidavit and urging they need time to file response. It was urged no court has declared the decision unconstitutional and that there is a 3 Judge bench at Malindi dealing with similar issues.

8. The Counsel for 2nd Respondent urged service was effected late when she was not in the office and sought more time to respond.

9. Mr. Okatch for 1st, 2nd and 3rd Interested parties opposed the application urging service was effected late though he has filed Replying affidavit. He contended the Notice of motion is not attached to certificate of urgency and so are the two affidavits, hence he was of the view that there is no valid application before court. He pointed that no orders has ever been granted by court inspite of the petitioner having had similar application. He urged this court to reject the application as without an application for review the application cannot be granted as by doing so this court will be sitting on appeal on its own decision. He urged that the issue of this court's jurisdiction was raised on 19/2/2019 and that there are existing similar matter being Elc No. 53 of 2018 to which petitioner has filed a counter-claim. He urged prayer No. 2 is a substantive prayer and cannot be granted at this stage. He urged in their Replying affidavit they had permit from police to demonstrate and that was done outside the petitioner's farm. He urged his clients were exercising their constitutional rights in carrying out the demonstrations as allowed by the constitution. He concluded by submitting his clients did not invade or entered into the petitioner's land nor do they have intention to do so. He urged if they do so action may be taken against them.

10. It is of great importance to bear in mind, that this matter is scheduled for hearing on 26/6/2019 by Hon. Justice W. Korir, who is on leave and this court has only dealt with the matter as the trial court is on leave and due to the urgency of this matter. It should therefore be clear, that where it not for the urgency as demonstrated by the petitioner, I would not have not allowed the parties to address the court on this matter. I have considered that justice delayed is justice denied and that this court is enjoined to do justice without due regard to technical technicalities. If the court claims its hands are tied and let injustice be done on the parties on that ground, it will fail in execution of its mandate of administering justice without undue regard to technicalities. It is for that reason I proceeded to hear this application only without taking over the matter.

11. I have considered the brief submission by all parties and note that this court was mentioning this matter to give directions. I have perused the court file and have found no orders granting and/or giving reasons for declining to grant orders sought in the application. I similarly perused the pleadings in this petition and Elc No. 53 of 2018 and noted the issues for consideration and prayers sought are different. I note prayers sought in this petition are within the mandate of this court as enshrined under Article 165(3) of the Constitution of Kenya.

12. I have considered the fact, that it has been urged the 1st, 2nd and 3rd Interested parties have not entered into petitioner's land and have no intention of doing so, and any order restraining them from trespassing into the petitioner's land would not prejudice them but the petitioners will be prejudiced if orders sought are denied. I further find, that it would be against the principles of substantive justice, if this court claims its hands are tied simply because there are other unrelated suits pending hearing and determination before other courts and that the matter is pending before a Judge of this division and fail to issue orders preserving the subject matter pending *inter-partes* hearing. This cannot be allowed as justice has not only to be done but seen to be done to all parties irrespective of their status.

13. As regard prayers sought, I will leave prayers Nos 2, and 3 to be fully canvassed before the trial Judge, however I will grant prayer No. 4 of the petition dated 4th April 2019 for 50 days from today to preserve the subject matter; pending *inter-partes* hearing on 26th June 2019 before Hon. Justice W. Korir who is seized of this matter.

14. The Respondents are granted 21 days to file and serve their responses.

15. Costs of the application be in the cause.

Dated, signed and delivered at Nairobi this 22nd day of May, 2019.

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J .A. MAKAU

JUDGE