



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC PETITION NO. 13 OF 2016

JANET NGINA NZUKI.....PETITIONER

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

**MARGARET ITOTIA (Sued as the administrator of
the estate of PETER ITOTIA).....4TH RESPONDENT**

RULING

What is before me is the Petitioner's application dated 13th October, 2016 in which the Petitioner has sought the following prayers:

1. That this honourable court be pleased to grant an order restraining the 1st and 2nd Respondents, their agents, servants, employees and/or anyone acting under their instructions respectively from revoking the Petitioner's title in respect of the property known as Land Reference Number 22318 and/or issuing an allotment letter to the 4th Respondent or any other person whatsoever or alienating the said land in any way pending the hearing and determination of the Petition.

2. That this honourable court be pleased to grant an order of injunction restraining the 4th Respondent, her agents/servants, employees and/or anyone acting under her instructions from entering, occupying, remaining in the property, profiting, selling, transferring and/or dealing in any manner with all that piece of land known as Land Reference Number 22318, measuring 4.339 hectares, situate in Machakos County pending the hearing and determination of the Petition.

The application was brought on the grounds that, the Petitioner was at all material times the registered proprietor of all that parcel of land known as L.R No. 22318 (hereinafter referred to as "the suit property"). The Petitioner averred that she was allocated the suit property on 28th May, 1998 and was subsequently issued with a title on 5th January, 2012. The Petitioner averred that on or about 13th February, 2015, the 4th Respondent purported to lodge a complaint with the 1st Respondent regarding the Petitioner's title to the suit property. The Petitioner averred that the 4th Respondent's complaint was based on a letter of allotment dated 23rd May, 1997 that was issued to her deceased husband Peter M. Itotia in respect of the same property. The Petitioner averred that the said letter of allotment was revoked before the suit property was allocated to her. The Petitioner averred that after hearing the 4th Respondent's complaint, the 1st Respondent notified her through a letter dated 5th April, 2016 that it had reached a decision that the Petitioner's title to the suit property be revoked and that the 4th Respondent be issued with a new letter of allotment in respect of the suit property. The Petitioner averred that her title to the suit property was indefeasible and that the 1st Respondent had no jurisdiction to review the same. The Petitioner averred that the 1st Respondent's decision to revoke her title was illegal, unreasonable and a violation of her legitimate expectation. The Petitioner averred that no evidence was placed before the 1st Respondent of any fraud or irregularity in the manner she acquired the suit property and that the 1st Respondent failed to give her reasons for its decision to revoke the title for the suit property contrary to the provision of Section 4(2) of the Fair Administrative Action Act and Article 47(2) of the Constitution. The Petitioner termed the decision as arbitrary, unconstitutional and illegal. The Petitioner averred that the 1st Respondent had directed the 2nd Respondent to implement its decision and that it was just and equitable that the injunction sought be granted to safeguard her interest in the suit property pending the hearing of the petition so as to prevent a miscarriage of justice.

The application was opposed by the 1st and 4th Respondents. The 1st Respondent opposed the application through a replying affidavit sworn by its Director of Legal Affairs, Brian Ikol on 17th January, 2018. The 1st Respondent defended its decision to revoke the Petitioner's title.

The 1st Respondent averred that it had jurisdiction to review grant of public land and that upon hearing the Petitioner and the 4th Respondent, it made a finding that the suit property was not available for allocation to the Petitioner as it had already been allocated to the 4th Respondent's deceased husband, Peter Mbugua Itotia (hereinafter referred only as "the deceased"). The 1st Respondent averred that it found no evidence that the allocation of the suit property to the deceased had been revoked or withdrawn. The 1st Respondent contended that the Petitioner's Petition has no probability of success.

