



Abdullahi & another v National Land Commission & 3 others; Kenya Deposit Insurance Corporation (Receivers of Dubai Bank Kenya Limited) (Interested Party) (Environment & Land Petition 3 of 2017) [2024] KEELC 13682 (KLR) (2 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 3 OF 2017
LL NAIKUNI, J
DECEMBER 2, 2024**

BETWEEN

MOHAMED SHEIKH ABDULLAHI 1ST PETITIONER

SHEIKH DAIB MOHAMED 2ND PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

BILL KIPSANG ROTICH 3RD RESPONDENT

MASHA BIRYA DENA 4TH RESPONDENT

AND

THE KENYA DEPOSIT INSURANCE CORPORATION (RECEIVERS OF DUBAI BANK KENYA LIMITED) INTERESTED PARTY

RULING

I. Introduction

1. Before the Honorable court is a short decision emanating from a proceedings held in court orally 20th November 2024. The contention was mainly between the two (2) Learned Counsels – Mr. Mogaka and Mr. Wafula Advocates for the Petitioners and the Interested Party herein.
2. The main bone of contention was whether the Honorable Court may take move evidence after the closure of the case, filing of written submissions and having retired to render its Judgment. Indeed its imperative to note that the court ought to have delivered the Judgment on 12th November, 2024 but it was deferred to 2nd December, 2024.



3. During the date for the delivery of the Judgment the courts attention was drawn to its direction that made on 16th July, 2024 to the effect that pursuant to the Provisions of Section 173 of the Evidence Act 80 and in order to assist the court arrive at an informed decision, the Land Registrar, Mombasa to furnish the parties with copies of both the parcel and correspondence files for the Grants registered as CR numbers 59150 and 62008 for all that parcel of land known as MN/I/6589, Nyalii within the County of Mombasa. Further, it was after they were furnished with these documents that they would embark on preparing and filing their written submission.
4. The Honorable Court has noted that the nature of the case was whereby there existed two (2) Certificate of title deed bearing the same CR Numbers, but issued to two difference people. Based on this situation and applying Solomonian wisdom found in holy scripture of 1st Kings 3 16 to 18 the Honorable Court felt it needful to summon the Land Registrar to appear in court to enable him/her produce the records in form of the parcel correspondence files pertaining to the suit land within their custody.
5. It's based on the process adopted by Court that Mr. Mogaka Advocate vehemently opposed it. He based his argument on the fact that the process was tantamount on the court ascending to the arena of litigation and indeed having turned into an investigation agency for the parties. To him the court was being misused and urged it to totally reject that approach. He held that the court should act in its best form of all parties and proceed to render the Judgment as scheduled as to in the contrary was re-opening the case. He opined that the Court should refuse to be swayed from right to left hand side. The Court should not be dealing on issues that were never pleaded. To buttress his argument, he cited the Court of Appeal case of:

COA No. 219 of 2013 - "IEBC and Leonard Okemwa (Returning Officer) – Vs- Stephen Mutinda Mule and Others" eKLR (2014) where the court held as follows:-

"The Appellant submits that by unilaterally framing new issues for determination not pleaded or responded to by parties, the Learned Judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict.the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.....In the adversarial system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for the item called "Any other business" in the sense of that points other than those specific may be raised without notice.."

6. On the other hand, Mr. Wafula Advocate advanced the argument that due to the peculiar circumstances of the case where there existed two (2) conflicting titles over the same parcel there had been need to summons the Director of Land Administration who appeared in court and adduced evidence within their purview. It was from the same viewpoint that the Honorable Court on 16th July, 2024 saw it fit and invoked the provisions of Section 173 of the Evidence Act 80 to summon the Land Registrar to appear and provide more information in form of the parcel and correspondence files on the suit land. Infact, the land Registrar was to have supplied all the parties with these copies to enable them finalise their written submissions.
7. Indeed, the Learned Counsels proceeded to extract and issued summons against the Land Registrar. To him, the summons were a form of a court order. He emphasized that Court orders were never issued in vain. They ought to be obeyed as the consequences of not doing so were very severe bordering on criminality. He averred, and rightfully so, that if anyone who felt aggrieved, they would either move



Court for either review or setting side or vary of the said order but certainly not to disobey them. None of this had happened and thus he held that there was nothing wrong with the decision. By no means was it a re - opening of the case as it was alleged.

