



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 1396 OF 2014

IN THE MATTER OF THE PREAMBLE TO THE CONSTITUTION OF THE REPUBLIC OF KENYA, ARTICLE 1, 2, 10, 19, 20, 21, 22, 23, 28, 29, 40, 47, 50, 64, 165 AND 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 12, 16, 18, 19, 20, 21, 24, 25, 26 AND 107 OF THE LAND REGISTRATION ACT, CAP.300 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE GOVERNMENT LANDS ACT, CAP. 208 OF THE LAWS OF KENYA (NOW REPEALED)

AND

IN THE MATTER OF THE FOREST ACT, CAP 385 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE SURVEY ACT, CAP. 299 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE THREATENED INFRINGEMENT UPON THE FUNDAMENTAL RIGHTS AND FREEDOMS OF MR. JEREMY MARK BLOCK RELATING TO HIS PROPRIETARY RIGHTS OVER THAT PIECE OF PROPERTY DESCRIBED AS LR NO. 214/432 MUTHAIGA, NAIROBI AND WHICH RIGHTS ARE RECOGNISED UNDER ARTICLES 40 AND 65 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

BETWEEN

JEREMY MARK BLOCK.....PETITIONER/APPLICANT

VERSUS

KENYA FOREST SERVICE.....RESPONDENT

AND

THE CHIEF LAND REGISTRAR.....1ST INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL.....2ND INTERESTED PARTY

DENIS AWORI.....3RD INTERESTED PARTY

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

RULING

1. This is the notice of motion dated 26th September 2014 brought under Articles 22, 23, 165 of the Constitution, Rules 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all other enabling provisions of the law:-

2. It seeks orders:-

(a) Spent.

(b) Spent.

(c) Spent.

(d) Spent.

(e) That pending the hearing and determination of the constitutional petition filed herein this honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its officers, agents, and/or servants from tearing down the fence on the petitioner's property and with fence forms the boundary between the said property and Karura forest.

(f) That pending the hearing and determination of the constitutional petition filed herein this honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its officers, agents and/or servants from appropriating any portion of the petitioner's property and which property has its boundaries delineated as per the registered deed plan no. 67617 from the Director of Surveys.

(g) That pending the hearing and determination of the constitutional petition filed herein this honourable court do issue a conservatory order restraining and/or preventing the respondent either by itself or through its officers, agents and/or servants from interfering with the petitioner's property in any form or manner and especially as relates to the boundary between the said property and Karura forest and which boundary is delineated on the registered deed plan No. 67617 from the Director of Surveys.

(h) That the costs of and incidentals to this application be borne by the respondent.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 39.

4. The application is supported by the affidavit of Jeremy Mark Block, the petitioner/applicant herein sworn on the 26th September 2014 and a supplementary affidavit sworn on the 11th May 2015.

5. The application is opposed. There is a notice of preliminary objection dated 6th October 2014 filed by the respondent and a replying affidavit. The 1st and 2nd interested parties have also filed grounds of opposition dated 6th October 2014. The 3rd interested party, Dennis Noel Awori has sworn an affidavit on 31st June 2015 in support of the petitioner's notice of motion.

6. On the 4th June 2015, the court directed that the application be canvassed by way of written submissions.

The petitioner/3rd interested party's submissions

7. The respondents seeks to demolish the applicant's fence which is constructed on the boundary between his residential property and Karura forest. This is despite the fact that the present location of the boundary has been established and confirmed by the relevant government institutions and is expressly evidenced on statutory maps and plans. The applicant is the absolute proprietor of the property on which the fence is erected to wit LR NO. 214/432, Muthaiga being a portion of the premises comprised in and conveyed by an Indenture of Conveyance dated 13th February 1939.

8. He has put forward the cases of **Andy Forwarders Service Limited vs Capital Markets Authority [2011] eKLR; Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 and Patrick Ouma Onyango & 12 Others vs The Attorney General & 2 Others [2005] eKLR.**

The petition disclosed a prima facie case hence the application ought to be allowed. The petition will be rendered nugatory if the order sought are not granted.

The Respondent's submissions

9. This court has no jurisdiction to determine a clear and admitted boundary dispute which has now been presented as a constitutional petition by the Petitioner. Section 18 of the LRA, 2012 provides for resolution of boundary disputes by Registrar of Titles and not the court. Application ought to be struck out for want of jurisdiction.

10. The disputed parcel of land lies within Karura forest the same is public land therefore unavailable for allocation or grant to the petitioner. The respondent has deponed extensively that it has never degazetted the claimed portion from the larger Karura forest and therefore the same cannot be said to be part of the petitioner's private land. Public land must remain public at all times and the courts are enjoined to secure the public interest in this regard by refusing such applications as the present one where the effect of the orders sought would be to give legitimacy to a claim for public land by a private person. They have put forward the case of **John Peter Kamau Ruhangi vs Kenya Forest Service [2010] eKLR; Republic vs Commissioner for Lands & 4 Others Exparte Associated Steel Ltd [2014] eKLR.**

11. The petitioner's actions are against public policy and the inconvenience, loss and damage that is caused thereby cannot be compensated by way of damages. They have put forward the case of **Shelfer vs City of London Electricity Lighting Co. [1895] 1 CH 287; Veronicah Waithe, Trustee of Interchristian Churches & 3 Others vs Kenya National Highways Authority [2014] eKLR.** Public interest would be sustained by the grant of conservatory orders in terms of the application to protect and preserve the public forest and amenity being Karura forest from alienation and development for commercial use by respondent. They urge that the application be dismissed.

12. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures, the written submissions of counsel and the authorities cited. The issues for determination are:-

(i) Whether or not the petitioner's/applicant's application meets the threshold for grant of conservatory orders.

(ii) Who should bear costs?

13. At this juncture it is necessary to briefly examine the legal principles governing the application of this nature. The onus is in the applicant to satisfy the court that it should grant the orders. In the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125**, the Court of Appeal in determining what amounts to a prima facie case stated thus:-

"So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter..... A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the possibility of success of the applicant's case upon trial. That is clearly the standard which is higher than an arguable case".

14. It is the petitioner's/applicant's case that the respondent seeks to demolish the applicant's fence which is constructed on the boundary between his residential property and Karura forest; that the present location of the boundary has been established and confirmed as being correct by the relevant government institutions and is expressly evidence on statutory maps and plans.

15. It is not in dispute that the applicant is the absolute proprietor of LR No. 214/432 Muthaiga on which the fence is erected. The Director of Surveys enjoined in these proceedings as the 4th Interested Party will be able to shed light during the hearing as to where exactly the boundary ought to be. If it is found that the fence is on the portion within Karura forest, then it will be demolished. In the meantime, I find that it is necessary to grant the orders sought.

16. I find that the petition discloses a prima facie case to warrant the grant of the orders sought. I am also of the view that the petition will be rendered nugatory if these orders are not granted. I find that it is in the interest of justice that status quo is maintained pending the hearing and determination of the petition.

17. In conclusion, I find merit in this application and grant the orders sought namely:-

(a) That conservatory order be and is hereby issued restraining and/or preventing the respondent either by itself or through its officers, agents, and/or servants from tearing down the fence on the petitioner's property and with fence forms the boundary between the said property and Karura forest pending the hearing determination of the constitution petition.

(b) That a conservatory order be and is hereby issued restraining and/or preventing the respondent either by itself or through its officers, agents and/or servants from appropriating any portion of the petitioner's property and which property has its boundaries delineated as per the registered deed plan no. 67617 from the Director of Surveys pending the hearing and determination of the constitutional petition.

(c) That a conservatory order be and is hereby issued restraining and/or preventing the respondent either by itself or through its officers, agents and/or servants from interfering with the petitioner's property in any form or manner and especially as relates to the boundary between the said property and Karura forest and which boundary is delineated on the registered deed plan No. 67617 from the Director of Surveys pending the hearing and determination of the constitutional petition.

(d) That the costs of this application do abide the outcome of the petition.

It is so ordered.

Dated, signed and delivered in Nairobi on this 24TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Muchiri advocate for the Petitioner/3rd Interested Party

Mr. Ekitololo holding brief for Mr. Njenga for the Respondent

No appearance for the Interested Party

Kajuju - Court Assistant