REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL APPLICATION NO.585 OF 2012

BETWEEN

PROF. CHRISTOPHER MWANGI GAKUU.....PETITIONER/APPLICANT

AND

KENYA NATIONAL HIGHWAY AUTHORITY.....1ST RESPONDENT

SERAH WANGARI NYORO.....2ND RESPONDENT

CHIEF LAND REGISTRAR.....3RD RESPONDENT

HON.ATTORNEY GENERAL.....4TH RESPONDENT

COUNTY COUNCIL OF KIAMBU.....5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....6TH RESPONDENT

RULING

Introduction

1. The Petitioner, Prof. Christopher Mwangi Gakuu in his Chamber Summons Application dated 8th February 2013 and supported by his Affidavit sworn on the same date, seeks a conservatory order to preserve the land known as L.R Limuru/Rironi/1073 and Limuru/Rironi/1074 *(the suit land)* and to bar the Respondents and/or their agents from demolishing or interfering with development made on the suit land until the hearing and determination of the Petition herein. He has also sought for an order of costs for the Application.

2. The Application is opposed and the 1st Respondent filed Grounds of Opposition dated 29th January 2013 and a Replying Affidavit sworn by Thomas Gicira Gacoki on the same date. The 3rd and 4th Respondents filed a Replying Affidavit sworn by Jonathan Ndirangu Kin'gori, the District Lands Registrar, Kiambu, on 13th March 2013 while the 5th Respondents on its part filed a Replying Affidavit sworn by Mwangi Kinyua, an engineer who works for the 5th Respondent and sworn on 7th March 2013. The 6th Respondent filed a Replying Affidavit sworn by Samuel Lopokoyit, the Head of Environmental Impact Assessment Section at the Nairobi County Headquarters of the 6th Respondent, sworn on 1st March 2013. I have also seen an Affidavit

sworn by the 2nd Respondent, Serah Wangari Nyoro, on 17th January 2013 in respect of the Application dated 19th December 2012 which Application was dispensed with by consent of parties and it follows that there is no response on record for the 2nd Respondent with regard to the Application before me. All parties, except the 2nd Respondent, also filed written submissions pursuant to an order of this Court in that regard

Petitioner/Applicant's Case

3. The Petitioner has urged the point that he purchased the suit land sometime in 2009 from the 2nd Respondent and a title deed was issued to him on 11th December 2009. Thereafter, the Petitioner claimed to have sought the approval of the 5th Respondent for change of user of the suit land from agricultural land to commercial land with the intention of constructing a multi-storey building. Allegedly thereafter, the 5th Respondent sought the approval of the 3rd Respondent's Department of Physical Planning which was granted given that there were no objections received.

4. That having complied with the requirements of the **Physical Planning Act No. 6 of 1996,** and the **Local Government Act, Cap 265,** in terms of changing of zoning and change of user, the Petitioner sought to comply with the **Environmental Management** and **Co-ordination Act of 1999** by seeking an environmental impact assessment license and an environmental audit to be conducted by the 6th Respondent. He claims that the 6th Respondent carried out due diligence and invited comments from various departments including those of the 1st and 3rd Respondents as well as members of the public before issuing a licence dated 8th December, 2011. He subsequently commenced the construction of a parking lot in conformity with the approvals and licences granted to him.

5. On 9th January 2012, he was served with a letter by the 1st Respondent dated 10th January 2012, notifying him of the intended demolition of an alleged illegal structure erected on a classified road reserve and at that time, his construction had been assessed at about 60% completion.

6. He claims that the threat to demolish his properties is illegal, irregular, wrongful, unprocedural and a breach of his constitutional rights as enshrined in Article 40 of the Constitution. He also contends that the 1st Respondent's actions are in bad faith and malicious and amounts to an unfair administrative action and offends **Article 47** of the **Constitution.**

7. He further contends that the government could not have compulsorily acquired the suit land in 1987 as alleged because Gazette Notice number 4381 of 18th September 1987 which gave notice of the compulsory acquisition does not mention the suit land anywhere. And that the 2nd Respondent has clarified that the Government acquired a portion of her land and not the whole land and she was duly compensated for the portion so acquired and he relied on the case of ***Commissioner for Lands v Coastal Aquaculture Ltd KLR (E &L) 1 264*** to argue that the law must be strictly followed when land is being compulsorily acquired. For the above reasons, he seeks the orders elsewhere set out above.

1st Respondent's Submissions

8. The 1st Respondent, Kenya National Highway Authority, on its part claims that in 1987, the Ministry of Roads proposed and designed a dual carriageway between Kabete and Rironi thus necessitating acquisition of land to accommodate the additional lanes that were to be added to the existent road. Subsequently, land parcels numbers Limuru/Rironi/1073 and 1074 were compulsorily acquired in accordance with the law for the said reason.

