



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2016

TAMBAYYA ENTERPRISES LIMITED.....1ST PETITIONER
BROOKSIDE STUDIOS LIMITED.....2ND PETITIONER
ABISHAX HEIGHTS LIMITED.....3RD PETITIONER
CATHERINE R. NJERI.....4TH PETITIONER
VALEVIEW PLAZA LIMITED.....5TH PETITIONER
INDUSTRIAL COLLABORATIVE LIMITED.....6TH PETITIONER
PHILIP K. WAINAINA.....7TH PETITIONER
MAREWA PLANTATIONS LIMITED.....8TH PETITIONER
JENNIFER WANJIRU NJAU.....9TH PETITIONER
NOEL K. WAMBUA.....10TH PETITIONER
JAMMA CONSOLIDATED LIMITED.....11TH PETITIONER
PARKSIDE MEDICAL CENTRE.....12TH PETITIONER
SATELLITE INDUSTRIAL SUPPLIES LIMITED.....13TH PETITIONER
WARIMAX GENERATION LIMITED.....14TH PETITIONER
GATHIRU ENTERPRISES LIMITED.....15TH PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT
REGISTRAR OF TITLES.....2ND RESPONDENT
ATTORNEY GENERAL.....3RD RESPONDENT
ETHICS AND ANTICORRUPTION COMMISSION.....INTERESTED PARTY

RULING

1. Through a petition dated 13th December 2015, the petitioner herein sued the respondents seeking the following orders:

a) A declaration that Gazette Notice No. 15580 in Volume CXII- No. 124 of the Kenya Gazette of 26th November 2010 and its effect violate the principles of the Constitution and is thus unconstitutional.

b) A declaration that Gazette Notice No. 15580 in Volume CXII- No. 124 of the Kenya Gazette of 26th November 2010 violates the fundamental rights and freedoms of the petitioners to own land and to equal benefit and protection of the law.

c) A declaration that Gazette Notice No. 15580 in Volume CXII- No. 124 of the Kenya Gazette of 26th November 2010 violates the principles of expeditious, efficient, lawful, reasonable and procedurally fair administrative actions enshrined in articles 27,47,48 and 50 the Constitution;

d) An order of judicial review to move into the High Court and quash the decision of the Registrar of Titles revoking the petitioners' titles to L.R No. 209/13539/124, L.R No. 209/13539/82, L.R No. 209/13539/47, L.R No. 209/13539/148. L.R No. 209/13539/108, L.R No. 209/13539/140, L.R No.209/13539/113, L.R No. 209/13539/109, L.R No. 209/13539/114, L.R No. 209/13539/107, L.R No. 209/15339/97, L.R No. 209/13539/61, L.R No. 209/13539/42, L.R No. 209/13539/74 and L.R No. 209/13539/94:

e) Costs of this application.

f) Any other or further relief that this Honourable court considers appropriate and just to grant.

2. The petition was opposed through the 1st respondents grounds of opposition dated 29th April 2016 parties thereafter took directions that the petition be canvassed by way of written submissions and on 18th October 2017, Mativo J. granted the petitioners 21 days to file and serve written submissions after which the respondents and the interested parties were to file the written submissions. Several mentions date were thereafter fixed to confirm compliance when further directions were taken for one reason or the other but mainly for the reason that there was no evidence of service of the mention notices.

3. On 27th June 2018, the petitioner's counsel informed the court that the petitioners required more time to file submissions which request counsel for the respondents opposed on the basis that the petitioners did not appear keen on prosecuting their case.

4. The court however, adjourned the case to 1st October 2018, when the petitioner's counsel once again informed the court that the petitioners wished to proceed with the case by way of written submissions, a proposition which the interested party's vehemently opposed on the basis that the petitioners had in the past sought numerous adjournments to enable them file submissions and had completely failed to honour their word or the court's orders granting them time to file submissions.

5. The interested party urged the court to dismiss the petition for want of prosecution and upon considering the totality of the circumstances surrounding this petition and the past adjournments that had been granted at the petitioner's instance, this court declined to grant the petitioners any further adjournments and dismissed the petition for want of prosecution thereby precipitating the filing of the application dated 2nd October 2018 that is the subject of this ruling.

6. In the said application dated 2nd October 2018, the applicants seek orders to set aside these courts orders of 1st October 2018 dismissing the petition for want of prosecution.

7. The applicant argued that the Mutunga Rules do not allow for the dismissal for failure to file submissions as Rule 22 of the said Rules is not couched in mandatory terms. According to the applicants, the court could still determine the petition despite the fact that the submission had not been filed.

8. The applicants counsel submitted that the petition should not have been dismissed on 1st October 2018 as the said date was for mention and not the hearing.

9. Counsel attached a copy of the draft submissions to the application and submitted that the nature of the orders sought in the petition require a determination on merit.

10. In a rejoinder, Mr. Mbutia, learned counsel for the respondent, submitted that under Article 159(2) (b) of the Constitution, justice should not be delayed and that the Constitution supersedes the rules. Counsel observed that it has been over 1 year since the petitioners intimated to the court that they intended to canvass the application by way of written submissions which they did not file.

11. On his part, Mr. Shamalla, learned counsel for the interested party, submitted that the application has no merit as the applicants did not explain why they had not filed their written submissions.

12. I have considered the application dated 2nd October 2018 and the responses by the respondents and the interested party. The main issue for determination is whether this court should set aside the orders of 1st October 2018 dismissing the petition for want of prosecution.

13. In the instant case, I note that it is the petitioners who as early as 12th October 2017, requested and/or suggested that they wished to canvass their petition by way of written submissions after which the court granted them 21 days to file the same. It turns out, as I have already noted in this ruling that no submissions were filed by the petitioners despite several other numerous adjournments and that on 1st

October 2018 almost one year after directions were given on the filing of submissions, the petitioners were still asking the court for more time to file submissions.

14. My finding is that this court was justified to hold that the petitioners, in failing to file written submission, had lost interest in their own case as they had chosen to engage the court in an endless game of adjournments at the expense of the respondents and the interested party who were keen on having the matter determined.

15. Be that as it may, I will exercise my discretion and allow the instant application to set aside the orders of 1st October 2018 but on condition that the petitioner file and serve their written submissions to the petition within 7 days from the date of this order hereof in which submissions, the petitioners should also canvass the issue of the jurisdiction of this court to hear and determine the petition herein in view of the orders /prayers sought therein especially prayer(d) of the petition.

16. The respondent and the interested parties shall file and serve their written submissions within 14 days from the date of service with the petitioner's submissions. Mention on 12th March 2019 for further directions. The costs of this application shall abide the outcome of the petition.

Dated, signed and delivered in open court at Nairobi this 3rd day of December 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Njenga for the petitioner

Mr Wahome for Miss Masaka for the 1st respondent

Mr Wahome for Mrs Shamalla for the interested party.

Court Assistant – Kombo