



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

PET NO 40 OF 2019

COLFAX HOLDINGS LIMITED.....PETITIONER

VERSUS

1. THE NATIONAL LAND COMMISSION

2. KENYA RAILWAYS CORPORATION.....RESPONDENTS

RULING

1. Before me for determination is the Petitioner's/Applicant's Chamber Summons application dated 24th September, 2019 brought under the constitution of Kenya 2010 and all other enabling provisions of the law and the inherent jurisdiction of the court. The applicant approached the court by way of certificate of urgency seeking inter alia that pending hearing and determination of the petition herein, a declaration be made that the 1st and 2nd respondents action non-compensation in respect of Land Reference Numbers MN/VI/29437/12, MN/VI/29473/11, MN/VI/29437/19, MN/VI/29437/20, MN/VI/29437/22, MN/VI/29437/23, is illegal, null and void *ab initio* and contrary to legitimate expectations as espoused in Article 28, 40 and 47 (2), and that pending the hearing and determination of the petition herein, funds earmarked for the compensation of the said parcels of land compulsorily acquired by the 1st and 2nd respondents be forthwith released to the petitioners.

2. The application is premised on the grounds on the body of the application and further supported by the affidavit of Harji Govind Ruda sworn on 24th September, 2019. It is deponed that the petitioner is the registered and beneficial owner of the aforementioned parcels of land that were compulsorily acquired for the construction of the Standard Gauge Railway. That the petitioner has the constitutional right to prompt full and just compensation. Further, that the petitioner is not a party to other suits, to wit ELC Number 405 of 2017 where there are injunctive orders issued against the 1st respondent herein from releasing any money in respect of whole or part acquisition of plot nos. MN/VI/29437/12, MN/VI/29473/11, MN/VI/29437/19, MN/VI/29437/20, MN/VI/29437/22, MN/VI/29437/23. That there is also another suit ELC No.273 of 2017 revolving around ownership dispute in regard to parcel NOS.MN/VI/909 and MN/VI/910 which are not related to the petitioner's parcels of land in any way. The petitioner's case is that it should not be victimized and denied their constitutional right to compensation by the respondents in dispute that the applicant is not a party. That the respondents will suffer no prejudice if the orders sought herein are granted.

3. The applicant's advocate relied on the case of **Isaiah Staito & 6 Others –v- County Government of Vihiga (2018)eKLR** and **Patrick Musimba –v- NLC & 5 Others Petition No. 613 of 2014** and submitted that the applicant ought to be compensated promptly, adding that they have continued to suffer not only losing occupation of their land since 2015, but also deprived of their right to compensation.

4. While admitting that the orders sought appear to be final in nature, counsel for the applicant submitted that the court has the inherent power to grant the orders sought in the interest of justice. The applicant's counsel relied on and cited the case of **Shepherd Homes Ltd –v- Shandahu (1971) 1 Ch D34**, and **Nation Media Group & 2 Others –v- John Harun Mwau (2014)eKLR**. The applicant further submitted that the legal threshold of sub judice has not been met in this case as it involves different parties from that in ELC No.405 of 2017 and cited the case of **Rep-v-Registrar of Societies Kenya & 2 Others Ex-Parte Moses Kirimi & 2 Others (2017)eKLR**. The applicant further submitted that it has met the principles of grant of conservatory orders and relied on the case of **Law Society of Kenya –v- The Attorney General and Another, JSC (interested Party)(2020)eKLR**, **Barsogat Investment Ltd –v- County Government of Vihiga and Christopher Ndarathi Murungaru –v- Kenya Anti-Corruption Commission and Hon. Attorney General (2006)eKLR**.

5. In opposing the application the 1st Respondent filed grounds of opposition dated 27th January, 2020 on the grounds that the orders sought in the application cannot be granted as prayed and framed at an interlocutory stage since they are final in their nature; that the matters raised in the entire petition are sub judice since they are directly and substantially before court in Mombasa ELC No.405 of 2017 where the courts have issued orders restraining the respondents herein from making any compensation over the suit land; and that the conditions for grant of conservatory orders have not been met and that the entire petition is an abuse of the court process.

6. I have considered the application and the submissions made. The essence of the petitioner's case is that it is the registered owner of the aforementioned parcels of land that were compulsorily acquired. The petitioner avers that the compensation amounts have not been released to the petitioner. In the petition, the applicant is seeking a declaration that the respondents' action of non-compensation in respect of the suit properties is illegal, null and void and contrary to the legitimate expectation as espoused in Article 28, 40 and 47 (2) of the constitution. The applicant is also seeking an order that the funds earmarked for compensation of the said parcels of land be forthwith released to the petitioner.

7. In the application herein, it is clear to me that the petitioner is seeking the same orders as those sought in the petition. Indeed those are the only prayers sought in the petition. In the case of **Olive Mwhaki Mugenda & Another –v- Okiya Omtata Okoiti & 4 Others (2016) eKLR**, the Court of Appeal considered a persuasive decision of India on issuance of final orders at interlocutory stage and stated:

“Ashok Kumar Bajpai –v- Dr. (Smt) Ramjama Bajpai, Air 2004, ALL 107, 2004 (1) AWC 88 at paragraph 17 of the India Court expressed as follows:

i.....it is evident that the court should not grant interim relief which amounts to final relief and in exceptional circumstances where the court is satisfied that ultimately the petitioner is bound to succeed and fact situation warrants granting such a relief, the court may grant the relief but it must record reasons for passing such an order to make it clear as what are special circumstances for which such a relief is being granted to a party.”

8. The courts have been reluctant to grant final orders at the interlocutory stage. However, the same may be granted, but only in special circumstances. In this case, the matters raised in the petition herein are said to be directly and substantially before court in ELC No.405 of 2017 where it is not in dispute that the court issued orders restraining the respondents herein from making any compensation over certain parcels of land, including the suit land. In my view, no special circumstances have been shown why the court should grant orders which amount to final orders at an interlocutory stage. Besides, the grant of the orders sought will amount to having two conflicting orders in this matter and ELC NO.405 of 2017. Having carefully considered the material before me, I cannot safely consider this a clear case that can be decided at once or in a summary manner. I am therefore not persuaded that the prayers sought should be granted.

9. The upshot is that the Notice of Motion dated 24th September, 2019 is devoid of merit and the same is dismissed with costs to the 1st respondent.

10. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF JULY 2021

C.K. YANO

JUDGE

In the presence of:

Borona for applicant

No appearance for respondent

Court Assistant – Yumna

C. K. YANO

JUDGE