



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL CASE NO. 253 OF 2012

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW OF MANDAMUS AGAINST THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR AND THE COMMISSIONER OF LANDS

IN THE MATTER OF THE IN THE MATTER OF THE LAND REGISTRATION ACT 2012 SECTIONS 107 AND 108, ARTICLES 10, 73 AND 159 OF THE CONSTITUTION

IN THE MATTER OF LAND REFERENCE NUMBER 8747 THIKA

REPUBLIC.....APPLICANT

VE R S U S

1. THE ATTORNEY GENERAL [SUED FOR AND ON BEHALF OF THE MINISTRY OF LANDS].....1ST RESPONDENT

2. THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

3. THE COMMISSIONER OF LANDS.....3RD RESPONDENT

AND

SOUTH AND CENTRAL [THIKA] INVESTMENTS LIMITED....EX PARTE APPLICANT

AND

THUGI RIVER ESTATE LIMITED.....INTERESTED PARTY

RULING

1. On 24th June, 2016, this Court delivered a judgement herein in which it issued an order of an order of mandamus compelling the Respondents to consider the applicant’s application for registration and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, the Respondent was to be deemed not to have any reasons in which event an order of mandamus would issue compelling the Respondents to register the said transfer.

2. In this ruling the interested party herein, **Thugi River Estate Limited** (hereinafter referred to as “the Applicant”), has moved this Court seeking the following orders:

1. The order issued on 18th July, 2014 by Honourable Justice G.V Odunga in this matter against the interested party be set aside and/or varied.

2. The interested party be granted unconditional leave to defend these proceedings unconditionally.

3. The ex-parte Applicant be ordered to surrender to the Court the title document issued to it pursuant to the Court Order on 18th July, 2015.

4. This Honourable Court do grant further orders, directions as it may find fair and just in the circumstances.

5. The costs of these proceedings be provided for.

3. According to the applicant in this application, it has since 1971 been the registered proprietor of L.R. No. 8747 Thika which was transferred pursuant to an Order of this Court but is still registered in its name. According to it, on 26th October, 2009 it registered a caveat against the title which caveat is still in place having not been discharged. It was averred that on 16th July, 2014 the **Honourable Lady Justice L.N. Gacheru** gave orders that an order of Status quo be sustained for a period of 12 months from that date & she also specifically provided that there shall be no dealing with the suit property which order was extracted and served upon the 3rd Defendant. However, National Bank of Kenya Limited purported to sell L.R. 8747, a coffee farm in Thika measuring approximately 350 acres to Wagathagu Limited in a purported exercise of its power of sale.

4. To the applicant, the suit property being agricultural land, necessitated procurement of the Consent of the District's Lands Control Board before transacting or transferring the same, the district herein being Gatanga District which requirement is pursuant to section 8 of the Land Control Act Cap.281 of the Laws of Kenya required to be sought for within six months of the date of the sale agreement. However, National Bank of Kenya Limited and Wagathagu Limited did not make the application for consent within six months as required by law and if the application is not made within six months, that sale agreement becomes a nullity in law.

5. According to the applicant the order issued herein are in stark contrast to the orders issued by the same High Court. Hence it is imperative that the ex-parte applicant be granted an opportunity for a hearing with the participation of all necessary parties in terms of Order 53 of the **Civil Procedure Rules**.

6. It was revealed that whereas the Ex-parte Applicant and the Interested party were involved in various litigious matters over the same subject matter to wit ELC Case.No.525 of 2013 and Civil Appeal No. 45 of 2009, all this litigation was not brought to the attention of the court and had been, then the court would have ordered the *ex parte* applicant to serve the applicant with the documents and it would have had an opportunity to bring all this to light.

7. In opposition to the application it was averred that when these proceedings were instituted, the Applicant was not a party who needed to be joined to the case and this is because they had already filed cases seeking preservation orders both in the High Court and Court of Appeal and all had been ruled against them. To the ex parte applicant, the only issue outstanding in respect of the suit property was between themselves and the Department of Lands who had delayed to issue the title to them. It was therefore their case that the joining the Applicant to this case will not add any value to the case, whether now or in the past since the ex parte applicant is now the registered proprietors of the suit property.