9. It is further submitted that Limuru/Rironi/1073 and 1074 are parcels of land that were created as a result of a purported mutation carried out on original land title number Limuru/Rironi/506 which is a product of a mutation on Limuru/Rironi/216. That through Gazette Notice number 4381 of 18th September 1987, Limuru/Rironi/216 was publicised for acquisition for the express purpose of the construction of the Kabete/Limuru Road and at that time, the 2nd Respondent was the

registered proprietor of all those parcels of land known as Limuru/Rironi/506 and Limuru/Rironi/507. Following the acquisition, the 2nd Respondent was duly compensated for her land vide cheques Nos.036100 and 036101 for Kshs.296,341 and Kshs.531 respectively. Thereafter, it is alleged that the 2nd Respondent subdivided Limuru/Rironi 506 and created Limuru/Rironi/1073 and 1074 and purported to sell the same to the Petitioner despite the same having been compulsorily acquired by the Government. That the 2nd Respondent did not therefore have any good title to the suit land to confer to the Petitioner.

10. The 1st Respondent also claims that the Petitioner cannot now argue that he had no knowledge of the acquisition of the suit land by the Government as the same was duly gazetted and that he failed to exercise due diligence when purchasing the same and is thus barred from claiming that he was an innocent purchaser for value without notice. Further, that the on-going construction by the Petitioner assessed at 60% completion does not grant him legality to the title on which the developments stand.

11. It is also the 1st Respondent's argument that the subject matter and the parties to this Petition are similar to those in ELC No. 34 of 2012 filed by the Petitioner against the 1st Respondent and which was determined by a Court of competent jurisdiction, thus the issues here are *res judicata.* In that case, it is argued, Lady Justice Ougo dismissed a similar application for interlocutory orders and that this Court cannot now review the learned Judge's Ruling in that regard. That therefore this Application is an attempt made to circumvent ELC No.34 of 2012 by the improper application of **Article 22** of the **Constitution** and to allow this Application would be a collateral attack on an order of a Court of competent jurisdiction which is itself unconstitutional. That therefore the Petition and Application are without merit and should be dismissed with costs.

3rd and 4th Respondents' Submissions

12. The 3rd Respondent, The Chief Land Registrar and the 4th Respondent, the Attorney General, argue that the original title for the suit land was measuring 36.3 acres and was subdivided to produce various parcels of land ranging from registration numbers Limuru/Rironi 505-547. That from the records, Limuru/Rironi/506 and 507 were allocated to the 2nd Respondent and were subsequently acquired by the government in 1987 for public interest to expand the Kabete-Limuru Road and affected parties were duly compensated but knowing very well that she was no longer the owner of the suit land, the 2nd Respondent still purported to transfer the suit land to the Petitioner and other third parties and that therefore the purported sale to the Petitioner was null and void for having been fraudulent.

13. It is the position of the 3rd and 4th Respondents that Government has a duty to safeguard the rights of citizens and to ensure equitable access and use of land and that under **Article 62(4)**, public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of the disposal and use. They rely on the decision in **James Joram Nyaga and Anor v the Hon. Attorney General, H.C. Misc. Civ. Application No. 1723 of 2004 (Nbi)** where it was held that where land is held by the Government on behalf of the public,then no other party could purport to pass title to anyone else.

14. It is their contention that the Application is an abuse of the Court process because the same issues raised herein were raised in **ELC No. 34** of **2012** in relation to the same suit land and that in that case the Court gave a judgment dismissing the Petitioner's Application for conservatory orders on 7th December 2012 and the same Application cannot now be re-opened in this matter.

15. They therefore urge me to strike out the Application with costs and particularly because the issues raised herein can only be dealt with in a civil suit through the normal litigation process rather than in a Constitutional Petition where no evidence would be called.

5th Respondent's Submissions

16. The 5th Respondent acknowledged that the Petitioner sought for and was granted approval for construction on the basis that a search done on the suit properties revealed that the Petitioner was the registered owner. It contends that the 5th Respondent therefore exercised due diligence in establishing the ownership of the suit land.

17. It also claims that the Physical Planning Department is to be found within the 3rd Respondent and not the 5th Respondent and so any action of the Physical Planning Department cannot be blamed on the 5th Respondent.

18. It adds that prior to granting the approval, the Ministry of Lands in a letter dated 12th May 2011 authored by a District Physical Planner advised the 5th Respondent that it did not have any objection to the construction so long as certain conditions were met. That based on that communication, the 5th Respondent wrote to the Petitioner by a letter dated 3rd August 2011 setting out the conditions to be observed by him in the course of construction which conditions were to *inter-alia* ensure safety during the construction.

19. That therefore it cannot be held responsible for any loss likely to be incurred by the Petitioner since it did not author the purported notice and urges me to dismiss the Application with costs to the 5th Respondent.

6th Respondent's Submissions

20. In its Grounds of Opposition, the 6th Respondent contends that the Application before me is made in bad faith, is an abuse of the court process as it amounts to forum shopping and is mischievous since it seeks to defeat due process. It claims that the issues forming the subject matter of this Petition and Application are also the subject of **ELC No. 34 of 2012** which has been determined and so both are barred by fact of *res judicata*.

21. In the Replying Affidavit sworn by one Samuel Lopokoyit on behalf of the 6th Respondent, the latter acknowledges that the Petitioner applied for a grant of an environmental impact assessment license to undertake construction of a multi-dwelling development on Land Parcel No. L.R. Limuru/Rirorni/1073 at Rironi area. That the 6th Respondent scrutinized the application and was satisfied that it was in compliance with the legal requirements of **Regulations 7** and **8** of the **Environmental (Impact Assessment and Audit) Regulations, 2003** relating to the form, content and presentation of the report. The project was approved on certain conditions and the Petitioner was *inter-alia* required to accept those conditions as the basis for grant of an Environmental Impact Assessment (EIA) license. After the Petitioner accepted the conditions, he was issued with license No. 0009916 on 8th December 2011 and the position of the 6th Respondent with regard to this matter is that it applied the law and relevant procedures prior to granting of the license aforesaid.

22. It is also its submission that by the time the Petitioner obtained the EIA license, he had already obtained a change of user permit together with a building permission from the 5th Respondent and so the 6th Respondent cannot be blamed for the Petitioner's own decisions. It also contends that if at all the Petitioner's property is on a road reserve he ought to have been advised by the experts who prepared the project report as they owe him a duty of care to conduct diligent investigations and confirm to the Petitioner the suitability of the land and thereafter make a full disclosure to the 6th Respondent in terms of **Section 58** of the **Environmental Management** and **Act Co-ordination (EMCA)** and **Regulation 7** of the **EIA Regulations** so as to enable the 6th Respondent make an informed decision.

23. It is therefore its position that the Petition as filed by the Petitioner raises no constitutional violation on the part of the 6th Respondent and in any event it is statute barred by **Section 66(1)** of the **Environment Management** and **Cordination Act** as it seeks to impose civil liability on the 6th Respondent arising from the grant of an EIA license.

24. It urges me to dismiss the Application for the above reasons.

Determination

25. It is not in dispute that the issues raised in this Application were also raised before Ougo J in **ELC No. 34 of 2012.** I have seen the Ruling rendered by the learned Judge in that matter on 7th December 2012 and it is clear to me that the Petitioner is now seeking the same orders as he did in **ELC No. 34 of 2012.**

26. The Petition herein was filed on 20th December, almost two weeks after Ougo, J. rendered her Ruling aforesaid and instead of appealing against that decision if he was aggrieved by it, the Petitioner decided to file the present Petition alleging a violation of his constitutional rights and in the interim he has also filed the instant Application seeking the same orders as he did in the Application dated 12th March 2012 in **ELC No. 34 of 2012** as I have indicated above.

27. Ougo J while considering whether to grant the Petitioner a temporary injunction to restrain the 1st Respondent and its agents from interfering with the suit land, stated as follows;

"I have read and considered the affidavits, annextures, submissions and authorities filed and I take the following view of the matter; On 24th July 1990, the government acquired Limuru/Rironi/216 from Esther Nyakio Kairu measuring approximately 0.80 hectares for construction of Kabete -Limuru road. It is not in contention that Limuru/Rironi/506 was one of the resultants parcels of L.R.No. Limuru/Rironi/216 after its subdivision. On 24th July 2009, Serah Wangari Nyoro received two compensation cheques for Kshs.296,341.00 and Kshs.531 pursuant to acquisition of L.R.No. Limuru/Rironi/506 by the Commissioner of Lands. This fact is admitted by Serah Wangari Nyoro as per CMG 2(a) with a rider that the compensation was for only 1 acre while the whole parcel measured 1 1/4 acres. As per annexture SOO3, on 29th July 1991, the Commissioner of Lands instructed land officer to place a caveat on among other parcels of land LR No. Limuru/Rironi/506 measuring 0.449 which had vested in the government. CMG 1 is a land certificate showing that LR No. Limuru/Rironi/506 measured approximately 0.4492011ha. If the government acquired 0.449 hectares of land Limuru/Rironi/506 measuring approximately 0.4492011h, it therefore follows that the government acquired the whole of Limuru/Rironi/506. Since the suit properties are resultant parcels of L.R. No. Limuru/Rironi/506 whose mutation was carried out on 13.10.2008, I am unable to find that the Plaintiff has established a prima facie case with a probability of success."

