



Republic v Kisii County Land Registrar & another; SBM Bank (Kenya) Limited (Exparte); Kebisa & another (Interested Parties) (Miscellaneous Application 1 of 2020) [2023] KEELC 20276 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS APPLICATION 1 OF 2020
M SILA, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

KISII COUNTY LAND REGISTRAR 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

SBM BANK (KENYA) LIMITED EXPARTE

AND

THOMAS MWANGI OGETO KEBISA INTERESTED PARTY

RICHARD KERONGO MOTUKA INTERESTED PARTY

JUDGMENT

(Suit by ex parte applicant seeking orders of certiorari to quash a reissued title deed and reconstructed register and mandamus for the Land Registrar to reconstruct a proper register (Green Card); ex parte applicant demonstrating that 1st interested party charged the title and handed over the original title deed to the ex parte applicant; somehow,, the 1st interested party obtaining another title deed from the Land Registry with no charge endorsed; Land Registry also constructing another Green Card now without the charge and the original Green Card mysteriously vanishing; Respondent conceding to the application; 1st interested party’s explanations dismissed; judgment entered for the ex-parte applicant).



1. On 29 June 2020, the ex parte applicant obtained leave to commence proceedings seeking the following prerogative orders:-
 - i. *Certiorari* directed at the Green Card constructed by the Kisii County Land Registrar with respect to land title LR No Central Kitutu/Daraja Mbili/3960 by which a title deed is shown to have been re-issued on 2 May 2016.
 - ii. *Certiorari* directed at the Certificate of Title purportedly “re-issued” on 2 May 2016; and
 - iii. *Mandamus* to compel the Kisii County Land Registrar to reconstruct a Green Card showing all *bona fide* entries/encumbrances with respect to land title LR No Central Kitutu/Daraja Mbili/3960 including the legal charge dated 14 December 2015 and registered on the same date.
2. The main motion seeking the above orders was duly filed on 17 July 2020.
3. The ex parte applicant is a financial institution and the successor of Chase Bank Kenya Limited. It is her case that the 1st interested party, Thomas Mwangi Ogeto Kebisa, is the registered proprietor of the land parcel Central Kitutu/Daraja Mbili/3960 (the suit land). She avers that the 2nd interested party presented an application to Chase Bank Limited seeking a loan of Kshs. 11,000,000/- which was approved with the suit land offered as security. The 1st interested party then applied for consent to charge from the Land Control Board, which was granted on 10 December 2015. A charge was then registered against the Green Card on 14 December 2015 upon payment of stamp duty and the original title deed surrendered to the ex parte applicant. There was default in repayment of the monies disbursed and in September 2019, the ex parte applicant proceeded to conduct due diligence. An official search could not however be availed to confirm the status of the suit land. The bank’s advocate then requested for a copy of the Green Card from the 1st respondent, the Land Registrar, Kisii. He was furnished with a Green Card which showed that a title had been re-issued to the 1st interested party on 2 May 2016 and this Green Card did not contain the charge earlier registered. It is the case of the ex parte applicant that this issue of a duplicate title was an illegality, for reason *inter alia*, that the original title deed was readily available as it was in the custody of the bank and there was no need for replacement; that no proper application for re-issue of the title deed had ever been made pursuant to Section 33 of the [Land Registration Act, 2012](#) and regulations No 27, 28 and 29 of the [Land Registration \(General\) Regulations, 2017](#); that there was no gazette ment for the allegedly lost title deed; that there existed a Green Card with the charge endorsed, and if at all the Green Card got lost, the Land Registrar ought to have ensured that all pre-requisites regarding reconstruction were followed. The ex parte applicant contends that the Land Registrar is statutorily obliged to maintain proper, credible, verifiable records with respect to the suit land, and that he omitted to discharge his duties as a public officer. It is further averred that the *ex parte* applicant discovered, by coincidence, that the 1st interested party had submitted an application to transfer the title to a third party, one Dennis Maina Omai, and the bank lodged an inhibition to stop the transfer.
4. The 1st and 2nd interested parties appointed counsel and filed a preliminary objection to the effect that the suit, as it pertains to the order of certiorari, is time barred pursuant to Section 9 of the [Law Reform Act, Cap 26, Laws of Kenya](#) as read with Order 53 of the [Civil Procedure Rules](#). The preliminary objection was dismissed in a ruling delivered on 19 October 2021.
5. Subsequently the 1st interested party filed a replying affidavit to oppose the suit. Inter alia, it is deposed that the [Land Registration Act](#) provides that a certificate of title shall be taken by all courts to be prima



facie evidence that the person named therein is the proprietor; that the issues raised, including fraud, cannot be proved by way of judicial review and requires evidence to be tendered and subjected to cross-examination; that judicial review is not concerned with merits and thus the action ought to have been commenced by way of plaint; that the order of certiorari is obtainable where an inferior tribunal or court has acted without jurisdiction and cannot issue against the Land Registrar, since the decision he allegedly made is not capable of being quashed, as it is within the powers of the Land Registrar to make entries in the register when prompted; that whether those entries are right or wrong is a matter to be determined in normal court proceedings; that mandamus cannot issue to compel the Land Registrar to rectify the register since it is not the mandate of judicial review to substitute the decision of the Land Registrar with its own decision; that a judicial review court has no jurisdiction to deal with matters regarding entries in the register in absence of a case challenging the same. He deposed that at no time has he ever secured a loan from the *ex parte* applicant with the suit land as security and any alleged offering of the suit land as security was tainted with fraud; that if any person applied for a loan, the *ex parte* applicant should follow the correct channels in recovering the money and not conspire with the borrower and other third parties to hatch a scheme to deprive him of his property; that the orders sought are not available as the *ex parte* applicant has not followed the process of reconstructing a Green Card and wishes to use these proceedings to bypass the law on reconstruction of Green Cards; that it is disingenuous and dishonest for the *ex parte* applicant to seek cancellation of the entries in the register through judicial review as this will disenfranchise him from cross-examining the bank's witnesses and seek to know how they acquired an interest in the suit premises.

6. The Land Registrar did not file any reply to the motion.
7. I invited counsel to file written submissions and I have seen the submissions of Mr. Nyamurongi, learned counsel for the *ex parte* applicant, and M/s Ocharo Kaba & Company, for the interested parties. At the hearing of the suit, Mr. Wabwire, learned State Counsel appearing for the respondent, did submit that he has seen the original title deed in the hands of the *ex parte* applicant and has seen the mischief of the interested parties in asking the Land Registrar to reconstruct the title. He submitted that the Land Registrar was misled to reconstruct the register without the charge. In light of that, he wished not to oppose the motion. He invited the parties to avail the documents for reconstruction to cure the mischief of trying to escape paying the loan. He sought to have his client excused from paying costs of the suit as the Land Registrar was ready to abide by the decision of the court.
8. Mr. Nyamurongi did present to court the original title deed and pointed out the charge registered therein. He added that the interested parties have not denied signing the charge and that they engaged in a fraudulent scheme to obtain a new title.
9. He submitted that the acts of the Land Registrar were administrative and that he acted unreasonably. He submitted that it will be a bad precedent to have a chargor walk to the land registry and get a fresh title and it will negatively impact on financial institutions doing business within Kisii County. He submitted that he will not seek costs against the respondents, as they have conceded to the motion, but sought costs against the interested parties.
10. No appearance, during the formal hearing of the motion, was made by counsel for the interested parties.
11. I have considered all the above before arriving at my decision.
12. In a nutshell, the *ex parte* applicant wishes to have quashed the reconstructed Green Card and Title Deed issued on 2 May 2016, and mandamus to compel the Land Registrar to reconstruct the Green Card with the correct entries. The respondent has already conceded to the motion and what I need to consider is the response of the interested parties. I see no substance in the argument of the interested



parties that prerogative orders of judicial review are not available in a suit of this nature. I see nothing which stops a party from seeking orders to quash a wrongly reconstructed Green Card and a title deed that was unprocedurally “re-issued.” The act of preparing a Green Card, and issuing a title deed are administrative actions of the Land Registrar. Administrative actions, unless there are other peculiar circumstances, would fall under the radar of judicial review. Thus, in my opinion, this is not the sort of case that must be heard through plaint, unless the court in its own discretion given the peculiar circumstances of the case so orders. I have not, on my part, seen any special circumstances which would make the court not exercise its discretion in judicial review, and I am in fact persuaded that this is a fit case to be determined through judicial review.

