



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

THE CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 5 OF 2017

IN THE MATTER OF ARTICLE 22(1), (3) & (5), 60 (1),

67, 73, 251 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT, 2012

AND IN THE MATTER OF NATIONAL LAND COMMISSION ACTS, 2016

BETWEEN

MICHAEL KIBOI GATUMA.....PETITIONER

AND

THE COUNTY GOVERNMENT.....1ST RESPONDENT

THE COUNTY EXECUTIVE COMMITTEE MEMBER IN CHARGE OF LAND, PHYSICAL PLANNING,

WILDLIFE, ENVIRONMENT AND NATURAL RESOURCES2ND RESPONDENT

RULING

The notice of motion dated 7th June, 2017 and filed in court by the petitioner seeks the following orders:

- a. That the respondents be estopped from transferring, licensing, allotting, selling and or dealing and or trading with the property known as Plot No. 31/Industrial Olekasasi Trading Centre pending the outcome of the petition.

The application is premised on several grounds set out in the body of the notice of motion and the affidavit of Michael Kiboi Gatuma also sworn on 7th June, 2017 in support of the petition.

The brief background of the notice of motion and also the petition is as follows:

The petitioner Michael Kiboi Gatuma vide a letter dated 3rd December, 1986 made an application to then County Council of Ole Kejuado to be allocated a plot referenced as No. 31/Industrial Ole Kasasi Trading Centre. That the request was duly accepted by the defunct Ole Kejuado County Council by issuance of a letter of allotment dated the 3rd December, 1986. The letter of allotment provided interalia payments to be remitted to the County Council comprising of Kshs. 500 annual rent and Kshs 20 being survey fees.

The letter of allotment further indicated the conditions to be complied with by the petitioner which comprised developing the plot within 2 years from the date of allocation.

In the same letter of offer the petitioner was required to submit plan for building for approval to the relevant departments within six months acceptance of the offer. As an indication of acceptance of the letter of offer dated 3rd December, 1986, the petitioner was to accept the terms within 30 days.

It is further the petitioner's case as deponed in the affidavit that he confirmed making payments to the County Council on diverse dates as supported by various annexed receipts marked MKG dated 11th October, 1991, 1168, the dated receipt marked MKG 3 being outstanding rates of Kshs. 60,462.50 dated 4th February, 2003.

In the year 2005 more specifically on 3rd March the petitioner deposes that he made a further payment of Kshs. 60,462.50 for rates over the property as evidenced by receipt annexed marked as MKG 4. The petitioner further avers that on 20th June, 2006 he paid Kshs. 14,000 being payment for rent fees as supported by a receipt marked MKG5.

In addition, the petitioner deposes that he has been the registered allottee of the plot No. 31/Industrial – Ole Kasasi Trading Centre despite the fact that the County Council herein now referred as the 1st respondent has not demarcated or surveyed the property.

Equally, the petitioner deposes that following the promulgation of the new constitution in 2010, the 1st respondent took over the management of land and natural records within the county.

In his engagement through correspondence with the 1st respondent, the petitioner avers that the property specified in the letter of allotment has not been surveyed or exact boundaries developed as per the agreement. That being the status of his property it was the petitioner's case of him instructing the advocate to file this petition seeking redress under the constitution.

The Main prayers sought in the main petition are couched in the following terms:

- 1. That there be a declaration that the petition fundamental rights and freedom as established under Article 22(1) 40(1) (3) & 5 and 60(1) of the constitution have both contravened and infringed upon by the respondents by refusal to grant the petitioner the said property as plot No 31/Industrial Ole Kasasi Trading Centre.**
- 2. declaration that the petitioner is the rightful and lawful owner of the property known as plot No. 31/Industrial Ole Kasasi Trading Centre.**
- 3. A declaration that the petitioner is entitled to the payment of damages and compensation for the violation and contradiction of its fundamental human rights by the respondents herein under Article 40(1), 3, & 5, 60 (1) 67, 73 and 251 of the constitution.**
- 4. That the court to assess the quantum of damages and compensation to be paid by the respondent.**
- 5. A compulsory order compelling the respondents to release the petitioner the title to property of the said plot.**
- 6. Alternatively, and with no prejudice to prayer No. 5 compel the respondents to give the petitioner, a parcel of land of**

equal dimension proportions, value, free of any encroachment and in the same location.

The Respondent's Case

The application and the petition are opposed vide a replying affidavit of Joshua Lemaikai Matura filed in Court on 29th September, 2017. In the said affidavit the application is opposed on grounds interalia:

That the petitioner was allocated plot No. 31/Industrial – Ole Kasasi Kasasi Trading Centre. In the year 1986 by the predecessor Council of Ole Kejuado but before the area was planned. However, on the 24th July, 2002 the Trading Centre and area was planned by way of a part development plan a copy of which is allocated to the affidavit.

That following the plan, validation of plots was undertaken in the years 2000, 2008 and 2016.

In the year 2016 the respondents depones that the audit and exercise on validation was done in confirmation with the National Land Commission. The respondents made reference to a notice published in the Standard Newspaper dated 16th March, 2015 on regulation of existing developments – Ole Kasasi Kejuado County.