II. Determination

8. The Honorable Court has keenly pondered upon all the issues raised by the Learned Counsels. It is not in dispute that:-

Firstly there exists two (2) titles bearing the same numbers over the same parcels of land but issued to two different parties.

Secondly, that indeed apart from the evidence adduced both oral and documents by the witnesses summoned by the parties – court has had an opportunity to call for further expert evidence e.g. the Chief Land Administrator and hence also summoned the Land Registrar Mombasa.

Thirdly, that all these processes were very engaging and interactive. Indeed, court was able to benefit a lot.

- a. Having agreed on the above , therefore, there would be only one issue for determination here - Whether the Land Registrar was summoned and if they turned up.

9. To answer this issue, I must state herein that both the Learned Counsels Mr. Wafula and Mr. Mogaka concur that indeed the Land Registrar, one M/s Sheilla N. Soita was not only summoned but she swore a six (6) Paragraphed Replying affidavit dated 9th August, 2024. stating as follows: -

- a. “That I am the Land Registrar, Mombasa County Lands Registry and representing the 2nd Respondent herein and I am competent to make and swear this affidavit.
- b. That I was served with the order dated 18th July, 2024 on 23rd July, 2024 by the office of the Attorney General.
- c. That the order directed the office to furnish the Court and the parties register of CR No. 59150 and CR 62008.
- d. That the efforts to trace the particular register have been made at the registry.
- e. That unfortunately we have been unable to trace the registers by 8th August, 2024.
- f. That what is deposed to herein is true to the best of my knowledge, information and belief save where otherwise stated and sources thereof identified”.

10. Of great interest and in a nutshell, the Land Registrar not only obliged to the summons but also went further to swear an affidavit stating the office of the Land Registrar were not in possession of the parcels nor correspondence file for the suit parcel within their custody. This being a Court of record, I have observed from the Witness statement by the Land Registrar – Mr. John Gichuki Wanjohi sworn and filed in Court on 15th July, 2020 where he held as follows:-

“Paragraph 1 – That upon scrutiny of the record in our custody I have only accessed both the Deed file and Correspondence files in respect to the New Grant for LR No. MN/ I/6585 registered as CR. 62008 to Masha Binye Dena on the first registration and which was subsequently transferred to Mohammed Sheikh Abdullahi and Sheikh Daib Mohammed, vide a transfer dated 24th June, 2015 and registered in Lands Office on 26th June, 2015”.



Paragraph 7 – in the absence of the Correspondence file for Grant registered as CR. 59150 it is hard to explain how and when it was received in the Registry for registration..”

11. Clearly, these assertion made under oath in an affidavit seems to closely resonate and corroborate with what the current Land Registration has deponed in the filed affidavit pursuant to this Court’s direction of 16th July, 2024. It’s from this response that has outraged Mr. Wafula demanding that the Land Registrar needed to be summoned to state this averment physically to and hence if possible to be cross examined and the Court give direction in one way of the other.
12. Now that is what Advocate Mr. Mogaka never wanted to hear or stand. According to him, it tantamounted to re - opening the case and if not controlled it would go on and on Ad finition like the Babel Towers making parties applying to produce any documents even after the closure of the case. To him there ought to be a closure to litigation.
13. The Honorable Court fully concurs that its orders were obeyed. This was when the Land Registrar filed an Affidavit to that effect. There was nothing more that may come out any other process – unless Mr. Wafula was imputing that there existed aspects of Integrity in that office. So be it and that calls for action by the appropriate statutory established bodies e.g. the Police or EACC. The much the court can do is to wonder how such documents may go missing from their place of safe keeping by the person duly appointed to keep them. Certainly, it not only leaves some bad taste in the mouth but raises eye brows by all means. Where should members of the public turn to for the safety of the documents on land. I need not belabor the point that from the provision of Sections 14 of the [Land Registration Act](#), No. 3 of 2012 the Land Registry has been bestowed with the legal mandate custody of all records on land in the Republic of Kenya.

