



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
PETITION NO.15 OF 2013

GATARAKWA FARMERS COMPANY LTD.....PETITIONER

VERSUS

THE ATTORNEY GENERAL AND 8 OTHERS..... RESPONDENTS

R U L I N G

In the application dated 28/10/2013, the applicant prays for orders that this Honourable Court be pleased to order that the 7th and 8th respondents, directors of the 2nd respondent, be arrested and brought to court to show cause why they should not furnish security for their appearance at the trial of this petition. The said 7th and 8th respondents be restrained from leaving the jurisdiction of this Honourable Court pending the hearing and determination of this suit.

That until further orders of this Honourable Court the 2nd or/and 7th and 8th respondents must not remove from the Republic of Kenya and of the 2nd respondents assets up to the value of Kshs.350 million or in any way dispose of or deal with or diminish the value of any of the 2nd Respondent's assets whether they are in or outside the Republic of Kenya.

That order 5 above applied to all assets whether or not they are in the name of 2nd respondent's or 7th and 8th respondent's or any of its servants and agents and assets include any asset which the 2nd and 7th and 8th respondents have power directly or indirectly to dispose of or deal with as if they were their own. The 2nd, 7th and 8th respondents are to be regarded as having such power if a third party holds or controls the asset in accordance with their direct or indirect directions. The 2nd, 7th and 8th respondents must immediately and to the best of their ability inform the petitioner's advocates of all the assets in the Republic of Kenya and elsewhere in the world whether in their names or not, giving the value of location and details of the 2nd respondent's assets whether or not they are in its name or those of 7th and 8th respondents or other servants or agents.

That within 10 working days after being served with this order the 7th and 8th respondents must swear and serve upon the petitioner's advocates affidavits setting out the above information. The 2nd, 7th and 8th respondents must permit Mr. Kibe Munga advocate, the supervising advocate, two other advocates and police officers accompanying him and any vehicles under their control or around their Nairobi premises so that they can search for inspect and deliver into safe keeping of the petitioner's advocates all the documents and articles.

That the 2nd, 7th and 8th respondents must permit Mr. Wahome Gikonyo advocate, the supervising advocate, two other advocates and police officers accompanying him and any vehicles under their control or around their Mweiga premises so that they can search for, inspect and deliver into safe keeping of the petitioner's advocates all the documents and articles.

The 2nd, 7th and 8th respondents must immediately hand over to the petitioners advocates any of the items which are in their possession or under their control save for any computer or hard disk integral to any computer. Any items the subject of dispute as to whether they are listed items must immediately be handed over to the petitioner's supervising advocate for safe keeping pending resolution of the dispute or until further order of the court.

The 2nd, 7th and 8th respondents must give the search party effective access to the computers on the premises with all necessary passwords to enable the computers to be searched. If they contain the listed items the 2nd, 7th and 8th must cause the listed items to be displayed so that they can be read and copied.

That the 2nd, 7th and 8th respondents must immediately inform the petitioner's (in the presence of the supervising solicitors) so far as they are aware where all the listed items are; the name and address of everyone who has supplied or offered to supply them with listed items; the name and address of everyone to whom they have supplied or offered to supply the listed items; full details of the dates and quantities of every such supply and offer.

That the 2nd respondent do produce and place at the disposal of the court all road construction equipment to satisfy the decree in this cause or such security as this honorable court shall deem fit.

That this honorable court be pleased to restrain the 2nd respondent whether by itself, its servants and agents or otherwise howsoever from entering into, remaining on, Uaso Nyiro/Suguroi/Block VI/3027 pending the hearing and determination of this suit.

This honorable court be pleased to restrain the 2nd respondent whether itself, its servants and agents or otherwise howsoever excavating from Uaso Nyiro/Suguroi/Block VI/3027 stones and crushing them into or processing into ballast or other road making material and removing them from the said Uaso Nyiro/Suguroi/Block VI/3027 pending the hearing and determination of this application or until further orders of this honourable court.

That this honorable court be pleased to restrain the 2nd respondent whether itself, its servants and agents or otherwise howsoever excavating from Uaso Nyiro/Suguroi/Block VI/3027 stones and crushing them into or processing into ballast or other road making material and removing them from the said Uaso Nyiro/Suguroi/Block VI/3027 pending the hearing and determination of this suit.

The officer commanding station closest to the 2nd respondent's offices at Mweiga and Nairobi do assist the petitioner to enforce the orders of this honourable court made herein.

The application is based on grounds that In 1986 the government of Kenya, without any colour of title and not following the procedure laid down by both section 75 of the former Constitution Of Kenya and the Land Acquisition Act for acquiring land, took possession of the petitioners' farms and subdivided them into smaller parcels some of which were allocated to the shareholders of the petitioners whilst others were registered in its name under the Registered Land Act. In a report titled report of the presidential probe committee on Gatarakwa Farmers' Company limited. 1986 – 1988, a government institution known as Probe Committee, appointed by the former president, Daniel Arap Moi has

explained how the government took over the petitioner's 32 farms whose acreage was 85,843 and subdivided them into plots of which the suit property L.R. No.Uaso Nyiro/Suguroi/Block VI/3027 is one. The petitioner contends that the taking of the petitioner's land including the suit property was a contravention of the petitioner's property rights and the Government of Kenya became a constructive trustee in respect of the parcels carved from the petitioner's 32 farms and registered in its name.

The applicant has filed in this court an application under certificate of urgency on 29th Oct 2013. The orders sought are the orders of injunction against the respondents in respect of parcel of land known as Uaso/ Nyiro/ Suguroi/ BlockVI/ 3027(suit property) measuring 25,589 acres. The applicant seeks the respondents to be restrained from entering, remaining on, excavating and or crushing ballast in the suit property for the purposes of constructing roads listed in the application pending hearing and determination of the suit here in.

The genesis of the matter is stated that the Government of Kenya(GOK) acquired land from the applicant compulsorily between 1986-1987. The total land taken measured 85,843 acres in total. Then it was divided into small blocks allocating some to individual members and registering others in its own name. The suit property is stated to be among such subdivisions, named as "public purpose plot". It was registered in the governments name as dam and quarry site. The applicant states that it had purchased these farms from previous foreign European owners in 1973. The applicant states that the government was bound by Article 75 of the former constitution to compensate the applicant for the land upon acquiring it.

The GOK later entered into a contract with the 2nd respondent to tarmac various roads and ballast was to be excavated from the suit property. Its also stated that the 2nd respondent consequently entered into a lease with the 3-6th respondents as agents of the government to let the suit property to the 2nd respondent for 5 years from 2009 a term expiring in 2014. The 3-6th respondents are said to have mis stated themselves as Gatarakwa self-help group.

The applicant avers that the GOK breached trust bestowed upon it to be custodian of the properties of the citizens, by dealing with the suit property fraudulently. It argues that as a person having interest in the use of the land, the government having reserved the suit property for dam and quarry, it was bad for it to allow non interested persons to enter into a lease about it and allow strangers in the dealing and excavating materials therefrom.

The applicant thus seeks the account of the profits accrued from the sale of materials extracted from the suit property by the 2nd respondent since 2009 when it was licensed to carryout quarry services. On this, the applicants seeks all electronic invoices and computer soft ware touching on the payments regarding the activities in the suit land. The applicants say the respondents are trespassers in the suit property and they are entitled to seek redress for tort of trespass.

The court issued conservatory orders against the respondents pending the hearing of the suit. However after the service of the orders the respondents applied in the court seeking the review and setting aside of the court orders earlier issued against them stating that the applicant is a fake company. They also state that the matters raised in this suit are sub-judice, and others are res-judicata having been dealt with in another court of law and suits. They have also provided documents showing that **Issais Company** is registered in the country and the directors are licensed to practice in the country.

The 3rd respondent filed his Replying Affidavit on 10/12/2013 explaining the side of story, stating that the applicant company ceased its activities after it had distributed the lands purchased to its members and its board of directors dissolved. He states that the land is managed on behalf of the government by the

local committee. Who were given the go ahead to enter into a a lease with **Issais company** for quarrying to provide materials for the construction of public roads.

The parties filed their written submission. The applicant first relies on the failure of the AG to reply to the case as having no explanation to the matters there in. It relies on the case of **Punch Nigeria Ltd vs AG(1966 commonwealth human rights digest 46)**. It argues that the state has the mandate of protecting private property averting invasion by individuals or by itself, and if that happens it amounts to trespass liable to pay of damages.

On this it relies on the case of **Entick vs Carrington (1765) 19 st. tr.1030**. On the issue of the trust by the Government of On behalf of the applicant, there is reliance on the case of **Commissioner of Lands Vs Coastal Aquaculture Limited, Civil Appeal No 252 of 1996(KLR Land and Environment 264)**., where the court observed that when the state exercises its right of compulsorily acquiring property against owners will pursuant to a constitutional provision, then there must ensured compliance with the procedures required to be adhered to in this form of land acquisition, and especially public good of the land for the benefit of the public and full compensation.

