



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
PETITION NO 20 OF 2020

K. M. A LANGATA RESIDENTS

WELFARE ASSOCIATION..... 1ST PETITIONER

DAVID OKETCH, LINCOLN MAINA NJENGA

AND BEATRICE KYALAANI MALONZA

(As Office Bearers of the 1st Petitioner)2ND PETITIONER

VERSUS

KENYA MEDICAL ASSOCIATION HOUSING

CO-OPERATIVE SOCIETY LIMITED..... 1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF

LANDS & PHYSICAL PLANNING.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF

ENVIRONMENT AND FORESTRY..... 6TH RESPONDENT

NAIROBI CITY COUNTY..... 7TH RESPONDENT

INSPECTOR GENERAL OF POLICE.....8TH RESPONDENT

CABINET SECRETARY, MINISTRY OF

ENVIRONMENT AND FORESTRY..... 9TH RESPONDENT

RULING

1. The Petitioners initiated this suit through a petition dated 29/6/2020. They sought declaratory, injunctive, prohibitory and judicial review orders relating to more than 110 titles relating to parcels of land situated in Langata Area of Nairobi City County. They also sought compensation and damages as alternative remedies. Together with the petition, they brought a notice of motion dated 29/6/2020. The motion was amended on 30/6/2020. They sought a conservatory order preserving the titles, developments, and occupancy relating to the suit properties, pending the hearing and determination of the petition. The said application is one of the two subjects of this ruling.
2. The other subject of the ruling is the notice of preliminary objection by the 5th respondent (the National Land Commission) dated 8/7/2020, challenging the jurisdiction of this court to hear and determine the petition herein. I will summarize the petitioner's case and the response(s) thereto before I dispose the above two items.
3. In summary, the petitioners' case is that KMA Langata Residents Welfare Association is an association duly registered under the Societies Act, Cap 108. David Oketch, Lincoln Maina Njenga and Beatrice Kyalaani are its office bearers. They brought this petition on behalf of its members as a public interest litigation under Articles 22, 23 and 258 of the Constitution, seeking judicial determination and interpretation of various constitutional provisions which impact on their right to property and the legality and constitutionality of a government decision to transgress onto those rights.
4. The petitioners contended that pursuant to **Part Development Plan Number 42/8/93/11**, developed by the Ministry of Lands and Physical Planning, the Commissioner of Lands allocated land measuring 4.045 Hectares to M/s Arladyks Investments Limited. The later subsequently sold the said land to M/s Jackim Limited. Subsequently, on 3/2/1994, the Commissioner of Lands issued Grant Number IR 61685 relating to the said parcel of land, **LR No 18589**, to M/s Jackim Limited. On or about 30/4/1998 Kenya Medial Association Housing Co-operative Society Limited (the 1st respondent), upon due diligence, purchased the said parcel of land from M/s Jackim Limited. The parcel of land was duly registered in the name of the 1st respondent. In 2001, the 1st respondent obtained requisite approvals and developed a modern, carefully planned, serene, and gated residential estate comprising of 112 maisonettes, a nursery school, a convenient store/super market, and an open playground. Further, the 1st respondent installed necessary amenities.
5. Between 2000 and 2005, the 1st respondent sold the houses to members of the petitioner, some of whom were financed by various financial institutions. Its members enjoyed quiet possession of the properties until 9/6/2020 when the 9th respondent issued a public statement to the effect that their properties and the head title on which they were erected were part and parcel of Ngong Road Forest. The 9th respondent was alleged to have further stated that he would fence the parcel of land comprised in the head title and release wild animals from the Nairobi National Park into the said homes. Aggrieved, they brought the petition and the motion.
6. The 1st respondent responded to the motion through a replying affidavit sworn on 10/8/2020 by Dr Josephine Omondi, its Honorary Secretary. She deposed that the 1st respondent is a co-operative society registered in 1981 as a response to the need among the medical fraternity in Kenya to own residential homes. Besides KMA South C Housing Estate which comprises of 61 units, it developed what is known as KMA Langata Otiende comprising of 112 residential maisonettes at a cost of Kshs 400,000 and sold the 112 units.
7. Dr Omondi added that in 1996, the 1st respondent purchased the parcel of land comprised in Grant No IR 61685 following proper due diligence. The purchase was partially financed by Co-operative Bank of Kenya Limited who registered a charge against the title. Following appropriate sub-division and development approvals, the 1st respondent developed the 112 units, sold them, and conveyed them to the purchasers, with the full approval of the relevant authorities.
8. The 2nd, 6th and 9th respondents opposed the application through a replying affidavit sworn on 17/7/2020 by Mr Evans Kegode. 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 **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.

9. 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 properties be deposited in court.