8. It was contended that this court is now *functus officio* and cannot revisit this matter.

Determinations

9. I have considered the application and this is the view I form of this matter.

10. The applicant's case is that although it has interest in the suit property, it was never served nor joined to these proceedings. The ex parte applicants on the other hand seem to be of the view that since the orders sought herein did not affect the applicant there was no reason to serve the applicant in the instant application.

11. Order 53 rule 3(2) of the *Civil Procedure Rules* provides:

The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.

12. It is therefore a mandatory requirement that the notice of the application ought to be served on all persons directly affected. In this case, it is contended that the interested parties are persons directly affected by the decision sought to be set aside since they claim interests in the suit land. It is not in doubt that they were neither parties to the application which gave rise to the judgement herein nor were they served.

13. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456:**

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.” [Emphasis mine].

23. It is therefore clear that it is not the perceived hopelessness of a person's case that determines whether

or not he ought to be heard in a decision likely to adversely affect him since under Article 19 of the Constitution the right to be heard is a fundamental human right that is not given by the State as human rights are generally universal and inalienable rights of human beings only given recognition by the Constitution. In **Egal Mohamed Osman v Inspector General of Police & 3 others [2015] eKLR** at page 7 the Court at the time referred to **The Management of Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

“It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing.”

14. Therefore the omission to afford the interested parties an opportunity of being heard by omitting them from the proceedings altogether, though the *ex parte* applicants were aware that they were making some claim to the suit property, was a breach of their fundamental rights as envisaged under Article 47 of the Constitution and that is a reason to set aside the proceedings herein.

15. As was held by the Court of Appeal in **CMC Holdings Ltd vs. Nzioki [2004] KLR 173**:

“In an application for setting aside *ex parte* judgement, the Court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst other an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle. In the instant case the learned trial magistrate did not exercise her discretion properly when she failed to address herself as to whether the appellant’s unchallenged allegation that its counsel did not inform it of the hearing date for the hearing that took place *ex parte* and hence it would appear was true and not if true, the effect of the same on the *ex parte* judgement was entered as a result of the non-appearance of the appellant and on the entire suit. The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate...The second disturbing matter which arises from the decision of the learned magistrate in dismissing the application for setting aside the *ex parte* judgement is that in so dismissing the same application, the learned trial magistrate does not appear to have considered whether or not the defence which was already on record was reasonable or raised triable issues. The law is now well settled that in an application for setting aside *ex parte* judgement, the Court must consider not only the reasons why the defence was not filed or for that matter why the applicant failed to turn up for the hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if draft defence is annexed to the application, raises triable issues. The Court has wide discretion in such cases to set aside *ex parte* judgement. In the instant case, the defence and counterclaim was already in the file when the matter was heard *ex parte* and the trial magistrate stated that she considered the same and dismissed the same defence and counterclaim when the appellant was not in court to put forward its case. Further it appears that certain matters raised in the defence were not considered at all and indeed could not be considered without the appellant’s input...What the Trial Court should have done when hearing the application to set aside the *ex parte* judgement was to ignore her judgement on

record and look at the matter afresh considering the pleadings before her and see if on their face value a prima facie triable issue (even if only one) was raised by the defence and counterclaim. If the same was raised, then whether the reasons for the appellant's appearance were weak, she was in law bound to exercise her discretion and set aside the *ex parte* judgement so as to allow the appellant to put forward its defence. Of course in such a case, the applicant would be condemned in costs or even ordered to pay thrown away costs. The learned judge should not have considered what the learned Trial Court had concluded on the evidence before her but should have in the same way looked at the pleading and considered whether a triable issue was raised by the defence and if so, then the appeal should have been allowed”.

16. In Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

17. Consequently I find merit in the application.

Order

18. In the result, I hereby set aside the judgement entered herein and grant leave to the interested parties to defend these proceedings which will be heard de novo. I hereby direct that a prohibitory order be registered against the suit property in order to preserve the substratum of these proceedings in the state in which it is currently.

19. The costs of the application shall however be in the cause.

Dated at Nairobi this 27th day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mcronald for Mr Gatheru Gathemia for the ex parte applicant

CA Mwangi