



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC PETITION NO. 7 OF 2017

JAPETH KIPKEMBOI MAGUT.....PETITIONER

VERSUS

NATIONAL LAND COMMISSION.....RESPONDENT

AND

KESTEM COMPANY LIMITED.....INTENDED/INTERESTED PARTY

RULING

This ruling is in respect of an application dated 10th December 2018 brought by way of Notice of motion by the petitioner/applicant seeking for the following orders:

- a) Spent.
- b) That a conservatory order be and is hereby issued staying implementation of Serial No. 12 of Special Issue Kenya Gazette No. 11714 dated 9th November 2018 concerning Land Reference No. **ELDORET MUNICIPALITY/BLOCK/10/48** pending the hearing and determination of the application inter-partes.
- c) That the Respondent be and is hereby ordered to publish a Corrigenda in the Kenya Gazette within fourteen (14) days hereof publishing the substance of the Decree and orders of the Court issued in the **Eldoret Environment and Land Court Constitutional Petition Number 7 of 2016 Japeth Kipkemboi Magut VS National Land Commission & Others**, and particularly that the decision of the National Land Commission revoking title to **Land Reference No. Eldoret Municipality/Block/10/48** and vesting the property to Stephen Kiplating Metto and Kestem Company Limited, was by order of the Court of 28th July 2017, the National Land Commission was permanently barred from reviewing or determining proprietorship of **Land No. Eldoret Municipality/Block 10/48, that the property is registered to Japheth Kipkemboi Magut;**
- d) That the decision of the Respondent borne **serial No. 12 of Special Issue Kenyan Gazette No. 11714** dated 9th November concerning LR No. Eldoret Municipality/Block 10/48 be quashed;
- e) That the Honourable court be at liberty to issue such further directions and orders for purposes of meeting the ends of justice;
- f) Costs of the application be borne by the Respondent.

Parties filed their respective submissions and gave the background to the case necessitating this current application and the issues for determination by the court.

PETITIONER'S SUBMISSIONS.

Counsel for the petitioner listed the following issues for determination by the court:

- a) Whether the Court issued a Ruling in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, revoking the title deed over L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 held by the Petitioner and vesting it in the Interested Party;
- b) Whether the decision of the National Land Commission of 4th August 2016, having been revoked and rendered of no effect by an Order of Court of 9th December 2016 in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth

Kipkemboi Magut vs. National Land Commission & Others, could validly be active and be affirmed and or enforced without first setting aside the Court Order;

c) Whether the National Land Commission could in November 2018 exercise its Review of Grants disposition jurisdiction under Article 68(v) of the Constitution and Section 14 of the National Land Commission Act, 2012.

d) Natural justice – *audi Alteram partem*;

e) Contempt of court order and legal implications thereon;

f) Persistent violation of National Values by the National Land Commission.

On the first issue as to whether the Court issued a Ruling in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, revoking the title deed over L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 held by the Petitioner and vesting it in the Interested Party, Counsel submitted that the Court did not make any Ruling and or issue any order in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others revoking the title of the Petitioner over L.R No. ELDORET/MUNICIPALITY/BLOCK.10/14, which is a fact that can be ascertained from the Court record.

Counsel further submitted that the issue before the court is one of fact, whether the Environment and Land Court issued a Ruling in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, revoking the title deed over L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 held by the Petitioner and vesting it in the Interested Party which can be determined by perusal of the court record. Counsel submitted that no such ruling exists.

Counsel also submitted that to formally ascertain this fact to the parties, the Honourable Court called for the court file in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others and issued a clarification that no such order existed.

On the second issue as to whether the decision of the National Land Commission of 4th August, 2016 having been revoked and rendered of no effect by an Order of Court of 9th December 2016 in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, could validly be active and be affirmed and or enforced without first setting aside the Court Order, Counsel submitted that the Respondent, argued that it sought to enforce its decision issued on 4th August 2016 which decision Counsel submitted that was made in violation of a Court order of injunction of 31st May 2016 issued in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others and was by Consent of the parties recorded as an order of Court of 9th December 2016 set aside and declared null and void and of no effect in the following terms:

IT IS HEREBY ORDERED BY CONSENT THAT:

1. The report/proceedings of the National Land Commission made on 4th August 2016 be and is hereby nullified and rendered of no effect...'

Counsel therefore submitted that the said decision was for all purposes of law nullified, and has no effect whatsoever and that the said nullification having been endorsed by a Court Order with the consent of the parties, cannot be revived, unilaterally by the Respondent. Counsel cited the case of Flora N. Wasike vs. Destimo Wamboko (1988) eKLR, where it was held as follows

...". if a consent order is to be set aside, it can really only be set aside on grounds which would justify setting of a contract entered in to with knowledge of the material matters by legally competent persons"

Counsel submitted that the petitioner has not consented to setting aside the consent order of 9th December,2016 and accordingly the consent order of 9th December,2016 is still effective and further that its ruling of 28th September, 2018 issued in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others the Court reiterated the existence of the Consent Order of 9th December 2016 nullifying/ revoking the decision of the Respondent of 4th August 2016.

Counsel therefore submitted that the decision of the Respondent of 4th August 2016, was nullified and of no effect, and cannot be relied on and or applied by the Respondent presently.

On the third issue as to whether the National Land Commission could in November 2018 exercise its Review of Grants disposition jurisdiction under Article 68(c)(v) of the Constitution and section 14 of the National Land Commission Act, 2012; Counsel submitted that the Respondent vide its Replying Affidavit misguidedly claimed that in publishing the impugned publication in the Kenya Gazette, being the Corrigenda in the Special Issue Kenya Gazette No. 11714 dated 9th November 2018 that it was exercising its jurisdiction under Article 68(c) (v.) of the Constitution and section 14 of the National Land Commission Act, 2012.

Counsel further submitted that the listed functions of the NLC, are time barred and cannot be lawfully conducted by the NLC presently: the function of investigating legality of issuance of grants and dispositions to public land, section 14(1) of the National Land Commission Act, for a limited period of five (5) years from commencement of National Land Commission Act.

The Act commenced on 2nd May 2012 accordingly this jurisdiction expired on 1st May 2017.

Further that the NLC has no jurisdiction to exercise the functions aforesaid, and the inquiries therefore, so far as L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 together with its subdivisions, is concerned, the property being private property, cannot include any recommendations that adversely affect the proprietorship of the company over the property.

It was Counsel's submission that the Petitioner is a registered proprietor under sections 24 and 25 of the Land Registration Act, 2012, and such right of indefeasible proprietorship can only be upset in accordance with the Land Registration Act, which is by the Environment and Land

Court, not the NLC. Counsel submitted that the purported review was unconstitutional, ultra vires, null and void.

On the issue of natural justice- Audi Alteram partem, Counsel submitted that the decision of the Respondent of 4th August 2016 having been set aside and being of no effect, for the Respondent to revoke the Petitioner's title and vest it in the Interested Party, the Respondent must have first afforded the Petitioner an occasion to be heard before any such decision is made. Since the injunction against the Respondent to hear the review of grant of the Petitioner vide court order of 31st May 2016 issued in Eldoret Environment and Land Court Constitutional Petitioner No.7 of 2016 Japheth Kipkemboi Magut vs National Land Commission and others and the subsequent revocation/nullification of decision of the Respondent of 4th August 2016, there was no further hearing on the Petitioner's title.

It was Counsel's submission that any decision made by the Respondent, including the decision culminating in the publication of the impugned Corrigenda in the Special Issue Kenya Gazette No. 11714 dated 9th November 2018 were decisions made without hearing the Petitioner. That the decision violated the Rules of Justice- Audi Alteram Partem (that no man shall be condemned unheard). The Law in Kenya is settled that any decision made in violation of the rules of natural justice is void. Counsel cited the case of General Medical Council v Sparckman [1943] 2 All E.R. 337 where it was held;

"If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."

Further Lord Diplock, delivering the judgment of the Privy Council in the case of Attorney-General v. Ryan, [1980] A.C. 718 at page 730 letter E, observed as follows:

"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority. "

Counsel submitted that the aforementioned decision was adopted by the Court of Appeal of Kenya in **MIRUGI KARIUKI VS THE ATTORNEY GENERAL NAIROBI CIVIL APPLICATION NO.70 OF 1991** in adopting the said decision of the Privy Council, the court of appeal delivered itself as follows;

'The mere fact that the exercise of discretion by the decision making authority affects the legal rights or interests of some person makes it judicial, and therefore subject to the procedure required by natural justice. Thus, that discretion must be exercised judicially, that is to say, fairly.

The fact that the exercise of discretion is administrative does not make it any the less judicial for this purpose –see page 463 of the 5th edition of H. W.R. Wade on Administrative Law.'

Counsel also submitted that the Respondent's Replying Affidavit that the Petitioner's property L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 together with its subdivisions do not enjoy protection of the Constitution by dint of provisions of Article 40(6) of the Constitution, that such submission is not tenable at all. The question of legality of the Petitioner's title cannot at present be determined by the Respondent, the NLC, the same can only be determined by this Honourable Court.

Counsel cited the case of Republic v National Land Commission Ex-Parte Cecilia Chepkoech Leting & 3 others [2016] eKLR where the court held as follows, at paragraph 50:

'50. Whereas it is correct that under Article 40(6) of the Constitution, land which is found to have been unlawfully acquired is not protected under Article 40, it is my view that there must be a finding that the land was unlawfully acquired. In other words the due process must be adhered to in the process of making a determination whether or not the particular property was unlawfully acquired.'

Counsel further submitted that this Court in Eldoret Environment and Land Court Constitutional Petition No. 7 0 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, issued Conservatory Orders on 31st May 2016 in the following terms:

'The conservatory order is hereby issued staying the proceedings by the 1st Respondent (National Land Commission) investigating the proprietorship of the property Land Reference No. Eldoret Municipality Block 10/48 as commenced or at all or recommending the revocation of the Petitioner's title to Land Reference No. Eldoret Municipality Block 10/48 pending the hearing and determination of this application inter partes'.

That in disobedience of the said Court Order, the Respondent on 4th August 2016 during the currency of the order of injunction by this Court, proceeded to revoke the title to land over Land Reference No. Eldoret Municipality Block 10/48. Counsel relied on the said principle elucidated in Clarke and Others vs Chadburn & Others [1985] 1 All E.R. (PC) 211, adopted in Kenya Tea Growers Association v Francis Atwoli & 5 others [2012] 1 eKLR.

On the last issue of persistent violation of National Values by the National Land Commission, Counsel highlighted instances where the respondent has acted unconstitutionally where the petitioner's property is concerned as follows:

a) Firstly, is the manner in which the Respondent subjugated the fundamental rights of the Petitioner in the Review of Grant proceedings, openly shouting down the Petitioner, brazenly taunting the Petitioner that a decision would be made against the Petitioner in course of the hearing, and barring the Petitioner from adducing evidence before it which prompted the Petitioner to file the Constitutional proceedings in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others to protect his inviolable right to fair trial and to property guaranteed by the Constitution.

b) Secondly, when the Petitioner filed the Petition above, the Court issued orders of injunction on 31st May 2016, which orders were duly served upon the Respondent. However notwithstanding the express Orders of Court barring the Respondent from hearing and revoking the Petitioner's title, the Respondent still went ahead to revoke title on 4th August 2016, which revocation was nullified/revoked by Court order of 9th December 2016, by consent of the parties.

c) Thirdly, even after the Court had issued its judgment on 13th July 2017, the Respondent while being aware of that Judgment did publish in the Kenya Gazette Notice No. 6862 of 17th July 2017, alleging that the petitioner's title over Land Reference No. ELDORET MUNICIPALITY/BLOCK 10/48 had been revoked and title vested in the Interested Party, which was untrue that prompted the Petitioner to file the present Petition, seeking revocation.

d) Fourthly, vide consent of the parties including the Respondent of 11th October, 2017, wherein the Respondent, NLC undertook that it would publish a Corrigenda in the Kenya Gazette to correct the erroneous publication in the Kenya Gazette, the Respondent has not done so, and rather than publish the proper correction, the Respondent published the malicious impugned Corrigenda in the Special Issue Kenya Gazette No. 11714 dated 9th November 2018 reiterating the very error.

e) Fifthly, even after it was brought to the attention that there was no Ruling in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, the Respondent still resisted and ignored the Orders of the Honourable Court.

Counsel therefore urged the court to grant the prayers in the application as prayed.

1ST RESPONDENT'S WRITTEN SUBMISSIONS

Counsel for the 1st respondent filed submissions and listed the following issues for determination by the court

- a) Whether the Respondent had the jurisdiction to review the grant with respect to I-R No. Eldoret/Municipality/Block 10/48.
- b) Whether the orders sought should be granted?

Counsel also gave a brief background to the case and stated that at the time of filing these submissions the 1st respondent had not filed any submissions.

On as to whether the respondent had the jurisdiction to review the grant with respect to LR NO. ELDORET/MUNICIPALITY/BLOCK/10/48, Counsel submitted that the 1st Respondent is an independent Commission established under Article 67 (1) of the Constitution and is operationalized by the Act, and has as its fundamental functions, the management of public land on behalf of the National and County Government. In addition to the functions donated to it under the Constitution, the respondent is also mandated under Section 14 of the Act to review all grants and dispositions of public land, either on its own motion or upon receipt of a complaint with a view to establish their legality or propriety. Further that in the exercise of this mandate the 1st Respondent operates as a quasi-judicial body within the full meaning of Article 169(1) of the Constitution and the procedure for carrying out this mandate is clearly set out under Section 14 of National Land Commission Act.

Counsel also submitted that the review of grants and dispositions of public land simply entails the Respondent analyzing the process under which public land was converted to private land and make findings of the legality or regularity of the grants in question.

That under Section 14(1) of the Act, the Respondent commenced review proceedings seeking to establish the legality of the grant over LR No. Eldoret/Municipality/Block/10/48, the suit property herein which process commenced following receipt of a complaint from Stephen Kiplenting Metto the director of Kestem Company limited the interested party, who stated that the Petitioner had fraudulently acquired title documents over the suit property, requesting the Respondent to review the legality of the grant on the grounds that it was unlawfully acquired.

Ms. Machinda submitted that the Respondent sitting as quasi-judicial body and pursuant to the law was able to carry out review proceedings

with respect to the suit property and made its determination, one which if the Petitioner was not satisfied with, he was at liberty to prefer an Appeal or Judicial Review proceedings and not institute a Constitutional petition. Counsel cited the case of Harrikissoon V Attorney General of Trinidad and Tobago [1980]AC265, Lord Diplock, decried the tendency of people rushing to institute Constitutional Petitions alleging violation of fundamental freedoms where there was none, stating;

"The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by...the constitution is fallacious. The right to apply to the High Court... for redress when any human right or fundamental freedom is or is Likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... the mere allegation that a human right of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court... if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom." (emphasis)

Counsel submitted that whereas Article 40 the Constitution protects one's right to ownership of property this particular right is not absolute. Article 40 (6) provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired. Counsel therefore submitted that the Respondent carried out its mandate pursuant to the provisions of the Constitution, the National Land Commission Act, 2012 and the Fair Administrative Action Act, 2015 and did not in any manner violate the Petitioners' Constitutional rights.

Counsel also stated that it was only after the Commission had begun carrying out its mandate pursuant to Article 67 and Section 14 of the National Land Commission Act that the Petitioner herein filed Eldoret ELC Petition No. 7 of 2016 in which a finding was made in error following the fraudulent misrepresentation of facts by the Petitioner to the effect that Eldoret ELC Suit No.95 of 2013 between Kestem Company Ltd and Ndala Shop Ltd and & Others was in existence and could be prosecuted, and that the proceedings before the Commission were *sub-judice*. That the misrepresentation of facts by the Petitioner herein was deliberate because Eldoret ELC Suit No.95 of 2013 between Kestem Company Ltd and Ndala Shop had been dismissed for want of prosecution on 7th April 2015.

Counsel further submitted that by the time judgement was being issued in favour of the Petitioner in ELC Petition No. 7 of 2016 (Japheth Kipkemboi Magut Vs National Land Commission & 2 Others) the Commission had already made its determination with respect to the suit property.

Counsel submitted that the Respondent should not be bound by the consent recorded on 11th October 2017 because the same was entered into after the Petitioner deliberately misrepresented facts by alleging that the proceedings before the Commission were *sub-judice*. A notion that has since been rectified by the Ruling issued on 28th September, 2018 in which the Interested party herein who sought to review the judgement delivered in ELC Petition No. 7 of 2016 (Japheth Kipkemboi Magut Vs National Land Commission & 2 Others) and same was set aside.

On the issue as to whether the orders sought should be granted, Counsel cited the Supreme Court case of Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 2 others (2014) eKLR where the court stated that;

Conservatory orders bear a more public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not like interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm' occurring during pendency of a case; or high probability of success' in the applicant's case for orders of stay.

Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to relevant causes.'

Counsel therefore urged the court to dismiss the application with costs as the petitioner has not satisfied the test to warrant issuance of conservatory orders as prayed.

2ND RESPONDENT'S SUBMISSIONS.

Counsel for the 2nd respondent submitted that it was the petitioner's contention that the court is *functus officio* on the issue of proprietorship of LR NO. ELDORET MUNICIPALITY BLOCK 10/48 and that the 2nd respondent has no right to claim the property.

Counsel submitted that the 2nd respondent Eldoret ELC Petition No. 7 of 2017 (between Japheth Kipkemboi Magut Vs National Land Commission is a decision of this hounarable curt Eldoret ELC Petition No. 7 of 2016 (Japheth Kipkemboi Magut Vs National Land Commission & 2 Others in which the court initially found for the petitioner. Counsel gave a chronology of the happenings in the case and faulted the decision of the court.

