REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC PETITION CASE NO. 3 OF 2017

YAKO SUPERMARKET

SUDHIR KHETIA.....PETITIONERS

VERSUS

NATIONAL LANDS COMMISSION

THE CABINET SECRETARY MINISTRY

OF LAND & URBAN DEVELOPMENT

THE CHIEF LAND REGISTRAR

BOARD OF MANAGEMENT KAKAMEGA

PRIMARY SCHOOL .

THE HON THE ATTORNEY GENERAL .....RESPONDENTS

RULING

The application is dated 27th June 2019 and is brought under Section 3 &3A Civil Procedure Act and Order 40 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this application may be certified as urgent.

2. That service of this application may be dispensed with and it be heard ex-parte in the 1st instance.

3. That pending the hearing of this application inter-partes, there be an order of temporary injunction restraining the respondents and in particular, the 4th respondent either by themselves, their agents, servants, assignees or any other person claiming through them from trespassing, developing, alienating, wasting, constructing premises on or in any manner from interfering with all those parcels of land known as Kakamega/Municipality Block II/292 and Kakamega/Municipality/Block II/252.

4. That pending the hearing and final determination of this suit, there be an order of temporary injunction restraining the respondents and in particular, the 4th respondent either by themselves, their agents, servants, assignees or any other person claiming through them from trespassing, developing, alienating, wasting, constructing premises on or in any manner from interfering with all those parcels of land known as Kakamega/Municipality Block II/292 and Kakamega/Municipality/Block II/252.

5. That costs of this application be provided for.

The petitioners submitted that on 5th February, 2011, the 1st petitioner purchased Kakamega/Municipality Block II/292 for valuable consideration from one Michael Odwoma. Annexed are copies of the Sale Agreement, duly registered transfer of lease and certificate of Lease marked as SRK-01. That on 20th August, 2011 the 2nd petitioner purchased Kakamega/Municipality Block II/252 for valuable consideration from Kito Pharmaceutical Limited. Annexed are copies of the sale agreement, duly registered transfer of lease and certificate of lease marked as SRK-01. That the petitioners have since applied to the commissioner for Lands for amalgamation of Kakamega Municipality Block II/292, 296, 314 and 252. That the director of survey issued a deed plan after the amalgamation of the parcels was approved, being, Kakamega Municipality Block II/360. Annexed are copies of the same and marked SRK-01. That because of the contested issues herein a new title for the amalgamated land is yet to be issued and ought to be issued upon the surrender of the original title documents

and the original transfers in relation to Kakamega Municipality Block II/292, 296, 314 and 252. That prior to purchasing the amalgamated property, the petitioners exercised all due diligence which showed that there was no defect in the titles which the vendors held. That the petitioners therefore hold the titles for their respective parcels as bonafide purchasers, for value, without notice of any defect to the titles whatsoever. That upon registration of the proprietary interest of the suit property and the endorsement of the certificates of title by the registrar of titles, the petitioners became the proprietors of the suit properties holding absolute and indefeasible titles to the suit properties in terms of Section 23 (1) of the Registration of titles Act, chapter 281 Laws of Kenya (now repealed by the Land Registration Act. No. 3 of 2012 which retains the same principles under sections 24, 25 (1) of the Act). That as the absolute and indefeasible owners of the suit properties, the petitioners' property rights are guaranteed, respected and protected by Article 40 and secured in accordance with the principle embodied in Article 60 (1) (b) of the constitution of Kenya. That since conferment of ownership of the suit properties to the petitioners and on the strength of the guarantee of 'Title obtained from the government of the Republic of Kenya through the 2nd and 3rd respondents herein the petitioners used their titles to the suit property to secure business arrangements with local and foreign investors alike. That in particular the 1st petitioner has always remained in possession of its parcel and has made part developments thereon worth Ksh. 200 Million with the potential of employing at least 200 Kenyans and indirectly supporting a myriad households. Annexed is a copy of the valuation of the developments as at 22nd February, 2014 marked as SRK-01. That the 2nd petitioner has attempted to put up a three star hotel on his parcel but each time the process has been scuttled by constant harassment and infringement of the 2nd petitioner's proprietary rights from various quarters. That the petitioners aver that despite being the registered proprietors to the suit property, they have faced constant harassment and infringement of their proprietary rights and quiet possession at the hands of officers of the 3rd respondent, the 4th respondent and the Vice-chairperson of the 1st respondent and/or their agents. That on 17th February, 2012 through Kenya Gazette Notice No. 1619, the Land Registrar of Kakamega District purported to revoke the petitioners' titles in the suit properties on the ground that the suit properties belonged to the 4th respondent. Annex is a copy of the Gazette Notice marked as SRK-01 pages 39-40. That the above stated action impelled the petitioners to file Kakamega Judicial Review Case No. 20 of 2012 against the Land Registrar and the Chairman of the School Committee of Kakamega Primary School seeking an order of certiorari to quash the decision of the Land Registrar. That on 9th May, 2013 the court quashed the Land Registrar's decision to revoke the titles and the subject gazette notice was declared null and void. Annexed is a copy of the decree marked as SRK-01 pages 41-42. That this decision was never challenged nor has an appeal been preferred against it. That soon thereafter, on 28th June, 2013, the 1st respondent wrote to inform the petitioners that the commission had received a complaint regarding the ownership of the suit properties and that the commission was investigating the grant held by the petitioners to determine the propriety and legality of the same. The letter further required the petitioners to cease dealing with the suit properties until the case was determined. Annexed is a copy of the letter marked as SRK-01 pages 43. That the petitioners wrote back explaining how they became seized of the suit properties and attached documents supporting the same. That on 6th January, 2014, the 1st respondent again wrote to the petitioners stating thus:- "It is our opinion that the said properties are separate and distinct from the surrounding ones. In that regard, we find no justifiable merit to stop any further work that you are undertaking." Annex is a copy of the said letter marked as SRK-01 pages 45.

That the 1st respondent again wrote to the petitioners on 4th April, 2014 advising that the commission had commenced a review of the grants held by the petitioners land required the petitioners to make a presentation to the commission on how the petitioners acquired the suit properties. Annexed is a copy of the said letter marked as SRK-01 page 45. That it is a trite principal of law that a matter that has been adjudicated by a competent court and may not be pursued again/further by the same parties. That this trite principal of law notwithstanding, by a public notice dated 14th April, 2014 the 1st respondent informed the members of the public that it had received complaints regarding many parcels of land including the suit properties herein and invited the members of the public to present information regarding the same. Annexed is a copy of the public notice marked as SRK-01 page 46. That pursuant to the notice dated 14th April, 2014, the petitioners by a letter dated 15th April, 2014 once again wrote to the 1st respondent and provided all the documentation regarding their ownership to the suit properties. Annexed is a copy of the response marked as SRK-01 pages 47-85. That on 23rd April, 2014 appeared before the commission and made presentations of how they came to be in ownership of the suit properties. That on 18th June, 2014, the 3rd respondent without offering any explanation to the petitioners, entered restrictions on the petitioners' titles to the suit properties barring any dealings with the parcels until the 3rd respondent got directions presumably from the 1st respondent to do so. Annexed are copies of searches conducted on the suit properties marked as SRK-01 pages 86-89. That the petitioners made several appearances for the review hearing and presented all the documentation to show ownership of the suit properties with the last appearance being on 21st November, 2014. That during the appearances, the petitioners made numerous requests to have sight of the letter of complaint against them together with the supporting documents but none was forthcoming. Annexed is a copy of the letter from the petitioners' advocates requesting for the documents marked as SRK-01 page 90. That after the review hearings, the 1st respondent never delivered any determination in respect of the suit properties despite the numerous letters written from the petitioners' advocates requesting for the 1st respondent's determination marked as SRK-01 pages 91-96. That during this period when the petitioners' fates were in limbo, the Vice-Chairperson of the 1st respondent visited Kakamega Primary School without informing the petitioners and went ahead to assure the students and staff there that the suit properties were in fact the school's playground. That it was after this incident that the petitioners became aware that the Vice-Chairperson of the 1st respondent is an alumnus of Kakamega Primary School. That the petitioners therefore verily believe that the Vice-Chairperson of the 1st respondent had an interest and a bias against the petitioners which interest caused the Vice-Chairperson of the 1st respondent to be hell bent on expropriating the petitioners' properties and used her to clout and position to ensure the same. That on 3rd July, 2015, the petitioners visited the 1st respondent's offices only to be casually informed by the Vice-Chairperson of the 1st respondent that their titles have already been revoked yet the Vice-Chairperson did not have the full decision of the commission to relaying the same. That the Vice-Chairperson of the 1st respondent then handed the 2nd petitioner a letter dated 1st July, 2015 wherein the Vice-Chairperson indicated that the commission had revoked the petitioners' titles and that the Commission's full decision would be communicated in due course. Annexed is a copy of the letter marked as SRK-01 pages 97-102. That it was only after 11 months of the petitioners' last appearance before the 1st respondent and after the petitioners' advocates threatened to take action against the 1st respondent that the petitioners received a letter dated 21st October, 2015 and titled "Determination for Review of Grants and dispositions on Kakamega Township Block II/32 and all the subsequent sub-divisions – Block Nos. II/296, II/251, II/292, II/252, II/293, II/294 and II/295" from the Vice Chairperson of the 1st respondent on behalf of the Chairman, Muhammad A. Swazuri. The same letter was copied to the 3rd respondent, the Governor Kakamega County, the Board of directors Kakamega Primary School, the head teacher of Kakamega Primary School and the petition and enclosed the determination of the Commission. Annexed is a copy of the letter and determination marked as SRK-01 pages 103 -127.

That section 14 (1) of the Act empowers the 1st respondent to, within five years of its commencement on its own motion or upon a complaint

by the National or County Government, a community or an individual, review all grants or dispositions of public land to establish their proprietary or legality. That under Article 68 (c) (v) as read with section 14 (1) of the Act, the 1st respondent has jurisdiction and/or power to review grants of public land as defined by the Constitution under Article 62 and not as the 1st respondent has purported to on page 2 of the determination. That under section 14 (2) of the Act, the 1st respondent is enjoined to hold deference to the provisions of Articles 40 (right to property), 47 (fair administrative action) and 60 (principles of land policy including security of land rights) of the Constitution. That the public land the subject of the review jurisdiction and/or power of the 1st respondent is limited to public land as defined under Article 62 of the Constitution of Kenya, 2010 and does not extend to private land as defined under Article 64 of the Constitution of Kenya, 2010. That the suit property is private land in terms of Article 64 (b) of the Constitution, and consequently, the 1st respondent lacks the constitutional and/or statutory power to review the petitioner's title to the suit property. That in reviewing grants or dispositions of public land, section 14 (7) of the Act prohibits the 1st respondent from directing the revocation of the title of a bonafide purchaser, for value without notice of a defect in the tile.

The 4th Respondent submitted that, Kakamega Primary School is, pursuant to statute, a public school run by a Board of management duly established under the Basic Education Act, 2013. That the said school is managed by a Board of management constituting individual and representative members for the various interest groups and or stakeholders and duly appointed in accordance with the provisions of the said Basic Education Act, 2013. That ever since the coming into force of the said Basic Education Act, 2013, the Chairperson of the Board of Management is neither synonymous with nor the ultimate representative of the Board of Management as a legal entity. That the members of the Board of Management for the said 4th respondent herein have been advised the amended petition and application and the entire claim herein are consequently and fundamentally defective and improperly instituted against the said 4th respondent, being an unrecognized , in-incorporated entity without any legally representative nor synonymy with the Board of Management contrary to Article 22 of persons generally as well as judicial precedent and ought to be struck out and or dismissed with costs. That the amended petition and application and the entire claim herein are fundamentally defective and improperly instituted against the 4th respondent, who has no locus standi to stand and or sustain judicial proceedings as presented herein and ought to be struck out and or dismissed with costs. That the petition and application herein are non-starters, an abuse of the due and court process, defective in substance and improperly presented, void ab initio and ought to be struck out and or dismissed with costs. That in view of the foregoing preliminary issues, the petition and application herein are non-starters, an abuse of the due and court process as well as of law, defective in substance and improperly presented, void ab initio and ought to be struck out and or dismissed with costs.

That through a just, open, inclusive and fair process by the 1st respondent, following a formal complaint and which was brought to the petitioners' attention, the registration of the parcels of land known as L.R.. No. Kakamega Township/Block II/294, L.R. No. Kakamega township/Block II/295 and L.R. No. Kakamega Township/Block II/296 constituting the subject of the petition herein was found to have been irregularly and illegally made in favour of the petitioners herein respectively and consequently recommended revocation. Annexed hereto and marked "DI 1 (a) ns (b)' are copies of the said notifications. That the said process under which the 1st respondent exercised its constitutional and statutory mandate was undertaken fairly, on legitimate and established grounds, namely the petitioner was duly notified of the 4th respondent's claim and or interest in the said parcels of land. The petitioner was allowed and duly participated in the process leading to the review of the grant and or recommendation for the respective revocation. The said petitioner had sufficient information and opportunity to adduce their evidence and demonstrate the process of acquisition and registration of the said parcels in their respect favour, and which was found wanting. The said petitioner was duly notified of the findings and the reasons in the findings and decision of the 1st respondent. In arriving at their decision, the 1st respondents were within their constitutional and statutory mandate and did not, in any manner, exceed thereof nor act ultra vires.

That in view of the foregoing, the said petitioners were, on their part, accorded fair hearing and due process by the 1st respondent in its proceedings as conducted on 3 separate occasions culminating in the 1st respondent's decision sought to be challenged herein. Annexed hereto and marked "D1 2"is a copy of the said decision dated 8/10/2015. That in arriving at the said decision, the 1st respondent did so justiciably, pursuant to its mandate and all such powers as vested in it by the Constitution of Kenya, 2010 and statute inter alia, to undertake review and dispositions in respect of public grants and redress historical injustices such as those under which the said land was acquired and ended in the petitioners' irregular proprietorship. That as L.R. No. Kakamega Township/Block II/294, L.R. No. Kakamega township/Block II/295 and L.R. No. Kakamega Township/Block II/296 were previously comprised in the land parcel No. L.R. No. Kakamega township/Block II/32, all reserved as public land as a playfield and not available for subsequent allocation and or further grant from which the petitioner would benefit and or derive registrable interest, their proprietorship was contrary to the ideals of law and in respect whereof they are not entitled to any of the remedies, whether interlocutory or final, as sought herein. That in any case, the remedies of certiorari and prohibition sought herein as prescribed at law are unavailable to the petitioners on account of being time barred. That as the petitioners herein fully acquiesced and subjected themselves to the process under the 1st respondent, duly participated and involved therein and contributed to the process and is final determination by the 1st respondent herein, they are bound by the outcome thereof and are consequently precluded by the doctrine of estoppel from asserting to the contrary.

That in view of the irregular, flawed and improper manner in which the petitioners purportedly acquired the said parcels of land and contrary to the reserved use despite the noted reservation, they are neither a beneficiary to nor does the doctrine of legitimate expectation operate in their favour. That in the circumstances, it would be absolutely illegal, absurd, unjustified, unconscionable and contrary to ideals and equity to sanitize and or legitimaze their irregularity through the honourable court. That indeed as the decision of the 1st respondent is expected to be collective, inclusive and open, its chairperson's personal opinion cannot, in any way whatsoever, be alleged to override the 1st respondent's findings and or unilaterally induce an expectation on the part of the petitioner to hold onto public land the subject herein. That the doctrine of legitimate expectation must be assessed against public interest and legality prior to its endorsement, declaration and or recognition by the honourable court and consequently does not arise as matter of right or automatic endorsement on the part of the honourable court.

That as a fact and in view of the public nature of the parcels the subject of the current proceedings as well as the fact of its being a public school with an enormous population, the doctrine of legitimate expectation would far operate in favour of the 4th respondent and not that of the petitioners as they are private persons with no superior right and or larger public interest than that of the public good in general. That in the prevailing circumstances, the doctrine of legitimate expectation is totally inapplicable in favour of the petitioners' herein. That in any case, the intended developments on the said public parcels of land the subject herein, and the proximity of the 4th respondent thereto, their

respective purposes with the intent of the petitioner are at cross, non-complementary and bound to occasion undue hardships, perpetual nuisance and disturbances thereby interfering with the best interests of the learners at the 4th respondent. That the amalgamations, remapping and allocation of all those parcels of land the subject herein and previously comprised in parent title L.R. No. Kakamega Township/Block II/32 were and are in favour of the 4th respondent herein. Annexed hereto and marked "DI 3 (a), (b) & (c)" are copies of formal correspondences in recognition of the 4th respondent's entitlement and interest in the said parcels among others. That the said amalgamations as admitted and disclosed in the amended petition herein not having been challenged, the doctrine of estoppel then applies as against the petitioners precluding them from seeking the orders sought herein. That the issues at the centre of the petition herein were well investigated, documented, discussed and valid decisions made as per the requisite Gazette Notice recommendations by the 1st respondent herein. That in deed had the petitioners duly undertaken due diligent as alleged, and if any, they would have taken cognizance of and established the many and multiple litigations then ongoing over the said parcel of land that pitted the 4th respondent against different 3rd parties. That in deed, the 4th respondent's possession, use, control and care for the said parcels of land has been open, continuous, marked, uninterrupted and unchallenged, details which the petitioners would easily have established on the ground vide physical inspections and or visitations to the site and situate of the said parcels of land.

That there have been several ongoing court battles and judicial proceedings over the subject of the parcels herein, among them, Kakamega CMCC No. 281 of 2004 and Kisumu High Court Civil Case No. 97 of 2004, and which were in public domain and the petitioners were and remain authors of their joint and or several misfortune in failed due diligence over the respective parcels and in respect whereof the 4th respondent cannot in any way be made to suffer in the circumstances. Annexed hereto and marked "DI 4" is a copy of the ruling in Kisumu High Court Civil Case No. 97 of 2004 by Justice B.K. Tanui. That the 4th respondent properly presented has been granted letter of allotment in respect of the amalgamated parcel of land being the present site on ground. Annexed hereto and marked "DI 5(a) – (g)" are copies of documents in support thereof and the requisite payment compliances. That in the circumstances, the amended petition and application herein are totally misplaced, an abuse of the court process and time, sought to irregularly utilize the honourable court to entrench unethical status quo, wholly unsustainable in any case, contrary to the spirit and letter of the constitution and statute and ought to be struck out and or dismissed altogether with costs to the 4th respondent. That as a school, they have at all times occupied, used and asserted ownership over the above parcels of land herein, which have always been so inseparable on the ground. That the school, through public funding and approvals, is currently developing the whole of its parcel as it has always been known to it and the community. That in the circumstances, the balance of convenience tilts in total favour of the 4th respondent herein.

This court has considered the application and the submissions therein.It is based on the grounds that, the 1st petitioner is the registered owner of L.R. No. Kakamega/Municipality/Block II/292. That the 2nd petitioner is the registered owner of L.R. No. Kakamega/Municipality/Block II/252. That the respondents and in particular, the 4th respondent, without any colour of right, while this case is pending hearing have entered the suit parcels of land and are in the process of constructing premises on L.R. No. Kakamega/Municipality/Block II/252 owned by the 2nd petitioner and threatened to disposes him of the same, wasting it while alleging that it is part of the school compound owned by the 4th respondent – an untrue fact. That unless an order of temporary injunction is issued against the respondents, the petitioners are likely to suffer irreparable injury and loss. That the petitioners have a prima facie case with high chances of success against the respondents. That the balance of convenience tilts in the petitioner's favour. That it is in the interest of justice that an order of temporary injunction be issued to restrain the respondent's oppressive acts.

The 4th respondent submitted on a preliminary issue that, ever since the coming into force of the said Basic Education Act, 2013, the Chairperson of the Board of Management is neither synonymous with nor the ultimate representative of the Board of Management as a legal entity hence the petition and the application is defective. Be that as it may the word Chairman was struck out from the pleadings on the 23rd of July 2019 hence the pleadings are not defective.

The application being one that seeks injunctions, has to be considered within the principles set out in the case of Giella vs Cassman Brown & Co. Ltd 1973 E.A 358 and which are:-

1. *The applicant must show a prima facie case with a probability of success at the trial*

2. *The applicant must show that unless the order is granted, he will suffer loss which cannot be adequately compensated in damages and,*

3. *If in doubt, the Court will decide the application on a balance of convenience.*

It must also be added that an interlocutory injunction is an equitable relief and the Court may decline to grant it if it can be shown that the applicant's conduct pertinent to the subject matter of the suit does not meet the approval of a Court of equity. In the case of *Jane Kemunto Mayaka vs Municipal Council of Nakuru & Others, HCCC No.124 of 2005*, where the Court held that:-

"injunctions are issued to prevent the occurrence of an event that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place....."

In the instant case the 4th Respondent entered into the suit property in the *year June 2019*, the 4th respondent states that as a school, they have at all times occupied, used and asserted ownership over the above parcels of land herein, which have always been so inseparable on the ground. That the school, through public funding and approvals, is currently developing the whole of its parcel as it has always been known to it and the community. That the 4th respondent properly presented has been granted letter of allotment in respect of the amalgamated parcel of land being the present site on ground. The petitioners aver that they are the registered owners of the suit parcels being bonafide purchasers. That in particular the 1st petitioner has always remained in possession of its parcel and has made part developments thereon worth Ksh. 200 Million. That the 2nd petitioner has attempted to put up a three star hotel on his parcel but each time the process has been scuttled by constant harassment and infringement of the 2nd petitioner's proprietary rights from various quarters. That the petitioners aver that despite being the

registered proprietors to the suit property, they have faced constant harassment and infringement of their proprietary rights and quiet possession. It is not in dispute that there have been several ongoing court battles and judicial proceedings over the subject of the parcels herein, among them, Kakamega CMCC No. 281 of 2004 and Kisumu High Court Civil Case No. 97 of 2004. That after the petitioners' titles were revoked they filed Kakamega Judicial Review Case No. 20 of 2012 against the Land Registrar and the Chairman of the School Committee of Kakamega Primary School seeking an order of certiorari to quash the decision of the Land Registrar and on 9th May, 2013 the court quashed the Land Registrar's decision to revoke the titles and the subject gazette notice was declared null and void. Annexed is a copy of the decree marked as SRK-01 pages 41-42. This order of the court still stands. Therefore the Court finds that *the petitioners/applicants have* established that they has a *prima-facie* case with probability of success at the trial. I order that the status quo be maintained pending the hearing and determination of the petition. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE