



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MILIMANI

ELC PETITION NO.28 OF 2017

**IN THE MATTER OF INFRIDGMENT & THE CONTRAVENTION OF
FUNDAMENTAL RIGHTS & FREEDOM UNDER ARTICLE 22,23,24,27,(1) &
(2),40,47,(1)& (2),50,62,64,67(2) & 259 OF THE CONSTITUTION OF KENYA 2010**

=AND=

IN THE MATTER OF THE REGISTATIONOF TITLES ACT,CAP 281

(NOW REPEALED) SECTION 23

=AND=

IN THE MATTE ROF LAND REGISTRATION ACT,2010 ,SECTION 26 & 80

AND THE IRREGULAR GAZETTE PUBLISHED AS KENYA GAZETTE

NOTICE NO.9742 BY THE NATIONAL LAND COMMISSION

ON 25TH NOVEMBER ,2016

=AND=

IN THEMATTER OF TITLES FOR LAND REGISTRATION NO.122/7 IN THE NAME OF SIMON KOMONDO THEURI

=AND=

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE RULES, 2010**

=BETWEEN=

SAMUEL KIMONDO THEURI.....PETITIONER

=AND=

DR.MOHAMMED SWAZURI.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

RUIRU SPORTS CLUB.....INTERESTED PARTY

RULING

1. The Petitioner /Applicant filed a Constitutional Petition on 9th June 2017 in which he alleged that his constitutional rights to property had been violated by the respondents. The applicant contemporaneously filed a Notice of Motion in which he sought injunctive reliefs as well as orders of Certiorari against the respondents.

2. The applicant was the registered owner of LR No.122/7 (suit property) which was about 30 acres. During the construction of the Thika Super Highway, the Government of Kenya acquired about 15 acres of the applicant's land for purposes of construction of the Thika Super Highway. The 15 acres which the Government acquired were gazetted for compensation which was due to the applicant.

3. In 2007 the interested party filed a suit against the applicant and two others in which it claimed that the suit property had been illegally excised from its land known as LR No. 122/4 which was then registered in the names of two individuals names in that suit who later transferred it to the applicant. Compensation due to the applicant had been assessed at Kshs.71,486,990/= and the same gazetted. The interested party obtained orders in that suit restraining the applicant from receiving compensation.

4. The applicant contends that the respondents later carried out investigations regarding ownership of the suit property. Pursuant to those investigations the respondents published a gazette notice which deleted the one which had earmarked compensation to the applicant and substituting it with one which now indicated that the compensation for the 15 acres which had been acquired were in respect of LR No.122/4 which is in the name of the interested party.

5. The applicant had already subdivided the remainder of the 15 acres which he had sold to third parties. The applicant contends that he was not given an opportunity to be heard in the proceedings which led to the publication of the Gazette Notice which deprived him of the intended compensation.

6. The second respondent opposed the applicant's application based on grounds of opposition dated 23rd October 2017 and filed in Court on 30th October 2017. The second respondent contends that the nature of the reliefs sought by the applicants are final in nature and cannot be granted at interlocutory stage; that the application offends the provision of Order 53 Rule 2 of the Civil Procedure Rules 2010; that the prayers for judicial review were brought outside the 6 months period and that the applicant has not meet the threshold for grant of injunctive reliefs.

7. The interested party has opposed the applicant's application based on the grounds of opposition dated 20th June 2017 and filed in Court on 28th June 2017. The interested party contends that the orders of Judicial Review being sought by the applicant are time barred in that the proceedings were not brought within 6 months.

8. I have considered the applicant's application as well as the opposition thereto by the respondents and the interested party. I have also considered the submissions by the parties herein. The issues which emerge for determination in this application are firstly whether the judicial review being sought is statute barred. Secondly whether the judicial review remedy of Certiorari can be granted at this stage and thirdly whether conservatory orders ought to be granted.

9. On the first issue, the respondents and the interested party are contending that the judicial review proceedings were not brought within 6 months. It is important to note that this application was brought as an interlocutory application under a constitutional petition. These are not proceedings which were commenced by way of judicial review. If the proceedings had been brought under Judicial Review then the issue of 6 months would have come in. This Court is empowered to grant reliefs of Judicial Review when hearing a matter commenced as a constitutional petition. I therefore find that the application which seeks Judicial Review is not barred by the 6 months period.

10. The second issue for determination is whether the orders of Judicial Review can be granted at this stage. I notice that what is sought in the application is the same as that which is sought in the Constitutional Petition. It will therefore not be appropriate to grant Judicial Review orders at this stage even if the court were to find that there are grounds which exist for its grant.

11. On the issue of whether there should be conservatory orders issued, I agree with the reasoning in the case **Bella Vista Restaurant Mombasa Limited Vs Kenya Revenue Authority (2016) eKLR** which quoted with approval the case of **Muslim for Human Rights (Muhuri) & 4 others Vs Inspector General of police & Others Mombasa Petition No 62 of 2014** where the court stated as follows:-

“The emerging principles for the grant of injunction or conservatory orders under the constitutional litigation as I understand them, are firstly that the applicant must demonstrate an arguable case -sometimes called prima facie arguable case - the reference to arguable case distinguishing it from the prima facie test of Giella Vs Cassman Brown (1973) EA 358 traditionally applied in regular civil cases; secondly ;that the applicant must show that the petition would be rendered nugatory or that the damage that would be suffered in the absence of the conservatory order would be irreversible ;and thirdly that in constitutional cases, the public interest in the matter would be considered and generally upheld”.

12. In the instant case, the issue in contention is on compensation which has already been ascertained. Part of the suit property has already been acquired by the Government. The Petitioner's Petition would not be rendered nugatory even if conservatory orders were not granted. If it turns out that the decision of the respondents was wrong and should be reversed, then the applicant can be compensated. There is already a case against the applicant and other parties pending. In that case, there were orders which were issued restraining any compensation being given to the applicant. The Court must have considered the facts in contention before it granted those orders. In the circumstances I do not find that conservatory orders should be granted. The upshot of this is that I do not find merit in the applicant's application which is hereby dismissed with costs to the respondents and the interested party.

It is so ordered.

Dated, Signed and Delivered at **Nairobi** this **11th** day of **April 2018**.

E.O .OBAGA

JUDGE

In the presence of ;-

M/s Makau for Mr Manduku for Petitioner

Mr Mwaura for Mr Wawire for interested party

Court Assistant: Hilda

E.O .OBAGA

JUDGE