REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. 1337 OF 2016

1. KARIOBANGI SOUTH LAND OWNERS WELFARE GROUP

2. JAMES MBUGUA KIMIRI

3. SABINA MANDERE

4. JOSEPH JUMA OMENYA & OTHERS….....PETITIONERS

VERSUS

NAIROBI CITY COUNTY….....1ST RESPONDENT

GOVERNOR NAIROBI CITY COUNTY..…….....2ND RESPONDENT

CHIEF OFFICER LANDS……...…3RD RESPONDENT

COUNTY SECRETARY NAIROBI CITY COUNTY..…..4TH RESPONDENT

NATIONAL LAND COMMISSION……..…5TH RESPONDENT

ATTORNEY GENERAL..……..…6TH RESPONDENT

AND

KARIOBANGI SOUTH JUA KALI SOCIETY……INTERESTED PARTY

RULING

The petitioners commenced these proceedings by way of a petition dated 10th October 2016. In their petition, the petitioners sought among others, the following reliefs;

i. A permanent injunction against the respondents restraining them from alienating, subdividing, downsizing, and/or doing anything prejudicial to the petitioners.

ii. A declaration that the rights of the petitioners have been breached, violated, infringed and/or threatened.

iiii. A declaration that the petitioners and all other plot owners of Kariobangi South Jua Kali Sector VI are entitled to quiet possession of the plots allocated to them on 6th November 2002.

iv. A declaration that the new Part Development Plan (PDP) generated in 2015/2016 is illegal null and void.

v. An order for judicial review to remove to the High Court the Part Development Plan (PDP) generated in 2016, the list of allotments thereof and quash them.

vi. An order of judicial review to remove to the High Court all letters of allotment issued by the respondents in 2013 and 2015 for the purpose of being quashed.

vii. An order for compensation for damages and loss occasioned to the petitioners.

viii. An order that the petitioners have acquired the plots under their occupation by prescription.

ix. An order of judicial review to compel the respondents to issue the petitioners with titles deeds on the basis of the letters of allotment which were issued on 6th November 2002.

x. An order restraining the respondents from receiving payments of any kind from the 2013 and 2015 allottees.

xi. An order compelling the respondents to accept payments from the allottees who were issued with letters of allotment on 6th November 2002

Together with the petition, the petitioners filed an application by way of Notice of Motion dated 10th October 2016 seeking among others the following orders:-

i. That pending the hearing and determination of the petition, there be a conservatory order in the nature of an injunction restraining the respondents by themselves, their agents, servants or whosoever from sub-dividing, remaining in, alienating and/or doing anything prejudicial to the allottees in respect of L.R No. 12062/R(Original) renamed 12062/1245 which extends from Outering Road to Junction Mutarakwa and Demonstration Center in any way whatsoever.

ii. That the respondents do produce the Part Development Plan(PDP) and the list of allottees.

iii. That the costs be in the cause.

The petitioners' application was supported by several affidavits sworn by the 2nd and 3rd Petitioners, James Mbugua Kimiri and Sabina Mandere. In summary, the petitioner's case against the respondents as set of in the said affidavits is as follows. The 1st petitioner is registered with the Ministry of Labour, Social Security and services as a self-help group. It was registered on 2nd August 2016. The 2nd , 3rd and 4th petitioners together with others own portions of all that parcel of land known as L.R No. 12062/1245(Original L.R.No.12062/R) situated at Kariobangi South Sector VI (hereinafter referred to as "the suit property"). The petitioners were allocated the said portions of the suit property (hereinafter referred to as "plots") following a directive issued by the Permanent Secretary, Ministry of Local Government to the Town Clerk of Nairobi City Council through a letter dated 2nd May 2002. The plots had definite sizes and were allocated to the petitioners on 6th November 2002. The letters of allotment specified the plot sizes, the duration of the lease and the charges to be paid to the Nairobi City Council, the predecessor to the 1st respondent. The petitioners paid the stand premium and other charges to the Nairobi City Council in accordance with the terms of the said letters of allotment. The petitioners have over the years paid to the Nairobi City Council and to its successor, the 1st respondent the recurring charges for these plots. The petitioners' complaint is that in gross violation of their right to legitimate expectation, the respondents have illegally and in bad faith downsized or reduced the sizes of the plots which were allocated to the petitioners in the year 2002 as aforesaid. The petitioners have contended that the actions by the respondents aforesaid were influenced by greed and corruption. The petitioners have contended that following the said illegal downsizing of plots, the respondents issued new illegal letters of

allotments to the petitioners and proceeded to prepare illegal Part Development Plan on the basis of which they intend to issue title deeds. The petitioners have contended that the new letters of allotment with downsized plots contain a demand for enhanced stand premium, ground rent and survey fees. The petitioners have contended that the new plot allocations, downsizing of the plots and enhancing of stand premium and other charges violated the petitioners' constitutional rights. The 3rd petitioner contended that after she was allocated a plot in the year 2002, she paid all the necessary charges and presented to the Nairobi City Council plans for the development that she wanted to commence on the said plot. The said plans were duly approved after she paid all the requisite charges. The 3rd petitioner has contended that the respondents have now sub-divided her lot and allocated part of it to another person, a Mr. Mbugua. The 3rd petitioner has contended that her right to property has been violated. The petitioners have contended that the respondents have engaged in abuse of office, corruption and deceptive conduct. The petitioners have accused the respondents of violating the provisions of Articles 10, 40, 73, 74, 75, and 76 of the constitution.

