



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 43 OF 2015

IN THE MATTER OF: AN APPLICATION BY ACACIA

HOLDINGS LIMITED FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: SECTIONS 38 AND 39 OF THE LAND REGISTRATION ACT,

CHAPTER 3, SECTIONS 86 AND 86A OF THE REGISTERED LAND ACT,

CHAPTER 300, SECTION 21(1) OF THE RATING ACT AND

SECTION 162 OF THE LAND ACT, 2012

ACACIA HOLDINGS LIMITED.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MOMBASA.....RESPONDENT

RULING

The Application

1. The Notice of Motion application before the court is dated 25th May, 2017 and filed herein on 26th May, 2017. The ex parte Applicant seeks the following orders:

(a) An order of Mandamus be issued directing the Respondent to Issue to the Applicant, Acacia Holdings Limited, a Rates Clearance Certificate certifying that the rates payable by it in respect of MOMBASA/BLOCK XX/521 to the County Government of Mombasa have been paid up to and including the 31st December, 2017.

(b) A declaration be made that all the rates payable by the Applicant Acacia Holdings Limited to the County Government of Mombasa and its predecessor, the Municipal Council of Mombasa in respect of its property being MOMBASA/BLOCK XX/521 have been fully paid up to and including the 31st December, 2017 and there is no amount due by the Applicant Acacia Holdings Limited to the County Government of Mombasa.

(c) That all consequential directions as may be deemed necessary be given and;

(d) That the costs of this application be provided for.

2. The application is premised on the grounds set out in the statement dated 6th October, 2015 and filed on 8th October, 2015 and on the Affidavit Verifying the facts contained in the said statement sworn on 6th October, 2015 by Ketan Vrajilal Gandhi together with annexures thereto.

3. The application is further supported by two Further Affidavits of Chitrnanjan Bhanuprasad Gor sworn on 8th January, 2018 and 3rd March, 2018 both pursuant to leave granted by the court.

4. The ex parte Applicant's case is that the Applicant is the registered owner of MOMBASA/BLOCK XX/521 (Suit Property) having purchased the same from Citizen Cinema Corporation Limited. Under Section 86 of the Registered Land Act, Chapter 300, the Land Registrar shall not register any instrument purporting to transfer or to vest any land, or a lease of land, situate within the area of a rating authority unless there is produced to the Registrar a written statement by the authority that all rates and other charges payable to the authority in respect of the land for the last twelve years have been paid, expressed to be available until the day upon which or until a day not earlier than that upon which the instrument was registered. The Applicant states that the Citizen Cinema Corporation Limited - the Vendor of the Suit Property to the Applicant - provided the Applicant with Rates Clearance Certificate No. 20001 and dated 25th May, 2006 and Rates Clearance Certificate No. 20874 dated 8th August, 2006 issued by the Municipal Council of Mombasa (currently County Government of Mombasa) confirming that all rates due in respect of the Suit Property were paid and the said certificates were available up to 25th August, 2005 and to 31st October, 2006, respectively. Pursuant to the said Clearance Certificate the Land Registrar registered the transfer of the Suit Property to the Applicant. Induced by the confirmation by the Municipal Council of Mombasa, that no rates were due on the Suit Property, the Applicant purchased the Suit Property from the Citizen Cinema Corporation Limited, and paid the purchase price in full without any deductions for rates if any. Since the aforesaid Clearance Certificate, the Municipal Council of Mombasa and the County Government of Mombasa has issued the following Rates Clearance Certificates confirming that all rates, until the dates stated therein, are paid -

(a) Rates Clearance Certificate No. 10044 dated 16th April, 2007 available to 30th June, 2007 issued by the Municipal Council of Mombasa to the Applicant,

(b) Rates Clearance Certificate No. 03686 dated 16th November, 2010 available to 16th February, 2011 issued by the Municipal Council of Mombasa to the Applicant,

(c) Rates Clearance Certificate No. 05395 dated 9th June, 2011 available to 9th September, 2011 issued by the Municipal Council of Mombasa to the Applicant,

(d) Rates Clearance Certificate No. 06953 dated 13th December, 2011 available to 13th March, 2012 issued by the Municipal Council of Mombasa to the Applicant,

(e) Rates Clearance Certificate No.10106 dated 6th February, 2013 available to 6th May, 2013 issued by the Municipal Council of Mombasa to the Applicant,

5. The Applicant has been diligent in paying for all land rates owed by the County Government of Mombasa and its predecessor, the Municipal Council of Mombasa as shown by the receipts from the year 2007 to 2015.

