



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW CONSTITUTIONAL DIVISION

MISC. APP. NO. 46 OF 2002

REPUBLIC..... APPLICANT

VERSUS

THE REGISTRAR OF TITLES

THE ATTORNEY GENERALRESPONDENT

AND

1. SAIDA TWAHIR MOHAMED HATIMY
2. ALHAD MOHAMED HATIMYINTERSTED PARTIES

EX PARTE KALIDAS KANJI (AFRICA) LTD.

JUDGMENT

Introduction

0. By Notice of Motion dated 4th March 2002 and amended on 3rd July 2002, the Applicants who claims to be a Chargee over the suit property herein sought relief in terms of an order of Mandamus against the 1st respondent Registrar of Titles as set out in the Statement in the following specific terms:

“An Order of Mandamus directed to the Registrar of Tiles, Mombasa to exercise his powers in terms of section 60 of the Registration of Titles Act (cap 281 Laws of Kenya) to wit to summon SAIDA TWAHIR MOHAMED HATIMY of Post office Box Number 81703 Mombasa to deliver up Certificate of Title No. CR 33878 dated 2 November 2000, in respect of Sub-division NO. 8826 (Original No 143/2) Section I Mainland North as delineated on Survey Plan NO. 177959 annexed to the said Certificate of Title and registered as C.R. NO. 3878/1 and to revoke the same and also revoke transactions, if any, carried in respect of the said land subsequent to the issue of the said Certificate of Title and in reliance upon the said Certificate of Title.”

Facts of the Case

0. The summary of facts of the case which were undisputed were that the suit property plot No. 143

Section I Mombasa Mainland North was registered in the names of Kalidas Kanji & Co. Ltd. and Taher Mohamed Hatimy the latter who charged his undivided half share interest to the ex parte applicant herein, Kalidas Kanji (Africa) Ltd. In a suit Mombasa HCCC NO. 71 of 1988 (OS) where Sheikh Abdulrehman Mohamed Hatimy and Haji Mohamed Sheikh Hatimy, executors of deceased co-owner of the suit property Taher Mohamed Hatimy sued his co-owner Kalidas Kanji & Co. Ltd. the Court (Wambilyangah J.) on 23rd May 1995 approved a subdivision of the suit property grant plots 1-96 to the Kalidas Kanji & Co. Ltd and plots 97-184 to the plaintiffs.

