



**Githae & another v National Land Commission & another (Environment & Land Petition 6 of 2018) [2020] KEELC 3879 (KLR) (30 January 2020) (Ruling)**

*Ephantus Githae & another v National Land Commission & another [2020] eKLR*

Neutral citation: [2020] KEELC 3879 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**

**ENVIRONMENT & LAND PETITION 6 OF 2018**

**JG KEMEI, J**

**JANUARY 30, 2020**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS) PRACTICE & PROCEDURE RULES, 2013**

**AND**

**IN THE MATTER OF ARTICLES 1, 10, 22(1), 27, 40, 60, 65 & 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE PHYSICAL PLANNING ACT, CAP 286 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 1, 10, 27, 40, 46 & 47 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

**EPHANTUS GITHAE ..... 1<sup>ST</sup> PETITIONER**

**JAMES MWANGI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MURANGA ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. The Notice of motion is brought under Rules 4(1), 19 and 23 of the [Constitution of Kenya \(Protection of rights and fundamental freedoms\) Practice and Procedure Rules](#), 2013.
2. The motion seeks one prayer that the Court issue conservatory orders directed at the Respondents restraining them from proceeding with approval and or consideration of an application for extension of leases lodged by the Proprietors in any manner dealing with the reversionary interests with respect to the properties being LR NO 12157/1-5, 12158 and 13289 (suit lands).
3. The motion is supported by the grounds adduced thereto and the supporting affidavit of the 1<sup>st</sup> Petitioner sworn on the 5/11/18. In it the Petitioner depones that the suit lands are leased to Delmonte Limited (Delmonte), a non-citizen Company for their exclusive utilization for pineapple farming canning and export. That the leases are for 49 years and are due to expire in 2022 at which time the Respondents are to make a decision on the fate of the reversionary interests of the suit lands.
4. The deponent further averred that he is aware that Delmonte has applied to the Respondents seeking an extension of leases. That Section 12 and 13 of the [Land Act](#) provides that upon expiry of the leases the reversionary interest vests in the Respondents and that Delmonte does not have any preemptive rights to the lease after expiry. He accused the Respondents of violating the provisions of Art 60 of the Constitution by not involving the Petitioners and the residents of Muranga County. He urged the Court to compel the Respondents to publish the steps they intend to take to ensure compliance with Art 60 and 65 of the [Constitution](#) in respect to the equitable access and utilization of the suit lands.
5. Further that the Respondents have not availed information in respect to the renewal of leases and have reasonable fear that the process may be done in secrecy and camouflaged manner and in contravention of the principles of access to information and public participation in the entire lease renewal process. He averred that the reversionary interest must be dealt with in compliance of the law to ensure maximum benefit to the people and residents of the County.
6. He stated that to accord with the Constitutional principles and citizens' right to equitable access to the suit property and ensure full compliance with the Constitutional principles governing utilization and management of the suit lands, the Respondents should be compelled to invite suitable bids from members of the public capable of holding utilization and management of the suit lands so as to give effect to the provisions of Art 60 of the [Constitution](#). In addition, he stated that only a detailed tender document for lease of land would be in complete accord with the Constitutional principles that guide the process of reallocation of the reversionary interest for the interest of the public and ensure transparency and equitable access.
7. The 2<sup>nd</sup> Respondent opposed the motion through the replying affidavit dated the 3/12/18 sworn by Hon S T Masaki, the County Executive Committee Member. She stated that the leases for the suit lands expire in 2022 and that Delmonte has commenced the process of applying for the renewal of the said leases. She stated that no decision has been made as the process is still in its infancy stage. That at the opportune time the 2<sup>nd</sup> Respondent shall inform and involve the residents of the county of the renewal process. That the 2<sup>nd</sup> Respondent as the custodian for the local communities will take into consideration the land use in the county for maximum economic benefit of the public and the communities and such land use include commercial and industrial use of the land. That in view of the fact that the leases are yet to expire the deponent opined that the application is premature.



