



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC REFERENCE NO. I OF 2018

THE NATIONAL LAND COMMISSION.....APPLICANT

=AND=

AFRISON EXPORT IMPORT LIMITED.....1ST INTERESTED PARTY

HUELANDS LIMITED.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF NAIROBI.....3RD INTERESTED PARTY

DIRECTOR OF SURVEYS.....4TH INTERESTED PARTY

CHIEF LAND REGISTRAR.....5TH INTERESTED PARTY

CABINET SCIENCE AND TECHNOLOGY.....6TH INTERESTED PARTY

ATTORNEY GENERAL.....7TH INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION.....8TH INTERESTED PARTY

CABINET SECRETARY MINISTRY OF LANDS

AND PHYSICAL PLANNING.....9TH INTERESTED PARTY

DIRECTOR OF PUBLIC PROSECUTIONS.....10TH INTERESTED PARTY

PATRICK THOITHI KANYUIRA11TH INTERESTED PARTY

RULING OF E.O.OBAGA J

1. The National Land Commission (The NLC) filed a Reference to this court on 2nd August 2018 pursuant to the provisions of Section 127 of the Land Act No.2 of 2012. The NLC contemporaneously filed a Notice of Motion in which it sought among other orders conservatory orders staying any civil or criminal proceedings in respect of any processes touching on the compulsory acquisition of LR No.7879/4 pending the hearing and determination of the Reference.

2. The NLC seeks determination of the issues raised in The Reference which includes whether the portion which is the subject of compulsory acquisition is public or private land. The genesis of the Reference and the motion can be traced to the process put in place by the NLC in acquiring a portion measuring about 13.5 acres where Ruaraka High School and Drive In Primary School are located. The NLC has already paid out **Kshs.1,500,000,000/=** out of the total compensation of **Kshs.3,269,040600/-** which is said to be due to the 1st and 2nd interested parties.

3. The application for conservatory orders is based on the fact that following the payment of part of the compensation, various bodies including the Ethics and Anti-Corruption Commission which is the 8th interested party commenced investigations to establish whether there was anything wrong in the whole process of acquisition of the portion where the two schools lie. Also investigating the issue is the Departmental Committee on Lands of the National Assembly and the Senate Sessional County Public Accounts and Investments Committee

of the Senate. The Departmental Committee on Lands of the National Assembly has already made a report which was tabled before the National Assembly and adopted. The Departmental Committee on Lands blamed the Commissioners of The NLC for the acquisition and loss of **Kshs.150000000/=** which has already been paid out as compensation to the 1st and 2nd interested parties.

The Committee recommended that the Director of Criminal Investigations should investigate possible collusion by the 1st and 2nd interested parties with The NLC, National Treasury and Ministry of Education.

4. The NLC therefore contends that pending the hearing and determination of the Reference, there should be conservatory orders staying all civil and criminal cases touching on compulsory acquisition of part of LR No.7879/4. The NLC argues that it will not be proper for any criminal prosecution arising from the acquisition to be commenced because at the end of the Reference, it may turn out that the acquisition and payments were properly made.

5. The application for conservatory orders was opposed by the 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and 10th, interested parties. The 7th and 10th interested parties raised a preliminary objection on the ground that this court does not have jurisdiction to give conservatory orders touching on criminal prosecution. Those opposing the issuance of conservatory orders argue that it is not proper for this court to interfere with the constitutional mandate of the bodies mandated to carry out investigations and prosecution of any persons who may have been involved in criminal activities relating to the acquisition of the land in issue.

6. On my part, I have considered the application by The NLC and the opposition to the same by the 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th interested parties. I have also considered the submissions filed herein on behalf of the parties to this Reference and application. The only issues which emerge for determination are firstly whether this court has jurisdiction to grant conservatory orders as prayed for. Secondly, whether conservatory orders should be granted in the manner sought.

7. This Reference together with the application were filed on 2nd August 2018. Most of the prayers therein have already been spent. There was a prayer that the reference be fast-tracked. Already the Reference has been heard and is pending judgement. There was also a prayer that parties to the Reference do file documents relating to the process of compulsory acquisition within 7 days of the filing. This prayer has already been spent as it was not granted when the matter was first considered by the court on 2nd August 2018.

8. Those arguing that this court has no jurisdiction to grant conservatory orders cited Article 162(2) (b) and 3 of the Constitution pursuant to which the Environment and Land Court Act was enacted giving jurisdiction to the court to deal with matters relating to the environment use, occupation of and title to land. It was further argued that this court's jurisdiction is limited to matters to do with Environment, use occupation and title to land and that that jurisdiction does not extend to grant of conservatory orders touching on criminal prosecution which is a preserve of the High Court which has unlimited original jurisdiction in both civil and criminal matters. In support of this argument the case of **Republic Vs Karisa Chengo & 2 others (2017)eKLR** was cited. In this case, the Supreme Court affirmed the decision of the Court of Appeal which had found that a Judge of the Environment and Land Court could not sit with a Judge of the High Court to determine a criminal appeal. The issue of jurisdiction of the High Court and Courts of equal status was addressed and it was held that either court could not assume jurisdiction reserved for the other.

9. In the instant case, this court has been moved under Section 127 of the Land Act which provides as follows:-

“The Commission may at any time, by application in the prescribed form, refer to the Court for its determination any question as to—

a. the construction, validity or effect of any instrument;

b. the persons who are interested in the land concerned;

c. the extent or nature of their interest;

d. the persons to whom compensation is payable;

e. the shares in which compensation is to be paid to tenants in common;

f. the question whether or not any part of a building is reasonably required for the full and unimpaired use of the building; or

g. the condition of any land at the expiration of the term for which it is occupied or used.

10. Section 128 of the Land Act gives this court jurisdiction to deal with any dispute arising out of any matter provided for under the Act. The NLC has moved to this court for the determination of issues in the reference under Section 127 of the Land Act. A look at the application by The NLC shows that the application was mainly brought as a result of apprehension that its officials are likely to face prosecution following the investigations touching on the acquisition in issue. The Reference is before this court which is seized with jurisdiction to determine the same. The question which arises then is whether an issue which is ancillary to the issue before the court can be dealt with by this court though the jurisdiction on the ancillary issue lies with another court.

11. The NLC is seeking to stop any criminal or civil cases touching on compulsory acquisition of LR No.7879/4 . There is no doubt that this court has jurisdiction to grant any orders touching on any civil matter relating to the compulsory acquisition where there is just cause shown. The only aspect which needs to be decided is on whether this court can give conservatory orders on the second limb of the prayer which seeks to stop criminal proceedings. In my considered view, this court can grant conservatory orders touching on criminal prosecution which

are arising directly from a matter which is properly pending before the court if there is just cause shown for it to do so.

12. It will not be proper for this court to split the prayers and say that it will grant the conservatory order touching on the civil aspect and decline the one touching on the criminal aspect. As I have said hereinabove, the apprehended criminal prosecutions stem from what is before this court. This court is being asked to determine whether the portion where the two schools sit is public or private land. The 1st and 2nd interested parties contend that there was no surrender of the portion where the schools lie. There is a contrary view by the other interested parties. This is a matter which squarely falls under the issues which this court can determine under Section 127 (1) (a) (b) (c) and (d) of the Land Act.

13. In the case of **Prof. Daniel N Mugendi Vs Kenyatta University & 3 Others (2013) eKLR**, the Court of Appeal was dealing with an issue touching on employer/employee relationship in a matter which was before the High Court. The Court of Appeal found that this was a matter which should have been dealt with by the Industrial Court which is now the Employment and Labour Relations Court. The Court made the following remarks:-

“ In the same token we venture to put forth the position that as we have concluded that the industrial court can determine industrial and labour court relations matters alongside claims of fundamental rights ancillary and incidental to those matters , the same should go for Environment and Land Court, when dealing with any claims of breaches of fundamental rights associated with the two subjects”.

14. In **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014) eKLR** , the supreme court Judges quoted the following finding in the case of **Board Governors ,Moi High Scool Kabarak & another Vs.Malcom Bell SC Petition No.687 of 2013 (2013)eKLR** where it was stated as follows:-

“Where the Supreme Court has appellate jurisdiction derived from the constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject matter of the appeal, pending the resolution of the contested issues”.

15. The case of **Prof. Daniel N Mugendi and Gatirau Peter Munya (supra)** dealt with the issue of a court granting orders which are related to the matter in issue though strictly speaking the court has no jurisdiction to grant them but because of the very nature of the case, the order can be given legitimately. In the instant case, this court will be determining issues which are perfectly within its jurisdiction but there are ancillary issues which have arisen which are so intertwined with the main issue as not to be separated. I therefore find that the criminal aspect which arises from the acquisition process cannot be severed. It is therefore my finding that this court has jurisdiction to grant conservatory orders in the circumstances if there is just cause for the same.

16. Having now disposed of the issue of jurisdiction, I now turn to the issue of whether conservatory orders should be granted stopping any civil or criminal matters arising out of compulsory acquisition of part of LR No.7879/4. A look at the record of materials placed before the court show that there are a number of cases before the courts touching on the issue of the compulsory acquisition in issue. The cases are spread across the lower Court, Environment and Land Court , the High Court and Court of Appeal . In the Court of Appeal, we have Civil Appeal No.1488 of 2016 between **Okiya Omtatah Vs Afrison Export Import Ltd& Others**. Though I do not have details of the issues involved in the cases which are pending, it was incumbent upon The NLC to demonstrate that those cases have a bearing on what is before this Court and that there is need to stop the cases from proceeding. There is a matter before the Court of Appeal. This Court cannot stop a matter pending before that court. I therefore find that there is no basis upon which a conservatory order can be given stopping the civil cases pending before the various courts.

17. On the aspect of the prayer seeking to stop criminal investigations or prosecution arising from the acquisition of LR No. 7879/4, the payment of Kshs.1.5 billion was made on or around 26th January 2018. The investigations surrounding the acquisition of the land in issue and the subsequent payment followed thereafter. It is as a result of these investigations and apprehension of prosecution that The NLC has moved to Court for conservatory orders seeking to stop any prosecution which may arise from those investigations. This Reference and application were filed on 2nd August 2018. There were no conservatory orders granted then.

18. The NLC was seeking the conservatory orders pending hearing and determination of the Reference. As I have already said hereinabove, the Reference has since been heard and it is pending judgement. There is no precipitate action which has been taken by either the 8th or the 10th interested parties towards any prosecution which The NLC is apprehensive about. I therefore find that it will be superfluous to grant any conservatory orders. I proceed to dismiss the Notice of Motion dated 2nd August 2018. As Judge Eboso agrees the final orders of the majority ruling of the court shall be as follows:-

1. The preliminary objection by the 7th and the 10th interested parties is overruled.

2. The prayer for conservatory orders is declined

3. Each party to bear their own costs.

Dated, Signed and delivered at Nairobi on this 1st day of February 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Arende for applicant

Mr Kibet for 1st and 2nd interested parties

Mr Kamau for 4th ,5th ,6th ,7th and 9th interested parties

Mr Odhiambo for 3rd interested party

M/s Kibogy for 8th interested party

M/s Mwaila, Mr Kinyanjui ,M/s Mwangi and Mr Nyamache for 10th interested party

Mr Odhiambo for Mr Njenga for 11th interested party

Court Assistant: Hilda

E.O.OBAGA

JUDGE