



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 193 OF 2013

IN THE MATTER FOR AN APPLICATION FOR ORDERS OF CERTIORARI

AND

**IN THE MATTER OF KAJIADO PRINCIPAL MAGISTRATES COURT MISCELLANEOUS
CIVIL CASE NI. 16 OR 2012**

AND

REPUBLICAPPLICANT

VERSUS

THE PRINCIPAL MAGISTRATE, KAJIADO LAW COURTS....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

RIKOYIAN OIPAKI OLE KUKU.....1ST INTERESTED PARTY

FLORENCE SOILA NGOSSOR.....2ND INTERESTED PARTY

**THE DISTRICT LAND REGISTRAR, KAJIADO.....3RD INTERESTED
PARTY**

EX-PARTE: ROOTS INVESTMENTS COMPANY LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 10th June, 2013 the *ex parte* applicant herein, **Roots Investments Company Ltd**, seeks the following orders:
1. **THAT this Honourable Court do call for the record of the proceedings in Kajiado Principal Magistrates Court Miscellaneous Civil Case No. 16 of 2012 and quash the same by way of Certiorari.**
2. **THAT the costs of this application be provided for.**

Applicant's Case

2. The Motion is supported by a verifying affidavit sworn by **Washington Karuru Kiiru**, the Chairman and the Managing Director of the Applicant on 6th June, 2013.
3. According to the deponent, the Applicant is the registered proprietor of Land Title No. KJD/KAPUTEI-NORTH/45336 (hereinafter referred to as the suit property) having purchased the same for valuable consideration from **Geoffrey Ndungu Gathii**, the then registered proprietor 2011. At the time of purchase, the land was part of KJD/KAPUTEI NORTH/2966 registered in the name of the said **Geoffrey Ndungu Gathii** who subdivided it into two parcels, namely KJD/KAPUTEI-NORTH/45336 and 45337. The former was transferred to the Applicant while KJD/KAPUTEI-NORTH/45336 was transferred to somebody else.
4. Sometimes in April 2013, the Applicant found a buyer for the land and therefore applied for the consent of the Isinya Land Control Board to transfer the same. However, when the Applicant's representative attended the Land Control meeting on 19th April 2013, the Applicant learnt that, **Rikoyian Oipaki Ole Kuku**, the 1st Interested Party, had objected to the consent being given to the Applicant claiming that he is the owner of the land and that he had filed Kajiado PMC Miscellaneous Civil Case No.16 of 2012. The board therefore deferred the application pending resolution of the court matter.
5. The deponent deposed that pursuant to an application by Chamber Summons, the court had, on 4th December 2012, ordered the Land Registrar Kajiado, to reconstruct the records/green card in respect of KJD/Kaputei-North/2966 which had been claimed to be registered in the name of **Florence Soila Ngossor**, the 2nd Interested Party. Pursuant to the order, the Land Registrar, vide Gazette Notice No. 3188 placed an advertisement in the Kenya Gazette to the effect that one *"Florence Soila Ngossor, is registered proprietor absolute ownership of the land containing 18 acres or thereabouts under Title No. KJD/Kaputei-North/2966 and whereas sufficient evidence has been adduced to show that the Land Title Deed issued thereof has been lost, notice is hereby given that, after the expiration of Sixty (60) days from the date whereof, I will issue a new Land Title Deed provided the no objection has been received within that period"*.
6. As the Applicant had hitherto be unaware of the proceedings, it applied to be joined to the same, and for the same be struck out as the court lacked jurisdiction to hear and determine the dispute. However, the magistrate, in his ruling deliver on 4th June 2013, dismissed the application but, ironically, directed applicant to appear before the Land Registrar Kajiado, the 3rd Interested Party, within 3 days failing which, the Executive Officers of the court would execute the transfer documents.
7. The deponent averred that the Applicant filed an objection o the issuance of the Title Deed in respect of KJD/Kaputei-North/2966 to **Florence Soila Ngossor**, as the effect of the order was to cancel the application title No. KJD/Kaputei-North/45336 without having been heard as required by the principles of natural justice.
8. According to the deponent, under **Environment and Land Court Act**, 2011, the jurisdiction to hear and determine land disputes has been given to the Environment and Land Court, established pursuant to Article 165(2)(b) of the Constitution. Section 12 of the Act gives the court the jurisdiction to hear and determine the dispute relating to environment and use and occupation of, and title to land and under Section 4(2) of the Act, the court has the status of the High Court, and is therefore presided by a Judge, not a magistrate yet the Kajiado Law Court is a subordinate court.
9. He contended that even under the old legal regime, the court would not have had preliminary jurisdiction since the Applicant purchased the land in 2011 for Kshs, 20,400,000/=.
10. Surprisingly, the 1st Interested Party, **Rikoyan Oipaki Ole Kuku** vide his application dated 16th May 2013, applied that the Executive Officer of the court execute the transfer documents to himself, and not to **Florence Soila Ngossor** as advertised in the Kenya Gazette. According to the deponent's investigations, ID Card No. 0791421, which the 1st Interested Party claims to be his, actually belongs to **Siliel Ole Suyianka Kimiti**, hence he believes that the 1st Interested Party does not exist and that this must be a conspiracy between the magistrate, the land registrar and the police to grab the Applicant's land.
11. The deponent deposed that unless an order of stay is issued the Executive Officer of the court will sign transfer documents and the Land Registrar will proceed to issue new title to the 1st Interested