The 4th Respondent opposed the application through a replying affidavit sworn on 30th June, 2017. The 4th Respondent averred that her deceased husband, Peter Mbugua Itotia (the deceased) in respect of whose estate she was the administrator was the first allottee of the suit property pursuant to the letter of allotment dated 23rd May, 1997. The 4th Respondent averred that she was in occupation of the suit property and had been cultivating the same since 1997. The 4th Respondent averred that as at the time of the death of the deceased, she was not aware of the status of the title of the suit property and that it was until the year 2010 that she stumbled on the original letter of allotment in respect of the suit property. The 4th Respondent averred that when she approached the Ministry of Lands to regularize the allotment by paying the stand premium and other charges, she was advised that the property had been re-allocated to another person. The 4th Respondent averred that she was not informed or notified that the letter of allotment that had been issued to the deceased on 23rd May, 1997 had been cancelled. The 4th Respondent averred that the 1st Respondent had jurisdiction to entertain her complaint. The 4th Respondent contended that although the Petitioner claimed to have been allotted the suit property on 28th May, 1998, the Petitioner did not pay the requisite charges until the year 2011. The 4th Respondent averred that the Petitioner had never made any effort to access the suit property.

The application was argued by way of written submissions. The Petitioner filed her submissions on 10th January, 2018 and the 4th Respondent filed her submission on 16th January, 2018. I have considered the application together with the affidavit filed in support thereof. I have also considered the affidavits filed in reply to the application and submissions of counsel. The Petitioner's application has been wrongly brought under the Civil Procedure Rules. What the Petitioner is seeking are conservatory orders pending the hearing of her Constitutional Petition brought under Article 22 of the Constitution.

Under Article 22 (3) and Article 165 (3) of the Constitution, the Chief Justice made rules for the enforcement of Constitutional Rights and Fundamental Freedoms. The rules are known as The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter referred to only as "the rules" where the context so admits). Rule 23 (1) of the rules gives the court power once a petition for enforcement of a constitutional right or fundamental freedom has been lodged to hear and determine an application for conservatory or interim order. This is the rule that the Petitioner should have invoked in the application before me.

Failure by the petitioner to invoke the correct provisions of law under which she has moved the court is however not fatal to the application. Article 159 (2) (d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicalities. Furthermore, rule 24 of the rules allows an application for conservatory or interim order to be made by way of informal documentation. I would therefore deem the petitioner's application herein to have been brought under rule 23 of the rules. It is now settled that an applicant for a conservatory or interim order under rule 23 of the rules must demonstrate that:

- (i) He has a prima facie case;
- (ii) Unless the conservatory or interim order is granted he is likely to suffer prejudice or injury as a result of violation or threatened violation of his constitutional rights or the constitution;
- (iii) It would be in the public interest to grant the order.

In the Supreme Court case of Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Petition No. 2 of 2014, the court stated that:

““Conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore, are not unlike interlocutory injunction, linked to such private-party issues as “the prospects of irreparable harm” occurring during 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 a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”

I am satisfied on the material before me that the Petitioner has established a prima facie case of violation of her constitutional rights by the 1st Respondent. I am also persuaded that the Petitioner risks suffering further violation of her constitutional rights and a miscarriage of justice if the conservatory orders sought are not granted. The Petitioner stands the risk of having her title to the suit property cancelled and the property allocated to the 4th Respondent who may dispose of it to third parties. I am of the view that justice would be better served if the current status quo in relation to the suit property is preserved pending the hearing of the petition. No party in my view would suffer prejudice as a result of an order to that effect.

Due to the foregoing, I hereby make the following orders with regard to the Petitioner's Notice of Motion dated 13th October, 2016:

1. Pending the hearing and determination of the petition herein or further orders by the court, the execution of the 1st Respondents determination made on or about 5th April, 2016 and communicated to the Petitioner and the 4th Respondent by a letter of the same date in relation to L.R No. 22318 – Athi River is stayed. For the avoidance of doubt the 2nd Respondent is restrained from revoking the Petitioner's title to L.R No. 22318 – Athi River and issuing a new letter of allotment to the 4th Respondent in respect to the said parcel of land.

2. Pending the hearing and determination of the Petition herein or further orders by the court, the status quo relating to the title, possession and use of L.R No. 22318 shall be maintained by both parties. The 4th Respondent shall remain in occupation of the suit property while the Petitioner shall remain the holder of the title in respect thereof but neither shall sell, transfer, lease or charge the property pending the hearing and determination of the petition or further orders by the court.

3. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 11th day of October 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Petitioner

N/A for the 1st Respondent

N/A for the 2nd Respondent

N/A for the 3rd Respondent

Mr. Ajulu h/b for Mr. Kuria for the 4th Respondent

Catherine Court Assistant