REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

PETITION NO. 19 OF 2017

IN THE MATTER OF: ARTICLES 22 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:THE CONSTITUTION OF KENYA (PROTECTION OF

RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER: OF ALLEGED CONTRAVENTION OF FUNDAMENTALRIGHTS AND FREEDOM UNDER THE CONSTITUTION OF KENYA, 2010 TO WIT CONTRARY TO ARTICLES 19, 21,22, 23, 27(4), 35(2), 40, 47 AND 60

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300(REPEALED)

AND

IN THE MATTER OF: GAZETTE NOTICE NUMBER 6866 CONTAINED IN THE

SPECIAL ISSUE VOL. CXIX-NO. 97 AND PUBLISHED ON THE 17TH DAY OF JULY, 2017 BY THE CHAIRMAN, NATIONAL LAND COMMISSION.

BETWEEN

LIKIZO LIMITED.....PETITIONER

VERSUS

NASIB KASHURU MUMBO.....1ST RESPONDENT

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

THE CHIEF REGISTRAR.....3RD RESPONDENT

THE COUNTY LAND REGISTRAR, KILIFI.....4TH RESPONENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. By this Notice of Motion dated and filed herein on 20th September 2017,Likizo Limited (hereafter "the Petitioner") prays for Orders:-

> ***4. That pending the hearing of this Petition, a conservatory order does issue to restrain the Respondent from in any manner whatsoever whether themselves, their servants, agents of advocates or any of them or otherwise from enforcing the Gazette Notice.***
>
> ***5.That pending the hearing of this Petition, a conservatory order does issue to restrain the Respondents, their servants and/or agents from interfering with the Petitioner's use, ownership and utility of Title No. Chembe/Kibabamshe/407;***
>
> ***6. That the Court be pleased to make any other order fit in the circumstances of this case.***

2. The application is supported by an affidavit sworn by the Applicant's shareholder and Director Timothy Mathew Darlington and is premised inter alia on the grounds that:-

> ***1. The Petitioner is the registered proprietor of a leasehold interest in Title No. Chembe/Kibabamshe/407(the suit property.***
>
> ***2. The Petitioner purchased the property measuring approximately 3.4 Ha from one Simeon Kipkoech Mining on 24th February 2004 at a consideration of Kshs 4,500,000/-***
>
> ***3. The Petitioner carried out a search for the suit property prior to and after purchasing the same and there was no caveat or caution registered thereon.***
>
> ***4. A report on the Special Task Force on Kilifi Jumba and Chembe Kibabamshe dated June 2010 recommended the allocation of the suit property to Nashib Kashuru Mumbo(the 1st Respondent for a term of 99 years effective 1st September 2010.***
>
> ***5. On 29th September 2010, the then Land Registrar Kilifi, (now the County Registrar and (the 4th Respondent) without due regard to the process issued a Certificate of Lease in favour of the suit property to the 1st Respondent.***
>
> ***6. The suit property having been owned privately was not government land and was not available for allocation and the allotment and subsequent registration of the Certificate of Lease in favour of the 1st Respondent was thus irregular, null and void.***
>
> ***7. On 17th July 2017, the National Land Commission (the 2nd Respondent) caused to be published a Gazette Notice on the Determination of Review of Grants and Dispositions of Public Land which it made the following determination on Plot No. 407 aforesaid.***
>
> ***"Regularlize to Nasib Kashuru Mumbo first allottee and subsequent transferee as he is the bonafide allottee. Embargo in respect of this property is hereby lifted.***
>
> ***8. The Gazette Notice is ultra vires the powers of the 2nd Respondent as it has donated unto itself powers that it does not possess.***
>
> ***9. As a result of the publication of the Gazette Notice by the 2nd Respondent, the 1st Respondent and his agents or assigns have encroached upon the suit property claiming ownership and are in the process of erecting structures thereon.***
>
> ***10. Unless this Court promptly intervenes the Applicant will suffer incalculable and irreparable loss at the hands of the Respondents and the Petition and the application will be rendered nugatory.***

3. By a Replying Affidavit filed herein on 17th October 2017, the 1st Respondent opposes the said application and avers that he is the bonafide owner of the suit property having acquired the same through the required process of land allocation. The 1st Respondent avers that the Petitioner has no proprietary interest on the property and its purported acquisition thereof was irregular, fraudulent and tainted with illegality.

4. The 1st Respondent further asserts that the Petition is a non-starter in law as the Petitioner had already filed two suits before this Court relating to the same suit property.

