**Mmboroki v The Chief Conservator of Forests and Minister for Environment**

**and Natural Resources**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 15 March 2006

**Case Number:** 27/06

**Before:** Nyamu J

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Land law – Challenge to indefeasibility of title – Public resource – Alienation of natural resources –*

*Public interest over registered land – When to issue conservatory orders.*

**RULING**

**Nyamu J:** An originating summons under section 75 and 84 of the Constitution was filed on 19 January 2006 together with a Chamber Summons of the same date. The Chamber Summons prays that the court issues a conservatory order prohibiting the first and second respondents personally or through their agents, officers or servants to refrain from re-establishing the intended boundary of Lower Imenti Forest or dealing in any manner whatsoever that would affect the applicants proprietary rights in whole or in part until final determination of the Originating Summons filed by the applicant. The reasons are that the applicant is the registered and lawful owner of all that parcel of land known as Nyaki/Giaki/2615 and that the respondent is trying to re-establish the boundary of Lower Imenti Forest, and the intended re-establishment would excise 0.32 hectare of applicant’s land. The two defendants have filed a replying affidavit sworn by Mr Ambune the Deputy Chief Conservator of Forests on 16 February 2006. In brief he depones that the Lower Imenti Forest was gazetted vide Proclamation number 104 of 1938 and that vide Legal Notice number 174 of 20 May 1964 the forest was declared to be a central forest. It is contended that the Forest Department has been requested by a voluntary local group who are interested in fencing and keeping away the animals from their farms to re-establish gazetted forest boundaries and that the exercise was done in July and September 2005. The re-establishment of the boundaries revealed isolated encroachment of forest land amounting to 88.9 hectares. Part of the encroachment is by the applicant as per the copy of the map marked EKA4 and that the applicant after presenting an index map was requested to sort out the problem with the District Forest Officer – Meru but declined to do so. The applicants claim that beacons have been mounted on his land but that no such beacons have been fixed. I have taken into account the arguments presented by the applicants’ counsel and the respondent’s counsel and that the community is putting up an electric fencing project along the established boundaries of Lower Imenti Forest which project is intended to minimise human wildlife conflict. On issues concerning boundaries under Registered Land Act transactions, the relevant law is 21 and section 22 of the Registered Land Act. It is not contended by the applicant that this procedure has been invoked. In addition the mere fact that section 28 of the RLA Chapter 300 gives a proprietor an indefeasible title does not on a *prima facie* basis gave him a title that is beyond any challenge including a constitutional challenge. Supposing a person acquires a title vide a first registration of a hospital or forest plot or a wetland, a water course or a title with natural resources belonging to the public. The question is, is that title necessarily indefeasible? I think not although this does not call for a determination now and if a public resource is acquired this can be a ground for challenge. The Government cannot alienate natural resources without invoking the constitutional procedure and any such alienation as permitted can only be for a public benefit. The Government holds public resources for the people generally and therefore there is a public trust in respect of all such resources including forests. It is my view that such a public trust would in an appropriate case defeat the defence of an indefeasible title because it is in the public interest that such resources including forest land be held in trust – this being in the public interest, I reiterate the observations I made in Kenya *Guards and Allied Workers Union v Security Guards Services and others* miscellaneous application number 1159 of 2003 (UR) concerning the preeminence of the public interest. This, assumes even greater importance in a matter involving an issue of environmental law. On a *prima facie* basis the argument that the applicant has encroached has not been challenged and on a *prima facie* basis any encroachment would be void in law. Moreover if the respondents are found to have encroached on his land he can always be compensated in damages. Issuing a conservatory order in the nature of an injunction would not be proper in this matter especially taking the wider interests of the other members of the community to have the fence done so as to protect themselves from the animals. There will be greater harm in halting the community project. Moreover it is the community which is fencing and they are not parties to these proceedings. In exercising my discretion the balance tilts heavily in refusing the conservatory order as sought.

The application is dismissed with costs.

For the appellant:

*Information not available*

For the respondent:

*Information not available*