



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Application 3 of 2010

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF
MANDAMUS**

AND

**IN THE MATTER OF: PLOT NO. 1177 (ORIG. NO. 67 REV/507) 1 MN AND
REGISTRATION OF TITLES ACT, CAP. 281, LAWS OF
KENYA**

AND

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE A JUDICIAL REVIEW
APPLICATION BY RACHEL DIANA MULI**

BETWEEN

REPUBLIC APPLICANT

VERSUS

LAND REGISTRAR, MOMBASA LAND REGISTRY .. 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

(BOTH SUED THROUGH THE ATTORNEY GENERAL)

AND

DAVID CHARLES KIMENZU MULI 1ST INTERESTED PARTY

ALWI SHARIFF ALI 2ND INTERESTED PARTY

RULING

Background

1. The Ex-parte Applicant herein is wife to the 1st Interested Party. The 1st Interested Party is the

- registered owner of the suit property. She claims that the said property is matrimonial property and that she had placed a caveat over the suit property on 28/11/2004, to prevent the 1st Interested Party from selling the property without any reference to her, which he had attempted to do.
2. In October 2009, the 1st Interested Party informed the Applicant of his desire to sell the property, offering her a share in the same. While negotiating on her share, the caveat was lifted in December 2009 and a transfer registered over it in favour of the 2nd Interested Party. The Applicant seeks the court's intervention by an order of Mandamus to compel the Respondents to cancel the lifting of the caveat and the transfer; and to rectify the record accordingly.

The Application

3. The application for mandamus is based on the following grounds:

- The Caveat was lifted without notice to the Applicant who placed it.
 - The Notice to Lift the Caveat was allegedly sent by Registered Post but the Certificate of Posting does not bear a registration number, neither does the Post Office bear any record of the letter.
 - The Applicant is solely providing for the needs of the issues of the marriage and will be destabilized by the said sale/ transfer.
 - The property was undervalued at sale/transfer.
4. The application dated 3/1/2010 was argued before court on 13/12/2011 and judgment reserved. On account of overload of work and official assignments within and outside the jurisdiction, the court has not been able to deliver its judgment earlier and the delay is much regretted.

The Applicant's Case

5. Counsel for the Applicant, Mr. Wameyo, submitted that:

- The notice was illegal for giving 45 days from date of notice rather than 45 days from date of receipt of the notice, contravening section 57 (5) of the Registration of Titles Act.
- The notice was not sent, as the certificate of posting does not bear the registration number.
- The Applicant's claim was a public law claim for the breach of law in the Registrar's lifting of the caveat without valid notice of the caveator, and while an application for removal of the caveat was pending before the court in H.C.C.C. 20 of 2005 (O.S.).
- The Applicant's Notice of Motion was based on section 62 of the Registration of Titles Act as a statutory procedure providing for special jurisdiction of the court.

6. The applicant relied on the following case law:

- (1) **Commissioner of Lands vs. Kunste Hotel Ltd. CA 224 of 1995**
- (2) **Brooke Bond Kenya Ltd. vs. Bahari (T) Company H.C.C.C. No. 1441/2003**
- (3) **Julia Aguirre vs. District Lands Registrar Kwale H.C.C.C. No. 451 of 2009**

to demonstrate the court's power to issue an order of mandamus in judicial review where the decision making process offends the principles of natural justice and statutory provisions on fair hearing.

The Respondents' case

7. No formal appearance or documents have been filed for the respondents although the Attorney General has been represented by State Counsel, Mr. Kamau, in court over this matter, who chose to associate himself with the submissions made on behalf of the 1st Interested Party.

8. The 1st Interested Party has filed a Replying Affidavit and claims that:

- The property was acquired prior to the marriage and does not constitute matrimonial property.
- The Applicant's recourse if any should be in family law and not Judicial Review.
- The Caveat was improper as it was post dated, the applicant's interest on the caveat was licensee, yet the property is claimed to be matrimonial property, and the Applicant was indolent for 6 years after placing caveat.
- Applicant has not contributed in any way to the purchase or development of the property.
- The sale and transfer was conducted without any malice, fraud or mistake upon expiry of caveat Notice by the Registrar for 45 days having expired without action from the Applicant.
- The 2nd Interested Party is an innocent purchaser for value.

9. Counsel for the 1st Interested Party submitted, principally, that:

- The Application seeks certiorari orders disguised as mandamus for a private law dispute.
- The Registrar complied with the law as to notice.
- The Applicant's interest in the property was not established.

10. Counsel emphasized the role of mandamus to compel performance of public duty only, and submitted that judicial review will not issue in private rights claim relying on the authorities of:

- (1) **Francis Kaimuru Gitu vs. Minister for Finance & Another (2008) eKLR**
- (2) **R. vs. Chief Land Registrar, Murang'a & Another Exparte Geoffrey Wanyatura Mwangi Nairobi H.C.JR No. 2 of 2007**
- (3) **R. vs. VC, JKUAT (2008) eKLR**
- (4) **Total Kenya Ltd. vs. PS, Ministry of Energy & 14 others, (2006) eKLR.**

11. The 2nd Interested Party has filed a Replying Affidavit sworn on 9/8/2010 stating:

- He is an innocent purchaser who had exercised due diligence and there was no caveat on the property when the transfer was signed. The only encumbrance he was aware of when signing the contract is that of the bank charges which were all discharged prior to signing the contract.
- He complained that he had invested a colossal sum in the property and stands to lose it if the orders sought are granted.

12. Counsel for the 2nd Interested Party, Miss Wachira associated herself with submissions made on behalf of the 1st Interested Party and contended further that the 2nd Interested Party was an innocent purchaser whose transfer had already been registered as entry No. 31 on the Title. She further submitted that the 2nd Interested Party had invested a lot of money on the property and would suffer substantial loss if the orders sought were granted.

Issue for Determination

13. The issue for determination in the application is whether there was a valid notice given to the Applicant of the intention to lift the caveat and whether the order of the day sought will be granted.

Findings

14.

(1) The Application for a order of mandamus sought by the Applicant to compel the Registrar of Titles to cancel the lifting of the caveat and subsequent transfer of the property cannot be maintained because:

(a) There is no credible evidence in the face of the Certificate of Postage and in the absence of evidence from a Post Office Official, that the Notice of Intention to lift caveat requiring the Applicant to obtain a court order or have the caveat removed, was not sent to the Applicant. Under section 107 of the Evidence Act, the burden of proof remains with the Applicant.

(b) Under section 3(5) of the Interpretation and General Provisions Act, the nature to the contention is deemed **“to have been effected at the time at which the letter would be delivered in the ordinary course of the post”**. The contention by the Applicant however is that the letter was never sent, so that the date for which the notice letter is to be reckoned as having been received is immaterial. It would have been material, in my view, in an application seeking extension of time under section 57 (8) of the Registration of Titles Act.

(c) Although sought under the special jurisdiction of the court under section 62 of the Registration of Titles Act, the order of Mandamus is a judicial review remedy which falls to be considered on the same principles for the grant of judicial review orders, thereof, so far as material that:

(i) Mandamus is issued to compel the performance of a public duty;

(ii) Mandamus cannot be issued to quash a decision which is the province of the order of certiorari; and

(iii) All judicial review remedies are by their nature discretionary remedies.

(d) The procedures for removal of the caveat under section 57 (5) and (6) of the Registration of Titles Act are independent and mutually exclusive and the one is not affected by the other. The existence of the Originating Summons number 20 of 2005 is not a bar to administrative proceeding for removal of the caveat by the Registrar of Titles. Indeed, the two sub-sections empower different persons to move for the removal of the caveat, - **“the Proprietor or other person claiming land”** by Section 57(5) of the Act and **“the caveatee”** in the case of Section 57(6) of the Act.

(e) The Applicant's interest in the matter is a private interest to ½ share of proceeds of sale which the Interested Party had offered at Kshs.5 million but which the Applicant by letter of 26th October 2009 proposed to be enhanced to Kshs.7 million. The same could be recovered by way of an application under the private law remedy of Married Women Propriety Act, 1882.

(f) There are disputes as to the applicant's interest in the property and of her right to maintain a caveat as a licensee when seeking an inchoate Matrimonial right. The dispute as to her interest in the property must be adjudicated by the Family Court under section 17 of the Married Women Property Act of 1882.

(g) The applicant's claim is not a claim in public law but rather uses public law provisions to recover a private interest. The Applicant does not demonstrate on the part of the Respondent a breach of law the enforcement of which all persons are interested. The Respondents, it has been demonstrated by a

Certificate of Postage of a letter conveying a notice under section 157 of the Registration of Titles Act, that prima facie complied with the law in respect to the Applicant's case.

(h) There is already registration of the property in the name of the 2nd Interested Party who bought the property from valuable consideration and whose notice of the caveat has not been adequately proved by the Applicant to offset his status as a bona fide purchaser for value without notice.

(2) Accordingly, for the reasons set out above, I dismiss the Applicant's Notice of Motion with costs only to the 2nd Interested Party. The matrimonial nature of the dispute as between the Applicant and the 1st Interested Party militates against award of costs between them. The Respondents did not file any documents or make any submission in the suit and I therefore do not order costs in their favour.

Dated and delivered this 22nd day of February 2013

EDWARD M. MURIITHI
JUDGE

In the presence of:

Mr. Anami for Wameyo for the Applicant

Mr. Mutiso for Taib for 1st Interested Party and for Balala for the

2nd Interested Party

Miss Linda Osundwa – Court Clerk