



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 125 OF 2015**

**JOSEPHINE AKOTH ONYANGO .....PETITIONER**

**VERSUS**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**SEHIT INVESTMENTS LIMITED.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA COMMERCIAL BANK LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**PETER ODIWOUR NGOGE .....3<sup>RD</sup> INTERESTED PARTY**

**RULING**

1. The present application relates to the investigation by the respondent of the petitioner's title to **Land Reference No. 1160/784, Nairobi**. The petitioner argues that the respondent has no jurisdiction to inquire into the title to her property, which is private property. In her petition dated 1<sup>st</sup> April 2015, the petitioner seeks the following orders:

- i) A declaration that the respondent has infringed the petitioner's Constitution Rights, as provided under Article 27, 47, 48 and 50 of the Constitution.*
- ii) A declaration that the respondent has no constitutional or legal authority to receive, entertain, arbitrate and/ or summon the petitioner to answer to the complaint by the 1st interested party in respect of Land Reference No 1160/784 which complaint is subject of the proceedings in HCCC No 705 of 2009.*
- iii) A declaration that the suit property is private land and that the respondent has no mandate to commence investigations or receive complaints in respect of its acquisition or disposition.*
- iv) A declaration that the respondent has exceeded its constitutional jurisdiction under Article 67 and Section 14 and 15 of the Land Commission Act by entertaining a civil disputed between the petitioner and the 1st interested party.*
- v) A declaration that all proceedings before the respondent in respect of Land*

**Reference No 1160/784 purporting to investigate the petitioner's title therefor on the complaint of the 1<sup>st</sup> interested party are illegal, null and void.**

**vi) An order of certiorari bringing into court and quashing any and all proceedings by the respondent purporting to investigate and/ or review the petitioner's title to the suit property being Land Reference Number 1160/784.**

**vii) Costs of this petition to be paid by the respondent and the 1<sup>st</sup> interested party.**

2. On 28<sup>th</sup> April 2015, the petitioner filed an application dated 27<sup>th</sup> April in which she sought the following orders:

**1. That pending the hearing and determination of the petition or further orders of the court, the respondent by itself, agents, employees and or anybody deriving its authority be restrained from taking any proceedings in relation to the petitioner's ownership and title to all that piece or parcel of land being Land Reference No. 1160/784, Nairobi or revoking the petitioner's title thereto.**

**2. That the costs of this application be in the petition.**

3. The application was expressed to be supported by the affidavits of the petitioner annexed to the petition and the application, and on such grounds as were to be adduced at the hearing of the application.

4. In her affidavit in support of the application, the petitioner deposes that the respondent has assumed jurisdiction that it does not have in relation to her property, Land Reference No. 1160/784, Nairobi. It is her contention that as the property is private property, the respondent has no jurisdiction over it, and if it is allowed to proceed, may revoke her title to it.

5. It is also the petitioner's contention that the matters and dispute that the respondent purports to preside over are the subject of adjudication by the Court in **HCCC No. 705 of 2009 - Sehit Investments Limited vs Josephine Akoth Onyango, Simon Otieno, Savings and Loan Kenya Limited and The Attorney General**. She contends that an embarrassing situation may arise if the High Court reaches a different conclusion from the respondent.

6. The petitioner deposes that she had been ordered by the respondent to file her response to the claim by the 1<sup>st</sup> interested party; that she had sought assurance that the matter would not proceed as it was *sub judice*, she had not received a response from the respondent and there were hints that hearings in respect of the matter were proceeding clandestinely. She contends that the respondent is "heavily impartial" and she stands no chance of a fair hearing before it.

7. In his submissions on behalf of the petitioner, Mr. Nyawara submitted that the respondent had summoned the petitioner with a view to investigating her title pursuant to a complaint by the 1<sup>st</sup> interested party. He submitted that there is litigation between the 1<sup>st</sup> interested party and the petitioner pending before the High Court and Court of Appeal, and the substance of the litigation is the substance of the complaint before the 1<sup>st</sup> respondent by the same complainant. The complaint before the respondent was thus *sub judice* the case before the High Court and the Court of Appeal and to be summoned to concede to the jurisdiction of the respondent would suggest that the respondent has equal footing with the High Court, a position not countenanced in law.

