



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 679 of 2006

JULIE NYAWIRA MATHENGE.....PLAINIFF

VERSUS

KENYA INSTITUTE OF ADMINISTRATION.....DEFENDANT

ATTORNEY GENERAL.....THIRD PARTY

KENYA ANTI –CORRUPTION COMMISSION.....INTERESTED PARTY

RULING

The applicant herein Julie Nyawira Mathenge has brought this notice of motion dated 12/7/2011 for several declarations. The application was brought under the construction of Kenya (Supervisory Jurisdiction and protection of fundamental rights and freedom of the individual) High court practice and procedure Rules 2006.

The applicant sought ;

1. A declaration that the plaintiff is the absolute and indefeasible owner of all those parcels of land known as CR. 11509, 11510 and 11511 situated along lower Kabete Road Nairobi.
2. A declaration that the suit properties do not constitute Public land within the meaning of article 62 of the constitution of Kenya, but actually accords to the definition of article 64 of the constitution of Kenya 2010 and is private land belonging to the plaintiff.
3. A declaration that the decision of the Defendant to interfere with the Plaintiff ownership and possession of CR No. 11509 , 11510, is a violation of the plaintiff's rights under article 62 and 64 of the constitution of Kenya 2010.
4. A declaration that the decision of Registrar of titles represented by third party herein purporting to revoke the plaintiff's titles to LR 11509, 11510, and 11511 and contained in Kenya Gazette Notice No. cell – No 124 dated 26th /11/2010 violates the constitution of Kenya 2010 and the same be revoked.
5. A declaration that the decision of the Registrar of Titles represented by the third party to revoke the plaintiff titles aforesaid is arbitrary,unlawful and unconstitutional for offending articles 40 and 47 of the constitution 2010 and it is this null and void.
6. A declaration that the defendant , the 3rd party and the interested party whether by themselves or by their agents or other government officers are stopped from denying the plaintiffs property rights to the suit properties by virtue of the fact that the plaintiff has paid stand premium, land rent and local authority

rates at all material times.

7. That the Respondent be jointly and severally be ordered.

- a) To effect a chamber summons of CR No. 11509, 11510 and 11511 to the plaintiff unconditionally.
- b) To pay compensatory damages of the loss of use of all those parcels of land known as LR No. 11509, 11510 and 11511 Lower kabete Nairobi and for the inconvenience and anguish caused to the plaintiff for the illegal conduct ordering interference with his quiet enjoyment of property which is contrary to Article 40 and 47, 62 and 64 of the constitution.

8. Upon the issuance of the orders of this court as above the court do issue orders declaring HCC 679/2010 and HCC 324 of 2010 and 325 of 2010 to be duly determined in as far as affects the plaintiff and to be marked concluded.

The application was supported by the grounds on the face of the application and on the supporting affidavit of **Julie Nyawira Mathenge**.

Among the grounds set out are that

- a) The Plaintiff has since 1982 in the case of CR 11509 and 1997 in the case of both LR 11510 and 11511 been the duly registered owner and holder of grants/certificates of titles of the same.
- 2) The Registrar of Titles and Commissioner for lands have no power or authority in law to cancel the plaintiff A's title deeds in respect of CR No. 11509 , 11510 and 11511.
- 3) The decision by the Registrar of Titles to cancel the Plaintiff A's titles to LR No. 11509, 11510 and 11511 without due process violates the doctrine of sanctity of title and is contrary to the constitution of Kenya 2010
- 4) The title documents issued to the Plaintiff A in respect of CR No. 11509 , 11510 and 11511 are conclusive property that the plaintiff A is the absolute owner of all three parcels of land having been lawfully issued to the plaintiff.
- 5) The applicant has incurred loss and damage on account of the unlawful articles by the Respondents

The notice of motion is vehemently opposed. The defendant through Dr.Margaret Kibia stated that it is not true that the plaintiff A is the absolute and indefeasible owner of land parcels No. LR. 11509, 11510 and 11511 lower Kabate road in Nairobi.

That the stated parcels of land constitute public land and the same was never available for allocation to private individuals.

That the issues raised do not constitute issues that could not be dealt with by amendment of the plaint and that plaintiff is seeking to avoid file that day by moving the court by way of an application while the suit ought to go for that.

