REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appli 3 of 2008

IN THE MATTER OF: ORDER LIII RULE 3 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: AN APPLICATIONBY HEINZ ISBRECHT FOR JUDICIAL REVIEW

IN THE MATTER OF: CAUTION DATED THE 21ST SEPTEMBER 1999 REGISTERED BY HEINZ ISBRECHT AND ENTRY NUMBER B7

AND

IN THE MATTER OF: TITLE NUMBER KWALE/DIANI COMPLEX/249

BETWEEN

THE REPUBLIC

VERSUS

1. **THE REGISTRAR, KWALE LANDS REGISTRY**
2. **CHARLES OCHIENG NDIGA**
3. **MOFFAT MUREITHI KANGI……..… INTERESTED PARTIES**

EX-PARTE

HEINZ ISBRECHT …….....…….. APPLICANT

RULING

The subject matter of this Ruling is the notice of preliminary objection date 11th April 2008 filed by

Moffat Mureithi Kangi, the 3rd Interested Party herein. In the aforesaid notice, the 3rd interested party raised the following grounds to have the Ex-parte application's notice of motion dated 28th February 2008 struck out:

"**(1) The statement dated 12th February 2008 is supported by a defective and an incompetent verifying affidavit.**

(2) The entire application is bad in law for lack of an applicant and or a lawfully appointed agent.

(3) This court lacks jurisdiction to grant the prayers sought.

(4) The entire cause is misconceived and an abuse of the process of court.

(5) The issue touching on the caution dated 21st September 1999 and on the execution process in H.C.C.C. No. 320 of 1997 are Resjudicata."

When the motion came up for hearing the notice of preliminary objection had to be disposed of first. Mr. Wameyo, learned advocate for the interested party, simply invited this court to consider the grounds enumerated in the notice of preliminary objection and the skeleton arguments without verbally expounding. Let me now consider the issues raised and how the parties addressed them.

Before considering the issues raised I feel obliged to give a brief background of the facts leading to the filing of the motion dated 28th February 2008. This can easily be deduced from the statement of facts and the verifying affidavit accompanying the motion. Charles Ochieng Ndiga, the2nd interested party herein, secured financial facilities in the sum of Kshs.300,000/= from Barclays Bank (K) Ltd upon pledging title No. Kwale/DianiComplex/249 as a collateral. The bank registered the charge dated 30th august 1999 against the aforesaid title on the 21st day of September 1999. Heinz Isbrecht, filed Mombasa H.C.C.C.C No. 320 of 1997 against Charles Ochieng Ndiga in which he claimed for interalia

(i) Payment of Kshs.2,706,068/15

(ii) Damages for breach of contract.

(iii) Interest.

The aforesaid suit was compromised by consent on 15th September 1999 in which Heinz Isbrecht was given judgment in the sum of Kshs.3,218,627/20.

On the 22nd day of September 1999, Heinz Isbrecht registered a caution against title No. Kwale/Diani Complex/249 when the2nd interested party failed to settle the decree arising out of H.C.C.C.C. No. 320 of 1997. He also managed to obtain a prohibitory order from this court vide Mombasa H.C.C.C. No.320 of 1997 dated 4th November 1999 in an apparent attempt to attach title No. Kwale/Diani Complex/249 in execution of the decree. Barclays Bank of Kenya Ltd. took up objection proceedings under Order XXI rules 53, 56 and 57 of the civil proceedings. The aforesaid bank successfully had the prohibitory order lifted by this court on 22nd October 2003. The caution dated 21.9.1999 was finally removed on 7th December 2007 by the District Land Registrar, Kwale. On the 8th day of February 2008, title No. Kwale/Diani Complex/249 was transferred and title issued to Moffat Mureithi Kangi, the 3rd Interested Party herein. Apparently, the ex-parte applicant's learned advocate learnt of the transaction in the morning of 8th February 2008. On the 28th day of February 2008, the ex-parte applicant filed the motion in which he sought for interalia

(a) An order of certiorari to remove into this court for quashing the decision of the Land Registrar, Kwale made on 7/12/2007 to remove the caution dated 21.9.1999.