10. The 3rd respondent responded to the motion through a replying affidavit sworn on 24/7/2020 by Mugendi Geoffrey Moses, a Principal Planner in the Ministry of Lands and Physical Planning. He deposed that prior to the enactment of the new repealed Physical Planning Act, alienation of public land was governed by the repealed Government Lands Act. He added that **Part Development Plan No 42/8/93/11** which generated the mother title giving rise to this suit was duly prepared and approved by the Directorate of Physical Planning following the authority of the Commissioner of Lands. The alienated land was hitherto reserved for use by the Prisons Department. The Commissioner of Lands did not disclose that the subject land was part of Ngong Road Forest at the time of developing the said Part Development Plan. Mr Mugendi deposed that in spite of the preparation and approval of Part Development Plan No 42/8/93/11, legitimacy of the alienation should be based on whether there was a valid degazettement of part of Ngong Road Forest. He contended that in the absence of a valid degazettement, the subject land remains an unalienated government land. He added that the said Part Development Plan was void and the subsequent allotment was similarly void.

11. The 7th respondent (Nairobi City County Government) filed grounds of opposition dated 27/7/2020 in which it contended that the 1st petitioner lacked capacity to sue; the petitioners had not demonstrated a prima facie case, and the application lacked merit.

12. The motion and the Preliminary Objection were canvassed through written submissions which I have duly considered. Because the preliminary objection raised the question of jurisdiction, I will first dispose in one paragraph because if it succeeds, the court will be obligated to down its tools [see ***Owners of Motor Vessel "Lillian S" v Caltex (Kenya) Ltd [1989] eKLR***].

13. The gist of the 5th respondent's preliminary objection is that this petition is prematurely before court because this court can only exercise supervisory or appellate jurisdiction under Sections 152(F), 155(9), 155(10 and 155(11) of the Land Act. I have considered the tenor of the preliminary objection in the context of the cited legal framework and the substance of the dispute in this petition. I do not find any merit in the preliminary objection. The above legal framework apply to the context of unlawful occupation of public land without any iota of right or licence. In the present dispute, the applicants have titles issued by the Department of Lands. Some of the respondents are challenging those titles on the ground that they relate to ungazetted forest land. What is therefore in dispute in this petition is the validity of those titles. My finding on the preliminary objection in the circumstances, is that it lacks merit. The same is, consequently, rejected. I now turn to the application.

14. The petition herein is anchored on Articles 24, 40 and 50 among other Articles of the Constitution. 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 a conservatory order is granted under Article 23 (3) (c) of the Constitution.

15. The Supreme Court of Kenya in ***Gatirau Peter Munga v Dickson Menda Kithinji & 2 Others (2014) eKLR*** outlined the criteria upon which jurisdiction to grant conservatory relief 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 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

16. The 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...”

17. The single question falling for determination in this application is whether the applicants have satisfied the criteria upon which our courts exercise jurisdiction to issue conservatory orders pending the hearing and determination of a suit.

18. The applicants seek conservatory orders preserving the developments on the suit properties and the subsisting occupancy. The suit properties were alienated by functionaries in the Ministry of Lands and Physical Planning in conjunction with various Statutory Offices within the Government of Kenya. The mother title was subsequently sub-divided and developed by the 1st respondent and sold to members of KMA Langata Residents Association. Currently, there exist 112 maisonettes and other developments, together forming what is called KMA Langata Otiende Estate. It is not in dispute that the mother title and the subsequent sub-titles were all registered and issued by the Department of Lands. It is also not in dispute that the estate is occupied. What awaits determination at the substantive hearing of this petition is whether the said titles are valid titles protected under Article 40 of the Constitution and Section 25 of the Land Registration Act.

19. In their response to the application, the 2nd, 6th and 9th respondents contended that should the court be inclined to grant conservatory orders, the same should be made conditional.

20. I have considered the unique circumstances of this application. There is indeed real danger that in the absence of a conservatory order, the occupants of the 112 units may be evicted and the 112 units may go down tumbling in a demolition exercise before the present dispute is heard and determined on its merits. The court is therefore satisfied that the applicants have satisfied the criteria upon which our courts exercise jurisdiction to grant conservatory orders. The court will, in the circumstances, grant appropriate conservatory orders. The court will give directions on quick disposal of the petition.

Disposal Orders

21. In light of the above findings, the court issues the following disposal orders in relation to the applicants’ notice of motion dated 29/6/2020 and amended on 30/6/2020 and in relation to the 5th respondent’s Notice of Preliminary Objection dated 8/7/2020:

a) The 5th respondent’s preliminary objection dated 8/7/2020 is dismissed for lack of merit.

b) Pending the hearing and determination of this petition, a conservatory order is hereby issued preserving the titles, developments and occupancy relating to all the properties listed in Paragraph 8 of the petition herein.

c) Pending the hearing and determination of this petition, there shall be no disposition or charging of any of the titles listed in paragraph 8 of the petition.

d) Costs of the preliminary objection and the application shall be in the cause.

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

B M EBOSO

JUDGE

In the Presence of: -

Mr Musili holding brief for Mr Eric Muhia for the Petitioners

Mr Allan Kamau for the 2nd, 3rd, 4th, 6th, 8th and 9th Respondents

Ms Achola holding brief for Mr Kithi for the 4th 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