



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**CONSTITUTIONAL PETITION NO. 12 OF 2019**

**FRANCIS GITHINJI NGATIA.....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, KIAMBU.....4<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEYS.....5<sup>TH</sup> RESPONDENT**

**RULING**

The matter for determination is the **Notice of Motion Application** dated **24<sup>th</sup> September 2019**, by the Petitioner/ Applicant seeking for orders that;

**1. That pending the hearing and determination of the Application herein a conservatory order of injunction restraining and staying an 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 Ndumberi/ Riabai/ 2673 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 Ndumberi/ Riabai/2673 or re planning of the said land Ndumberi/ Riabai/2673 or in any manner whatsoever acting on the said determination by the 1<sup>st</sup> respondent touching on land parcel No. Ndumberi/ Riabai/2673.**

**2. That pending the 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/2673 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/2673.**
- e) The 4<sup>th</sup> Respondent to avail copies of the survey records for land parcel Ndumberi/ Riabai/2673.**

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

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

The Application is premised on the grounds that the Petitioner/ Applicant is the registered owner of the suit property. That at the time of the

purchase, the Petitioner conducted the requisite due diligence before purchasing the said property and was satisfied that the vendor had a good title to pass. That in **Kenya Gazette ( Special Issue) Vol.CXX-No 138 of 9<sup>th</sup> November 2018**, the 1<sup>st</sup> Respondent made a determination / recommendation to the 2<sup>nd</sup> Respondent to cancel the title for the suit property.

That the 1<sup>st</sup> Respondent's decision was arbitrary and unreasonable as it cancelled the title to the suit property without conducting a hearing despite the Applicant having entered his response as highlighted under **Section 14(3) of the National Land Commission Act**. It was contended that the 1<sup>st</sup> Respondent did not provide the Petitioner/ Applicant with a written complaint, did not conduct an inquiry, did not even follow the format of the complaint contained in their proposed rules for the hearing of review of grants. Further that the 1<sup>st</sup> Respondent entertained a matter that had been before Courts relating to the suit property and a consent entered to remove the restriction on the suit property by the Kiambu Municipal Council.

Further that the 1<sup>st</sup> Respondent published the aforesaid **Kenya Gazette** purporting it to be signed by the **Chairman** of the **National Land Commission**. That it was well known that the Chairman of the NLC was under disability of criminal proceedings and was the substantive chair of the National Land Commission at the time. That the 1<sup>st</sup> Respondent's decision is made in bad faith and in breach of the law as the 1<sup>st</sup> Respondent proceeded without proper rules and in contempt of a Court order directing the making of the rules. It was further contended that the 1<sup>st</sup> Respondent's statutory mandate to review grants of public land had also expired when the 1<sup>st</sup> Respondent purported to make the determination relating to the suit property. That the **3<sup>rd</sup>** and **5<sup>th</sup> Respondents** are in violation of the Petitioner's /Applicant's rights interfering with the land survey records of the suit property.

That the Applicant has over the years been in possession/ occupation and has dealt with the suit property in the normal and ordinary manner and has undertaken a business in the property. That the Petitioner is the bonafide purchaser for value without notice of any defect of the title and it is therefore unconstitutional for the 1<sup>st</sup> Respondent to revoke the title and thus the Petitioner's rights have been violated.

In his supporting Affidavit, **Francis Githinji Ngatia**, the Petitioner/ Applicant herein averred that on **7<sup>th</sup> December 2007**, he purchased the suit property from **Lucy Njoki Kimani** for **Kshs.1,400,000/=** and on **17<sup>th</sup> December 2007**, he was registered as the owner of the suit property and was lawfully issued with a title deed in his name. That he has been in possession of the suit property to date. It was his contention that at the time of sale, he conducted his due diligence and the search showed no encumbrance.

