



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION CASE NO. 10 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ARTICLE 2 (1) (2) (4) (5) (6) ARTICLE 3 (1) ARTICLE 20 (1) (2) (3) (4) ARTICLE 21 (1) ARTICLE 22 (1) (3) (4) ARTICLE 23 (1) (3) ARTICLE 24 (1) (2) (3) ARTICLE 40, ARTICLE 50 (1) ARTICLE 60 (1) (b) AND ARTICLE 64 (b)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF AN INDIVIDUAL AS ENshrined IN ARTICLES 40 & 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT SECTIONS 24, 25 & 26

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2006 AS READ WITH CLAUSE 19 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA TRANSITIONAL CLAUSE AND COSNEQUENTIAL PROVISIONS OF THE SCHEDULE TO THE CONSTITUTION

BETWEEN

KATANGI DEVELOPERS LIMITED.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA RAILWAYS CORPORATION.....2ND RESPONDENT

RULING

Katangi developers ltd hereinafter referred to as the petitioners have brought the application is dated 16/9/2019 seeking orders that *pending the hearing and determination of the Petition there be issued an order of prohibitory injunction restraining and prohibiting the Cabinet Secretary for Interior and Co-ordination of National Government, the Cabinet secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director of Kenya Railways Corporation by themselves or any one of them, their subordinates, representatives, agents or any other person acting through them or on their instructions or directions from repossessing, taking possession, fencing off, blocking ingress or egress into or out of the properties or premises of the Petitioner namely, Kisumu municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440 and from in any other way howsoever interfering with the Petitioner's access to occupation and user of the buildings thereon.*

AND THAT pending the hearing and determination of the Petition there be issued an order of mandatory injunction compelling the Cabinet Secretary for Interior and Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to remove all fences, barriers, blockades, blockages, beacons, beacon marks and any other objects hitherto blocking, barring, impeding or interfering with access ingress or egress to or from the properties of the Petitioner registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429,

430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.

AND THAT pending the hearing and determination of the Petition there be issued an order of prohibitory injunction restraining and prohibiting the Chief Land Registrar and/or the County or District Land Registrar, Kisumu or any other officer acting under them or any one of them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any other way whatsoever or howsoever interfering with the Petitioner's titles to the properties namely Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.

AND THAT the costs of this application be borne by the Respondents in any event.

The application is based on grounds that **the petitioner is the registered proprietor as Lessee from the Government of Kenya for a term of Ninety Nine (99) years from 1st November 1990 of all those parcels of land or plots known as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.**

The Petitioner was issued with certificates of Lease of all the properties by the District Land Registrar, Kisumu on 13th November 1998 and it still holds and is in possession of the certificates of title to date.

The Petitioner's said properties are developed with godowns with railway sidings and also shops cum showrooms fronting the major commercial and industrial streets in Kisumu City known as Obote Road and Oginga Odinga Road.

The petitioner has enjoyed open, free, quiet, and peaceable proprietorship, occupation and user of all the twenty-two (22) properties from November 1998 until recently.

Most of the properties are leased to tenants who pay rents to the Petitioner while the Petitioner is at various stages of developing, redeveloping or renovating six (6) of the buildings on the properties namely Kisumu municipality/Block 7/419, 420, 421, 422, 433 and 434.

The Petitioner's titles to all the twenty-two (22) properties are protected and its right to occupy and use the said properties is protected and guaranteed by **Article 40 (1) of the Constitution.**

Pursuant to **Article 40 (2) (b) of the Constitution** the Petitioner is entitled to enjoy the ownership, occupation, user and access to the properties without limitation or restrictions.

Article 40 (2) prohibits the Parliament from enacting any law that permits the state to deprive the Petitioner of the said properties or to limit or enjoy the rights that go with the Petitioner's ownership, occupation, user of and access to the said properties.

Article 40 (3) prohibits the state from depriving the Petitioner of the said properties or of any interest therein except as provided for in **Article 40 (3) (a) & (b).**

Article 21 (1) binds the state and makes it a fundamental obligation of the state and every state organ to observe, respect, protect, promote, and fulfill the Petitioner's rights to its said properties.

Article 22 (1) confers on the Petitioner the right to institute Court proceedings if its rights to the said properties have been denied, violated or infringed or threatened.

Article 23 (1) gives this Honourable Court the jurisdiction to entertain the Petitioner's petition while the Constitution of **Kenya (Protection for Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** permit the Petitioner to bring this interlocutory application.

Sections 24, 25 and 26 of the Land Registration Act No. 3 of 2012 offer guarantee of the Petitioner's titles to the said properties.

The petitioner alleges that from sometimes on or about the 5th September 2019 state and other officers from the National Youth Service in the Ministries of Interior and Co-ordination of National Government, Transport, Infrastructure, Housing and Urban Development and Kenya Railways Corporation have invaded the Petitioner's properties aforesaid and blocked access to thirteen (13) of them. They have dug holes to put fencing posts in front of the other nine (9), which front Obote Road. They have a clear intention and plan to fence and block off those plots in due course.

The said officers have informed the Petitioner albeit only verbally and by their manifestly unconstitutional and illegal actions that the said properties belong to Kenya Railways Corporation and that they are in the process of forcibly recovering them for the said Corporation. Full details of those acts are contained in the supporting affidavit filed herewith.

