



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 13 OF 2015

(FORMERLY NAIROBI HC MISC APPL NO. 441 OF 2014)

HANNAH WANJIRU MBURU.....EX-PARTE APPLICANT

- VERSUS -

NATIONAL LAND COMMISSION.....RESPONDENT

SIMON MUHU MARARO.....1ST INTERESTED PARTY

JEREMIAH NYUTU MARARO.....2ND INTERESTED PARTY

CYRUS THIGARI MARARO.....3RD INTERESTED PARTY

WANJIKU MARARO.....4TH INTERESTED PARTY

JUDGMENT

1. On 25/11/2014, the *ex-parte* applicant, Hannah Wanjiru Mburu, obtained leave of the High Court (Korir J), permitting her to bring a judicial review motion to challenge a compulsory land acquisition exercise that was being undertaken by the National Land Commission (**the respondent**) in relation to **Land Parcel Number Ndeiya/Ndeiya/506**. The said leave was to operate as stay of implementation and enforcement of **Gazette Notice No 6577** dated 19/9/2014 and payment of compensation money to the interested parties in respect of a portion of the said parcel of land measuring 0.0282 hectares.

2. Subsequent to that, the *ex-parte* applicant brought a substantive motion dated 1/12/2014 seeking the following verbatim orders:

1. An order of certiorari be and is hereby issued to remove into the High Court and quash the entire decision of the respondent contained in Gazette Notice No 6577 dated 19th September, 2014, gazetting the interested parties as the registered owners of Land Parcel No Ndeiya/Ndeiya/506.

2. An order of prohibition be and is hereby issued directing the respondent, its agents and servants, to cease henceforth from gazetting the interested parties as the registered owners of Land Parcel No Ndeiya/Ndeiya/506.

3. An order of prohibition be and is hereby issued prohibiting the respondent, its servants and agents, from carrying out inquiries as to compensation, compensating, directing or issuing instructions on the compensation of the interested parties in respect of the acquisition of the gazetted portion of Land Parcel No Ndeiya/Ndeiya/506 and in reliance of (sic) Gazette Notice No 6577 dated 19th September, 2014.

4. The costs of this application be paid by the respondent.

3. The *ex-parte* applicant's case, was set out in the motion, statement of facts, verifying affidavit, and written submissions. In summary, her case was that she was the administrator of the estate of her late husband, **George Mburu Kabucho (the deceased)**. In 1985, the deceased purchased from the 1st and 2nd interested parties four (4) acres of land out of the suit property. The deceased was given possession of the said portion of land in 1985 and had remained in possession thereof since then. **Land Parcel Number Ndeiya/Ndeiya/506** belonged to the **late Mararo** who was father to the 1st to 3rd interested parties and husband to the 4th interested party. The four interested parties were administrators of the estate of the late Mararo.

4. The *ex-parte* applicant further contended that on 19/9/2014, the respondent (National Land Commission) published Gazette Notice No

6577 dated 11/9/2014 expressing its intention to acquire a portion of **Land Parcel Number Ndeiya/Ndeiya/506**. The interested parties were designated as the registered proprietors of the said land and hence the beneficiaries of the compensation money. She added that on 26/9/2014, through her advocates, she wrote to the respondent seeking its formal confirmation that it would not facilitate or direct compensation or carry out inquiry as to compensation of the interested parties or any other person in relation to the suit property until **Nairobi High Court Environment and Land Case No 3 of 2010 (formerly Nyeri HCCC No 158 of 2009)** which was pending in court would be heard and determined. The respondent failed to respond to the said letter, prompting her to initiate the present proceedings.

5. The respondent filed a replying affidavit sworn on 28/8/2019 by Brian Ikol. Its case was that, once the *ex-parte* applicant became aware of the impugned Gazette Notice, she informed the respondent about the interest of the estate of **George Mburu Kabucho** in the suit property and the pendency of **Nairobi High Court Environment & Land Case No 3 of 2010**. He added that, once the respondent was informed, payment of monies in relation to the suit property was halted, pending the hearing and determination of the above case. The respondent further gave an assurance in the replying affidavit that compensation money would not be paid until a determination was made by the court as to the rightful owner of the suit property. Further, the respondent stated that the compensation money had been paid into a special account within the framework of **Section 115** of the **Land Act**.

6. The court record does not bear any replying affidavit or written submissions by the 1st and 2nd interested parties.

7. The case of the 3rd and 4th interested parties was that **Land Parcel Number Ndeiya/Ndeiya/506** measured 12 acres and was owned by the **late Mararo** who was father to the 1st to 3rd interested parties and husband to the 4th interested party. The **late Mararo** had three wives. Upon the death of the **late Mararo**, the four interested parties obtained a grant of letters of administration and the Grant was confirmed, leading to sub-division of the land into three portions, each measuring 4 acres, namely: (i) **Ndeiya/Ndeiya/2360** - given to the 1st and 2nd interested parties; (ii) **Ndeiya/Ndeiya/2361** given to the 3rd interested party; and (iii) **Ndeiya/Ndeiya/2362** - given to the 4th interested party. They contended that the *ex-parte* applicant did not have any interest in the 8 acres given to the 3rd and 4th interested parties. They added that there was no justification for stopping the 3rd and 4th respondents from being compensated.

