



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 2 of 2008

REPUBLICAPPLICANT

VERSUS

THE SENIOR REGISTRAR OF TITLES COAST REGISTRY....RESPONDENT

AND

RAMADA LIMITEDINTERESTED PARTY

EXPARTE BRAWNY PROPERTIES LIMITED

RULING

Brawny Properties Ltd., the exparte applicant herein, took out the Notice of Motion dated 11th June 2007 pursuant to the provisions of Order LIII rule 3 of the Civil Procedure Rules and under S.62 of the Registration of Titles Act. In the aforesaid motion the applicant applied for an order of Mandamus to issue to compel the Registrar of Titles, Coast Registry to register the transfer of all that parcel of land known as L.R.No.17835, Kilifi C.R No. 35336 from Ramada Ltd to Brawny Properties Ltd. The motion is supported by the affidavit of Pietro Canobbio sworn on 19th May 2007. It is also accompanied by a statement of facts. The Senior Registrar of titles, coast Province, Mr. Geoffrey Gachathi filed a replying affidavit he swore on 21st November 2007 in which he opposed the motion. Pietro Cannobbio, a director of the exparte applicant filed a further affidavit to respond to the facts raised in the replying affidavit of Geoffrey Gachathi. The motion was also opposed by one ZumZum Investments Ltd which filed the affidavit of Nedim Mohamed Ibrahim sworn on 5th September 2008. There was also another affidavit sworn by Pietro Canobbio on 12.11.2008 in response to that of Nedim Mohammed Ibrahim. Edward Mzee Karesi one of the Interested Parties also swore an affidavit on 14th March 2009 to oppose the motion. All the parties concerned in this motion were granted leave to file written skeleton submissions. Learned advocates also appeared to make oral highlights.

I have considered the material placed before this court. I have also taken into account both the written and oral submissions made by learned counsels. The history leading to the filing of this motion is short and largely uncontested. By a sale agreement dated 23rd February 2007, the Interested Party contracted with one Pietro Canobbio, a nominee of the applicant, for the exparte applicant to purchase L.R.No.Kilifi/17835 (C.R.35336) for a sum of Kshs.14,000,000/-. Ramada Ltd, the Interested Party herein was in possession of a letter of allotment dated 23rd January 1996 and the subsequent grant (No. CR 35336), for 99 years issued on 16th October 2002 under the provisions of the Registration of Titles Act (Cap 281 Laws of Kenya). Brawny Properties Ltd, the exparte applicant herein and Ramada Ltd, the Interested party herein obtained all the necessary consents and clearances and thereafter executed a deed of transfer on 29th March 2007. The aforesaid deed of transfer was lodged for registration on 3rd April 2007. There was a slight delay in processing the registration. This delay prompted the parties to instruct the firm of Sachdeva & Co. Advocates to make inquiries. By a letter dated 3rd May 2007, the aforesaid firm of Advocates wrote to the Registrar of Titles. By his letter of 18th May 2007, Mr. G.G. Gachathi, a Senior Registrar of titles informed the firm of Sachdeva & Co. Advocates the reasons why he was unable to register the deed of transfer. Basically the Senior Registrar of titles told the aforesaid firm

of advocates that there existed another title to the same parcel of land allegedly issued on 14th January 2004. That is what provoked Brawny Properties Ltd to take out these proceedings. It is the submission of Mr. Kinyua, learned advocate for the exparte applicant that the Senior Registrar of titles, Mombasa, in rejecting to register the transfer from Ramada Ltd to Brawny Properties Ltd, he acted ultra vires his mandate. It is the learned advocate's view that the Senior Registrar of titles took into account extraneous reasons which are not amongst those provided for under section 33 of the Registration of Titles Act. It is argued that the Senior Registrar has willfully failed to perform his statutory duty hence an order of Mandamus should issue.

Mrs. Umara, learned litigation counsel, appeared for the Respondent to oppose the motion. It is her submission that the motion should be dismissed for various reasons. First, it is argued that Ramada Ltd, the interested party, is not the registered owner of the suit property, hence it has nothing to support its claim. Secondly, that Edward Mzee Karezi, the registered owner has not been enjoined to those proceedings yet he is an affected party. Thirdly, it is said that the order for mandamus cannot issue because there is no valid instrument of transfer which has been placed before the Registrar of titles to act on.

