



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 33 OF 2015 (JR)

**IN THE MATTER OF: AN APPLICATION BY NANCY KAVUTHA MUYSYOKI FOR LEAVE
TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS**

AND

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 AND JUDICATURE ACT
LAWS OF KENYA**

AND

**IN THE MATTER OF: SRM MISC. APPLICATION NO. 100/2014 NANCY KAVUTHA
MUSYOKI VS. THE REGISTRAR OF TITLES MOMBASA & JANET MWENDWA**

AND

IN THE MATTER OF: THE REPUBLIC OF KENYA

VERSUS

HON. RESIDENT MAGISTRATE B.M. EKHUBI.....RESPONDENT

AND

1. THE REGISTRAR OF TITLES MOMBASA.....INTERESTED PARTY

2. JANET MWENDWA.....INTERESTED PARTY

EX-PARTE APPLICANT: NANCY KAVUTHA MUSYOKA

RULING

1. This Ruling relates to an **Application** by way of a Notice of Motion dated 2nd September, 2015 in which the ex parte Applicant, **Nancy Kavutha Musyoka**, sought -

(a) an order of certiorari to issue for purpose of quashing all the proceedings in Senior Resident Magistrate's Court at Mombasa Misc. Application No. 100 of 2015 **between** Nancy Kavutha Musyoka vs. Registrar of Titles Mombasa and Janet Mwendwa and the decision dated 28th April, 2015 by the First Respondent;

(b) an order of mandamus to issue directed at the First Interested Party to rectify the Title Register and reinstate the Applicant's Certificate of Title in Plot No. 4612 Section II Mainland North;

(c) the costs occasioned by the Application be provided for.

2. The Application was supported by the Affidavit of the Applicant Verifying the Facts sworn on 12th August, 2015, and the grounds set out in the Statutory Statement also dated 12th August, 2015, all attached to the Chamber Summons dated 12th August, 2015 and filed on the same day seeking leave to commence judicial review proceedings, the subject of this Ruling. In addition, counsel for the ex parte Applicant also filed submissions dated 11th March, 2016 together with authorities referred to therein.

THE APPLICANT'S CASE

3. The Applicant's case is simply that the sale, transfer and registration of the property known as Mombasa/Block II/MN/4612 (the suit property) to the Second Interested Party was illegal and fraudulent and procedurally improper on ground that the suit property was under-valued and the issue of the Provisional Certificate was not gazetted, and the creation of the skeleton file in the Lands Registry was unlawful. The ex parte Applicant contended that the issue of the vesting orders on 28th April, 2015 was unprocedural and irregular and procured through fraud and in breach of the rules of natural justice.

4. Counsel also contended that the Second Interested Party failed to disclose material facts and thus deliberately misled the court, and which conduct is scandalous, frivolous and an abuse of the court process.

5. In support of the submissions counsel relied upon the decisions in **KARANJA VS. ATTORNEY GENERAL** (Civil Appeal No. 310 of 1999) that –

“...an order made without jurisdiction is a nullity and no amount of legal ingenuity can make it valid...”

6. On the question of fraud, the Applicant's counsel argued that she was always in possession of title, and the Second Interested Party never sought from her whether she held the original title, hence counsel argued the creation of skeleton file for the issue of a Provisional Title was done in collusion between the First Interested Party the Registrar of Titles, who was at all times aware of the existence of a caveat which would not be removed without involvement of the ex parte Applicant the registered proprietor of the suit property. The creation of the skeleton file was to defeat justice. Whoever seeks equity must do equity.

7. The Applicant also faulted the basis of advertisement for the sale of property, as clearly the application dated 24th March, 2014 was in respect of movable property, and not immovable property. Besides, the sixty (60) days' notice in the Gazette is mandatory and failure to advertise, is an offence under Section 163 of the Land Registration Act.

