



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**CONSTITUTIONAL PETITION NO. 16 OF 2019**

**IN THE MATTER OF ARTICLES 2, 3, 27, 35, 40,47,48,50, 67 (2), 68(V), 165(6) AND 260 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT NO. 5 OF 2012**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015**

**AND**

**IN THE MATTER OF KENYA GAZETTE(SPECIAL ISSUE) VOL.CXX.NO.138 OF 9<sup>TH</sup> NOVEMBER 2018**

**AND**

**IN THE MATTER OF LAND PARCEL NDUMBERI/RIABA/2674**

**AND**

**IN THE MATTER OF THE VIOLATION OF THE CONSTITUTIONAL RIGHTS OF**

**FRANCIS GITHINJI NGATIA BY THE NATIONAL LAND COMMISSION,**

**CHIEF LAND REGISTRAR, LAND REGISTRAR KIAMBU,**

**COUNTY GOVERNMENT KIAMBU**

**AND DIRECTOR OF SURVEYS**

**BETWEEN**

**ALEX KAMWERU NJUNGE.....PETITIONER/APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, KIAMBU.....3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU.....4<sup>TH</sup> RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated 25<sup>th</sup> November 2019, by the Petitioner/Applicant seeking for orders that;

**1. That pending the hearing and determination of the Petition herein a conservatory order of injunction restraining and staying any action by the Respondents of the determination of the 1<sup>st</sup> Respondent contained in Kenya Gazette( Special Issue) Vol CXX-No 138 of 9<sup>th</sup> November 2018 touching on the Petitioner's land parcel No. Ndumberi/Riabai/2674 and also restraining and barring the 2<sup>nd</sup> to 5<sup>th</sup> Respondents from cancelling the Petitioner's title for land parcel No. Ndumberi/ Riabai/ 2674 or re-planning of the said land parcel no. Ndumberi/Riabai/ 2674 or in any manner whatsoever acting on the said determination by the 1<sup>st</sup> Respondent touching on land parcel No. Ndumberi/ Riabai/ 2674.**

**2. That pending hearing of the Petition, the Respondents be directed to furnish the Petitioner with:-**

**a) The 1<sup>st</sup> Respondent to avail copies of the written complaint for review of grant lodged with the 1<sup>st</sup> Respondent.**

**b) The 1<sup>st</sup> Respondent to avail copies of the proceedings and hearings conducted for the review of the grant of land parcel Ndumberi/Riabai/2674, by the 1<sup>st</sup> Respondent.**

**c) The 1<sup>st</sup> Respondent to avail copies of the full written determination by the 1<sup>st</sup> Respondent.**

**d) The 3<sup>rd</sup> Respondent to avail copies of the land records/ Green card for land parcel Ndumberi/ Riabai/ 2674.**

**e) The 4<sup>th</sup> Respondent to avail copies of the survey records for land parcel No. Ndumberi/Riabai/2674.**

**3. That this Honourable Court do give directions on the hearing of the substantive Petition.**

**4. That costs of this Application be provided for.**

The Application is premised on the grounds that the Petitioner is the registered owner of the suit property. That the Petitioner/ Applicant conducted due diligence before purchase of the suit land and was satisfied that the vendor had a good title to pass. Further that in **Kenya Gazette (Special Issue) Vol. CXX-No 138 of 9<sup>th</sup> November 2018**, the 1<sup>st</sup> Respondent made determination/ recommendation to the 2<sup>nd</sup> Respondent to cancel title for land parcel **Ndumberi/ Riabai/2674**. That the 1<sup>st</sup> Respondent's decision was arbitrary and unreasonable, as it cancelled the suit property without conducting a hearing, despite the Petitioner/Applicant having entered his response as highlighted under **Section 14(3) and (4) of the National Land Commission Act**. Further that the 1<sup>st</sup> Respondent did not conduct an inquiry in the manner required by law nor did it provide the Petitioner/ Applicant with a written complaint nor did it follow the format of the complaint contained in their proposed rules for the hearing of the review of grant.

Further that the 1<sup>st</sup> Respondent entertained a matter that had been before Courts, relating to the suit property and a consent order entered to remove any restriction on the suit property by the Kiambu Municipal Council. That the **Gazette Notice** is unconstitutional and that the 1<sup>st</sup> Respondent published the said Gazette Notice purporting it to be signed by the Chairman of the **National Land Commission**, but that it was well known that the Chairman was under disability of criminal proceedings and was not the substantive Chairman of the said **National Land Commission**. It was contended that the 1<sup>st</sup> Respondent's decision is in bad faith and in breach of the Law. Further that the statutory mandate of the 1<sup>st</sup> Respondent to review grants of public land expired when the 1<sup>st</sup> Respondent purported to make the determination relating to the suit property. It was also contended that the Petitioner/ Applicant has been in possession and has dealt with the suit property in a normal way and developed it. Further that the Petitioner/ Applicant is a bonafide purchaser for value, without notice of any defect and it is therefore unconstitutional for the title to be revoked. That the Petitioner's/ Applicant's constitutional rights have been violated.

