



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR ELC CASE NO. 111 OF 2011

VERSUS

REGISTRAR OF TITLES2ND RESPONDENT

FAZA HOLDINGS LIMITED.....2ND INTERESTED PARTY

EX-PARTE.....JOHN KAGONYE NGURURI

JUDGEMENT

Sometimes in 2002 Abubakar Mohamed Habib took a loan of Kshs.7.5 million from the Bank. He charged his title L.R. No. 209/4356 to secure the said loan. Abubakar Mohamed Habib passed away on 17th June, 2007. He will henceforth be referred to as the deceased. According to the Bank, the deceased defaulted in the payment of the loan and consequently it exercised its statutory power of sale and sold the property to the Applicant. The property was subsequently transferred to the Applicant by the Bank through a transfer dated 15th December, 2008. On 31st December, 2008 the following entries were made in the lease:-

3. Transfer to John Kagonye Ngururi for kshs.60,500,000/= (Freed and discharged from all liabilities)."

"Caveat by the Senior Registrar of Titles claiming an interest under Section 65(1)(f)."

"Entries No. 2 and 3 above expunged vide Ministerial direction Reference MIN/MOL/GEN/VOL II (199) dated 16th June, 2011."

"1. An order of CERTIORARI do issue to remove into the High Court and quash the 1st Respondent's decision and ministerial direction Reference MIN/MOL/GEN/VOL II (199) dated 16TH June, 2011 directing the 2nd respondent to expunge entries number 2 and 3 from Grant No. 114860, Land Reference No. 209/4356 being a Replacement of Charge by EABS Bank Ltd (formerly Akiba Bank Ltd) for kshs.7,500,000/= and a Transfer to John Kagonye Ngururi (the Applicant) for kshs.60,500,000/= respectively, registered as entry number 7 in the said Grant.

- 3. An order of PROHIBITION do issue to prohibit the 1st and 2nd Respondents from making or causing to be made any entries in Grant No. 114860, Land Reference No. 209/4356 which interfere with the applicant's proprietorship and ownership of the said property.**
- 4. According to the statutory statement dated 15th December, 2011 the grounds upon which the**

reliefs are sought are:-

The 1st Respondent's ministerial direction, Reference MIN/MOL/GEN/VOL II (199) dated 16TH June 2011 registered as entry number 7 in Grant No. I.R. 114860 on 25th June 2011 was made without jurisdiction.

- 4. Proper and prescribed procedures as set out in the Registration of Titles Act Cap 281 Laws of Kenya were not followed in cancelling the Replacement of Charge by EABS Bank Ltd (formerly Akiba Bank Ltd) and the Transfer to John Kagonye Ngururi (the Applicant) in Grant No. 114860.**
- 6. The 1st Respondent's ministerial direction aforesaid and the registration thereof by the 2nd Respondent in Grant No. 114860 are an abuse of power.**
- 8. The Respondents' decisions and actions are *subjudice* and they have the effect of determining the matters in issue in Nairobi Milimani HCCC No. 153 of 2001 and Court of Appeal Nairobi Civil Application No. Nai. 123 of 2011.**
- 10. Such other and further reasons to be adduced at the hearing thereof."**

The Bank supported the application through a replying affidavit sworn by its Legal officer, Ms Caroline Mbenge, on 8th May, 2012. In summary the Bank's case is that by a charge dated 17th November, 1996 and a supplementary charge dated 17th September, 1997 the deceased charged the property in question to Akiba Bank Limited now Eco Bank Kenya Limited. The deceased defaulted on his loan and in June, 2000 the Bank served him with a statutory notice of its intention to sell the property to recover the outstanding loan. After receiving the statutory notice the deceased filed **High Court Civil Case Number 153 of 2001 ABUBAKAR M. HABIB v AKIBA BANK LIMITED** and obtained an interim injunction restraining the Bank from selling the property. After the deceased passed away on 17th June, 2007 one year lapsed without any application being made to the Court by the deceased's personal representative to be made a party to the suit. The suit together with the interim orders therefore abated on 17th June, 2008. The Bank decided to exercise its statutory power of sale on the basis of the statutory notice issued to the deceased in 2000. By private treaty the Bank in September, 2008 sold the property for KShs.60,500,000/= to the Applicant. The bank later learned that the Minister and the Registrar had without seeking clarifications from it, expunged entries of a replacement charge and the statutory sale from the lease so that the property could revert back to the estate of the deceased. The Bank averred that the Minister and the Registrar did not have the legal authority to expunge the said entries and it is only a court which can give such orders.

