



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**  
**THIKA LAW COURTS**

**ELC.JUDICIAL REVIEW NO.10 OF 2017**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION**

**BETWEEN**

**REPUBLIC (Exparte MBO-I-KAMITI**

**FARMERS COMPANY LTD.....APPLICANT**

**-VERSUS-**

**THE NATIONAL LAND COMMISSION.. .....1<sup>ST</sup> RESPONDENT**

**TWIGA ESTATE SQUATTERS SOCIETY .....2<sup>ND</sup> RESPONDENT**

**RULING**

The matter for determination is the Exparte Applicant's application dated **3<sup>rd</sup> October 2017** brought under **Article 40 of the Constitution of Kenya** and **Order 53** of the **Civil Procedure Rules** wherein the Applicant has sought for the following orders:-

**1) That the orders of prohibition do issue against the 1<sup>st</sup> Respondent, to prohibit it from interfering in any way with the Applicants title or user to land parcels LR.252, 3760,**

**9312 & 9313.**

**2) That the cost of this application be provided for.**

The application is supported by the grounds stated on the face of the application and by the **Supporting Affidavit** of **George Waweru Njuguna**.

These grounds are:-

**1) That the land is privately owned land to which the Applicant is entitled to protection under Article 40 of the Constitution of Kenya.**

**2) That there have been a plethora of suits some concluded and some on-going between the Applicant and the 2<sup>nd</sup> Respondent regarding the suit premises. These include:-**

**(i) HCCC No.781 of 2004 – Dismissed**

**Twiga Men & Women Group..Vs..Mbo-I-Kamiti Farmers Co. Ltd**

*(ii) HCCC No.170 of 2010 – Dismissed*

*Twiga Men & Women Group..Vs..Mbo-I-Kamiti Farmers Co. Ltd*

*iii) ELC No.781 of 2004 – Dismissed*

*William Chege & 20 Others(suing as Twiga Estate Squatters)..Vs..Mbo-I-Kamiti Farmers Co. Ltd*

*iv) Pet. No.144 of 2012 – Dismissed*

*David Mwathi KIbe & Others (Suing as Twiga Estate Squatters)..Vs. Municipal Council of Ruiru*

*v) HCCC No.57 of 2012 – Orders of Eviction issued*

*Municipal Council of Ruiru..Vs..Twiga Estate Squatters*

*vi) ELC No.149 of 2011 – Claim for Adverse Possession*

*Twiga Estate Squatters..Vs..Mbo-I-Kamiti Farmers Ltd & 8 Oth*

*vii) CA No.23 of 2015 – Pending in the Court of Appeal*

*Salome Mwihaki & 3 Others (Suing as Chairlady, Treasurer and Secretary of Twiga Estate Squatters..Vs..Mbo-I-Kamiti Farmers Co. Ltd*

*3) That the attention of the 1<sup>st</sup> Respondent has been drawn to these cases that the issues that want to deal with are either Res judicata or sub-judice.*

*4) That the 2<sup>nd</sup> Respondent is forum hunting having filed cases in court cannot now seek other interventions to override court decisions or matters pending in court.*

*5) That the inter-meddling by the 1<sup>st</sup> Respondent at the instance of the 2<sup>nd</sup> Respondent is clearly intended to prejudice the Applicants ownership and defence in the on-going court cases.*

In his **Supporting Affidavit, George Waweru Njuguna**, reiterated the contents of the grounds in support of the application and further averred that from the **year 2010**, the Applicant started facing a myriad of cases from the 2<sup>nd</sup> Respondent who had invaded the land and started claiming interest in this suit land as squatters or adverse possessors.

However, most of the cases were concluded and dismissed and some are still pending in court. Further, that on **11<sup>th</sup> September 2017**, the Applicant received a letter from the 1<sup>st</sup> Respondent indicating that the 1<sup>st</sup> Respondent would visit the suit land on **26<sup>th</sup> September 2017**. He contended that it is clear that the said letter was written to the 2<sup>nd</sup> Respondent but they were the instigations of the threatened action. Further that since there are matters are pending in court, the Respondents conduct is meant to supersede matters that have already been determined by competent court. Further that the said conduct of the Respondent is meant to interfere with matters pending before the Honourable Court and thus subjudice.

Though the Applicant has protested to the 1<sup>st</sup> Respondent vide a letter dated **14<sup>th</sup> September 2017** about the intended intervention and/or interference by the 1<sup>st</sup> Respondent, the said 1<sup>st</sup> Respondent has ignored the said protest and has communicated to the **District Commissioner, Kiambu** of its intention to proceed with the said intervention which conduct would infringe on the Applicant's right to enjoyment of private property as enshrined in **Article 40 of the Constitution**.

