



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 42 OF 2018

IN THE MATTER OF: ORDER 53 RULE 1, ORDER 50 RULE 5 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND ADJUDICATION & SETTLEMENT

OFFICER, KISAUNI, MOMBASA THE DIRECTOR OF LAND

ADJUDICATION AND SETTLEMENT, MOMBASA

THE LAND REGISTRAR.....RESPONDENTS

EX-PARTE: MOHAMED SAID MOHAMED

RULING

1. By an application dated 8th May, 2018, the intended ex-parte applicant seeks for leave to commence judicial review proceedings out of time and leave to apply for judicial review. The application is based on the grounds set out in the Statutory Statement dated 8th May, 2018 and the verifying affidavit of MOHAMED SAID MOHAMED sworn on 8th May, 2018.
2. The Applicant alleges that on the 4th February, 2010 he entered into a sale agreement with one PONDA KARISA CHENGO in which the applicant purchased plot no. 114 Ziwa la Ng'ombe Settlement Scheme Kisimani village (herein after to be referred to as the "suit land") for a consideration of Kshs. 450,000/-. Subsequently, on diverse dates being 23rd August, 2010, 26th August, 2010 and 1st September, 2010 the Chief Kongwea location wrote to FATUMA SAHA JUMA, the wife of the vendor, summoning her to his office to consent to the sale of the aforementioned land but the said FATUMA SAHA JUMA did not honour the summons.
3. The Applicant avers that on 18th September, 2010 a letter was issued by Ziwa la Ng'ombe Squatter Settlement Scheme Committee addressed to the Land Adjudication Settlement Officer, Mombasa stating that the suit land had been occupied by the applicant and requesting the officer to review its records accordingly. However, the applicant contends that the Land Adjudication Settlement Officer failed to do so.
4. The applicant claims that on 2nd January, 2013, a letter of offer was issued by the Director of Land Adjudication and Settlement, Mombasa offering the suit land to FATUMA SAHA JUMA despite the fact that the suit land had been sold to the applicant.
5. The applicant states that a dispute arose as to the ownership of the suit land which dispute was tried to be resolved by various government entities. The applicant alleges that the Chief of Kongwea Location one VICTOR WANGOMBE responded to a letter by the District Land Adjudication Settlement Officer confirming that the suit land was erroneously indicated as belonging to FATUMA SAHA JUMA instead of

the applicant who was the rightful owner.

6. The applicant alleges that on 5th September, 2013 the District Land Adjudication Settlement Officer, Mombasa summoned the applicant, FATUMA SAHA JUMA and ALI PONDA KARISA to a meeting to be held on 10th September, 2013. During the meeting of 10th September, 2013, the applicant claims that issues of matrimonial property arose as between FATUMA SAHA JUMA and ALI PONDA KARISA as it became clear that both had contributed towards development of the suit land. The Applicant states that on 17th September, 2013 the District Land Adjudication Officer referred the matter to the Kadhi's court.

7. The Applicant claims that title deed for the suit land was registered in the name of FATUMA SAHA JUMA and in 2015 FATUMA SAHA JUMA stormed into the suit land seeking to evict the applicant and his family.

8. It is the applicant's case that he has made several attempts to have the errors made in relation to the registration of the title deed for the suit land corrected to no avail. Further, the applicant states that he has extensively developed the suit land with the hope that the title for the suit land would be registered in his name.

9. It is also the applicant's case that he delayed in bringing this application because he only found out in 2015 that the title to the suit land had been issued to someone else and thereafter he made several attempts to correct the error but the errors/mistakes have not been corrected to date.

10. The Applicants avers that should this application succeed, the applicant will be seeking the following orders:

a) An order of certiorari for the purpose of its being quashed; first, the entries made by the District Land Adjudication & Settlement Officer, Kisauni, Mombasa in the adjudication register; second, the decision made by the Director of Land Adjudication and Settlement, Mombasa following the entries made in the adjudication register, whereby it was adjudged on the 2nd January, 2013 that the government, through the Settlement Fund Trustees has offered one FATUMA SAHA JUMA, ID No. [particulars withheld] Plot No. 114 (0.014) Ha at Ziwa la Ng'ombe Settlement Scheme in Kisauni District and third, the decision made by the Land Registrar, Mombasa whereby a title of Plot No. 114 Ziwa la Ng'ombe Settlement Scheme in Kisauni District was issued to FATUMA SAHA JUMA.

b) A declaration that the entries made by the District Land Adjudication & Settlement Officer, Kisauni, Mombasa in the adjudication register and the decision by the Director of Land Adjudication and Settlement, Mombasa whereby it was adjudged on the 2nd of January, 2013 that the government, through the Settlement Fund Trustees has offered one FATUMA SAHA JUMA, ID No. [particulars withheld] Plot No. 114 (0.014) Ha at Ziwa la Ng'ombe Settlement Scheme in Kisauni District and the decision by the Land Registrar, Mombasa whereby a title of Plot No. 114 Ziwa la Ng'ombe Settlement Scheme in Kisauni District was issued to FATUMA SAHA JUMA was and is invalid and void and of no effect.

