



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 188 OF 2015

IN THE MATTER OF ARTICLES 22(1) OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

ACT, 2012

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER ARTICLES 19, 20, 21(1), 24, 27, 28, 40, 47, 50 AND 60(1) OF

THE CONSTITUTION

BETWEEN

AIRPORT VIEW HOUSING LIMITED.....PETITIONER

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE CABINET SECRETARY

MINISTRY OF LAND, HOUSING &

URBAN DEVELOPMENT.....2ND RESPONDENT

NAIROBI CITY COUNTY.....3RD RESPONDENT

THE CHIEF LAND REGISTRAR.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

What is before me is a Notice of Motion application dated 25th February, 2015. In the application, the petitioner/applicant (hereinafter referred to only as “the applicant”) has sought seven prayers. Prayers 1, 2 and 3 in the application are spent. The same were sought pending the inter partes hearing of the application. The substantive prayers left in the application are prayers 4, 5 and 7 which seek the following orders;

1. THAT a conservatory order be issued restraining the 1st respondent by itself, its commissioners, directors, servants, agents or otherwise howsoever from conducting the public hearing on the review of grant or disposition of L.R No. 209/12848 scheduled for

Friday, 13th March, 2015 pending the hearing and determination of the petition.

2. THAT a conservatory order be issued restraining the 4th respondent or any other registrar undertaking duties of land registration and/or administration from revoking, registering any transaction in or making any entry on the title to L.R No. 209/12848 save for the orders issued by this honourable court pending the hearing and determination of the petition.

3. THAT the costs of the application be provided for.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of the applicant's director, Mandip Singh Amrit sworn on 25th February, 2015. The applicant averred that all material times, it was and still is the registered proprietor of all that parcel of land known as L.R No. 209/12848 (hereinafter referred to only as "the suit property"). The applicant averred that the suit property came about as a result of amalgamation of two parcels of land namely, a portion of L.R No. 209/11296 (L.R No. 209/11296/100) and L.R No. 209/12256 which were allocated to the applicant by the Government of the Republic of Kenya on 4th October, 1989 and 17th May, 1994 respectively.

The applicant averred that upon its registration as the proprietor of the suit property and issuance to it of the certificate of title by the registrar of titles, its title to the suit property became absolute and indefeasible in terms of section 23(1) of the Registration of Titles Act, Chapter 281(now repealed) and sections 24, 25(1) and 26(1) of the Land Registration Act, 2012. The applicant averred that its proprietary rights in the suit property were guaranteed, respected and protected under Article 40 as read with Article 60(1) of the Constitution of Kenya. The applicant averred that as the proprietor of the suit property, it had a guarantee and protection of the law against any deprivation or interference with its property and had a legitimate expectation that any holdings, reports, decisions or acts of interference with its proprietary interest in the property would be administratively fair and shall be done in compliance with the Constitution of Kenya and the law.

The applicant averred that for some years prior to the filing of the present petition, Langata Road Primary School (hereinafter referred to only as "the school") which is situated on its own parcel of land owned by the 3rd respondent had entered upon, occupied and claimed that the suit property was its playground and that the same had been allocated to it. The applicant averred that the school had never produced any document showing that it owned the suit property. The applicant averred that the 3rd respondent had on many occasions acknowledged the applicant's title to the suit property and directed the school to vacate the same. The applicant averred further that the 1st, 2nd, 4th respondents had also acknowledged the applicant's ownership of the property and together with the 3rd respondent had approved the subdivision and amalgamation that gave rise to the suit property.

The applicant averred that in 2014, it obtained approval from the 3rd respondent and erected a perimeter wall to demarcate the boundaries of the suit property with a view to commencing development thereon. The applicant averred that after the construction of the said wall, there were media reports that the applicant had grabbed the suit property from the school. The applicant averred that on 16th January, 2015, the 1st respondent's commissioners visited the suit property without notice to the applicant and addressed the public in which address they claimed that the suit property belonged to the school. The applicant averred that on 19th January, 2015, the 3rd respondent without any basis in law through its agents and officers with the assistance of members of the public invaded the suit property and knocked down the wall that had been put up around it by the applicant. The applicant averred that the 1st and 2nd respondents were once again reported in the press claiming that the suit property belonged to the school.

The applicant averred that on 19th January, 2015, the 1st respondent put up an advertisement in a local newspaper pursuant to section 14 of the National Land Commission Act, 2012 giving notice to the public that it would conduct a public hearing for review of the title to the suit property on 9th February, 2015. The applicant averred that in the advertisement, the 1st respondent invited concerned parties to file memoranda/representations and documents by Friday, 23rd January, 2015. The applicant averred that in response to that notice, it filed its memorandum and documents with the 1st respondent on 23rd January, 2015 and followed it with a letter of protest on 3rd February, 2015. The applicant averred that the 2nd respondent had also declared to members of the public that the applicant had grabbed the suit property. The applicant averred that the 3rd respondent had proceeded to erect another wall on the suit property thereby denying the applicant access and use of the property.

The applicant contended that the 1st respondent had no jurisdiction under section 14(1) of the National Land Commission Act (the Act) to review the grant in respect of the suit property which was private land. The applicant contended that the 1st respondent's review powers under section 14(1) of the Act was limited to public land. The applicant averred that in purporting the review the title of the suit property, the 1st respondent was acting in excess of its powers. Without prejudice to that contention, the applicant contended that from the utterances of its commissioners, the 1st respondent had already conducted its own investigations, reviewed the title of the suit property and concluded that the same belonged to the school and that the applicant acquired the same illegally.

The applicant averred that the said decision was arrived at without affording it an opportunity to be heard thereby violating its right to a fair hearing and a fair administrative action. The applicant averred that the 1st respondent having continuously referred to the applicant as a grabber of public land, it had acted in unfair and biased manner and as such could not be an impartial arbiter envisaged under Article 50(1) of the Constitution and section 14 of the Act. The applicant averred that the 1st respondent had ignored all the foregoing issues that had been raised with it and had scheduled a hearing of the review of the title of the suit property on 13th March, 2015. The applicant averred that if the said process which was being challenged in these proceedings was allowed to proceed, the petition herein would be rendered futile. The applicant urged the court to grant an order staying the proceedings before the 1st respondent pending the hearing of the petition.

The application was opposed by the respondents. The 1st and 3rd respondents opposed the application through a joint grounds of opposition dated 20th March, 2015. The 1st and 3rd respondents contended that the application did not meet the threshold for granting the orders sought. The 1st and 3rd respondents contended that the 1st respondent had powers under section 14(1) of the Act to review grants and dispositions of

public land which power could not be curtailed on speculative grounds. The 1st and 3rd respondents averred that the applicant's title was yet to be reviewed by the 1st respondent and as such the allegation of bias was speculative. The 1st and 3rd respondents averred that there was no threat of revocation of the applicant's title to warrant the grant of the orders sought.

The 2nd, 4th and 5th respondents also opposed the application through a joint grounds of opposition dated 7th April, 2015. The 2nd, 4th and 5th respondents contended that the orders sought by the applicant were contrary to the law particularly Article 68(v) of the Constitution and section 14 of the National Land Commission Act, 2012. The 2nd, 4th and 5th respondents averred that the 1st respondent had power to review all grants or dispositions of public land to establish their propriety and to direct the Land Registrar to revoke titles where necessary.

The application was heard by way of written submissions. The applicant filed its submissions on 9th April, 2015 while the 1st and 3rd respondents filed their submissions on 23rd March, 2015. The 2nd, 4th and 5th respondents did not file submissions. The parties highlighted the submissions before Onguto J. on 20th April, 2015. Onguto J. did not deliver a ruling on the matter due to the decision that was made by the Court of Appeal to the effect that Environment and Land Court judges had no jurisdiction to hear matters reserved for the High Court and vice versa. Since Onguto J. was a judge of the High Court, he was unable to determine the present application that was heard before him. The matter came to this court for the purposes only of writing the ruling that was pending.

I have considered the petitioner's application together with the supporting affidavit. I have also considered the submissions by the advocates for the parties both written and oral. In Kevin K. Mwiti & Others v Kenya School of Law & Others [2015] eKLR the court stated as follows on the principles which govern the exercise of the court's discretion in applications for conservatory orders:

“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”

In Kenya Association of Manufacturers & 2 others v Cabinet Secretary Ministry of Environment and Natural Resources & 3 others [2017] eKLR the court had this to say on the same principles:

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

In Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR the Supreme court stated as follows:

“[86] *Conservatory orders* bear a more decided *public-law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. *Conservatory orders*, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant's case for orders of stay. *Conservatory orders*, consequently, should be granted on the *inherent merit of a case*, bearing in mind the *public interest*, the *constitutional values*, and the *proportionate magnitudes*, and *priority levels attributable to the relevant causes*.”

I have considered the application in the light of the foregoing principles. The applicant has raised several issues in the petition. However, the issue that has a strong bearing on the conservatory orders sought concerns the validity of the proceedings that were commenced by the 1st respondent for the purposes of reviewing the propriety of the title held by the applicant over the suit property. As I have mentioned above, the applicant has contended that the 1st respondent had no power to review its title to the suit property because the suit property is private land. The applicant has contended in the alternative that the 1st respondent is already biased against it and as such it would not get a fair hearing before it in the said review proceedings.

The onus was on the applicant to demonstrate on a prima facie basis that the 1st respondent had no power to review the title of the suit property and that the 1st respondent was likely to be biased against it. From the material before the court, I am not satisfied that the applicant has discharged this burden of proof. It was common ground that section 14(1) of the National Land Commission Act, 2012(the Act) gave the 1st respondent power to review grants and dispositions of public land for their propriety. I am not in agreement with the applicant at this stage that its title was not subject to review by the 1st respondent. The evidence placed before the court shows that the suit property was public land and that it was alienated to the applicant by way of a grant. In my view, since the suit property was a grant of public land by the Government of the Republic of Kenya to the applicant, its title was liable to review by the 1st respondent under section 14(1) of the Act. I am in agreement with the applicant that the suit property is now private land. However, what the 1st respondent is supposed to review is the process through which the suit property changed from public land to private land.

On the issue of bias, again, I am not satisfied that this has been established. I am not satisfied from the material placed before the court that the applicant's apprehension of likelihood of bias against it by the 1st respondent is reasonable. I have noted that the applicant had submitted

to the jurisdiction of the 1st respondent by filing its memorandum in support of the validity of its title to the suit property. There is no evidence that after the 1st respondent had initiated the process of reviewing the title of the suit property, it engaged in acts or utterances which may give reasonable apprehension of bias on its part against the applicant. For the forgoing reasons, I am not persuaded that the applicant has established a prima facie case of violation of its constitutional rights by the respondents to warrant a grant of the orders sought.

The upshot of the forgoing is that, I find no merit in the petitioner's Notice of Motion application dated 25th February, 2015. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 18th Day of June, 2020

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Ouma for the Petitioner

Mr. Masinde for the 1st Respondent

Mr. Kamau h/b for Mr. Motari for the 2nd, 4th and 5th Respondents

N/A for the 5th Respondent

Ms. C. Nyokabi-Court Assistant