The application is vehemently opposed by the Respondent. The 1<sup>st</sup> Respondent filed **Grounds of Opposition** dated **5<sup>th</sup> January 2018** and averred that:-

*1) That the Applicant's said application is incompetent, mala fides, misconceived, mischievous, bad in law and is an abuse of the court process.*

*2) That the application is devoid of merit, misconceived, frivolous, vexation and ought to be dismissed with costs.*

*3) That the 1<sup>st</sup> Respondent is an Independent Commission established under Article 67(1) of the Constitution and is operational by the National Land Commission Act No.5 of 2012.*

*4) That the Applicant's application is meant to deny/deprive the powers of the 1<sup>st</sup> Respondent as provided under Section 6(1) and (2)(b) of the National Land Commission Act No.5 of 2012.*

*5) That it is within the scope of the 1<sup>st</sup> Respondent to hold public inquiries to perform all necessary powers in execution of its*

*functions under the Constitution.*

**6) That the Applicant's application further impedes the functions/powers of the 1<sup>st</sup> Respondent as spelled out in the 1<sup>st</sup> Respondent Act.**

**7) That the subject parcels have raised public outcry in the County of Kiambu after years of endless wrangles and violence that has led to several deaths that then prompted the County Government to intervene.**

**8) That the exercise and findings reached by the 1<sup>st</sup> Respondent will not be of any detriment whatsoever to any of the parties as it will just paint a well-reasoned opinion to the endless land dispute which could then be used by an relevant institution to reaching a just conclusion.**

**9) That the 1<sup>st</sup> Respondent prays that the application be dismissed with costs.**

The 2<sup>nd</sup> Respondent filed its **Replying Affidavit** through **David Mwathi Kibe**, the Treasurer of the 2<sup>nd</sup> Respondent who averred that he has been advised by his advocate that **National Land Commission** has powers conferred to it by the **Constitution and National Land Commission Act** and **Land Act No.6 of 2012** to investigate historical injustices especially where such an act has resulted in displacement of people. He contended that the members of the 2<sup>nd</sup> Respondent society comprising of about 4000 members have occupied the suit properties **No.252, 3760, 9312 and 9313** since colonial times and the said land was previously owned by a **white settler** known as **Sebastian Tamms** who had allowed the squatters to settle on the said parcel of land.

Further that the said white settler left the country after independence and he left the land to the squatters in appreciation of their good work. It was his contention that the squatters have occupied the entire land since then until **20<sup>th</sup> December 2012** when they were forcefully evicted from the land. That the Applicant had secretly obtained a **Court Order in ELC No.57 of 2012** whereby eviction orders were issued.

Therefore the act of the Applicant has caused great injustice to the members of the 2<sup>nd</sup> Respondent as the said members have been rendered paupers, homeless and total destitutes. Further that the members of the 2<sup>nd</sup> Respondent have been moving from office to office to seek justice and that is why they presented their grievances to **National Land Commission**. However, instead of the Applicant attending the intended site visit at **Tinga Estate Farm**, it filed the instant proceedings. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions wherein all the parties filed their respective rival submissions in support of their positions. The parties also cited various decided cases.

The Court had carefully considered the pleadings in general and the annexures thereto. The Court has also carefully considered the rival written submissions and the cited authorities. The Court too has also considered the relevant provisions of law and the Court makes the following findings.

At the centre of the dispute herein are land **parcels No.LR.No.252,3760, 9312 and 9313** which are registered in favour of **Mboi-i-Kamiti Farmers Co. Ltd**, the Applicant herein. From the annexures hereto, the said parcels of land were transferred to the Applicant in the **year 2003** allegedly by **Karume Investments Ltd**, for monetary consideration. The said parcels of land had been registered in favour of **Karume Investments Ltd** in **1974**.

It is also not in doubt that various suits have been filed over the suit properties and adjudicated upon by various courts. The said suits were over the suit properties and the parties were the Applicant herein and 2<sup>nd</sup> Respondent. A number of suits have been dismissed and two others are still pending court. The Applicant herein has alleged that the 1<sup>st</sup> Respondent intends to carry a public inquiry over the suit properties which intervention amounts to infringement of the Applicant's right to enjoyment of its property and further the said action goes against the subjudice rule.

However, the Respondents have contended that the act of the 1<sup>st</sup> Respondent falls within its mandate as it is only carrying out an investigation which might give a result that would be useful to any other institution dealing with the dispute herein.

The Applicant has sought for prohibitory orders which is one of the remedies that this Court is empowered to grant as a relief as the court deems fit and just as provided by **Section 13(7)** of the **Environment and Land Court Act**.

**Black Law Dictionary 9<sup>th</sup> Edition** describes '**Prohibition as "A law or order that forbids a certain action....It is a kind of common law injunction to prevent an unlawful assumption of jurisdiction...."**

It is therefore clear that the Applicant herein are seeking orders to forbid the 1<sup>st</sup> Respondent from carrying on with the inquiry over the suit properties. The suit properties are all registered in favour of the Applicant. They are thus private properties and the Applicant as the proprietor of the said suit properties is deemed to be the absolute and indefeasible owner of the same. However this proprietorship can be challenged if the said registration or proprietorship was acquired through **fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme** as provided by **Section 26(1)(a)&(b)** of the **Land Registration Act**. There is no doubt that **prima-faciely**, the Applicant is the absolute and indefeasible owner of the suit properties.

