



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW APPLICATION NO. 4 OF 2021

REPUBLIC.....APPLICANT

-VERSUS -

ASSETS RECOVERY AGENCY.....1ST RESPONDENT

LAND REGISTRAR, THIKA LAND REGISTRY.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

CHOSEN BUILDERS INVESTMENT LIMITED.....INTERESTED PARTY

FAMILY BANK LIMITED.....EXPARTE APPLICANT

JUDGMENT

Background

1. What falls for determination in this Judgment is a notice of motion dated 12/9/2019, brought by **Family Bank Limited (the exparte applicant)**. It seeks, inter alia, judicial review orders quashing and vacating a restriction registered on 15/4/2019 in the proprietorship section of the parcel register relating to Land Title Number **Mitubiri/Wempa Block 1/6824**. The parcel of land measures approximately 121.31 hectares. The land is registered in the name of **Chosen Builders Investments Limited** (the interested party). The restriction was registered by the Land Registrar (2nd respondent) at the behest of **The Assets Recovery Agency** (the 1st respondent), on the ground that the 1st respondent was investigating a fraud and money laundering case where the suit property had featured.

2. The exparte applicant contends that it advanced **Kshs 408,000,000** to the interested party to purchase the suit property and a charge was registered against the title to secure the loan. The interested party subsequently defaulted in the loan repayment. When the ex-parte applicant sought to realize the security, they discovered that a restriction had been registered on the title without the Land Registrar giving them a hearing in terms of **Article 47** of the Constitution and without a court order in terms of **Section 68** of the **Proceeds of Crime and Anti-Money Laundering Act**.

3. On its part, the 1st respondent contends that the ex-parte applicant discharged the title on 5/9/2018 and that there was no subsisting charge in the encumbrances section of the land register at the time they caused the restriction to be registered. Indeed, both the official search exhibited by the ex-parte applicant and the certified extract of the land register exhibited by the 1st respondent do not bear any subsisting registered charge in the encumbrances section of the parcel register as at 15/4/2019, the date when the impugned restriction was registered. The broad question to be answered in this judgement is whether the ex-parte applicant has proved a case to warrant grant of the judicial review orders sought.

4. The suit was filed in the High Court at Kiambu. It was subsequently transferred to Thika ELC. A significant development which took place during the pendency of this suit is that the ex-parte applicant, the 1st respondent, the 2nd respondent and the 3rd respondent filed a signed consent allowing excision of 50 acres from the suit property. The consent reads as follows:-

“BY CONSENT

1. The restriction by the Asset Recovery Agency placed on 15/4/2019 over Land Registration No. MITUBIRI/WEMPA BLOCK 1/6824 measuring approximately Three Hundred (300) acres is hereby lifted with regards to fifty (50) acres compulsorily acquired by the National Land Commission vide Gazette Notice No. 6601;

2. The restriction over the fifty (50) acres is hereby lifted to facilitate the registration of the mutation forms as required for the subdivision and processing of the Title for the said fifty (50) acres in the name of the Permanent Secretary – The National Treasury, on behalf of the Republic of Kenya;

3. The present suit being Thika ELC JR 4 of 2021 (formerly Kiambu HCJR 13/2019) – Family Bank Limited v Asset Recovery Agency, Land Registrar, Thika and another subsists with regards to the remaining Two Hundred and Fifty (250) acres.”

5. The consent was adopted by this court on 12/10/2021. The above development is significant because excision of the 50 acres would not be finalized without closing the old land register and opening new land registers. Consequently, in the absence of appropriate amendments to the motion to reflect the new survey numbers and land registers, the notice of motion under consideration may have been rendered redundant by the creation of new land registers.

Ex-parte Applicant’s Case

6. The case of the exparte applicant is contained in the notice of motion dated 12/9/2019; the statutory statement dated 26/8/2019; the verifying affidavit sworn on 14/8/2019 by Alex Mwangi Muriithi; the supplementary affidavit sworn on 12/3/2020 by Alex Mwangi Muriithi; and the written submissions dated 7/9/2021, filed by *M/s Waweru Gatonye & Co Advocates*. The exparte applicant identified the following as the four issues falling for determination in this suit: (i) Whether the decision of the 2nd respondent to place a restriction on the parcel of land subject matter of these proceedings is illegal; (ii) Whether the decision to place a restriction on the subject parcel of land is ultra vires; (iii) Whether the 2nd respondent’s decision is unreasonable and irrational; and (iv) Whether the 2nd respondent’s decision amount to a breach of the rules of natural justice. In summary, the ex-parte applicant contends that it is registered as a chargee on the title relating to the suit property, having wholly financed the purchase of the suit property by the interested party in the sum of Kshs 408,000,000. The charge subsists to secure repayment of the said loan. Consequently, the ex-parte applicant has a legal interest in the suit property.

