



MUGURE THANDE.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

Introduction

1. Pursuant to the provisions of Article 68 and the Fifth Schedule of the Constitution, Parliament enacted the Land Registration Act (Act No. 3 of 2012), the National Land Commission Act (Act No. 5 of 2012), and the Land Act, (Act No. 6 of 2012). The commencement date of the four Acts, which are intended to consolidate the various Acts of Parliament hitherto dealing with registration of land and to regulate land dealings in Kenya was the 2nd of May 2012. The Preamble to the Land Registration Act (LRA) states that the Act was enacted to revise, consolidate and rationalise the registration of titles to land, to give effect to the principles and objects of devolved government in land registration and other connected purposes.

2. Section 109 of the LRA repealed five land laws: the Indian Transfer of Property Act of 1882; The Government Lands Act (Cap 280); The Registration of Titles Act (Cap 281); The Land Titles Act, (Cap 282) and the Registered Land, Act (Cap 300) with effect from the commencement date. The repealed statutes set out above have been governing the registration of transactions in land and other documents in the various land registries in Kenya. The new Acts are intended to harmonise dealings in land in conformity with the provisions of the Constitution. It is against the above background that the petitioner filed this petition and the Chamber Summons application dated 12th June 2012.

3. The application is supported by the affidavit of the petitioner, MugureThande, sworn on 12th of June 2012, and seeks orders in the following terms:

1. ...

2.

3. The Honourable Court be pleased to issue a temporary injunction restraining the Respondent from implementing sections 106(1) and 109 of the Land Registration Act. No.3 of 2012 pending the hearing and determination of this petition.

4. Costs, of and incidental to, this application be in the cause.

The Petitioner\'s Case

4. Ms.NjokiGachihi presented the case for the petitioner. She submitted that the petitioner has been registered as the owner of all that parcel of land known as Nachu/Mikuyuini/660 and the Title Deed was issued under the repealed Registered Land Act Cap 300 by the Kiambu Land Registrar on the 4th of May 2012, two days after the commencement date of the LRA. Under section 2 of the LRA, only a Certificate of title or a Certificate of Lease could be issued as proof of ownership of land or a lease under Section 30

of the LRA. This certificate of title is defined by section 2 of the LRA as “...**a certificate of title in the prescribed form issued under Section 30**”. The petitioner is therefore apprehensive that her title and any or all titles, leases, charges, mortgages or other documents in dispositions of private land currently being registered by Registrars under the repealed Acts can be challenged with dire consequences to her and the public in general.

5. The petitioner contends that the implementation of sections 106(1) and 109 of the LRA without clear and effective transitional clauses and the necessary infrastructure and administrative structures has a chill effect on land transactions in the country; that it effectively prohibits and threatens her right to own property under Article 40(1) of the Constitution and violates the land policy principles enshrined in Article 60 of the Constitution.

6. The petitioner sets out the basis on which she contends that the implementation of sections 106(1) and 109 of the LRA threatens her constitutional rights and those of other citizens under Article 40(1) of the Constitution. She contends that the Cabinet Secretary responsible for matters relating to land has not promulgated regulations envisaged by the Act; that the Land Registrars have not been appointed under the Act to carry out the provisions of the Act; that the transitional provisions enumerated by Part XII of the LRA have not provided for the Registrars appointed under the repealed Acts. Finally, she contends that the prescribed forms intended to facilitate the disposition of private land have not been made yet. Section 43 of the LRA requires that every instrument effecting any disposition of private land shall use the prescribed forms specified in relation to that disposition under the LRA. This section further provides that no instrument effecting the disposition of private land under the LRA shall operate to sell or assign land until it has been registered in accordance with the laws relating to the registration of instruments affecting the land.

7. The petitioner also contends that the implementation of sections 106(1) and 109 cannot be realised without the formation of the National Land Commission as provided for under Part III of the National Land Commission Act No.5 of 2012; the promulgation of the regulations as provided for under section 110 of the LRA and the appointment of the Chief Land Registrar and other officers for the effective discharge of the functions of the LRA.

8. Ms. Gachihi therefore submitted that it would be in the interest of justice to allow the registration of interests in land under the repealed Acts pending the putting in place of the necessary infrastructure and administrative structures to effectively facilitate the actualisation of the provisions of the LRA.

The Respondent's Case

9. While the respondent did not file an affidavit in response to the application, Mr. Moimbo responded on points of law to the arguments by the petitioner. While agreeing with the petitioner that the Constitution envisages the protection of the right to property and that this court has jurisdiction to protect that right, Mr. Moimbo took the position that the petitioner's application is speculative since it was based on unfounded apprehensions.

10. According to Mr. Moimbo, the petitioner's right to property had not been challenged as the petitioner had been registered as the owner of all that parcel of land known as Nachu/Mikuyuini/660 and issued with a title that is indefeasible. The petitioner has not disclosed any loss she would incur as a result of holding the title document that she had been issued with.

11. The respondent submitted further that the petitioner had conceded at paragraph 10 of her Chamber Summons application that the Cabinet Secretary is the one charged with the responsibility of making the requisite forms under section 43 of the LRA. Accordingly, the petitioner should have sought mandatory orders directed at the Cabinet Secretary to compel him to make the forms.

12. The respondent submitted that some parts of the repealed Acts had been saved by the LRA, and therefore every holder of a title issued under the LRA or the repealed Acts has valid ownership that can only be impugned under the provisions of Article 40(6) of the Constitution. Mr. Moimbo referred the

court to the provisions of section 108 of the LRA which provides that the provisions of the repealed Acts would continue to apply where there is a lacuna; that the Commissioner of Lands retained powers to issue directions to the Registrar to register documents, and that the contentions of the petitioner to the contrary were misleading. For the court to issue a conservatory order directed at section 106 and 109 of the LRA would be to stifle the operations of land registries across the country thus violating people's rights as there would be no business in land registries. He therefore urged the court to dismiss the petitioner's application and find that the provisions of section 108 of the LRA had saved the application of the repealed laws.

Determination

13. From the contents of the application and supporting affidavit, and from the submissions made before me in this matter by Ms. Gachihi for the petitioner, it appears to me that the basis of the petitioner's challenge to the provisions of sections 106 (1) and 109 is not that they are unconstitutional or in any way threaten the petitioner's rights; rather, her concern is that the transitional provisions necessary to operationalize the Act are not in place, and that the absence of such transitional mechanisms somehow threatens the right to property by exposing it to likely challenges. She argues that the requisite forms are not in place, and neither have the Registrars whose duty it is to register land transactions under the new Act been properly appointed or provision made under the repealed legislation for them to continue registering documents.

14. The question that I must address therefore is whether, as alleged by the petitioner, there are no transitional mechanisms in place for the implementation of the Land Registration Act which would result in implementation of Sections 106(1) and 109 constituting a threat to her right to property under Article 40 of the Constitution.

15. Section 106(1) of this Act provides that:

'On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies.'

16. At section 109 of the LRA, it is provided that ***'The written laws set out in the schedule are repealed.'*** The Acts set out in the Schedule are all the Acts that have hitherto regulated all dealings in land in Kenya namely the Indian Transfer of Property Act of 1882, The Government Lands Act, Cap 280, the Registration of Titles Act, Cap 281. The Land Titles Act, Cap 282 and the Registered Land Act, Cap 300. Clearly, if the legislation set out above was repealed without adequate provisional mechanisms being put in place pending the enactment of appropriate regulations and provision of the transitional structures such as forms and personnel, there may be reason for concern.

17. However, at section 108, the LRA provides as follows:

'Until the Cabinet Secretary makes the regulations contemplated under section 110, any rules, orders, regulations, directions, notice forms, notifications or other administrative acts made, given, issued or undertaken before the commencement of this Act under any of the Acts of Parliament repealed by this Act or any other law continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Act.

18. The petitioner's concern with regard to her title to property is, in my view, adequately answered by the provisions of Section 108 set out above. Her concern, as is apparent from her affidavit and petition, is that the implementation of section 106(1) and 109 threatens her rights because administrative action has not been undertaken to ensure the operationalization of the LRA. However, the provisions of section 108 of the LRA that the form of the documents or instruments presented for registration shall not change until rules, orders, regulations, directives, notices, forms and notifications are put in place by the Cabinet Secretary clearly secure any title document to land that is issued prior to the enactment of the requisite rules and regulations by the Cabinet Secretary. The saving of the rules and regulations made under the repealed Acts by section 108 is critical given that Cabinet Secretaries will not be appointed until after the

establishment of the first government elected under the new Constitution.

19. In addition, the concerns of the petitioner with regard to her title are, in my view, specifically addressed by the provisions of section 107 as follows:

107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.

20. Having considered the petitioner's application against the provisions of Section 107 and 108 of the LRA, I find nothing that would justify the grant of an interim injunction restraining the operationalization of sections 106(1) and 109 of the Land Registration Act. The legislation and provisions in question result from implementation of the constitutional provisions with respect to land registration. The Act contains sufficient transitional provisions to safeguard the petitioner's and any other title issued after the commencement date. No loss has been shown as likely to result if the interim injunction is not issued. In the circumstances, I find no merit in this application and the same is hereby dismissed. Costs shall be in the cause.

Dated, Delivered and Signed at Nairobi this 3rd day of August 2012

**MUMBI NGUGI
JUDGE**