



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**MISC APPLI 946 &967 OF 2005**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF  
JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT (CAP 300)**

**AND**

**IN THE MATTER OF: THE DECISION OF THE DISTRICT LAND REGISTRAR  
MOMBASA DATED 9<sup>TH</sup> DECEMBER 2005 REMOVING**

**CAUTIONS LODGED AGAINST TITLES OF**

**MOMBASA/BLOCK XLVIII/135,138,139 AND 140**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DISTRICT LAND REGISTRAR, MOMBASA .....RESPONDENT**

**EX PARTE:**

**EAST AFRICAN BULKING SERVICES LIMITED .....APPLICANT**

**AND**

**EAST AFRICAN MOLLASSES CO. LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**MBARAKI BULK TERMINAL LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**CONSOLIDATED WITH**

**MISCELLANEOUS APPLICATION NO. 967 OF 2005**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF JUDICIAL**

**REVIEW**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT (CAP 300)**

**AND**

**IN THE MATTER OF: A DECISION OF THE DISTRICT LAND**

**REGISTRAR MOMBASA MADE ON THE 9<sup>TH</sup>**

**DECEMBER 2005 TO REGISTER INSTRUMENTS**

**OF TRANSFER OF TITLE NUMBERS**

**MOMBASA/BLCOK XLVIII/185 (FORMERLY**

**MOMBASA /BLOCK XLVIII/135,138 AND 140**

**AND MOMBASA/BLOCK XLVIII/139)**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DISTRICT LAND REGISTRAR, MOMBASA.....RESPONDENT**

**EXPARTE:**

**EAST AFRICAN BULKING SERVICE LIMITED .....APPLICANT**

**AND**

**EAST AFRICAN MOLASSES CO. LTD. ....1<sup>ST</sup> INTERESTED PARTY**

**MBARAKI BULK TERMINAL LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

The facts leading to these proceedings are that on the 25<sup>th</sup> day of May 2005, East African Bulking Services Ltd and East African Molasses company Ltd hereinafter referred to as the applicant and the 1<sup>st</sup> Interested Party respectively entered into a sale agreement in which the latter would sell to the former the parcels of land comprised in titles No. Mombasa/Block XLVIII/135, 138, 139 and 140 at an agreed consideration. For one reason or another the agreement was not completed as scheduled on 30<sup>th</sup> September 2005. Serious disagreements appear to have developed between the parties in the course of time. On the 7<sup>th</sup> day of November 2005 the applicant lodged cautions against the aforesaid titles. On 17.11.2005, the 1<sup>st</sup> interested party applied to the District Land Registrar, hereinafter referred to as the Respondent to have the cautions removed. On 18/11/2005 the Respondent informed the applicant of the 1<sup>st</sup> interested party's intentions. Upon receiving the information it would appear the applicant wrote a letter protesting any action removing the cautions. The Respondent resolved to call upon the parties to make written submissions and to appear for hearing before her on 8/12/2005. It is not clear what happened on 8/12/2005 but the record shows that the Respondent received the written submissions and met the advocates appearing for the parties she had summoned. She reserved her decision for 9/12/2005.

The final decision by the Respondent is that she ended up removing the cautions. On the same date the Respondent caused titles Nos. Mombasa/Block XLVIII/135, 138 and 140 consolidated and closed giving rise to Mombasa/Block XLVIII/185. Title No. Mombasa/Block XLVIII/139 was not affected by the consolidation. The Respondent effected the transfers of the aforesaid property on the same date from the 1<sup>st</sup> Interested Party in favour of Mbaraki Bulk Terminal Ltd. hereinafter called the 2<sup>nd</sup> Interested Party.

Being aggrieved by the Respondent's decision and actions the applicant filed two separate motions seeking to have the aforesaid decisions quashed. In these proceedings the applicant first obtained leave on 13.12.05 before filing the motion dated 21.12.05. In this motion the applicant seeks to remove into this court for quashing the Respondent's decision of 9/12/2005 to remove from the register the cautions lodged by the applicant on 7/11/2005 against titles known as Mombasa/Block XLVIII/135,138, 139 and 140.

The second motion filed by the applicant is that dated 23<sup>rd</sup> December 2005 vide Mombasa H.C. Misc. App. No. 967 of 2005. In this motion the applicant prayed for an order of certiorari to remove into this court for quashing the Respondent's decision made on 9/12/05 consolidating titles No. Mombasa/Block XLVIII/135, 138 and 140 to give rise to Mombasa/Block XLVIII/185. The applicant also sought for an order of certiorari to bring into this court for quashing the Respondent's decision to register instruments of transfer transferring the aforesaid property to the 2<sup>nd</sup> Interested Party.

