



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO 287 OF 2014**

**THE CHAIRMAN, SECRETARY AND**

**TREASURER OF THE BOARD OF GOVERNORS**

**OF LANGATA BOYS HIGH SCHOOL.....1ST PLAINTIFF**

**MIKE GIDEON MBIVI SONKO.....2ND PLAINTIFF**

**VERSUS**

**EMANGA NE SEMENTA INVESTMENTS LIMITED.....1ST DEFENDANT**

**ATTORNEY GENERAL ON BEHALF OF**

**PERMANENT SECRETARY MINISTRY OF LANDS.....2ND DEFENDANT**

**CHIEFTAIN COURT LIMITED.....3RD DEFENDANT**

**RULING**

1. On 19/10/2015, parties to this suit appeared before Gitumbi J and adopted a consent referring the dispute in this suit to the National Land Commission (the Commission) for the purpose of review within the framework of Section 14 of the National Land Commission Act. The consent contained the following verbatim orders:

- a) That the dispute over title LR No 72/3174 be referred to the National Land Commission for the purposes of review of the grant in accordance with Section 14 of the National Land Commission Act.*
- b) That points 1 and 3 are not adopted as an order of this court.*
- c) That this matter is referred to the National Land Commission to resolve the dispute herein within 90 days from today's date.*
- d) That parties may take another mention date at the registry.*

2. Consequently, the National Land Commission made a determination dated 8/6/2017 in which it upheld the title held by Chieftain Court Limited (the **applicant**) and directed cancellation of the title held by the Principal Secretary for Treasury as trustee for Langata Boys High School in respect of the suit property. The disposal determination of the Commission read thus:

- 1. The Certificate of title currently held by Chieftain Court Limited be and is hereby upheld as valid and lawful.*
- 2. Certificate of title held by the Principal Secretary for Treasury as Trustee for Lang'ata Boys High School over Nairobi/Block 72/3174 be forthwith revoked by the Chief Land Registrar as they have no claim whatsoever over Nairobi/Block 72/3174.*
- 3. Chieftain Court Limited surrenders ¼ an acre of their land for public purpose/public utility.*

3. Aggrieved by the last limb of the determination which required the applicant herein to surrender ¼ of the suit property for public purpose/public utility, the applicant brought a Notice of Motion dated 31/7/2017 seeking the following orders.

- 1. Spent**

2. Spent

3. That an order of certiorari do issue to bring into this court and quash Order 3 of the determination of 8th June 2017 by the National Land Commission requiring Chieftain Court Limited to surrender  $\frac{1}{4}$  an acre of their land for public purpose/public utility over Nairobi block 72/3174.

4. That an order of prohibition do issue to prohibit and/or restrain the National Land Commission from enforcing the order that Chieftain Court Limited to surrender  $\frac{1}{4}$  acre of their land for public purpose/public utility over Nairobi block 72/3174.

5. That an order of certiorari do issue to bring into this court and to quash item Number 9 14 of the Kenya Gazette Vol. CXIX No. 97 of 17th July 2017 which requires Chieftain Court Limited to surrender  $\frac{1}{4}$  an acre of their land for public purpose/public utility over Nairobi Block 72/3174.

6. That an order of prohibition do issue to prohibit and/or restrain the Chief Land Registrar from taking any action based on the impugned gazette notice and or ordering Chieftain Court Limited to surrender  $\frac{1}{4}$  an acre of their land for public purpose/public utility over Nairobi block 72/3174.

7. That costs of this application to provide for.

The said application is the subject of this ruling.

4. The applicant's case is that the mandate of the Commission was to determine the validity of the respective titles held by the 1st plaintiff and the applicant herein and none of the parties to the consent sought alienation of part of the land as a public utility. It contends that the order by the Commission requiring the applicant to surrender  $\frac{1}{4}$  acre of its land for public purpose/public utility was irrational and went beyond the Commission's mandate. It argues that the order is unfair, was made in bad faith, and was taken with an ulterior motive calculated to prejudice the applicant. Further, the applicant argues that in making the impugned limb of the determination, the National Land Commission did not direct itself properly in law and fact and acted irrationally and unreasonably. It contends that the Commission having found that the applicant was a *bona fide* purchaser for value of the suit property, it violated the legitimate expectation of the applicant by ordering that it surrenders  $\frac{1}{4}$  of its land for public purpose/public utility. Lastly, it contends that the impugned order violates its fundamental right to property under Article 40 of the Constitution. Consequently, it urges the court to quash the impugned limb of the determination.