The 2<sup>nd</sup> Respondent on their part have alleged that they have lived on the suit properties since colonial days and were bequeathed the said properties by the former proprietor who was a white settler known as **Sebastian Tamms**, and who left the country immediately after

independence. Further that the members of the 2<sup>nd</sup> Respondent were unlawfully evicted from the suit properties in the **year 2012**. To the 2<sup>nd</sup> Respondent the act of eviction of its members was unjust and that the 2<sup>nd</sup> Respondent has moved from one office to another trying to seek for justice.

Further, that it was out of their quest for justice that the said members of the 2<sup>nd</sup> Respondent lodged a complaint with the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent decided to carry out an inquiry on the root cause of the long standing problem herein.

The applicant alleged that the 1<sup>st</sup> Respondent has no authority to investigate or carry out inquiry over Privately owned land.

The Court has considered the relevant provisions of law. Indeed **Article 40** of the **Constitution** provides for the protection of right to property. Therefore every person has a right to protection of his/her property by the State. The **Constitution of Kenya 2010** has also categorized various holding of land such as **Public land, Community land and Private land**.

However, in **Article 66(1)**, the State is given mandate to regulate the use of any land or any interest in or right over any land in the interest of **Defence, Public Safety, Public Order, Public Morality, etc.....**"

It is for the above reasons that the Constitution further established the **National Land Commission** and its functions have been enumerated in **Article 67(2)**. Among the many functions of **National Land Commission** is **"to initiate investigations, on its own initiative or complaint into present or historical land injustices, and recommend appropriate action"**.

Further, the **National Land Commission Act No.5 of 2012** spells out the functions and powers of the **National Land Commission** in **Section 5(1)** and these functions are the ones spelt out in the **Article 67(2)** of the **Constitution** and among the said functions are to:-

**"initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress".**

The Court has also considered **Section 6(1)** of **National Land Commission Act** and it provides that the Commission shall have all the powers necessary for the execution of its function under the Constitution, the Act and any other written law.

Further **Section 6(2)(b)** provides that the Commission shall have power to:-

**"hold inquiries for the purposed of performing its functions under this Act".**

From the above provisions of law, the Court finds that the **National Land Commission** has powers to investigate any alleged historical land injustice and make any appropriate recommendation. In doing So, the **National Land Commission** can hold inquiries for purposes of carrying out the above stated investigations. It does not mean that by carrying an investigation and inquiry, the **National Land Commission** has already concluded that the land in issue was acquired irregularly or there is any historical injustice. It may just be an alleged historical injustice and after the investigation and inquiry, the said Commission may come up with appropriate recommendation that might assist in unlocking the dispute herein.

Having now analyzed the facts of the case and the fact that the members of the 2<sup>nd</sup> Respondent are alleging that they were unjustly evicted from the suit land and having analysed the functions and mandate of the **National Land Commission**, the Court finds that by carrying out an inquiry over the suit properties herein, the 1<sup>st</sup> Respondent, **National Land Commission** would not be going outside its mandate. The said investigation and inquiry might actually assist the parties herein in settling this matter once and for all. The recommendation that might be made by 1<sup>st</sup> Respondent after the inquiry might even assist the court and/or other

Institution to come up with a just determination.

Therefore the Court finds that the intended inquiry by the 1<sup>st</sup> Respondent, would not at all interfere with the matters that are already in court and is not subjudice. The matter herein is of public concern and the inquiry might assist in maintaining public order. The 1<sup>st</sup> Respondent is acting within its mandate.

However, if the 1<sup>st</sup> Respondent in carrying out its functions of investigations and inquiry do exceeds its mandate, then the Applicant is has a right to come to court and seek redress through filing for any prerogative orders or reliefs.

Therefore the Court finds that the **National Land Commission** should be allowed to carry out its mandate and any aggrieved party can come to court for redress. The Court finds and holds that there is no justifiable reason to prohibit the 1<sup>st</sup> Respondent herein from carrying on with the intended inquiry.

Having now carefully considered the instant **Notice of Motion** dated **3<sup>rd</sup> October 2017**, the **Court finds it not merited and the said application is dismissed entirely with costs to the Respondents**.

It is so ordered.

**Dated, Signed and Delivered at Thika this 19<sup>th</sup> day of October 2018.**

**L. GACHERU**

**JUDGE**

**19/10/2018**

In the presence of

No appearance for the Applicant

No appearance for 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent present in person

Lucy - Court clerk.

**Court** – Ruling read in open court.

**L. GACHERU**

**JUDGE**

**19/10/2018**