



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELC PETITION NO. 21 OF 2014**

**BRITISH AMERICAN TOBACCO (K) LTD.....PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MIGORI.....2<sup>ND</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION.....3<sup>RD</sup> RESPONDENT**

**NATIONAL CEREAL AND PRODUCE BOARD.....4<sup>TH</sup> RESPONDENT**

**RULING**

What I have before me is the petitioner's application dated 25<sup>th</sup> June 2014 in which the petitioner has sought a conservatory order by way of an injunction to restrain the 2<sup>nd</sup> respondent from trespassing on, cutting down trees or demolishing any of the petitioner's structures which are erected on all those parcels of land known as Bwire/Bokehenche/563 and Bwire/Bekehenche/529 (hereinafter referred to as "Plot No. 563" and "Plot No. 529" respectively) or in any manner howsoever evicting or interfering with or curtailing the petitioner's quiet possession of the said properties pending the hearing and determination of the petition herein.

The application was brought on the grounds that, from the year 1987, the petitioner had occupied and used a parcel of land measuring approximately 5.4 hectares situated at Ntimaru, Kuria West Sub-county (hereinafter "the suit property"). The petitioner has contended that it had occupied and used the suit property with the knowledge and permission of the defunct Municipal Council of Kehancha within whose jurisdiction the property was situated. The petitioner has contended that Municipal Council of Kehancha (hereinafter "the Council") had referred to the suit property as Bwire/Bokehenche/563 ("Plot No. 563") and had demanded and received land rent and rates from the petitioner in respect thereof. The petitioner has contended that it has had uninterrupted possession of the suit property for several years and has erected buildings and other structures thereon on which it has been conducting its tobacco business. The petitioner has contended that on or about 30<sup>th</sup> March 2014, the 2<sup>nd</sup> respondent entered the suit property without prior notice and started cutting down trees that the petitioner had planted and demolishing the buildings the petitioner had put up thereon. The petitioner has contended that the 2<sup>nd</sup> respondent thereafter commenced the construction of a building on the said parcel of land.

The petitioner has contended that it felt aggrieved by this invasion and decided to file a suit against the 2<sup>nd</sup> respondent for redress. The petitioner has contended that while in the process of preparing the pleadings with a view to filing a suit against the 2<sup>nd</sup> respondent as aforesaid, it learnt that there was a

discrepancy with regard to the parcel number Bwire/ Bokehenche/ 563 (“Plot No. 563”) that had been assigned to the suit property by the council and by which the 2<sup>nd</sup> respondent had all along referred to the suit property. The petitioner has averred that it learnt that, on the ground, the parcel of land that has all along been referred to as Plot No. 563, falls within land parcel number, Bwire/Bokehenche/529 (“Plot No. 529”). The petitioner has averred that upon learning of this discrepancy, it decided to bring this petition to compel the respondents to furnish it with the necessary information regarding Plot No.529 and Plot No.563 before it can institute the intended suit against the 2<sup>nd</sup> petitioner. The petitioner has contended that it is apprehensive that if the conservatory orders sought herein are not granted pending the hearing of its petition, the 2<sup>nd</sup> respondent will continue with illegal construction on the suit property thereby rendering the petition nugatory.

The application was served upon the respondents and the interested party. The 2<sup>nd</sup> respondent and the interested party entered appearance and filed replying affidavits. The interested party filed a replying affidavit sworn by its board secretary, P. M. Karanja on 25<sup>th</sup> September 2014 in which affidavit, the interested party supported the petitioner’s petition herein. The interested party contended that it had been in occupation of Plot No. 529 since the year 1990 and had invested heavily on the same. The interested party has contended that since the petitioner who all along thought that it was occupying Plot No. 563 has now come to the realization that it is occupying Plot No. 529 on the ground which plot is infact occupied by the interested party, it would serve the interest of justice if the respondents provide the information sought by the petitioner so that each party may be able to know the correct land reference number it is occupying on the ground.

On its part, the 2<sup>nd</sup> respondent opposed the petitioner’s application. In its replying affidavit that was sworn by its secretary, Christopher Odhiambo Rusana, the 2<sup>nd</sup> respondent contended that the petitioner’s application has no basis because the petitioner has not placed any material before the court in support of its claim over Plot No. 529. The 2<sup>nd</sup> respondent contended that that the petitioner should limit its claim to Plot No. 563 in respect of which it had been paying land rates and rents. The 2<sup>nd</sup> respondent contended that if at all the petitioner has been occupying Plot No. 529, such occupation has been illegal, the same having been obtained without the permission of the 2<sup>nd</sup> respondent or its predecessor, Municipal Council of Kehancha (“the Council”). The 2<sup>nd</sup> respondent contended that the petitioner had not demonstrated a prima facie case that would justify the granting of the injunction sought. The 2<sup>nd</sup> respondent contended further that the construction works that the petitioner has sought to stop was in respect of public utility offices which were being put up for the benefit of residents of Kuria East Sub-county. The 2<sup>nd</sup> respondent urged the court to uphold public interest as opposed to the petitioner’s private interest.

I have considered the petitioner’s application and the affidavits that were filed by the 2<sup>nd</sup> respondent and the interested party in opposition and in support thereof respectively. I have also considered the written submissions that were filed by the petitioner and the interested party and the authorities that were cited in support thereof. The principles upon which this court exercises its discretion on applications for conservatory orders are now well settled. In the case of, **Centre for Rights Education and Awareness (CREAW) and 7 others vs. The Attorney General & others, Petition No. 16 of 2011 (unreported)**, Musinga J. (as he then was) stated as follows:-

**“.....a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of violation or threatened violation of the constitution.”**

In the case of, **Muslims for Human Right and others vs. The Attorney General and others, Petition No. 7 of 2011 (Unreported)** Ibrahim J. (as he then was) stated that:

**“.....a conservatory order is an order that tends to and is intended to preserve the subject matter or set of circumstance that exists on the ground in such a way that the constitutional proceedings and cause of action is not rendered nugatory.”**

In the case of, Andy Forwarders Services Ltd. vs. Capital Markets Authority and another [2011]eKLR, Mumbi Ngugi J. stated as follows:-

**“From the decisions above, it is apparent that two conditions need to be satisfied for a conservatory order to issue, as in this I would agree with the respondents’ submissions. The first is that the situation requires “conservation” so as to maintain the status quo pending the hearing of the petition. If the order is not issued this petition would be rendered nugatory. The second is whether the petitioner or the other party seeking a conservatory order has established a prima facie case with a probability of success.”**

It is on the foregoing principles that I would consider the application before me. From the material on record, it appears that when a dispute arose between the 2<sup>nd</sup> respondent and the petitioner over the suit property, the parties agreed to carry out a joint survey on the parcel of land occupied by the petitioner to establish its ownership, position on the ground, size, reference number and location vis a vis the neighbouring parcels of land. The survey was carried out on 3<sup>rd</sup> June 2014 and a report dated 9<sup>th</sup> July 2014 submitted to the parties. The said report is annexed to the petitioner’s affidavit in support of the petition as annexure “SM9”. The said report confirmed that the petitioner is occupying a parcel of land measuring 1.2 ha. at Ntitaru Urban Centre which land the petitioner has developed with a large warehouse, a small tin structure and a permanent structure for demonstration purposes. The petitioner has also planted several trees which are nearing maturity. According to the report, 1.04 ha. of the land occupied by the petitioner falls on Plot No. 529 while the rest measuring 0.16 ha. falls on Plot No. 569. The survey report confirmed that the petitioner is not occupying any portion of Plot No. 563 and that part of the land occupied by the petitioner has been hived off and that standing on the hived off portion is a stalled chief’s office and a foundation for ward office.

The evidence before me shows that the 2<sup>nd</sup> respondent’s predecessor, Municipal Council of Kehancha (“the council”) had been receiving land rent from the petitioner since the year 1987 with respect to Plot No. 563 measuring 5.4 ha. One of such payments was made by the petitioner to the council on 23<sup>rd</sup> November 2011 in the sum of Kshs.812,796.50. There is no evidence of whatsoever nature that the council or the petitioner believed that the petitioner was occupying Plot No. 529 or that it had any relationship or connection with the same. Now that it has come out clearly that the petitioner is occupying and has developed Plot No. 529 and not Plot No. 563 that was leased to it by the 2<sup>nd</sup> respondent’s predecessor, the Council, the petitioner has a right to seek information from the respondents regarding the history of Plot No. 529 and Plot No. 563 and all documents relating to the said parcels of land to enable it ascertain whether the parcel of land that was leased to it was

Plot No. 563 in respect of which the 2<sup>nd</sup> respondent’s predecessor demanded and received rents or Plot No. 529 which is under its occupation.

I am satisfied that the petitioner has established a prima facie case against the respondents. I am also satisfied that the petitioner stands to suffer prejudice unless the conservatory order sought is granted. In the circumstances of this case, it is necessary to maintain the status quo pending the hearing and determination of the petition. It is not disputed that the 2<sup>nd</sup> respondent had entered onto Plot No. 529 which is occupied by the petitioner forcefully and commenced the construction of structures thereon which it has referred to as public utility offices. If the orders sought are not granted, the 2<sup>nd</sup> respondent would proceed with the construction of the said structures which are objected to by the petitioner. This would no doubt render the petition nugatory.

The upshot of the foregoing is that the petitioner’s Notice of Motion application dated 25<sup>th</sup> June 2014 has merit. The same is allowed in terms of prayer 3 thereof limited only to the parcel of land known as Bwire/Bokehenche/529. The conservatory order shall last for a period not exceeding twelve (12) months from the date hereof within which the petitioner must set down the petition for hearing and final determination.

The order shall in no way relieve the petitioner from its obligation to pay any land rent or rates that shall

accrue to the 2<sup>nd</sup> respondent with respect to Bwire/Bokehenche/529. The costs of the application shall be in the cause.

**Signed at Nairobi this 12<sup>th</sup> Day of April, 2016**

**S. OKONG'O**

**JUDGE**

**Delivered, Dated and signed at Kisii this 15<sup>th</sup> day of April, 2016**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of**

Mr. Rono for Kamaru for the Plaintiff

Mr. Ocharangi for Siganga for the Defendants