



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

MISC CIVIL APPLICATION NO 4 OF 2021

CAROLLA TOLKDORF.....PLAINTIFF/EX-PARTE APPLICANT

VERSUS

LAND REGISTRAR KWALE.....DEFENDANT/RESPONDENT

LENNY MURAYA MWANGI.....INTERESTED PARTY

RULING

INTRODUCTION

1 The subject matter of this judicial review proceedings is Plot Number Kwale/Galu Kinondo/1203 hereinafter referred to as the suit property. According to the Applicant the suit property was sold to the Applicant by one Antonie Thaddee Bockle through Diederich Alois and Reiten Winfred who had a power of attorney to engage in the said sale. The Applicant states that thereafter she was registered as the owner of the suit property. That sometime in the year 2013 she discovered upon conducting a search on the suit property that the Interested Party, Lenny Muraya Mwangi was registered as the proprietor of the suit land pursuant to a court order dated 14th August 2012.

2 The Applicant filed these Judicial Review Proceedings on 6th June 2013. On 7th June 2013 this court granted to the Applicant leave to apply for an order of Certiorari to quash the Respondents decision that led to the issuance of title deed over the suit property to the Interested Party Lenny Muraya Mwangi. Leave was also granted to apply for an order of mandamus to compel the Respondent Land Registrar Kwale to expunge several entries from the Green card record and register of the suit property. The leave granted was to operate as a stay against the Interested Party from undertaking any dealings on the suit property.

3 It is upon the foregoing background that the Applicant herein filed the present Notice of Motion dated 13/6/2013 which is the subject of this ruling.

The Applicants Case

4 The Notice of Motion application seeks the following orders;

a) That an order of certiorari be granted to quash the Respondents decision contained in entries no 4,5 and 6 of the green card record relating to Plot No Kwale/Galu Kinondo /1203 whereby pursuant to a purported court order dated 14/8/2012 Respondent registered Plot No Kwale/Galu Kinondo/1203 in the name of the interested party and subsequently issued The Interested Party with a title deed.

b) That an order of mandamus be granted order to compel the respondent to expunge entries 4,5 and 6 from the green card record and to forthwith register the land known as Plot No Kwale/Galu Kinondo/1203 in the name of the Exparte Applicant.

c) A declaratory order that the interested party has no right of ownership of Plot No Kwale/Galu Kinondo/1203

d) That the costs of this application be provided for.

5 The application is premised on the grounds that the Applicant is the registered owner of the suit property and upon which she resides together with her husband since 1996 having constructed a house complete with a garage, swimming pool and fence. That the land was as a result of a subdivision over Plot No Kwale/Galu Kinondo/185 which belonged to one Antoine Thaddee Bockle who died leaving his wife with the responsibility of ensuring title over the property was obtained by the Applicant. A title deed was issued upon the Applicant but after a search over her property it was discovered that vide a court order dated 14/08/2012 the interested party herein had been registered as the

owner of the suit land. The process of issuance of title to the interested party herein is viewed as having been irregular, unlawful and procedural and hence the prayer to expunge the Interested Party's name from the record and have the Applicant registered as the owner of the property. Allegations of fraud were also pleaded.

The Interested Party's case

6 The Interested Party responded to the application vide his replying affidavit sworn on 29th August 2013. The Interested party raised some three preliminary issues that 1)the application having been filed 6 months after 14/9/2012 being the date the title for the Interested Party was issued, leave to file these judicial review proceedings ought not to have been granted by the court. 2) He also contended that the Applicant being a foreigner cannot legally own freehold title as the Constitution only allowed foreigners to own land by lease not exceeding 99 years. 3)A point was also raised by the Interested Party that the suit ought to have been commenced by way of Plaint where parties would be called to adduce evidence and be tested in cross examination. This court will not go into making a determination of these issues except the last issue.

7 According to the Interested Party the applicant has never been registered at any one time as the proprietor of the suit property. It is claimed that it was not possible that the applicants title was issued without there being an entry in the green card which entry was mandatory under the Registered Land Act (repealed).

8 The Interested Party stated that he acquired the suit property through a public auction where he was the highest bidder and duly paid the purchase price. That he was issued with a certificate of sale of land, obtained Land Control Board Consent to transfer the land into his name whereupon the transfer was executed by the Court. It is further stated that he paid stamp duty and presented his documentation to the 1st Defendant, who upon payment of the requisite fees issued him with a title on 14th September 2012.

9 The Interested Party also deposed that before he placed his bid, he visited the land with a surveyor who identified the beacons and also noted the land was vacant. That he also upon service of the application herein visited the land on 18th July 2013 with a friend and confirmed there were no developments as alleged by the applicant. That the allegations that the Plaintiff resided on the property since 1996 were mere fabrications. That inspection and valuation before the auction confirmed that the land was vacant and unimproved. It is claimed that the Interested Party visited the suit property again in the company of the same friend and three other people on 19th July 2013 and took photos confirming that the land was vacant. He also contended that the valuation for stamp duty did not match the presence of the alleged developments on the suit property.

10 The Interested Party stated that all the above fabrications were proof of how untruthful and unreliable the applicant was and urged that the order sought should not be granted. Moreover, the allegations that the suit property was transferred in consideration for love and affection were unsupported by documentation. Further that it was possible that the applicant had been cheated that she owned the suit property and was confusing the suit property with another where she allegedly resided.

1st Respondent Case

11 The 1st Respondent responded through the replying affidavit sworn by Widad Alamin, the Land Registrar Kwale on 15th June 2021. In her deposition the Registrar gave a chronology and particulars of the entries in respect of the suit property as per the records at the Kwale Land Registry. That the land was allocated to Antoine Thadde Bockle on 12th April 1996, a Power of Attorney was registered to Diedrich Alois and Winfred Johann on 12th April 1996, on 14th September 2012 a court order was registered directing registration of transfer dated 27th April 2012. Later the land was transferred to Lenny Muraya Mwangi from Brian Oduor as Msanjo investments on 14th September 2012. She deposed that according to the records at the Registrar's office the bonafide owner of the suit property was Lenny Muraya Mwangi. She also attached a surveyors report the genesis of which I will explain shortly.

Surveyors Report

12 The proposal to get a surveyor's report was raised by the Applicant at the outset of filing the present application. On 6th November 2019 Counsel for the Applicant sought an order that the Kwale County Land Surveyor do survey the suit property to establish if the parties were refereeing to one and the same plot. The Court agreed and issued orders that the District Land Surveyor, Kwale and the District Land Registrar Kwale, proceed to the ground of the land claimed by the Exparte Applicant Corolla Tolkdorf and also proceed to the land claimed by the Interested Party, Lenny Muraya Mwangi to identify where on the Registry Index Map (RIM) the two grounds claimed by the two parties lie and further identify the actual parcel numbers on the RIM where the two grounds fall. For various reasons this survey was not undertaken until 11th May 2021. The surveyor visited the property and filed a report. However, the applicant faulted the report for indicating that the Interested party was present during the site visit when he was not. The exercise was then repeated in the presence of all parties on 6th December 2021. On 17th January 2022 Mr. Njonjo informed this court that it was confirmed that the property referred to was one and the same plot. The Report annexed to Registrars replying affidavit also confirmed that the parties referred to the same property.

SUBMISSIONS

13 The application was canvassed by way of written submissions, the applicant and Interested party complied. The 1st Respondent did not file submissions. I have read both the rival submissions and I will highlight briefly some key points which I find relevant in respect of the ownership of the suit property.

Applicants Submissions

14 Counsel for the applicant emphasized that the Respondent should have first ascertained the boundaries of the suit property together

with its location before registering the court order herein. Further, that the Respondent ought to have made inquiries about the ownership of the property and ensure that any party who would be adversely affected by the Respondents decision was heard before any decision was made with regard to the suit land. It was also urged that the Respondent ought to have been aware of the Applicants interest bearing in mind of the transfer lodged by Imelda Thaddee Bockle and the resulting registration of the Applicant as owner. It was further urged the Interested Party failed to exhibit the Court order delivered on 14th August 2012 which order was very critical since it was the basis of the acquisition of title by the Interested Party. Furthermore, the suit purportedly filed by Francis Maina T/A Njonjo Associates (see 'LMN-7') was not filed against Antoine Thaddee Bockle who is disclosed as the registered owner (see LMN-4). Referring to the provisions of Section 22 & 107 of the Registration of Titles Act Chapter 281 (repealed) Counsel contended that the Respondent had not explained to court on how the title deed to the suit property had been issued to the interested party while the Exparte Applicant had title over the same at that particular time. This court was asked to look into allegations of fraud as was raised in order to establish how the Interested Party's title deed was obtained. Counsel prayed for the petition to be allowed and for costs to be awarded to the applicant.

