



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.262 OF 2013

BETWEEN

SHREE VISA OSHWAL COMMUNITY

NAIROBI REGISTERED TRUSTEES.....PETITIONERS

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE COMMISSIONER OF LANDS.....2ND RESPONDENT

THE CABINET SECRETARY

IN CHARGE OF EDUCATION.....3RD RESPONDENT

AND

HON. GIDEON KIOKO MBUVI.....INTERESTED PARTY

RULING

1. On 28th March 2014, I delivered a judgment in which I dismissed the Petition herein. The Petitioner, dissatisfied with that Petition filed a notice of appeal and by an Application dated 15th April 2014, now seeks the following orders;

“(1) ...

(2) ...

(3) ...

(4) *That the implementation of the notice contained in the letter dated 4th January, 2013 be stayed pending the hearing and determination of the Petitioners’ intended Appeal against the judgment of this Honourable Court delivered on 28th March 2014.*

(5) That the Respondents be restrained whether by themselves or by their servants, agents or otherwise howsoever from trespassing, alienating, purporting to evict from, or in any other way whatsoever interfering with the Petitioner's quiet possession of all that piece of land known as Land Reference Number 209/5996 situate in the City of Nairobi which is the subject of Grant Number I.R. 18152 issued under the Registration of Titles Ordinance, Cap 160 pending the hearing and determination of the Petitioners' intended Appeal.

(6) That in the alternative to prayer (5) above, this Honourable Court do issue a Conservatory Order maintaining the status quo ante over all that piece of land known as Land Reference Number 209/5996 situate in the City of Nairobi which is the subject of Grant Number I.R.18152 issued under the Registration of Titles Ordinance, Cap 160 pending the hearing and determination of the Petitioners' intended Appeal.

(7) That the costs of and incidental to this Application be costs in the intended Appeal.”

2. In his Affidavit in support of the said Application and in submissions by Mr. Amoko, acting for the Petitioner, the intended Appeal raises fundamental issues of law that go to the root of the judgment of this Court and particularly on the interpretation and application of **Article 40(3)(b)** of the **Constitution**.
3. Further, that unless the orders sought are granted, there is a real possibility that the leasehold title held by the Petitioner for L.R. No.209/5996, situate on Mpaka Road in Nairobi, may be reversed and possession thereof taken away from it without adequate and due compensation for that action.
4. In response, the Respondents and Interested Party filed Grounds of Opposition dated 22nd and 24th April 2014, respectively, and urged that since this Court has already determined that the Notice issued vide letter dated 4th January 2013 for the Petitioner to surrender its title aforesaid within 6 months was valid, any further challenge to that notice, as the Petitioner has done, is frivolous, vexatious and an abuse of Court process. That therefore the Application ought to be dismissed with costs.
5. I have taken into account the submissions by Counsel appearing for both Parties and in my view, the first issue to address is the nature of the orders sought. A casual reading of the three substantive orders sought pending appeal and reproduced elsewhere above would show that they are;
 - i. An order of stay of the implementation of the notice contained in the letter dated 4th January 2013.
 - ii. An order of injunction restraining the Respondents from trespassing into, alienating or evicting the Petitioner from L. R. No.209/5996 aforesaid.
 - iii. In the alternative, a conservatory order to maintain the *status quo ante* over L.R. No209/5996.
6. In that regard, I agree with Mr. Amoko that the right of appeal granted by **Article 164(3)** may be exercised with attendant interim reliefs such as an order of stay, injunction or conservatory order. That is why Majanja, J. was right in **Joseph Ihugo Mwaura & 82 Others vs The A.G & 2 Others [2012] eKLR** when he stated thus;

“Article 23(3) entitles the High Court to grant appropriate relief in respect of matters brought under Article 22. Apart from the specific relief in the nature of an injunction set out in Article 23(2) the Court can frame any relief that is appropriate in the circumstances. It follows therefore that such relief must also include such as is necessary to secure the applicant's right to appeal and ensure that the appeal is not

rendered nugatory and the right thereby protected is watered down.

To argue that the relief secured by Article 23 is diminished merely because there is lack of a specific provision in the Constitution or under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 is to undermine the Bill of Rights and its efficacy. I do not read Rule 23 to prohibit the Court from granting further relief after hearing and determining a matter.

I reject the Respondent's argument that this Court lacks jurisdiction to grant interim relief pending appeal. I find and hold that this Court's exercise of its power under Article 23(3) is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal."

7. In addition and regarding orders of stay and injunction pending appeal, this Court in **Lillian Nkirote Marete vs The A.G [2013] eKLR** had this to say;

"As to the principles to be applied in granting or denying an injunction pending appeal, Megarry J. quoted Wilson vs Church [1962] & All L. R. 466 where Cotton LJ held as follows;

"when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful is not nugatory".

8. Applying the above principles to the present Application, I am satisfied that the issues raised in the Application are not frivolous and are certainly arguable.
9. I say so because the question whether the Petitioner should surrender its title without compensation for the land and that compensation should be limited to the buildings on it, is heavily contested and should best be resolved by a Court higher than this one.
10. Secondly and as a corollary to the above, Mr. Amoko pointed me to a number of decisions where the issue of compensation for land compulsorily acquired was addressed. These are;
- a. **Sound Equipment Ltd vs Registrar of Titles [2011] eKLR.**
 - b. **Virenda Ramji Gudka & 3 Others vs the A.G [2014] eKLR.**
 - c. **Shalein Masood vs The A.G & 5 Others [2014] eKLR.**
 - d. **Veronica Waithira Trustees of Inter-Christian Churches & 3 Others vs Kenya National Highways Authority [2014] eKLR.**
11. His submission was that the decision made by this Court was a departure from those earlier decisions and without saying more, that argument ought to be interrogated on appeal.
12. Thirdly, the nature of the Petition and the issues raised are such that if the orders of stay and injunction are not granted, the Appeal would be rendered nugatory because the contested land on which Visa Oshwal Primary School stands may be interfered with and title affected in ways that may prejudice whatever interest the Petitioner has. That is a good reason to sustain the premises as it is, presently.
13. Lastly, this case involves wider issues of the role of charitable organization in the public domain, the public interest in the management of schools and these issues should best be resolved on appeal.
14. In the circumstances, I am satisfied that while I see no reason to grant the alternative orders

contained in Prayer 6 of the Application, Prayers 4 and 5 are merited.

15.I will therefore exercise discretion and grant those Prayers in the following terms;

(i) That the Respondents be restrained whether by themselves or by their servants, agent or otherwise howsoever from trespassing, alienating, purporting to evict from, or any other way whatsoever interfering the Petitioners quiet possession of all that piece of land known as Land Reference Number 209/5996 situate in the City of Nairobi which is the subject of Grant Number I.R. 18152 issued under the Registration of Titles Ordinance, Cap 160 pending the hearing and determination of the Petitioners' intended Appeal.

(ii) As for costs, let the same abide the Appeal.

16.Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Mr. Okoth for applicant

Miss Chepkorir for Respondent

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE

11/9/2015