



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

PETITION NO. 29 OF 2019

IN THE MATTER OF ARTICLES 20, 23, 40, 50, 67 AND 159 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47 AND 50 OF

THE CONSTITUTION

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

ACT, THE LAND ACT, THE LAND REGISTRATION ACT

AND THE ENVIRONMENT AND LAND COURT ACT

BETWEEN

SHAKE TRADING COMPANY LIMITED.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

NAIROBI CITY COUNTY.....3RD RESPONDENT

RULING

At all material times, the petitioner was and still is the registered proprietor of all that parcel of land known as L.R No. 209/13279 (hereinafter referred to as “the suit property”). Through Gazette Notice No. 6865 published on 17th July, 2017, the 1st respondent directed the 2nd respondent to revoke the petitioner’s title in respect of the suit property on the ground that the property was reserved for the expansion of North Highridge Primary School.

The petitioner filed this petition on 13th June, 2019 challenging the 1st respondent’s decision to revoke its title over the suit property. In the petition, the petitioner contended that it was not heard by the 1st respondent before the 1st respondent made a decision to revoke its title and as such its constitutional right to be heard guaranteed under Articles 19(1), 22(1), 25(c), 27(1), 40(1), (2) and (6), 47(1) and (2), 48(1) and (2) and 50(1) of the constitution were violated by the 1st respondent. The petitioner averred further that its right to property, legitimate expectation, fair trial, protection of the law and fair administrative action were also violated by the 1st respondent. The petitioner averred that the 1st respondent was enjoined by the constitution to respect, observe, promote, protect and fulfill the principles and values that underpin the constitution.

Together with the petition, the petitioner filed a Notice of Motion application dated 10th June, 2019 seeking a conservatory order in the form

of an injunction restraining the respondents from revoking its title to the suit property and/or doing anything prejudicial to the suit property pending the hearing and determination of the petition. The application was brought on the grounds that the 1st respondent purported to conduct public hearing to review the title of the suit property without any prior written notice to the petitioner and hence condemned the petitioner without a hearing contrary to the rules of natural justice. The petitioner averred that unless the conservatory order sought was granted, the petitioner was at risk of suffering a huge financial loss to the tune of more than US \$ 55,000,000/=.

The petitioner's application came up for hearing ex-parte on 14th June, 2019 when the court directed that the application be served upon the respondents, and the Attorney General and North Highridge Primary School which had not been made parties to the petition for mention on 3rd July, 2019 for directions. When the application came up for mention on 3rd July, 2019, the petitioner had only served the respondents and only the petitioner's advocate and the 1st respondent's advocate appeared in court. The Attorney General and North Highridge Primary School had not been served with the application. The advocate for the 1st respondent sought time to respond to the application and the court gave all the respondents 30 days to file their responses. The application was fixed for hearing on 25th February, 2020 and the petitioner directed to serve the application upon the Attorney General and North Highridge Primary School as had been directed earlier by the court.

When the application came up for hearing on 25th February, 2020 only the advocates for the petitioner, and the 1st and 3rd respondents appeared in court. The Attorney General, North Highridge Primary School and the Chief Land Registrar did not appear although they had been served. None of the respondents filed a response to the application even those who appeared in court for the hearing thereof. In his submissions in support of the application, Mr. Osoro who appeared for the applicant reiterated the contents of the affidavit and further affidavit of Rahim Chatur sworn on 10th June, 2019 and 27th June, 2020 respectively in support of the application. Mr. Osoro submitted that the petitioner had established a prima facie case of violation of the petitioner's fundamental rights by the respondents and urged the court to allow the application.

Ms. Masinde who appeared for the 1st respondent informed the court that the 1st respondent had no objection to the conservatory order sought by the petitioner save for the costs of the application. The advocate for the 3rd respondent, Mr. Eredi submitted that the 3rd respondent had nothing to do with the cancellation of the petitioner's title to the suit property and for that reason, there was no basis for granting the orders sought as against the 3rd respondent.

I have considered the petitioners' application together with the supporting affidavits. I have also considered the submissions by the advocates for the parties. In George Odero v Lake Victoria Environment Programme & Others [2015] eKLR, this court held that an applicant for a conservatory order under rule 23 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 had to demonstrate that;

- (i) He has a prima facie case.
- (ii) Unless the conservatory order is granted he is likely to suffer prejudice or injury as a result of violation of his constitutional rights or the Constitution.
- (iii) It would be in the public interest to grant the order.

I am satisfied from the material before me that the petitioner has met the threshold for granting a conservatory order. The petitioner has placed before the court uncontroverted evidence showing that it was and still is the registered owner of the suit property and that the 1st respondent without serving it with a notice proceeded to review its title to the suit property and recommended that the same be revoked by the 2nd respondent. The petitioner has also demonstrated that it stands to suffer substantial loss if the 2nd respondent proceeds to revoke its title to the suit property. I am persuaded that a prima facie case of violation of a right to be heard before a prejudicial decision is made and a right to a fair hearing have been established. It has also been demonstrated that the petitioner's right to own property is threatened with violation unless the order sought is granted to stop the intended revocation of its title.

Due to the foregoing, I find merit in the petitioner's Notice of Motion application dated 10th June, 2019. The application is allowed in terms of prayer 3 thereof as against the 1st and 2nd respondents only. The conservatory order shall last for a period of 24 months from the date hereof or until the hearing and determination of the petition whichever comes earlier. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 5th Day of May 2020

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Petitioner

N/A for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd Respondent

