



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

PETITION NO 22 OF 2020

(Consolidated with Nairobi ELC Petition Nos 23 and 24 of 2020)

BEIGE INVESTMENTS LIMITED.....PETITIONER

- VERSUS -

KENYA FOREST SERVICE.....1ST RESPONDENT

CABINET SECRETARY FOR ENVIRONMENT AND FORESTRY....2ND RESPONDENT

NATIONAL LAND COMMISSION.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The disputes in the above three Petitions, namely: (i) Nairobi ELC Petition Number 22 of 2020; Beige Investments Limited v Kenya Forest Service & 4 Others; (ii) Nairobi ELC Petition Number 23 of 2020; Langata Gardens Limited v Kenya Forest Service & 4 Others; and (iii) Nairobi ELC Petition Number 24 of 2020; Silverline Limited vs Kenya Forest Service and 4 Others, are all related. The three Petitions relate to: (i) Land Reference Number 18591/2 comprised in Grant Number IR 63385; (ii) Land Reference Number 18591/9 comprised in Grant Number IR 63081, and (iii) Land Reference Number 18591/10 comprised in Grant Number IR 63079, respectively.

2. The three petitioners brought their respective petitions through the firm of Oyugi & Company Advocates. They contended that, on diverse dates in the month of June 2020, the 2nd respondent was reported to have instructed the 1st respondent to repossess all parcels of land hived off the Ngong Road Forest, including the petitioners' properties. They added that the 2nd respondent had vowed to evict the occupants, demolish the developments on the said parcels, and fence off the said parcels. Consequently, they sought declaratory orders protecting their respective titles to the suit properties. They also sought prohibitory orders directed against the 1st and 2nd respondents, protecting the developments on the suit properties and securing their quiet enjoyment of their rights in the suit properties.

3. Together with their respective petitions, they brought separate notices of motion all dated 30/6/2020, seeking conservatory orders restraining the 1st and 2nd respondents, jointly and severally, among other things, against demolishing the developments on the suit properties or evicting the petitioners from the suit properties, pending the hearing and final determination of their respective petitions. The said three interlocutory applications are the subject of this ruling.

4. Because the three petitions, motions, responses, and submissions are related, the court decided to write a single ruling on the three applications, containing a joint determination on the three applications.

5. Besides the petitioners' applications, the 3rd respondent canvassed a preliminary objection relating to the jurisdiction of this court in the context of Section 152 (F), 155(9), 155(10) and 155 (11) of the Land Act and Article 162 of the Constitution. I have considered the said objection and I do not find any merit in it. The context in which the above provisions of the Land Act apply are different. The above provisions apply in relation to unlawful occupation of public land without any iota of right or license. In the present suit, the applicants have titles issued by the Department of Lands. The respondents have confirmed that the titles were issued by the Department of Lands. They challenge the titles on the ground that their issuance was not preceded by a degazettement of the forest land in respect of which they were issued. What is therefore in dispute is the validity of those titles. Given the above context, my finding on the preliminary objection is that this court has jurisdiction to entertain the dispute herein. I now turn to the applications

6. The applications were supported by affidavits sworn by **Mr Kagwanja Thuo** and **Ms Winfred Nyawira Maina** respectively. The Petitioners' cases were that they purchased existing and duly registered titles from previous owners after carrying out due diligence. They subsequently developed the suit properties with approval from relevant regulatory authorities. The developments are worthy millions of shillings and constitute dwelling estates. They urged the court to conserve the developments and the existing occupancy, pending the hearing and determination of the three petitions.

7. The applications were opposed by the 1st, 2nd, 4th and 5th respondents through replying affidavits sworn by Mr Evans Kegode and filed by the Attorney General. Their case was that the suit properties were part of a gazetted forest which was reserved for Langata Women Prison. The suit properties were irregularly allocated to various allottees who in turn sold them to third parties, a number of whom had since constructed and/or build on the lands. This had given rise to a number of residential estates, including the estates where the suit properties are located. The illegal allocations involved among others: (i) the Commissioner of Lands; (ii) the Chief Conservator of Forests; (iii) the Commissioners of Prisons; and (iv) the Director of Physical Planning in the Ministry of Lands and Physical Planning. The allocations followed the preparation of **Part Development Plan No 42/8/93/11** which was issued on a parcel of land that was not available for allocation and was thus void *ab initio*. Mr Kegode urged the court not to grant the conservatory orders.