Analysis and Resolution

I have considered the notice of motion and the main petition in consideration they raise the same issues. The notice of motion sought for an order of injunction over the plot number 31/Industrial Ole Kasasi Trading Centre pending the determination of the petition. The petition seeks a more expounded test of declarations and prayers.

In support of all these are the content in the main and supplementary affidavit by the petitioner **Michael Kiboi Gatuma**. In the same force the respondents have relied on the replying affidavit by Joshua Lemakal Matura.

The first issue which I deal with is whether the petitioner has satisfied the test to entitle him to the relief sought in the notice of motion dated 9th June, 2017. The law on injunctions in Kenya is well settled following the principle in the case of **Giella versus Cassman Brown Co. Ltd 1973 EA 58**. The court held interalia in the case as follows:

“That the grant of equitable relief of injunction is a matter of judicial discretion at all times aimed at presenting the subtraction of the such that the final determination of the main claim/dispute.”

The conditions to be met therefore for relief of injunction to issue revoke around these principles:

- a. First, the applicant must show a prima facie case with a probability of success.**
- b. Secondly, the injunction later satisfying a permanent will not normally be issued by the court unless the applicant demonstrates that he/she will suffer irreparable injury/loss which would not adequately be compensated by an award of damages.**
- c. Thirdly, if the court is in doubt on any of the above two conditions, it would decide the application on the balance of convenience.**

The question I raise in this matter from the onset is whether from the supporting affidavit the petitioner has established a prima facie case with a probability of success.

I am reminded of the fact that in determining matters of injunctions, this court should not endeavour to go into the merits of the case. I have considered the affidavits by the petitioner and the rejoinder in the respondents replying affidavits. It is not in dispute that the suit property No. 31/Industrial Ole Kasasi was allocated to the petitioner by Ole Kejuado County Council on 3rd December 1986. The petitioner paid off rates outstanding rents up to including January 17th 2017.

However, the petitioner admits that the said plot replaced as plot No. 31/Industrial Ole Kasasi remains unsurveyed and exact boundaries unascertained. The allotment letter which is the basis and the petition sets out conditions to be met by the application. On the issue of making necessary payments there seems to be no major dispute. The property in question was to be developed within 2 years which required of the petitioner to plan and present building designs for approval to the relevant authorities to the defunct Ole Kejuado County Council. There is no evidence that the petitioner fulfilled his obligations to present building plans within 6 months for approval or develop the plot as indicated in the letter within 2 years. I consider these to be conditions precedent in answer to the letter of offer besides payment of rates and rents.

The petitioner has not produced any evidence that he accepted the offer letter with all the conditions attached as at 3rd December 1986. It does not escape the attention of the court that the successor of Ole Kejuado County Council now referred as the County Government acknowledges the allotment of the plot to the petitioner. The respondents further confirmed audit and validation exercise of all leases/allotments. This was done vide a notice in the standard newspaper of 16th March 2015.

The petitioner pleads clearly that he did not attend the validation and regularization exercise called by the National Land commission in conjunction with the respondents. What the public notice categorically stated was to all persons claiming rights to any parcel of land at Ole Kasasi to present documents to prove their allocation documents given by the defunct County council of Kejuado. This is the legal entity which allotted the petitioner a plot subject matter of this petition.

In my view, the letter of offer of unsurveyed land does prove conveyance of an interest of the suit property to the petition subject to the fulfillment of the conditions in the said offer. The petitioner partially complied with the terms in the letter of offer on payment of rates without doing more to acquire a lease or title to the same land. In other words, the petitioner's document dated 3rd December 1986 continued to remain a letter of offer with some of the key conditions still unfulfilled by the petitioner. The land titles for Ole Kasasi Trading Centre including plot No. 31 do exist but in the custody of the respondents. The transfer of assets and liabilities pursuant to the new constitution as deponed by the respondents necessitated a fresh audit and verification exercises of land around Ole Kasasi Centre.

The situation in this petition is less clear in respect of the alleged failure by the petitioner to avail the registration of his parcel of land and existing developments as per the newspaper notice of 16th March 2015. From the advert the applicant was required to present a certified copy of the national ID, KRA pin certificate, a copy of a letter of allotment from the defunct County Council, copies of approved building plans, copies of all receipts of payments made to the defunct county council of Ole Kejuado or the Ministry of Lands, an application for regularization for allocation addressed to the Secretary, Kajiado county Land Management Board and a declaration in writing that the subject parcel was not a public purpose plot or any part thereof.

I have considered both affidavits by the petitioner none of these conditions have been complied with do either the National Land commission or the Kajiado County Land Management Board. This is further complicated by the fact that the petitioner did not lodge an appeal with the National Land Commission to consider his case. I need to observe without going into the merits of the petition that I am being asked to interpret the rights under Article 40 of the constitution based on a letter of offer.

This Article provides that every person has the right either individually or in association with others to acquire and own property. Further the same Article provides that possession cannot be compulsorily taken except in certain specific circumstances in accordance with the law.