5. By a Replying Affidavit sworn by its Acting Director, Legal Affairs and Enforcement, Brian Ikol and filed herein on 15th November 2017, the 2nd Respondent equally opposes the grant of the orders sought in the application. The 2nd Respondent avers that Article 67(2) (e) of the Constitution and Section 15 of the National Land Commission Act mandates it to initiate investigations on its own initiative or on a complaint, onto present or historical land injustices and recommend appropriate redress.

6. Pursuant to the said mandate the 2nd Respondent asserts that it sought to address historical land issues affecting the Coast region and in particular complaints, emanating from Chembe/Kibabamshe Registration Section of Kilifi County. After carrying out a field observation and

interviews with area residents the 2nd Respondent concluded that multiple registration of titles under different regimes of ownership had taken place in the region which development precipitated numerous land disputes and problems within the Kilifi Chembe/Kibabamshe area.

7. The 2nd Respondent further avers that in line with its mandate under Section 14 of the National Land Commission Act, it commenced a review of grant over Chembe/Kibabamshe/407 amongst other plots. Prior to carrying out the review, the 2nd Respondent asserts that it published notices appearing on 1st and 2nd September 2015 in a number of local newspapers in which it informed members of the public of its intention and invited interested parties to tender written representations and documentation to the 2nd Respondent.

8. Further, the 2nd Respondent avers that it conducted a public hearing at the Red Cross Hall in Malindi on 16th September 2017 but the Petitioner failed to appear and/or make any representation. Thereafter upon conclusion on the hearings, the 2nd Respondent made the following findings:-

i) That all parcels of land falling within the Chembe/Kibabamshe area are trust lands and not government lands.

ii) That consequently, the Commissioner of Lands had no authority to allocate and proceed to issue titles either under the Registration of Tittles Act or the Registered Land Act.

9. In accordance with its said findings, the 2nd Respondent made a determination directing the Chief Land Registrar(the 3rd Respondent) to revoke the Petitioner's title to the suit property and instead recommended the issuance of title to the 1st Respondent, who was the bonafide owner arising out of the adjudication process. The findings were ultimately communicated vide notice as published and appearing in Gazette Notice No. 6866 on 17th July 2017.

10. It is the 2nd Respondent's case that its findings are independent, separate and distinct from the recommendations of the Special Task Force on Kilifi Jimba and Chembe Kibabamshe dated June 2010 as its findings were made pursuant to article 67 of the Constitution and Section 14 of the Act.

11. The 2nd Respondent concludes that in the exercise of its mandate as aforesaid, it has quasi-judicial powers which gives finality to its decisions. Therefore where one is dissatisfied with its determination, recourse lies as a right of appeal and not through the current proceedings in the form of a Petition which are but a thinly veiled attempt aimed at substituting the 2nd Respondent's findings with another decision.

12. The County Land Registrar Kilifi (the 4th Respondent) equally opposes the application. In a Replying Affidavit sworn by Felix Nyakundi and filed herein on 10th January 2018, the 4th Respondent lends support to the processes taken by the 2nd Respondent. It is the 4th Respondent's case that having reviewed the grants as by law provided, the 2nd Respondent gave a directive to the 3rd Respondent for compliance. Upon receipt of the directive, the 3rd Respondent directed the 4th Respondent to place a restriction on the affected suit property and to thereafter await for further directions. It is therefore the 4th Respondent's case that the entire Petition has no merit and that it should therefore be dismissed.

13. I have considered the application and the response thereto. I have equally taken into account the oral submissions made before me by the Learned Advocates for the parties.

14. As was stated in ***Judicial Service Commission –vs- Speaker of the National Assembly & Another(2013) eKLR***:-

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.

15. This position was reinforced by the Supreme Court in ***Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 Others (2014*) *eKLR*** where the highest Court in the land held:-

***"Conservatory orders bear a more decided public connotation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the Public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues, as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the* inherent merit of the case, bearing in mind the public interest, the Constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant cause."**

16. As it were, the law as I understand it is that in considering an application of this nature, this Court is not called upon and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the Court that will ultimately hear the Petition. At this stage, the first condition the applicant is required to establish is a prima facie case with a likelihood of success.

17. As Musinga J.(as he then was) stated in ***Centre for Rights Education and Awareness(CREAW) & 7 Others -vs- Attorney General(2011)eKLR:-***

> ***"….It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a conservatory order in terms of Prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. 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 order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

18. What then are the issues that the Petitioners intends to canvass at the hearing of this Petition?. The Petitioner in this matter contends that he is the registered proprietor of a leasehold interest in Title No. Chembe/Kibabamshe/407 having purchased the same from one Simeon Kipkoech Mining on or about 24 February 2004 at a consideration of Kshs 4,500,000/=. Having so purchased the property, the same was duly transferred to his name and a Certificate of Lease dated 3rd August 2004 was subsequently issued in the name of the Petitioner.