8. The motion was not contested by the 1<sup>st</sup> Respondent.
9. The Petitioners submitted that the suit lands are public properties leased to Delmonte for a period of 49 years which term expires in 2022. That on expiry the reversionary interest shall vest in the Respondents on behalf of the public as public assets which ought to be dealt with in a transparent free and fair manner as per the dictates of the law. That the Respondents have secretly received applications for renewal without any public advertisement inviting the members of the public to bid in accordance with the Public procurement laws. That to that extent a *prima facie* case has been established.
10. That there is reasonable fear that the Respondents will consider process and issue extension of leases of the subject properties to Delmonte thus rendering the petition nugatory.
11. In respect to whether there is public interest the Petitioners submitted that the reversionary interest is a public asset that should be dealt with in accordance with the law for the benefit of the residents of Muranga. That the conservatory orders sought will grant all Kenyans an opportunity to participate in the renewal of the leases through public procurement and further so that they may register their complaints reservations or dealings regarding any intended action on the subject properties.
12. The 2<sup>nd</sup> Respondent filed submissions and stated that no *prima facie* case has been established by the Petitioners to warrant grant of conservatory orders. It noted that though the application for renewal of leases has been received there is no substantive decision that has been made.
13. I have carefully considered the submissions, the application against the petition. The key issue that has crystalized for my determination in my considered view is whether at this stage the Court should grant conservative orders sought.
14. In any proceedings brought challenging the violation, infringement or threat to a right under the bill of rights enunciated in Art 22 of the [Constitution of Kenya](#), this Court is empowered to grant appropriate relief under Art 23 (3) of the [Constitution of Kenya](#). Such reliefs include a conservatory order.
15. It is now settled that an applicant for a conservatory or interim order under Rule 23 of the [Constitution of Kenya \(protection of the rights and fundamental freedoms\) Practice and Procedure Rules, 2013](#) must demonstrate that: -
  - a. He has a *prima facie* case.
  - b. Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his Constitutional rights or the Constitution.
  - c. It would be in the public interest to grant the order.
16. The definition of a *prima facie* case is now well settled. A *prima facie* case is a case in which on the material placed before a Court, a Court properly directed will concluded that there is a right which has been infringed by the other side to warrant an explanation or a rebuttal from that party. The person must show evidence of an infringement of a right and the probability of success in a trial. It must be. See [Mrao Ltd v First American Bank Kenya Limited & 2 others](#) (2003).
17. In this case, the Petitioner has averred that the Respondents are in receipt of an application for renewal of leases which leases were granted to Delmonte for a period of 49 years wef 1973. The leases are due for expiry in 2022. It is their argument that reversionary leases being public assets they and the residents of Muranga should be given access to information about the process as well as involvement by way of public participation. That the Respondents have failed to deal with the reversionary interest in



- accordance with Art 60 and 65 of the Constitution. They fear that the leases may be renewed under cover of secrecy and in a camouflaged manner.
18. Art 60 of the Constitution provides the overarching principles of land policy in Kenya. It decrees that land shall be held, used and managed equitably, efficiently, productively and sustainably and in accordance with the principles of interalia; equitable access to land, security of land rights, sustainable and productive management. This is in recognition that land being a natural resource is inelastic and has to be dealt with in a manner to achieve maximum benefit and sustain it for future generations.
  19. It must be noted that the suit lands are still registered under the name of Delmonte Limited and that the leases expire in 2022. As at now the suit properties are therefore private property and therefore there are no public assets in form of reversionary interest that the Petitioners have alluded to in the application. Upon expiry of the leases the inherent reversionary interest shall vest to the Respondents who are expected to handle it either for use, holding and or management in accordance with the tenets of Art 65 and section 12 and 13 of the Land Act whether or not the leases are required to be extended for another term or not.
  20. Art 65 of the Constitution of Kenya read together with the provisions of Section 12 and 13 of the Land Act govern the renewal of leases in the new Constitutional dispensation. I will not go into the details as this is the gist of the Petitioners suit. These provisions govern the manner in which a renewal of lease is to be dealt with by the Respondents.
  21. Art 65 makes provision for land holding by non-citizens in this Country. A non-citizen may hold land on the basis of lease hold tenure only and in the event the lease period is greater than 99 years the Constitution deems the period as 99 years and no more. Section 13 of the Land Act directs the National Land Commission to notify the lessees by registered mail of the expiry of the lease and inform him of the preemptive rights 5 years before the actual expiry of the lease. It further details the steps that the Nation Land Commission takes in renewing the lease and in the event the renewal of the lease is declined, the reason for the refusal must be given to the lessee.
  22. The law provides under the Land (Extension And Renewal Of Leases) Rules, 2017 LN 281/2017 the steps that the National Land Commission must take before the lease is renewed. The County Government plays a critical role as the custodian of public interest on behalf of the residents of the county. In this case the representative of the county confirmed that the application was received and that no substantive decision has been taken. She sought to assure the Petitioners that at the right time the lease renewal shall be considered in accordance with the law.
  23. Among the steps enumerated in the above provisions does not include the recommendations proposed by the Petitioners which is that the leases be dealt with by way of public tender. I say no more in view of the petition that has not been determined.
  24. The Petitioners have argued that the Petitioners have availed access to information in respect to the leases. The nature of information has not been stated. In addition, there is no evidence that the said information was sought in writing and refused. It is the law that the person requiring information must first seek the information and when it is refused then the recourse made to the Court. None of these have been demonstrated.
  25. It is not clear to my mind what constitutional right has or is being threatened with violations to warrant this Court to issue conservatory orders. The Petitioners failed to demonstrate *prima facie* case. It is the finding of the Court that the application is brought prematurely.



26. Further due to the infancy of the stage of the renewal process, the Court is unable to see how the Petitioners will be prejudiced if the conservatory orders are not granted. They have failed to show the prejudice that they are likely to suffer.
27. As stated above no public interest has crystalized as the leases are due to expire in 2022. The suit properties are still vested in the private entity and the process is at its infancy and therefore the question as to what public interest need to be protected and further what rights have been violated remain unclear.
28. In the upshot I find the motion unmerited and it is dismissed with costs to the Respondents.
29. It so ordered.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JANUARY 2020**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

1<sup>st</sup> & 2<sup>nd</sup> Petitioners – Absent

1<sup>st</sup> & 2<sup>nd</sup> Respondents– Absent.

Irene and Njeri, Court Assistants