8. For all the above reasons counsel for the ex parte Applicant urged the court to grant the orders sought.

THE 2ND INTERESTED PARTY'S SUBMISSIONS

9. The application was opposed by the Second Interested Party, **firstly** through the Replying Affidavit of Janet Mwendwa, the said Second Interested Party, sworn and filed on 10th November, 2015, and **secondly** the written submissions of counsel for the Second Interested Party dated and file don 6th April, 2016. The Second Interested Party's grounds in opposition to the application were these –

(a) the decree in the lower court was issued following a consent between the ex parte Applicant, her husband (Peter Masya), (the plaintiffs in the RM's Civil Suit No. 2225 of 2013);

- (b) the ex parte Applicant and her husband admitted being indebted to the plaintiffs and hence the decree;
- (c) the ex parte Applicant and her husband are therefore estopped from challenging the execution process and the title to the property;
- (d) the issue of pecuniary jurisdiction is irrelevant, as the sum claimed in the lower court was within the pecuniary jurisdiction of the court;
- (e) the value of the land was never the subject matter of the Resident Magistrate or the Senior Resident Magistrate's Court in Misc. Application No. 100 of 2015;
- (f) the ex parte Applicant had deliberately omitted to join the plaintiffs as interested parties to hide the evidence that the Second Interested Party lawfully purchased the property of the ex parte Applicant and her husband (Peter Masya);
- (g) the matter lies within the environment and land court and not this court.

10. In this regard, counsel for the Second Interested Party relied on the cases of **KENYA NATIONAL EXAMINATIONS COUNCIL VSL. REPUBLIC [1997]eKLR**, that courts do not issue orders in vain by making futile orders, and **secondly** that it has always been a policy of the law to prevent a multiplicity of suits on one issue.

ANALYSIS OF SUBMISSIONS

11. The first question for me to determine is the question of jurisdiction. **Firstly**, the application herein is about judicial review not a civil suit. In exercise of its judicial review jurisdiction, this court, is not exercising its civil or criminal jurisdiction. Section 8 of the Law Reform Act (Cap 26, Laws of Kenya) clearly states that the court shall not in its civil or criminal jurisdiction issue any of the prerogative (judicial review) orders of certiorari, prohibition or mandamus. That is equally correct of the Environment and Land Court. Judicial review is not about the merits of the case, it is about the decision-making process. The application is not about ownership, or title to land. It is about the process of making orders by the lower court, and sale of land following orders of court. The question in judicial review is not about who owns the land or title thereto, but was the acquisition lawful, (hence the question of "illegality"), was the acquisition procedural (hence procedural "impropriety"), was the decision reasonable on irrational (hence the question of "irrationality", "unreasonableness" and the breach of the rules of natural justice). I am therefor satisfied that this court has the necessary jurisdiction to determine the application herein.

12. The order of **certiorari**, (the quashing order) is issued by the court to quash the decision of a lower or subordinate court, authority, body or person on grounds of illegality, irrationality or procedural impropriety.

13. What is not in dispute is that the Plaintiffs Nancy Kavutha Musyoki (the Applicant) and her husband Peter Masya, owed Rose Waikibia and Jane Abuodha (third parties), a sum of Kshs. 176,000/= which they admitted and judgment was duly entered. That sum grew to over Kshs. 352,000/= with costs and interest. Peter Masya was committed to civil jail for six months for failure to pay. However his wife, Nancy Masya came to the rescue and offered her title for the said suit property as a guarantee for the release of her husband from civil jail. The couple failed to pay, hence the process for sale of the property commenced. A notice of sale and sale of immovable property was issued on 24th December, 2014 pursuant to orders granted in Mombasa Resident Magistrate's Court Civil Case No. 2225 of 2013, to satisfy the decretal sum of Kshs. 352,250/=.

14. The ex parte Applicant was well aware what would happen if she and her husband failed to pay the decretal amount. The suit property, of which she had handed title to the Plaintiff's Advocates, would most likely be sold to satisfy the decretal sum. To say that she was always in possession of the title is

truly being uneconomical with the truth – she had handed over the title to the Plaintiff’s Advocates. The property was sold by public auction to the Second Interested Party.

15. Besides under Section 60B of the Transfer of Property Act, and Section 99 of the Land Act, 2012 a purchaser at a public auction has no obligation to inquire as to whether the auction is due or not, or proper, or as to the application of the purchase moneys. I find no illegality, irrationality or procedural impropriety in the sale in this matter.

16. Consequently, I find no merit in the ex parte Applicant’s Notice of Motion dated 2nd September, 2015 and filed on 4th September, 2015. It is dismissed with costs to the Second Interested Party.

17. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 17th day of May, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

No Appearance for Applicant

Miss Lutta for Respondent

Miss Lutta for 1st Interested Party

No Appearance for 2nd Interested Party

Mr. S. Kaunda Court Assistant

No Appearance for 2nd Interested Party

Mr. S. Kaunda Court Assistant