8. Mr. Nyawara submitted further that the petitioner appeared before the respondent and informed it that the matter is the subject of proceedings before the High Court; that as late as 22<sup>nd</sup> of January 2015, Kamau J. in a comprehensive ruling, had found that the 1<sup>st</sup> interested party, who is the complainant, has no prima facie case on the matters alleged against the petitioner. It was Mr. Nyawara's submission further that the ruling of Kamau J was echoing the finding of Njagi, J on the same issue.

9. While the respondent was not a party to the disputes before the High Court, Mr. Nyawara submitted that it had clothed itself with jurisdiction that it does not have, and had ruled, upon the petitioner raising the issue of *sub judice*, that it has jurisdiction to hear the matter and would revoke the petitioner's title, the High Court proceedings notwithstanding.

10. According to Mr. Nyawara, the issue for determination in this petition affects the independent and integrity of this Court, and there is clear breach of Article 47 and 50 as the petitioner is being forced to appear before a tribunal on a matter that is before the court.

11. He submitted further that the petitioner considers it an abuse of process to be forced to defend the issue before the respondent and the High Court; and that she has had to defend herself before the criminal court, and her position was that it breaches fundamental rights to have to defend the same issue in different forums.

12. Mr. Nyawara observed that in the replying affidavit sworn by Mr. Brian Ikol on behalf of the respondent, it was deposed that the respondent was dealing with the matter on the basis of the complaint of the interested party, which raises the same issues as are before the High Court. His submission was that the respondent has no jurisdiction to determine private matters and disputes involving private land, as its ambit is in respect of public land; that if the respondent were to revoke the petitioner's title and give it to the 1<sup>st</sup> interested party, and the High Court reaches a different conclusion, there would be embarrassing results, and he urged the Court to grant the prayers in the application.

### **The Response**

13. The respondent opposed the application and relied on an affidavit sworn by Mr. Brian Ikol, its Deputy Director, Legal Affairs and Enforcement, on 12<sup>th</sup> June 2015. Mr. Ikol states that he is also the Head of the Review of Grants and Dispositions Secretariat, a committee established within the respondent to oversee the review of grants and dispositions process. Its case was presented by Mr. Wahome.

14. The respondent, an independent commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act, No 5 of 2012, states that it has as its fundamental functions the management of public land on behalf of the national and county governments. It has powers to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint to establish their legality or propriety, within 5 years of the commencement of the National Land Commission Act.

15. The respondent's case is that it is seized of the matter pursuant to powers vested in it under section 14 of the National Land Commission Act. Such powers, according to the respondent, include any conveyance, agreement for sale, lease or license, made by and on behalf of the government and includes a certificate of title or a certificate of lease issued pursuant to the provisions of any Act of Parliament.

16. It is deposed on behalf of the respondent that it has and continues to receive complaints from members of the public and government institutions with respect to various grants alleged to have been acquired unlawfully or irregularly. It is its duty, in its view, to act on each and every claim and determine which complaints warrant review of the legality of titles complained of.

17. With respect to the present matter, the respondent confirms that it acted on the basis of a complaint by the 1<sup>st</sup> interested party, through a letter dated 5<sup>th</sup> January 2015 written by its director, Rose Mbithe Mulwa regarding an alleged fraudulent transfer of L.R 1160/784, registered in its name, to the petitioner. The 1<sup>st</sup> interested party requested it to revoke the title to the petitioner.

18. The respondent avers that it conducted its own preliminary investigations to ascertain the veracity of the claim. It states that it was able to establish that the land in dispute was previously government land which had been alienated and allocated to the 1<sup>st</sup> interested party for a term of 99 years from 1<sup>st</sup> July 1985. It further states that the land is indeed public land as it was made on behalf of the Government of

the Republic of Kenya, and the respondent therefore has authority to review its grant, with a view to determining its legality, under section 14(1) of the National Land Commission Act.

19. The respondent further states that it gave notices to all parties, including the petitioner, to appear before it. It contends the petitioner has failed to actively participate in any of the proceedings or to furnish the Commission with any documents that would assist it to reach an informed decision. It is its contention that in deciding to review the grant to the property, it acted in good faith and was well within its constitutional mandate. It denies that it is biased or partial towards any party.

20. In his submissions on behalf of the respondent, Mr. Wahome conceded that the respondent has commenced review of Grant No L.R 1160/784, and that it commenced the review at the instance of the 1<sup>st</sup> interested party through the letter dated 5<sup>th</sup> January 2014.

