



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**E.L.C. PETITION NO. 1 OF 2017**

**ANKHAN HOLDINGS LIMITED.....PETITIONER**

**VERSUS**

**KENYA FOREST SERVICE.....RESPONDENT**

**NATIONAL LAND COMMISSION.....INTERESTED PARTY**

**JUDGEMENT**

1. The Petitioner seeks a declaration that L.R. No. 18486, Ngong Road (“the Suit Property”) allocated to it is not within Ngong Road Gazetted Forest as the Respondent claims. It also seeks a declaration that the title issued to it over the Suit Property on 10/3/1994 was lawfully issued, and an order of certiorari to bring into this court the decision contained in the letter dated 28/11/2016 to the effect that the Suit Property forms part of Ngong Road Gazetted Forest for quashing. An order to prohibit the Respondent or its agents from trespassing, alienating, acquiring or in any manner interfering with the Suit Property is also sought together with costs of the suit.
2. The Petitioner applied to the Commissioner of Lands in March 1993 for allotment of land situated along Ngong Road and adjacent to Ngong Forest. The Commissioner of Lands wrote to the Ministry of Environment and Natural Resources on 13/4/1993 inquiring whether the land formed part of the gazetted forest given its proximity to Ngong Forest. The Director of Forestry informed the Commissioner vide the letter dated 21/5/1993 that the department had surrendered the land requested with immediate effect.
3. On the basis of that letter, the Commissioner of Lands offered the Petitioner allotment of the land delineated in deed plan number 100265/56A for a term of 99 years from 1/6/1993 through the letter of allotment dated 28/5/1993. The Petitioner paid the stand premium of Kshs. 3,080,000/= and annual rent of Kshs. 616,000/= on 8/3/1994.
4. The Minister of Environment and Natural Resources wrote to the Commissioner of Lands on 9/3/1994 stating that he was in the process of de-gazetting the land from the gazetted forest land. He attached a copy of the signed gazette notice dated 8/3/1994 to confirm this position. Based on this, a certificate of title was issued to the Petitioner by the Commissioner of Lands on 10/3/1994 in respect of grant number I.R.61850 for L.R. No. 18486, Ngong Road.
5. The Petitioner informed the Respondent vide its letter of 10/11/2016 that it wished to fence the Suit Property. It argued that this was a courtesy notification even though the Respondent had no right or interest over the Suit Property. The Respondent in its letter of 28/11/2016 claimed that the Suit Property formed part of Ngong Road gazetted forest. The Petitioner contends that this claim is a blatant attempt by the Respondent to acquire its property in contravention of Article 40 of the Constitution.
6. The Petitioner contends that the Respondent cannot resile from the representations made by the Minister of Environment and Natural Resources in the letters dated 21/5/1993 and 9/3/1994 together with the signed gazette notice dated 9/3/1994 since the Commissioner of Lands relied on the representations made by the Ministry in allocating it the Suit Property. The Petitioner argued that having been issued a lawful title it had a legitimate expectation that all processes and procedures had been followed before the title was issued and that it was therefore the bona fide and lawful registered proprietor of the Suit Property without notice of any restrictions on the Suit Property.
7. The Petitioner contended that Ngong Forest falls within the parcel of land comprised in L.R. No 81938 measuring 538.2 ha and that the Suit Property is distinct and separate from Ngong Forest.
8. The Petitioner attached a copy of the letter dated 21/5/1993 addressed to Commissioner of Lands by the Director of Forestry. The letter reads as follows:

**“RE: SURRENDER OF LAND – NGONG FOREST**

*Please refer to your letter ref no. 100265/53 dated 13/4/1993.*

*This is to confirm that the department has surrendered the letter requested with immediate effect.”*

9. The letter of allotment dated 28/5/1993 bears reference no. 100265/59 and refers to an un-surveyed residential plot, Ngong Road. The Petitioner also annexed copies of the draft gazette notice dated 8/3/1994, certificate of title over the Suit Property issued on 11/3/1994, together with the correspondence exchanged dated 10/11/2016 and 28/11/2016.
10. The Respondent opposed the petition based on its Grounds of Opposition filed on 17/3/2017 and the Replying Affidavit of Esther Keige, its Corporation Secretary. The Respondent contended that having transferred the Suit Property to NSSF, the Petitioner has no locus standi to bring this suit. It further contended that the Suit Property remains part of Ngong Road Gazetted Forest and has never been de-gazetted. She deponed that the National Social Security Fund (NSSF) wrote to the Chief Conservator of Forests in the Ministry of Lands claiming ownership of the Suit Property on 16/2/2004. She also noted that the Suit Property featured in the report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land presented to President Mwai Kibaki.
11. The Respondent contended that from Legal Notice number 174 of 1964 and Kenya Proclamations, Rules and Regulations of 1932, Ngong Road Forest has remained a gazetted forest. It argued that the procedure for de-gazettement of forest land was well entrenched in law and a draft Gazette Notice cannot pass a title to any entity. The Respondent attached a copy of the letter dated 16/2/2004 in which NSSF informed the Chief Conservator of Forests that the Suit Property was registered in its name on 16/5/1994.
12. The letter stated that there existed an access tarmac road which cuts across the plots leading to Nairobi International Show Ground. NSSF intended to develop the land and was planning to cut down the trees and clear the existing shrubs on the plot. NSSF made reference to the Gazette Notice signed by the Minister of Environment and Natural Resources dated 8/3/1994 saying these confirmed that the forest boundary was altered. The letter stated that NSSF intended to fence off the land which meant that the existing cemetery road would not be accessible from Ngong Road. The letter urged the Chief Conservator of Forests to liaise with the City Engineer, Nairobi City Council to create an alternative access to Nairobi International Show Ground from Ngong Road.
13. The Respondent produced Legal Notice No. 174 dated 20/5/1964 being A Declaration of Central Forests which had the schedule showing that Ngong Road Forest in Nairobi measured approximately 3,722 acres through Proclamation number 44 of 1932.
14. The National Land Commission (NLC) joined these proceedings as an Interested Party. Its Principal Land Officer, Zachary Ndege swore its Replying Affidavit. It confirmed that the Petitioner applied for allocation of the suit land on 2/3/1992 and annexed a copy of the application letter signed by Jonathan Moi. The letter stated that the Petitioner wished to apply for a piece of land situated along Ngong Road as per the attached map. A deed plan was annexed to that application which is not very legible although it appears similar in size and shape to the Suit Property that was ultimately allocated to the Petitioner.
15. The Interested Party confirmed that there was correspondence between the Commissioner of Lands and the Minister for Environment and Natural Resources prior to the allotment of the Suit Property to the Petitioner.
16. Parties filed submissions. Mr. Ngatia submitted that the Petitioner owns the Suit Property and seeks to assert its rights under Article 40 of the Constitution. It seeks the quashing of the Respondent's decision contained in the letter of 28/11/2016. He maintained that Ngong Forest measures 538.2 ha and a title over the forest was issued in 1999. He argued that the Suit Property is adjacent to the forest land but distinct from it. He contended that since the Petitioner was issued a title over the Suit Property, no process has ever been taken to challenge its validity. He relied on Section 23 of the Registered Titles Act which was the operative law under which titles could be challenged. On the issue of locus standi, the Petitioner argued that there is a distinction between privity of contract and privity of estate. He urged that privity of estate enabled the Petitioner to pursue its rights acquired upon being issued with title which it can transfer to NSSF.
17. Mr. Mbuthia appeared for the Interested Party which supports the petition. He aligned himself with the submissions of Mr. Ngatia. He stated that having analysed the procedure adopted by the Commissioner of Lands in allocating the Suit Property to the Petitioner, NLC found that it was procedural and as envisaged by the Government Lands Act. According to him, the only issue was the failure to publish the de-gazettement notice. It was his submission that this was an irregularity that can be cured. He urged that the Respondent's officers having reached a decision to avail the land for private use, the omission to de-gazette the suit land was of no effect. He maintained that since the Respondent had surrendered the land it was available for allocation. He concluded that the suit land was available for allocation and that the only issue outstanding was to have the de-gazettement notice published which is the function of the Government Printer. He implored the court to consider the public interest as the land had been transferred to NSSF.
18. Mr. Macharia opposed the petition on behalf of the Respondent. He urged the court to consider the fact that the letter of allotment is dated 28/5/1993 while the purported gazette notice is dated 8/3/1994 after the purported allocation had been done. He maintained that the suit land is forest land which can only be acquired through a gazette notice which would de-gazette the forest land and avail it for allocation to private individuals. He referred the court to the Forest Act which requires that 21 days' notice be given which was not done in this case. The impugned Gazette Notice is dated 8/3/1994.
19. On 9/3/1994 the Minister wrote to the Commissioner of Lands advertising him that he was in the processing of de-gazetting the land in question. The Petitioner's title was issued the next day on 10/3/1994 granting the Petitioner a 99-year lease from 1/6/1993. It is admitted that the Gazette Notice was never published. The Respondent submitted that the documents relied on by the Petitioner cannot form the basis of a right that should be upheld by this court under the Constitution.
20. Mr. Macharia urged that the Petitioner approached the Commissioner of Lands vide its letter of 2/3/10092 seeking to be allocated land near Ngong Road in line with the map it attached yet there was no land available for allocation at that time when it made the application. He urged that the Suit Property was already alienated as forest land and relied on the Government Lands Act which has since been repealed. He urged that having failed to follow the procedure for de-gazettement of forest land, the suit land was not properly acquired and the Petitioner

cannot claim a constitutional right to that land.

21. Mr. Macharia contended that the Respondent's letter of 10/11/2016 was not an administrative decision but was in response to the Petitioner's advocate's letter seeking to take possession of the Suit Property. On the issue of public interest, he submitted that it was unfortunate that NLC thought NSSF had a bigger public interest than all Kenyans and the animals who have a right to the enjoyment of the forest.

22. Mr. Ngatia clarified that there was a misconception that the Suit Property was part of forest land. He submitted that it never was part of forest land and that the acts that were followed were not necessary except to show that the Director of Surveys had objection to the land being allocated to private individuals.

23. The court has looked at the copy of the certificate of title in respect of I.R. No. 61850 for L.R. No. 18486 and notes that although this land was first registered in the Petitioner's name, the land was transferred to the Board of Trustees National Social Security Fund for Kshs. 70 Million on 16/5/1994. Under Section 23 of the Registration of Titles Act (now repealed), the court had to take as conclusive evidence the certificate of title which in this case shows that the Board of Trustees National Social Security Fund is the proprietor of this piece of land and is therefore the absolute and indefeasible owner of the suit land, subject to challenge on grounds of fraud or misrepresentation to which the registered proprietor is proved to be a party.

24. Section 26 of the Land Registration Act provides that the certificate of title is *prima facie* evidence that the person named as proprietor is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained in the title; and subject to challenge on grounds of fraud or misrepresentation to which the proprietor is proved to be a party; or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.

25. The registration of the Board of Trustees National Social Security as the proprietor of the Suit Property vested in this board the absolute ownership of the suit land together with all the rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of the lease pursuant to Section 24 of the Land Registration Act and subject to challenge on the grounds set out in Section 26 of that Act. Such rights include the right to bring suits such as this petition to enforce the registered proprietor's interest over its land.

26. The Board of Trustees National Social Security Fund, is not a party to this suit. It would not be fair for this court to make orders that may affect the National Social Security Fund as the registered proprietor without affording it an opportunity to be heard.

27. The court declines to grant the orders sought by the Petitioner. The petition is dismissed with costs to the Respondent.

**Dated and delivered at Nairobi this 1<sup>st</sup> day of October 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Opany holding brief for Mr. Ngatia for the Petitioner

Mr. Macharia for the Respondent

Mr. V. Owuor- Court Assistant

No appearance for the Interested Party