Section 14 provides as follows:-

14. General powers of Land Registrars

- (1) The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act-
 - (a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
 - (b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;
 - (c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;
 - (d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and
 - (e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.
- (2) In addition to the powers conferred by section 14(1) the Chief Land Registrar shall-



- (a) formulate practice instructions and guidelines for implementation of the land registration policies and strategies;
 - (b) set standards for the registries;
 - (c) supervise the registries;
 - (d) prepare and submit an annual report on the state of land registration to the Commission and the Cabinet Secretary;
 - (e) hear and determine appeals from the registries;
 - (f) approve the format of any instrument which is not in accordance with the prescribed form; and
 - (g) perform such other functions or duties as may be provided under any written law.
- (3) The Deputy Chief Land Registrar shall be the principal assistant of the Chief Land Registrar in the execution of the functions of the Chief Land Registrar.
- (4) The County Land Registrar shall be responsible for administering the registries within the respective county and in the implementation of policies, guidelines and strategies in accordance with this Act.
- (5) The Registrar shall not be held personally liable for lawful acts discharged by the Registrar under this Act in good faith.
14. Honestly, based on the elaborate statutory roles spelt out for the Land Registrar above, it's not enough to show up in Court and casually state under sworn affidavits that these documents were missing from their place of safe keeping!!! To me this amounts to professional negligence and carelessness which ought to be penalised through reprimand nor otherwise. It should serve as a retributive lesson to others occupying such important and strategic public positions. Our Courts should never appear so helpless in such situations.
15. However, having noted this state of affairs, its unfortunate to state that the Court lacks any legal capacity to conduct investigation over such wrong deed. Two wrongs do not make a right. In saying so, I seek refuge from the famous decision of “Macfoy – Versus – United Africa Company Limited (1961) 3 ALL ER 1169”, where Lord Denning J stated thus:-
- “if an act is void, it is in law a nullity. it is not only bad, but incurably bad. there is no need for an order of the court to set it aside. it is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so”
16. I have to be satisfied by the answer given by the Land Registrar – through filed affidavit after all it's the court that acted suo moto to gather for this information, I confirm, the information has been provided though bad information. But like the bitter Malaria Quinine tablet, it still has to be swallowed. This matter must rest there.

III. Conclusion & findings: -

17. In the given circumstances, and having caused the indepth analysis to the single issue herein, I proceed to order: -



- a. That although the court should be reluctantly satisfied by the responses granted by the Land Registrar through the Affidavit dated 9th August, 2024 but it lacks the capacity to proceed on further.
- b. That the Land Registrar who was directly responsible for safe keeping and hence got them lost in his/her hands from the records of these documents be penalized to pay a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500, 000.00) as fine payable to Court for the loss of this documents Within The Next Thirty (30) Days from this date as tantamount to professional negligence and carelessness awaiting further investigation by the appropriate investigation agencies.
- c. That any party who feels aggrieved by the rather unhelpful answer to engage more appropriate investigation organ for further assistance as court fails to have the required capacity.
- d. That in the meantime, the Honorable Court to proceed to render its Judgment as scheduled on 28th January, 2025 utilizing the empirical documentary and oral evidence adduced including the affidavit by the Chief Land Administration and the Land Registrar.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS 2ND DAY OF DECEMBER 2024

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Mogaka Advocate for the 1st & 2nd Petitioners.

Mr. Mukuha holding brief for Mr. Bwire Advocate for the 3rd Respondent.

No appearance for the Interested Party.

No appearance for 1st & 2nd Respondents.