(b) An order for mandamus directing the aforesaid Land Registrar to cancel all the entrie**s which** remov**ed the caution together with the title deed issued to Moffat Mureithi Kangi, the 3rd Interested Party.**

(c) An order of prohibition to prohibit any registration on interference on the parcel of land.

(d) Costs.

Having given the history behind the filing of this motion, let me now address my mind to the issues raised in the notice of preliminary objection dated 11th April 2008. The first ground is to the effect that the statement dated 12th February is supported by a defective verifying affidavit. The 3rd Interested Party has pointed four defects which should convince this court to strike out the verifying affidavit.

First, it is stated that the verifying affidavit does not mention the date when it was executed. Mr. Tindika on his part did not deny this fact but instead urged this court to excuse the defect on the ground that it is a mere irregularity. I have perused the verifying affidavit of Mr. Randolph Tindika filed in court on12th February 2008. It is obvious from the face of it that the date it was attested was not mentioned. The law is quite explicit when it comes to the particulars to be stated in the jurat. It suffices to reproduce the contents of Section 5 of the Oaths and Statutory Declaration Act as follows:

"**S.5. Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act <u>shall</u> state truly in the jurat or attestation what place and on what date the oath or affidavit is taken or made."**

It is apparent from the above excerpt that an affidavit in its jurat must state the date it was deponed. In default the entire affidavit is rendered null and void ab initio. I find the preliminary objection to be well founded on this issue. The defect is fundamental hence it cannot be classified as a mere irregularity as suggested by the learned advocate.

The second defect pointed out, is that Mr. Tindika swore the verifying affidavit without the authority of the ex-parte applicant. It is the submission of Mr. Tindika that he did not need prior written authority before making the affidavit from his client because he had been duly appointed as the advocate for the ex-parte applicant under Order III of the Civil Procedure Rules. I have read the verifying and supporting affidavits filed by Mr. Randolph Tindika. Those affidavits do not state that he was authorized by the client to make the averments contained in the aforesaid affidavits. In fact in paragraph 2 of the supporting affidavit, Mr. Radolph Tindika states as follows:

"**2. That currently the applicant is at Bremen, West Germany and due to the urgency of this matter, it is not possible to have him travel to Kenya and I believe I am capable of swearing this affidavit."**

It is obvious that Mr. Tindika did not obtain the express authority to make the affidavits. The cause is not his. He did not even make any averment to the effect that he was authorized by the client so as obviate the necessity of filing a written authority. The learned advocate appears to have confused the necessity to obtain authority with his competency to swear the affidavit. There is no doubt that he was appointed under Order III of the Civil Procedure Rules to represent the ex-parte applicant. By virtue of the aforesaid provision he became competent to swear an affidavit as a legally recognized agent. But that did not excuse the learned advocate from filing a written authority to make the averments on behalf of the client or to even aver that he was authorized to do so. For the above reasons I am convinced that the preliminary objection on this ground is well founded, consequently the verifying and supporting affidavits are available for striking out as prayed.

The third defect pointed out is to the effect that the learned advocates swore an affidavit in respect of contentious issues contrary to the provisions of rule 9 of the Advocates (Practice) Rules. There is no doubt that the issues raised in the motion are contentious. There is an allegation to the effect that the Land Registrar acted illegally, fraudulently and unprocedurally in removing the caution. The learned

advocate at some point may be required to stand on the witness box as a witness. That obviously contravenes rule 9 of the Advocates (Practice) Rules. Again, I find this ground raised in support of the preliminary objection to be proved. I uphold the same by striking out the affidavits.

The fourth defect argued is to the effect that the jurat of the verifying affidavit is on a separate page from the body of the affidavit Mr. Tindika is of the view that there is no explicit provision under the Oaths and Statutory Declarations Act which states that the jurat must be on the same page with the body of the affidavit. The learned advocate is also of the view that the error relates to the format hence excusable. I have perused the jurats of both affidavits and I find that the defect pointed exists. The jurat is on a separate page instead of being on one page with part of the body of the affidavits. I agree with the submissions of Mr. Tindika that there is no express provision under the Oaths and Statutory Declarations Act and the rules therein that states that the jurat must be on the same page with part of the body of the affidavit. I also agree that the defect is that of form. This court has the discretion to excuse such a defect on the basis that it is a mere irregularity under Order XVIII rule 7 of the Civil Procedure rules. The aforesaid rule provides as follows: -

"**7. The court may receive any affidavit sworn for the purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof."**

The objection on this ground is overruled.

The second main ground raised as a preliminary point of law is the fact that there is no aggrieved party. It is the argument of the 3rd Interested Party that there is no evidence that Heinz Isbrecht is a party in this matter hence the proceedings are null. I must confess that I do not understand the 3rd Interested Party's submission over this issue. My predicament is worsened by the fact that Mr. Tindika did not deem it fit to make submissions over this allegation. I have looked at the motion and it is crystal clear that Heinz Isbrecht is named as the ex-parte applicant. Whether he is an aggrieved party or not is a matter of evidence. For this reason I do not see any merit on this ground.

The third ground which was enumerated in the notice is to the effect that this court lacks jurisdiction to issue the orders sought. Again I must point out that I find this ground to be misplaced. The 3rd nterested Party seems to confuse the role of this court and that of the Registrar. The ex-parte applicant has sought in the motion for orders of certiorari, mandamus and prohibition. These are Public Law remedies which can be issued by the High Court pursuant to Sections 8 and 9 of the Law Reform Act and pursuant to Order LIII of the Civil Procedure Rules. The fact that the orders sought may not be issued against the Land Registrar in the circumstances of this matter does not in any way mean that this court lacks the jurisdiction to issue the orders. With great respect, I must dismiss this ground of the preliminary objection.

The last ground of the preliminary objection is the fact that it is alleged that the matter is resjudicata. It is the argument of the 3rd Interested Party that the issues raised herein were dealt with by this court in its ruling of 22nd October 2003. Mr. Tindika was of the view that this objection should be dismissed because the aforesaid decision only dealt with the prohibitory order and not the caution. I have already pointed out in the introductory party of this ruling that this court lifted the prohibitory order registered by the ex-part applicant against title No. Kwale/Diani Complex/249 in its decision of 22.10.2003 upon the application by Barclays Bank (K) Ltd. by way of Chamber Summons dated 5.6.2002. A cursory look at the aforesaid summons will reveal that Barclays Bank (K) Ltd. had applied for following orders interalia:

"**1. The attachment levied by the plaintiff upon the defendant's immoveable property comprised in plot No. Kwale/Diani Complex/249 situated at Diani in the Republic of Kenya be set aside and discharged.**

2. That the prohibitory order dated 4th November 1999 registered by the Plaintiff against the title to plot No. Kwale/Diani Complex/249 pursuant to the said attachment be lifted."

In the end this court granted the orders as prayed in the summons. Can this be said to be resjudicata? I do not think so. It is clear that the issue touching on the removal of the caution was not pleaded now argued at the interpartes hearing of the summons. For this reason, and, with respect, I agree with the submissions of Mr. Tindika that the motion is not resjudicata.

In the end I will uphold the preliminary objection on the basis of the first ground. That is to say that the verifying and supporting affidavits deponed by Mr. Randolph Tindika are declared to be fatally defective hence they should and I hereby order that they be struck out and expunged from record. The other grounds are on notice are dismissed for lacking in merit. The effect of my order is that the motion dated 28th February 2008 stands as unaccompanied by a statement of fact. What is the legal position regarding such a motion?

The decision of the court of appeal in **Commissioner General of Kenya Revenue Authority =v= Silvano Onema Owaki T/a Marenga Station C.A. 45 of 2000** answers the question as follows:

"**It is the verifying affidavit not the statement to be verified which is of evidential value in an application for judicial review ….**"

The end result is that there is no evidence to support the motion as required under Order LIII rule 1(2) of the Civil Procedure Rules. Consequently the motion is ordered dismissed with costs to the 3rd Interested Party. I deny the other interested parties costs because they did not participate at the time when the preliminary objection was being prosecuted.

Dated and delivered at Mombasa this 28th day of August 2008.

J.K. SERGON

JUDGE