



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC JUDICIAL REVIEW NO. 31 OF 2018

REPUBLIC.....APPLICANT

THE OFFICIAL RECEIVER AND LIQUIDATOR1ST RESPONDENT

SUB COUNTY LAND REGISTRAR NAIVASHA.....2ND RESPONDENT

EX PARTE

TRANSMATTER KENYA COMPANY LIMITED

J U D G E M E N T

1. The ex parte applicant was granted leave to commence judicial review proceedings on 28th December 2018. The Applicant on 15th January 2019 filed the substantive Notice of Motion seeking the following orders.

1. An order of Certiorari to remove into this Honorable Court and quash the 2nd Respondent's restriction and /or decision dated 6th November, 2018 purporting to restrict any dealing over the parcels of land known as Naivasha Maraigushu Bloc 2/184 and 185 now amalgamated as Naivasha Maraigushu Block 2/3987 (Nyondia).

2. An order of Mandamus compelling the 2nd Respondent to remove and/or cause to be removed the restriction entered on the suit properties Naivasha Maraigushu Block 2/184 and 185 now amalgamated as Naivasha Maraigushu Block 2/3987 (Nyondia) including any subsequent restriction and/or caveats, cautions whatsoever put on the suit parcels.

3. An order of prohibition directed to the Respondents prohibiting them jointly and/or severally either by themselves, their servants, employees and/or agents from making or causing to be made any restriction, caution, caveat, encumbrance and any impediment amalgamated as Naivasha Maraigushu Block 2/3987 (Nyondia).

2. The application was premised on the grounds set out on the body of the application and the supporting affidavit sworn by one George Njahi Kimani, a Director of the ex parte applicant and the annexures thereto. The ex parte applicant in support of the application averred that it was the lawful legal owner of land parcel **Naivasha Maraigushu Block 2/184 and 185** now amalgamated as land parcel **Naivasha Maraigushu Block 2/3987 (Nyondia)** (" the suit property"). The applicant stated that upon carrying out an official search on the suit property on 22nd November 2018, the search disclosed that the 2nd Respondent had placed a restriction on the suit property barring any dealings with the suit property. The applicant contended the restriction constituted an infringement of its property rights in regard to the suit property. The Applicant contended the registration of the restriction against its property was in bad faith unreasonable and irrational and was made without affording the applicant of the opportunity of being heard and was consequently made in breach of Articles 47 and 50 of the Constitution. The applicant in the premises contended that the decision to impose a restriction on the suit property was amenable to judicial review and sought orders as per the Notice of Motion.

3. The 1st Respondent, the official Receiver and liquidator upon being served entered appearance on 7th February 2019 and on the same date filed a Notice of preliminary objection that the suit against the Respondents was fatally defective and a nullity as leave to institute the same was not obtained. Further the 1st Respondent filed a replying affidavit sworn by Cyrus Njenga, Senior State Counsel dated 4th February 2019 in opposition to the notice of Motion. The 1st Respondent vide the replying affidavit reiterated the issue of the suit being fatally defective for having been commenced against it without leave. The 1st Respondent stated that Agrarian Building Society was always the proprietor of land parcels **Naivasha /Maraigushu Block 2/184 and 185** as evidenced by copies of title deeds and official searches dated 20th January 1989 and 5th June 2008 respectively annexed and marked "CGN2" collectively. The 1st Respondent further averred it had caused the suit land to be subdivided into 140 plots measuring 40 Ft by 80 Ft and 2 ½ acres were reserved for a nursery school and that some of the plots had been sold by the society to members before the commencement of the winding up process. The 1st Respondent

further stated that there had been ongoing litigation vide **Mombasa CMCC No.79 of 1993: Godfrey Mwangi Runo -vs- The Official Receiver of Agrarian Building Society** where pursuant to a decree issued in the case, the decree holder sought to execute the decree by way of attachment and sale of the suit properties. A prohibitory order was issued and registered against the two plots restricting all dealings. However, following a consent order dated 11th February 2016 the Official Receiver and the said Godfrey Mwangi Runo agreed to have the prohibitory orders placed on the land parcels removed.

4. The 1st Respondent further stated that sometime in 2018 some persons caused the suit parcels of land to be fraudulently transferred to Transmaster Company Kenya Limited as copies of search carried out on the 8th November 2018 reviewed. The 1st respondent contends the titles in the name of the applicant and exhibited herein were fraudulent and were obtained through the manipulation of records held at the Land office. The same are forgeries and that the 1st Respondent had reported the fraud to the Director of public prosecutions, the Directorate of Criminal Investigations and the Ethics and Anti-corruption Commission for investigations and necessary action. The 1st respondent further contended the suit properties have always been owned by the 1st Respondent and that the applicant's intention was to manipulate the court process to sanitize what was otherwise an illegal and fraudulent transaction on the part of the exparte applicant.