Interested Party's Submissions

15 The Interested Party filed its submissions on dated 11th July 2018. Counsel urged that the application was filed on 6th June 2013 in contravention of section 9[3] of the Law Reform Act and leave to file the same ought not to have been granted since it ought to have been filed not later than March 2013 that is within 6 months. That no justification can override the legal requirement. Reliance was placed upon the holding in **Jiteshi Shah & Another V Nairobi District Land Registrar and Republic V County Council of Kwale (E&L)1**. Counsel also urged that the suit ought to have been commenced by way of Plaintiff where parties would be called to adduce evidence and be tested in cross examination.

16 Counsel for the Interested Party submitted that the Applicant being a foreigner could not legally own land and could only hold the same under a lease exceeding 99 years. Reference was made to Article 65[1] of the Constitution on leasehold tenure of land. It was further submitted that the suit land herein is a freehold and that no application had been made to convert it into a leasehold. Counsel highlighted the provisions of section 8[1] of the Land Control Board Act to the effect that an application ought to be made to the board within six [6] months of making an agreement over a controlled transaction. That in any event the Applicant being a foreigner could not go to the board as she was not allowed to register ownership of agricultural land in the country. Consequently, the Applicant was in occupation contrary to the law and should be ordered to vacate.

17 On the title issued to the Exparte Applicant it was submitted that the same was non-existent as the same could not be traced through the copy of green card at the Kwale Land Registry. That the suit in contention was one and the same being claimed by both parties herein. Counsel contended that the Applicant was listed as 1st Defendant in Mombasa RMCC 364/2011 which suit led to the auction of the suit property to the interested party. It was further claimed that the Exparte Applicant had not adduced any evidence in support of the contention she was given the plot in consideration of love and affection. The court was asked to dismiss the application with costs to the Interested Party.

ANALYSIS AND DETERMINATION

18 I have keenly considered the application, the supporting Affidavit thereof and the annexed documents thereto. I have also seen and considered the Interested Party replying affidavit to the notice of motion and the documents annexed thereto. I have also considered the rival submissions.

19 It is now settled that judicial review is not concerned with the merits of the decision being challenged but rather with the decision-making process. In the case of **Municipal Council of Mombasa v Republic & Umoja Consultants Ltd (Interested Party) Civil Appeal 185 of 2001 [2002] eKLR** the Court of Appeal emphasized as follows:-

'The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker consider relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review'

20 Guided by the above exposition clearly a consideration of the facts placed before this court, this is a dispute on ownership of the suit property. The Exparte Applicant has produced a title to the suit property that she is the registered owner though it is claimed that the same was non-existent as the entry could not be traced through the copy of the green card at the Kwale Land Registry. It is also contended by the Interested Party that the suit in contention was one and the same being claimed by both parties herein. The Exparte Applicant has even gone ahead in her final prayers to seek a declaration that she is the rightful owner of the suit property. The Respondent has also deposed that according to the records at the Registrar's office Kwale the bonafide owner of the suit property was Lenny Muraya Mwangi. I have looked at the proceedings in this matter and I have observed that initially my learned brother Munyao J was hesitant to make an order for survey – see the proceedings of 6th November 2019. He however commented after hearing Counsel for the Applicant on the same and which goes to buttress that the dispute before this court is a land ownership dispute thus:-

'It could be that the issues herein can be resolved if it is clear on which land in the RIM the land claimed by the Exparte applicant is and that claimed by the interested party is.'

22 From the foregoing and looking at the entirety of this application, the material, the facts and contentions revolve around ownership and that is basically the reason why the decision of the Respondent is being impugned. It has nothing in my view to do with the process undertaken by the Respondent to register the court order culminating to the registration of the Interested Party as proprietor of the suit

property. This is matter not fit for judicial review and I agree with counsel for the Interested Party submissions in this regard. This is a claim where parties should go through the rigorous of a full suit to enable the court determine fully the ownership of this suit property.

23 In arriving at the above conclusion or finding I'm further guided and persuaded by the holding in **Karaini Investments v National Land Commission & another [2018] eKLR** where the court in declining to entertain a judicial review application where there is a substantive ownership dispute over land stated as follows; -

52 The grant of the orders or certiorari, mandamus and prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that what emerges is that there is an ownership dispute on the property in question, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership of the property. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed property. I decline the invitation to venture into this forbidden territory.' (emphasis is mine)

24 The upshot is that I dismiss the Notice of Motion dated 13th June 2013 with costs to the Interested Party.

DELIVERED AND DATED AT KWALE THIS 7TH DAY OF MARCH, 2022.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr.Obonyo.....for the Exparte Applicant

Mr. Waga H/B.....the Respondent

No Appearance for.....Interested Party

Mr. Denis Mwakina..... Court Assistant.