



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW 89 OF 2011
IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF MANDAMUS
AND

IN THE MATTER OF: AN APPLICATION BY KHAIRUNISSA HUSSEIN HAJI LADHA

IN THE MATTER OF: L.R. NO. 22056 C.R. NO. 28568

REPUBLIC
APPLICANT

V E R S U S

THE REGISTRAR OF TITLES MOMBASA
RESPONDENT

AND

1. KILIFI RESORTS LIMITED

2. NORTHERN LIGHTS LIMITED

3. SULEIMAN ABDULREHMAN HAJI SULEIMAN

HAJI LADHA INTERESTED
PARTIES

EXPARTE KHAIRUNISSA HUSSEIN HAJI LADHA

JUDGEMENT

(1) The Exparte Applicant has filed these Judicial Review proceedings seeking an order of mandamus to

compel The Registrar of Titles Mombasa (the Respondent) to cancel the Registration of Entries No. 2 and 3 on the Grant Registered as Number CR 28568, LR No. 22065.

(2) The Grounds upon which the relief is sought are set out in paragraph 3 of the Statement dated 12th August 2011 filed together with the application for leave and are as follows-

(a) That the Respondent registered two Entries Nos. 2 and 3 on the Grant registered as Number CR 28568 which were as a result of forgery.

(b) That the Respondent has failed to delete, revoke and or deregister the said Entries despite several representations by the Applicant.

(c) That the Respondent's blatant refusal to delete, revoke and deregister the said Entries flies in the face of clear provisions of Section 59 and 60 of the Registration of Titles Act (Cap 281).

(d) That the Respondent has failed in his public duty under the said Provisions of the Act.

(3) For reasons that will become apparent presently I do not find it necessary to get into the fine details of the dispute which has triggered these proceedings. A brief background will do.

(4) The 2nd Interested Party is the current registered proprietor of the leasehold interest in Land Reference No. 22056 having obtained a transfer therefrom on 26th August 2010 from the 1st Interested Party. The passing of title from the names Hussein Haji Suleiman Haji Ladha, Aishabal Abdulrehman Haji Suleiman Haji Ladha, Abdulmajid Abdulrehman Haji Suleiman Haji Ladha and Suleiman Abdulrehman to the 1st party is the source of controversy. The Exparte Applicant is the Adminstratix of The Estate of Hussein Haji Suleiman Haji.

(5) The Exparte Applicant is of the view that the transfer was a fraud and so lodged a caveat with the Respondent. There is no date on the face of the caveat but it is verified by the oath of Exparte Applicant on 27th May 2011. The Exparte Applicant further says that she requested the Respondent to cancel the transfers to the 1st Interested Party and the 2nd Interested Party. The Respondent, it is said, has refused to register the caveat and to cancel the transfers.

(6) The 3rd Interested Party swore a lengthy affidavit in which he sought to demonstrate the bona fides of the transfers.

Applicants case

(7) The Exparte Applicant argues that in refusing to register the caveat and to cancel the transfer the Respondent has failed in a public duty bestowed upon him by Sections 59 and 60 of The Registration of Titles Act. (now repealed) (hereinafter referred to as the Act).

She also cites Section 64 of the Act as giving power to the High Court to direct the Registrar to, inter alia, cancel any entry in the Register to give effect to a judgement or order of court. Finally that Section 75 of the Act reserves the jurisdiction of the Court to deal on the ground of actual fraud.

The Reply

(8) The Respondent neither filed any documents nor participated in these proceedings. And as it is now the trend in proceedings of this nature it was left to the Interested Parties to give the opposing and alternative views.

(9) The Interested Parties raised the following arguments-

(a) That the Exparte Applicant has no locus to bring this cause as she has not obtained a Grant of Probate

under the Law of Succession in respect to the suit property. My attention is drawn to the provisions of Section 52 of The Act.

(b) That this matter is not suited for Judicial Review as the provisions in respect to the procedure for cancellation and/or correction of entries under The Act has not been initiated or fully exhausted and that these proceedings are premature.

(c) That the controversy herein cannot be resolved without an evaluation of conflicting evidence presented by the parties and it is not in the province of Judicial Review proceedings to adjudicate and determine a matter which requires viva voce evidence to be adduced. It is said, for instance, that the basis of the Exparte Applicants claim is that fraud was committed. This, in the view of the Interested Parties, cannot be resolved by assessing affidavit evidence.

(d) That if this court was to grant the prayers, it would have unwittingly dealt a fatal blow to Mombasa HCCC 621 of 2011. This is a suit between the 1st Interested Party and the 2nd Interested Party in which the former alleges breach of contract and seeks, inter alia, cancellation of the transfer from it to the 2nd Interested Party.

(e) That the Exparte Applicants counsel Mr. Khatib has had connection with the matter before court in which he variously acknowledged that the 1st Interested Party had good title to the property. For this reason, it is argued, the Exparte Applicant is estopped for raising a question of illegality in respect thereof.