The applicant argues that since the GOK has registered itself as the legal owner, then the company(applicant) remains as the equitable owner of the suit property. Reliance is placed in the recent case of **Methodist Church in Kenya Vs Ag And Others Meru Hc Petition No. 4 Of 2010** where the court declared the compulsory acquisition of land of the petitioner without due process was illegal and contravention of the property rights of the petitioner. The applicant further submits that the respondents had constructive notice of the applicants interest in the suit property had they carried the due and diligent search, and are barred from denying claims of trespass and share of the profits accrued for the quarry from the suit property.

The respondents on their part have filed their submissions dated 16/12/13. They too rely on the **Giella vs Casmann Brown & others 1975 (EA) 358** case principles set for the grant of injunction just as the applicant being a **Prima facies case, with probability of success, proof of irreparable loss**, and in **case of doubt balance of convenience**. They argue there is doubt as to Stephen Kinini Wang'onde who has sued on behalf of the applicant being a director as he is not in the last list of directors filed in 1986 before the land was allegedly acquired.

The respondent also argues that all the issues raised in the application are subject to proof in the main hearing of the suit, since the allegations of the land having been taken away from them in 1986 cannot be deciphered from the pleadings unless proved in a main hearing of the suit. It also asserted that there is no evidence that the company has been alive since the last action in the year 1986 where in the report it is stated to have been dissolved and its directorship done away with, and in any case that there is no show that there is any inconvenience to be suffered by the applicant if the orders sought are not granted.

I have looked at the submissions, pleadings and documents arguments of each of the parties herein. The applicant seeks injunctive orders of conservation of the suit property. I have also considered the principles set for the grant of injunctions in the Giella case.

On the issue of prima facie case, I have seen that the applicants claim is mainly challenging the granting of lease upon the 2nd respondent by the GOK through the self help group represented in the suit by the 3rd-6th respondents as well as the 9th respondent. I have seen from the pleadings by the respondents that the Government Of Kenya placed the care of the suit land upon the community based in the area and that is where the respondents come in to be care taker of the suit land on its behalf. Unfortunately, The Government has not filed any document in the matter.

I have also looked at the probe committee that limited shareholders of the applicant holding into a total of 40 acres maximum. Since the land is alleged to have been taken by the Government of Kenya who registered it in its name, then the applicants case can be said to be stemming against the government mainly. The applicants sues for the trusteeship bestowed upon the government and states that there ought to be care as to who enters the land.

The statement of the chief shows the land is registered as government land and the issue of it having been taken from the applicant by eminent domain power of government is a matter to be proved at the hearing of the case, as its not known and the circumstances under which it was taken are subject to main hearing to be proved. From the analogy it can be deduced that the applicant says the government duped it by taking the land and later allowing person without interest to enter into lease with private persons as opposed to the constitutional requirement that land acquired compulsorily be for public use and thus the claim the claim for fraud comes in.

I have looked at the pleadings that the land use stated by the government was dam and quarry. The respondents have stated that the use of the land is still a dam and quarry by the 2nd respondent who have said they entered into the lease on behalf of the government as community care taker trustees. I have not seen any use that is inconsistent with public use of the land as described in the pleadings and the contrary can be proved at the hearing of the matter.

Time has passed since the same was done and I have perused the bundles of documents i have not seen any correspondence to the government following up the matter of the alleged compulsory acquisition of the suit land by the applicants. **Equity helps the vigilant.** Its 28 years since the alleged take over happened and except a few cases so far filed, there appears to have been no activity on the part of the applicant in respect of the suit property herein, pursuing any action from the government.

I have also seen there is challenge of the directorship of the above stated Stephen on behalf of the company. I have also looked at he affidavit of Kiiru Gachuiga who is among the surviving directors of the applicant, and who has not laid any valid grounds to shed light in the matters herein . The applicants in their submission rely on the fact the new constitution has widened the scope of locus standi in constitutional matter and that any person can file and prosecute a constitutional petition.

Personally I am of the view that this is not a constitutional petition perse but a claim in property. Every right is embedded in the constitution, but not all claims of breach of every right constitute a constitutional petition. This being a land claim, claims in land have the degree of locus and the party ought to establish nexus to the interest in the land, for capacity to be established because the constitution protects rights in land as private rights. Locus standi in this matter is of essence and the petitioner Stephen ought to establish authority to sue from the applicant. That is an issue that can be proved at the main hearing as the respondents have an issue with it.

Whether the applicants was paid by the government after the alleged acquisition has not been expressively exhibited at this stage and is an issue to be proved at the main hearing in the matter, and after all it is a remedy which can be compensated by damages.

With all these factors the applicant has not established a case for grant of the orders of injunction, Mareva or otherwise and the application is hereby dismissed with costs.

Dated, signed and delivered at Nyeri this 17th day of October 2014.

A. OMBWAYO

JUDGE



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