



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 11 OF 2018

IN THE MATTER OF ARTICLE 19, 20, 22, 23, 27, 40, 47, 50 (1), 64, 159 AND 165 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA (2010)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF THE REGISTERED LAND ACT (CAP 300 LAWS OF KENYA – REPEALED)

BETWEEN

BERNARD KIBERA KAHINGA.....1ST PETITIONER

PAUL KARIUKI KAHINGA.....2ND PETITIONER

STANLEY KANYUIRA MUGO.....3RD PETITIONER

VERUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

What is before me for determination is the Petitioners' Notice of Motion application dated the 27th September, 2018 brought pursuant to Rules 19, 23 and 24 (1) of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and all the other enabling provisions of the law. The Petitioners seek temporary injunction against the Respondents from interfering with land parcels numbers KAJIADO/ MOSIRO/134 and KAJIADO/ MOSIRO/ 290 hereinafter referred to as the ' suit lands", pending the outcome of the suit.

The application is premised on the following summarized grounds where the Petitioners state that they are the absolute proprietors of the suit lands. The 1st Respondent after purported public hearings, on or about the 12th and 13th October, 2016 issued a directive which was captured in the Standard Newspaper dated the 14th October, 2016 revoking 1000 title deeds for land said to have been illegally given to individuals in Mosiro, part of which title deeds are those of the Petitioners. The Petitioners have learnt that the 1st Respondent is about to issue the requisite notice in the official Kenya Gazette publishing and confirming cancellation of title deeds which include those belonging to the Petitioners'. The intended gazette, de – registration, cancellation and re – allocation of the suit lands is in violation of the Petitioners' rights to acquire and own property as enshrined in the Constitution as well as the registration as stipulated in sections 24, 25 and 26 of the Land Registration Act.

The application is supported by the affidavit of BERNARD KIBERA KAHINGA the 1st Petitioner herein where he reiterates their claim and confirms that the adjudication process in Mosiro Adjudication Section was challenged vide Nairobi HCCC Misc No. 312 of 1991 (JR) and on the 14th May, 1991 the High Court quashed the certificate of finality issued in respect of the said Adjudication Section. He explains that the said decision was overturned on Appeal vide the Nairobi Civil Appeal No. 83 of 1992 where the Court found that the prerogative orders granted by the Judge affected many people who had acquired title deeds to their respective parcels of land. He insists that with the nullification of the Judgement of the High Court, the Petitioners' title deeds remained valid. He contends that all attempts to enjoy the benefits of the suit lands has been futile since no registration can be effected on the said lands for reasons that the Green Card containing the registration particulars of the said parcels had been forwarded to the 2nd Respondent without the knowledge or consent of the Petitioners. Further, that the 2nd Respondent has declined to release the said Green Cards unless he is served with a Court Order. He insists they are the proprietors of the suit lands and an illegal including irregular deregistration as well as interference with ownership of the said lands contravene their rights and interest as conferred in the Constitution. He reiterates that their title deeds are conclusive evidence of ownership and makes them the absolute and indefeasible owners of the suit lands. He further contends that the 1st Respondent does not have the mandate to question their titles over the suit lands and efforts to hold public hearing is a deliberate act on its part to visit a long settled matter. Further, that the notice to hold the public hearings was too short and unreasonable, as well as failed to disclose the nature of the complaint. He avers that the intended gazettelement, deregistration, cancellation and re - allocation of their respective title deeds is in total violation of their rights to acquire and freely own property under Article 40 of the Constitution.

The application was unopposed as none of the Respondents filed any response, despite being duly served.

Analysis and Determination

Upon consideration of the instant Notice of Motion Application including the supporting affidavit as well as the submissions filed by the Petitioners, the only issue for determination is whether an interlocutory injunction should issue pending the outcome of the Petition.

The principles for consideration in determining whether interlocutory injunction can be granted or not is well settled in the celebrated case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**.

In line with this principle, I will proceed to interrogate whether the Petitioners have demonstrated a prima facie case with a probability of success at the trial. I note that the Petitioners who hold titles to the suit lands are seeking injunctive orders against the Respondents to restrain them from interfering with the suit lands. In their submissions, the Petitioners have reiterated their claim and relied on the cases of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358; Olympic Sports House Ltd Vs School Equipment Centre Ltd (2012) eKLR; High Court of Delhi at New Delhi CS (OS) No. 967 of 2010 Charanjit Thurkal & Anor Vs Deepak Thural & Anor**, to buttress their arguments.

Looking at the documents presented by the Petitioners, it is clear they all have legitimate claims over the suit lands which they all hold titles to. However I note the acts complained of were committed in October 2016 and the Petitioners have not informed Court on whether the 1st Respondent had already undertaken the gazettelement of their title deeds for registration or not. From the Petitioners' averments, they contend that this matter had even been handled up to the Court of Appeal vide Civil Appeal No. 85 of 1992, way back in 1995. I opine that since this is an issue touching on an adjudication section, it is pertinent if the substratum of the suit was preserved pending the determination of this Petition. It is against the foregoing, I hold that the petitioners have established a prima facie case with a probability of success at the trial.

On the second principle as to whether the petitioners will suffer irreparable harm which cannot be compensated by damages, I find that since the respondents have not controverted the Petitioners' averments over ownership of the suit lands, I hold that interference with their respective titles amounts to a violation of their rights. This in essence means they will suffer irreparable harm which cannot be compensated by way of damages. At this juncture I find that the balance of convenience tilts in favour of the petitioners.

In so far as the instant application is unopposed and bearing the circumstances of the issues at hand, and the overriding objective of the proceedings before this Court, I will rely on rule No. 32 of the ELC Practice Directions and make an order that the prevailing status quo be maintained pending the hearing and determination of the Petition.

I urge the parties to comply with order 11 and set the Petition down for hearing as soon as possible.

The costs will be in the cause.

Dated, signed and delivered at Kajjado this 5th day of March, 2019.

CHRISTINE OCHIENG

JUDGE