In the context of this petition, the County Government has not expropriated the parcel of land back to itself or transferred it to the third party. If that were to be the case, it will satisfy the criteria of deprivation of property without an opportunity given to the petitioner to present his side of the story.

The petitioner though in physical possession of prima facie evidence in regard to this allocation the land tenure under the land Act cannot be perfected without regularizing registration of the suit property. In terms of Article 67 of the constitution the National Land commission has the mandate to manage land on behalf of the National and County governments. The parcel of land this court is being asked to adjudicate under violation of rights to property falls squarely within the provision of Article 62 of the constitution. The petitioner is yet to seek registration as provided for under section 5 of the Land Act of 2016.

In the present case I have taken into account all the circumstances of the petitioner's case and the explanation by the respondents. The threshold condition of a prima facie case as developed in cases has not been established by the petitioner. The petitioner has

failed to answer to the question that there exist land title or lease and referred to as plot No. 31/Industrial Ole Kasasi Trading Centre. Although the sources and forms of evidence from both the petitioner and the respondent allude to this particular reference the extent of its legal title remains unknown. Though obvious that the petitioner made payments to the respondents the other covenants in the letter of offer remain unfulfilled.

It is not uncommon for the claimants to lay interest over land based on letters of offer which has not been registered as a leasehold or certificate of title. My view is that before proceeding to answer whether one's rights have been infringed or violated under Article 40 under the constitution one has to ascertain the nature of the legal interests or and rights. The forms of evidence in support of the petition has not demonstrated existence of prima facie evidence that the petitioner's rights will be infringed or impaired by the time of hearing the petition if the injunction is not granted.

What the applicant has on record is an arguable case and not a prima facie case to entitle him for an equity remedy of injunction. On this ground alone, the notice of motion fails.

What about the nature of all harm and award of damages" Can the circumstances of this case be considered as one which falls under irreparable harm" In law, harm is irreparable if it either cannot be quantified in numerical terms as a way of restoring the injured party to his original form.

The petitioner sought interlocutory injunction to restrain the respondents from implementing the transfer acting/securing or transacting in any way with parcel No. 31/Industrial Ole Kasasi. One of the peculiarities of this case is that the respondents admits that the petitioner's name is still retained in the register as allottee of the plot.

The respondents further confirmed that the screening and verification exercise is still on-going within the County whose strong basis has already been laid down in the relying affidavit. The view I take in this matter on the facts of the petition is that the respondents are yet to close the register and lock out the petitioner.

In the event the petitioner loses on appeal or review before the County Government through the National Land Commission he will have an opportunity to seek redress for compensation and damages as a result of the legitimate expectation. This ground is not available to the petitioner.

In the present case, what really matters to the parties is whether the letter of offer dated 3rd December 1986 which has not been perfected into title is still valid. It would be therefore advisable for the petitioner to seek that relief from the respondents and the National Land Commission and before seeking an interpretation of a violation of a right which is yet to mature.

After discussing the two tests, I now turn to one on a balance of convenience. In this respect, I would consider the unperformed primary obligations of the petitioner and the respondent under the land allocation agreement. This contract on land allocation like any other contract may be terminated by either of the parties by breach of any one clause in the contract. Can one say that the land transaction between the petitioner and the respondent is *void* or *voidable abinitio*" In my considered view, the validation exercise scheduled for 16th March 2015 was aimed at addressing some of the issues raised in this petition. The constitutionality of that process has not been challenged by the petitioner.

The stay order must be determined as to which of the parties will suffer greater harm from the granting or denial of the injunction sought. The central issue here is about ownership of land. This prayer is only sustainable for interlocutory injunction if in the main petition the ambit and scope of the right can be proved on balance of probabilities. The continuation of the validation exercise phrase by the respondents has not been shown to be a threat or violation to the petitioner's right to land allocation at Ole Kasasi or any other Centre within the County. The determination of this right under the letter of offer has not crystalized to a level warranting invoking Article 23 (1) of the constitution.

The balance of convenience lies in allowing the respondent to continue with the regularization of existing developments within the County. The petitioner has a legal redress with the County Land Management Board or the National Land Commission as provided for under Article 67 of the Constitution of National Land Commission.

Decision

I am therefore satisfied that the petitioner has not fulfilled any of the conditions set for grant of an injunction within the dictum in the **Giella Versus Cassman Brown and American Cynamide** cases.

The application is therefore disallowed to the extent of restraining the respondent from proceeding to undertake the regularization, validation of the existence, ownership of the parcels of land within Ole Kasasi Trading Centre.

The petitioner shall be entitled to proceed in the accordance with the law in exercise of his rights with respect of the said property referenced as Plot No. 31 to vindicate his rights with the respondents. This is further, subject to the conditions that the respondents as the owners of the property shall alienate, encumber or part with the possession of the suit property.

I make no orders as to cost.

Dated, delivered and signed in open court at Kajiado on 20th December 2017.

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R. NYAKUNDI

JUDGE

Representation:

- Ms. Kariuki for the Petitioner
- The respondent Counsel was absent
- Mr. Mateli Court Assistant



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