The Applicant attached particulars of dates, receipt numbers and amount paid to the application.

6. By a letter dated 24th September, 2010, the Officer in Charge of Rates advised the Town Clerk that on investigation it was revealed that a Clearance Certificate was issued in the year 2006 in respect of the Suit Property together with a letter from the then Town Clerk that the rates had been cleared stating further that a sum of Kshs.1,215,257.00 was due in respect of rates and penalty for the years 2008, 2009 and 2010. By a letter dated 12th November, 2010 addressed to the Town Clerk/Treasurer, Municipal Council of Mombasa the Applicant sent cheques totaling Kshs. 1,385,160.00 in settlement of the rates due for the years 2008, 2009, 2010 and 2011. The said Town Treasurer vide his letter of 16th November, 2010 in reply to the Applicant's said letter confirmed that the account was settled.

7. The Applicant states that in spite of the issue of the aforesaid Rates Clearance Certificates and the letters confirming that all rates were paid, the County Government of Mombasa is now demanding a sum of Kshs.7,869,391.00 in outstanding rates penalties etc. The Applicant's case is that all land rates payable to the County Government of Mombasa in respect of the Suit Property have been fully paid up by the Applicant at the time of instituting this suit.

8. The Applicant through its advocates, C.B. Gor & Gor Advocates, has since requested the County Government of Mombasa to update and rectify its rates' records of the Suit Property and confirm that all rates until 2015 were paid and to issue a Rates Clearance Certificate. However, the County Government of Mombasa has not yet rectified its records as requested.

9. The Applicant intends to develop the suit property but cannot get its development plans passed unless an up to date Rates Clearance Certificate is issued by the County Government of Mombasa to the Applicant.

The Response

10. The application is opposed by the Respondent vide a Replying Affidavit sworn by Jimmy Waliaula on 16th May, 2017. The deponent is the legal officer of the Respondent and depones to the said affidavit as such officer. The Respondent's case is that the application herein is misconceived, incompetent, bad in law and the orders sought therein against Respondent are untenable in the circumstances. The Respondent states that a rates payer is under an obligation to pay land rates as reflected in a property land rates statement. The payment of county land rates made pursuant thereto are evidenced by land rates receipt issued to a rates payer, and that it is not true that the land rates in respect of the subject property herein have been paid in full as alleged or at all. The Respondent's case is that as at 16th November 2010, the rates arrears, the annual rent and penalties due added up to a total of Kshs. 31, 023,576. It is therefore incumbent upon the Applicant to prove by way of receipts or other evidence that the aforesaid sum of Kshs. 31,023,576 was fully paid to the Respondent by either the Applicant or the former owners of the subject property Messrs. Citizen Cinema. The Respondent denies any evidence that a waiver of the penalties was extended to the Applicant herein. Further, the Respondent states that it has been disclosed by the Applicant that there was a suit between the Respondent and Messrs Citizen Cinema in which rates payment was the subject of that suit. There is however no evidence

that suit was concluded and in what terms; or whether the rates therein were paid by Messrs Citizen Cinema. The Respondent states that the letters and the certificates relied upon by the Applicant do not amount to evidence of payment of the property land rates on account of the subject property. There is therefore a dispute as to the land rates which are payable and those that have paid by the Applicant. This dispute ought to be resolved first. However, Judicial Review proceedings would not be appropriate forum for determining such issues. In the circumstances, the Respondent's case is that the prerogative order of Mandamus would not be appropriate remedy, and so the Applicant is not entitled to the orders sought and these proceedings should be dismissed with costs.

The Submissions

11. The court granted leave to parties to file written submissions. However, only the ex parte Applicant did that and the Respondent did not file submissions and so on 10th April, 2018 the court reserved the matter for Ruling on 14th June, 2018.

12. The ex parte Applicant submitted that the suit property belongs to the ex parte applicant and that all rates due on the property had been paid. The ex parte Applicant also referred to Further Affidavits sworn on 8th January, 2018 and 23rd March, 2018 by Chitranjan Bhanuprasad Gor. The annexures to those affidavits show that the rates in respect of the suit property are fully paid to 31st December, 2018. Those affidavits were not disputed.

13. On their part the Respondent avers that there is a dispute on amount payable as rates, and the said dispute can only be cleared after taking evidence of the parties, and that being so Judicial Review proceedings is not the best forum since evidence is not taken in Judicial Review proceedings. This proposition by the Respondent was not progressed as the Respondent did not submit on the issue. Further, it appears that the Respondent vacated this submission by its action of issuing clearance certificate pursuant to above said Further Affidavit.

The Determination

14. The Applicant is the registered proprietor of all that piece or parcel of land known as MOMBASA/BLOCK XX/521 (the suit premises). The title deed for the suit premises has been exhibited as annexure KVG 2 of the annexed verifying affidavit of Ketan Vrajlal Gandhi sworn on 6th October, 2015. The Applicant purchased the suit premises from Messrs Citizen Cinema Corporation. Prior to the suit premises being transferred to the Applicant the Respondents predecessor the Municipal Council of Mombasa had issued Rates Clearance Certificates respectively (see annexures KVG 5 and KVG 6 to the verifying affidavit of Ketan Vrajlal Gandhi). The Respondents predecessor aforesaid had also written a letter dated 8th August, 2006 confirming that the rates in respect of the suit premises had been paid upto 31st December, 2006 (see annexure KVG 4 to the verifying affidavit of Ketan Vrajlal Gandhi).

15. The Applicant acted on the representation given to the Municipal Council of Mombasa that no rates were due in respect of the suit premises, and paid the full purchase price without any deductions of rates. Thereafter the Applicant continued to pay rates to the Municipal Council of Mombasa and obtained from the Municipal Council of Mombasa from time to time Rates Clearance Certificates (see annexures KVG 7(a), 7 (b), 7 (c) , 7 (d) and 7 (e) of the Verifying Affidavit of Ketan Vrajlal Gandhi).

16. It is the finding of this court that the Municipal Council of Mombasa having represented to the Applicant that all rates had been paid upto 31st December, 2006 it (or its successor) is estopped from alleging otherwise. The Applicant had a legitimate expectation that it will never be required to pay any such rates which the Municipal Council of Mombasa had confirmed to have been paid.

17. It appears that sometime in the year 2015 the Applicant intended to develop the suit premises but could not get its development plans passed unless it obtained an upto date rates clearance certificate issued by the Respondent. At that point the Respondent issued to the Applicant a rates statement showing that as at 2nd June, 2015 the applicant owed rates of Kshs. 7, 201,607 (see annexure KVG 12 to the Verifying Affidavit of Ketan Vrajlal Gandhi in respect of the suit premises. A cursory glance at that statement shows that on 13th November, 2014 the Respondent made an adjustment referenced as "CORRECTION" and claimed rate arrears of Kshs.5,685,015.015 which started incurring penalties on a monthly basis.

18. The Applicant then through its Advocates Messrs C. B. Gor & Gor wrote a letter dated 10th July, 2015 making inquiry on the issue. That letter elicited 3 no response hence the Applicant was constrained to bring the present proceedings to the Court.

19. The Respondent claimed that the rates arrears as at November, 2016 was Kshs.31,023,576.00. However, this figure was revised to Kshs.8,798,053.00 said to be due in October, 2015. There was never any explanation by the Respondent as to why on 13th November, 2014 the Respondent adjusted the rates statement and claimed arrears of Kshs.5,685,015.00. The decision to adjust the rates statement was clearly arbitrary.

20. However during the pendency of the proceedings herein the Respondent on 8th January, 2018 issued a Rates statement stating that as of 1st January 2018 the Applicant did not owe any money to the Respondent for rates in respect of the suit property (see annexure CBG 1 to the further affidavit sworn by Chitranjan Bhanuprasad Gor on 8th January, 2018). Subsequently the Respondent has preceded to issue to the Applicant a Rates Clearance Certificate dated 31st January, 2018 confirming that all the rates have been cleared.(See affidavit sworn by C. B. Gor on 23rd March, 2018).

21. Effectively, the Respondent has admitted Applicant's claim, thereby making any opposition to this application a mere opposition. This court allows the prayers in the Notice of Motion amended to include the year 2018 as it's clear that the rates for 2018 are also fully paid and a Rates Clearance Certificate issued to the Applicant.

22. From the foregoing it is the finding of this court that the Notice of Motion dated 25th May, 2017 is merited. The same is allowed as prayed with costs to the ex parte Applicant.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 14th day of June, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Omolo holding brief for Applicant

Mr. Kaunda Court Assistant