The Petitioner's titles have not been impugned in any Court of law or competent Tribunal.

Rather than protect the Petitioner's right to property as per the Constitution enjoined the state and its organs has turned to the violator of those rights of the Petitioner.

Unless interim Conservatory and Prohibitory Orders are forthwith issued by the Honourable Court in this application there is grave danger that the state officers and those of state organs will proceed to deprive the Petitioner not only of its occupation, user of and income derived from its properties but of the very properties themselves.

Other acts perpetrated by the said officers by demolishing buildings and structures of other residents and business people in Kisumu including those who had valid and running leases with the 2nd respondent without notice is clear testimony that only interim Conservatory and Prohibitory Orders will secure the Petitioner's properties pending the hearing of its petition.

Only a mandatory order of this Honourable Court will compel the Respondents to re-open and restore to the Petitioner access to its properties that it is now unable to easily access.

This application needs to be heard with expedition and ex-parte in the first instance for the reasons elucidated in the supporting affidavit filed herewith.

The supporting affidavit of Dipak, Panachand Shah reiterates the grounds of the application.

The 2nd Respondent filed a replying affidavit stating that he is informed by the estate department which he verily believes to be true that all the listed suit lands fall within a larger parcel of land on the Kisumu port owned by Kenya railways Corporation. Further, the suit lands are held and occupied by the Petitioners subject to a long-term lease granted by the Second Respondents for which the Petitioners pay annual rent.

The suit lands have never been surrendered to the Government of Kenya for allocation to other entities including the Petitioners and the Second respondents have all the records to that effect. THAT he is also informed by the Estates department that by the terms of the long-term leases mentioned above, the Petitioners can only undertake any improvements on the suit land with the consent and approval of the second respondents which the second respondents are not aware of.

The Second Respondent does not admit the allegations leveled against her by the Petitioners as there has not been any evidence presented to court to specifically show the involvement of the Second Respondent in the acts complained of.

According to the 2nd respondent, if the Petitioners hold any titles to the suit properties which is different from the long-term leases, then the said titles must have been obtained irregularly and the Petitioners ought to come clean on that.

THAT if indeed the Petitioners hold clean and legal titles to the suit lands, they ought not to be averse to any investigations into how they acquired the same and should instead welcome investigations to authenticate their said Titles.

The 2nd respondent asserts that the Petitioners have not presented any evidence to prove that any of the officers came from the Second Respondent. Apparently, what the Petitioners are complaining about are actions of a multi-agency Unit of the Government of Kenya with nothing specific against the second Respondents and that the Petitioners have not presented to this Honourable court any evidence to prove the involvement of the second respondents in the acts complained of in paragraphs 14, 15, 16 and 17 of the supporting affidavit.

The Petitioner filed a supplementary affidavit showing in details the historical background to the title they hold.

I have considered the submissions of all counsel on record and do find that the Petitioners are holding title to the property whilst the Respondents claim that the titles were obtained illegally. The property is fully developed and is being occupied and utilized by the petitioners, and therefore I do find that this is a case where temporary conservatory orders ought to be granted to preserve the status quo pending the hearing of the petition.

I do find that if the conservatory orders are not granted the petitioners are likely to suffer injury of demolitions of the property.

Ultimately, I do grant the following orders namely: -

(a) **THAT pending the hearing and determination of the Petition there be issued an order of prohibitory injunction restraining and prohibiting the Cabinet Secretary for Interior and Co-ordination of National Government, the Cabinet secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director of Kenya Railways Corporation by themselves or any one of them, their subordinates, representatives, agents or any other person acting through them or on their instructions or directions from repossessing, taking possession of the properties or premises of the Petitioner namely, Kisumu municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440 and from in any other way howsoever interfering with the Petitioner's access to occupation and user of the buildings thereon.**

(b) **THAT pending the hearing and determination of the Petition there be issued an order of mandatory injunction compelling the Cabinet Secretary for Interior and Coordination of National Government, the Cabinet Secretary for Transport, Infrastructure, Housing and Urban Development and the Managing Director Kenya Railways Corporation by themselves, their subordinates, agents, representatives and any other person acting on their instructions or directions to create a 20 metre road next to the petitioner's properties registered as Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.**

(c) **THAT pending the hearing and determination of the Petition there be issued an order of prohibitory injunction restraining and prohibiting the Chief Land Registrar and/or the County or District Land Registrar, Kisumu or any other officer acting under them or any one of them or on their behalf or instructions or directions or in any other way howsoever from revoking, annulling, cancelling, restricting or in any other way whatsoever or howsoever interfering with the Petitioner's titles to the properties namely Kisumu Municipality/Block 7/414, 415, 417, 419, 420, 421, 422, 424, 425, 426, 429,**

430, 431, 432, 433, 434, 435, 436, 437, 438, 439, and 440.

(d) THAT the costs of this application be borne by the Respondents in any event.

Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 22nd DAY OF NOVEMBER, 2019.

In the presence of:

Mr. Wasuna for Petitioner

M/s Lang'at for 1st Respondent

Mr. Juma for 2nd Respondent

Mr. Bii for Interested Party

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A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE