



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
J.R. ELC MISC. APPLICATION NO. 96 OF 2007

PERIS WANJIKU MUNGAI APPLICATION
VERSUS
LAND REGISTRAR, KIAMBU DISTRICT.....RESPONDENT
AND
MUNGAI NDIHO1ST INTERESTED PARTY
JAMES MUCHIRI MUKUNGA2ND INTERESTED PARTY
RULING

The ex-parte applicant obtained leave to file an application by way of judicial review for the following orders;

1. That an order of certiorari be issued to remove into this honourable court and quash the decision of the District Land Registrar Kiambu of 21st August, 2007 registering James Muchiri Mukunga as the proprietor of L.R. No. Ondiri Farm Scheme/ 441.
2. That an order of mandamus do issue to compel the respondent to cancel the registration of James Muchiri Mukunga as proprietor of parcel of land Ondiri Farm Scheme/ 441 and to register the ex-parte applicant Peris Wanjiku Mungai as the proprietor of the same parcel of land.
3. That an order of prohibition do issue to bar, restrict or prevent the Land Registrar Kiambu, the respondent, from making any entries in the register in favour of James Muchiri Mukunga.
4. Costs of this application be provided for.

The grounds set out on the face of the Notice of Motion are;

1. On or about 15th April, 1998 and 15th July 1998 the applicant entered into an agreement with Mungai Ndiho for the purchase of a piece of land that was to be excised from LR. 138 Ondiri Scheme situated in Kikuyu area of Kiambu District.
2. Thereafter the suit property LR. Ondiri Farm Scheme/441 was created.
3. The parties applied for consent from the Kikuyu Land Control Board and the said consent was issued on 2nd August, 2007.
4. The transfer form was duly executed and lodged at the Land Registry in Kiambu on 9th August 2007.
5. The applicant paid the requisite stamp duty on 9th August, 2007.
6. The Land Registrar Kiambu District has failed, ignored and or neglected to register the applicant's interests in the suit property LR. Ondiri Farm Scheme Parcel No 441.

7. On or about 21st August, 2007 the Land Registrar registered James Muchiri Mukunga as the proprietor of the suit property and proceeded to issue him with a title deed.

8. The Land Registrar's action is fraudulent and unlawful and void *ab initio*.

9. The applicant ought to be registered as the proprietor of the suit property and title deed issued to her.

10. The respondent's action ought to be quashed and cancelled forthwith.

11. It is fair and just that the prayers sought herein be granted.

Attached to the Notice of Motion is a statement and the affidavit of the ex-parte applicant Peris Wanjiku Mungai. The 1st and 2nd Interested Parties have opposed the application and there are on record replying affidavits alongside a Notice of Preliminary Objection filed on their behalf.

Learned counsel on record have filed written submissions and cited some authorities. These I have read. I consider it necessary to set out the summary of the Notice of Preliminary objection because in my view, if the objection is upheld then it will not be necessary to consider any other matters related to the Notice of Motion.

It is the case of the 1st and 2nd Interested Parties that the court cannot enforce the transaction that is void. This is because the sale agreements relied upon by the ex-parte applicant are dated 29th December, 1997, 15th April, 1998 and 15th July 1998. The ex-parte applicant and the 1st interested party did not apply to the Land Control Board for consent within 6 months from date of said agreements as provided by Section 6 and 8 of the Land Control Act Cap 302 Laws of Kenya. Consequently, the sale transaction being a controlled transaction is void for all purposes.

The Land Control Board consent granted by Kikuyu Land Control Board on 2nd August, 2007 is null and void and of no effect having been granted 11 years from the date of the agreement, contrary to the provisions of Section 8(1) of the Land Control Act aforesaid, which makes it mandatory for an application to be made in the prescribed form to the appropriate Land Control Board within 6 months of the making of the agreement for the controlled transaction by any party thereto.

Section 7 of the Land Control Act aforesaid provides that if any money or other valuable consideration has been paid in the cause of a controlled transaction that becomes void for lack of consent by the Land Control Board, that money or consideration shall become recoverable as debts by the person who paid it from the person to whom it was paid. Therefore the only remedy available to ex-parte applicant is a claim for refund and not the orders sought in this application. It is also the case of the 1st and 2nd Interested Parties that the application is incompetent because an application for judicial review orders of prohibition, mandamus and certiorari cannot be converted into an ordinary suit neither can an ordinary suit be filed in an application for Judicial Review orders aforesaid. And lastly the 2nd interested party is a bona fide purchaser for value without notice valid by registered as the proprietor of Ondiri Farm/441, which parcel of land is different from LR Ondiri 138 the subject of the agreements dated 29th December, 1997, 15th April 1998 and 15th July 1998 relied upon by the ex-parte applicant.

I have looked at the agreements referred to above and it is true that the subject matter therein is a parcel of land known as LR 138 Ondiri scheme. Nowhere is the parcel of land known as LR Ondiri Farm Scheme/441 mentioned. If this latter parcel of land was created from the parcel of land mentioned in the sale agreement, that is a matter of oral evidence that cannot be addressed by way of Judicial Review whose orders are founded on affidavit evidence. I am also of the view that there are competing interest in respect of the suit property, be it LR 138 or LR 441 between the ex-parte applicant and the 2nd respondent which interests fall within private law as opposed to public law. These interests cannot be advanced by way of Judicial Review but a suit instituted by way of a plaint.

The above observations would render the Notice of Motion incompetent *ab initio*. Underlying the pleadings is also the issue of whether or not a valid consent was granted under the Land Control Act by the relevant board. The consequences of failing to obtain a consent for the sale of agricultural land or where the consent obtained is void are clear from the provisions of the Land Control Act Cap 302 aforesaid and in particular Sections 6,7 and 8.

From 1998, the consent was obtained in the year 2007 and no explanation has been advanced by the ex-parte applicant for delay in so doing. The transaction is therefore void and the only remedy is as provided by Section 7 of the said Act that of the refund of the money paid under the said transaction.

After considering all the matters raised by the parties herein and in particular the preliminary objection, I uphold the preliminary objection and declare that the Notice of Motion before me is incompetent and is hereby struck out with costs to the Interested Parties.

Orders accordingly.

Dated, signed and delivered at Nairobi this 7th day of March, 2011.

A. MBOGHOLI MSAGHA
JUDGE