



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MISC APPLI 360 OF 2007

COAST WATER SERVICES BOARD.....APPLICANT

Versus

COMMISSIONER OF LANDS.....RESPONDENT

MARGROVE INVESTMENTS LIMITED.....INTERESTED PARTY

RULING

Before me is an Application by way of Chamber Summons. It is brought by the ex parte Applicant, Coast Water Services Board against the Commissioner of Lands, the Respondent and Mangrove Investments Ltd., the Interested Party. The Applicant seeks the leave of this court to bring Judicial Review proceedings for the following orders:

2.

(i) An order of certiorari quashing the grant of lease issued pursuant to the provisions of the Registration of Titles Act (Cap 281) Laws of Kenya

^h February 2002 to Scleraca Ltd, a limited liability Company, in respect of LR No. MN/VI/3615 situate in Mombasa, the suit premises herein.

(ii) An order of certiorari to quash the decision of the Respondent to consent and endorse in the title document the transfer of the suit premises to the Interested Party herein and in Land Register on 22nd February 2002.

(iii) An order of mandamus compelling the Respondent to grant leasehold interest in respect of the suit premises to the Applicant and to register the Applicant as the proprietor of the suit premises;

3. That leave if granted do operate as stay of execution by the Interested Party of possessing rights in respect of the suit premises and or any attempt to evict or remove the applicant from the suit premises;

4. Costs of the proceedings.

The Chamber Summons is supported by the Statutory Statement and a Verifying Affidavit sworn by Engineer Iddi Mwasine, the Chief Executive Officer of the Applicant.

When the matter came up under certificate of urgency on 13th April 2007 before the vacation judge, he ordered that the Chamber Summons be heard interparties. The other parties were therefore served and one Ashok Labshanker Doshi, Director of the Interested Party filed an Affidavit in opposition to the Application.

The Interested Party is the present registered proprietor of LR MN/VI/3615, the suit premises herein, having been granted a lease on 1st July 1997 in terms of the title exhibited as ALD I, which was sold to the Interested Party by Scleraca Ltd. for a sum of Kshs.6 million. (ALD2 is the registered transfer).

The Respondent did not file any reply or appear. The Applicants case is as follows:-

The Applicant is a statutory body engaged in management and operation of water services in Coast Province. The suit premises had been vested in the Applicant pursuant to Rule 5 (c) of the Water Services Rules 2005 – made under the Water Act. The land had been Public Land and the Applicant's contention is that the land was not available for allocation but the Respondent went ahead to allocate the land to Scleraca Ltd who then transferred it to the Interested Party.

It is the Applicants contention that the Respondent's actions were ultra vires his powers, illegal and an abuse of his powers, was null and void. That the Interested Party filed a suit 172/06 seeking to have the land declared as theirs and injunct the Applicants from entering or using the said property and that on 14th February 2007 Justice Serگون granted the prayers. That the Applicant has been served with an order of eviction and yet the Applicant performs public duties which are threatened.

The Respondent contends that the Applicant is not entitled to leave because if any orders are granted, they are likely to conflict with those in the HCC 172/06, that the issues raised herein are similar to those in HCC 172/06. That besides the order of mandamus cannot be granted as the court would be substituting the decision of the Respondent with that of the court. It was also argued that the order of certiorari cannot issue as it has been sought outside the 6 months period. The Respondents Counsel relied on several authorities in support of their objection to the orders.

The scope of Judicial Review is summed up in the following passage from **THE SUPREME COURT PRACICE 1997 VOL 53/1 – 14/6** which states:-

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself.

It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority which he has been subjected and that is no part of that purpose to substitute the opinion of the judiciary or individual judges or that of the authority constituted by law to decide the matters in question."

In this case this court would not concern itself with the merits of the issuance of the title/lease to the Interested Party by the Respondent, but by the process by which the decision was made.

In the case of **NJUGUNA V MINISTER FOR AGRICULTURE (2000) IEA 184**, the Court of Appeal set out the test applicable as to when the court can grant leave. The court held "**The test as to whether leave should be granted to an Applicant for Judicial Review is whether, without examining the matter in any depth, that is an arguable case, that the reliefs might be granted on the hearing of the substantive Application"**

The court held the same in the case of **AGA KHAN EDUCATION SERVICE KENYA V REP (2004) IER 1**.

All that the court is required to do at this stage is consider whether the Applicant has an arguable case. It need not be a good case that is likely to succeed and the court need not go with the depth of the matter.

In the present case, it is not disputed that there is a Civil Case pending between the parties herein. The Interested Party filed a suit to evict the Applicant from the suit premises. The Applicant has filed a defence and counterclaim in the said suit. The title to the suit land is in the names of the Interested Party. The underlying dispute in this matter is ownership of the suit land. It is noteworthy that the Respondent is not joined in the Civil Suit though the dispute is over unlawful or illegal allocation of the suit land. I would have expected the Applicant to bring in the Respondent as a 3rd party to the Civil suit in order to articulate its case properly.

Can the issue of title be resolved in a Judicial Review Application. The answer is in the negative. To prove ownership there would be need for proof by way of viva voce evidence but not Judicial Review which is determined on affidavit evidence. The purpose of leave to bring a Judicial Review Application was summarized in the case of **R V IRC ex parte FEDERATION OF SELF EMPLOYED (1982) AC 642**, where Lord Diplock said:-

“The need for leave to start proceedings for remedies in Public Law is not new. It applied previously to Applications for prerogative orders though not to Civil courts for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceeding for Judicial Review it were actually pending even though misconceived.”

For an order of certiorari to issue the Applicant would need to establish sufficient interest in the suit land. But the title is in the Interested Party's names who has bought it from another. As earlier observed, there would be need for adduction of evidence to establish how they came to be on the land, how it was transferred to the Scleraca Ltd who sold it to the Interested Parties. If there is allegation of fraud, it has to be proved any way of evidence. In respect of mandamus, this court would be usurping the powers of the 2nd Respondent if it were to decide to whom the lease was to be issued to.

For the argument by the Interested Party that the orders of certiorari cannot be issued because this matter is filed outside the 6 months allowed by Order 53 Rule '2', it is not be an issue to consider at this stage. I can only point out that the limitation of 6 months only refers to “judgment, decrees, order conviction or other proceedings”. A decision by any other body which is null and void may be quashed even after expiry of 6 months. The Constitutional Court confirmed that position in the case of **JUDICIAL INQUIRY IN THE GOLDEN BERG AFFAIR ex parte MWALULU HC MISC 1279/04**.

For the reasons considered above, I find that prima facie, an arguable case has not been demonstrated by the applicant and the Chamber Summons is hereby dismissed. Each party to bear its own costs.

Dated and delivered this 25th day of June 2007.

R.P.V. WENDOH

JUDGE