5. The Commission's response to the application is contained in an affidavit sworn on 9/2/2018 by Brian Ikol, the Commission's Acting Director - Legal Affairs and Enforcement. The case of the Commission is that the merits of the substantive determination by the Commission has not been challenged by any of the parties. Secondly, it contends that in making the impugned limb of the determination, it considered public interest. Thirdly, it argues that it established that from a planning point of view, the Chief's Camp in the area was congested and the congestion necessitated the requirement for surrender of  $\frac{1}{4}$  of the suit property. Lastly, it contends that the requirement for surrender was made only as a recommendation to the registered proprietor with a view to the parties subsequently recording a consent order if the applicant acceded to the recommendation.

6. Through written submissions dated 3/7/2018, the 1st defendant supports the application and contends that the Commission overstepped its mandate and violated the terms of the consent order which referred the dispute to it for determination.

7. In written submissions dated 14/6/2018, the Attorney General similarly supports the application and contends that the impugned limb of the determination ought to be treated as a request which the registered proprietor is entitled to reject if it deems so..

8. I have considered the tenor and import of the orders sought in the present application. I have also considered the dispute culminating in the consent which culminated in the impugned determination by the Commission. Only the last limb of the determination by the Commission is impugned. This is the limb which reads thus:

***"Chieftain Court Limited surrenders  $\frac{1}{4}$  an acre of the land for public purpose /public utility"***

9. It is instructive that both in its replying affidavit and written submissions, the position of the Commission is that the impugned limb of the determination was merely a recommendation which does not bind the applicant. It is similarly instructive that both the Attorney General and the 1st defendant have supported the application by the 3rd defendant and have urged the Court to grant the present application. On their part, the plaintiffs elected not to respond to the application. The said determination was communicated to the general public through a gazette notice.

10. Langata Boys High School is a public school. Through this suit, it laid a claim of title to the suit property. Both the School and the 3rd defendant held parallel titles to the suit property. The 3rd defendant acquired its title consequent to a purchase of the suit property from the 1st defendant. On their own volition, parties to this suit decided to refer the dispute to the National Land Commission for review of the titles within the framework of Section 14 of the National Land Commission Act. Upon hearing the parties, the Commission determined that the title held by Chieftain Court Limited (the Applicant) was the valid and lawful title. It further determined that the title held by the Principal Secretary for Treasury as trustee for Langata Boys High School was invalid and ordered its revocation. It is not clear if the revocation has been effected.

11. In my view, in exercising its mandate, the Commission was required to be guided by the framework in Article 67 of the Constitution, Section 14 of the National Land Commission Act and the consent order which set out the terms of reference within which the Commission was to make its determination. The mandate of the Commission under those three instruments was limited to a review entailing a determination on the validity of the two titles. It was not within the mandate of the Commission to recommend or order for surrender of  $\frac{1}{4}$  of the suit property by either of the rival parties. It is therefore clear that the Commission overstepped its mandate and acted irrationally in

directing and/or recommending surrender of ¼ of the suit property by the applicant (3rd defendant). Similarly, it is clear that the Commission's directive and or recommendation violates the applicant's right to property. Having found that the title held by the 3rd defendant is the legitimate title, the Commission had no right to require the applicant to surrender any portion of its land. Acquisition of the applicant's land for public purpose would be tenable only if carried out within the legal framework on compulsory acquisition under Part VIII of the Land Act which sets out the procedure to be followed whenever the state wishes to invoke the doctrine of eminent domain.

12. Lastly, it is noted from the Commission's response that the impugned recommendation was influenced by an alleged congestion in the Area Chief's Camp. That, in my view, was a factor that should not have informed the Commission's decision. It was an irrelevant and irrational factor.

13. The net result is that the impugned limb of the Commission's determination is unconstitutional, illegal, null and void. Consequently, the Notice of Motion dated 31/7/2017 is allowed in terms of Prayers 3, 4, 5 and 6. The rest of the Commission's determination remains undisturbed. Because of the public nature of the present litigation, there shall be no order as to costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF JANUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Migos Ogamba and Mr Onganda Junior for the Applicant

Mr Manyara Advocate for the 1st respondent

Court clerk - June Nafula