



REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 1B OF 2017

IN THE MATTER OF ARTICLES 1,2,3,10,19,20,21,22,23,40 (1) (a), (b), 47,67,73
 AND 165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

BETWEEN

OLOJORAI COMPANY LIMITED.....PETITIONER

AND

NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL2ND RESPONDENT

RULING

Introduction

1. On 18th January 2017, the petitioner herein, a limited liability company which describes itself as a land buying company, presented the petition that is the subject of these proceedings.
2. The petitioner accuses the 1st Respondent, National Land Commission, of contravening the constitution by delving into issues of private land and thereby infringing upon the petitioner’s constitutional rights.
3. Alongside the petition, the petitioner also filed Notice of Motion dated 13th January 2017 in which it seeks the following orders:

1. ..

2. THAT this court be pleased to certify that the petition raises issues on interpretation of the constitution and Fundamental Rights and Freedoms and the same ought to go for final disposal and determination immediately.

3. ...

4. THAT pending the hearing and determination of this petition, this honourable court be pleased to grant conservatory orders restraining the 1st respondent and the interested parties from initiating any investigations or purporting to investigate, discussing, commenting on, allocating, alienating, disposing, intermeddling, interfering with or in any way dealing with the issues of the plaintiff's parcel of land known as L.R. No. 9581 & 10242.

5. THAT this court gives certain directions as it may deem just and fit.

6. THAT the respondents be condemned to pay costs.

4. The application is supported by the affidavit of Peter Ole Sono, a director of the petitioner.

5. This ruling is in respect of the Notice of Motion dated 13th January 2017.

6. The 1st respondent is a constitutional commission established under Article 67(1) of the Constitution of Kenya, 2010 and whose functions are spelt out at Article 67(2) as follows:

a) to manage public land on behalf of the national and county governments;

b) to recommend a national land policy to the national government;

c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

g) to assess tax on land and premiums on immovable property in any area designated by law; and

h) to monitor and have oversight responsibilities over land use planning throughout the country.

7. Additionally, pursuant to section 5(2) of the National Land Commission Act, the 1st respondent has power to:

a) on behalf of, and with the consent of the national and county governments, alienate public land;

b) monitor the registration of all rights and interests in land;

c) ensure that public land under the management of the designated state agencies is sustainably managed for the intended purposes;

d) develop and maintain an effective land information system for the management of public land;

Submissions

8. Being satisfied that the respondents had been served with both the petition and the application, I allowed the application to proceed. The application was therefore heard unopposed.

9. Relying on the supporting affidavit, counsel for the petitioner submitted that the petitioner purchased two parcels of land, LR No. 9581 and 10242 from the Agricultural Development Corporation and subdivided them into 3,965 parcels to be given to its shareholders. So far 900 titles have been issued and the process is ongoing.

10. It was further submitted that within the two parcels there are 3 secondary schools and 6 primary schools and that 800 deceased persons are also buried there.

11. The petitioner accuses the 1st respondent of writing a letter dated 17th June 2015 addressed to the governor of Nakuru County informing him of a meeting that was held on the same day where it was resolved that genuine settlers/squatters on the petitioner's land be profiled. Following the said meeting, the 1st respondent formed a committee to undertake the exercise.

12. The petitioner submits that the two parcels of land are private land and therefore do not fall within purview of the functions of the 1st respondent. The petitioner contends that by holding the meeting, making the resolutions and forming the committee, the 1st respondent exceeded its mandate.

13. The petitioner further argues that the actions of the 1st respondent amount to violations of Articles 40 and 47 of the Constitution. The petitioner contends that there has been no complaint by anybody of any historical injustice in relation to the two parcels of land. The petitioner therefore urges the court to grant conservatory orders in terms of prayer 4 of the notice of motion.

Analysis and determination

14. The petitioner seeks conservatory orders. I remind myself that at this stage I am not supposed to make a final analysis of the facts. To succeed in the application, all the petitioner needs to do is to establish a prima facie case with a likelihood of success and further persuade the court that unless the orders are granted, it will suffer prejudice.

15. As was stated by Musinga, J as he then was in **Centre For Rights Education and Awareness (CREAW) & 7 Others** (Petition No. 16 of 2011 (Nairobi)):

“...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 real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

16. To establish a prima facie case, the petitioner needs to show that the 1st respondent has no functions or powers over the suit land and that therefore the actions of the 1st respondent as regards the parcels of land known as L.R. No. 9581 & 10242 are likely to be violation of the petitioner's constitutional rights.

17. In view of the provisions of Article 67 of the Constitution and section 5(2) of the National Land Commission Act, the 1st respondent's functions and powers are limited to public land.

18. The petitioner has maintained that L.R. No. 9581 & 10242 is private land as opposed to public land. Article 64 of the constitution defines private land as consisting of:

- a) registered land held by any person under any freehold tenure;
- b) land held by any person under leasehold tenure; and
- c) any other land declared private land under an Act of Parliament.

19. On the other hand, public land is defined at Article 62 of the constitution as consisting of:

- a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;
- c) land transferred to the State by way of sale, reversion or surrender;
- d) land in respect of which no individual or community ownership can be established by any legal process;
- e) land in respect of which no heir can be identified by any legal process;
- f) all minerals and mineral oils as defined by law;
- g) government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;
- h) all roads and thoroughfares provided for by an Act of Parliament;
- i) all rivers, lakes and other water bodies as defined by an Act of Parliament;
- j) the territorial sea, the exclusive economic zone and the sea bed;
- k) the continental shelf;
- l) all land between the high and low water marks;
- m) any land not classified as private or community land under this Constitution; and
- n) any other land declared to be public land by an Act of Parliament—
 - (i) in force at the effective date; or
 - (ii) enacted after the effective date.

20. To demonstrate that L.R. No. 9581 & 10242 is private land the petitioner would simply need to exhibit the title documents and show that it is the registered proprietor of the parcels. Other than the averment that it bought the two parcels, the petitioner has not put before the court any evidence of ownership. In the circumstances, the court is unable at this stage, to determine whether L.R. No. 9581 & 10242 is private land or public land as defined by the constitution.

21. The petitioner has shown that the 1st respondent wrote a letter dated 17th June 2015 addressed to the governor of Nakuru County informing him of a meeting that was held on the same day where it was resolved that genuine settlers/squatters on “Oljorai Farm” be profiled. Following the said meeting, the 1st respondent formed a committee to undertake the exercise.

22. Nevertheless, the aforesaid letter does not specifically identify the said “Oljorai Farm” through a plot number neither is it addressed to or copied the petitioner. It is therefore not possible at this interlocutory stage to conclude that the actions of the 1st respondent which are complained of were in regard to the parcels of land known as L.R. No. 9581 & 10242.

23. To the extent that the court is not able to ascertain whether the land in question is private land and further to the extent that it has not been shown that the actions of the 1st respondent which are complained of were in regard to the parcels of land known as L.R. No. 9581 & 10242, there is no basis for the court to hold that the 1st respondent's actions pose a threat of violation of the petitioner's constitutional rights.

24. I therefore find that no prima facie case with a likelihood of success has been established. Similarly, I find that the petitioner has not shown that unless the court grants the Conservatory Order, there is real danger that it will suffer prejudice.

25. I hasten to add that my findings are based purely on an assessment of whether a case for grant of conservatory orders has been made. I make no determination nor do I express any opinion on the prospects of the main petition.

Conclusion

26. From the foregoing, it must be clear that I find no merit in the application. The Notice of Motion dated 13th January 2017 is dismissed with no order as to costs.

27. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2017.

D. O. OHUNGO

JUDGE

In the presence of:

for the petitioner

for the 1st respondent

for the 2nd respondent