He further averred that on **3<sup>rd</sup> March 2017**, the 1<sup>st</sup> Respondent made an advertisement in the **Daily Nation** for the review of the grants which included the suit property registered in his name. That through his Advocates, he wrote to the 1<sup>st</sup> Respondent requesting to be availed with the written complaint filed against his suit property, the details of the complaint and the complaint together with the supporting documents, but the 1<sup>st</sup> Respondent did not avail the said documents. That he filed a Memorandum of response dated **23<sup>rd</sup> March 2017**, but by a Notice, the 1<sup>st</sup> Respondent postponed the hearings from **24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> April 2017** to **24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> May 2017**, and that on a **Notice dated 24<sup>th</sup> April 2017**, further postponed the hearings until further notice .

It was his contention that the statutory period for review of grants under **Section 14(1) of the National Land Commission Act of 2015** was for **5 years** and had expired on **2<sup>nd</sup> May 2017**, and no extension was granted by Parliament. That the legal period expired before any hearings of the complaint of the suit property. Further that the 1<sup>st</sup> Respondent made a determination to the effect that the 2<sup>nd</sup> Respondent do revoke the title of the the suit property and re plan the area as market. That the said determination was dated **28<sup>th</sup> April 2017**, and was published 18 months later on **9<sup>th</sup> November 2018** . Further that the 1<sup>st</sup> Respondent in **Kenya Gazette ( Special issue) Vol . CXXX-No138 of 9<sup>th</sup> November 2018** though dated **28<sup>th</sup> April 2017** amends a gazette Notice for **July 2017**. He contended that the 1<sup>st</sup> Respondent failed to make rules and regulations for the review exercise and gazette them as it had been ordered by Court in **Sceneries Limited...Vs... National Land Commission (2017) eKLR**. That the 1<sup>st</sup> Respondent did not even comply with its draft rules published on its website.

He further contended that no hearing was conducted before a determination, and the suit had earlier been the subject of legal proceedings in **Chief Magistrate's Court at Kiambu** whereby the Municipal Council of Kiambu by consent removed the restrictions on the suit property. That the Municipal Council had confirmed that the suit land was lawfully acquired. He averred that the **3<sup>rd</sup>** Respondent has denied him access to his land records and that the **5<sup>th</sup>** Respondent has on unknown dates deleted and or erased the Survey Map for the suit property. He contended that the recommendation for re planning is to be undertaken in violation of his constitutional rights. That he is a **bonafide purchaser** for value and is protected by law as he also made inquiries at the 1<sup>st</sup> Respondent's office in Kiambu and he was given a letter that stated that his ownership of the suit property had been upheld. He averred that the violation of his constitutional rights has caused him losses as he cannot develop the land or use it as security . He urge the Court to grant the orders sought.

The Application is opposed and the **4<sup>th</sup>** Respondent filed grounds of opposition dated **25<sup>th</sup> October 2019**, and averred that the 1<sup>st</sup> Respondent in line with **Sections 6 and 14 of the National Land Commission Act, 2012** held public hearings to review grants and disposition of public land including the suit property from **30<sup>th</sup> January 2017** to **3<sup>rd</sup> February 2017**, at Thika Town Hall. . That on **3<sup>rd</sup> March 2017**, the 1<sup>st</sup> Respondent issued a Notice to that effect in the **Daily Nation Newspaper** and upon issuance of the Notice and hearings of the parties made a determination in the official **Kenya Gazette Special Issue Vol. CXX No. 138** dated **9<sup>th</sup> November 2018**, to the Chief Land Registrar to revoke the title of the suit property.

It was contended that the Petitioner/ Applicant has yet to demonstrate that the official Kenya Gazette is tainted with illegality and procedural Impropriety . That the 1<sup>st</sup> Respondent cannot be said to be in contempt of court order by dint of the fact that the **National Land Commission** (Review of grants and Dispositions of Pubic land) Regulations 2017 through which the 1<sup>st</sup> Respondent undertook the review of the grants were made operational vide **Kenya Gazette Supplement No. 64** dated **21<sup>st</sup> April 2017**. Further that the Petitioner has failed to establish how his constitutional rights have been violated and has thus failed to establish the threshold required for grant of conservatory orders.

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. 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. Having gone through the submissions by the parties, the Court notes that the parties have submitted that the issues for determination are whether:- **the Petitioner is a bonafide purchaser for value, whether due process was followed, whether the 1<sup>st</sup> respondent had mandate to review the Petitioner's / Applicant's grant. Whether the Applicant's rights were violated.** However, all these issues go to the merit of the case and if the Court was to make a determination on the said issues at this stage, will in effect be determining the Petition which is not the duty of the Court to do so at this interlocutory stage.

It is the Court's considered view that as the Petitioner/ Applicant is seeking for conservatory orders, and the same being at interlocutory stage, the main issue for determination at this stage is whether the Applicant is deserving of the said orders. Further since the Applicant has also sought for various documentations, the Court finds the issue for determination is **whether the Petitioner/Applicant is entitled to the orders sought.**

The Petitioner/ Applicant has sought for conservatory orders. 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"*

Therefore, guided by the above case law, the Court has 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 and 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 herein is the registered owner of the suit property **Ndumberi/Riabai/2673**, having produced a title deed issued to him on **17<sup>th</sup> December 2007**, which made him the prima facie absolute and indefeasible 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 recommended the revocation of his title to the suit property and that the 4<sup>th</sup> Respondent should **re-plan** the said property as a market.

It is alleged by the Petitioner/ Applicant that the same was done without following the due process and in excess of its jurisdiction. If indeed that is the case, then the Applicant's rights over the suit property have allegedly been infringed which then calls for a rebuttal from the Respondents. Given that the Petitioner/Applicants has a title to the suit property and there is a recommendation for revocation of the same, the Court finds that the Applicant has established a **prima facie** case.

On whether the Applicant will suffer prejudice, 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. If the 2<sup>nd</sup> Respondent is to replan the suit property into a market area and the title is revoked, there is no doubt that the Petitioner/ Applicant will suffer prejudice as his efforts to recover the suit property, if indeed the Court is to find that his rights were violated will be next to impossible. Therefore, the Court is satisfied that if **conservatory orders** are not issued, then the Applicant will, suffer irreparable harm more so because land is unique in nature and it cannot be substituted. 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”.**

Therefore, this Court 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 to the Respondent 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 notes that the Survey Records can only be provided by the 5<sup>th</sup> Respondent.

For the above reasons, the Court directs that the said Survey Records be provided by the 5<sup>th</sup> Respondent herein.

Having carefully considered the available evidence, the Court finds the Application dated **24<sup>th</sup> September 2019**, is **merited** and the same is allowed in terms of prayers **no. 3** and **4**.

Further the Court directs the **5<sup>th</sup> Respondent**, 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.

The Court notes that in Order No. 3 of the application, the Applicant had sought for **conservatory orders** pending the hearing and determination of the Application which was a repetition of order No. 2. In exercise of its inherent powers and in the interest of justice, the Court orders that the conservatory orders are issued pending the hearing and determination of the Petition.

For avoidance of doubt the Court makes the following orders;

**1. That pending the hearing and determination of the Petition herein a conservatory order of injunction be and is hereby made restraining and staying an 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 Ndumberi/Riabai/2673 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 Ndumberi/ Riabai/2673 or re planning of the said land Ndumberi/Riabai/2673 or in any manner whatsoever acting on the said determination by the 1<sup>st</sup> respondent touching on land parcel No. Ndumberi/Riabai/2673.**

**2. That pending the hearing of the Petition , the Respondents be and are hereby 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/2673 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/2673.**
- e) The 5<sup>th</sup> Respondent to avail copies of the survey records for land parcel Ndumberi/ Riabai/2673.**
- f) The Applicant is entitled to the costs of the Application.**

It is so ordered.

**Dated, signed and Delivered at Thika this 19<sup>th</sup> day of November 2020**

**L. GACHERU**

**JUDGE**

**19/11/2020**

**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 Wang'oo for the Petitioner/Applicant**

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

**M/s Ndundu for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> Respondents**

**M/s Ndundu holding brief for Mr. Marim for the 4<sup>th</sup> Respondent**

**L. GACHERU**

**JUDGE**

**19/11/2020**