Counsel therefore urged the court to find that the finding in EDORET ELC PETITION NO. 7 OF 2016 between JAPHETH KIMKEMBOI MAGUT and NATIONAL LAND COMMISSION, THE HON. ATTORNEY GENERAL and KESTEM COMPANY LTD was made in error following the deliberate and fraudulent misrepresentation of the facts by the petitioner to the effect that ELDORET ELC NO. 95 OF 2013 between KESTEM COMPANY LTD AND NDALAT SHOP LTD AND 2 OTHERS was in existence and could be prosecuted and that the deliberations before the National Land Commission in exercise of its powers under section 14 of the National Land Commission Act were *sub judice*. That the suit had been dismissed for want of prosecution on 7th April 2015. That the National land Commission had conducted its inquiry at the time of the judgment and made a finding for the 2nd respondent and r. STEPHEN KIPLETING METTO.

Counsel further submitted that the decision of the 1st respondent is founded on lawful exercise of its powers and mandate which can only be challenge vide a fresh suit or a petition. Counsel relied on the case of OLYMPIC COMPANY TRADING TD & ANOTHER VS SAID MOHAED & 4 OTHERS where Mutungi J held that :

‘Whereas the constitution protects property rights of every individual the constitution exempts from such protection property that has been unlawfully acquired Article 40(b) of the Constitution provides:-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired”.

Counsel also cited the case of **Macharia Mwangi Muna & 87 others –vs- Davidson Mwangi Kagiri (2014) & e KLR** where the Judges observed as follows:-

Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”.

Counsel further cited the case of ALICE CHEMUTAI TOO VS NICKSON KIPKURUI KORIR & 2 OTHERS (2015) eKLR where Munyao J held as follows.

“It is time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud and no title holder will ever be deprived of his good title by the tricks of con artists”.

In conclusion Counsel submitted that the petitioner’s application has been brought to defeat the course of justice and should therefore be dismissed with costs to the respondents.

ANALYSIS AND DETERMINATION

This is a matter that had been substantially handled by Justice Ombwayo who recused himself at the instance of the interested party on the ground that it did not believe in the court dispensing justice given the two rulings the court had made in the matter. The matter was therefore transferred to my court for hearing of this current application. I should highlight from the onset that the submissions of Counsel for the 2nd respondent/ Interested Party were full of vitriol and use of unpalatable language against the person of the judge who handled this matter before he recused himself. Counsel should be aware that he is an officer of the court and is under a duty to respect the dignity of the court. Clients come and go and if a party is dissatisfied with the decision of a court, such party is at liberty to file an appeal in a higher court, which is why there is hierarchy of courts. The court will not have an opportunity to respond to such unpalatable and disrespect for the court which borders on contempt of court. This goes to the question as to when the rain started beating the legal profession which has always been known as a noble profession where noble men and women practice law. I take great exception to such kind of conduct on the face of the court.

That aside, Counsel agreed to canvass the application vide written submission which were duly filed. The parties listed several issues for determination by court which I have considered. The main contention by the petitioner is whether the Court issued a Ruling in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, revoking the title deed over L.R No. ELDORET MUNICIPALITY/BLOCK 10/48 held by the Petitioner and vesting it in the Interested Party. The court called for the court file in Eldoret ELC Petition 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others and issued a clarification that no such order existed in the court file. This settles the issue as to whether there was a ruling revoking the title deed held by the petitioner and vesting it in the interested party.

The second issue for determination is as to whether the decision of the National Land Commission of 4th August, 2016 having been revoked and rendered of no effect by an Order of Court of 9th December 2016 in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others, could validly be active and be affirmed and or enforced without first setting aside the Court Order, it is on record that there was a court order of injunction dated 31st May 2016 hence the decision by NLC was made in violation of a Court order of injunction issued in Eldoret Environment and Land Court Constitutional Petition No. 7 of 2016 Japheth Kipkemboi Magut vs. National Land Commission & Others and was by Consent of the parties recorded as an order of Court of 9th December 2016 which set aside and declared null and void in the following terms:

IT IS HEREBY ORDERED BY CONSENT THAT:

1. *The report/proceedings of the National Land Commission made on 4th August 2016 be and is hereby nullified and rendered of no effect... ’*

This in effect made the report and the proceedings of the National Land Commission null and void. So what was being enforced was in violation of the consent order which had not been set aside.

The other issue is as to whether the National Land Commission has the mandate to investigate titles, according to Article 67(2)(e) of the Constitution one of the functions of the National Land Commission, the 1st Respondent herein is:

to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

There is no doubt that the Commission has power either on its own motion or pursuant to a complaint to initiate investigations into present or historical land injustices and to recommend appropriate redress but the powers must be exercised within the law and adhere to Constitutional principles.

Counsel for the 1st respondent cited Section 14 of the *National Land Commission Act*, which provides that:

(1) Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).

From the provisions cited above it is clear that the Commission has powers but there are certain requirements that it must follow with respect to the mandate and exercise of power with respect to natural justice and accord the affected parties an opportunity for a fair hearing with notice before orders are made. It should be noted that the Commission deal with Public land on behalf of the County government and national government or an individual to review all grants or dispositions of public land to establish their propriety or legality, of course subject to Article 68(c)(v) of the Constitution which restricts its powers of review of all grants or dispositions to public land. The bottom line is that the Commission has powers but should not act ultra vires.

The last issue is as to whether the petitioner is entitled to the orders sought for conservatory orders, the principles to be satisfied in granting of a conservatory order was expressed by Justice Onguto J. (as he then was) in the case of **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** as follows

“In summary, the principles are that the Applicant ought to demonstrate an arguable prima facie case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. Further, the Court should decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of a specific right or freedom in the Bill of Rights, and whether if an interim Conservatory order is not granted, the petition or its substratum will be rendered nugatory. Lastly, that the Court should consider the public interest and relevant material facts in exercising its discretion whether to grant or deny a conservatory order.”

The Court of Appeal further enunciated the principles for the grant of mandatory injunction in the case of **Kenya Breweries limited and another vs Washington Okeyo (2002) EA 109** whereby it held as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff.”

The Supreme Court of Kenya also rendered itself on conservatory orders in the Case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others eKLR** as follows:

“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable harm’ occurring during the pendency of a case; or ‘high probability of success’ in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes”

It was further held in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others v The Attorney General & Others Petition No. 16 of 2011** where **Musinga J** (as he then was)observed that:

“At the interlocutory stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the constitution.”

The question is whether the petitioner has demonstrated a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger he will suffer prejudice. From the submissions of Counsel and perusal of the proceedings in the aforementioned case files I find that the petitioner will suffer prejudice if the orders sought are not granted. This has been a protracted case where parties have filed several cases and affidavits to prove their claim. The respondents will not suffer any prejudice if due process is followed and a just conclusion is arrived at involving all the parties in accordance with the principles of natural justice. It should be noted that conservatory orders are not easily granted as the threshold for grant of such orders are higher than grant of interlocutory injunctions.

I have considered the pleadings the submissions of counsel and find that the application has merit and is therefore allowed with the following specific orders:

- a) That a conservatory order is hereby issued staying implementation of Serial No. 12 of Special Issue Kenya Gazette No. 11714 dated 9th November 2018 concerning Land Reference No. **ELDORET MUNICIPALITY/BLOCK/10/48** pending the hearing and determination of this petition
- b) That the Respondent is hereby ordered to publish a Corrigenda in the Kenya Gazette within fourteen (14) days hereof publishing the substance of the Decree and orders of the Court issued in the **Eldoret Environment and Land Court Constitutional Petition Number 7 of 2016 Japeth Kipkemboi Magut VS National Land Commission & Others**, and particularly that the decision of the National Land Commission revoking title to **Land Reference No. Eldoret Municipality/Block/10/48** and vesting the property to Stephen Kiplating Metto and Kestem Company Limited, was by order of the Court of 28th July 2017, the National Land Commission was permanently barred from reviewing or determining proprietorship of **Land No. Eldoret Municipality/Block 10/48, that the property is registered to Japheth Kipkemboi Magut;**
- c) That the decision of the Respondent borne serial No. 12 of Special Issue Kenyan Gazette No. 11714 dated 9th November concerning LR No. Eldoret Municipality/Block 10/48 is hereby quashed.
- d) The respondents to pay costs of the application.

DATED and DELIVERED at ELDORET this 24TH DAY OF OCTOBER, 2019.

M. A. ODENY

JUDGE

RULING read in open court in the presence of

Mr.Ngigi holding brief for Mr.Bwire for Petitioner and Mr.Mutai for Interested party and in the absence of Mr.Odongo for National Land Commission.

Mr. Mwelem – Court Assistant