5. The 2nd Respondent filed a replying affidavit sworn by Minnie Wacuka, District Land Registrar Naivasha dated 3rd July 2019. The Land Registrar deponed that the Official receiver vide a letter dated 22nd December 2015 wrote to her and forwarded a Court

Order issued by a Mombasa Court together with a liquidation order requesting that the same be registered against land parcels **Naivasha Maraigushu/Block 2/184 and 185**. The Land Registrar further deponed that following validation of the Court orders and noting there was an imminent ownership tussle relating to the property she proceeded to register the restriction against the property as requested by the 1st Respondent. The 2nd respondent further contended the application raises an issue of ownership of the suit property which would fall outside the ambit of judicial review proceedings such as the present one.

6. The applicant filed a further supporting affidavit in response to the replying affidavits to the replying affidavits on 22nd February 2020 where the applicant contended that Agrarian Building Society was not a party to these proceedings and that the Official Receiver cannot properly purport to litigate on its behalf. The applicant further averred it was not a party to the suit in Mombasa CMCC No.79 of 1993 and that the present proceedings are totally different such that the Mombasa suit has no relevance. The applicant further stated the allegations of fraud made by the official Receiver cannot be adjudicated in the present proceedings and that the official Receiver would need to institute a fresh suit to have such issues adjudicated.

7. On 7th October 2019 the Court directed the parties to argue and canvass the application by way of written submissions. The applicant was to file their submissions within 30 days and the Respondents were to file their submissions within 30 days of being served. On 9th December 2019 when the matter came up for mention the parties had not filed any submissions and the court extended the time for the filing of submissions upto 27th February 2020 when a further mention was directed.

8. As at 27th February 2020 the applicant had not filed any submissions. The 1st and 2nd Respondents filed their respective submissions on 27th February 2020. The 1st Respondent in her submissions canvassed the legal point taken in the preliminary objection filed simultaneously with the replying affidavit that the suit was fatally defective as no leave as envisaged under the Insolvency Act was obtained before the commencement of the suit. Section 432 (2) of the Insolvency Act provides:-

“When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be began or continued only with the approval of the court and subject to such conditions as the court considers appropriate”

The above provision mirrored the provisions under section 228 of the Companies Act, Cap 486 Laws of Kenya (now repealed) which provided as follows:-

“ When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court may impose”

9. On the material presented before the Court there is evidence that a Winding –up Order was made against Agrarian Building Society on 30th September , 1996 , and Gazetted Vide Gazettee Notice No.1182 Published on 7th March 1997 .

10. There is further evidence that before the Winding-up Order was made, Agrarian Building Society was registered as proprietor of Land parcels **Naivasha /Maraigushu/Block 2/184 and 185** as per the copies of Title deeds and certificates of official searches annexed which show the Society was registered as owner of the two land parcels on 20th January 1989. The Winding up Order of Agrarian Building Society was made by the Registrar of the Building Societies because after investigating the affairs of the Societies he was of the opinion **“ That the Society is unable to meet the claims of the members....”**

11. In the premises the provisions of section 432 (2) of the Insolvency Act would be applicable and any suit affecting the Society in liquidation would have to have the sanction of the Court.

12. Any action commenced without any such sanction would be fatally defective and incompetent in law. Both under the Insolvency Act and the Companies Act, where a company or a Society is under liquidation, it is mandatory to obtain leave to commence a suit against such a party.

13. I am mindful that the applicant sought and obtained leave to commence judicial review proceedings as required under Order 53 Rules 1 and 2 of the Civil Procedure Rules 1 and 2 which provides thus:-

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

14. The leave granted was specifically to institute judicial review proceedings and did not relate to leave to institute an action against an institution that was under liquidation. In the instant matter, the Land Registrar caused the restriction sought to be removed by the Applicant to be registered pursuant to the letter by the Official Receiver dated 6th November 2018. As per the said letter it was made quite clear that the Official Receiver was acting on behalf of "Agrarian Building Society (in liquidation) and it was therefore incumbent upon the applicant to obtain leave of the Court to institute legal proceedings against a party that was in liquidation. The official Receiver had made it clear that he was undertaking liquidation of the institution and therefore any person who intended to institute any action that could have affected the interests of the firm under liquidation ought to have sought the court's leave. I agree with the submissions of the 1st Respondent that the leave contemplated for judicial review proceedings cannot serve the same purpose as the leave required under the Insolvency Act.