7. The ex-parte applicant further contends that the restriction registered on the title was procured illegally and unconstitutionally because it was registered without following the procedure stipulated under **Sections 76 to 78** of the Land Registration Act, 2012 and **Section 68** of the Proceeds of Crime and Anti-Money Laundering Act. They further contend that the suit property is not a realizable asset within the meaning of **Section 2** of the Proceeds of Crime and Anti-Money Laundering Act.

8. Further, the ex-parte applicant contends that the restriction was procured in contravention of the provisions of **Section 4(3)** of the **Fair Administrative Action Act** and **Sections 76 and 77** of the **Land Registration Act** in that the ex-parte applicant was not accorded an opportunity to be heard. They add that the registration of the restriction was ultra vires because the 1st respondent did not obtain a court order in tandem with the requirements of **Section 68** of the Proceeds of Crime and Anti-Money Laundering Act. They term the decision to register the restriction as unreasonable and irrational on the ground that it failed to take into account the fact that the suit property was not a realizable assets within the meaning of the Act. Lastly, they contend that the registration of the restriction constitutes a breach of the rules of natural justice in the sense that they were not accorded an opportunity to be heard as contemplated under the Fair Administrative Action Act, 2012.

9. On the discharge of charge registered in the encumbrances section on 5/9/2018, counsel for the exparte applicant submits that this was a conditional discharge and not a full discharge. Counsel contends that the 2nd respondent who is the custodian of the land records had not disputed the factual averment relating to the conditional discharge. Counsel adds that there existed a caution by the ex-parte applicant registered in the proprietorship section of the land register on 12/3/2019 as entry number 6. Counsel urged the court to grant the judicial review orders sought.

Case of the 1st Respondent

10. The case of the 1st respondent is contained in the replying affidavit sworn on 10/2/2022 by **Fredrick Muriuki**, a police officer attached to the 1st respondent; and the written submissions dated 26/1/2021, filed by **S. Githinji**, Senior State counsel, on behalf of the 1st respondent. In summary, its case is that the 1st respondent received information from the Directorate of Criminal Investigations relating to fraud and theft of Kshs 1,052,746,094 from Ekeza Sacco by **David Kariuki Ngari**, Chairman of the said Sacco and a director of the interested party. Inquiry by the 1st respondent established that a sum of Kshs 1,052,746,094 had been fraudulently transferred from the accounts of the Sacco to the personal activities and companies associated with David Kariuki Ngari. Investigations further established that David Kariuki Ngari was a shareholder and director of the interested party. It was also established that David Kariuki Ngari used proxies such as registered companies in which he was a shareholder to launder the Sacco funds through purchase of properties in the names of proxies.

11. The 1st respondent adds that vide a letter dated 15/4/2019, the 1st respondent applied for a restriction to be placed against the land register relating to the suit property under **Section 76(1)** of the Land Registration Act to enable the 1st respondent finalize its investigations. It is the 1st respondent’s case that at the time of requesting the Land Registrar to place a restriction on the parcel register there was no encumbrance on the parcel register. The 1st respondent contends that Section 76(1) empowers the Land Registrar to place a restriction on parcel register for purposes of compulsory acquisition, prevention of fraud or improper dealing or for any other sufficient cause. It adds that the restriction is in place only during the period of investigations.

12. Counsel for the 1st respondent identified the following as the two key issues falling for determination in the motion: (i) Whether the decision of the 2nd respondent to place a restriction on the parcel register relating to the suit property is illegal and unconstitutional; and (ii) Whether the 2nd respondent’s decision to place a restriction on the parcel register relating to the suit property was unreasonable and irrational. Counsel for the 1st respondent submitted that the restriction was lawful, constitutional, and properly placed by the 1st respondent within the framework of Section 76(1) of the Land Registration Act. The learned senior state counsel added that given the circumstances outlined above, the decision to register the restriction was rational and reasonable.