21. Mr. Wahome reiterated the averments by Mr. Ikol with respect to the powers of the respondent under section 14 of the National Land Commission Act, noting that the prayer by the 1<sup>st</sup> interested party was for the respondent to cancel the title to the petitioner and issue a new title in the name of the interested party. He observed, however, that the respondent does not have the power to reverse any transaction.

22. With respect to the contention by the petitioner that the respondent does not have jurisdiction to determine the legality of the grant held by the petitioner on the basis that it is private land, Counsel relied on the decision of Korir J in **Judicial Review Application No. 376 of 2014 R vs National Land Commission Ex P Muktar Saman Olow** in which the Court found that under section 14 of the National Land Commission Act, the respondent has jurisdiction to determine the process under which public land became private land. It was also his submission that in **High Court Mombasa Misc. Appn. No. 132 of 2010 R vs Land Registrar Mombasa ex p Bhangra Ltd**, the Court held that the National Land Commission was vested with power to review the legality of grants. It was his submission therefore that as the suit property is public land, the respondent has jurisdiction to deal with it.

23. The respondent denied that the issues before it are the same as are pending before the Court in HCCC No 705 of 2009. According to Mr. Wahome, the essence of the orders sought (before the High Court) are to cancel or nullify the transfer from the interested party to the petitioner. In its view, the legality of the grant in question is not pending determination and the respondent is therefore not barred from proceeding with the review.

24. With regard to the orders sought, Mr. Wahome submitted that the principles for granting interim orders are set out in **Giella vs Cassman Brown & Co. Limited [1973] EA 358** and the petitioner had not met the test in that case as she had not established a prima facie case or the prejudice she will suffer if the orders sought are not granted. It was also his submission that the balance of convenience tilts in favour of the respondent as it has only 3 years to review grants of public land. In addition, in his view, an order of injunction cannot issue against a body exercising its quasi-judicial mandate.

### **Submissions for the 1<sup>st</sup> Interested Party**

25. Mr. Wena for the 1<sup>st</sup> interested party also opposed the application. He relied on grounds of opposition dated 15<sup>th</sup> May 2015. In the Grounds of Opposition dated 27<sup>th</sup> April 2015, the 1<sup>st</sup> interested party terms the petitioner's application as incompetent, mala fides, mischievous, bad in law and an abuse of the court process. It further contends that the application offend the provisions of section 5, 6 and 14 of the National Land Commission Act when read with Article 67 (2) and (3) of the Constitution.

26. It accuses the petitioner of not coming to Court with clean hands, and of bringing the application in bad faith with the intention of preventing the 1<sup>st</sup> interested party's quiet and peaceful possession of the property in dispute.

27. In his submissions, Mr. Wena supported the submissions made on behalf of the respondent with regard to its jurisdiction. In addition thereto, it was his submission that when the respondent is carrying

out its functions, it acts as an administrative tribunal and any challenge to its actions ought to be by way of judicial review for orders of mandamus, certiorari or prohibition. It was his submission therefore that the present petition is not proper, and conservatory orders cannot issue.

28. Mr. Wena further contended that the petitioner has also filed parallel proceedings while complaining about the same proceedings. In his view, the petitioner could have joined the respondent to the proceedings before the High Court instead of filing this petition.

### **Submissions by the 2<sup>nd</sup> Interested Party**

29. Mr. Otieno, on behalf of Kenya Commercial Bank(KCB), supported the application and aligned himself with the submissions made for the petitioner by Mr. Nyawara.

30. Mr. Otieno observed that despite the fact that the property is charged to KCB by a charge dated 4<sup>th</sup> April 2005 and registered on 14<sup>th</sup> April 2005 for a sum of Kshs 8m, KCB has not been involved in the proceedings before the respondent. KCB also supported the application on the basis that the matter before the respondent is pending before the High Court, and the matter before the respondent is an abuse of process by the 1<sup>st</sup> interested party.

### **Submissions in Response**

31. To the complaint by KCB that it had not been involved in the proceedings before the respondent even though it held a charge to the suit property, Mr. Wahome for the respondent submitted that there have been three publications of the decision by the respondent to review the grant of the land in dispute, published on 19<sup>th</sup> August 2014 and 29<sup>th</sup> June 2015. It was Mr. Wahome's submission that the 2<sup>nd</sup> interested party should therefore have had notice of the review.

32. For the petitioner, Mr. Nyawara agreed with Mr. Wahome with respect to the principles of law enunciated in the decisions relied on by the respondent with regard to the power of the respondent to determine complaints on grants of public land. He submitted, however, that the respondent has no jurisdiction with respect to dispositions between individuals, relying in this regard on the provisions of Article 62(4).

33. With respect to the orders sought by the petitioner, Mr. Nyawara submitted that under Article 23, a party can approach the Court for the various orders set out therein. It was also Mr. Wahome's submission that the crux of the dispute before the High Court, which the respondent submitted was also the issue before it, was the legality of the grant to the petitioner.

### **Determination**

34. I have set out earlier in the judgment the prayers that the petitioner is seeking in its petition. At the core of its claim is the question whether the respondent can properly exercise jurisdiction in respect of a dispute between two private individuals over title to land. There is no dispute that the petitioner and 1<sup>st</sup> interested party are embroiled in a dispute over the ownership of the subject property. The interested party has pending in the High Court a claim against the petitioner in **Sehit Investments Limited vs Josephine Akoth Onyango, Simon Otieno, Savings and Loan Kenya Limited and The Attorney General** (supra).

35. The petitioner seeks conservatory orders to stop the respondent from proceeding with its inquiry into the legality of the grant to the subject property. The respondent has questioned the competence of this petition, arguing that the decisions of the respondent can only be questioned by way of applications for orders of judicial review for orders of mandamus, certiorari or prohibition. However, the provisions of Article 23(3) are clear on the powers of the Court in petitions brought under Article 22 of the Constitution. The Court has power to grant, among others, injunctions, conservatory orders, orders for compensation and orders of judicial review.

36. With respect to what principles the Court should consider in granting conservatory orders, the respondent submitted that the petitioner has not met the criteria established with respect to injunctions in the celebrated case of **Giella vs Cassman Brown & Co. Limited** (supra) with respect to the need for a party to establish a prima facie case with a probability of success, irreparable loss that cannot be compensated with an award of damages, and in the event of doubt, a consideration of where the balance of convenience lies. However, several decisions of this Court and courts superior to it have addressed themselves to what a party seeking conservatory orders in a matter brought under Article 22 needs to establish. I need only quote a few.

37. The first is that the petitioner must show a prima facie case with a likelihood of success, and that if the conservatory orders are not granted, he is likely to suffer prejudice. In **Centre for Rights Education and Awareness (CREAW) & 7 Others vs Attorney General Petition No. 16 of 2011**, the Court (Musinga J (as he then was) stated as follows:

*“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, 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 the violation or threatened violation of the Constitution.” (Emphasis added)*

38. In **Muslims for Human Rights (MUHURI) & 2 Others vs Attorney General & 2 Others, Petition No 7 of 2011**, Ibrahim J (as he then was) while agreeing with the view expressed by Musinga J in the **CREAW** case cited above, observed as follows:

*“I would agree with my Brother, that an applicant seeking Conservatory Orders in a constitutional case must demonstrate that he has a “prima facie case with a likelihood of success.”*

39. In its decision in the case of **Martin Nyaga Wambora vs Speaker of The County Assembly of Embu & 3 Others Petition No. 7 of 2014**, the three-judge bench seized of the matter cited with approval the sentiments expressed in the decisions cited above and stated as follows:

*[59]”In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must 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 the violation or threatened violation of the Constitution”*

*[60] To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention”.*

*[61] The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory”.*

40. Finally, I bear in mind the words of the Court in the case of **Gatirau Peter Munya vs Dickson Mwenda Githinji & 2 Others SCK Petition No 2 of 2013** in which the Supreme Court enunciated a third, critical principle in the grant of conservatory orders. This principle is to the effect that the Court must consider the public interest in determining whether or not to grant conservatory orders, particularly

in cases where orders are sought to stop a public agency from carrying out its mandate. In that case, the Supreme Court (Ojwang and Wanjala, JJSC) stated as follows:

***[86]”...Conservancy Orders’ bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes”***

***[63] Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest.”***

41. In the present matter, the respondent has been invited, in effect, to inquire into the circumstances under which the petitioner acquired the property known as Land Reference No. 1160/784, Nairobi. The complaint was by the interested party, which alleges fraud on the part of the petitioner. The initial grant, according to the facts before me and so far as is relevant to the present application, was made to the 1<sup>st</sup> interested party by the government. Thus, if there was a need for an inquiry into the legality of a grant of public land, it would be in relation to the grant to the 1<sup>st</sup> interested party, not in relation to its transfer of the property from itself to the petitioner. The 1<sup>st</sup> interested party, however, does not ask the respondent to inquire into the legality of the grant to it of public land, but into its transfer of the land to the petitioner, a matter that it has also asked the High Court to inquire into in **HCCC No. 705 of 2009- Sehit Investments Ltd vs Josephine Akoth Onyango & Others**

42. The respondent has relied on the decision of Korir J in **R vs National Land Commission Ex P Muktar Saman Olow** (supra) to submit that the Court held that the National Land Commission has jurisdiction, under section 14(1) of the National Land Commission Act, to inquire into grants of public land. The Court did, indeed, state so at paragraph 47 of its judgment when it observed:

***47. Under Section 14 of the National Land Commission Act, 2012 the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. In my view, the Respondent can only fulfil this mandate by probing the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered as private property is no longer within the reach of the Respondent.***

43. However, the Court went on to consider a second question before it, that was similar, and in respect of which the parties had advanced arguments that are similar to those made before me in this matter. Korir J formulated that argument as follows:

***[56]. “The remaining question is whether the Respondent had jurisdiction to handle the dispute considering that the matter was already before the Court. The Applicant postulates that the Respondent exceeded its jurisdiction and usurped the role of the Environment and Land Court. On its part the Respondent submits that the issues before the Court are different from the issues it intends to review.”***

44. The Learned Judge then went on to consider the jurisdiction of the Environment and Land Court, then stated as follows:

***[58.] “The Respondent and the Interested Party hold the view that the Respondent’s mandate is not in conflict with that of the Environment and Land Court. They urge this Court to follow the decision of Waitaha, J in Elizabeth Nditi Njoroge vs The National Land Commission [2013] eKLR. In that case the learned Judge found that there was no friction between the jurisdiction of the Environment and Land Court and that of the Respondent. I agree that is a valid statement.***

***[59.] However, I do not envisage a situation where both the Respondent and the Environment and Land Court can entertain parallel proceedings between the same parties litigating over the same issues concerning the same parcel of land. Ideally, where the Respondent has jurisdiction, it ought to be given an opportunity to deal with the dispute. That does not mean that the Environment and Land Court cannot deal with a dispute in which the Respondent has jurisdiction.***

***[60.] In the case before me, the parties had already submitted themselves to the jurisdiction of the Court which has the mandate to deal with the matter. The Respondent had no business commencing parallel proceedings over the same parcel of land. The Environment and Land Court is in a position to determine the rival interests of the Applicant and the Interested Party as well as the legality of the grant.* (Emphasis added)**

45. In allowing the application before him and issuing orders of prohibition directed at the respondent, Korir J observed as follows:

***[62.] “The attempt by the Respondent to review the grant in question while there are court cases geared towards addressing that issue is clearly an abuse of power bordering on contempt of court.”***

46. I am conscious of the fact that I am, at this stage, only addressing myself to the question whether the conservatory orders sought by the petitioner should be granted. I am cognizant also of the fact that I have not gone into the facts and merits of the respective cases. However, on the material before me, and bearing in mind the decision of Korir J relied on by the respondent, I am satisfied that the orders sought by the petitioner in this matter are merited. On the face of it, the respondent is overreaching and entering into a matter that is already before the Court which has jurisdiction to deal with it.

47. I therefore grant the following orders:

- 1. That pending the hearing and determination of this petition, the respondent by itself, its agents, employees and or anybody deriving authority from the respondent be and is hereby restrained from taking any proceedings in relation to the petitioner’s ownership and title to all that piece or parcel of land known as Land Reference No. 1160/784, Nairobi or revoking the petitioner’s title thereto.***
- 2. That the costs of this application shall abide the outcome of the petition.***

**Dated, Delivered and Signed at Nairobi this 13<sup>th</sup> day of November 2015**

**MUMBI NGUGI**

**JUDGE**

**Mr Nyawara instructed by the firm of Nyawara & Co. Advocates for the petitioner.**

**Mr. Wahome instructed by the National Land Commission for the respondent.**

**Mr. Wena instructed by the firm of Miller & Company Advocates for the 1<sup>st</sup> interested party.**

**Mr. Otieno instructed by the firm of Robson Harris & Co. Advocates for the 2<sup>nd</sup> interested party.**