15. In the premises I hold and find that the suit as against the 1st Respondent is totally defective for want of leave in regard to a firm under liquidation. The suit is incompetent as relates to the 1st Respondent and I dismiss the same with costs to the 1st Respondent.

16. As relates to the suit against the 2nd Respondent, the Land Registrar, the 2nd Respondent has submitted that the 2nd Respondent was carrying out her statutory duty when she registered the restriction against the suit properties. In the present matter the 1st Respondent had alleged fraud and manipulation of records at the Lands office in having the suit land registered in the Applicants name and the issue of title deeds thereof in favour of the Applicant. The 1st Respondent had illustrated by furnishing copies of titles and searches that showed the properties to have been registered in the name of Agrarian Building Society on 20th January 1989 and there having been Court proceedings Vide Mombasa CMCC No.79 of 1993 where the suit lands were attached in execution of a decree issued in the said case against Agrarian Building Society. The prohibitory order issued against the properties had not been lifted until 2016 when Agrarian Building Society entered a consent with the decree holder to have the prohibitory order removed on terms. To the 1st Respondent's surprise they learnt from the searches and abstract of title obtained on 8th November 2018 that the properties had fraudulently been transferred to the Applicant. This precipitated the request by the 1st Respondent to the 2nd Respondent to register a restriction until the issue of ownership of the land was resolved.

17. Under Section 76 of the Land Registration Act, 2012 the Land Registrar has mandate to register restrictions against land to prevent fraud, improper dealing with the title and for any other sufficient cause. The land registrar can act on his own volition and/or upon the application of any person interested in the land.

Section 76 provides:-

1) For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

(2) A restriction may be expressed to endure—

(a) for a particular period;

(b) until the occurrence of a particular event; or

(c) until a further order is made,

and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.

(3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.

18. No doubt the Land Registrar invoked the above provision to register the restriction complained about by the applicant. Under paragraph 7 of her replying affidavit the Land Registrar deponed as follows:-

7. That we further received a letter dated 28th November 2018 from the liquidator forwarding court orders and application for

restriction and in the strength of all the above and noting the imminent ownership tussle we registered the restriction.

19. Considering the material furnished to the Land Registrar, the Land Registrar properly in exercise of her statutory mandate elected to register a restriction against the titles pending resolution of the issue of ownership between the 1st Respondent and the applicant. The import of section 76 of the Land Registration Act, 2012 is to ensure that where fraud is alleged or suspected and/or where there has been or improper dealing with land is suspected and/or there is such threat, the Land Registrar is able to place a restriction on the land to preserve the status of the land until investigations are carried out and/or the issue in contention resolved. In the present matter fraud was alleged and ownership of the subject parcels of land was in issue and the matter was squarely within the mandate of the Land Registrar to act in terms of Section 76 of the Land Registration Act, 2012.

20. In the instant matter judicial review was not the appropriate remedy available to the Applicant. Judicial review is inapplicable where there is an alternative remedy or where a statute provides a mechanism for dealing with a dispute arising from an administrative action or decision. Section 78 of the Land Registration Act, 2012 provides a procedure to be followed to remove and/or vary restrictions. It provides as follows:-

(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

21. The applicant if it considered itself aggrieved by the registration of the restriction should have invoked the provisions of section 78 of the Land Registration Act to apply for removal and/or variation of the restriction. Section 9 (2) & (3) of the Fair Administrative Actions Act, 2015 make it clear that all the remedies available under any other written law have to be first exhausted. The provisions provide as follows:-

9.(2) The High Court or a subordinate Court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanism for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

22. The Court of Appeal in the case of **Speaker of the National Assembly -Vs- James Njengs Karume (1992) eKLR** enunciated the exhaustion principle clearly when the court stated:-

“ There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of parliament, that procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

23. Having regard to the provisions of section 76 and 78 of the Land Registration Act, 2012 I am satisfied that the 2nd Respondent was acting within his mandate in registering the restriction and that the applicant if aggrieved by the said action did not apply to the 2nd Respondent to remove and/or vary the restriction. The commencement of these Judicial Review proceedings before exhausting the procedure provided under the Land Registration Act, 2012 was premature and constituted abuse of the Court process.

24. The upshot is that I find the judicial review application to be devoid of any merit and the same is ordered dismissed with costs to the Respondents .

25. Orders accordingly.

Judgment dated signed and delivered electronically at Nakuru this 7th day of May 2020.

J M MUTUNGI

JUDGE