



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
MISC APPLICATION NO 58 OF 2009

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF THE REPUBLIC.....APPLICANT

VERSUS

THE HON. THE ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

KAITET TEA ESTATE {1977} LIMITED3RD RESPONDENT

TAWAI LIMITED.....EX-PARTE

JUDGMENT

The matter before the court is a Notice of Motion dated and filed on 11/3/2009. It seeks an Order of Certiorari to remove into this court and quash the decision of the Chief Land Registrar (2nd Respondent) which created an entry NO. 20 in the Registrar of lands transaction in relation to L.R No. 5707 (LR No. 18551) now registered in the name of the Ex-Parte Applicant, Tawai Limited.

The Notice of Motion is said to be based on the grounds affidavits and Statement of Facts. A careful search of the court file however does not reveal that this application is supported by any kind of affidavit. Indeed the Notice of Motion itself is based on 10 grounds and then on a list of particulars of what is termed as errors and fraud which are printed on the face of the Notice of motion itself.

Failure to support the motion application by an affidavit, is in my view, a contravention of Order 50 rule (3) which states:-

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

It is my understanding of the above provision and it has become a practice of court) to strike out any application that is not properly supported by an affidavit, unless a party is given leave on application, to file such affidavit subsequently. In the view of the court accordingly, where a party does not seek leave to rectify failure to comply, the application is and remains fatally incompetent and liable to be struck out.

I have on the other hand carefully perused and considered the material for and against the application as submitted by both parties. The facts show that the Ex-parte applicant was the registered owner of the parcel of land known as L.R. No. 5707. The land was charged to the Kenya National Capital Corporation on 16/10/1981 and later to Brooke Bond Kenya Limited on 31/1/1986. The charges were not discharged until 15/9/2008. There is evidence on record to show that the land between the registration of the charges and their discharge, was subdivided into six divisions known as L.R. Nos 5707/1,5707/2,5707/3,5707/4,5707/5 and 5707/6. It is not in evidence whether the subdivision by the registered owner was with the consent of the chargee or the reverse. There is however a hint that the subdivision was possibly agreed upon by both sides to save the whole original property from being auctioned to recover some outstanding loan.

It does not escape the attention of this court that facts about the above mentioned transaction are very scarce. The ex-parte applicant was very economical with information, probably deliberately to deny this court sufficient information to make an informed decision. For example, although the applicant must have realised that the date of the decision or action that he challenges herein was vital, he deliberately failed to mention it both in this application and in the leave proceedings stage.

Be that what it may, it appears that either one or both chargees fully released five subdivision with their deeds to the ex parte applicant and retained the 6th subdivision L.R No. 5707/6 which it apparently sold to a third party Kaitet Tea Estate Limited - with a view to clear any agreed outstanding loan. It is not clear how the successful transfer of the said subdivision was done since apparently the whole original parcel (and similarly therefore, each subdivision) was subject to the two charges which in the normal course of such issues, required to be discharged to allow any other transaction to be registered.

The upshot of the above is that the ex parte applicant was aggrieved by the transfer of L.R. No. 5707/6 to the 3rd Respondent, Kaitet Tea Estate (1977) done Limited without following the set down procedures in the land Registry. Hence this application to quash the registrar's act to transfer the said parcel.

In response to the ex-parte applicant's application, the 3rd Respondent stated that the transfer to it of L.R. No. 5707/6 was regular, proper and effective. Entry No. 20 in the land register which the ex-parte applicant challenges, it argues, should be examined in a civil suit trial through regularly adduced evidence. That if such is done, the registrar will confirm that the regularly laid down procedure was followed and that the ex-parte applicant participated in the transaction.

The 3rd Respondent also argued that the Notice of Motion is bad in law because it was filed out of the statutory period of six months; that what is in dispute is the ownership of L.R. 5707/6 which is not a private law issue that can be challenged the public law process of Judicial Review and that the land was in any case transferred to a 3rd party in 2001 which for purposes of natural justice imperatively required the present owner to be enjoined to defend his private rights.

I have carefully considered the above arguments. It is trite law that the leave to file a Notice of Motion for any Judicial Review Order such as this, must be brought within six months from the date the challenged decision or action was made or taken. Section 9(3) of the Law Reform Act, Cap 26 of the Laws of Kenya states thus:-

“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of being quashed, leave shall not be granted unless an application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceedings.....”.

The above provision is reproduced in Order 53 Rule 2 of the Civil Procedure rules. The same are couched in mandatory terms thus making the compliance mandatory as well as failure of compliance fatal to the application.

The application to file the Notice of Motion before the court, was filed and the leave obtained, on 9/3/2009. The action of registration of a transfer challenged was done on 17th July 1987 as was revealed by the 3rd Respondent. Clearly the period of 22 years or so, is far beyond the six months allowed by the statute. In my view, accordingly, the leave granted to the applicant to file this Notice of Motion was so granted in error and most probably by a deliberate failure by the ex-parte applicant to disclose the material date of the decision or act intended to be quashed. It is my further view that the order to grant leave was therefore not only null and void but also makes the Notice of Motion authorized by it, null and void for being against a statute. The avenue for seeking a Judicial Review order got closed six months after the Chief Land Registrar, the 2nd Respondent herein, registered the Transfer of L.R No. 5707/6 to the name of Kaitet Tea Estate {1977} Ltd., on 17/7/1987. On the above point reliance is placed on the case of **Harrison Ndungu Kungu Vs The Nakuru Chief Magistrate’s Court & Another**, Nakuru H.C.C.Misc. Application No. 47 of 2004 (eKLR).

In the above circumstances, this application by Notice of Motion, is declared incompetent and liable for striking out.

A third ground why this application should be struck out is because it concerns a private issue. The court agrees with the 3rd Respondent that the issue before the court is whether or not the transfer of L.R. No.5707/6 was lawfully transferred or was transferred under fraud against the ex-parte applicant. That will also raise the question as whether the 3rd Respondent was involved in the possible fraud or not and whether the title which later also passed to yet a third party who was not party but should have been made a party, is questionable. Such would need to be agitated and investigated through a private civil action in which evidence would be adduced, more so because the 3rd respondent denied error or fraud in the process of transfer.

For the above reasons it is this courts decision to strike this Notice of Motion and dismiss it out with costs to all other parties enjoined in this suit. Orders accordingly.

Dated and delivered at Bungoma this 23rd day of February 2011.

D. A. ONYANCHA

JUDGE