



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 14 OF 2018

IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER ARTICLE 40, 47 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: AN APPEAL TO THE MINISTER FOR LANDS IN APPEAL CASE NO. 161 OF 2016-KALIYE KIMWELI MWADUNDU V MURIUKI MBURU

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION & PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES 2013

AND

IN THE MATTER OF: PLOT NO. 945 KAWALA 'B' ADJUDICATION SECTION

AND

IN THE MATTER OF: ARTICLES 20, 21, 22 & 23 OF THE CONSTITUTION OF KENYA, THE ENVIRONMENT & LAND COURT ACT NO. 19 OF 2011, SECTION 13, THE LAND ADJUDICATION ACT CHAPTER 284 LAWS OF KENYA SECTION 19, 20, 21, 22, 26, 27, 28, 29 & THE LAND ACT NO. 6 OF 2012

BETWEEN

KARISA KAZUNGU KATANA.....PETITIONER

VERSUS

KALIYE KIMWELI MWADUNDU

DEPUTY COUNTY COMMISSIONER –KALOLENI SUBCOUNTY

THE LAND REGISTRAR-KILIFI

THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By this Notice of Motion application dated and filed herein on 25th September 2018, Karisa Kazungu Katana (the Petitioner) prays for a conservatory order to issue staying the implementation of a decision and order of the Deputy County Commissioner- Kaloleni County (the 2nd Respondent) made on 8th August 2018 allowing Kaliye Kimweli Mwadundu (the 1st Respondent) to be registered as the owner of Plot No. 945 Kawala 'B' Adjudication Section.

2. The Petitioner further prays in the alternative that in the event the 1st Respondent has already been registered as the owner of the said parcel of land, a Prohibitory Order be issued prohibiting the registration of any dealings on the title to the said property pending the hearing

and determination of the Petition.

3. The application is supported by a Supporting Affidavit and a Supplementary one both sworn by the Petitioner and is anchored on the grounds inter alia:

i) That the Petition seeks to squash the decision made in Appeal Case No. 161 of 2016 between the Petitioner and the 1st Respondent on 8th August 2018 which decision allowed the 1st Respondent to be registered as the owner of the suit property.

ii) That by this Petition the Petitioner seeks the enforcement and protection of his fundamental rights as enshrined in the Constitution which rights have been violated by the 2nd Respondent and are further threatened by the implementation of that decision; and

iii) That unless the decision is stayed, the 1st Respondent may dispose off the suit property to a third party and render the suit property out of the reach of the Petitioner and thereby cause irreparable loss and injustice which cannot be adequately compensated in momentary terms.

4. In response to the application, the 1st Respondent has sworn a Replying Affidavit filed herein on 12th October 2018 in which he denies that the Petitioner acquired the suit property from the original owner on 7th July 2008. He further avers that the person who allegedly sold the suit property to the Petitioner was not the true owner thereof and had no interest in the property capable of being passed to the Petitioner.

5. The 1st Respondent further asserts that ***Land Case No. 3 of 1970; Mwadundu Iha –vs- Kimweli Mwadundu*** was not in respect of the suit property herein and that it is ***Land Case No. 12 of 1968; Kimweli Mwadundu –vs- Kajefwa Chai*** in which the suit property comprised the subject matter. In that case, the 1st Respondent's father one Kimweli Mwadundu was awarded the rest of the land to the South.

6. The 1st Respondent denies that the evidence given by the Petitioner in ***Appeal Case No. 161 of 2016*** was not recorded or considered and/or that the Minister's decision was based on extraneous evidence not tendered by either the Petitioner or the 1st Respondent. He further avers that the Minister's decision in regard to this matter is final and that the Petition herein is an attempt to appeal the Minister's decision through the back door.

7. The 2nd Respondent and the Land Registrar Kilifi (the 3rd Respondent) have through the Honourable the Attorney General (the 4th Respondent) filed Grounds of Opposition to the application dated 22nd October 2018 in which they similarly object to the Petitioner's application on the following grounds: -

1. That the Application lacks merit since the Appeal to the Minister was heard and determined in strict compliance with Section 29(1) of the Land Adjudication Act;

2. That the Application and reliefs sought therein are fundamentally flawed since the procedure followed in arriving at the decision was in accordance with the Land Adjudication Act and did not violate any Constitutional provisions.

3. That the application is premature and an abuse of the Court process in that the applicant has neither exhibited proof of any violation of Articles 40, 47 and 50 of the Constitution by the 2nd Respondent and the same does not meet the threshold for grant of the orders sought herein;

4. That no allegation of irregularity, ultra vires or irrationality can be construed from the pleadings and evidence adduced against the 2nd Respondent;

5. That the Application is fatally defective and the Orders sought therein untenable for lack of material disclosure; and

6. That the Application is otherwise an abuse of the process of this Honourable Court.

8. I have perused the Petition and considered the application before me. I have also perused and considered the response to the application by the four Respondents herein.

9. The facts leading to this Petition can easily be gleaned from the pleadings filed by both sides to the dispute. It is apparent that when the Kawala 'B' Area was declared an Adjudication Section Plot No. 945 was initially marked in the name of the Petitioner. Aggrieved by the said decision, the 1st Respondent filed a case before the Area Land Committee pursuant to Sections 19 and 20 of the Land Adjudication Act. That case was heard and decided in favour of the 1st Respondent.

10. Aggrieved by the said decision, the Petitioner filed a case before the Arbitration Board pursuant to the provisions of Sections 21 and 22 of the said Act. On 16th December 2011, the Board rendered a decision, this time in favour of the Petitioner. It was now the turn of the 1st Respondent again to be aggrieved and he proceeded to file Objection ***Case No. 6 of 2014*** against the Petitioner.

11. As it turned out, that Objection was dismissed on 26th November 2012 and the 1st Respondent lodged an Appeal to the Minister pursuant to Section 29 of the Act. The Minister thereafter constituted a Ministerial Panel chaired by the 2nd Respondent. In its decision rendered on 8th August 2018, the Panel stated as follows: -

“In view of the above findings and other information and testimonials presented before this Court, this appeal is hereby allowed. Parcel No. 945 to be registered in the names of the Appellant Kaliye Kimweli Mwadundu of ID No. 3882460 in trust of other family members.”

12. In the application before me, the Petitioner contends that the decision of the Ministerial Panel was based on extraneous evidence that had not been tendered by either party during the hearing of the Appeal and that the Panel infringed on his right to a fair trial and procedurally fair administrative action when it failed to record or consider the evidence he adduced before it.

13. The Petitioner asserts that consequent to the said decision, the 3rd Respondent is now set to register the 1st Respondent as the absolute owner of the suit property and to issue him with a title deed therefor. The Petitioner is apprehensive that once the 1st Respondent is so registered, he shall move to evict the Petitioner who is presently in physical possession of the suit property and there will be nothing to stop the 1st Respondent from disposing off the suit property before this Petition is heard and determined.

14. The guiding principles upon which Kenyan Courts make findings on interlocutory applications for conservatory orders within the framework of Article 23 of the Constitution are settled. The law, as I understand it, is that in considering an application for conservatory orders, the Court is not required to make any definitive finding either of fact or law as that is a matter within the province of the Court that will ultimately hear the Petition.

15. The jurisdiction of the Court at this point in time is limited to examining and evaluating the material placed before it, to determine whether the Applicant has made out a prima facie case to warrant grant of conservatory orders. The Court is equally expected to evaluate the pleadings and determine whether denial of conservatory orders will prejudice the Applicant.

16. As Musinga, J (as he then was) explained in ***Centre for Rights Education and Awareness(CREAW) & 7 Others –vs- A-G (2011) eKLR:-***

“...At this 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 orders there is real danger that he will suffer prejudice as a result of the violation of the Constitution.”

17. In the matter before me, the Petitioner contends that the Ministerial Panel failed to record and/or take into account the evidence he placed before it and that it instead took into consideration extraneous matters in arriving at its decision. In particular, the Petitioner asserts that he produced evidence to the effect that there was a determination by a Court of Law in ***Land Case No. 3 of 1970*** which effectively decreed the suit property to the family that sold the land to the Petitioner as against the 1st Respondent.

18. While the 1st Respondent denies the Petitioner’s contention and asserts that the said case had nothing to do with this particular parcel of land, it was clear to me that the said dispute was between the person said to have sold the land to the Petitioner and the 1st Respondent’s father and predecessor in title.

19. Similarly, while it was denied that the Ministerial Panel had taken extraneous matters into consideration in arriving at its decision, the Panel’s own conclusion as cited hereinabove that it had taken into account other information and testimonials not disclosed in the proceedings lends some credence to the Petitioner’s fear that such other information was acquired other than in the course of the Panels’ recorded proceedings.

20. As it were, it was not contested that the Petitioner has built a residential home in the suit premises in which he has lived since he purchased the suit property in the year 2008. The 1st Respondent concedes this fact at paragraph 6 of the Replying Affidavit but asserts that the Petitioner carried out the development on the property at his own risk as the same was carried out during the pendency of the dispute between the parties and inspite of his objections.

21. In the circumstances of this case, I am prepared to accept that the Petitioner stands to suffer prejudice if the suit premises are placed in the hands of the 1st Respondent prior to the hearing and determination of the Petition filed herein.

22. Accordingly, I find merit in the application dated 25th September 2018. The same is allowed in terms of prayers 3, 4, 5 and 6 thereof.

23. The costs of this application shall be in the Petition.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE