

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI NAIROBI

ELC JR. APPLICATION NO. 40 OF 2017

KINGSWAY INDUSTRIAL PARK LIMITED.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

ELOSE MUKAMU KIMATHI.....2ND RESPONDENT

EVELYN WANJUGU KIMATHI.....3RD RESPONDENT

MIRIAM NYAWIRA KIMATHI.....4TH RESPONDENT

RULING

1. Kingsway Industrial Park Limited (**the applicant**) contends that it was formerly known as Real Industrial Park Limited. It further contends that it is the registered proprietor of Land Reference Number 209/11289 (**the suit property**). On 12/4/2017, it brought a chamber summons application dated 11/4/2017 seeking leave of the court to bring a substantive motion for orders of *prohibition* and *certiorari* against the 1st respondent. The 2nd to 4th respondents are alleged to be officials of Mukami Kimathi Foundation.

2. The applicant's case is that the respondents have entered into a scheme in which the 1st respondent is colluding with the 2nd to 4th respondents with a view to get the 1st respondent to allocate the 2nd to 4th respondents the suit property on the ground that the owner of the suit property fled the country. It is contended that as a result of the alleged scheme, the 1st respondent has issued summons to the applicant, requiring the applicant to appear before it and attend a public hearing to make representation on how it acquired the suit property. Aggrieved by that decision, the applicant brought the said chamber summons seeking leave to challenge the decision.

3. At the hearing of the chamber summons, Ms Inima, counsel for the applicant, contended that the suit property is not an unalienated public land but private property. She added that the 1st respondent has no jurisdiction to issue the summons it issued and that the purported investigations are intended to assist the 2nd to 4th respondents who are interested in the suit property. She further submitted that the suit property is a subject of court proceedings in **High Court Civil Case No 43 of 2011; Real Industrial Park Limited v Kingsway Industrial Park Limited**. Ms Masinde who appeared for 1st respondent and Ms Mburu who held brief for Mr Ndeda for the 2nd to 4th respondents did not oppose the application for leave.

4. I have considered the application. Grant or refusal of leave is an exercise of judicial discretion. The general test to be applied when exercising this jurisdiction is whether the applicant has made out an arguable case to warrant grant of leave [see ***UWE MEIXNER & ANOTHER V ATTORNEY GENERAL, (2005) eKLR***]. The requirement for leave serves to eliminate frivolous, vexatious or hopeless judicial review applications and ensures that only arguable cases proceed for further consideration.

5. Secondly, when considering an application for leave, the court is guided by the procedural framework in **Section 9** of the **Fair Administrative Action Act** to satisfy itself that all alternative mechanisms have been exhausted or that there is no framework for alternative redress mechanisms such as appeal forum or review forum.

6. Having considered the application against the above statutory and jurisprudential criteria, the court is satisfied that the applicant has made out an arguable case to warrant grant of leave. The court is also satisfied that there are no efficacious alternative redress mechanisms available to the applicant in the circumstances of the present application. Without saying more, I will grant the applicant leave in terms of prayer 2 (a) (b) and (c) of the chamber summons dated 11/4/2017. The substantive notice of motion shall be filed within 21 days. In default, the leave granted herein shall stand vacated. The applicant is at liberty to canvass the limb on an order of stay before the court seized of the substantive notice of motion.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2018.

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B M EBOSO

JUDGE

In the presence of:-

Mr Ayieko holding brief for Mr Wandabwa advocate for the exparte applicant

