



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. MISCELLANEOUS CIVIL APPLICATION NO. 261 OF 2016

IN THE MATTER OF: AN APPLICATION BY BAMBURI CEMENT LIMITED

(Ex parte Applicant) FOR LEAVE TO COMMENCE JUDICIAL REVIEW

PROCEEDINGS FOR ORDERS OF MANDAMUS DIRECTED AT

THE CHIEF LAND REGISTRAR (The Respondent);

AND

IN THE MATTER OF: THE DECISION DATED 27TH JULY 2010 OF

THE CABINET SECRETARY (MINISTER) OF LANDS;

AND

IN THE MATTER OF: A CAVEAT DATED 10TH AUGUST 2010

ENTERED BY THE REGISTRAR OF TITLES;

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

(CAP. 21) AND SECTIONS 8 AND 9 OF THE LAW REFORM ACT (CAP 26), LAWS OF KENYA;

AND

IN THE MATTER OF: SECTION 62, 64, 65(1) (F) & (i) OF THE REGISTRATION

OUT TITLES ACT, CAP. 281, LAWS OF KENYA (REPEALED);

BETWEEN

BAMBURI CEMENT LIMITED.....APPLICANT

AND

THE CHIEF REGISTRAR.....1ST RESPONDENT

ATHE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

1. Leave was granted to the *Ex parte* Applicant to commence judicial review proceedings against the Respondent on 26/9/2016. The

Applicant filed the Notice of Motion dated 26/10/2016 on 27/10/2016 seeking an order of mandamus to compel the Chief Land Registrar to remove the caveats entered on 10/10/2010 against the Applicant's parcels of land known as L.R. Numbers 18696/3, 18696/4, 18696/5, 18696/7, 18696/8, 18696/9, 18696/10, 18696/11, 18696/12, 18696/13, 18696/14, 18696/15, 18696/16, 18696/17, 18696/18, 18696/19, 18696/20, 18696/21, 18696/22, 18696/24, 18696/25, 18696/26 and 18696/56 ("the Suit Properties"). It also sought an order to prohibit the Chief Land Registrar from making any further entries or dealings against these parcels of land in a manner that may be prejudicial to the Applicant.

2. The application is made on the grounds that the Chief Land Registrar, Nairobi acted unreasonably and in bad faith by lodging the illegal caveats and refusing to remove them on the Applicant's titles. The Applicant contends that the Suit Properties are private land which was neither acquired unlawfully nor are they on any road reserve. The Applicant maintains that the caveats registered on 10/8/2010 against its titles contravene Article 40 of the Constitution of Kenya and are devoid of any legal justification under Section 65 (f) and (i) of the Registration of Titles Act and Section 72 of the Land Registration Act. The Chief Land Registrar expressed reluctance to remove the caveats until when directed by the court.

3. The application is supported by the affidavit of Betty Kanyagia who deponed that the Applicant is the registered owner of the suit plots since 1969. She annexed a copies of the searches done which confirmed that cautions were registered against the Suit Properties on 10/8/2010. On enquiry, the Applicant was informed that the caveats were registered following a ministerial memo dated 27/7/2010 which directed that restrictions would be made on titles for irregularly acquired road reserves. The Applicant contends that it was never given any notice of intention to register caveats against its parcels of land.

4. The Applicant's counsel wrote to the Ministry of Lands and the National Land Commission in October 2013 requesting to have the caveats removed. The National Land Commission responded on 25/11/2013 indicating that the complaint was under investigation.

5. The Kenya National Highways Authority wrote to the Applicant's advocates on 20/3/2014 and confirmed that the suit parcels of land are not encroaching on the old Mombasa Road. The Authority gave measurements for the road reserve as being 120 ft. (36.58 m). The Chief Land Registrar's letter of 15/10/2015 advised the Applicant that the caveats against the Suit Properties were put in place pursuant to the Cabinet decision taken at the meeting held on 29/6/2010 and as such the Registrar was not in a position to remove the caveats. The Registrar advised the Applicants to engage the court system to give direction for the caveats to be removed.