On 28th November 2016, Kariobangi South Jua Kali Society was added to the petition as an interested party. The application was opposed by the 1st, 2nd and 4th respondents and the interested party. The 1st , 2nd and 4th respondents(hereinafter referred to as "the respondents") opposed the application through a replying affidavit sworn by the Acting County Secretary of the 1st respondent, Dr. Robert Ayisi on 9th December 2016. The respondents stated that the history of the suit property goes back to 1990's when the former President Daniel Toroitich Arap Moi directed that the property be allocated to the interested party to promote local industrialization and entrepreneurship. The respondents stated that, the said directive was not followed because of a dispute which arose over the ownership of the suit property. The said dispute ended up in court with the City Council of Nairobi, the 1st defendant's predecessor being sued by the interested party through its officials in Nairobi HCCC No. 2303 of 1998(hereinafter referred to as "the 1998 suit"). The respondents stated that, while the 1998 suit was pending, the Ministry of Local Government through a letter dated 2nd May 2002 directed the City Council of Nairobi to formalize the settlement of the interested party's members on the suit property. The City Council of Nairobi made an effort to comply with the said directive. The respondents stated that, in the year 2011, the Ministry of Local Government directed the City Council of Nairobi through the Minster for Lands to stop illegal allocation of the suit property and to ensure that the presidential directive of 1990 was implemented. The respondents contended that following the intervention of the National Government, the parties to the 1998 suit agreed to settle the dispute amicably. The parties to that suit recorded a consent on 1st November 2012 in which they agreed that the suit property be subdivided in order to formalize the settlement thereon of the members of the interested party herein in accordance with the agreed list of members which was provided to the court. The respondents stated that in order to avoid further suits on the matter, the respondents decided to comply with the consent order. The respondents stated that in accordance with the terms of the said order, they carried out a survey of the suit property and were in the process of settling the members of the interested party on the property. The respondents stated that they were strangers to the petitioners and owed them no duty. The respondents stated that if the petitioners had any issue with the consent order made in the 1998 case, they should have moved the court to set it aside. The respondents stated that the petitioners concealed to the court material facts in that they failed to mention the interested party in the petition or the consent order which was made in the 1998 case.

The interested party opposed the application through the affidavit of its chairman, Danish Agalloh sworn on 16th December 2016. The interested party stated that the suit property belonged to it its members who had occupied the same since 1980's. The interested party stated that in the year 1992, the former President, Daniel Arap Moi directed the City Council of Nairobi to formalize the occupation of the members of the interested party on the suit property and to put up sheds for them. The interested party stated that the presidential directive was not implemented because the corrupt officials of the City Council of Nairobi resorted to allocating the suit property to non-members of the interested party. This forced the interested party to file the 1998 suit. The interested party stated that after prolonged litigation, the interested party and the City Council of Nairobi agreed to settle the dispute amicably on 1st November 2012. The interested party stated that the 2nd, 3rd and 4th petitioners and the other persons mentioned in the petition were its members. The interested party stated that after they entered into the said consent

with the City Council of Nairobi, another group brought a suit seeking to be included in the allocation of the suit property. Some members of the interested party also brought in their relatives whom they wanted to benefit from the allocation of the suit property. This led to fracas on the property which threatened to degenerate into a complete breakdown of law and order. After consultations, the committee members of the interested party decided to resolve this new dispute amicably. This was done by accommodating those who had gone to court after the consent order was made. The interested party stated that since the suit property was not enough to accommodate the new group, the interested party advised the 1st respondent to downsize the plots which had already been allocated to its members so that everybody could be accommodated.

The interested party stated that the process of subdividing and allocating the suit property to the interested party's members has been completed and every member has been issued with an allotment letter for his/her plot. The interested party stated that the downsizing of the plots was its committee's decision and that if the current plot sizes are interfered with which is what the petitioners are seeking, it is going to affect other members who will also seek to have their plot sizes increased. The other result would be that those who were co-opted as members would lose their plots a situation that would reignite the conflict that reigned on the property for several years. The interested party stated that if the court was to grant the orders sought by the petitioners, it will be a serious setback to the interested party's and the 1st respondent's efforts to have the members of the interested party settled on the suit property. The 3rd petitioner swore two further affidavits in response to the affidavit which was filed by the 1st 2nd and 4th respondents. The 3rd petitioner contended that the petitioners were not parties to the 1998 suit and as such were not bound by the consent order that was made in the same.

