



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 603 of 2002

KENYA NATIONAL CAPITAL CORPORATION.....APPLICANT

Versus

THE CHIEF LAND REGISTRAR.....RESPONDENT

JUDGMENT

In the Notice of Motion dated 12th November 2002, the ex parte Applicant, Kenya National Capital Corporation brings this application for Judicial Review against the Chief Land Registrar for an order that an order of mandamus directed at the Respondent directing him to endorse on the Register of Land parcel Ngandori/Kirigi/856 (the suit land), the charges dated 29th October 1984 and 17th October 1986 and costs of the application.

The application is grounded on a statutory statement dated 27th May 2002, a verifying affidavit of Ziporah Kinanga Mogaka, the Credit Recoveries Manager of National Bank of Kenya Ltd. with whom the exparte Applicant merged and is, dated 12th November 2002. A further verifying affidavit was filed by Ziporah Mogaka on 9th November, 2005 and skeleton arguments on 9th December 2005. The Respondent has filed an affidavit dated 27th June 2003 sworn by the District Land Registrar, one M.K. Njogu.

The Interested Party, Morris Guchura Njage filed a replying affidavit dated 10th May 2003 and skeleton arguments on 30th December 2005.

Briefly, the facts of this case are that the Interested Party charged the suit property to the Applicant which charges were registered on 29th September 1984 and variation and further charges on 17th October 1986, annexed as 2 km 222 to the further affidavit. The Interested Party defaulted in repaying the loan and the Applicant sought to realize the security in exercise of their statutory power of sale. The Interested Party filed a suit RMCC 67/1999 in which he sought an order of injunction to stop the sale but it was dismissed on 18th September 1999. The property was put up for sale again on 16th April 1999 and Damaris

Wanyaga Kiragu was the winner at Kshs.1.5 million and she paid the sum in full and the property was transferred to her. But before the said

transfer, the Interested Party filed HCC 42/99 seeking an order of certiorari to quash the decision of Manyatta Divisional Land Board on grounds that consent to transfer to the new purchaser was irregularly obtained. The court granted the prayers on 9th November 1999 and the transfer was also annulled ZKH (a & b) by the ruling of 9th November 1999 and all consequential orders were set aside.

The District Land Registrar admitted he discharged the property completely and issued the Debtor with a title deed free of all encumbrances and removed the charges and the further charge. The removal was based on a court order issued in HCCC 47/1999 which it has now been established never existed. Despite complaint through letters to the

District Land Registrar, to rectify the Register in light of the discovery that the order in HCCC 47/1999 was a forgery, it fell on deaf ears till the letter of 27th March 2002 when the District Land Registrar Embu (ZKM 7(d)) acknowledged that the discharge of the

property was fraudulently done. The refusal by the Registrar's Office to take action prompted the filing of this application.

In the District Land Registrar's affidavit in reply, he deponed that the charges which had been registered on the disputed land were discharged on 30th June 1999 pursuant to Section 77 (4) of the Registered Land Act, upon the exercise of the chargees' statutory power of sale and transferred to Damaris Kiragu and that the same were not unlawfully removed as alleged. That the Interested Party filed cases both in the lower court and High Court and prohibitory orders were registered and were only removed on 7th June 2001 and the said land was transferred back to the Interested Party vide a court order in HMisc Application 47/1999 dated 18th March 2001 (MKN1). He opposed the applicant's motion. However in his submissions, Mr. Chahale, Counsel for the Respondents said that the application was not opposed because investigations had been conducted by the Chief Land Registrar and it had been established that the court order presented to the District Land Registrar Embu was not genuine and that the Registrar is ready to abide by the court's orders. That if there was any fraud the Respondent was not party to it as the Respondent merely acted on the document presented to it.

Mrs. Kibe, Counsel for the Interested Party raised several grounds of objection, the first being that the leave to bring Judicial Review proceedings was granted based on a defective statement and affidavit because the statement contained facts instead of the facts being placed in the verifying affidavit. He relied on the case of **COMMISSIONER GENERAL K.R.A. V SILVANO ONEMA OWAKI CA 45/2000**. Counsel also submitted that the Notice of Motion is fatally defective because the Chief Land Registrar who is named as a Respondent is not the person mandated to exercise the powers sought, that is, to reinstate the charge on the Register but that it is the District Land Registrar Embu who wrote the letter ZKM 7 (d) dated 27th March 2001. That he is the one who made entries on the Register. That the Registrar can discharge a charge but cannot reinstate it under the Registered Land Act and that a charge can only be reinstated in accordance with the provisions of S.108 of the Registered Land Act, that is it should be registered in a particular form. That a power of sale having been exercised, there is no charge that can be reinstated.

