



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 111 OF 2010

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI, MANDAMUS
AND PROHIBITION AGAINST THE REGISTRAR OF TITLES**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE REGISTRAR OF TITLES.....1ST RESPONDENT
THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE

INCOME SUPERPLUS AGENCIES LIMITED

AND

ABUBAKAR AHAMED ABDURAHMAN.....1ST INTERESTED PARTY

MUZAHIM SALIM MOHAMED BAJABER.....2ND INTERESTED PARTY

JUDGMENT

(1) The Applicant claims to be registered proprietor of the suit property Plot No. 985 (Original No. 965/4) Section III MN upon transfer from the 2nd Interested Party on 16th December 2004. The 1st Interested Party had on 4th March 2009 obtained a decree for Kshs.1,535,421 against the 2nd Interested Party in Nairobi CMCCC No. 10516 of 2003, which he sought to execute by sale of the suit property on the basis of Certificates of Postal Search dated 15th July 2009 and 26th March 2010 issued by the Respondent indicating that the 2nd Interested Party was the owner of the property. Prohibitory orders issued against the 2nd Interested Party restraining him from transferring or charging the suit property was registered at the Registrar of Titles, Mombasa on 19th November 2009 and a Notification of Sale thereafter issued on 28th April 2010. The Applicant has searches before and after the 1st Interested Party's searches indicating the Applicant as the registered proprietor of the suit property.

- (2) By a Notice of Motion dated 18th October 2010, the Applicant seeks the following reliefs:
- (a) Certiorari to quash the decision of the 1st Respondent contained in the Certificate of Search dated 26th March 2010.
 - (b) Mandamus to compel the 1st Respondent to confirm that the Certificate of Searches issued on the 25th March 2010 and 16th September 2010 (in favour of the Applicant) are true and correct.
 - (c) Prohibition against the 1st Respondent and agents from issuing Certificate of Searches that contradict the ones in favour of the Applicant.
- (3) The Applicant submits in support of the reliefs that:
- (a) The search certificate dated 26th March 2010 was unreasonable under the Wednesbury Principle and issued without jurisdiction.
 - (b) The Respondent did not challenge the facts stated by the Applicant and indeed on 27th October 2011 conceded the application.
 - (c) The application was made within time prescribed for Judicial Review.
 - (d) The 2nd Interested Party had confirmed by affidavit of 12th May 2011 that he had sold the suit property to the Applicant.
- (4) The Respondents did not oppose the application. The 1st Interested Party opposed the application on three principal grounds, namely:
- (a) The prayer for Certiorari is time barred pointing out that there is also a Search dated 15th July 2009 which supports the Search dated 16th March 2010.
 - (b) Judicial review is not the forum to revoke a Certificate of Postal Search on the issue of ownership of property especially where there are conflicting searches as it would amount to a declaration of ownership of suit property through a short cut.
 - (c) The orders of mandamus and prohibition are not available to the application.
- (5) The question for determination is whether the orders of judicial review may be used to challenge certificates of search on ownership of property and to compel or prohibit issuance of a certificate to confirm the ownership of property the subject of dispute between the parties.
- (6) In my view, the determination of the present dispute as to the ownership of the suit property is a matter of private law to be investigated by full trial with oral evidence and cross-examination rather than the summary procedure of Judicial Review for public law cases. Moreover, the issuance of two different sets of certificates of search over the same property allegedly during the same period requires investigation as to the correct state of affairs obtaining regarding the ownership of the suit property sought to be confirmed by the certificates of search. While the Applicant and the 2nd Interested property assert ownership in the Applicant at material time, the 1st Interested Party suggest that the Applicant pretends to own the property so as to defeat the 1st Interested Party's attempt to realise the property in execution of the decree in his favour against the 2nd Interested Party.
- (7) In advocating for a single procedure for litigating public law and private law claims, the learned authors of **Wade & Forsyth, Administrative Law 9th ed. 2004 at p. 665** observed:

“The need for reform is clearly greater now than it was before 1977 [reform to introduce the remedies of declaration and injunction under judicial review procedure]. The first necessity is to abandon mutually exclusive procedures and institute a single comprehensive procedure, which ought to be the same for both public and private law. Instead of putting declaration and injunction into the group of prerogative remedies, as was in effect done in 1977, the prerogative remedies ought to be sought, at least initially, by the same procedure as applies to ordinary remedies. Once the initial step is taken, it can be decided whether case should be tried by judicial review procedure, which is best suited to the summary disposal of questions of law, or by ordinary procedure, which is best suited to the trial of disputed facts. Where the validity of a public authority’s action (or inaction) was challenged, either party would apply for dismissal of the claim on the ground of undue delay. In this way claims of whatever kind could be sorted out and directed into the right channel, at the interlocutory stages. Cases of judicial review should still have a prerogative style title with the Queen as the nominal Plaintiff, in order to preserve the important public interest element. No case could then be lost by choice of the wrong procedure before its merits ever came before the court.”

(8) Of essence is the observation by the authors that it is the ordinary procedure rather than the judicial review procedure that is best suited for litigating disputed facts. Even though the statutory regime of judicial review in Kenya under sections 8 and 9 of the Law Reform Act mirrors the dichotomy of the procedure under the public law and private law discussed in the passage quoted above, the provisions of Article 159 of the Constitution of Kenya 2010 remedies the situation by requiring substantial justice without regard to the technicalities of procedure. However, where as in this case there is an elaborate procedure for dealing with a particular dispute prescribed, the same should be followed unless a miscarriage of justice contrary to the Article 159 substantial justice principle can be shown.

(9) Order 22 of the Civil Procedure Rules provides for elaborate procedure for objections to attachment of property in execution of decrees of court. See Rules 51 thereof et seq. The Applicant herein could have its interest in the suit property litigated and determined under the objection procedure of Order 22 Civil Procedure Rules without necessity of incurring extra costs in filing fresh proceedings for that purpose.

(10) Although the 1st interested party contended that judicial review is not the forum for revocation of a Certificate of Postal Search, calling into mind an issue whether the certificate is a **“decision”** capable of being quashed by Certiorari, I take the view that because of the legal status of the Certificate of Postal Search as a confirmation of ownership of property, the certificate is liable to judicial review remedies. Considering whether a **“report”** may be quashed by Certiorari, **Wade & Forsyth, Administrative Law, ibid at p. 614** notes:

“Even a report may be quashed if it is substantially a decision rather than a mere recommendation, e.g. where the Act provides that it shall be final. There is no magic in the word ‘report’. The question is whether some issue is being determined to some person’s prejudice; and the court’s ability to intervene has been increased by the new doctrine that decisions which are wholly not statutory may nevertheless be reviewable where there is a ‘public element.’

I find such a ‘public element’ in the Certificate of Postal Search on the ownership status of the suit property and I hold that the same is reviewable by judicial review.

(11) However, in view of the existence of conflicting Certificates of Postal Search there is need for the court to determine, by the ordinary procedure suitable for determination of disputed facts, the true position with regard to the ownership of the suit property before a valid certificate of search could be given. The Applicant should comply with the elaborate procedure of Order 22 of the Civil Procedure Rules or file an ordinary suit for the declaration of his interest in the property, as he may be advised.

(12) In view of what I have said above, I do not find it necessary to determine whether the judicial review application for Certiorari was within time. I only observe that the limitation of 6 months for filing for the judicial review order of Certiorari applies only to **“judgment, order, decree, conviction or other proceedings”**, in my view, in the nature of judicial process and not administrative decisions.

(13) Accordingly, for the foregoing reasons, I dismiss the Applicant's Notice of Motion dated 25th May 2011 with costs to the 1st Interested Party.

EDWARD M. MURIITHI

JUDGE

Dated and delivered on this 14th September 2012.

F. TUIYOTT

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Miss Moriasi - Court Clerk