6. The Respondent filed Grounds of Opposition. They urged that the application was filed outside the 21 days' period set by Order 53 Rule 2 of the Civil Procedure Rules. It faulted the Applicant who learnt of the existence of the caveats in 2012 for failing to apply to court for the removal of the caveats until October 2016. The Respondent claims that it acted in good faith and in pursuit of public interest to safeguard a road reserve on which the Suit Properties are believed to lie. The 2nd Respondent also faulted the Applicant for not serving the suit papers on the Office of the Attorney General until February 2018.

7. Parties filed submissions. The Respondent urged that the judicial review application was filed out of time. It relied on the case of **Republic v. Kahindi Nyafula & 3 Others, Ex parte Kilifi South East Farmers Cooperatives Society [2014] eKLR** in which the court made reference to earlier decisions on the issue that the substantive motion seeking prerogative orders must be filed within 21 days and that this time cannot be extended. The Respondent saw no basis for the court to depart from the decisions which show that the time for filing judicial review applications cannot be extended.

8. The court agrees with the position that the time for filing judicial review applications cannot be extended. However, the court is minded to consider the substance of the application and make a determination on the merits of the dispute in line with its duty and the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Dismissing this suit on the basis of the application having been filed out of time will not resolve the dispute. Dismissal on the ground that the application was filed more than 21 days after leave was granted may not be a bar to the Applicant seeking leave afresh and filing another application for judicial review. Will this be economical and prudent use of the limited judicial resources? The court thinks not.

9. Section 62 of the Registration of Titles Act (RTA), now repealed, allowed a person dissatisfied with any act, omission, refusal, decision, direction or order of the Registrar to require the Registrar to give written grounds for the act, omission, refusal, direction and order upon which the person may apply to the court for an order of mandamus.

10. Section 65 (1) of RTA empowered the Land Registrar to enter a caveat on behalf of the Government to prohibit the transfer or dealings with any land belonging to or supposed to belong to the Government and also prohibit dealings in land where it appeared to the Registrar that an error had been made by misdescription of the land in any certificate of title or other instrument; or for the prevention of any fraud or improper dealing or other sufficient cause.

11. Section 64 of RTA gave the court the discretion in any proceedings respecting any land or in respect of a caveat or other entry affecting such land to direct the Land Registrar to cancel, correct, substitute or otherwise do any such acts as may be necessary to give effect to the judgement of the court.

12. The effect of a caution under Section 72 of the Land Registration Act is that a disposition that is inconsistent with the caution shall not be registered. A caution may be withdrawn by the cautioner who lodged it under Section 71; or it may be removed by order of the court or by order of the Land Registrar on giving notice to the cautioner of the intention to remove the caution.

13. The entries against the Suit Properties reads:

"caveat by Senior Registrar of Titles claiming interest under Sec 65 (1) (f) of RTA absolutely".

14. The basis for maintaining the caveats therefore is that the caveats against the Suit Properties were put in place pursuant to the decision

taken at the Cabinet Meeting held on 29/6/2010. A caution does not confer ownership rights over land. If the Government believes the Suit Properties belonged to or were supposed to belong to it, then it ought to have taken steps to revoke or legally challenge the Applicant's titles over the Suit Properties and follow due process.

15. The protection of the right over property afforded by Article 40 of the Constitution is to be enjoyed by the proprietor except where the property is found to have been unlawfully acquired. The court doubts that the Cabinet Meeting held on 29/6/2010 could make a finding contemplated by Article 40(6) of the Constitution. Besides the court making such finding, the National Land Commission Act made provision for the process through which such a finding could also be made.

16. The court has considered the submissions of both parties. The court finds that the application dated 26/10/2016 is merited and grants prayers 1 and 2 of that application. The Applicant is also granted the costs of the suit.

Dated and delivered at Nairobi this 5th day of October 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Odera for the Applicant

Mr. A. Kamau holding brief for Mr. Terrell for the Respondent

Mr. V. Owuor- Court Assistant