Mr. Mogaka, learned advocate instructed by the firm of Mogaka Omwenga & Mabeya Advocates to represent Zumzum Investments Ltd, Abdulkarim Salah Muhosin, Ancient Land And Seas Ltd, Saad Ibrahim Mohamed and Abdulsamed Ibrahim Gato, being interested parties. Mr. Mogaka's main submission in opposing the motion is to the effect that if the order of mandamus is issued, the Registrar of titles would be forced to commit an illegality. That is to say that he will create new titles on top of those already in existence. In essence Mr. Mogaka was stating that the court will sanction double registration of titles if the order was given. Each of the persons named hereinabove filed affidavits to oppose the motion. They each claimed to have bought portions of the land. They each claimed that they are innocent purchasers for value without notice.

Mr. Mulwa, learned advocate for one Edward Mzee Karezi argued in opposition of the motion. Mr. Mulwa adopted the line of submissions made by Mr. Mogaka. In a nutshell, it is Mr. Mulwa's submission that the registrar of titles is not legally bound to register the exparte applicant's transfer when there is already a registered title held by a third party for the same plot.

Having considered both the written and oral submissions, it is apparent that this court has been urged to determine whether or not an order of mandamus is appropriate in this dispute. The court of Appeal examined in great detail the scope and efficacy of an order of Mandamus in **Kenya National Examinations council and Republic vs= Geoffrey Gathenji Njoroge & others C.A. No. 266 of 1996 (unreported)**. At page 18, the Court of Appeal expressed itself as follows:

“An order of Mandamus Compels the performance of public duty imposed by Statute where the person or body on whom duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply because, like in an order of prohibition an order of mandamus cannot quash what has already been done.”

There is no doubt that the Senior Registrar of Titles, Mombasa, has refused to register the deed of transfer from Ramada Ltd to Brawny Properties Ltd. It is said there is already another title. Ramada Ltd and Brawny Properties Ltd are saying that no other titles have been issued as the titles cited were issued on the basis of other deed plans. I have carefully examined the replying affidavit of Geoffrey Gachathi sworn on 21.11.2007. The same refers to L.R. No. 17835 which is registered as C.R.37185. There are also annexures showing that they were copies of grant No. 37185. A critical perusal of the grant No. 37185 annexed to the replying affidavit of Geoffrey Gachathi will reveal that there are alterations of the grant numbers. There is also an indication at page 3 of the document that the same was closed on subdivision. There is no doubt that the property in dispute i.e. L.R. No.Kilifi/17835 (C.R.No.35336) is situate within Kilifi Township. There is evidence by the Kilifi Town Clerk that an application for subdivision of the property was received but it was not approved by the Local Authority. The information is reflected in the Town clerk's letter of 15.2.2008. There is also evidence that the Director of Surveys confirming that as of 16.4.2008 the property had not been subdivided. The Senior Registrar of titles was unable to resist those facts i.e. (those of the Kilifi Town Clerk and the Director of surveys). It is important to take note of the fact that the Director of surveys confirmed in his letter of 29.10.2008 in reply to the letter of Karigithu Kinyua & Co. Advocates dated 24th .10. 2008 that the deed plans i.e. deed plans Nos. 252654 and 252650 relied upon by the 6 affected parties represent plot Nos. L.R. No. MN/VI/4196 and MN.VI/4200. The director of Surveys further confirmed that Plot Numbers MN/VI/4196 and MN/VI/4200 are in Mombasa Mainland North Section VI and not in Kilifi Township. The aforesaid correspondence are annexed to the affidavit of Pietro Cannobio sworn on 12th November 2008. I have already stated that the Attorney General and the Registrar of Titles did not contradict the aforesaid assertions. In other words there is no legitimate explanation as to why the exparte applicant's deed cannot be registered in view of the clear fact that the titles in possession of the affected parties are in respect of a parcel of land situate in Mombasa Mainland North Section VI as opposed to the suit premises which is situate within Kilifi Township.

For the above reasons I see no merit in the objections raised by the affected parties. The Senior Registrar of titles appear to have considered extraneous factors to deliberately avoid performing his statutory duty. There is ample evidence that no other title has been issued under the deed plan of the Kilifi township property. In view of that, then the submissions by the Respondents and the affected parties that the applicant should have applied for the existing titles and entries in the registrar to be quashed by an order of certiorari cannot stand. There is nothing to quash as the Senior Registrar of titles pretended that titles had been issued upon subdivision of the property. That assertion was discounted by the Director of Surveys and the Town Clerk to Kilifi town council.

In the final analysis I am convinced the motion dated 11th June 2007 is well founded. In the circumstances of this case I am satisfied that an order of mandamus should issue against the Senior Registrar of titles, Mombasa. Consequently the motion dated 11.6.2007 is allowed with costs to the exparte applicant and the Interested party.

Dated and delivered at Mombasa this 21st day of May 2009.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Mogaka for Interested Party, Mr. Mulwa for one of the Interested Parties, Mrs. Umara for Respondent, and Kinyua for Ex-parte Applicant.