Both the charge and further charge registered as IR No. 9804/48 and 49 of 15th September, 1997 and 30th September, 1999 respectively were not discharged before the new Grant No. IR 114860 was registered.

- The Registrar therefore concluded that entries No. 2 and 3 in Grant No. I.R 114860 were procedurally and legally invalid. The Registrar subsequently wrote to the Applicant vide a letter dated 18th October, 2010 detailing the particulars of the alleged fraud and asking him to surrender Grant No. I.R. 114860 for cancellation within 21 days from the date of the letter. It was only after the Applicant failed to surrender the grant that the Registrar proceeded to cancel the same.

The 3rd Interested Party opposed the application through a replying affidavit sworn on 21st September, 2012. The 3rd Interested Party's case is that the registration of the lease in question in favour of the Applicant was based on illegalities and fraud and the cancellation of the entries in the lease by the respondents was therefore justified. It is the 3rd Interested Party's case that this Court should not issue the orders sought, for doing so would amount to protecting illegal and fraudulent transactions.

Whether the 1st Respondent has jurisdiction to direct the 2nd Respondent to expunge entries made in a lease;

- Are judicial review orders the most efficacious remedies in the circumstances of this case?
- The 1st and 2nd issues can be addressed together and that is what I propose to do. The power of the 2nd Respondent in respect to cancellation of entries and correction of instruments was clearly spelt out by Section 60(1) of the now repealed Registration of Titles Act, Cap 281 as follows:-

I think it is now established law that a Registrar of Titles cannot cancel or amend a title without involving the courts - see **REPUBLIC v KISUMU DISTRICT LANDS OFFICER & ANOTHER, MISC. APPLICATION NO. 80 OF 2012 AND REPUBLIC v REGISTRAR OF TITLES, MOMBASA & 2 OTHERS EX-PARTE EMFIL LTD [2012] EKLK**. That is a view I have no problem identifying with. Consequently the Minister has no power to order the Registrar of Titles to cancel entries made in an instrument. The Applicant is therefore correct when he argues that the respondents exceeded their powers in expunging the relevant entries from the lease instrument without fully complying with the laid down procedure.

In the case before me, it has clearly emerged that the entries which were expunged by the respondents were surrounded by controversies. The police believe that the said entries were made as a result of fraudulent activities. Two of the directors of the Bank are facing criminal charges in regard to the said entries. In **NAIROBI H.C. JR MISC. APPLICATION NO. 68 OF 2011 MICHAEL MONARI AND WILFRED OROKO v THE COMMISSIONER OF POLICE AND ANOTHER**, the directors (Michael Monari and Wilfred Orok) approached the Court seeking orders to quash the criminal proceedings before the lower Court. M. Warsame, J (as he then was) observed that there were irregularities in the manner in which the entries in favour of the Applicant herein had been made in the instrument. From the documents placed before me it is clear that the expunged entries were clouded by some anomalies. An example is the claim by the Chief Land Registrar through a letter dated 22nd June, 2012 addressed to the Director of CID that no stamp duty was paid in respect of the transfer from the Bank to the Applicant. I need not say more lest I prejudice any of the parties in the civil case that is proceeding in the Environment and Land Court.

“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself in the illegality. It matters not that the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him.”

Judicial review orders are meant to infuse fairness in proceedings before a public body. They are orders which are supposed to preserve the integrity of the proceedings before public bodies. The remedies given there-under are meant to infuse fairness in the actions of public authorities. Those who seek these orders must approach the court with clean hands. It is the Applicant’s case that the actions of the respondents have had the effect of determining the matters in issue in Nairobi Milimani HCCC No. 153 of 2001 and Court of Appeal Civil Application No. Nai. 123 of 2011. I have had the opportunity of looking at the Further Amended Plaint amended on 22nd March, 2010 in HCCC No. 153 of 2001. In my view, there are still live issues to be determined by the Court in respect of the title in question. The actions of the respondents did not in any way determine the issues in the civil suit.

Looking at the circumstances surrounding this matter, I find that I should not exercise my discretion in favour of the Applicant. The Applicant still has the protection of the law in the Environment and Land Court matter. That Court will eventually determine whether the transfer of the lease to the Applicant was legal. The same Court will also determine with finality all the issues surrounding the title in question.

Dated, signed and delivered at Nairobi this 26th day of June, 2013

W. K. KORIR,

<p justify;=""> **JUDGE**