The Learned Judge went on to state as follows;

"Save for stating that he stands to suffer great irreparable loss and damage, the Plaintiff has not demonstrated that damages would not be an adequate remedy in the event the orders sought are denied.....the upshot of this ruling is that the application dated 12th March 2012 is dismissed with costs to the respondents."

28. It is clear that Ougo J. had made a ruling, rightly or wrongly, and consequently, the option open to the Petitioner, if dissatisfied with the decision of that Court, was to appeal to a higher Court, in this case the Court of Appeal and not the Constitutional and Human Rights Division of the High Court. A literal reading of **Article 165(6)** of the **Constitution** is in clear terms and language that the High Court has no jurisdiction, real or perceived to supervise the superior Courts. This Article reads as follows;

"The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court."

The Superior Courts referred to in **Article 165(6)** have been defined by **Article 162(1)** as follows;

"The superior courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2)."

The Courts mentioned in **Clause (2)** are the Courts with the status of the High Court and these are the Industrial Court and the Environment and Land Court as established pursuant to **Article 162(2)** of the **Constitution.**

29. Nowhere under **Article 165** of the **Constitution** is there granted jurisdiction to the Constitutional and Human Rights Division of the High Court to supervise the conduct of Judges of other divisions of the High Court. That is a fallacy and in the circumstances I would do no better than quote my earlier sentiments expressed in **Philip Kipchirchir Moi v The Attorney General and Rossana Pluda Moi, Petition No. 65 of 2012** that;

"I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. Inspite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction."

30. I do not know how often or for how long Judges of that Division should continue to clarify that a Judge sitting in the Constitutional and Human Rights Division of the High Court at Nairobi has the same jurisdiction as any other judge sitting in any other division of the High Court or indeed any High Court Station outside Nairobi.

31. In the circumstances, the position advanced by the Petitioner that a ruling at an interlocutory stage is not a final judgment cannot be countenanced because I believe that this Application is an attempt to resurrect the issue of a conservatory injunction which was determined in **ELC No. 34 of 2012**. That issue has already been determined by a Court of competent jurisdiction and a decision made by the High Court whether interlocutory or final cannot be circumvented by making up a fallacious contention in form of a violation of constitutional rights and freedoms and relief sought under under **Article 22** of the **Constitution**. I am therefore in agreement with the Respondents that the said issue is now *res judicata*. And in this respect, although this is a matter purportedly filed under the Constitution, **Section 7** of the **Civil Procedure Act** is clear to my mind. This Section provides as follows;

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

32. For *res judicata* to be invoked in a matter, the issue in the present suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title - See the case of ***Karia and Another v the Attorney General and Others (2005) 1EA 83.*** It therefore follows that the essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause. This was also the holding in ***Omondi v National Bank of Kenya Ltd and Others (2001) EA 177.***

33. In that regard, I agree with Majanja, J. as he correctly stated in ***Edwin Thuo v Attorney General and Anor Petition No. 212 of 2012*** that the Court must be vigilant and guard against evading the doctrine of *res judicata* by introducing new causes of action. He stated as follows;

"The Courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff is in the second suit is trying to bring before the court in another way and in a form a new

cause of action which has been resolved by a court of competent jurisdiction"

34. It is also obvious that the Petitioner is trying to bring to this court in the disguise of an application for conservatory orders under **Article 23** of the **Constitution,** a new cause of action. It matters not in my view that some of the parties were not parties in the previous suit. The issues are the same and the real cause of action remains the same. He has in my view introduced the new parties so as to disguise his main intention from the Court. This Court must guard jealously its jurisdiction from such litigants.

35. Having addressed my mind as above, it is clear that the Application must fail. For that reason, I have refrained deliberately from addressing the issue as to whether the Petitioner has a *prima facie* case so as to be granted a conservatory order as it will serve no useful purpose given my findings above.

Conclusion

36. It must now be clear that the Petitioner's Application is an abuse of the Court process. It must be dismissed and it is hereby dismissed with costs to the Respondents.

37. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Kinyua for Petitioner

Mr. Dulo for 1st Respondent

No appearance for other Respondents

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Petition dated 19/12/2012 is fixed for hearing on 30/7/2013. Submissions to be filed before then.

Notice to issue.

ISAAC LENAOLA

JUDGE

28/6/2013