8. The parties presented written submissions to canvass their respective cases.

9. I have considered the motion, the responses thereto, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The key issue falling for determination in this motion is whether the *ex-parte* applicant has made out a case to warrant grant of the judicial review orders sought in the motion.

10. The gist of the *ex-parte* applicant's case is that she is the administrator of the estate of the **late George Mburu Kabucho**. The said estate is contended to be the equitable owner of four (4) out of twelve acres of land comprised in **Title Number Ndeiya/Ndeiya/506**. The estate secured its interest through a caution. The four acre portion was the subject matter of **Nairobi High Court Environment and Land Case No No 3 of 2010** between the estate of the deceased and the interested parties. When the respondent published notice of its intention to compulsorily acquire a portion of the suit property, the estate of the deceased promptly and formally notified the respondent about its interest in the suit property and sought the respondent's assurance that it would withhold payment pending the hearing and determination of **Nairobi High Court Environment and Land Case No 3 of 2010**. The respondent did not respond to the estate's letter, prompting these proceedings.

11. The respondent has presented a sworn affidavit assuring that it will not release compensation money relating to the compulsorily acquired portion (0.0282 hectares) of the suit property until **Nairobi High Court Environment and Land Case No 3 of 2010** is heard and determined. The respondent has further given an assurance that the compensation money relating to the said compulsorily acquired portion of the suit property has been deposited in a special account within the framework of **Section 115** of the **Land Act** to await hearing and determination of **Environment and Land Case No 3 of 2010**.

12. There is common ground that there exists a court dispute relating to four (4) acres out of **Parcel Number Ndeiya/Ndeiya/506**. Secondly, the impugned compulsory acquisition exercise relates to **Parcel Number Ndeiya/Ndeiya/506**. Thirdly, there is no evidence before court to suggest that the sub-division alluded to by the 3rd and 4th respondents had been finalized at the time the Gazette Notice was published or at all.

13. The respondent has not explained why it did not respond to the *ex-parte* applicant's letter dated 26/9/2014 by giving to the *ex-parte* applicant an irrevocable assurance in the terms contained in Brian Ikol's replying affidavit sworn on 28/8/2019. It is clear from the evidence before court that it took the respondent about four years to give the assurance contained in Mr Ikol's affidavit.

14. In the circumstances, the court is satisfied that there is a proper basis for issuing a prohibitory order to preserve the compensation money in terms of **Section 115** of the **Land Act**, pending the hearing and determination of **Environment and Land Case No 3 of 2010**.

15. I have carefully considered the manner in which the prayers in the notice of motion under consideration was crafted. Besides seeking a prohibitory order relating to payment of the compensation money to the interested parties, the *ex-parte* applicant also sought an order of *certiorari* quashing the entire compulsory acquisition exercise. Further, the *ex-parte* applicant sought an order prohibiting the respondent against undertaking the compulsory acquisition exercise.

16. It is apparent from the impugned Gazette Notice dated 11/9/2014 and published on 19/9/2014 and from the relevant evidential materials placed before court that the respondent was exercising the state's power of eminent domain in terms of the **Constitution** and **Part VIII** of the **Land Act**. It is also apparent from the evidential materials before Court that the compulsory acquisition exercise was being undertaken on behalf of the Government's Department of Roads, and the portion compulsorily acquired was to be used for construction of a public road.

17. Other than faulting the respondent for failure to respond to its letter dated 26/9/2014, the *ex-parte* applicant has not demonstrated to the court a proper basis for halting the entire exercise through a blanket prohibition order or through an order of *certiorari*. Secondly, it is not lost to the court that the framework in **Section 115** of the **Land Act** contemplates a situation similar to what is before court and provides an

appropriate remedy. The essence of that framework is that, it provides for preservation of the compensation money while allowing the compulsory acquisition exercise to proceed.

18. It is therefore my view that it would be unmerited and inappropriate to quash the entire compulsory acquisition exercise or to grant a blanket prohibitory order in the circumstances of this judicial review motion. I will, in the circumstances, only grant a prohibition order limited to preserving the compensation money in terms of **Section 115** of the **Land Act**.

19. Because the motion herein has only succeeded partially, parties will bear their respective costs of the suit.

20. In light of the foregoing, the ex-parte applicant's notice of motion dated 1/12/2014 is disposed in the following terms:

a. An order of prohibition is hereby issued prohibiting the National Land Commission against releasing compensation money relating to the portion of land compulsorily acquired out of Land Parcel Number Ndeiya/Ndeiya/506 pending the disposal of Nairobi Environment and Land Case Number 3 of 2010 (or as currently designated), involving the ex-parte applicant and the interested parties herein.

b. The ex-parte applicant's plea for an order of certiorari and for a blanket order of prohibition is rejected for lack of merit.

c. There shall be no award of costs herein.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF JANUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Masinde for the Respondent

Ms Nyambura for the *Ex-parte* Applicant

Court Clerk - June Nafula