The application was heard on 16th January 2017 and 31st January 2017 when Mr. Ondieki appeared for the petitioners, Mr. Njiru for the interested party and Ms. Awuor for the respondents. I have considered the petitioners' application together with affidavits filed in support thereof. I have also considered the replying affidavits by the 1st, 2nd and 4th respondents (respondents) and the interested party in opposition to the application. Finally, I have considered the submissions that were made before me by the parties' respective advocates. The petitioners have brought this petition pursuant to the provisions of among others Articles 10, 19, 20, 22, 23, 24, 25, 40, 47 and 50 of the Constitution for the enforcement of their constitutional rights. The present application has been brought under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter "the rules"). The petitioners have cited the 2006 rules in error. Rule 23 of the rules gives the court power to issue conservatory or interim orders pending the hearing and determination of the petition. The application before me is seeking conservatory orders. What I need to determine is whether the petitioners have satisfied the conditions for granting such orders. As this court had stated in the case of George Odero vs. Lake Victoria Environment Management Programme & others [2015] eKLR, it is now fairly 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 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 and;

iii. It would be in the public interest to grant the order.

See, also the case of Josephine Akoth Onyango vs. National Land Commission & 3 others [2015]eKLR which was cited by the respondents.

In the Supreme Court case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 2 others, Supreme Court of Kenya, Petition No. 2 of 2014[2014] eKLR , 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."

The petitioners' complaint is that the respondents have violated among others, their right to legitimate expectation, right to acquire and own property and right to fair administrative action. On the material before me, I am not satisfied that the petitioners have established a prima facie case of violation of constitutional rights. There is amble evidence before me that the suit property was given to the members of the interested party in 1990's through a presidential directive and that attempts to have the property subdivided and allocated to members of the interested party have met with several challenges over the years. The interested party has demonstrated that the petitioners are its members and that indeed they have been allocated land together with the others members of the interested party. If the petitioners were not members of the interested party, they would not be entitled to any portion of the suit property. The petitioners complaint if I got it right which I believe I did is that the respondents have changed the terms of allotment of the suit property to the members of the interested party which includes the petitioners. The petitioners have demonstrated that indeed the terms of allotment have been changed. This fact was admitted by the respondents and the interested party in their replying affidavits. Since the suit property was to be subdivided and allocated by the respondents to the members of the interested party as directed by the former president, the exercise was to be undertaken through a consultative process involving the respondents and the interested party. I am not persuaded that the respondents had a duty to consult each member of the interested party. I am of the view that it was sufficient if the officials of the interested party were consulted.

The interested party and the 1st respondent's predecessor, the City Council of Nairobi had a court case over the allotment of the suit property (the 1998 suit). From the material on record, prior to the filing of that suit in 1998, there had been a purported subdivision and allocation of portions of the suit property to some of the members of the interested party and non-members. This is what the interested party went to court to challenge. It is not clear why the Ministry of Local Government directed the City Council of Nairobi to continue with allocation of the suit property in the year 2002 while the 1998 suit was still pending in court. There is evidence before me that a consent order was made on 1st November 2012 through which the City Council of Nairobi was directed to subdivide the suit property in order to formalize the settlement of the interested party's members whose names were given to the court. I have noted from the list that was attached to the said court order that the petitioners were some of the members of the interested party who were to benefit from the suit property. The 3rd petitioner has not denied that she derives her membership to the interested party through her father whose name was in the list of the people who were to be allotted land. The interested party told the court that when it came to the implementation of the consent order, it encountered more challenges. These challenges necessitated the need to reduce the sizes of the plots which the members were entitled to so as to accommodate the other people who had also lodged a claim over the suit property.

From the affidavit of the chairman of the interested party, I am persuaded that the respondents and the interested party acted in good faith in the best interest of the members of the interested party. There is no evidence before me that the petitioners were discriminated against. I am of the view that the petitioners having been members of the interested party were bound by its decision as concerns the allocation of the suit property unless the decision was unlawful or discriminatory. I am in agreement with the respondents that in subdividing the suit property and allocating the same to the members of the interested party, they were only complying with the consent court order which was issued in the 1998 suit. I am also in agreement with the respondents that if the petitioners were aggrieved with the said court order, they should have moved the court to set it aside.

From what I have set out above, I am not satisfied that the respondents have violated the petitioners' constitutional rights to warrant the grant of the orders sought. I wish to add that the conservatory orders sought would not have been issued even if the petitioners had established a case for it. The evidence

before me shows that the process of subdivision of the suit property has been completed and the members of the interested party have been granted letters of allotment. The petitioners have sought an injunction. An injunction cannot issue to restrain what has already taken place. Considering the case as a whole, I am also of the view that it would not serve the public interest to grant the orders sought. In my view all is not lost for the petitioners, I have noted that they have sought compensation in the petition. If they establish at the hearing that their rights have been violated the court would be at liberty to award them damages. In the final analysis and for the foregoing reasons, it is my finding that the petitioners' application dated 10th October 2016 has no merit. The same is dismissed accordingly. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 15th day of September, 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Ondieki for the Petitioners

No appearance for the 1st, 2nd and 4th Respondents

No appearance for the 5th Respondent

No appearance for the 6th Respondent

Mr. Njiru for the interested party

Catherine Court Assistant