Findings of The Court

(10) I think it would be appropriate to start by considering the fundamental issue as to whether this court can grant the order as framed in the Motion. It helps to focus on it. The applicant seeks-

“... an order of mandamus to compel the Respondent to cancel the Registration of Entries No. 2 and 3 of the Title for Plot LR 22056 and CR No. 28568.”

(11) The Exparte Applicant is concerned that the Respondent has refused to delete the two entries and says these in paragraphs 8 and 9 of the affidavit in support of the application for leave-

“8. That whereas ABDULMAJID ABDULREHAMAN

HAJI SULEIMAN HAJI LADHA was a resident in Dar-es-Salaam and had given a Power of Attorney to the Deceased during his life time, Aishabhai Abdulrehman Haji Suleiman Haji Ladha was also dead at the time of the transfer on 30th September 2003.

9. That on 18th May 2011, I applied for a caveat to be

registered against the Title and also sought to have the transfers to the 1st Interested Party and the 2nd Interested Party deleted from the Title but the Respondent has since refused to register the Caveat and to delete the two entries. (Annexed hereto is a copy of the Caveat and affidavit marked KHSHL 5).”
(my emphasis)

(12) The Applicant is of the view that the conduct of the Registrar in failing to act as requested breaches the provisions of Sections 59 & 60 of the Act.

(13) The Legislative regime dealing with cancellation of entries and correction of instruments under the Act is found in Part XIII of the statute, Sections 59 to 64. Section 60(1) is relevant-

“60 (1) Where it appears to the satisfaction of the Registrar that a grant, certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that

an entry or endorsement has been made in error on any grant, certificate of title or other instrument, or that a grant, certificate, instrument, entry or endorsement has been fraudulently or wrongfully obtained, or that a grant, certificate or instrument is fraudulently or wrongfully retained, he may summon the person to whom the grant, certificate or instrument has been so issued, or by whom it has been obtained or is retained, to deliver it up for the purpose of being corrected.” (emphasis mine)

(14) There is no evidence that the Registrar has considered the Applicants request so as to be satisfied that there is a fraud committed. The Registrar has not communicated his/her decision, if any, to the Applicant. The Registrar has simply kept quiet. The Applicant has construed this as a refusal to delete the two entries, and she may be right.

(15) The Registrar had a duty, not only to deal with the matter expeditiously, but to advise the Applicant of the decision reached and to give written reasons for the decision. Although The Act does not expressly command him/her to do so, Article 47 of the Constitution 2010 requires this of the Registrar. The Article provides, in part, that-

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

Even good manners and simple courtesy required the Registrar, a public officer, to tell the Exparte Applicant of the decision on the request and reasons therefor.

(16) Having said that, I need to emphasize that under the provisions of Section 60 of the Act the prerogative to cancel and/or correct any entry in an instrument, in the first instance, is given to the Registrar and not the court. This court cannot make a decision in the stead of or on behalf of the Registrar. What this court can do is to compel the Registrar to consider the Applicants request for cancellation in the light of the provisions of Section 60 of the Act and/or to render reasons for his/her decision. I would not have hesitated to grant those orders if asked by the Applicant. What the Applicant prays for, however, is an order from this court compelling the Registrar to cancel the entries. The Applicant is asking this court to direct the Registrar to reach a given decision. I am afraid I do not see my authority in Judicial Review proceedings as going that far.

(17) I turn to the provisions of Section 59 of the Act which are reproduced in full below-

“(1) In the case of a non-existent or fictitious person

being named as proprietor, the name in the register or document of title or other instrument may on the order of the competent authority be cancelled.

(2) In other cases, the rectification of grants,

certificates of title and other instruments shall be effected by the addition of further endorsements correcting former endorsements which are found to be insufficient or to have been otherwise made in error.”

(18) My reading of the Section is that it deals with the cancellation or correction of entries made-

“(a) where a non-existent or fictitious person is named as proprietor.

(b) where there are endorsements made which are insufficient or made in error.”

This Section does not deal with fraudulently or wrongfully obtained entries. A person, like the applicant, who seeks to have an entry cancelled on account of fraud must move the Registrar under the provisions of

Section 60 of The Act. In my view the Applicant cannot properly found her claim under the provisions of Section 59 of The Act.

(19) Having come to this decision it would be moot for the court to discuss and determine the other issues raised. For the reasons given, I do hereby dismiss the Notice of Motion filed herein on 20th September 2011 with costs.

Dated and delivered at Mombasa this 23rd day of May, 2012.

F. TUIYOTT
JUDGE

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Dated and delivered in open court in the presence of:-

Mwijuma for Khatib for the Applicant

Eredi for the Respondent

No appearance for 1st & 3rd Interested Parties

No appearance for 2nd Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE