



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO.5 OF 2013

JOY MUGASIA LWENYA

LEVY AMIANI SANGALE.....PETITIONERS/APPLICANTS

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE DIRECTOR OF SURVEYS.....2ND RESPONDENT

THE PERMANENT -MINISTRY OF LANDS.....3RD RESPONDENT

RULING

1. This ruling follows the filing of submissions on the application dated 5/4/2013 and filed on the same date. The application is a Notice of Motion brought under Articles 20,22 and 23 of the Constitution of Kenya, 2010, rules 20,21 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental rights and freedoms of individual) High Court Practice and Procedure Rules, 2006, and Sections 7 and 19 of the 6th Schedule in the Constitution.

2. The applicants are **JOY MUGASIA LWENYA** and **LEVY AMIANA SANGALE** but one **FRED KIRUNGA ADAKA** has a power of attorney from both and is conducting the matter on their behalf. The application is against **THE HON ATTORNEY GENERAL (1ST RESPONDENT)**, **THE DIRECTOR OF SURVEYS (2ND RESPONDENT)**, and the **PERMANENT SECRETARY, MINISTRY OF LANDS (3RD RESPONDENT)**.

3. The properties in dispute are **KISUMU/KANYAKWAR "B"/1776** and **1778**. The two applicants used to hold titles to the properties but the respondents are said to have cancelled the titles and issued new ones in their place. This necessitated the filing of the petition herein but before the petition is heard and determined, the applicants felt they wanted some interlocutory orders. That is why this application was filed.

4. Prayer 1 in the application is spent and so also is the aspect of Prayer 2 dealing with a restraining order meant to run until determination of the application. To be precise, that aspect of prayer 2 comes to an end when this ruling is delivered.

5. As of now, the relevant prayers are as follows:

(a) That a conservatory order in the nature of injunction be issued to stop the respondent from

further dealing with Land Parcel numbers **KISUMU/KANYAKWAR”B”/1776** and **1778** pending the hearing and determination of the petition.

(b) That a mandatory injunction do issue by way of conserving the petitioner's right to property and directing the 2nd and 3rd respondents to issue title documents for land parcels Nos. **KISUMU/KANYAKWAR “B”/1776** and **1778** (hereafter suit properties) pending the hearing and determination of the petition herein.

c. That costs of the application be borne by the respondents.

These prayers are styled as 2,3 and 4 in the application.

6. The application is premised on the grounds that the respondents have issued other titles to the suit properties, with the new titles being **KISUMU/KANYAKWAR “B”/2386** and **2387**.

7. There is a Supporting affidavit accompanying the application where the petitioners are said to have bought the suit properties from one Jakob Nyakwa Ojwang at a consideration of Kshs.4,400,000. The petitioners were then issued with titles but they later got to learn that their titles had been cancelled and new ones had been issued. The petitioners were not informed or consulted concerning the cancellation and they view the respondents move as an affront to their legal and constitutional rights to property.

8. The Respondents responded vide a replying affidavit sworn by P.R. **WANYAMA**. Wanyama explained that one **MURTAZA TAHARALI** complained that his land parcel No. **KISUMU/KANYAKWAR “B”/386** had been sub divided by some unknown persons without his consent. **MURTAZA** availed his original title deed. **WANYAMA**, who was the Provincial Land's Surveyor, consulted with the Land Registrar who confirmed that the land parcel belonged to **MURTAZA**.

9. The Registrar revealed too that sometime in April 2012 one Jakob Nyakwar Ojwang purported to be the registered owner and caused sub division of Murtaza's parcel of land, with the resulting parcels being parcels numbers 1776, 1777, and 1778. It appears that the applicants then bought parcels numbers 1776 and 1778 from Jacob Nyakwar Ojwang.

10. It was then decided that the ownership of the land had to revert to Murtaza. That is how the applicants' titles were cancelled. Murtaza then decided to sub divide his land and that is how land parcels 2386 and 2387 came into being.

11. The applicants filed a supplementary affidavit and reiterated their ownership of the suit properties. They averred that the respondents acted ultra-vires. They were not consulted, they said, and no effective transfers therefore could have taken place.

12. The Applicants filed their submissions on 7/1/2013. The court was told that the respondents action violated the applicant's property rights under the constitution. And the conservatory order of injunction sought is meant to ensure that the rights of the applicants are not rendered nugatory before interpartes hearing. The applicants, it was submitted, have availed copies of titles issued to them. They are, it was argued, the owners of the suit properties.

13. For effect and guidance, the decided cases of **GLADYS BOSS SHOLLEI VS JUDICIAL SERVICE COMMISSION & 3 OTHERS: HCC PETITION NO 421/2013, NAIROBI** and **MILCAH JERUTO TALLAM T/a MILCAH FAITH ENTERPRISES VS FINA BANK LTD & Another: HCC NO.332/2012, NAIROBI**, were availed to show circumstances in which conservatory orders can be issued. The aim, it seems to me, is to ensure that the applicant's rights are not rendered nugatory before hearing (**GLADYSBOSS SHOLLEI's case**) and the necessary prerequisite before granting is that the suit must be founded on allegations of violation of fundamental freedoms (**MILCAH JERUTO's case**).

14. On mandatory injunction, the court was told it has power to issue it at interlocutory stage. It was

stated that in this case, the applicants are the owners of the suit properties. The respondents have cancelled the applicants titles. And the damages the applicants may suffer would be difficult to quantify in monetary terms. All this, it was submitted, makes this case a suitable one for grant of mandatory injunction.

15. The respondents submissions were filed on 13/11/2013. It emerges from the submissions that the applicant's titles were issued in error and that is why they were cancelled. The original owner of the land emerged to claim interference with his ownership and upon consideration of his claim, the applicants titles were cancelled. According to the respondents, the applicants were conned and they contributed to their predicament. The land was originally owned by **MURTAZA TAHERALI** as parcel No. **KISUMU/KANYAKWAR/"B" 386** and the applicants didn't show that Murtaza sold the land to them. It was submitted that the director of surveys realized the mistake made in issuing the applicants with titles and decided to rectify the mistake.

16. It appears to me that the applicants bought the suit properties from one Jacob Nyakwar Ojwang who must have convincingly represented to them that he was the owner of the suit properties. They are still convinced that he was the owner for in the predicament now facing them in this suit, they have not deemed it necessary to bring him on board.

17. But the Respondents story is unravelling. The applicants, it was said, were victims of a con game. The real owner of the land – one **MURTAZA TAHARALI** – later emerged to complain that strangers were interfering with his land. He urged his case at the respondents office and the office got convinced that he was telling the truth. What followed was cancellation of the applicant's titles and reversion of the land to Murtaza Taharali.

18. It seems to me that with this new development, the applicants needed to consider enjoining both Jacob Nyakwar Ojwang and Murtaza Taharali to the case. But this is not done and I am expected to issue injunctive orders which will affect the status of ownership of the suit properties without giving Murtaza a hearing.

19. In my view, a full picture is hard to emerge in this case if Jacob and Murtaza are not enjoined to give their side of the story. The overall impression created after reading what is presented by both sides is that the respondents were not motivated by ill-will in doing what they did. They realized they had done a mistake and rectified it.

20. I also note that title to the land has already changed. The suit properties are now officially known as **KISUMU/KANYAKWAR "B"/2386 and 2387**. Prayer 2 seeks to stop further dealings with the suit properties as known immediately before the changes were effected. This presents the first difficulty in granting the order, for it is certain that the respondents are no longer custodians of ownership records of that description. The prayer as formulated therefore shows some inadequacy. The description should match the current status.

21. But even if we assume that the prayer was well formulated with description of the suit properties as was then and is now, the reality that the current status shows a new owner not enjoined in the suit would still pose a problem. I would still hesitate to issue an order affecting a person who is not a party to the suit.

22. A further look into the possibility of granting the prayer presents another problem; viz: It is not clear to me what further dealings with the suit properties are anticipated to be. Normally, the respondents are involved in the process upto, and including, issuance of titles. The issuing of titles is normally the final stage. I would understand the import of the prayer sought if the applicants had discovered what the respondents were doing and sought to stop it. But as things stand, new titles deeds are already issued and the nature and character of ownership has changed. What then are the further dealings the Applicants are trying to prevent? The applicants needed to be more specific. They needed for instance to say whether they are talking of another transfer, another sale, or charge or whatever.

23. When all this is considered, it is clear that the prayer, if granted, could be unjust or in vain. It would be unjust to the extent that it could affect persons who are not parties to the suit. It could be in vain to the extent that the official description of the property has changed, and is now different from what the prayer states.

24. There is also the prayer for a mandatory injunction. The prayer seeks to have the suit properties revert to Applicant's ownership. The suit properties are in the name of Murtaza. The mandatory order sought will therefore affect Murtaza. The court has not heard Murtaza. Indeed, Murtaza is not a party to this suit. How then can we issue an order affecting him without hearing his side of the story? It wouldn't be fair.

25. A mandatory injunction is also not a remedy that is easily available to a litigant. It is only easily available where the plaintiff's case is clear and incontrovertible. Such cases are not common and indeed, this is not one such case. If I were to be minded to grant such order in this case, I would expect the applicants to show a very strong probability of future infringement of their rights. And I wouldn't stop there. I would also expect to be shown that the ensuing damage would be very serious. None of this is shown in this matter and I am not persuaded that I should give a mandatory injunction.

26. The upshot is this when all is considered: The application herein is not merited. The justification for the prayers sought is not demonstrated in accordance with the applicable law and standards. I therefore dismiss the application with costs.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Diang'a – Court Clerk

No party – present

Interpretation – English/Kiswahili

Lore for Yogo for Petitioner

M/s Langat (AG's office for Respondent.

COURT: Ruling on application dated 5/4/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/1/2015

AKK/vaa.