c) A declaration that the District Land Adjudication & Settlement Officer, Kisauni, Mombasa, the Director of Land Adjudication and Settlement, Mombasa and the Land Registrar, Mombasa are in breach of Sections 19, 23, 25, 28, 31 of the Land Adjudication Act and Section 79 of the Land Registration Act.

d) An ex parte injunction to restrain the Land Registrar, Mombasa whether by himself or his servants or agents or howsoever otherwise from making and/or causing any entry of any nature to be made in relation to Plot No. 114 (0.014) Ha at Ziwa la Ng'ombe Settlement Scheme in Kisauni District until the hearing of the application for judicial review or further order.

e) A direction that the hearing of the application for judicial review be expedited.

f) An order for costs.

g) And that all necessary and consequential directions be given.

11. The application came up for hearing on 17th July, 2018. Mr. Kinuthia, learned Counsel appeared for the applicant. Counsel submitted that the applicant was seeking for leave to apply for judicial review orders out of time. Counsel explained that the cause of the delay was that the impugned order was issued in 2013 and the parties involved tried to resolve the issue without avail. In support of the application, Counsel relied on Sections 85 and 100 of the Civil Procedure Act and Article 159 (2) of the Constitution.

The Determination

12. The ex-parte applicant seeks leave to commence judicial review proceedings. Order 53 Rule 1 of the Civil Procedure Rules, 2010 provides that no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted.

13. In the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996**, Waki J (as he then was) explained the purpose of application for leave to apply for judicial review in the following manner:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which

public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter parties hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".

Further in the case of **Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8** the Court held as follows:

"If he (the Applicant) fails to show, when he applies for leave, a prima facie case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers..."

14. It is therefore pertinent for the applicant to show that he has a prima facie case or a case that is arguable before a court can grant leave to apply for Judicial Review. The Applicant in this instant alleges that he bought the suit land from one ALI PONDA KARISA at a consideration of Kshs. 450,000/= on 4th February, 2010. The Applicant claims that the vendor's wife on FATUMA SAHA JUMA was summoned on various occasions to consent to the sale but she ignored the summons.

15. The Applicant claims that the suit land was erroneously registered in the names of FATUMA SAHA JUMA and a title deed was issued to her and in 2015 she sought to evict the applicant from the suit land. The applicant contends that despite various attempts to engage the Respondents to have the error corrected the same has not been corrected to date.

16. From the pleadings it is evident that the applicant was aware since 2015 that the suit land's title deed had been issued to FATUMA SAHA JUMA. However, this application was only filed this year. In defence of the delay in bringing these proceedings, the applicant contends that during the period between 2015 and 2018 he was making attempts to correct the error and was hopeful the error would be corrected. I do not find this explanation to be sufficient to explain the delay.

17. Be that as it may, as I understand it the matter herein boils down to the ownership of the suit land. From the documents annexed to the application it is alleged that the land, prior to the sale, belonged to FATUMA SAHA JUMA who was then married to ALI PONDA KARISA. FATUMA SAHA JUMA claims that she separated from ALI PONDA KARISA, therefore, ALI PONDA KARISA did not have the right to sell the suit land to the applicant. However, ALI PONDA KARISA also lays a claim to the suit land as he alleges that he helped to develop the land hence he could sell the same. In the meeting held on 10th September, 2013 organized by the District Land Adjudication Settlement Officer and attended by all concerned parties, it was resolved that the issue between ALI PONDA KARISA and FATUMA SAHA JUMA involved matrimonial property and as both professed Islam religion, the matter was referred to the Kadhi's Court. It is, however, not clear if the matter was addressed by the Kadhi's Court.

18. Judicial Review orders are only issued as a last resort where there are no other appropriate remedies. The issues raised herein will require the court to go into the merits of the case which is not the realm of Judicial Review. Witnesses may be required to testify and be cross-examined as to the ownership of the land and the legitimacy of the sale of the suit land to the applicant. In my view there are more appropriate remedies for resolving the dispute herein than Judicial Review Proceedings.

19. While the application herein is neither frivolous nor an abuse of the court process, the same should not have been filed before this court. I should think that the best forum for this matter is the Environment and Land Court which will be able to determine the issues herein on their merits.

20. For these reasons and in exercise of my discretion I decline to grant leave to apply for judicial review. The application dated 8th May, 2018 is dismissed. No order as to costs since the application has not been determined on its merits.

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

E. K. O. OGOLA

JUDGE

In the presence of:

Ms. Wamboi holding brief Kinuthia for Applicant

Mr. Kaunda Court Assistant