



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC REFERENCE NO 1 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 REGISTRAR5TH INTERESTED PARTY

CABINET SECRETARY - MINISTRY OF

EDUCATION, SCIENCE AND TECHNOLOGY.....6TH INTERESTED PARTY

ATTORNEY GENERAL.....7TH INTERESTED PARTY

ETHICS AND 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 KANYUIRA.....11TH INTERESTED PARTY

RULING OF B M EBOSO J.

Background

1. On 2/8/2018, the National Land Commission (**the applicant**) brought a reference under Article 162(2)(b) of the Constitution of Kenya 2010 and Section 127 and 128 of the Land Act, seeking a determination of the following six verbatim issues:

- a) **The construction, validity or effect of the title document over LR 7879/4 - the applicant refers this issue for consideration so that the court can determine whether the two schools sit on public land or private land;**
- b) **Whether or not the compulsory acquisition of the land occupied by the two schools as being undertaken by the applicant meets the constitutional threshold of public purpose – the question shall determine whether there has been loss of public funds as a result of payment of the partial award of compensation of Kshs.1,500,000,000/-;**
- c) **The person to whom compensation is payable – the applicant seeks this court to determine whether an award compensation is payable to an agent/nominee/assignee of the person duly identified as having interest in the land upon**

request. The validity and/or effects of the payment of the partial award of compensation made to the 1st and 2nd interested parties through their agent/nominee/assignee, Whispering Palms Estate Limited;

d) **Of vesting and formal taking of possession of compulsorily acquired land – at what point should the applicant take possession of compulsorily acquired land: either after payment of the initial award of compensation or upon gazettelement of the notice of intention to acquire;**

e) **An opinion on whether a search of a title at the Registrar is conclusive evidence of proprietorship; and**

f) **What other steps, if any, the applicant and any other person can undertake to confirm the authenticity of a title before transacting on it.**

2. Together with the reference, the applicant brought a notice of motion under certificate of urgency, dated 2/8/2018, seeking the following six orders:

a) *That this application be certified as urgent and that the same be heard ex parte in the first instance.*

b) *That the honourable court herein grants conservatory orders staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of LR 7879/4 pending the hearing and determination of the application herein.*

c) *That the honourable court herein grants conservatory orders staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of LR 7879/4 pending the hearing and determination of the Reference herein.*

d) *That the honourable court herein directs that all the parties herein do file all their respective documents, correspondences and any other instrument used in the process of compulsory acquisition of LR 7879/4 within 7 days from today.*

e) *That the reference herein be heard on priority basis.*

f) *That cost of this application be provided for.*

3. Both the reference and the notice of motion were supported by an affidavit sworn on 1/8/2018 by Professor Muhammad A Swazuri, Chairperson, National Land Commission. It is also noted that both the reference and the application do not have respondents; they only have the above eleven interested parties. Lastly, it is noted that prayers 1, 2, 4 and 5 of the application are now spent. They were disposed prior to the constitution of the current uneven bench of judges now seized of this matter. By consent of the parties, the question as to whether the conservatory order should be granted were reserved for determination by the uneven bench of judges. Similarly reserved for determination by the bench was the preliminary objection which raised the question as to whether this court has jurisdiction to issue a conservatory order relating to criminal processes. What substantially remains of the application is therefore prayer 3 which relates to the question as to whether this court should issue a conservatory order staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of Land Reference Number 7879/4 pending the determination of the reference herein. The reference was heard on 25/1/2019 and a determination is scheduled for 10/5/2019. Prayer 6 relates to costs of the application under consideration.

Issues

4. Two issues fall for determination in the Notice of Motion dated 2/8/2018. The first issue is the question as to whether the Environment and Land Court established under Article 162(2)(b) of the Constitution as read together with Sections 4 and 13 of the Environment and Land Court Act has jurisdiction to grant a conservatory order relating to criminal processes. The second issue is whether the applicant has demonstrated a proper basis for grant of a conservatory order staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of the suit property. I will deal with the two issues in that order.

Jurisdiction

5. The first issue relates to the jurisdiction of this Court. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the Constitution which establishes the three tiers of Kenya's Superior Courts. It provides thus:

1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)*

2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-*

a) *employment and labour relations; and*

b) *The environment and the use and occupation of, and title to, land.*

3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)*

4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.*

6. In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:

13 Jurisdiction of the Court

1) **The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**

2) **In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-**

a) **relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.**

b) **relating to compulsory acquisition of land;**

c) **relating to land administration and management;**

d) **relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and**

e) **any other dispute relating to environment and land.**

3) **Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.**

4) **In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court**

5) **Deleted by Act No. 12 of 2012**

6) **Deleted by Act No. 12 of 2012**

7) **In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-**

a) **interim or permanent preservation orders including injunctions;**

b) **prerogative orders;**

c) **award of damages;**

d) **compensation;**

e) **specific performance;**

f) **restitution; or**

g) **declaration; or**

h) **costs**

7. It is to be noted that under Article 165(5), the Constitution expressly bars the High Court against exercising jurisdiction in respect of matters reserved for the Supreme Court or falling within the jurisdiction of the third tier superior courts established under Article 162(2) of the Constitution. Article 165(5) of the Constitution provides thus:

