



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

CONSTITUTIONAL PETITION NO. 2 OF 2018

BETWEEN

IN THE MATTER OF : CHAPTER FOUR OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 2(5), 10, 28, 40, 63 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF : ARTICLE 17 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ON THE RIGHT TO PROPERTY

AND

IN THE MATTER OF : ARTICLE 14 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS

AND

IN THE MATTER OF : DOCTRINE OF ANCESTRAL DOMAIN AND/OR INTER-GENERATIONAL TRUST

AND A PETITION CHALLENGING INFRINGEMENT OF THEIR CONSTITUTIONAL RIGHTS BY THE

REFUSAL OF THE GOVERNMENT OF KENYA TO RECOGNIZE AND ADDRESS THE PLIGHT OF THE

ORIGINAL OCCUPIERS AND/OR DESCENDANTS OF THE OCCUPIERS AND CUMULATIVELY THE

COMMUNITY WITHIN RELATION TO PLOT NO 8 SEC III MN, CR. 14107, CR. 5606/14 AND 7120/15

SUB DIVISION NO. 470 (ORIGINAL NO 5/3) SEC III MN NORTH, CR NO 13026/1, TRANSFER REGISTERED

AS NO 57770/19, LAND SURVEY PLAN NO. 80138 AND SUBDIVISION 4399 ORIGINAL NO 15/4.5 & 286/3 SEC

II/MN PLAN NO 75772 CR 5692/2 WHICH MEASURE OVER 800 ACRES IN TOTAL FORMERLY KNOWN AS JEURI VILLAGE

BETWEEN

HENRY WAMBEGA & 4 OTHERS.....PETITIONERS

AND

THE GOVERNMENT OF KENYA

THROUGH THE HON A. G & 7 OTHERS.....RESPONDENTS

AND

SAFEPARK LIMITED.....INTERESTED PARTY

RULING

1. For determination is the application dated 1st October 2018 brought by the Safe Park Limited herein after referred to as the Interested Party/Applicant. The Notice of Motion is premised on the provisions of Rule 7, 19 and 25 of the Constitution on Kenya Practice and Procedure Rules 2013. The orders sought are;

(a) Spent;

(b) Spent;

(c) Safe Park be deemed as an Interested Party to this Petition and be joined as a party to these proceedings.

(d) The court be pleased to set aside, discharge vacate, stay and vary as against the Interested Party orders issued on 16th July 2018.

In the alternative:

(e) The Petitioners be ordered to give security in the sum of Kshs 3 million for the Interested Party's costs within 14 days of this Petition.

(f) The Petitioners be ordered to issue in the form of a bank guarantee for the sum of Kshs95,000,000 as projected damages to the applicant in respect of the ex-parte injunction obtained on 16th July 2018 failure to which the orders stand dismissed as against the applicant.

(g) Costs of this application be provided.

2. The application as grounded on the facts listed on its face inter alia;

(a) The Interested Party was subsequently informed of the service of the order and immediately instructed its personnel to stop the construction even though it was apparent from the Court order that the Interested Party was not a named Respondent in the suit.

(b) The Applicant was not served with any of the pleadings to this suit contrary to the provisions of Order 40 of the Civil Procedure Rules, 2010.

(c) The Petitioners have not met the threshold set for grant of an injunction which required the petitioners to establish;

(a) A prima facie case with a probability of success;

(b) That they stand to suffer irreparable harm not compensable in damages; and

(c) That the balance of convenience tilts in their favour.

(d) The Interested Party stand to suffer crippling financial losses which cannot be compensated by way of damages, should the injunctive orders issued by this Honourable Court not be lifted.

3. The motion is further supported by the affidavit of TUSHAR SHAH. Meanwhile the application is opposed by the Petitioners vide the replying affidavit sworn by Henry Wambega. Mr Wambega deposed that the applicant purchased the suit property after the commencement of this petition. That having been made aware of the suit through advertisement in the Standard Newspaper of 13th September 2018, the applicant should not have commenced the construction work. That the temporary orders were issued after sufficient notice to all affected parties; the applicant included. That the averments contained in paragraphs 12-19 of the supporting affidavit to the application are res judicata the orders made on 13th December 2018. The Petitioners therefore urge the court to dismiss the application with costs.

