



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KOOME & MUSINGA, J.J.A.)

CIVIL APPEAL NO. 386 OF 2018

BETWEEN

ANKHAN HOLDINGS LIMITED.....APPELLANT

AND

KENYA FOREST SERVICE.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) delivered on 1st October, 2018

in

E.L.C Petition No. 1 OF 2017.)

JUDGMENT OF THE COURT

1. The right to be heard occupies a central place in the principles of natural justice. It is a basic tenet of administrative law that no person may be deprived of property without due process of law, which necessitates notice and an opportunity to be heard before any decision on the property is made. **Article 40(1)** of the **Constitution of Kenya, 2010** protects the right to own property.

Parliament is even prohibited from enacting a law that permits the State or any person to arbitrarily deprive a person of property. A person includes a company, association or other body of persons, whether incorporated or unincorporated.

2. At the centre of this appeal is a prime parcel of land measuring 6.031 hectares or thereabouts situate in the city of Nairobi, along Ngong Road, adjacent to Ngong Forest, known as **L.R. No. 18486, (the suit land)**.

3. The suit land is now owned by the Board of Trustees, National Social Security Fund ('NSSF'), which is not a party to the appeal, and neither was it in the suit that gave rise to the appeal, **Environment and Land Court (ELC), Petition No.1 of 2017** at Nairobi.

4. Sometime in 1992, the appellant made an application to the Commissioner of Lands for allotment of the suit land, which was then unsurveyed and unregistered.

5. Given the proximity of the suit land to Ngong Forest, the Commissioner of Lands wrote to the Ministry of Environment and Natural Resources to enquire whether the land formed part of the gazzetted forest area.

6. The Director of Forestry informed the Commissioner of Lands vide a letter dated 21st May, 1993 that the "*Department has surrendered the land requested with immediate effect.*" On the basis of the said letter, and without any official gazettelement of any surrender, the Commissioner of Lands allotted the suit land to the appellant. On 10th March, 1994 the appellant was registered as the lessee of the suit land for a term of 99 years from 1st June, 1993. Shortly thereafter, the appellant sold and transferred the suit land to the Board of Trustees, NSSF, for Kshs.70,000,000. The transfer was registered on 16th May, 1994.

7. In February, 2017 the appellant filed a petition before the ELC seeking: -

a) **“A declaration that the premises comprised in title number L.R.18486, Ngong Road, Nairobi allotted to the Petitioner are not within Ngong Road Gazetted Forest as claimed by the Respondent or at all.**

b) **A declaration that the title issued to the Petitioner under the Registration of Titles Act (now repealed) on 10th March, 1994 in respect to the premises comprised in title no. L.R 18486, Ngong Road Nairobi is lawful in law.**

c) **An order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the Respondent’s decision contained in letter dated 28th November, 2016 to the effect that the parcel of land comprised in L.R.18486, Ngong Road Nairobi forms part of Ngong Road Gazetted Forest.**

d) **An order of Prohibition do issue to prohibit the Respondent whether by itself, servants, agents, employees or whomsoever from trespassing, alienating, acquiring and/or in any way whatsoever interfering with the premises comprised in title no. L.R. 18486, Ngong Road Nairobi.**

e) **Costs of and incidental to this suit.”**

8. It is not clear to us why the appellant filed the petition in respect of a property it had sold and transferred almost 23 years earlier. But what the record shows is that by a letter dated 10th November, 2016, the appellant informed the 1st respondent that it intended to fence the suit property. The 1st respondent objected, saying that the suit land formed part of Ngong Road Gazetted Forest.

9. In its grounds of opposition to the petition, the 1st respondent stated, *inter alia*, that the appellant did not have *locus standi* to sustain the suit, having sold and transferred the suit land to NSSF.

10. The 1st respondent further stated in its replying affidavit that on 16th February, 2004, the Managing Trustee, NSSF, had written to the Chief Conservator of Forests, Ministry of Environment and Natural Resources, stating that it intended to cut down the trees and shrubs on the suit land and fence off the land in preparation for its development. The said letter was annexed to an affidavit sworn by **Esther Keige**, the 1st respondent’s Corporation Secretary.

11. The 1st respondent relied on several documents to demonstrate that the suit land had been unlawfully hived off the gazetted Ngong Road Forest. It argued that the suit land is public land that is constitutionally protected against unlawful alienation. The appellant denied all those averments.

12. The 2nd respondent applied to be joined to the proceedings as an interested party. In an affidavit sworn by **Zachary Ndege**, Principal Land Officer, the 2nd respondent stated that records in its possession fully supported the appellant’s contention that the suit land was lawfully allotted to it and was not public land as averred by the 1st respondent.

13. Without making any determination on the prayers as contained in the petition or going into an analysis regarding the procedure through which the title to the suit land was registered, the learned judge stated that NSSF had absolute ownership of the suit land. She added that:

“25. The registration of the Board of Trustees National Social Security as the proprietor of the Suit Property vested in this board the absolute ownership of the suit land together with all the rights and privileges belonging or appurtenant thereto subject to all implied or expressed agreements, liabilities or incidents of the lease pursuant to Section 24 of the Land Registration Act and subject to challenge on the grounds set out in Section 26 of that Act. Such rights include the right to bring suits such as this petition to enforce the registered proprietor’s interest over its land.

26. The Board of Trustees National Social Security Fund, is not a party to this suit. It would not be fair for this court to make orders that may affect the National Social Security Fund as the registered proprietor without affording it an opportunity to be heard

27. The court declines to grant the orders sought by the Petitioner. The petition is dismissed with costs to the Respondent.”

14. Being aggrieved by the said judgment, the appellant preferred this appeal on grounds that the learned judge erred in law and in fact: in not appreciating sufficiently that the holding that NSSF had “*absolute ownership*” of the suit land was acknowledgement that the appellant possessed a valid title to the property; in not appreciating that the orders sought by the appellant could not adversely affect NSSF as the proprietor of the suit land; in adjudicating the suit on the basis of non-joinder of NSSF which was not an issue before the court; and in not appreciating the legal nature of the suit.

15. The 1st respondent was also dissatisfied with the trial court’s judgment and filed a cross appeal on grounds that the learned judge erred in law: in holding that the NSSF is the absolute and indefeasible owner of the suit land; in failing to appreciate the overwhelming evidence that the suit land was forest land, which was the main issue for determination; and by failing to consider the aspect of law in acquisition of the title to the suit land. In essence, the 1st respondent urged us to reverse the trial court’s finding that NSSF is the absolute owner of the suit land and declare that it is part of the gazetted Ngong Forest land.

16. When the appeal came up for hearing, parties relied on written submissions that were briefly highlighted by their respective advocates. In a nutshell, the appellant’s submissions as highlighted by **Mr. Ngatia**, learned counsel, is that the trial court’s determination that NSSF was the absolute and indefeasible owner of the suit property was an acknowledgement that the appellant had a valid title to the suit property which it could lawfully pass to NSSF, and which is protected by **Article 40** of the **Constitution of Kenya, 2010** and **section 23** of the **Registration of Titles Act**.

17. Counsel further submitted that it was a grave error of law for the learned judge to dismiss the appellant's case for non-joinder of NSSF. He added that where all questions involved in a suit could be effectively and completely adjudicated upon as between the parties in the suit, the Court is obliged to determine the matter on its merits. He cited ***Razia Begum & Sahebzadi Anwar Begum & Others [1958] AIR 886, 1959 SCR 1111*** in support of that submission.

18. Mr. Ngatia urged the Court to allow the appeal with costs; dismiss the cross appeal with costs, set aside the impugned judgment and substitute therefor an order allowing the orders sought in the petition.

19. **Mr. Mbutia**, learned counsel for the 2nd respondent supported Mr. Ngatia's submissions. He faulted the learned judge for failing to deal with the issues that had been raised for determination.

20. On his part, **Mr. Macharia**, learned counsel for the 1st respondent, submitted that the suit land was part of Ngong Forest gazetted land and the process of its alienation was flawed.

The letter dated 21st May, 1993 by the Director of Forestry to the Commissioner of Lands to the effect that the Department had surrendered the land, was of no effect and was not sufficient basis for alienating the suit land. This is because by a letter dated 9th March, 1994 the Minister for Environment and Natural Resources informed the Commissioner of Lands that he was in the process of degazetting the land in question. However, no Gazette Notice to that effect was ever published, and failure to inform the public that public land was going to be alienated was a fundamental oversight that affected the validity of the title.

21. Mr. Macharia submitted that the trial court should have pronounced itself on the manner in which the title to the suit land was created and whether it was in accordance with the Forest Act.

22. We have carefully considered the record of appeal and the submissions by counsel as summarized here above. There are several issues that are not in dispute. All the parties are in agreement that the suit land is currently registered in the name of the Board of Trustees, NSSF. There is also no dispute that NSSF was not a party to the proceedings before the trial court and even in this appeal. Another undisputed issue is that the trial court did not determine any of the issues that were raised in the petition.

23. The appellant had asked the trial court to make declarations that the suit land was not within Ngong Road Gazetted Forest; that the title to the suit land is lawful; to issue an order of certiorari to bring into the court for purpose of being quashed the 1st respondent's decision in the letter dated 26th November, 2016 that the suit land forms part of Ngong Road Gazetted Forest, and to issue an order of prohibition to prohibit the 1st respondent from trespassing or interfering with the suit land in any way.

24. The learned judge held, that since NSSF was not a party to the suit, it would be unfair to make orders that would affect it as the registered proprietor without affording it an opportunity to be heard.

25. If the learned judge were to determine the issues advanced and by any peradventure agree with the 1st respondent that the suit land was part of Ngong Road Gazetted Forest, it would have meant divesting NSSF of its property without the benefit of a hearing.

26. Under **order 1 rule 10(2)** of the **Civil Procedure Rules**, the trial court may, on its own motion, add a party to a suit if such a party is necessary in order to enable it to effectively and completely adjudicate all the questions involved in the suit. We do not agree with the appellant that NSSF was not a necessary party to the suit as it was likely to be prejudicially affected by the decision. We have perused ***Razia Begum v Sahebzadi Anwar Begum & Others (supra)*** and we respectively find that it is not relevant in the circumstances of this appeal.

27. In our view, when the matter came up for directions, the learned judge ought to have ordered that NSSF be joined as a party so as to enable the court effectively and completely adjudicate on all the issues raised in the matter. It may equally be prejudicial to NSSF or the 1st respondent if we pronounced ourselves on the merits of the issues raised by parties in this appeal.

28. In the circumstances, the order that commends itself to us is to set aside the impugned judgment dismissing the petition and remit this matter to the ELC at Nairobi for appropriate directions which should include NSSF as a party. We direct the matter be set down for hearing on priority basis before any judge in that court other than K. Bor, J.

Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 8th day of May, 2020

W. OUKO, (P)

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

*I certify that this is a true
copy of the original.*

Signed

DEPUTY REGISTRAR