



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC REFERENCE NO 1 OF 2018

IN THE MATTER OF AN APPLICATION BY THE NATIONAL LAND COMMISSION

SEEKING REFERENCE UNDER SECTION 127 OF THE LAND ACT, 2012

AND

IN THE MATTER OF COMPULSORY ACQUISITION OF

LAND UNDER PART VIII OF THE LAND ACT

AND

IN THE MATTER OF GAZETTE NOTICE NO 6322 OF 30TH JUNE 2017

AND

IN THE MATTER OF DRIVE INN PRIMARY SCHOOL AND RUARAKA HIGH SCHOOL

BETWEEN

THE NATIONAL LAND COMMISSION.....APPLICANT

AND

AFRISON EXPORT IMPORT LIMITED.....1ST INTERESTED PARTY

HUELANDS LIMITED.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF NAIROBI.....3RD INTERESTED PARTY

DIRECTOR OF SURVEYS.....4TH INTERESTED PARTY

CHIEF LAND REGISTRAR.....5TH INTERESTED PARTY

CABINET SECRETARY - MINISTRY OF EDUCATION,

SCIENCE AND TECHNOLOGY.....6TH INTERESTED PARTY

ATTORNEY GENERAL.....7TH INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION....8TH INTERESTED PARTY

CABINET SECRETARY - MINISTRY OF LANDS

AND PHYSICAL PLANNING.....9TH INTERESTED PARTY

RULING

Background

1. On 2/8/2018, the National Land Commission (**the applicant**) brought a Reference under Article 162(2)(b) of the Constitution of Kenya 2010 and Sections 127 and 128 of the Land Act, 2012, seeking a determination of the following six issues:

- a) **The construction, validity or effect of the title document over LR 7879/4 - the applicant refers this issue for consideration so that the court can determine whether the two schools sit on public land or private land;**
- b) **Whether or not the compulsory acquisition of the land occupied by the two schools as being undertaken by the applicant meets the constitutional threshold of public purpose – the question shall determine whether there has been loss of public funds as a result of payment of the partial award of compensation of Kshs.1,500,000,000/-;**
- c) **The person to whom compensation is payable – the applicant seeks this court to determine whether an award compensation is payable to an agent/nominee/assignee of the person duly identified as having interest in the land upon request. The validity and/or effects of the payment of the partial award of compensation made to the 1st and 2nd interested parties through their agent/nominee/assignee, Whispering Palms Estate Limited;**
- d) **Of vesting and formal taking of possession of compulsorily acquired land – at what point should the applicant take possession of compulsorily acquired land: either after payment of the initial award of compensation or upon gazettelement of the notice of intention to acquire;**
- e) **An opinion on whether a search of a title at the Registrar is conclusive evidence of proprietorship; and**
- f) **What other steps, if any, the applicant and any other person can undertake to confirm the authenticity of a title before transacting on it.**

2. Together with the Reference, the applicant brought a Notice of Motion under certificate of urgency, dated 2/8/2018, seeking the following six orders:

- (a) **That this application be certified as urgent and that the same be heard ex parte in the first instance.**
- (b) **That the honourable court herein grants conservatory orders staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of LR 7879/4 pending the hearing and determination of the application herein.**
- (c) **That the honourable court herein grants conservatory orders staying any civil and/or criminal proceedings in respect of any of the processes touching on the compulsory acquisition of LR 7879/4 pending the hearing and determination of the Reference herein.**
- (d) **That the honourable court herein directs that all the parties herein do file all their respective documents, correspondences and any other instrument used in the process of compulsory acquisition of LR 7879/4 within 7 days from today.**
- (e) **That the reference herein be heard on priority basis.**
- (f) **That costs of this application be provided for.**

3. Both the Reference and the Notice of Motion were supported by an affidavit sworn on 1/8/2018 by Professor Muhammad A Swazuri, Chairperson, National Land Commission. Both the Reference and the Application do not have respondents; they only have the above ten interested parties.