19. The Petitioner further avers that ever since it purchased the suit property, it has been in quiet occupation and possession of the same without any interference from the Respondents herein or any other persons. However, on or about 26th August 2010 and pursuant to a report commissioned by the Government of the Republic of Kenya entitled "Report on the Special Task Force on Kilifi/Jimba and Chembe Kibabamshe" dated June 2010, the Government allocated the suit property to the 1st Respondent for a term of 99 years effective 1st September 2010.

20. The Petitioner further contends that while the recommendations of the said Report on the Special Task Force on Kilifi Jimba Chembe Kibabamshe dated June 2010 does not have the force of law, on or about 29th September 2010, the 4th Respondent's predecessor without due regard to the due process of the law proceeded to issue a Certificate of Lease in regard to the suit property in favour of the 1st Respondent.

21. It is the Petitioner's case that the suit property having been owned privately was nolonger available for allocation as it was not government land. Its allocation to the 1st Respondent was therefore illegal and void ***ab initio***. The Petitioner further contends that the subsequent allocation of the land to the 1st Respondent amounted to compulsory acquisition of his land without adherence to due process.

22. The Respondents do not contest the fact that the Petitioner held a Certificate of Lease for the suit property. They however contend that the same was obtained irregularly and illegally and that hence the resulting title was tainted with fraud. They further aver that the 2nd Respondent granted an opportunity to all parties to make representations on the double allocations that have resulted in numerous disputes in the Kilifi Chembe Kibabamshe Adjudication Section but that the Petitioner failed to do so and hence the directive that the title reverts to the 1st Respondent who is said to have been the original allottee.

23. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However it is not a case which is frivolous. In other words, the applicant has to show that he or she has a case which discloses arguable issues, and, in this case, arguable Constitutional issues.

24. In the matter before me, it is contended that the land in question was private land and the 2nd Respondent had no basis dealing with the same. Further the Petitioner contends that the 2nd Respondent could not by dint of Section 14 of the National Land Commission Act purport to review any grant 5 years after the commencement date of the Act on 2nd May 2012. Those 5 years would lapse on 2nd May 2017 and the Constitutionality of the Gazette Notice made by the 2nd Respondent herein on 17th July 2017 has been questioned. In addition, the Petitioner contends that even if the 2nd Respondents decision was made within the time allowed in law, the 2nd respondent could only recommend appropriate legal redress but could not make a determination in the manner it did vide the impugned Gazette Notice.

25. Having considered the foregoing, it is my finding that considering the issues raised, this Petition discloses prima facie arguable issues for trial. In other words, it is my position that it cannot be said that the Petition as designed and pleaded is wholly frivolous and unarguable at this stage.

26. The second issue then which I must consider is whether the Petitioner has satisfied the provisions of Article 23(3) (c) of the Constitution. That Article empowers the Court in any proceedings brought such as this one under Article 22 of the Constitution to grant appropriate relief, including a conservatory order.

27. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. A strict interpretation of Article 23(3) (c) therefore reveals that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

28. A party seeking a conservatory order thus requires to demonstrate that unless the Court grants the order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by Mwongo, J in ***Martin Nyaga Wambora –vs- Speaker of the County Assembly of Embu & 3 Others (2014) eKLR*** where the Learned Judge expressed himself as follows:-

> ***"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much that it desires immediate remedial attention or redress by the Court. Thus an allegedly threatened violation that is remote and unlikely will not attract the Court's attention."***

29. In the matter before me, the Petitioner has demonstrated that it has title to the suit property. The right to hold that property is protected under Article 40 of the Constitution. The 2nd Respondent has by the impugned Gazette Notice determined that the said suit property should be "regularized and transferred" to the 1st Respondent. The 4th Respondent confirms that the 3rd Respondent received the 2nd Respondent's

determination and that pursuant to a directive from the 3rd Respondent, placed a restriction on the title relating to the suit property. In the circumstances of this case, it is evident to me that there is real danger of the suit property being alienated unless otherwise restrained.

30. Accordingly, I am satisfied that the Petitioner had made out a case for the grant of conservatory orders. Those orders will issue as prayed in Prayer No. 4 and 5 of the application before me but so far only as the same relate to the suit property and not any other parcel of land.

Dated, signed and delivered at Malindi this 31st day of October, 2018.

J.O. OLOLA

JUDGE