0. In a suit Mombasa HCCC NO. 29 of 1994, the ex parte applicant herein, Kalidas Kanji (Africa) Ltd successfully sued for recovery of the principal and interest monies due under the charge and obtained judgment against the said executors of the deceased co-owner of the suit property with the other co-owner, Kalidas Kanji & Co Ltd as a Third Party by Judgment of the Court (Ang'awa J.) made on 15th February 1996. There was no successful appeal from the judgment of the High Court after the appellants sole surviving executor of the deceased Chargor did not furnish security for stay of execution pending appeal. [As at March 2011, the monies under the charge were said to stand at Ksh.111,128,045.10.]
0. When the ex applicant herein as chargee sought by way of execution of the decree pursuant of the judgment to realise the undivided half share subject of the charge, objection proceedings were filed by the administrators of the Estate of one of the Executors to the co-owner/chargor of the undivided half share in plot 143 Section I MN and the 1st Interested Party. The objection proceedings were dismissed by the Court on 21st February 2001.
0. However, subsequently on 28th March 2001, the 2nd Interested Party herein filed another Objection Proceedings from whose affidavit in support the 2nd Interested Party it emerged as follows. The plots 1-96 created out of the subdivision of plot no. 143 Section MN was designated No. 8827 (original 143/2) Section Mainland North and the parcel comprising plots 97-184 was designated No. 8826 (Original 143/2) Section I Mainland North and registered in the name of the 1st Interested Party and certificate of title issued on 2nd November 2000. The 1st Interested party subsequently transferred the suit property to the 2nd Interested Party for a consideration of Ksh.800,000/- and transfer was registered on the 7th November 2000.
0. In a replying Affidavit by Mohydean Mohamed Mohamed Hatimy an attorney under a power of Attorney from the 2nd Interested Party, sworn on 6th May 2010, the respondent states that the 1st Interested Party passed on on the 5th February 2009 and objects that the applicant has not sought to join the deceased's personal representatives. It is further stated the suit property is also the subject of proceedings in HCCC 33 of 2003.
0. It appears from the Plaintiff in HCCC No. 33 of 2003 dated 8th February 2003 that the ex parte applicant as Plaintiff in the suit has sought judgment against the Interested Parties, who are the 2nd and 1st defendants, respectively, and two others for reliefs on the suit property as follows:
 - a. ***To set aside the Transfer dated 7 November 2000 executed by the Second Defendant in favour of the First Defendant;***
 - b. ***Damages limited to the difference between the price the sale of the deceased Chargor's interest in the charged property would obtain and the amount due to the plaintiff under the charge;***
 - c. ***An injunction to restrain the First [Defendant] by himself his servants or agents or otherwise howsoever from dealing with the land comprised in the transfer dated 7 November 2000;***
 - d. ***An account of all the monies received by him on disposal of sub-plots comprised in the transfer;***
 - e. ***An order requiring the Second Defendant to deposit in Court the sum of Ksh.800,000/-paid to her by the First Defendant;***
 - f. ***Costs of and incidental to this suit."***
0. In their Defence dated 12th March 2004, the defendants deny the plaintiff's averments on the existence of the Charge, the order for subdivision of the suit property by Wambilyangah, J and the judgment on the Charge amount by Ang'awa, J, and also pleaded ***re judicata*** in respect to the finding of the court in HCCC NO. 29 of 1994 made on the 28th August 2003.
0. In its ruling of 28th August 2003, in HCCC NO. 29 of 1994, the applicant's suit against the

executors of the deceased chargor of the suit property, the Court (Khaminwa, J.) upon the 2nd Interested Parties objection proceedings application dated 30/4/2001, made findings of fact reviewing the court's earlier finding of the 21st February 2003 referred to above, and ruled as follows:

“I have perused the application, affidavits sworn by the parties with annexures. I am satisfied that the Objector was on 7/11/2000 registered as owner of plot in dispute under certificate of title CR 33878. The law relating to registration of land guarantees title. These objection proceedings are not appropriate to go behind the documents of registered title because [of] the allegations of fraud or otherwise.

I am satisfied that the property attached belongs to the objector. [I]f it is desired to prove fraud in avoidance of execution of a decree the same should be pursued through other methods.

In my earlier (21/2/2001) ruling I said that the property of the deceased could be attached in execution of his debts without seeking substitution under Order 23 Civil Procedure Code. There is no evidence before the Court that the said Saida has not lawfully acquired the title and told it to the present Objector.

For above reasons, I find the Objector is the registered owner of the property in dispute and the attachment is hereby lifted. The application is allowed, order granted as prayed with costs.”

0. An order of Mandamus granted in this judicial review proceedings by Mwera, J as he then was on 16th December 2004 after hearing the counsel for the ex parte applicant in the absence of the respondent and the Interested Parties - who had not been served with the application - was set aside by the learned judge on the 9th September 2005 upon an application by the Interested Parties whom the Court found should have been served as “they were persons directly affected by virtue of their interest in the subject property.”

Submissions

0. The parties filed written submissions, with exception of the Respondents who did not wish to put in any submissions, and when the matter came up for hearing on 11/11/2014, Counsel for the parties - Mr. Jiwaji for the Applicant, Miss Namahya for the Respondents and Mr. Mwakisha for the Interested Parties – indicated that they wished to rely on the written submissions without supplementary oral submissions, and ruling was reserved.
0. For the ex parte applicant, the principal submission was that the existence of a charge on the undivided half share of the deceased Chargor made all the transactions on the suit property, including order by the Court (Wambilyangah J.) that the suit property plots be divided as aforesaid, were null and void. In addition, the ex parte applicant's submissions also challenged the registration of the 1st Interested Party and issuance of a certificate of title to her without a valid transfer by the administrators of the deceased chargor and consent of the ex parte applicant as chargee. Consequently, it was submitted, the transfer to the 1st interested party, without the same being made subject to the charge, was not valid.
0. The ex parte applicant's submissions packaged its case [and obviously also its pain at the loss] as follows:

“E. All the family members of the Deceased Second Co-owner and Chargor and their advocates, particularly Mr. Sagasi, being legally cognizant of the Charge in favour of the Applicant/Chargee (including Justice Wambilyangah), ignored the legal implications of the Cjarge against the Title and are now disposing off the illegally Subdivided Plots and in the process rendering the Applicant/Chargee having

a Registered Charge but not worth the cost of the paper on which it is written and substantial amounts of money are payable to the Applicant/Chargee on the Charge, plus interest and legal costs of the High Court and the Court of Appeal and the Court of Appeal ultimately declined to hear the Appeal as the Order made by Justice Hayanga for security was never complied with by the sole surviving Executor (Annexure “AC-3” attached for easy reference) and the Appeal abated.”

0. The respondent’s counsel chose to remain neutral and therefore made no submissions.
0. For the Interested Parties, a case was asserted of indefeasible title of a registered proprietor under section 23 of the Registration of Titles Act cap 281, tracing the Interested Parties’ titles back to the order of Wambilyangah ,J. of 23rd May 1995 in HCCC 71 of 1988 (O.S) in which the learned judge apportioned the plots created by subdivision of the suit property, from which they submitted there had been no challenge before any court of law.
0. Counsel for the Interested Parties also pointed to other factors which militate against the grant of the order of Mandamus as follows:
 - a. That the specific prayer that the Registrar of Titles summons the 1st Interested Party Saida Tahir to deliver up for revocation the tile to the suit property is incapable of being effected as the said Saida is since deceased and, in any event, she already transferred her title to the 2nd Interested Party.
 - b. Issue of fraud and or collusion apparent arising from the nature of the ex applicant’s allegations herein can only properly be resolved through ordinary action where evidence may be taken and tested by cross-examination.
 - c. The pending civil suit (HCCC 33 of 2003) should adequately redress the Applicant’s grievance.

Determination

0. I have considered the pleadings, affidavit evidence and the submissions by counsel in this matter and I take the view that the dispute in these judicial review proceedings is governed by well-known principles of law and practice that -
 - a. The Judicial Review Court cannot determine the merits of the case. It is trite that proof of fraud and or collusion which is the core allegation made against the Registrar of Titles with participation of the Interested Parties and subtly, unfortunately, with some Judges of the Court must be proved by *viva voce* evidence and direct documentary evidence, where applicable, in an appropriate procedure of the Court. Fraud has a higher standard of proof than the normal preponderance of evidence or balance of probabilities employed in civil litigation. Judicial review which proceeds on the basis of affidavits is not the appropriate procedure for determining disputed matters of fact.
 - b. Under the Registration of Titles Act, a registered title can only be rectified by proof of fraud to which registered proprietor is shown to have participated. Section 23 (1) of the Registration of Titles Act provides that:

“23. (1) The Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The provisions of the section were retained in almost similar terms under section 26 of the new Land Registration Act 2012 which repealed the Registration of Titles Act.

- c. The court cannot supervise the proceedings of a superior court. Article 165 (6) of the Constitution ousts the jurisdiction of the Court in terms that:

“(6) *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*”