4. The advocates filed written submission which they highlighted on 25th March 2019. Mr. Ismael learned counsel for the Applicant submitted that he had annexed his client's title at page 20 of the application showing that it is not true the applicant acquired the land after the filing of the Petition. That from the Petition as filed, it is difficult to tell what the map annexed relates to which land and therefore there is no basis for maintaining the orders of injunction. Mr. Kenga advocate appearing for the Petitioners submitted that the application is defective for failing to annex the order complained of. In reply, Mr Ismael said the Court of Appeal had closed the issue of annexing the order in the case of **Stephen Boro versus Family Finance B. S & 3 Others Civil Appeal NO. 263 of 2009**. He also relied on the provisions of Section 1A, 1B & 3A of the Civil Procedure Rules.

5. It is not disputed that the orders of 16th July 2018 were issued before the Applicant joined these proceedings therefore it did not have opportunity to reply to the issues raised by the Petitioner. The Petitioners have deposed that all affected parties were notified before the orders were issued vide an advertisement they placed in the Standard Newspaper of 13th September 2018 (paragraph 4 of the replying

affidavit). This conflict the proceedings on record. The order complained of was given on 16th July 2018 prior to the advertisement made on 13th September 2018.

6. Paragraph 6 of the order complained (of 16th July 2018) stated this;

“The parties to keep on hold any construction on the land and or transfer of the titles in dispute pending further orders.”

7. It is on 4th September 2018 when this court gave directions that the said order be served by advertisement and through the local administrators of the area (Chief or assistant chief). The order was also specific that it applied to the parties in this suit. The inference drawn then is that the order could only affect the Interested Party after it made the application to be joined and not earlier. Consequently having been joined, it is his right to oppose as against it and or participate in making arguments on whether the same should hinder it from using the land lest she be accused of being in contempt.

8. The Petitioners presented an argument that the Applicant herein purchased their land (part of suit property) after the commencement of this Petition and are thus not entitled to the variation and or discharge of the orders complained of. In response, the Applicant referred the court to its title deed. At page 23 of the application is entries. Entry no 5 refers to a transfer in favour of Safe Park Limited made on 6th October 2016. The applicant also annexed receipts made to the County Government of Kilifi in March 2017 for their building plain approvals.

9. From these documents it is shown that both the transfer and approvals for construction was done at least over a year before the Petition was filed on 28th January 2018.

10. In light of the fact that the orders were granted ex-parte as against the Applicant, has any cause been shown why the same should be varied? From the Petition, it is not in dispute that the Petitioners are not living on the suit land. Secondly in the background to the Petition, it is pleaded that the titles in respect of the suit parcels were issued during the colonial era. The Petitioners have highlighted their rights which have been infringed as provided in the Constitution of Kenya 2010.

11. In the reliefs sought in the Petition, they prayed that the mentioned suit parcels be declared as their ancestral land and be made trust land by virtue of the history of this land. Under paragraph (e) the Petitioners sought for orders of compensation for the 2nd – 6th Respondents (to include the Interested Party) and the land be adjudicated as per the Land Adjudication Act.

12. Besides the applicant's land, some of the Respondents have developed their parcels of land. The Petitioners did not make any prayers on what should happen to the developments that are existing on the suit land other than asking that the owners of those parcels be compensated. Since the Applicant acquired its land before the Petition was filed and following the reply made to the application not disclosing any irreparable harm that will be suffered in the event the order of injunction stopping construction is not maintained, I find no viable reason to stop the Interested Party from developing its land.

13. In the foregoing circumstances, I shall allow the motion dated 1st October 2018 in terms of prayer 3 and 4 to the extent that the orders of injunction issued on 16th July 2018 and extended pending hearing and determination of the Petition is varied to the extent that the Interested Party (Safe Park Ltd) be and is hereby allowed to carry on with its constructions works on its suit Parcel C. R No. 44069, L. R No. MN/111/4781. However the limb of the order barring transfer and or disposing of the subject land to any 3rd parties pending hearing and determination of the petition shall remain in force.

14. Given that I have partly granted the Prayer (4) of the Motion, I decline to grant prayer 5 and 6 for reasons that the orders if given will be vindictive to the Petitioners in exercising their rights accorded to them in the constitution. The parties shall bear their costs of the Motion.

Dated, Signed and Delivered at Mombasa this 5th day of June 2019.

A. OMOLLO

JUDGE.