



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW ELC MISC APPL NO. 280 OF 2010

RENEGE PROJECT LTD..... APPELLANTS

VERSUS

COMMISSIONER OF LANDS..... 1ST RESPONDENT
KENYA AGRICULTURAL 2ND DEFENDANT
RESEARCH INSTITUTE

RULING

There is before me an application by way of Notice of Motion under Order 53 Rule 3 (1) of the Civil Procedure Rules for orders that;

1. An order of certiorari be issued to bring to this court the title registered as Grant No. IR 106876 and land Survey Plan no. 273968 in respect of LR 27628 for the purpose of being quashed.
2. An order of mandamus be issued to direct the 1st respondent to cancel and or delete the certificate of title registered as Grant No. 106876 and Land Survey Plan No. 273968 in respect of the LR 27628.
3. An order of prohibition be issued to prohibit the respondents, their servants, agents or whomsoever from interfering, occupying, alienating or in any manner dealing with the applicant's parcel of land comprised in title No. LR 22426.
4. Cost of and incidental to this application be provided for.

The Notice of Motion is based on the grounds contained in the statutory statement and verifying affidavit of Michael Maru. On 12th May, 2010 Wendo J, granted leave to the applicant to apply for the orders sought and also that leave so granted do operate as a stay from alienating the suit property No. LR. 22426 for 90 days.

The Notice of Motion is opposed by the respondents and there is a replying affidavit on behalf of the 2nd defendant Geoffrey K. Muturi to that effect. Learned counsel appearing for the parties herein have filed submissions and cited some authorities.

I have read the material before and consider that the basic issue that must be determined at this stage is that of jurisdiction. I say so because, the respondents have submitted that the applicant's cause of action lies in private law as opposed to public law. If I were to find that the remedy lies in private law it may be prejudicial to the parties herein if I were to go into the merits of the Notice of Motion before me. From

the material before me, it is clear that there are competing interests in respect of the suit property. This is because both the applicants and 2nd respondent have titles to the same property which both claim are valid and confer ownership thereof.

There is also the contention by the respondent that the applicant was in breach of the provisions of Government Land Act Cap 280 in acquiring the said parcel of land. There are also issues of possession of the suit property which have to be resolved. In the statutory statement and in particular clause 3 (a) the applicant states that it purchased the parcel of land and a certificate of title issued under the Registration of Titles Act. That statement would be in direct conflict with the procedure under the Government Lands Act and in particular Section 35 thereof. If the respondents allege that the applicant did not comply with the Government Lands Act aforesaid those are matters that cannot be determined by way of affidavits. That contention coupled with the submission that both parties have title to the suit property, persuades me to find that the issue before the court is that of ownership of the suit property. Indeed, the issues identified by the learned counsel for the applicant point to the validity of title to the suit property. That being the case I find that the Notice of Motion seeking the orders as set out cannot be advanced by way of Judicial Review.

I am of the strong view that parties herein must call evidence which should be subjected to cross examination to find the truth behind the dispute. Therefore, the remedy of the applicant lies in private law and not public law which it has invoked. I have deliberately avoided reference to the respective affidavits and cited authorities because these will become relevant as and when the parties are heard at the correct forum.

For now, I agree with the submissions of the respondents and find that the application is misplaced and therefore dismissed with costs to the respondents.

Orders accordingly.

Dated, signed and delivered at Nairobi this 9th day of March, 2011.

**A. MBOGHOLI MSAGHA
JUDGE**