Party and that if that happens this application will be rendered nugatory. He further stated that the 2nd Interested Party is unknown to the Applicant.

12. He reiterated that as the entire proceedings by which the 1st Interested Party has sought to claim ownership of Land Title No. KJD/Kaputei North/2966 were commenced Chamber summons, and not by "Plaint", the entire proceedings are therefore a nullity *ab initio*.

2nd Interested Party's Case

13. The 2nd interested party in opposing the application swore a replying affidavit on 14th August, 2013, in which she deposed that she is the registered owner of all that property known as KJD/KAPUTEI NORTH/2966 pursuant to a Title Deed issued by the Kajiado Land registry under the repealed Registered Land Act (the "first title") which is a subdivision of property originally known as Kajiado/Kaputei North/T500 previously owned by **Rikoyan Oipaki Ole Kuku**, the 1st interested party, from whom she acquired it from.

14. According to her, over the years, she deposited all her documents in respect of land that she owns with the firm of **Shapley Barret & Company Advocates** and on or about the years 1994, she deposited the First Title with the said firm. She deposed that being a regular land dealer in Kajiado, she is well known to the Registrar of lands and other officials at the said registry. Sometimes in March of 2013, she received a call from the Registrar of Lands at Kajiado enquiring whether she was selling her land as he had seen documents that had a deed plan that resembled the property the subject of the First Title. She indicated to him that I was not selling any of my properties within Kajiado. She then visited **M/s Shapley Barret Company Advocates** and was informed by the said firm of advocates that the original Title Deed for the First Title could not be traced in their office and that the said advocates have admitted receipt and loss of the First Title by way of the statement to the Kenya Police.

15. On discovery of the loss of the First Title, she commenced the process of being issued with a new Certificate of Title by reporting to the land's registrar at Kajiado Lands Registry after which the office of the land registrar Kajiado Lands Registry caused to be published a notice in the Kenya Gazette dated 15th March 2013 inviting objections to the issuance of a new certificate of title. However, by a letter dated 6th May 2013, the Ex-parte Applicant lodged an objection to the issuance of a new Title Deed on the ground that the property the subject of the First Title was previously owned by **Geoffrey Ndungu Gathii** and that the First Title ceased to exist upon the subdivision of the same into two portions of land being KJD/KAPUTEI NORTH/45336 and KJD/KAPUTEI NORTH/45337 and that the Ex-parte Applicant has purchased KJD/KAPUTEI NORTH/45336 and it was the registered owner thereon.

16. She thereafter instructed her advocates to write to the land's registrar a response to the objection which the said Advocates did and sought vide a letter dated 19th June 2013 to have the objection dismissed and the new title issued to her. In order to fully protect her rights over the suit property and being well aware of the fraud occasioned by fraudulent criminals, she made a report of the loss of the Title Deed to the police and the Criminal Investigations Department. By a letter dated 8th May 2013, the DCIO Kajiado Central wrote to the Kajiado District Land Surveyor indicating that his office had investigated the "forgery" of the First Title and that the same had been subdivided and requested the office to stop any further dealings on the land.

17. According to the 2nd interested party, the Directorate of Criminal Investigation wrote a letter to the DCIO Ongata Rongai Division directing that investigation be carried out against the said **Geoffrey Ndungu Gathii** and a **Mr. Solomon Oleishorua** in respect of the sale of the suit property. She also instructed her advocates to write a letter to the PCIO Nairobi requesting investigations to be undertaken and pursuant thereto, her advocates caused to be written a letter dated 19th June 2013.

18. According to 2nd the interested party it is therefore clear that there is a fraud and criminal element involved in the loss, subdivision and the eventual sale of the subdivision to unsuspecting members of the public including the *Ex-parte* Applicant. However, as the process is tainted with fraud and criminality, the titles cannot confer any registrable interests on the *Ex-parte* Applicant.

19. From her investigations she averred that the said **David Ndungu Gathii** conspired to have himself

registered as the registered owner of KJD/KAPUTEI NORTH/2966 and was issued a Title Deed on 10th August 2009. Thereafter, the said **David Ndungu Gathii** caused to be prepared a mutation form for KJD.KAPUTEI NORTH/2966 for purposes of the subdivision. Now produced exhibit FSN 8 is a copy of the mutation form. However, the purported signature of a surveyor known to her called **Mr. Taffo Singe** in the mutation form, was disowned by the said person as a forgery. The said **David Ndungu Gathii** then sold one of the subdivisions to the *Ex-parte* Applicant and it was registered as the owner of the same. The other subdivision, KJD/KAPUTEI NORTH/45337 was first sold to **Johari Ventures Limited** and then to **DCF Engineering Company Limited**. According to her, all the records from the lands must have been forged, altered by way of removal and substitution with other documents to reflect that the said **David Ndungu Gathii** was the genuine owner of KJD/KAPUTEI NORTH/2966 which is not the case and that the process leading to the registration of the title to the *ex-parte* Applicant is tainted with fraud.

20. The 2nd interested party further averred that the subdivisions claimed by the 2nd Defendant and the 3rd Defendant originate from the First Title and that the 1st Defendant engineered the fraud to subdivide the suit property and sell the property the subject of the First Title. To her the 1st, 2nd and 3rd Defendants do not have a good root of title unlike the Plaintiff and the principle of *nemo dat quod non habet* applies as the actions of the 1st Defendant are riddled with fraud.
21. She was also aware that in an attempt to further try and defeat her rights to the title and take the property away from her reach, Kajiado Misc. Civil Case No. 16 of 2012, was filed against her and the Registrar of Lands, Kajiado by the 1st Interested Party in which it was sought to have the suit property KJD/KAPUTEI NORTH/2966 transferred to the 1st Interested Party. Having perused the documents, it seems that there was an order that was made allowing the 2nd Interested Party to issue a title to the 1st Interested Party and on the issuance of the title, to have her title KJD/KAPUTEI NORTH/2966 cancelled and of no effect and a gazette notice was published in the Kenya Gazette to this effect. To her that would be unlawful as the 1st Interested Party is not the owner of the property in the first place.
22. According to her, the *Ex-parte* Applicant also participated in the said suit. She however averred that she is not able to enjoy her rights of ownership and possession of the suit property due to the fraudulent actions enumerated above and that all the documents currently in respect of the parcels of the suit property are forged, unlawful and void *ab initio* for purposes of conferring any interest to any person in law. To her due to the fraud enumerated hereinabove, the *ex-parte* Applicant does not have a lawful and legitimate title.

Applicant's Submissions

23. It was submitted on behalf of the applicant while reiterating the contents of the verifying affidavit that since the jurisdiction to hear and determine land matters was conferred on the Environment and Land Court with the status of the High Court the Magistrate's Court had no jurisdiction to entertain the dispute notwithstanding the fact that the Chief Justice had purported to confer jurisdiction on it. In support of this submission the applicant relied on **Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Ltd [1989] KLR 1.**
24. It was submitted that since there are three claimants to the suit land, the Applicant, the 1st interested party and the 2nd interested party herein, the only proper way to resolve the dispute is for a proper suit to be filed in a Court with the requisite jurisdiction and in the manner prescribed by law.
25. It was submitted that on the evidence presented before the Magistrate it was clear that the Magistrate had no jurisdiction in the matter. Further it was wrong for the Magistrate to contend that the matter was not a dispute on ownership of land since if that were so it would not have been necessary to invoke the Court's jurisdiction.

Determination

26. I have considered the application herein, the statement and the affidavit in support thereof as well

as the submissions.

27. As was held in Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

28. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. It is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR, R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.

29. In order to succeed in it:

“...the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

See Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.

30. Judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the *Civil Procedure Act* does not apply. It is governed by sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition. On the other hand to determine a dispute as to ownership of land necessarily involves the taking of evidence thereon preferably by way of *viva voce* which evidence is normally subjected to cross-examination in order to determine its veracity. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application. See Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.

31. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts in order to have the merits of the dispute resolved, the Court would not have jurisdiction in judicial review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in an ordinary civil suit.
32. In this case what is being challenged is the decision of the 1st Respondent made on 4th June, 2013. By the said decision, the 1st Respondent disagreed with the Applicant contention that the Court had no jurisdiction to entertain the matter in light of the provisions of the Environment and Land Court Act. The decision was based on Gazette Notice No. 16268 which gave the subordinate court jurisdiction to hear cases as the one which was before the Court. The Applicant now contends that notwithstanding the said Gazette Notice, the 1st Respondent had no jurisdiction as the said Gazette Notice could not lawfully confer such jurisdiction. Whereas the Applicant's position may be right to accede to that argument would have the effect of nullifying the said Gazette Notice yet the said Gazette Notice is not the subject of this application. Accordingly that issue will have to await another day when the matter is properly brought before the Court.
33. The Court also found that the Applicant ought to have relied on a valuation report to determine the value of the land in question. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado." [Underlining mine].

34. Therefore the 1st Respondent ought to have determined the issue of jurisdiction based on the evidence which was before it and it did not matter that the same may have been scanty since scanty or limited facts constitute the evidence before the Court.
35. Apart from the foregoing the 1st Respondent seems to have usurped the powers of the Registrar conferred by section 33 of the ***Land Registration Act***. The said section provides as follows:

(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

36. The 1st Respondent ought to have taken into account the view expressed by the Court of Appeal in **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP)** in which it was held that there was considerable merit in the submission that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should have been strictly followed.
37. Apart from that the procedure by which the 1st Respondent was moved was by way of a Miscellaneous Civil Application. That miscellaneous application is unknown to Civil Procedure Rules was appreciated in **Ngugi vs. Kenya Railways & Another (1990) WLR 15**, although it was appreciated that it is a common practice. In my view the practice of originating civil cases by way of miscellaneous applications ought to be discouraged and ought only to be allowed in simple non-contentious matters since such a procedure does not lend itself to determination of contentious litigation. Even in such exceptional cases, I do not subscribe to the procedure of commencing civil litigation by way of Chamber Summons as opposed to Originating Notice of Motion. See **The Law Society of Kenya vs. The Hon. Chief Justice of The Republic of Kenya & Another HCMCA No. 85 of 2007, Masaba vs. Republic [1967] EA 488** and **Re: Messrs Shapley Barret Allin & Co. Advocates (1954) 27 LRK 48**.
38. The result of the procedure adopted was that persons who were likely to be adversely affected by the decision were not afforded an opportunity of being heard contrary to the provisions of Article 47 of the Constitution. Parties and their legal advisers ought to take the advice of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in **Macharia vs. Wanyoike [1981] KLR 45**, the Court was of the view that, that a pleading by way of the proposed short-cut method may or may not be an out of place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a time-saving device; but experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and that it may be specifically argued that in relation to the precaution against delay, a short-cut may be accepted or applied to expedite but not to delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Lastly, on this point it was held in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167** that:

“The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position.”

39. In my view the above decisions apply with equal force to the instant application.

Order

40. In the result I find that the proceedings in Kajiado Principal Magistrate's Court Miscellaneous Civil Case No. 16 of 2012 were tainted with procedural impropriety. Accordingly, an order of

certiorari is hereby issued bringing the said proceedings before this Court and the same are hereby quashed.

41.As the issue of ownership of the disputed land is yet to be resolved there will be no order as to costs.

Dated at Nairobi this 25th day of June, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyoka for the Applicant

Mr Wanjohi for the 2nd interested party

Cc Kevin