



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CONST. PETITION NO. 9 OF 2018

KILIMAMBOGO ESTATES LIMITED.....PETITIONER

VERSUS

THE NATIONAL YOUTH SERVICE.....1ST RESPONDENT

MINISTRY OF PUBLIC SERVICE, YOUTH AND

GENDER AFFAIRS.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL...3RD RESPONDENT

THE DIRECTOR OF SURVEYS.....4TH RESPONDENT

THE REGISTRAR OF TITLES,

NAIROBI COUNTY.....5TH RESPONDENT

THE CHIEF LAND REGISTRAR.....6TH RESPONDENT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. In the Notice of Motion dated 22nd March, 2018, the Petitioner is seeking conservatory orders in the following terms:

a. That a conservatory order do issue prohibiting the 1st and 2nd Respondents either by themselves, agents, servants or by any other person whomsoever from interfering with the proprietorship of the Petitioner's L.R No. 22298 by evicting, trespassing on, remaining on, interrupting with activities on, or by howsoever interfering with the Petitioner's possession and/or ownership of the property pending hearing and determination of the Petition.

b. That a temporary injunction do issue against the 5th and the 6th Respondents from revoking the Petitioner's title, registering any interest or encumbrances in the nature of caveats and/or in any other manner effecting registration of any entry against the Petitioner's property known as L.R. No. 22298 without the consent of the Petitioner pending hearing and determination of the Petition.

c. That in the alternative the Honourable Court be pleased to issue a status quo order in favour of the Petitioner in respect of L.R No. 22298 as against the Respondents pending hearing and determination of the Petition.

d. That costs of this Application be provided.

2. The Application is supported by the Affidavit of the Petitioner's Director. The Petitioner's Director deponed that the Petitioner is the registered proprietor of land known as L.R No. 22298 located in Machakos County (*the suit property*); that the Petitioner purchased the suit property from Robeston Company Limited vide the Sale Agreement of 15th May, 2009 and that before purchasing the said land, the Petitioner undertook due diligence.

