



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 1339 OF 2016**

**IN THE MATTER OF VIOLATION OF THE PETITIONER’S FUND AMENTAL CONSTITUTIONAL RIGHTS AND FREEDOMS UNDER SECTION 23 OF THE REGISTRATION OF TITLES ACT 9 NOW REPEALED) SECTION 14(7) OF THE LAND ACT,2012 & ARTICLES 40 & 62 (b) OF THE CONSTITUTION OF KENYA,2010 BY WAY OF AN UNCONSTITUTIONAL TAKING AND THE CONSEQUENCES RESULTING THEREFROM UNDER PART VIII OF THE LAND ACT 2012**

**- AND-**

**IN THE MATTERS OF PROTECTION AND/OR ENFORCEMENT OF THE OETITIONER’S CONSTITUTIONAL RIGHTS AND FREEDOMS UNDER ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND PART VIII OF THE LAND ACT 2012.**

**- AND-**

**IN THE MATTER OF A DETERMINATION BY NATIONAL LAND COMMISSION UNDER SECTION 14 OF THE NATIONAL LAND COMMISSION ACT, 2012 RECOMMENDNG THE REVOCATION OF TITLE TO L.R NO. 209/11314/3, LATER 209/19460 AND [ PRESENTLY REGISTERED AS LR NO. 209/21245) AND THE CONSEQUENCES RESULTING THEREFROM UNDER PART VIII OF NO. 209/21245) AND THE CONSEQUENCES RESULTING THEREFROM UNDER PART VIII OF THE LAND ACT 2012**

**- BETWEEN-**

**NAIVAS LIMITED .....PETITIONER**

**-AND-**

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

**KENYA URBAN ROADS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND**

**BOARD TRUSTEES.....INTERESTED PARTY**

## RULING

### BACKGROUND.

1. Naivas Limited (Naivas) filed a Constitutional Petition in which it named the **National Land Commission (NLC)** as the first Respondent, **Kenya Urban Roads Authority (KURA)** as the second Respondent and **National Social Security Fund Board of Trustees (NSSF)** as the interested party. Naivas contemporaneously filed an application in which it sought among other orders injunctive orders.
2. NLC had revoked title to parcel No. LR No. 209/2145 owned by Naivas. Naivas wanted the Chief Land Registrar restrained from implementing the recommendation by NLC to revoke its title. Naivas also wanted NLC compelled to undertake a comprehensive valuation of its land and a report be filed in court. Naivas too wanted KURA to be restrained from taking possession of its property until valuation is carried out and deposited in court.
3. When the application by Naivas came up before Hon. Lady Justice Gacheru on **15<sup>th</sup> November 2016**, orders of maintenance of status quo were granted. The effect of these orders was that the construction of the Outering Road at the section comprised on **LR No. 209/2145** had to be stopped. The contractor submitted a bill for loss of idle resources and additional costs incurred as a result of stoppage of work on the section of the road. This is what prompted **KURA** to make an application seeking review and or setting aside of the orders given by the court on **15<sup>th</sup> November 2016**.

### APPLICANT'S APPLICATION .

4. KURA now contends that the orders of status quo have caused the contractor of the Outering Road to give a bill of its costs which it is incurring on daily basis assessed at **Kshs. 359,320/=** which is a drain on public resources. That the orders have led to a traffic gridlock in the area which is wasting man hours and causing anxiety to motorists on the section of the road.
5. The applicant contends that what is in issue is the merit or otherwise of the decision by NLC which will not be affected if the orders of status quo are vacated and the construction of the road goes on. That what Naivas will suffer in the event that this Petition succeeds is capable of being compensated in monetary terms. There will therefore be no prejudice suffered by Naivas if the orders of status quo are set aside.

### NAIVAS' CONTENTION

6. Naivas opposed the applicant's application through a preliminary objection filed in court on **29<sup>th</sup> March 2017** which raised the following grounds:-

- a) ***That the application dated 19<sup>th</sup> January 2017 is an abuse of the process of the court as the applicant ought to have opposed Naivas application for temporary injunctive orders.***
- b) ***That the setting aside, variation and/or discharge of injunctive orders can only be brought under Order 40 Rule 7 of the Civil procedure Rules.***
- c) ***That the application before court is supported by an affidavit sworn by advocate who may likely be called as a witness or subjected to cross-examination.***
- d) ***That the order being reviewed has not been annexed to the application as is required under the law.***

7. NSSF has opposed the applicant's application based on grounds of opposition filed in court on **28<sup>th</sup> March 2017**. NSSF contends that KURA, the applicant herein is trying to circumvent Naivas' application dated **31<sup>st</sup> October 2016**. That Naivas' application shall be rendered nugatory if the orders of maintenance of status quo are vacated. That the applicant has not shown that there is any new evidence which has

come to its knowledge to warrant grant of the orders sought. That Naivas' private rights should not be sacrificed at the expediency of the applicant and that in any case Naivas is not privy to the contract between KURA and its contractor.

### **ANALYSIS.**

8. I have considered the applicant's application and the opposition to the same by Naivas and NSSF. I have also considered the submissions of counsel for the parties during the hearing of the applicant's application. The applicant's application was brought under the provisions of **Section 80** of the **Civil Procedure Act** and **Order 45** of the Civil Procedure Rules. These, provisions provide for review of decrees and orders.

9. Under **Order 45 Rule 1 (b)**, there are three grounds upon which review may be made. These are the following :-

***a) Discovery which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by the applicant at the time the order or decree was made.***

***b) Mistake or error apparent on the face of the record.***

***c) Any other sufficient reason.***

10. I have already given the background of what culminated into the present application. The order of maintenance of **Status Quo** was given pending the hearing and determination of Naivas application. M/s Ndundu's argument that KURA did not know that the road was going to pass through the plot which is the subject of Naivas' Petition is without basis. KURA was aware that the construction of the road was to pass through the plot owned by Naivas whose title had been revoked by NLC. The orders which Naivas was seeking are clear from the face of the application. It cannot therefore be argued that KURA came to learn later that the road had been designed to pass through the plot in issue.

11. Besides discovery new evidence or important matter, the applicant also moved the court on the basis that KURA is suffering huge costs as a result of the stoppage of the construction of the road. The applicant has annexed an itemised bill from the contractor of the Outer Ring Road which shows that they are incurring daily losses of **Kshs.359,520/=**. This is a huge amount by any standards and considering the fact that these are daily losses. The non-construction of the road at the said section is causing huge traffic snarl-up which is wasting valuable man hours. If the loss of man-hours were to be quantified, it will result in huge loss which can be avoided if the construction was to be allowed to go on.

12. The issue which brought Naivas to Court is revocation of title to its land By NLC . Even if title to land By NLC was not revoked, it is clear that the expansion of Outer Ring Road is going to affect that property and NLC was going to acquire it anyway. The only issue will then be on compensation for the land. There is therefore no need to stop a project when at the end of the day, the only issue is on compensation.

13. There was an issue raised on failure to annex the order sought to be re-viewed. The failure to annex the order sought to be reviewed is not fatal to the applicant's application. The concern of the court is to do substantive justice as opposed to technical justice. Failure to annex the order being sought to be reviewed has not prejudiced Naivas in any way. There was also another issue raised that the applicant ought to have come for setting aside under Order 40 Rule 7 of the Civil Procedure Rules. There was no injunction issued to warrant the applicant to come under Order 40 Rule 7 of the procedure Rules. The Court only directed that there be maintenance of **status quo**. The **status quo** was to ensure that the position obtaining at the time Naivas moved to court should be maintained. There was no injunction granted. It is therefore clear that the applicant was perfectly in order to move the court for review.

14. The State Counsel swore an affidavit in support of the application for setting aside and or review of the court's order. The State Counsel did not swear on anything contested which would have prevented her

from swearing the affidavit. What she deponed to were matters which were not contested. There was no contention that orders of status quo were given. There is also nothing in contention regarding the action which had been taken by NLC. What the state counsel swore on information as regards the loss incurred and the traffic grid lock are not contested issues in this matter. I therefore do not find any merit in the preliminary objection raised by Naivas.

### **CONCLUSION**

15. When a public project such as the ongoing construction of Outer Ring Road is stopped, any losses incurred are met using public funds. Considering the nature of Naivas claim, I find that there is need to review and or set aside the Orders of **15<sup>th</sup> November 2016**. I find that the applicant's Notice of Motion dated 19<sup>th</sup> January 2017 is well founded. The same is allowed with the result that the orders of maintenance of **Status Quo** given on **15<sup>th</sup> November 2016**, are hereby, set aside. Costs of the application shall be costs in the cause.

It is so ordered.

**Dated, Signed and Delivered at Nairobi on 31<sup>st</sup> day of July 2017.**

**E.O.OBAGA**

### **JUDGE**

In the Presence of :-

Mr Kiprono for M/s Masinde for 1<sup>st</sup> Respondent

Mr Motari for Ms Ndundu for 2<sup>nd</sup> Respondent

Court Assistant: Hilda

**E.O .OBAGA**

### **JUDGE**