“The High Court shall not have jurisdiction in respect of matters:

a) **reserved for the exclusive jurisdiction of the Supreme Court under this Constitution, or**

b) **falling within the jurisdiction of the courts contemplated in Article 162(2)”**

8. A plain reading of the above constitutional and statutory framework on the jurisdiction of the Environment and Land Court reveals that the Environment and Land Court which is the court contemplated under Article 162(2)(b) of the Constitution, has a broad constitutional

jurisdiction to hear and determine disputes relating to the environment and the use, occupation, and title to land. The Constitution donated powers to Parliament to legislate a legal framework elaborating on that broad constitutional framework. In so doing, Parliament at Section 13(7) of the Environment and Land Court Act empowered the Court to make any order or grant any relief as the Court deems fit and just, including **interim and permanent preservation orders**. Parliament did not limit the jurisdiction to grant interim or permanent preservation orders to civil processes only. It simply gave the Court jurisdiction to issue preservation orders. It is therefore my view that, if Parliament wanted this particular jurisdiction to be restricted only to civil processes, it would have done so. In its wisdom, it did not restrict the court's jurisdiction to grant preservation orders to civil processes alone.

9. It is not lost to me that, in its day to day adjudication of disputes relating to environment and the use and title to land, the Court is oftentimes confronted with disputes relating to rival allegations of fraudulent titles. Fraud is a criminal offence. The court is often invited to determine which of the rival titles is fraudulent and which is *bona fide*. It is expected that whenever the court is invited, in appropriate cases, it will be at liberty to exercise its jurisdiction under Section 13(7) of the Environment and Land Court Act and issue conservatory orders relating to both civil and criminal processes relating to any impugned title facing allegations of fraud. The same applies to cases in which the court is invited to exercise judicial review jurisdiction in criminal proceedings relating to criminal offences under the Environmental Management and Coordination Act (the EMCA) and other relevant statutes.

10. I am therefore satisfied beyond doubt that under Section 13(7)(a) of the Environment and Land Court Act, this court has jurisdiction to issue preservatory orders relating to both civil and criminal processes. That jurisdiction is however limited to matters relating to environment and the use and occupation, and title to land.

Conservatory Order

11. The second issue for determination is whether the applicant has made out a case for grant of a conservatory order. The jurisprudential principle upon which our courts exercise jurisdiction to grant conservatory orders was outlined by the Supreme Court of Kenya 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”

12. This Court is currently seized of a reference brought by the National Land Commission under Part VIII, Section 127 of the Land Act, which provides thus:

Reference of matters to the Court for determination by the Commission

1) 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 of which it is occupied or used.***

2) Without prejudice to the powers of the Court under this Part, the costs of any reference to the Court under subsection (1) shall be paid by such person as the court may direct or where the court does not give direction, by the Commission.

13. It is to be noted that Part VIII of the Land Act contains the legal framework under which the state exercises the power of eminent domain. The agency empowered by the Constitution to exercise that power on behalf of the state is the applicant herein. The tenor and import of Section 127 of the Act is that, whenever the National Land Commission has any doubt regarding any of the matters itemized under that section, it is allowed to seek a determination thereon by this court. That is the precise jurisdiction which this court has been invited to exercise in the present reference.

14. Instructively, what is before this court is not a petition by a citizen of this Country alleging apprehended fear of imminent violation of a right under the Bill of Rights. More importantly, no citizen of this Country has placed before us any material to suggest that he is threatened with imminent violation of his constitutional rights through any criminal or civil process relating to the reference herein. If that were to

happen, that citizen will be at liberty to initiate an action within the framework of the Bill of Rights and ventilate his grievances before the appropriate forum. None has been ventilated before us by a citizen of this Country. What is before the Court is a reference by the National Land Commission seeking the Court's interpretation within the framework of Section 127 of the Land Act.

15. It is to be noted that the 10th interested party brought a formal application praying for an even bench of judges to dispose the reference herein. He contended that the reference herein raises substantial questions of law and bears public interest elements. He urged the court to certify the reference as one that deserves to be disposed by an uneven bench. That plea was granted. At this point, nothing has been demonstrated to suggest that the 10th interested party has acted or is about to act in a manner that undermines the work of the court in the present reference.

16. The totality of the foregoing is that the National Land Commission does not deserve the conservatory order it seeks. If any of its commissioners or servants is reasonably apprehensive that any of the interested parties herein is about to take precipitate action in violation of the Constitution, that individual is at liberty to bring an appropriate action and ventilate his grievances.

17. In summary, I overrule the preliminary objection to the jurisdiction of this court. I similarly decline the prayer for a preservative order by the National Land Commission. Since Justice Obaga agrees with my final findings on the two issues, both the preliminary objection and the prayer for a conservatory order are lost. The final orders of the court shall be as set out in the ruling of Obaga J.

18. Because of the public nature component of the reference herein, my finding on the issue of costs is that each party shall bear their own costs of the material application and the preliminary objection.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF FEBRUARY 2019.

B M EBOSO

JUDGE