13. On the facts, the ex parte applicant has demonstrated that its predecessor, Chase Bank Limited, had a charge which was registered against the title. The charge instrument was exhibited and it shows that it was registered on 14 October 2015 under Presentation Book Number 51 of the same date. It follows that a corresponding entry of the charge was made, or was required to be made, in the register (Green Card) pursuant to Section 7 (5) of the [Land Registration Act, 2012](#), which provides as follows :-

“(5) Registration shall be effected by an entry in the register in such form as may from time to time be prescribed by the Cabinet Secretary, and by cancellation of the entry, if any, which it replaces.” (emphasis mine)

14. In addition, at the time of registration of a disposition, the certificate of title is presented and endorsed with the entry, as provided under Section 31 (1) of the [Land Registration Act](#), which provides as follows :-

31.

(1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease. (emphasis mine)

15. The ex parte applicant has in her hands the original title deed which has the entry of the charge endorsed, and thus, as I have stated above, there must have been a corresponding entry in the Green Card or one needed to be entered. The only conclusion I can reach is that there was a Green Card which had the correct entry of the charge but which was made to vanish into the thin air and a new one, without the entry of the charge, created.
16. In his reply, the 1st interested party has not given any explanation as to why the title deed was being “re-issued.” He has not stated how the original title deed escaped from his hands (as the proprietor) so that he would be at liberty to apply for a re-issuance of a title deed. He has not presented any letter that he wrote to the Land Registrar giving him reasons why he wishes to have his title deed re-issued. Section 33 of the [Land Registration Act, 2012](#) applies to lost or destroyed titles and registers and it provides as follows:-

“ 33. Lost or destroyed certificates and registers



- (1) where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.
- (2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.
- (3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.
- (4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.
- (5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.
- (6) Upon the issue of a replacement certificate no further dealings shall be carried out using the replaced certificate." (emphasis mine)

17. It will be discerned from the foregoing that where a title deed is lost, the proprietor may apply for issuance of a new title, but only after he has availed evidence that the same is lost or destroyed. If the Registrar is satisfied with the evidence provided, he will publish the notice in the Gazette and any two local newspapers of nationwide circulation. On expiry of 60 days of the advertisement, a replacement certificate of title may issue. In so far as registers are concerned, the Land Registrar has power to reconstruct a lost or destroyed register after making the necessary inquiries and giving a notice of 60 days in the Gazette.
18. In our case, the 1st interested party has not provided any document that he wrote to the Land Registrar that his title is lost and that he provided the required evidence to enable the Land Registrar issue a new title deed. He has not provided any evidence that the allegedly lost title was advertised in the Kenya Gazette and in two daily newspapers as required. From the blue, he somehow managed to obtain a re-issue of title which was clearly unprocedural and irregular. Regarding the Green Card, there is no evidence that there was any advertisement in the Kenya Gazette that the Green Card was lost.
19. I am persuaded that the issuance of a new title deed to the 1st interested party and creation of a new register, which did not now have a charge, was irregular and null and void. The purported new certificate of title issued to the 1st interested party is hereby quashed by an order of Certiorari. This court finds and holds that the only title deed that is genuine and which is capable of being used in future dispositions is the title deed held by the ex parte applicant and which is endorsed with the encumbrance



of a charge. The purported Green Card which shows a re-issue of the title deed is also hereby quashed. The *ex parte* applicant asked for an order of mandamus to compel the Land Registrar to reconstruct the Green Card showing the *bona fide* entries. I am persuaded that the *ex parte* applicant is entitled to the said order. This court proceeds to order the Land Registrar, Kisii to reconstruct the Green Card with documents to be provided by the *ex parte* applicant, and in this instance, this court waives the requirement of making an advertisement in the Gazette.

20. I am aware that the 1st interested party claimed that he has never taken a loan with the *ex parte* applicant. If it is his view that the loan was a fraud, and that the charge registered was a fraud, nothing stops him from filing suit to contest the same.
21. The last issue is costs. The *ex parte* applicant waived costs against the respondents given their concession. I will not therefore make any order on costs, for or against the respondents. I award costs of the suit to the *ex parte* applicant to be paid by the 1st interested party.

Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 28 DAY OF SEPTEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

