



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Miscellaneous Application 258 of 2008

HOSEA NDERI KIRIITHI.....APPLICANT

VERSUS

KENYA NATIONAL ASSURANCE COMPANY LIMITED (2001).....RESPONDENT

JUDGMENT

By his Originating Summons dated 20th March 2008 and lodged on 29th May 2008, Hosea Nderi Karithi (hereinafter “*the applicant*”) sought the court’s determination of the following questions:

- (a) **Whether the applicant is entitled to all that parcel of land known as Land reference number sub-division 2886 (Original 2562) section VI Mainland North.**
- (b) **Whether the applicant is entitled to be duly registered as the proprietor of all that parcel of land known as Land reference number sub-division 2886 (Original 2562) section VI Mainland North.**

The applicant further sought the following order:

- (d) **That the respondent do effect a transfer of all that parcel of land known as Land reference number sub-division 2886 (Original 2562) section VI Mainland North in favour of the Applicant and in default an order that the Deputy Registrar of the High Court do execute the transfer thereof in favour of the Applicant.**

The Originating Summons which is supported by the applicant’s affidavit, is based on the following grounds:

- (a) That all that parcel of land known as Land reference number sub-division 2886 (Original 2562) section VI Mainland North was owned by the Municipal Council of Mombasa and was subject to a charge to Kenya National Assurance Company Limited.**
- (b) That the Kenya National Assurance Company Limited in exercise of its statutory power of sale sold the suit land by public auction to the applicant on 11th November 1989.**
- (c) That the applicant fulfilled all the terms and conditions of the sale and became the Lawful owner of the said land known as Land reference number sub-division 2886 (Original 2562) section VI Mainland North.**
- (d) That the applicant's occupation and possession of the said land has been uninterrupted.**
- (e) That the Kenya National Assurance Company Limited went into liquidation and its Closed Fund under which the said land was comprised was transferred to the respondent.**
- (f) That the respondent has despite the foregoing, unlawfully refused to transfer the said land to the applicant.**
- (g) That the applicant has therefore been unable to register the said land in his name.**
- (h) That the applicant is duly and legally entitled to the said land and ought to be registered as the proprietor thereof.**
- (i) That the applicant is bound to suffer irreparable loss as he has been in possession of the suit property since 1990.**
- (j) That the applicant cannot deal with his property which is now worth more than Kshs. 2,000,000/= in any manner he deems fit as he has no title documents thereof.**

The supporting affidavit elaborated the above grounds and exhibited several annextures including a copy of the sale agreement and correspondence exchanged.

The Originating Summons is opposed on the basis of Grounds of Opposition filed by the advocates for the respondent. The respondent objected to the Originating Summons on three substantive grounds namely; that the respondent is not the registered owner of the said piece of land and therefore has no legal capacity to effect a transfer in favour of the applicant; that the Municipal Council of Mombasa is the registered owner of the said piece of land and the applicant has no claim against the respondent since it holds no title to the said piece of land, and that the application is incompetent and an abuse of the process of the court.

The record does not show that any of the parties herein applied for directions despite the order of the court made on 5th May 2009. Rule 8A of Order XXXVI was therefore not complied with. Be that as it may by a consent dated 5th July 2009. Counsel agreed on the following:

- 1) That the plaintiff/applicant do file his submissions by 17th July 2009 and serve the same upon the defendant/respondent.**
- 2) That the defendant/respondent do file its submissions by 27th July 2009.**
- 3) That the matter be mentioned on 29th July 2009 to take a judgment date.**

Pursuant to that consent order, the matter was mentioned before me on 29th July 2009 when the written submissions were found to be in place. The gist of the applicant's case as can be gathered from the application and the supporting affidavit is that he purchased the suit property at a public auction at the

consideration of Kshs. 300,000/= which sum he paid in full but before a transfer could be effected in his favour the chargee went into liquidation and its “*closed fund*” was transferred to the respondent which now has the legal capacity to execute a transfer in favour of the applicant but it has neglected or refused to do so, hence the Originating Summons.

The gist of the respondent’s response is that there was no contract between it and the applicant and that the documents relied upon by the applicant do not show that the respondent has legal capacity to transfer the suit property to the applicant. The respondent has further challenged the competence of the application in the absence of an exhibited extract of title to show that such a plot indeed exists and was charged as alleged by the applicant. In the respondent’s view, the suit property is owned by the Municipal Council of Mombasa and it ought to have been joined in these proceedings.

I have now considered the Originating Summons, the supporting affidavit, the Grounds of Opposition and the submissions of counsel. Having done so, I take the following view of the matter. The applicant has invoked the provisions of section 64 of the Registration of Titles Act (Cap 281) which reads as follows:-

“64. In any proceedings respecting any land or in respect of any transaction, contract relating thereto, or in respect of any instrument, caveat, memorial or other entry affecting any such land, this court may, by order, direct the Registrar to cancel, correct, substitute or issue any memorial or entry in the register or otherwise to do such acts or make such entries as may be necessary to give effect to the judgment or order of the court.”

The section refers to land subject to the Act. All the documents annexed to the applicant’s supporting affidavit do not show how the suit property is registered. The applicant describes the property as Land reference number sub-division 2886 (Original 2562) section VI Mainland North. The property which was advertised for sale was however described as Bungalow Number 3 standing on sub-division Number 2886 (Original 2562/R) section VI Mainland North. It would appear that what the applicant is claiming is a larger title comprising more than was advertised for sale. The applicant would have settled the issue if he had obtained a certified copy of the register incorporating the suit property. He did not

In the premises, there has been failure to comply with the provisions of Order XX Rule 5A of the Civil Procedure Rules which rule is in the following terms”-

“5A. Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written Law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any judgment is delivered.”

In the end, I find and hold that this Originating Summons is incompetent. I order that the same be and is hereby struck out. As the application has been determined on a technicality, costs shall not follow the event. I order that each party bears his/its own costs. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF OCTOBER 2009.

F. AZANGLALA

JUDGE

Read in the presence of:-

Were holding brief for Kaburu.

F. AZANGALALA

JUDGE

8TH OCTOBER 2009