Counsel also submitted that there was no requirement that the Applicant be heard before removal of the charges because the Registrar was not performing a quasi judicial function and that mandamus cannot issue because there is no statutory duty imposed on the Chief land Registrar to reinstate the charges. He cited the **KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96** in which the court considered the scope of the orders of Judicial Review including mandamus. That mandamus cannot lie to correct what has been done in the wrong way.

Another objection raised is that the order sought is at variance with that in the statement and cannot issue. Lastly that the court in Embu made orders which are still valid since there has been no appeal in HCC 42/09.

I have now considered all the affidavits on record, the submissions by all Counsel. I wish to note that the submissions made by Mr. Chahale, Counsel for the Respondent are not in tandem with the Replying affidavit sworn by the Respondent, the District Land Registrar on 27th June 2003. If the Respondent found out that the order upon which the Registrar relied in discharging the charges was forged, then the Deputy Registrar should have sworn an affidavit to that effect. The Counsel cannot purport to give evidence from the bar and contradict what has been deponed to on oath in an affidavit. The Respondents position is inconsistent.

The Interested Party objected to the verifying affidavit and the statutory statement as being incompetent. Order 53 Rule 1(2) requires that the statement should contain the name and description of the Applicant, the relief sought and the grounds upon which the application is made. The facts are supposed to be contained in the verifying affidavit. The statement herein contains the grounds as well as facts in support of the application. Whereas the verifying affidavit dated 12th October 2002 only contains 4 paragraphs which cannot be evidence in support of the motion. In the **ONEMA OWAKI CASE (supra)** the Court of Appeal observed that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. The court also cited Supreme Court Practice 1976 Vol 1 para 53/1/7 which confirmed that position. The verifying affidavit herein is of no evidential value to the Applicants case. However on 26th October 2005 the applicant applied to the court to file a further affidavit and the Interested Party had no objection to the filing of the further affidavit provided they were accorded a chance to reply. Justice Nyamu allowed the filing of the further affidavit and gave the Interested Party 21 days to respond.

By 20th January 2006 when the matter came up for mention, the Interested Party had not filed their further replying affidavit and the court allowed them a further 14 days and on 16th February 2006, it is recorded that the Interested Party was no longer interested in filing a further affidavit in reply and this file was sent to the Honourable the Chief Justice for

allocation of hearing dates. That is how the Applicant's further affidavit was filed. It is dated 9th November 2005. Ordinarily the court would not allow such affidavit to be filed because under Order 53 Rule 4(2) Civil Procedure Rules a further affidavit can only be filed with the leave of the court and it should be a reply to new matter raised in the other party's affidavit.

In this case the affidavit did not give all the evidence required to support the application and annexures. However since neither the Interested Party nor the Respondent had no objection to the filing of that affidavit, it cannot be challenged at this stage. It is properly on record and the Interested Party did not challenge it by filing another affidavit despite the fact that they were given a chance to file a reply. The applicant's further affidavit is properly on record and the grant of leave without Judicial Review proceedings cannot be challenged at this stage.

As for the statement, even though it contains facts, the same can be ignored and the court looks only at the grounds. The grounds in the statement are that the removal of the charges from the Register is unlawful, that failure to reinstate the same is improper and unjustified and the Applicant is entitled to equal protection of the law. The question of the removal of the charges being unlawful is a ground upon which a Judicial Review application can be premised and it cannot be said that application has no grounds.

The facts of this case are not disputed. After the Interested Party defaulted in repayment of the loan, borrowed from the Applicant, the Applicant exercised their power of sale and sold the property by auction only for the court in HMisc 42/1999 to quash the decision of the Manyatta Divisional Land Control Board made on 21st May 1999 giving consent of the transfer of LR Ngandori/Kirigi/856 from the Interested Party to the purchaser. That is not disputed. That being the court's decision, that what had been done was quashed and reduced to nothing, it means that there had been no sale and no transfer of the suit land to the purchaser. The court set aside all the consequential orders including the registration of titles on 30th June 1999 in favour of the purchaser. That having been done in my considered view, the parties were back to square one and the charges registered in favour of the Applicant were still in place on the Registrar.

Then an order dated 15th March 2001 in HMisc 47/1999 was "issued" and the Registrar registered it on 7th June 2001. The said order directed the Registrar to remove all prohibitory orders and charges from the suit land because the case was finalized and that the title deed held by Damaris Wanyaga Kiragu be cancelled and annulled. That is the order that Mr. Njogu, the District Land Registrar Embu acted upon and released the title to the Interested Party. It is MKM -1. It is the order that the Applicant claims to have been a forgery. Indeed neither the Respondent nor Interested Party have exhibited proceedings in which that order of 15th March 2001 was issued. The Deputy Registrar/Senior Resident Magistrate's Court in its letter of March 2002 (2KHM 7c) confirmed that HMCC 47/1999 involves other parties **NJAU MORIS V ALBINO NYAGA MULINGA** and the Estate of **Paul Ndunda**. It does not relate to the parties or proceedings herein or the suit land.

The source of the order of 15th March 2001 is unknown and it had no basis. It can only be a forged order. Interestingly, the Interested Party has not made any reference to it yet it is as a result of that order that his title was released to him when he well knew that he had not paid up the loan owed to the applicant. The order of 15th March 2001 being a forgery, it was null ab initio and could not confer any rights or duties and what was done by the Registrar as a result of the forged order was a nullity.

I have seen the powers of the Land Registrar under Sections 7 and 8 of the Registered Land Act. The Chief Land Registrar is responsible for administering the Land Registers in accordance with the Act. (7(1)). Under Section 7 (4) the Chief Land Registrar may in writing authorize a Land Registrar to exercise or perform any of the powers conferred on the Chief Land Registrar. My understanding of this provision is that all Land Registries fall under the supervision of the Chief Land Registrar and are answerable to him. Any act done by any other Land Registrar will be deemed to be done by the Chief Land Registrar who has the authority over all of them. I believe that even if the District Land Registrar in Embu acted on the title in issue, the Chief Land Registrar is properly sued as the District Land Registrar is not being sued on his personal capacity.

Under S. 6 Registered Land Act provides that each registration District has to maintain a register S.7 then gives the Chief Land Registrar have responsibility of administering all Land Registries. It is the District Land Registrar who dealt with this title to the suit land following a forged order or a fraud. It was a nullity ab initio. He had no authority to deal with it in the manner that he did. What was null and void cannot acquire any legality and that being so, the Land Registrar should put the registers back to the place in which he found them before the said forged order of 15th March 2001. The order of transfer had been quashed by the court and so there had been no sale and it follows that the charges should not have been removed from the register of suit land. By returning charges court register does not mean that the Registrar would be acting under S. 108 of the Registered Land Act which provides for registration of a charge or an instrument. It is not a new charge. It does not arise here. The Interested Party got loans as a result of which the charge was registered, and he defaulted in payment. The court had quashed the purported sale of the land by the Applicant in

exercise of its statutory powers. It follows that the position as before the aborted sale remain with the charges on the register. The only option is to direct the Registrar to rectify that which he did in error, believing that the order of 15/3/01 was genuine and issued by the court. The Land Registrar has a duty to maintain land registers in proper order. And to do so, the charges registered on any given title should be in place. I find that mandamus would issue in this case. The Registrar has known that the order of 15th March 2001 was a fraud and so should put the register in the position it had been before the said fraud was committed.

The Interested Party submitted that the court's orders in HCCC 42/99 are still subsisting and not appealed against. That is not the issue here. The applicant is actually challenging the orders made as a result of the forged order. Once it is done the applicant can then follow procedure and start the process of exercise of their statutory power of sale afresh.

Is the order sought in the statement at variance with that in the Notice of Motion? Order 53 Rule 4 (1) Civil Procedure Rules provides that the orders in the Notice of Motion should be those set out in the statement. So that if they are at variance, no orders can be granted. In the Notice of Motion, the Applicant seeks an order that an order of mandamus directed at the Chief Land Registrar directing him to endorse on the register of land parcel No. Ngandori/Kirigi/856, the charge dated 29th October 1984 and 17th October 1986. In the statement, the prayer is that an order of mandamus directed at the Chief Land Registrar directing him to endorse on the register of the suit land and in the Debtor's title the charge in favour of 'KENYAC' described above. The only difference between those two prayers is that the statement does not specify the date of the charges and KENYAC (the applicant) is not specifically mentioned. That is a minor variation that does not alter the prayer or order sought. In the result, I find that the Chief Land Registrar is hereby directed to endorse or enter the charges back in the Register from where he removed them in error, because the Respondent was misled by a forged order. I direct that each party bears their own costs.

Dated and delivered this 19th day of September 2008.

R.P.V. WENDOH

JUDGE

Present:-

Ms. Were for Applicant

Mr. Makongo for Respondent

Elizabeth: Court Clerk