Case of the 2nd and 3rd Respondents

13. The case of the 2nd and 3rd respondents is contained in the replying affidavit sworn on 17/6/2021 by **Joseph Wang'ombe Kamuyu**, a Land Registrar attached to Thika Lands Registry. He deposes that at all material times the 1st respondent was conducting investigations surrounding the interested party and in the cause of investigations, the 1st respondent established that the interested party and its director used proxies to launder funds through purchaser of properties. The 1st respondent obtained a copy of the parcel register relating to the suit property. Subsequently, on 15/4/2019, the 1st Respondent wrote to the 2nd respondent requesting the 2nd respondent to place a restriction on the suit property. Consequently, the 2nd respondent placed a restriction on the parcel register pursuant to **Section 76(1)** of the Land Registration Act, No 3 of 2012 which gives the Land Registrar the discretion to place a restriction for the purpose of compulsory acquisition, prevention of any fraud or improper dealing or any other sufficient cause. He deposes that the restriction was lawful and procedural. It is the case of the 2nd and 3rd respondents that the application is unmerited and an abuse of the court process. The 2nd and 3rd respondents elected not to file written submissions. They elected to adopt the written submissions filed by the 1st respondent.

Case of the Interested Party

14. The interested party did not file a response to the application. Similarly, the interested party did not file written submissions.

Analysis and Determination

15. I have considered the application, the responses to the application; and the submissions tendered to the court. I have also considered the relevant constitutional and statutory frameworks together with the prevailing jurisprudence on the key issues falling for determination in the application. Two key issues fall for determination in the application. The first issue is whether registration of the impugned restriction violated the ex-parte applicant's right to be heard prior to registration of the restriction. The second issue is whether the registration of the impugned restriction violated the relevant constitutional and statutory frameworks.

16. I have carefully examined the certified copy of the land register exhibited to the court. I have also examined the instrument of charge exhibited by the ex-parte applicant as exhibit **"AMM 4"**. Similarly, I have examined the certificate of official search exhibited by the ex-parte applicant as exhibit **"AMM 7"**. What emerges from the above documentary evidence is that the suit property was charged on **30/4/2015** to secure a sum of Kshs 408,000,000 lent to the interested party by the ex-parte applicant. This was entered in the encumbrances section of the land register as **entry number 1**. Secondly, on the same day, an entry was made in the proprietorship section as **entry number 5**, reserving the ex-parte applicant's rights under Section 87 of the Land Act. This means that during the subsistence of the charge, there was to be no dealings in the land register without the consent of the ex-parte applicant. Thirdly, on **5/9/2018**, the charge which subsisted as an encumbrance was discharged through registration of a discharge of charge as **entry number 2** in the encumbrances section. What this means is that, with effect from 5/9/2018, the charge which existed as an encumbrance in the land register in favour of the ex-parte applicant ceased to exist. Fourthly, on 15/4/2019, the day when the impugned restriction was registered, there was no subsisting charge in the encumbrances section of the parcel register. Consequently, without a subsisting charge as at 15/4/2019, the ex-parte applicant cannot be said to have been a chargee entitled to a hearing before registration of the impugned restriction.

17. The ex-parte applicant contends that what was registered on 5/9/2018 was a conditional discharge to allow for subdivision and processing of titles for bonafide purchasers. I do not agree with that contention. First, both the Land Act and the Land Registration Act do not envisage a conditional discharge. The law envisages a partial discharge in the event a portion of a charged land is to be partially discharged. The procedure for registration of a partial discharge is clear. It must comply with the requirements of **Section 22(2)** of the Land Registration Act which provides as follows:

"Upon the application of a proprietor of a parcel for the division of that parcel into two or more parcels, and authentication of the cadastral map, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register: Provided that nothing shall be done under this section that would be inconsistent with the provisions of this Act or any other written law."

18. Counsel for the ex-parte applicant did not submit on the statutory foundation of the alleged conditional discharge. Secondly, a look at the encumbrances section of the parcel register reveals that the word **"CONDITIONAL"** was inserted in the column relating to entry number 1 which relates to the charge. Thirdly, having discharged the title on 5/9/2018, the ex-parte applicant caused a caution to be registered in the proprietorship section of the same title on 12/3/2019, claiming a chargee's interest. I have no doubt that if a valid charge existed in the encumbrances section of the parcel register, there would have been absolutely no reason to cause a caution to be registered in the proprietorship section of the same parcel register.

19. Further, it is noted that the charge instrument contained the following framework on discharge:

"The bank may, at any time and without notice or demand and notwithstanding any settlement of account or other matter whatsoever, combine or consolidate all or any then existing accounts including accounts in the name of the Bank (whether current, deposit, loan or of any facility other nature whatsoever, whether subject to notice or not and in whatever currency denominated) or the Chargor alone or jointly with other wherever situate and set off or transfer any sum standing to the credit of any one or more of such accounts in or towards satisfaction of any obligations or liabilities to the Bank of the Chargor whether such liabilities be present, future, actual, contingent, primary, collateral, several or joint."

20. It is clear from the above clause that the charge did not contemplate a conditional discharge as contended by the ex-parte applicant.

21. The totality of the foregoing is that the ex-parte applicant did not have a subsisting registered charge in the encumbrances section of the parcel register. In the circumstances, the ex-parte applicant was not entitled to the right to be heard prior to the registration of the impugned

restriction. Consequently, there was no violation of the ex-parte applicant's right to be heard in relation to the registration of the impugned restriction.

22. The second issue for determination is whether registration of the impugned restriction violated the relevant constitutional and statutory frameworks. The court has already made a finding to the effect that no registered charge (encumbrance) subsisted in the land register at the time the impugned restriction was registered. Put differently, the ex-parte applicant did not have a subsisting registered encumbrance against the title. Against the above factual background, the ex-parte applicant has alleged that the 1st and 2nd respondents violated various statutes in procuring registration of the impugned restriction. The interested party has not challenged the restrictions.

23. The ex-parte applicant cited **Article 47** of the Constitution, **Section 4(3)** of the Fair Administrative Action Act, **Sections 68** of the Proceeds of Crime and Anti-Money Laundering Act (POCAMLA) and **Section 76** of the Land Registration Act. The court has made a finding to the effect that no registered charge (encumbrance) existed on the land register at the time the impugned restriction was registered and that the ex-parte applicant was not entitled to a hearing prior to the registration of the restriction. That finding disposes the contention that the constitutional and statutory requirement for a fair hearing under Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act were violated. It is therefore my finding that Article 47 of the Constitution and Section 4(3) of the Fair Administrative Action Act were not violated.

24. Similarly, I do not find merit in the allegation that there were violations of Section 76 of the Land Registration Act and Section 68 of the POCAMLA. My view is informed by various reasons. First, the 2nd respondent swore a replying affidavit in which he deposed that the impugned restriction was registered under Section 76(1) of the Land Registration Act. **Section 76(1)** provides as follows:-

“76.(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

25. My understanding of the above framework is that it gives the Land Registrar discretionary powers to place a restriction on a land register to: (i) facilitate the process of compulsory acquisition of the land; (ii) prevent fraud or improper dealings; (iii) for any other sufficient cause. There is evidence that the 1st respondent was investigating a fraud and money laundering case and requested the 2nd respondent to place the restriction against the suit property. A letter dated 15/4/2019 was exhibited and confirms that indeed the request was made. In the circumstances, the 2nd respondent cannot be faulted or said to have violated the provisions of Section 76 of the Land Registration Act. He properly acted within the framework of Section 76(1) of the Act.

26. The ex-parte applicant faulted the 1st respondent for failing to seek and obtain a restraint order from the court under **Section 68** of the Proceeds of Crime and Anti-Money Laundering Act. The said section provides as follows:-

68(1) The Agency Director may apply to a court ex parte for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.

(2) A restraint order may be made in respect of—

(a) realizable property as may be specified in the restraint order and which is held by the person against whom the restraint order is being made;

(b) all property which, if it is transferred to that person after the making of the restraint order, would be realizable property.

(3) A court to which an application is made under subsection

(1) may make a temporary restraint order if the court is satisfied that—

(a) a criminal investigation has been started in Kenya with regard to an offence; or

(b) there is reasonable cause to believe that a person leads a criminal lifestyle and has benefited from his criminal conduct.

(4) A restraint order shall provide for the period of the notice to be given to persons affected by the order.

27. My interpretation of Section 68 of The POCAMLA is that it is complimentary to the framework in Section 76(1) of the Land Registration Act. Where the exigencies of the case do not allow the prompt procurement of a court order, the Asset Recovery Agency can properly move the Land Registrar to preserve the property within the framework of Section 76(1) of the Land Registration Act.

28. Consequently, my finding on the second issue is that there was no breach of constitutional or statutory frameworks to warrant grant of the orders sought by the ex-parte applicant.

29. The result is that the ex-parte applicant has failed to demonstrate a case to warrant grant of the review orders sought in the motion dated 12/9/2019. Consequently, the notice of motion dated 12/9/2019 is dismissed for lack of merit. Since this dispute had elements of public

interest, there will be no award of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 14TH DAY OF FEBRUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Githinji for the 1st Respondent

Court Assistant: Lucy Muthoni