



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL CASE NO 43 OF 2018**

**ALTANA CORPORATION**

**LIMITED.....PLAINTIFF/ RESPONDENT**

**VERSUS**

**CLARENCE MATHENY LEADERSHIP TRAINING**

**INSTITUTE .....DEFENDANT/APPLICANT**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**ETHICS AND ANTICORRUPTION**

**COMMISSION..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Defendant took out a motion on notice dated 8<sup>th</sup> November 2019 and filed on even date, brought under Articles 10 and 40(3)(b) of the Constitution, sections 1A,1B,3A and 63 of the Civil Procedure Act and Order 51 rule 1 of the Civil Procedure Rules, 2010. The motion seeks two main orders. First; that **Kshs. 710, 801, 070** be released to it, and, second; that **Kshs 77, 188, 498.40** be transmitted back to the National Treasury. The Applicants further prays that **Kshs 139, 895, 511/=** be held in court pending the hearing and determination of the main suit herein. The motion is based on the grounds on its face and on the affidavit of Samuel Kung'u Karanja Kamara, also sworn on 3th November 2019.

2. The grounds in support of the motion are that whereas this court, by a ruling dated 14<sup>th</sup> February 2019, issued an injunction restraining the 1<sup>st</sup> Interested Party from releasing **Kshs 927,885,080** to the Defendant/Applicant, and whereas the money was deposited in court, the Ethics and Anti-Corruption Commission, the 2<sup>nd</sup> Interested Party, withdrew its petition, **ELC constitutional Petition No 9 of 2019** Ethics and Anti-Corruption Commission v National Land Commission & Others, after it entered into a consent with the Defendant herein. In that consent, the Defendant accepted **Kshs 850,696581.60** as the full compensation for compulsory acquisition of its parcel of land **No. Ngong/Ngong/15559**.

3. The consent further required that **Kshs 77,188,498.40** be released to the National Treasury, while **Kshs 139,895,511**, the subject of this suit, is to remain in court until the determination of this suit.

4. Samuel Kung'u Kamau, in his affidavit, reiterates the facts and the grounds on the face of the motion. He deposes that there was a consent filed before the ELC accepting the final compensation to the Defendant/Applicant, the manner of distributing the money. He deposes that the consent concluded the petition before that court. He also attaches the various rulings previously made by this court and the order of the ELC adopting the consent recorded before that court ELC on 7<sup>th</sup> November 2019 in relation to Parcel **No Ngong/Ngong/15559** belonging to the defendant.

5. The application is opposed by the Plaintiff/Respondent through a replying affidavit by Zaheer JHanda, sworn on 19<sup>th</sup> November 2019. In that affidavit, the deponent admits that the money was deposited in court pursuant to a court order, and that the money was to be held pending the filing of ELC case in the Environment and Land Court which was done. He however, states that should the money be released, the substratum of the suit will be lost as well as that in the ELC case and public interest.

6. The deponent argues that the 2<sup>nd</sup> Interested Party who is the Petitioner in the ELC and the Defendant/Applicant herein, have colluded to settle the Petition out of court in the ELC through the consent adopted by that court on 7<sup>th</sup> November 2019. According to the deponent, although that court adopted the consent, it reserved a ruling on costs and therefore, that matter has not been fully concluded.

7. He states that the consent recorded before the ELC involved only 2 parties out of the 6, thus questioning the motive of that consent. The deponent further states that there is a cross petition still pending before the ELC, which has not been determined and, for that reason, this court should not grant the orders it is being asked to make.

8. During the hearing of the application, Mr. Echesa learned counsel for the Applicant, moved the motion and urged the court to grant the orders sought. He argued that the consent recorded before the ELC concluded the petition between the petitioner, the 2<sup>nd</sup> Interested Party herein and the 2<sup>nd</sup> Respondent, the Defendant herein who is the owner of the subject land. He therefore argued that there would be no reason to keep the money in court.

9. Mr. Wambugu, learned counsel for the 2<sup>nd</sup> Interested Party, supported the application and urged the court to order the release of the money in terms of the consent recorded before the ELC.

10. Miss Akello, learned counsel for the Plaintiff/Respondent, argued that the matter has not been finalized; that there is a cross-petition before the ELC and that there is a ruling on costs that is yet to be delivered. Counsel further argued that the plaintiff herein, who is the 3<sup>rd</sup> Respondent in the ELC suit was not party to the consent, and has filed a notice of appeal signifying their intention to appeal against the consent order. She therefore urged the court to dismiss the application.

11. I have considered the application, the responses and submissions by counsel for the parties. I have also perused the consent order recorded before the ELC and the various rulings of this court, **(Nyakundi, J)** ordering depositing of the money in court.

12. The Defendant/Applicant and the 2<sup>nd</sup> Interested Party recorded consent before the ELC in which they agreed on the amount of compensation to be paid to the Defendant/Applicant, as compensation for its parcel of land. In this application the applicant seeks release of the money in the manner specified in the orders sought.

13. First; that order was adopted as a decision of a court of competent jurisdiction to handle the matter before it. It is also a court of concurrent jurisdiction to this court. That consent has not been set aside to this day.

14. Second, the consent order recorded before that court does not, in my view, interfere with the substratum of the matter pending before this court. The order sought clearly states that the money, the subject of the dispute before this court, should remain in court until the determination of that dispute by this court. the balance of the money is to be released to the National Treasury as it is public money.

15. The Plaintiff/Respondent has argued that it is appealing against the consent order recorded before the ELC. They are perfectly in order to do so, as that is their constitutional right. However, this court cannot stay an order by ELC given the clear constitutional provisions in Article 165(6) which bar this court from superintending other superior courts. In that regard, the option available to the plaintiff respondent was to apply for stay before that court, or seek stay of execution before the Court of Appeal.

16. In the circumstances, I am satisfied that there is a valid consent and this court has no option but to accord it the legitimacy it commands. I also do not see the reason for keeping public money in court which does not form the basis of the dispute before this court.

17. Consequently, the application dated 8<sup>th</sup> November 2019 is allowed as follows;

**a) The orders of this court issued on 28<sup>th</sup> November 2018 and 14<sup>th</sup> February 2019 respectively, be and are hereby reviewed to the extent that, the Deputy Registrar of the court is hereby directed to immediately release and pay the Defendant, CLARENCE MATHENY LEADERSHIP TRAINING INSTITUTE, the sum of Kshs. 710, 801,070/=**

**b) The sum of Kshs. 77,895,498.40 be immediately transmitted to the National Treasury**

**c) The sum of Kshs 139, 895,511/= be retained in court pending the hearing and determination of this suit.**

**d) Each party do bear their own costs of this application.**

**Dated, Signed and Delivered at Kajiado this 7<sup>th</sup> day of February 2020.**

**E C MWITA**

**JUDGE**