3. It is the Petitioner's case that after undertaking due diligence in respect of the suit land, it found out that Robeston Company Limited acquired the suit land from the initial allottee, one Cheruiyot; that the informal transfer of the suit land from the said Cheruiyot to Robeston was done with the consent of the Commissioner of Lands and that Robeston Company Limited was issued with a Grant by the President.
4. The Petitioner's Director deponed that on 13th February, 2018, the 1st and 2nd Respondents issued a public notice published in the Daily Nation newspaper requiring the Petitioner, amongst others, to surrender possession of the suit land within fourteen (14) days; that the impugned notice amounts to violation of the Petitioner's constitutional rights and that the Petitioner is a purchaser for value without notice.
5. The Petitioner's Director finally deponed that the Petitioner sought and obtained the consent to transfer the suit land from the Yatta Land Control Board; that if the 1st Respondent had a legitimate interest over the suit property at the time of the purchase, the consent of the Land Control Board would not have been granted and that the Respondents cannot therefore purport to divest the Petitioner of its lawfully acquired land.
6. According to the Petitioner's Director, the Petitioner has invested heavily in the suit land through structural developments and acquisition of farm equipment estimated at Kshs. 150,000,000 and that he stands to suffer substantial loss if the orders of injunction are not issued.
7. The Respondents filed their Grounds of Opposition in which they averred that the Application does not meet the threshold for the Grant of conservatory orders; that the Petitioner has not demonstrated that it has a prima facie case with a likelihood of success and that the Application is premised on mere speculations and amounts to abuse of the court process.
8. Other than the Grounds of Opposition, the Respondents did not file a Replying Affidavit. The Application proceeded for hearing by way of written submissions.
9. The Petitioner's advocate submitted that the Petitioner has presented to the court sufficient material to show that it has a right which is on the verge of being infringed by the Respondents; that the Petitioner is the registered proprietor of the suit land having purchased the same and that the Petitioner has established a prima facie case with chances of success. Counsel relied on several authorities which I have considered.
10. The Respondents' counsel submitted that although the Constitution provides for the rights and interests of a registered owner of land, the protection does not extend to properties that are unlawfully or illegal acquired; that the Petitioner has not adduced evidence to show that it has a prima facie case with chances of success and that there has been no infringement of the Petitioner's proprietary rights.
11. The Respondents' advocate finally deponed that the Petitioner has not exhibited any evidence to show that it has invested on the suit. Counsel submitted that the public notice that was issued by the 1st and 2nd Respondents was for the sole purpose of recovery of public land. According to counsel, if the court was to grant the orders sought, the Petitioner will be at liberty to deal with the property which was acquired illegally.
12. Article 23 (3) (c) of the Constitution and Rule 23 of the Constitution of Kenya (*Protection of Rights and Fundamental Freedoms*) Practice and Procedure Rules, 2013 grants to this court the mandate to issue conservatory orders in Constitutional Petitions. While considering an Application for conservatory orders, the court considers whether the Applicant has an arguable case; whether the injury or the threatened loss is irreparable and whether the Petition, if successful, would be rendered nugatory. Further, the court is required to consider whether the grant or denial of the conservatory relief will enhance constitutional values and objects of a specific right or freedom in the Bill of Rights (*See Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 others (2015) eKLR; Kenya Association of Manufacturers & 2 others vs. Cabinet Secretary – Ministry of Environment and Natural Resources & 3 others (2017) eKLR and Muslims for Human Rights (Muhuri) & 4 others vs. Inspector General of Police & 2 others, Mombasa Constitutional Petition No. 62 of 2014 [2014] eKLR*).
13. The evidence before this court shows that by way of a Sale Agreement dated 15th May, 2009, the Petitioner purchased land known as L.R. No. 22298 – Yatta from Robeston Company Limited. The Agreement shows the purchase price of the suit land as Kshs. 10,000,000.
14. After payment of the purchase price, the suit land was transferred to the Petitioner by way of a Transfer dated 24th September, 2009. The Transfer was duly registered on 23rd November, 2009 as I.R 98582/4.
15. The copy of the Freehold Grant in respect of L.R. No. 22298 shows the suit land was registered in the name of Robeston Company Limited on 4th August, 2005. The said Grant shows that the suit land is currently registered in favour of the Petitioner.
16. The 1st and 2nd Respondents have not denied that on 13th February, 2018, they caused a notice to be published in the Daily Nation newspaper. In the said notice, the 1st and 2nd Respondents informed the Petitioner to voluntarily vacate the suit premises and surrender the title documents to the 1st Respondent within fourteen (14) days. According to the said notice, the 1st Respondent was the proprietor of the suit land.
17. The Respondents did not file an Affidavit to state how the suit land belongs to the 1st Respondent. Indeed, the Respondents did not produce any evidence to show that the land was reserved for the 1st Respondent or for any other public purpose.
18. Considering that Section 23 (1) of the Registration of Titles Act (*repealed*) obligates courts to take the Certificate of Title issued by the Registrar as conclusive evidence that the person named therein is the proprietor of the land, and is the absolute and indefeasible owner thereof, I find that the Petitioner has established that he has a prima facie case with chances of success.
19. Indeed, in view of the fact that the Petitioner is in possession of the suit land, the Petitioner shall not only suffer irreparable injury if it is

evicted from the land, but such an act will also render the Petition nugatory.

20. For those reasons, I allow the Notice of Motion dated 22nd March, 2018 as follows:

a. That a conservatory order do issue prohibiting the 1st and 2nd Respondents either by themselves, agents, servants or by any other person whomsoever from interfering with the proprietorship of the Petitioner's L.R No. 22298 by evicting, trespassing on, remaining on, interrupting with activities on, or by howsoever interfering with the Petitioner's possession and/or ownership of the property pending hearing and determination of the Petition.

b. That a temporary injunction do issue against the 5th and the 6th Respondents from revoking the Petitioner's title, registering any interest or encumbrances in the nature of caveats and/or in any other manner effecting registration of any entry against the Petitioner's property known as L.R. No. 22298 without the consent of the Petitioner pending hearing and determination of the Petition.

c. The Respondents to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE