



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI(MILIMANI LAW COURTS)**

**Miscellaneous Civil Suit 67 of 2007**

**REPUBLIC.....PLAINTIFF**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**DOMINIC NGARE.....1<sup>ST</sup> INTERESTED PARTY**

**MARGARET WAMBUI KENYATTA.....2<sup>ND</sup> INTERESTED PARTY**

**NANCY MUGECHI NGARE.....3<sup>RD</sup> INTERESTED PARTY**

**JAMES MACHARIA GICHUKI.....4<sup>TH</sup> INTERESTED PARTY**

**CECILIA WANJIRU WAWERU.....5<sup>TH</sup> INTERESTED PARTY**

**PETER MUCHIRI NGATIA.....6<sup>TH</sup> INTERESTED PARTY**

**THERESIA WAIRIMU NGATIA.....7<sup>TH</sup> INTERESTED PARTY**

**KAGIRI NDIRANGU.....8<sup>TH</sup> INTERESTED PARTY**

**EX-PARTE JAMES NJOROGE NJUGUNA**

**RULING**

The dispute herein revolves around a parcel of land known as LR. No.11916/2 situate

in Karen, Nairobi. The land was originally registered in the name of Joseph Njuguna Njoroge. There are other references to the same parcel of land which however show a subdivision of the original title relating to the said land. The ex-parte applicant is said to be the personal representative of the estate of late Joseph Njuguna Njoroge who died of 21<sup>st</sup> April, 1980.

It is the applicant's case that in or about the month of December 1986, the applicant's mother the late Felista Wanjiru Njuguna, without the knowledge and consent of the applicant, unlawfully and fraudulently caused the suit premises known as title number LR.11916/2 to be transferred to her name thereby creating LR.No.11916/3 which was then registered by the respondents in her favour in the register.

It is also the applicant's case that his late mother was guilty of fraud in that, she caused to be drawn a transfer in her favour purporting to have been executed by the deceased father who had died six years previously. She was guilty also of fraud in presenting or causing to be presented the said transfer for registration which indeed was a forgery in the circumstances. She was further guilty of fraud in purporting to transfer good title to the interested parties herein knowing well that, her title was unlawfully and fraudulently obtained and therefore null and void.

After the registration of LR.No.11916/3 the applicant's late mother unlawfully caused the suit premises to be further subdivided into four portions which have been set out in the statement in this application. These subdivisions were then transferred to several parties, some of them the interested parties named in this Motion. It is the applicant's case that his late mother, the said Felista Wanjiku Njuguna had no title to the suit premises and as such could not pass any to the interested parties herein, by -passing the applicant who is a beneficiary of his father's estate. It is also his case that the said transactions were effected without the consent of the Land Control Board being granted; this suit property being agricultural land. As a result, the interested parties' title to the respective portions of the suit premises are void having being passed by a person with no title at all or capacity to deal with the suit property without Letters of Administration after the death of the applicant's father.

Consequently, the applicant says, he has suffered loss and damage and disinherited from the estate. He now seeks orders of mandamus to issue compelling the respondents to cancel all entries and dealings made in the register after the death of his father the late Joseph Njuguna Njoroge. Further and all in the alternative, he asks the court to issue orders of certiorari to remove to this court for purpose of quashing all entries and fraudulent dealings made in the register after the death of his late father.

Leave was granted for the applicant to move the court for the said orders and he subsequently filed a Notice of Motion to that effect. In the verifying affidavit sworn on 1<sup>st</sup> February, 2007 the applicant gives a chronology of events leading to the application. In that affidavit he discloses he filed three suits these being High Court Civil Case No. 5507 of 1993 and High Court Civil Case No.810 of 2004 and High Court Misc App. No.381 of 2004. The pleadings in respect of those suits have been annexed to the verifying affidavit the contents of which I have noted. I only wish to observe at this stage that in all those suits the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein were not cited as parties. Those cases did not therefore address the issue raised against the two respondents in the Motion.

The Notice of Motion is opposed by the respondents and all the interested parties. There are affidavits sworn in that regard and following directions with consent of counsel appearing herein, submissions were filed to address the issues in the Motion. Several authorities have also been cited. I have related the submissions and the cited authorities to the pleadings herein and I believe that sufficient material has been presented to enable the court to address the issues. The Motion brought by the applicant is said to be under Order LIII Rule 1(2) of Civil Procedure Rules.

The objections raised by the 1<sup>st</sup> and 3<sup>rd</sup> interested parties are that these matters relate to title under Registration of Titles Act, Cap 281 Laws of Kenya wherein the law provides at Section 24 that, the remedy lies in damages which cannot be awarded in an application for Judicial Review. In addition, in the suits filed by the ex-parte applicant and in particular High Court Civil Case No.5507 of 1993 and High Court Civil Case No.810 of 2004 which sought remedies under the Registration of Title Act aforesaid have been determined by the High Court with finality, and the orders of that court have not been reviewed or appealed or set aside and therefore they are bidding and valid.

On the basis that litigation must come to an end, the present application is an abuse of the process of court and should be dismissed. It is further advanced that the matters canvassed are *res judicata* and the application should not be entertained. More significantly, it is provided under Section 9(3) of the Law Reform Act Cap 26 Laws of Kenya and Order LIII Rule 2 that an application for an order of certiorari shall be lodged in court within six (6) months from the date of such order. The present application being lodged well over twenty (20) years since the act complained of, cannot be deemed to be within reasonable limits. Additionally, the ex-parte applicant has attacked the decision but not in the process of reaching the said decision whereas, Judicial Review is not concerned with the merits or otherwise but the propriety or otherwise of the decision making process.

Order LIII Rule 7(1) requires that the applicant should lodge a copy of the order he challenges with the Registrar. In this case, no order has been filed with the Registrar and also there is no account for the failure to attach the order. The application is therefore incompetent.

The other interested parties submit that they are purchasers for value without notice and if anything, the applicant's remedy lies in damages. To counter the said submissions, it is the applicant's case that what is challenged is an illegality bordering a criminal offence in that, there has been inter-meddling with the property of a deceased person in total contravention of Section 45 of the Law of Succession Act Cap 160 Laws of Kenya. Further, the period of limitation does not apply where an illegality is an issue, and it cannot also be said that an alternative remedy exists because such an existence is not a bar to granting an order of certiorari.

The parties who are submitting that they were purchasers for value without notice of a defective title, cannot advance their case because what was registered in the title was a death certificate and not a confirmed grant which should have alerted any genuine buyer of the defect in the title. What is being challenged is not an order but illegal entries in the register and therefore no copy of the order was necessary in the circumstances.

My first observation is that the existence of an alternative remedy is no bar to a granting of an order of certiorari. In that regard I can only quote *Civil Appeal No.265 of 1997, David Mugo t/a Manyatta Auctioneers -Vs- Republic* where the learned judges quoting an English decision said as follows; **“the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time, being extended to meet changing conditions.....We have reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private of domestic character, has to determine matters affecting subjects provided always it has a duty to act judicially.”**

In this case, the ex-parte applicant first challenges the actions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents who registered the death certificate in respect of his late father and thereby opened the suit property to be affected by future transactions. It is elementary knowledge that the registration of death certificate does not confer any rights upon the two respondents to deal with the property of a deceased person. It is also elementary knowledge that only a grant which has been confirmed can confer such an opportunity. It cannot be said by any stretch of imagination that the two respondents did not know those requirements. If

they did not know, then, they did not deserve to occupy those offices.

It is significant to note that the respondents and by extension the interested parties have decided to address the issue on technicalities. This is evident from the submissions that they have filed. I can only say that, the orders sought being equitable, the court has unfettered discretion to address the issues advanced by the applicant without undue regard to technicalities. As to whether or not the prayers are time-barred, I am persuaded that where an illegality is advanced, then limitation cannot be pleaded. I am fortified that in so holding by the decision in **High Court Misc App. No.1279 of 2004**. The Goldenberg case where it was held that Order LIII Rule 2 which prescribes the time limit does not extend to a plea of nullities or decisions made without jurisdiction.

There is then the crucial submission that Section 24 of the Registration of Titles Act provides the right remedy for the ex-parte applicant. Whereas I agree that the holder of a title under Section 23 of the Registration of Titles Act Cap 281 can plead indefeasible title and that any aggrieved party should claim damages, a strict interpretation of those provisions may cause injustice to the parties and also expand the scope of fraud and impunity. Where it is shown that the foundation of any title cannot be sustained, an aggrieved party should be in a position to move the court for appropriate orders to challenge such as title.

The application of the maxim *ex nihilo nihil fit*, which means “out of nothing comes nothing” should be applicable in this case. If the registration of the death certificate did not confer any title to the late mother of the applicant, then every subsequent dealings in respect of this land were void *ab initio*. This is because nothing came out of that registration.

I have asked myself what consequences shall befall the parties who are said to have purchased the properties for alleged valuable consideration without notice. The answer lies in due diligence. If they did not conduct due diligence, then they should not blame any one for that omission. In that case, the loss lies where it has fallen. Without going any deeper into these matters, I find that the registration of the death certificate in the title was misconceived. The transfer of the title to the name of the mother of the ex-parte applicant without production of a confirmed grant was illegal and therefore the ex-parte applicant has justified his case for orders of certiorari and mandamus as set out in the Notice of Motion filed herein. I grant the same and at the same time order that the 1<sup>st</sup> and 2<sup>nd</sup> defendant shall immediately cancel any entries made without registration of the confirmed Grant of Letters Administration. The applicant shall have the costs of this application against all the respondents.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of October, 2010.***

**A. MBOGHOLI MSAGHA**  
**JUDGE**