4. On 2/8/2018, the Hon Lady Justice Gacheru certified the application as urgent and listed it for hearing before the Vacation Duty Judge on 14/8/2018. When the application came up for hearing on 14/8/2018 before the Vacation Duty Judge, Hon Lady Justice Komingoi, a number of interested parties requested for time to file and serve their responses. The court granted the request and slated the application for hearing on 16/8/2018.

5. In the intervening period, the Director of Public Prosecutions, through Jacinta Nyamosi, brought a Notice of Motion of even date, seeking a certification that this Reference raises substantial questions of law and public importance and the same should be referred to the Honourable Chief Justice to constitute a panel of uneven number of judges to hear and determine it. In the same intervening period, various interested parties filed formal objections to the jurisdiction of the Environment and Land Court to grant the conservatory orders sought in the Notice of Motion dated 2/8/2018.

6. When the Notice of Motion dated 2/8/2018 came up for hearing before Lady Justice Komingoi on 16/8/2018, Prof Ojienda SC, counsel for the applicant, submitted that the Reference is complex and raises serious constitutional issues. He urged the court to refer the matter to the

Chief Justice to constitute a bench of three (3) judges to hear and determine the Reference.

7. The Honourable Lady Justice Komingoi did not make a pronouncement on the plea for a bench of three judges. She instead directed that the File be placed before this court which she observed was seized of a related matter involving the same parties and the same subject matter, ELC JR 30/2018. She directed that this matter be listed before this court on 28/8/2018 for directions.

Consent Orders and Plea for Conservatory Order

8. When the matter came before me on 28/8/2018, parties to the Reference intimated that the related matter, ELC Judicial Review Application, No 30/2018 had since been withdrawn. Secondly, parties recorded the following consent orders on the twin subject of constitution of a bench of uneven number of judges and ventilation of questions relating to the jurisdiction of the Environment and Land Court to issue conservatory orders contemplated in the Notice of Motion:-

(a) The present reference meets the requirements of Article 165(3)(b) and (d) of the Constitution read together with Section 21 of the Environment and Land Court Act and should be referred to the Chief Justice for the constitution of a bench of uneven number of judges to hear it.

(b) Any questions of jurisdiction of the court in any matter relating to the present dispute or related dispute be heard before the panel of judges to be constituted.

9. Further, Prof Ojienda SC, counsel for National Land Commission, urged the court to exercise discretion and grant a conservatory order in the interim period. The court directed parties to make brief oral submissions on the plea for an interim conservatory order. The court further directed that directions as to whether or not to adopt the above consent would be made at the time of rendering a ruling on the plea for a conservatory order. This ruling therefore relates to the consent orders and the plea for a conservatory order. I will make pronouncements on the consent orders before making a brief pronouncement on the plea for a conservatory order.

Adoption of Consent Order

10. The first limb of the consent order relates to the constitution of a bench of uneven number of judges of the Environment and Land Court to hear and determine the Reference herein. Although the parties to the reference have presented a consent order in which they have agreed that a bench of uneven number of judges should be appointed to hear the Reference, the Court is by law obligated to satisfy itself that the Reference meets the criteria for certification for the purpose of constituting a bench of uneven number of judges to hear and determine it. Certification is a discretionary jurisdiction exercisable by the court. Both the Constitution and the Environment and Land Court Act do not envisage a scenario where parties confer certification by consent. For this reason, I am obligated to exercise my discretion and satisfy myself that the criteria for certification has been met. Only then can the consent be adopted.

11. The criteria for certification is set out in Section 21 of the Environment and Land Court Act which provides as follows:-

21(1) The court shall be properly constituted for the purposes of its proceedings under this Act by a single judge.

(2) Notwithstanding subsection (1), any matter certified by the court as raising a substantial question of law:

(a) under Article 165(3)(b) or (d) of the Constitution or

(b) concerning impact on the environment and land, shall be heard by an uneven number of judges, as determined by the Chief Justice.

12. It follows from the above statutory framework that the test to be applied in determining whether a dispute satisfies the threshold for certification for the purpose of constituting an uneven bench of judges is that of “**substantial question of law**”. Therefore the court’s discretion to accept or reject the consent order is to be guided by the test of “**substantial question of law**”.

13. What constitutes substantial question of law was defined by the Supreme Court of India in **Sir Chunilal V Mehta v Century Spinning and Manufacturing Co; AIR 1962 SC 1314** thus:

A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which has not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficult or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial....

14. Lenaola J (as he then was) in **Maina Kiai & 2 others v Independent Electoral and Boundaries Commission & another 2016 eKLR** outlined the following as the key factors to be considered in determining whether a substantial question of law is disclosed:

(a) Whether, directly, or indirectly, it affects the substantial rights of the parties: or

(b) Whether the question is of general public importance; or

(c) Whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or

any other superior court; or

(d) The issue is not free from difficulty;

(e) It calls for a discussion of an alternative view.

15. While adopting the criteria outlined by the Supreme Court of India, Kenya's Court of Appeal in **Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution & Planning & 3 others (2017) eKLR** held thus:

The position we take whilst embracing the test by the Supreme Court of India in Sir Chunilal V Mehta and Sons Ltd v The Century Spinning and Manufacturing Co. Ltd is that each case must be decided on its own facts and circumstances. No factor alone is decisive. A party seeking certification must lay a basis for the certification. Further, certification under Article 165 (4) of the Constitution is a matter in the judicial discretion of the court. Such discretion must, however, be exercised on sound basis.

16. The Court of Appeal further observed that whether a matter raises a substantial point of law for purposes of Article 165 of the Constitution is a matter for determination on a case by case basis. It further noted that the categories or factors to be taken into account in arriving at that decision is not a closed one.

17. The present reference contains six weighty questions. The Reference was prompted by what is commonly referred to by the media as “**Ruaraka Land Scandal**”. Whether the acquisition of the suit property is a scandal or not is what the Reference seeks to establish. For the last three months, it has dominated public discourse in the media, Parliament and social fora. From the materials presented to the court, state agencies mandated to undertake criminal investigations and prosecutions have spent substantial amount of time on the matter but no criminal charges have been preferred against anyone in the matter at this point. A brief summary of the background to the Reference would suffice.

18. The applicant undertook compulsory acquisition of a portion of Land Reference Number 7879/4 measuring approximately 13.5364 Acres which Ruaraka High School and Drive-in Primary School occupy. It made an award of Kshs 3,264,040,600 as compensation to the 1st and 2nd interested parties. Part of the award [Kshs 1.5 Billion] was paid to the 1st and 2nd interested parties through their nominees. The 8th interested party contends that the acquisition, award and payment are a fraud because the suit property on which the two schools stand was in or about 1984 surrendered to the state as a requisite condition for the approval of a subdivision plan implemented by the 1st and 2nd interested parties together with their sister companies. The 8th interested party further contends that the suit property ceased to be private property when the condition was accepted, surrender made, and the approval for the subdivision plan granted. On their part, the 1st and 2nd interested parties contend that the suit property was not surrendered, is private land, and the award and payment were legitimate.

19. The Two Houses of Parliament [National Assembly and Senate] made inquiries into the matter and came up with conflicting findings and reports. Consequently, the status of the suit property and the legality of the compulsory acquisition and the subsequent award and payment remain unresolved. One of the key questions which fall for determination in the present Reference is whether the suit property was surrendered to the state and whether it was public property at the time the applicant undertook compulsory acquisition of the property. Parliament has come up with conflicting findings on this critical question.