In his supporting Affidavit, the Petitioner/ Applicant averred that he purchased the suit property on **19<sup>th</sup> January 2009**, for a sum of **Kshs 4,230,000/=** and he was registered as a co-owner on **20<sup>th</sup> March 2019**. Further that on **3<sup>rd</sup> March 2017**, the 1<sup>st</sup> Respondent made an advertisement on the **Daily Nation Newspaper** for the review of the grants. He further averred that he wrote to the 1<sup>st</sup> Respondent through his Advocates requesting to be availed with the written complaint filed against the suit property and the details and supporting documents for the complaint, but that the 1<sup>st</sup> Respondent did not avail to him any written complaint or supporting documents.

It was his contention that even in the absence of the written complaint, he filed a **Memorandum** of response and that the 1<sup>st</sup> Respondent on a Notice dated **24<sup>th</sup> April 2017** further postponed the review hearings from **24<sup>th</sup>, 25<sup>th</sup> & 26<sup>th</sup> April 2017** to **24<sup>th</sup>, 25<sup>th</sup>, and 26<sup>th</sup> May 2017**, and that vide a Notice dated **24<sup>th</sup> April 2017**, further postponed the review hearings for **24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> May 2017**, until further notice. He further averred that the 1<sup>st</sup> Respondent's statutory period had expired on **2<sup>nd</sup> May 2017**, and no extension period was granted by Parliament, before any hearing of the complaint over the suit property. That the 1<sup>st</sup> Respondent then made a determination that the 2<sup>nd</sup> Respondent do revoke the title over the suit property and **re-plan** the area as a market. That the determination by the 1<sup>st</sup> Respondent is dated **28<sup>th</sup> April 2017**, but was published 18 months later. Further that the 1<sup>st</sup> Respondent in the Kenya Gazette of **9<sup>th</sup> November 2018**, though dated **28<sup>th</sup> April 2017**, also amends a Kenya Gazette Notice for **July 2017**. That the 1<sup>st</sup> Respondent did not comply with a Court order to make rules for the review of the title to the suit property and that no hearing was conducted before the said review.

It was his contention that the 3<sup>rd</sup> Respondent has denied him access to the land records for the suit property. Further that the 5<sup>th</sup> Respondent has on unknown date deleted and or erased the survey map for the suit property and the recommendation for **re-planning** in the said determination is to be undertaken by the Respondents jointly and in violation of his rights. That he made inquiries from the 1<sup>st</sup> Respondent's office in Kiambu, and he was given a letter that stated that his ownership over the suit property had been upheld as a bonafide purchaser. That he undertook all approvals and a change of user before construction and that he has suffered huge losses due to the inability to get loan with the title as the land records are withheld, hidden or missing at the Kiambu Land Registry. Further that the violations of his Constitutional rights have caused him immense losses as he cannot develop the land or use it as security. He urged the Court to grant his prayers.

The Application is opposed and the 4<sup>th</sup> Respondent filed Grounds of opposition dated **21<sup>st</sup> January 2020**, and averred that the Application as drawn is incurable defective and an abuse of the Court process, Further that the Applicant has no **locus standi** to commence the proceedings against the 4<sup>th</sup> respondent. It was further contended that the Application raises no reasonable cause of action against the 4<sup>th</sup> Respondent and that the issuance of survey records with respect to the suit property falls under the mandate of the 5<sup>th</sup> Respondent. It urged the Court to dismiss the Application.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Respondents also filed grounds of opposition dated **21<sup>st</sup> January 2020**, and averred that the Petition will not be rendered nugatory if the orders sought are not granted. Further that there is no evidence tabled by the Petitioner/ Applicant to show that the survey records for the suit property are non-existent having been deleted/ erased. Further that the Petitioner/ Applicant has not demonstrated that the Respondents have failed to discharge their constitutional mandate to require the intervention sought from the Court. It was contended that the Application is misconceived, frivolous and vexatious and that the Applicant ought to have carried out due diligence to ensure that the land was surveyed.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The issue for determination is whether the Petitioner/Applicant is entitled to the orders sought.

From the onset, the Court has to first determine whether the Petitioner/ Applicant has the requisite **locus standi** to commence the Proceedings. This is so as the 4<sup>th</sup> Respondent in his grounds of opposition and submissions has averred that the Petitioner/ Applicant has failed to demonstrate the requisite locus standi . In the case of **Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000**, the Court held that :-

*“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi ( 1982) KAR 229, the Court also held that;-*

*“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.*

The question then is whether the Petitioner/Applicant has sufficient interest. It is not in doubt that the Petitioner/ Applicant is the registered owner of the suit property and therefore holds all rights and interest over the said property. Being the registered owner, it follows that he has sufficient interest to sue in the matter that involves the suit property. Further given that the recommendation from the 1<sup>st</sup> Respondent is that the suit property should be used as a market area which act is to be done by the 4<sup>th</sup> Respondent, then the said recommendations affects the Petitioner/Applicants. Therefore, the Court finds and holds that **locus** to institute proceedings against the 4<sup>th</sup> Respondent who would be affected by an order granted has been demonstrated. Whether or not it is reasonable, will have to be determined during the main hearing.

The Applicant has sought for conservatory order. In the case of **Kenya Electricity Transmission Company Limited ...Vs... Kibotu Limited [2019] eKLR** the Court held that;

*“The principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J. (as he then was) in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR are as follows*

*“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”*

*Further the Supreme Court of Kenya also rendered itself on conservatory orders in the Case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others eKLR as follows:*

*“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 applicants 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”*

From the above analysis, the Court finds that in deciding whether the Applicant is deserving of the conservatory orders, it ought to be satisfied that the Applicant has demonstrated a **prima facie case**, with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice.

A **prima facie case** was defined in the case of Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR, to mean:-

**“A case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

It is not in doubt that the Applicant is the registered owner of the suit property. Further it is also not in doubt that by the Special issue of Gazette Notice, the 1<sup>st</sup> Respondent has recommended the revocation of his title to the suit property and that the 4<sup>th</sup> Respondent should **re-plan** it as a market. That was done without following the due process and in excess of its jurisdiction. Therefore, it follows that the Applicant’s rights over the suit property have allegedly been infringed.

On whether the Applicant will suffer irreparable harm, it is not in doubt that in its recommendation, the 1<sup>st</sup> Respondent recommended that the suit property be re-planned as a market. The Petitioner/Applicant has produced in evidence photographs showing that he had put up development in the said suit property. The same has not been controverted, by the Respondents. Therefore, the Court is satisfied that if the **conservatory orders** are not issued, then the Applicant will, suffer irreparable harm. If the suit property is re-planned as a market, there is no doubt that the building thereon will have to be demolished and damages may not cover the same. See the case of Muslims for Human Rights (MUHURI) & 2 Others...Vs...Attorney General & 2 Others, HC Petition No.7 of 2011, where the Court held that:-

**“A Conservatory Order would enable the court to maintain the status quo or existing situation or set of facts and circumstances so that it would still be possible that the right and freedoms of the claimant would be capable of protection and enforcement upon determination of the Petition and the trial was not a futile academic discourse of exercise”.**

The Court therefore finds and holds that the Petitioner/ Applicant is deserving of the conservatory order sought.

Further the Applicant had sought for copies of various documents. The Court has seen various correspondences by the Applicant seeking for written complaints and the proceedings. It is not in doubt that the said documents are necessary for the effective adjudication of the matter. For these reasons, the Court finds and holds that the Applicant is entitled to the orders sought, that he should be availed the said documents. However, the Court agrees with the 4<sup>th</sup> Respondent that the Survey Records can only be provided by the 5<sup>th</sup> Respondent and therefore the Court directs that the said Survey Records be provided by the 5<sup>th</sup> Respondent.

The Upshot of the foregoing is that the Notice of Motion Application dated **25<sup>th</sup> November 2019**, is found merited and the same is allowed in terms of prayers **no. 3 and 4** with an order that the 5<sup>th</sup> Respondent be and is hereby directed to avail the copies of the survey records of the suit property to the Applicant, instead of the 4<sup>th</sup> Respondent. The Applicant is also entitled to costs of the Application.

It is so ordered.

**Dated, signed and Delivered at Thika this 15<sup>th</sup> day of October 2020**

**L. GACHERU**

**JUDGE**

**15/10/2020**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Gatitu for the Petitioner/Applicant**

**No appearance for the 1<sup>st</sup> Respondent**

**No appearance for the Attorney General for 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Respondents**

**No appearance for 4<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**15/10/2020**