The third party also opposed the application and stated that the order sought cannot be issued at the interim stage.

That if the orders sought is granted the entire suit shall be rendered nugatory.

The parties herein put on them written submissions and also highlighted the submissions on 11/12/2012 .

The applicant in his submission stated that the application is for enforcement of constitutional rights to property under several articles of the constitution . She averred that she filed the suit in the year 2006. That

before the suit was finalized, the Registrar of titles represented by a 3rd party issued a gazette notice which purported to cancel the three titles LR No. 11509, 11510 and 11511 which are the subject matter of this suit. That is purporting to cancel the title the Registrar was effectively denying the Court the opportunity to hear and determine the suit on merit.

The Defendant averred that the titles were issued through fraud and the court should uphold the cancellation that the declaration sought goes way beyond cancellation of title and that the suit cannot be determined by way of application. That Plaintiff should have sought amendment of the pleadings. That Plaintiff is not absolute and indefeasible owner of the property as the title is tainted with fraud.

The interested party also opposed the application and stated that the interested party is out to protect the interest of the public that the applicant's seeking to be declared the absolute owner by way of an application. If the prayers are granted then it means the Plaintiff other suits will be rendered nullity. That the Plaintiff should have amended the plaint. That the Plaintiff should have filed a Petition in the Constitution Court for an order for Judicial review. That the prayers sought are finality before viva voce evidence is taken.

The Court has now considered the available pleadings and the submissions therein.

In the plaint, the Plaintiff had sought the declaration that the Defendant has no entitlement legal or otherwise to LR No. 11509, 11510 and 11511 and that Plaintiff is the Legal owner of these plots.

The Defendant denied the claim in the Plaint and also filed another claim that there be declaration that the grant of titles issued to the Plaintiff for plots No. LR No. 11509, 11510 and 11511 within Lower Kabete in Nairobi were issued by concealment of material facts and by use of fraud and the same was illegal null and void.

That the said grant be cancelled and Titles be issued to the Defendants. It is also evident that Plaintiff had sought for an injunction but the Court declined to grant it.

Thereafter the attorney General and Kenya Anti-Corruption Commission (KACC) were included as third and interested parties respectively.

It is also evidence that the interested party has filed two other suits i.e. ELC 325/2010 and ELC 324/2010 over these suit parcels of land.

From the Plaintiff/Applicants it is evident that the Registrar of titles cancelled the three titles in the names of the Plaintiff.

The Applicant thereafter filed this application seeking for various declarations. Among the declaration is that Plaintiff be declared as the absolute and indefeasible owner of all those parcels of land mentioned i.e. LR 11509, 11510 and 11511 along Lower Kabete Road.

If indeed the Court would concur with the Applicant and issue the sought declarations then the suit herein will have been marked settled.

I will concur with the Defendants 3rd party and interested party and prayers cannot be issued at an interim stage. The titles were alleged cancelled by Registrar of Titles. The Registrar of Titles is not a party in this suit. What the Plaintiff ought to have done is to amend the Plaint and include the prayers sought herein on the stated amended Plaint and also include the Registrar of Titles as a party.

The Applicant could also have filed a separate Constitution Reference and Judicial Review to challenge the action of the Registrar of Titles.

At this juncture, I find that if I grant the orders sought, then the Court will have determined the main suit through an interlocutory application.

The Court therefore finds that Applicant's application is not merited. I dismiss the same and order that Applicant to set the main suit for hearing so that the main issues herein can be settled once and for all..

Applicant is also at liberty to challenge the Registrar of Titles action through a separate Judicial Review or Constitutional Reference.

Cost of this application in the cause.

L.N. GACHERU
JUDGE
18/3/2013

18/3/2013

Before Gacheru, J

Anne Court Clerk

Miss Mutai for 3rd Party

The other parties and counsels absent though notified through Ruling Notices issued by the Court.

L.N. GACHERU

JUDGE

18/3/2013

Court

Ruling read in open court

In the Presence of:

M/s Mutai for Attorney General and absence of the other counsels though notified by the Court.

L.N. GACHERU

JUDGE

18/3/2013