20. In his Notice of Motion dated 16/8/18, the Director of Public Prosecutions similarly made a plea for certification and constitution of uneven bench of judges. He cited various grounds, among them: the suit property has been the subject of various suits before various courts and the decision made in the Reference has the potential of exposing the entire justice system to ridicule and embarrassment; the determination of this Reference will impact on the performance of the constitutional mandate of various constitutional bodies and will involve the interpretation of Article 201 of the Constitution and various provisions of the Public Finance Management Act; and the Reference raises a number of substantial questions of law and public importance.

21. Taking into account the certification criteria set out in the preceding paragraphs of this ruling and the position taken by the Director of Public Prosecutions, I have considered the legal issues raised in the Reference and the public interest involved in the questions put forth in the Reference. No known reference of this nature has been ventilated before this court. Secondly, more than Kshs 3.2 Billion of public funds is involved in the Ruaraka land acquisition. While I appreciate the operational and budgetary challenges posed by the clamour for judicial benches of more than one judge, I am persuaded that the legal issues and the public interest involved in the Ruaraka land acquisition puzzle justify the constitution of a bench of uneven number of judges of the Environment and Land Court to determine the questions put forth in the Reference. Without saying much at this point, I am satisfied that the criteria for certification for the purpose of constitution of a bench of uneven number of judges has been met. I accordingly grant certification and adopt the first limb of the consent order.

22. The second limb of the consent order is a binding agreement by the parties, that all questions relating to the jurisdiction of the Environment and Land Court to grant conservatory orders in the present Reference be canvassed by the parties before the bench to be constituted by the Chief Justice. In my view, having granted certification, there are no legal hurdles in the adoption of this limb of the consent. I accordingly adopt it.

Conservatory Order

23. The last limb of this ruling deals with the question as to whether or not a conservatory order should be granted at this point. A number of interested parties have challenged the jurisdiction of this court to grant a conservatory order in the manner contemplated by the application dated 2/8/2018. Secondly, parties have agreed that the present Reference should be disposed by uneven bench of judges of the Environment and Land Court and certification to that effect has been granted. They have further agreed that all questions relating to the jurisdiction of this court to grant conservatory orders be canvassed before the bench to be constituted.

24. In light of the above mutual position of the parties to this Reference, I am of the view that, it would be inappropriate for this court, sitting

as a single judge, to grant a conservatory order in the face of the questions and challenges raised against its jurisdiction to grant the contemplated conservatory order and the parties' mutual agreement that questions of jurisdiction to grant conservatory orders be disposed by the bench to be constituted. I will therefore refrain from making a determination on the plea for a conservatory order and direct that, that limb of the motion be canvassed before the bench to be constituted. I nonetheless appreciate the urgency of this matter and the anxiety of the parties. I will take that into account when making my disposal orders.

Disposal Orders

25. For the reasons set out in the preceding paragraphs of this Ruling, I make the following disposal orders:

(a) Having independently considered the criteria for certification under Article 165 of the Constitution and Section 21 of the Environment and Land Court Act, the consent order recorded in court on 28/8/2018 by the parties to this Reference is hereby adopted in the following terms:-

(i) The present Reference meets the requirements of Article 165(3) (b) and (d) of the Constitution read together with Section 21 of the Environment and Land Court Act and is hereby referred to the Chief Justice to constitute a bench of uneven number of judges to hear and determine it.

(ii) Any question of jurisdiction of the court in any matter relating to the present Reference shall be heard before the panel of judges to be constituted by the Chief Justice.

(b) The limb of the Notice of Motion dated 28/8/2018 seeking conservatory orders shall be argued before the bench to be constituted by the Chief Justice.

(c) Because of the public interest involved in this matter, there shall be no order as to costs of the Motion dated 2/8/2018.

(d) The Deputy Registrar of the Environment and Land Court, Nairobi, shall cause the proceedings herein to be typed forthwith and the File to be transmitted to His Lordship the Chief Justice for the purpose of constituting uneven bench of judges to hear and determine the Reference herein.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF SEPTEMBER 2018.

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B M EBOSO

JUDGE