Findings

0. On the merits of the case, the ex parte applicant has a prima facie case that the Registrar of Titles was in breach of the law in having failed and or neglected to give effect to the ex parte applicant’s charge registered on the 12th March 1962 as entry No. 12, Presentation No. 105 and in failing to require a valid transfer to the alleged beneficiary Saida Twahir Mohamed Hatimy, the 1st Interested Party herein, by the executors (or administrators *de bonis non* following the death of the executors) of the deceased owner of undivided half share of the suit property which was the subject of the charge aforesaid.
0. However, the matter does not end there as by its ruling on 28th August 2003, the Court upheld objection proceedings by the 2nd Interested Party on the basis of transfer of the suit property for valuable consideration paid by him to the 1st Interested Party. Previously, although the issue of the charge and the liability of the Interested parties predecessors in title had been established by the Court in HCCC 29 of 1994, by the Judgment of Ang’awa J., the charge was not registered against the portions of land Nos. 97 – 184 created by subdivision of the suit property parcel No. 143/2 Section I Mainland North awarded to the said predecessors of title by the Order of Wambilyangah, J of 23rd May 1995 in HCCC NO.71 of 1988 (O.S). Moreover, in the suit HCCC NO. 33 of 2003 filed by the ex parte applicant, the defendants have not admitted by their Defence the facts of the Charge, the judgment of Ang’awa, J. and the order of Wambilyangah, J.
0. There is need for hearing of the dispute under the procedure of an action permitting oral and direct evidence, with discovery and cross-examination of witnesses, on the questions of the existence of the charge, its registration, the registration of the 1st Interested Party as owner by transmission without consent of the Chargor, the making of orders of subdivision of the suit property without an accompanying order for registration of the charge and the acquisition of a purchaser’s interest by the 2nd Interested Party and whether the Interested Parties were aware of the ex parte applicant’s charge and nonetheless colluded with the Registrar of Titles to defeat it by not giving it effect and issuing a certificate of Title to the 1st Interested Party and subsequently registering a transfer to the 2nd Interested Party.
0. Moreover, in the circumstances of the case, any order of judicial review would have the effect of exercising supervisory jurisdiction over proceedings of the superior courts presided by Wambilyangah, J. and Khaminwa, J., a jurisdiction which is expressly ousted by Article 165 (6) of the Constitution as set out above.
0. The path to mandamus in this case is also fraught with difficulties because of the following circumstances:
 - a. Upon the undisputed death of the Person to be bound by the order of Mandamus sought and no substitution of her personal representatives having been made, the order for Mandamus as sought is technically unavailable. Even if it could be saved by Article 159 principle of substantial justice without undue regard to technicalities, the fact that the title of the suit property has changed hands and the summons sought to deliver the certificate of title issued to the deceased 1st Interested party would be of no effect, as such title would no longer exist following the transfer.
 - b. The Order of the Court (Wambilyangah, J. in HCCC NO. 71 of 1988 (OS)) for the division of suit property without further order for registration of Charge on the new plots has not been reviewed or corrected by appeal. Neither has the order of Khaminwa J. in the Objection proceedings by the 2nd Interested Party where the court found that the Interested Party was a registered proprietor of the property as a purchaser for value.
 - c. As a registered proprietor, section 23 of the Registered Titles Act provides for indefeasibility of his title save on ground of fraud of which he is shown to have been involved.
 - d. The court has not heard as interested parties, persons who, to the knowledge of the ex parte

applicant, have acquired some plots of the suit property from the 2nd Interested Party. Order 53 rule 3 (4) of the Civil Procedure Rules requires that all persons directly interested be served with the application for judicial review and it is, indeed, on such ground that the order of Mandamus made herein by Mwera, J. (as he then was) on 16th December 2004 was subsequently set aside on the application of the Interested Parties herein.

0. It is not without regret that the court determines that the order for Mandamus sought in this case must be declined. The simple matter whether or not there was a charge and the liability of the respondents and person under whom they claim was litigated in and out of the High Court before three different judges and in the Court of Appeal. It does seem to the Court that the matter could have been more diligently and expeditiously brought to an earlier closure, but this court does not apportion blame on any participant between the ex parte applicant, the Interested Parties and or their predecessors in title, or the courts.
0. It was not disclosed the status or stage of disposal of the suit in HCCC NO. 33 of 2003 but this court must venture to suggest that that is the right forum for determination of the dispute in the circumstances of the case.

Orders

0. Accordingly, for the reasons set out above, the Notice of Motion dated 4th March 2002 and amended on 4th July 2002 is declined with no orders as to costs.

DATED SIGNED AND DELIVERED THIS 23RD DAY OF JANUARY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Thiaka for Mr. Jiwaji for the Ex parte Applicant

No appearance for the Respondent

Mr. Mwakisha for the 2nd Interested Parties

Mr. Murimi - Court Assistant.