



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

PETITION NO. 3 OF 2020

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010.

ARTICLES 23, 19, 20, 22, 23, 24, 40 & 47 OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR CONTRAVENTION

OF RIGHT TO OWNERSHIP AND PROTECTION OF PROPERTY

UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR CONTRAVENTION

OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION ACT 2015,

AND UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF BILL OF RIGHTS

UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA,

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012,

THE LAND ACT, 2012, THE REGISTRATION OF TITLES ACT (REPEALED),

THE GOVERNMENT LAND ACT (REPEALED) & THE LAND TITLES ACT (REPEALED)

AND

IN THE MATTER OF LAND REFERENCE NO. 29746 (IR NO. 175337) THIKA MUNICIPALITY

BETWEEN

LEKAN DEVELOPERS LIMITED.....PETITIONER/RESPONDENT

AND

THE CABINET SECRETARY,

MINISTRY OF LANDS & PHYSICAL PLANNING.....1ST RESPONDENT
THE CHIEF LAND REGISTRAR.....2ND RESPONDENT
THE CABINET SECRETARY, MINISTRY OF INTERIOR AND COORDINATION OF
NATIONAL GOVERNMENT.....3RD RESPONDENT
THE DEPUTY COUNTY COMMISSIONER, THIKA SUB COUNTY.....4TH RESPONDENT
THE ATTORNEY GENERAL.....5TH RESPONDENT

AND

MILKA WANGUI, LAWRENCE MWAURA KAMAU &

TERESIA WAIRIMU (For themselves and on behalf of KIANG'OMBE

SQUATERS SETTLEMENT SCHEME.....INTERESTED PARTY

RULING

1. The Applicant/ Petitioner filed a Motion on the 22/7/2020 under Art 22, 23, (b) (c) & 159(2)(d) of the Constitution of Kenya 2010, Sections 1A, 1B, & 3A of the Civil Procedure Act and any other enabling provisions of the law seeking the following orders;

a. **Spent.**

b. **THAT** this Honourable Court be pleased to restrain the Respondents or any of their servants, or agents or anybody acting on their express or ostensible authority by way of a temporary injunction from interfering in any manner whatsoever with the Petitioner's quiet and peaceful possession, ownership and occupation of Land Reference Number 29746 THIKA MUNICIPALITY pending the hearing and the determination of this application for injunction.

c. **THAT** pending the hearing and determination of the Petition herein, the Respondents, their agents, employees, servants be restrained from interfering with the Petitioner's quiet and peaceful occupation, possession, ownership of Land Reference Number 29746 THIKA MUNICIPALITY.

d. **THAT** the costs of this application be provided for.

2. The application is premised on the grounds stated as follows;

a. The Petitioner is the duly registered proprietor of Land Reference Number 29746 THIKA MUNICIPALITY (hereinafter called the suit property).

b. The Petitioner is in lawful occupation and possession of the suit property and intends to fully develop the same.

c. The 1st Respondent has purportedly written a letter to the 14th Respondent on the 9th December, 2019 to the effect that the suit property being known as Kiang'ombe Village Plot TKA/04/03/2A (hereinafter called the alleged Kiang'ombe Plot) is also the suit property and that the same is reserved for the construction of a public school.

d. Based on that alleged letter, the 4th Respondent herein has written to the Applicant to stop interfering with the suit property allegedly referred to as the Kiang'ombe Plot.

e. The actions of the 1st and 4th Respondents as seen in those two letters have infringed on the constitutionally protected property rights of the Applicant with regard to the suit property without any due process.

f. The Applicant stands to suffer irreparable loss of her property in the event that the Court does not intervene and issue conservatory orders as prayed for herein.

g. The Respondents are determined in their illegalities to deprive the Applicant of her property without the due process, fair administrative action, just and prompt compensation or the benefit of a Court hearing and an order to which the Applicant has duly participated.

h. The Applicant has never been given any hearing by any of the Respondents before these arbitrary and adverse illegal actions have been taken against the Applicant.

i. It will be in the interest of justice and due protection of the Constitution and Property Laws in the Republic of Kenya to have the orders sought herein granted.

3. In support of the Application, the Applicant through its Managing Director namely **Rajesh Kent** swore an Affidavit on the 21/7/2020 reiterating the grounds of the application. In brief, he stated that the applicant purchased the property from the previous owners namely Gladys Wangui Mburu and Lydia Njeri Wangonde in 2016, became registered as proprietors in 2019 and took over possession and commenced development of the perimeter wall, the said development having been approved by Kiambu County Government vide annexure RK3.

4. That their quiet enjoyment of the property was rudely interrupted by a summon by the 2nd Respondent who issued the deponent with a letter from the Deputy County Commissioner, Thika West dated the 30/6/2020 informing them that the suit land is reserved for the construction of a public school and that they should avoid any interference with it. That they understood the letter to mean that their suit land was being appropriated for public purposes without due process, fair administrative action and due compensation and in clear violation of the constitutional rights to ownership. That to date the petitioner has not been afforded any hearing by the said Deputy Commissioner and or the Registrar of Titles concerning the proprietorship of the suit land.

5. The Application is opposed by the 1st Respondent through the Replying Affidavit sworn by **Mugendi Geoffrey Moses** on the 21/9/2020. In para 6 (a – h) of his affidavit the deponent gave a step by step procedure in which land was alienated under the repealed Government Lands Act (repealed).

6. It was the deponent's contention that according to the records held in their custody the Part Development Plan (PDP) No TKA/04/03/21 and approved Plan No 365 were approved in favour of Kiangombe Squatters Housing Scheme based on the Commissioner of Lands letters of authority dated the 29/7/1993 and 21/9/2007. That the effect of the letters were to retract the allocations already made on the land when it was discovered that there was an existing village occupied by the Kiangombe residents. The Commissioner therefore authorised the re-planning in favour of the Interested Parties, Kiangombe Squatters. Further in 1999 the Commissioner of Lands directed that any overlapping parcels be withdrawn and allottees issued with alternatives and the overlapping survey work was dispensed with and this paved the way for the Director of Physical Planning to prepare the plan and upon no adverse comments from various governmental bodies having not been received, the same was published on the 10/6/2021 and approved on the 4/12/2013. That the plan was approved by the Cabinet Secretary Ministry of Lands Housing and Urban Development and the same was forwarded to the National Land Commission. That on the 12/11/2015 the County Executive Committee Kiambu County, informed the Director of Physical Planning that the land set aside for a public school in the new approved plan had been allocated to an individual vide an approved PDP No NRB/4/92/15 approved as No 304. The individual held a letter of allotment at the time of the approval of the current plan (PDP). The CEC then requested the Director of Physical Planning to commence the process of revocation of the letter of allotment as per the Provisions of the Physical Planning Act in favour of the Primary School. In the end it was his contention that the suit land is part of the public land planned for Kiangombe Squatters Housing Scheme. He faulted the petitioner for failing to raise any objection then if at all the said PDP had encroached on its property. That the process of titling of the suit land commenced in 2016 three years after the approval of the new PDP and one year after the request by the CEC to revoke the title of the suit land in public interest. Finally, that the title of the Petitioner is in doubt given that the land was already reserved for public use vide an approved Plan. He urged the Court to dismiss the application as unmerited.

7. In a Supplementary Affidavit filed on the 16/11/2020 and sworn by Rajesh Kent on the 16/10/2020, the deponent reiterated the contents of his earlier Affidavit on record. That the alleged withdrawal of the letter of allotment giving rise to the suit land was not supported by any evidence and remains a mere allegation.

8. Vide an application dated the 18/10/2021 the officials of Kiang'ombe Squatters Settlement Scheme sought to be enjoined as interested parties in the petition. On the 10/11/2021 the parties consented to enjoin the interested parties being the Kiangombe Squatters Settlement Scheme.

9. The Interested Party through its learned Counsel on record Mr Magani informed the Court they were in support of the application dated the 21/7/2021.

10. Parties elected to file written submissions which I have read and considered. The Learned State Counsel **Ms Elizabeth Mwalizi** filed the submissions on behalf of the Respondents while the firm of **Otieno Okeyo & Co Advocates** filed on behalf of the Petitioner.

11. The key question for determination is whether the application is merited.

12. **Order 40 Rule 1** of the Civil Procedure Rules provides that where-

“Any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or that the Defendant threatens, or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be destroyed or delayed in the execution of any decree that may be passed against the Defendant in the Court the Court may order or grant a temporary injunction to restrain such act.”

13. For the Court to determine whether or not the application is merited the principles laid down in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** which has settled the law that the granting of injunctive reliefs is a discretionary exercise predicated upon three sequential limbs to wit: that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the application on a balance of convenience.

14. Has the Applicant established a prima facie case? A prima-facie case was defined in the case of **Mrao Ltd Vs First American Bank of**

Kenya Ltd & Others (2003)KLR, to mean:-

“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. It is the duty of the Applicant herein to establish that it has a prima-facie case. In this case the Petitioner has presented a title registered in its name on the 27/12/2019.

16. The Respondent's contention is that the suit land is public land having been reserved for a public school. I have seen the letters addressed to the petitioner by the Deputy County Commissioner Thika West requesting the petitioner to avoid interference of the land. Clearly the Petitioner is in possession of the land and its quiet possession is being interfered with.

17. I have carefully read and considered the Replying Affidavit of Mugendi Geoffrey Moses where he has explained at length the revocation of the PDP under the authority of the Commissioner of Lands. It is unfortunate that the said deponent did not attach the annexures referred as MGM1-18 in his Affidavit for the Court to form an opinion on the same. Clearly the issues surrounding the approved development plan overlap and revocation and re-planning of the land are issues that are best left to the trial Court so that evidence is laid bare and its veracity tested.

18. In any event the Court has not been shown the revocation of the letter of allotment, PDP and the title held by the Petitioner. In the circumstances therefore and being guided by section 26 of the LRA which provides that a certificate of title issued by the Registrar upon registration shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to limitations permitted by the Act. On the fact of it no evidence has been brought by the Respondents to show that the said title has been revoked.

19. The Court finds that the Petitioner has established a right on the suit land and hence a prima facie case.

20. On the second limb, the Petitioner has argued that its land is under threat of being repossessed without following due process of the law. I have seen the recommendation of the National Land Commission which seems to have validated the Petitioner's title. The County Government has granted the petitioner development permission to construct the perimeter wall. That said it is the Respondents case that the Kiambu CEC raised the matter of the suit land being public land and requested the Director of Physical Planning to revoke the PDP. The issue here is not about the injury being capable of being compensated with damages but more of the appropriation of property rights without following due process. In my considered view damages are insufficient in the circumstances. The Court finds limb No. 2 is established.

21. Where does the balance of convenience lie? The Court having not been in doubt, the balance lies in the suit land being preserved pending the hearing and determination of the suit.

22. In the upshot the application is allowed in terms of prayer c pending the hearing and determination of the Petition.

23. The cost of the application shall be in cause.

24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Petitioner – Absent

Respondent 1, 2, 3, 4 & 5 – Ms. Mwalozi

Court Assistant - Phyllis