8. Mr Kegode further deposed that, in the event the court found it merited to grant the conservatory orders, the same should be granted on the following conditions: (i) that the hearing of the petition is expedited; (ii) that the petitioners be restrained from alienating, disposing off, charging or transacting in any manner that would interfere with or alter the suit properties; and (iii) the rental income payable from the suit property be deposited in court.

9. I have considered the applications in the three petitions. I have also considered the responses thereto and the parties' respective submissions and caselaw. The single common question falling for determination in the three applications is whether the respective applicants have satisfied the criteria upon which our courts exercise jurisdiction to grant conservatory orders pending the hearing and determination of a suit.

10. All the three petitions are anchored on Article 40 of the Constitution, which protects the right to property. Article 40 is part of Kenya's Bill of Rights which is contained in Chapter Four of the Constitution. The Jurisdiction of this court to grant conservatory orders is granted under Article 23 (3) (c) of the Constitution.

11. The Supreme Court of Kenya in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others (2014) eKLR* articulated the criteria upon which jurisdiction to grant conservatory orders is exercised in the following words:

“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 applicant’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.”

12. The tenor and import of a conservatory order was explained by **Braithwaite JA** in the Privy Council case of **Attorney General v Sumair Bansraj (1985) 38 WIR 286** in the following words:

“The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction...”

13. The applicants in the present applications seek conservatory orders preserving the developments on the suit properties and the occupancy thereof. The respondents concede that the suit properties were allocated by Government authorities and there exist valuable permanent developments on the suit properties. Indeed, Mr Kegode deposed in paragraph 18 of his replying affidavits that the impugned allocations gave rise to a number of residential estates on the suit properties. Further, it is not in dispute that the impugned titles were issued by the Department of Lands. The case of the petitioners is that they hold titles issued by the Department of Lands. The case of the respondents is that the original allocations were irregular because they were not preceded by a degazettement of the forest land subject matter of the allocations. It does therefore appear at this interlocutory stage that the key issue to be answered at the substantive hearing of these petitions is whether the titles held by the petitioners are valid titles protected under Article 40 of the Constitution and Section 25 of the Land Registration Act.

14. The respondents contended that in the event the court found it merited to grant the conservatory orders, the same should be made conditional.

15. Taking into account the fact that the disputes in the three petitions relate to titles issued by the Department of Lands, and there exist valuable residential developments on the suit properties, there is legitimate need to preserve the developments and occupancy thereof. The court is in the circumstances satisfied that the criteria upon which our courts exercise jurisdiction to grant conservatory orders pending hearing and determination of suits has been satisfied. The court finds that there is a proper basis for preserving the titles; the developments thereon; and the occupancy thereof, pending the hearing and determination of the three petitions. The court will give further directions on quick disposal of the three petitions at the time of rendering this ruling.

16. Because the three petitions raise same issues and involve same respondents, I will consolidate them for purposes of disposal

17. In light of the above finding, the court issues the following disposal orders in relation to the three notices of motion dated 30/6/2020 and

brought in Nairobi ELC Petition Number 22 of 2020; Nairobi ELC Petition Number 23 of 2020; and Nairobi ELC Petition Number 24 of 2020:

a. Nairobi ELC Petition Numbers 22 of 2020; 23 of 2020; and 24 of 2020 are hereby consolidated for purposes of hearing and disposal.

b. Pending the hearing and determination of: (i) Nairobi ELC Petition Number 22 of 2020; Beige Investments Limited vs Kenya Forest Service & 4 Others; (ii) Nairobi ELC Petition Number 23 of 2020; Langata Gardens Limited vs Kenya Forest Service & 4 Others; and (iii) Nairobi ELC Petition Number 24 of 2020; Silverline Limited vs Kenya Forest Service and 4 Others, a conservatory order is hereby issued preserving Land Reference Number 18591/2 comprised in Grant No IR 63385; Land Reference Number 18591/9 comprised in Grant Number IR 63081; and Land Reference Number 18591/10 comprised in Grant Number IR 63079; the developments thereon; and the occupancy thereof.

c. The said titles shall not be disposed, charged or developed further during the subsistence of the three petitions

d. The costs of the three applications shall be in the respective causes.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF OCTOBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Manyara for the Petitioner/Applicant

Mr Allan Kamau for the 1st, 2nd, 4th and 5th Respondents

Mr Mbuthia for the 3rd Respondent

Court Clerk - Halima

Note

This Ruling was supposed to be delivered on 28/10/2020. This was not possible because I was assigned duties outside the Station.

B M EBOSO

JUDGE