When these applications were served upon the Respondent and the interested parties, they all intimated their opposition of the applications by filing grounds of opposition and replying affidavits. The 1<sup>st</sup> interested party filed a motion dated 3/3/2006 in which it sought to challenge the order for leave given by this court on 13.12.2005. When these applications came up for hearing, the applicant's motion dated 21.12.2005 and the 1<sup>st</sup> Interested party's motion dated 3/3/2006 were directed to be argued together by an order of consent of the parties involved in this dispute. It was further ordered by consent that the motion dated 21.12.2005 and the motion dated 23<sup>rd</sup> December 2005 in Mombasa H.C. MISC.APP NO. 967 OF 2005 be consolidated.

Let me start this matter by considering the issues which in my view are preliminary objections raised against the applicant's application (s). The Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties are unanimous in their arguments that the application(s) should be dismissed and or struck out because the applicant did not comply with the provisions of Order LIII rule 1(3) of the Civil Procedure Rules. It is the submission of Messrs Maroro, Nyaoga and Njoroge Regeru, learned advocates for the Respondent, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties respectively that the failure to serve notice upon the Registrar of this court or to obtain an order to excuse the filing of notice rendered the whole application(s) incompetent and incurably defective. On his part, Mr. Oraro learned advocate for the applicant conceded to the fact that the applicant did not file nor serve notice as required. The learned advocate however pointed out that the applicant had prayed for leave to be excused from filing such notice under the proviso to order LIII rule 1 (3). It is further pointed out that the applicant's advocate orally applied for the order excusing the filing of notice. It is the submission of Mr. Oraro that the learned Judge knew that the applicant had not filed the notice and that he proceeded to excuse the same though he did not put down in writing. It is the argument of the applicant advocate that in the circumstances of this case that this court should infer and deem that non service of notice was excused. At the same time Mr. Oraro asked this court to make an order excusing service of notice if it is of the view that the judge who dealt with the application for leave did not make such an order.

I have anxiously considered the rivaling submissions over this issue. It is not disputed that the applicant pleaded in this application to be excused from filing notice. It is not also disputed that the applicant's advocate orally argued the application at the *ex parte* stage. It is crystal clear that the honourable Mr. Justice Mwera granted the *ex parte* application for leave after certifying the same to be urgent. After a careful consideration of the matter I am of the view that the honourable judge must have excused the failure to file and serve notice. I make such inference because the applicant's advocate who argued the application *ex parte* before the honourable judge is an advocate of this court of long standing. The honourable Mr. Justice Mwera is a Senior Judge of this court. The only practical and reasonable

inference is that the order to excuse the failure to file and serve notice was made but was accidentally left out from hand written notes by the honourable judge. The position could have been different if there was no prayer for it in the pleadings and if no oral plea was made. Consequently the objection is rejected.

The second preliminary point raised against the motion is to the effect that the decision sought to be quashed is not annexed to the application as required under Order LIII rule 7(1) of the Civil Procedure rules. On its part the applicant has referred this court to the copy of the ruling annexed to the affidavit of Ameerali Kassamali Somji to resist this ground. I am satisfied that upon my perusal of the aforesaid affidavit that the decision of the District Land Registrar was filed together with the application. In view of that finding, the objection is dismissed.

The third preliminary point also raised against the motion is the fact that the application (s) is incompetent because the matter in dispute arose out of a contractual arrangement which is within the private law domain as opposed to public law remedies which are available through judicial review proceedings. The applicant on the other hand is of the view that the application is competently before this court in that the dispute relates to how the District Land Registrar exercised her statutory power. I have taken into account the submissions for and against this ground. I have also perused the pleading placed before this court. What is not in dispute is that this matter arose out of the District Land Registrar's decision made pursuant to the powers donated to her by the Registered Land Act (Cap.300 Laws of Kenya). In short the District Land Registrar made her decision in exercise of a statutory power. That is obviously amenable to judicial review. In a nutshell I see no merit in that objection.

Having disposed of the preliminary issues, let me now consider the merits and the demerits of the applicant's application (s). The first ground argued in support of the application is to the effect that the Respondent acted in disregard of the court order of 9/12/2005 hence her decision is null and void *ab initio*. It is the submission of the Respondent and the Interested Parties that the order maintaining the Status Quo was not explained to the Respondent hence she cannot be said to have breached the order. It is also submitted that the order was not directed at her. After a careful appreciation of the arguments made for and against this ground, I am convinced by the arguments of Mohamed Nyaoga learned advocate for the 1<sup>st</sup> Interested Party that this ground can only be agitated out through Mombasa H.C.C.C. No. 250 of 2005 as opposed to through these proceedings. Having come to that conclusion it is only safe not to say more than that lest I make a conclusive decision on a Civil matter which is still pending before this court. It is enough to state that this ground must fail.

The second ground argued in support of the motion is to the effect that the Respondent acted in abuse of her statutory power. It is argued that she exercised her power in bad faith hence her decision constituted gross abuse of power. It is the argument of the applicant that the Respondent conspired with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to defeat the applicant's interest over the property in dispute. The applicant gave detailed chronology of events, which gave rise to the Respondent's decision. As expected, the Respondent and the Interested parties were of the view that the Respondent did not abuse her statutory power. I have considered the arguments tendered by both parties over this ground. The brief summary of the chronology of events which gave rise to the Respondents decision of 9/12/2005 appear to be short and straightforward. On the 7<sup>th</sup> day of November 2005, the applicant lodged a caution against the aforesaid titles claiming a purchaser's interest under a contract dated 25.05.2005. The cautions were registered the same day by the Respondent. On the 10<sup>th</sup> day of November 2005. the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties entered into a sale agreement over the property. On 17.11.2005 the 1<sup>st</sup> Respondent applied for the cautions to be removed. On 23.11.2005 the 1<sup>st</sup> Interested party filed a suit before this court seeking to be discharged from the contract of 25.5.2005 between itself and the 1<sup>st</sup> Applicant. On 25.11.2005, it would appear the 2<sup>nd</sup> Interested Party completed payments of the purchase price in respect of the agreement dated 10.11.2005. At this time the cautions were still in place. The suit was and is still pending for hearing. Upon receipt of the application of the 1<sup>st</sup> Interested Party dated 17.11.2005 the Respondent invited the applicant and the 1<sup>st</sup> Interested Party to appear before her over the cautions. When the matter came up for hearing on 8/12/2005, the applicant's advocate applied for adjournment on the basis that there was an order by this court maintaining the Status Quo. The Respondent reserved her ruling for 9/12/2005 and that is when she made the decision which is now being sought to be quashed. Her ruling

in effect removed the cautions and paved way for the property to be transferred to the 2<sup>nd</sup> Interested Party.

It would appear all the necessary procedures were done on the same day leading to the property being registered in the name of the 2<sup>ND</sup> Interested Party. The chronology of events clearly shows that the Respondent and the interested parties herein had conspired to have the entire transaction completed in one day. This in my mind discloses bad faith on the Respondent's part in exercising her statutory power. In the circumstance, I am satisfied that her decision is vitiated by bad faith. Where a party acts in bad faith, such a decision is amenable to judicial review.

The third ground argued is to the effect that the Respondent acted without hearing the applicant. It is the submission of the Respondent and the 1<sup>st</sup> Interested Party that when the parties appeared before and presented their written submission to the Respondent on 8/12/2005, the requirement for a hearing was fulfilled. I have carefully perused the ruling delivered by the Respondent on 9/12/2005. I have also perused the written submissions presented to the Respondent. I am unable to agree with the applicant's submission that the Respondent did not give the parties a right of hearing. I am satisfied that they were given a chance to be heard and to submit. I therefore see no merit in this submission.

It has also been argued that the applicant should not have sought for judicial review remedies whereas there are available remedies under the Registered Land Act, which is said to be a self-encompassing Act. I agree with the Respondent's and the Interested Parties' arguments that the Registered Land Act has a comprehensive appeal mechanism against the Respondent's decision. In my view it does not matter whether the Respondent cancelled, removed or refused to register a caution. The question which must be answered is whether or not this takes away the applicant's right to seek for judicial review remedies? In my view the mere existence of such a mechanism does not bar a party from seeking Judicial Review remedy so long as it only relates to the decision making process and not looking at the merits of the decision. To rule otherwise would cause chaos in our judicial system. A good example is the decisions of the Land Disputes Tribunals under the Land Disputes Tribunals Act where there is an appeal mechanism and yet parties come before this court through judicial review proceedings seeking to quash the tribunal's decisions. This court has never turned away such parties although it is aware that there are other alternative remedies.

Before concluding this matter let me deal with the submission that the applicant has involved the parties in a multiplicity of suits. My simple view of the argument is that this is a matter which can be dealt with in another fora and not through these proceedings. I will not attempt to consider it wither.

The upshot of the whole matter is that the motion dated 3/3/2006 is dismissed with costs to the applicant. The motion dated 21.12.2005 in these proceedings and that dated 23.12.05 vide Mombasa H.C. Misc. Appl. No. 967 of 2005 are allowed as prayed with costs to the applicant.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of December 2006.**

**J.K. SERGON**

**J U D G E**