



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

JUDICIAL REVIEW CASE NO. 15 OF 2018

WYCLIFFE ONYANGO1ST APPLICANT

JANE NJERI ONYANGO.....2ND APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....RESPONDENT

LUCY AKINYI AMBALA1ST INTERESTED PARTY

GEOFFREY OCHIENG NDEDA.....2ND INTERESTED PARTY

JUDGMENT

The Judicial Review Motion

1. On 18/9/2019, the applicants brought a substantive notice of motion dated 2/7/2019 seeking the following verbatim judicial review orders:

(1) That leave having been granted, this honourable court be pleased to grant orders of certiorari directed to the respondent quashing its decision vide letter dated 9th February 2017 declaring that the title No. Nairobi/Block 112/ 58 does not belong to the applicants.

(2) That an order of mandamus by way of judicial review do issue directed to the respondent commanding the respondent to discharge his/her mandate and register the withdrawal of caution form lodged on 31st October 2008 by Geoffrey Ochieng Ndeda and thereafter to issue the applicants with a search for the property.

(3) That leave having been granted, this honourable court be pleased to grant to the applicants an order of prohibition prohibiting the respondent from interfering and/ or stopping the applicants from dealing with their land.

(4) The costs of this application be provided for.

Applicants' Case

2. The motion was supported by an affidavit sworn by the 2nd applicant on 2/7/2019 and a statement of facts dated 5/3/2018. The case of the applicants was that they were the registered proprietors of the suit property, **Title Number Nairobi Block 112/58 [the suit property]**, having purchased the same in 1997 from the late **Otieno Aggrey Ambala** and **Lucy Akinyi Ambala [1st Interested Party]**. Upon paying the agreed purchase price, the suit property was transferred to them and they took possession thereof. They were at that point duly issued with an official search indicating that they had been duly registered as proprietors of the suit property.

3. They contended that on 9/3/2006, the 1st interested party filed Nairobi **HCCC No 227 of 2006** through a plaint dated 8/3/2006 against them, alleging fraud in their registration as proprietors of the suit property and seeking an order annulling their registration as proprietors of the suit property. The said suit was dismissed by **Justice Mbogholi Msagha** on 12/5/2015 for want of prosecution under **Order 17 rule 2(1)** of the **Civil Procedure Rules** and the applicants were awarded costs of the suit.

4. The applicants further contended that in November 2008, they discovered that Geoffrey Ochieng Ndeda (**2nd Interested Party**) had lodged a caution against the parcel register of the suit property claiming "interest as administrator" of the estate of the late Otieno Aggrey Ambala. By a letter dated 13/4/2011, the applicants wrote to the respondent requesting him to remove the caution since the matter had been resolved between them and the cautioner and the cautioner had duly signed and presented a notice of withdrawal of caution in the prescribed form. The respondent, however, declined to act on the notice of withdrawal of caution presented by the cautioner. Despite several requests,

the respondent had refused to remove the caution and or supply the applicants with an official search relating to the suit property.

5. What ultimately provoked the present proceedings was a letter dated 9/2/2017 from the respondent to the National Land Commission in which the respondent stated that the suit property did not have a green card (parcel register) and therefore he could not furnish the National Land Commission with a search relating to the suit property. The respondent further stated in the said letter that according to the records in the respondent's file, the suit property belonged to **Otieno Aggrey**

Ambala and Lucy Akinyi Ambala of Post Office Box 58741 Nairobi.

6. Aggrieved by the respondent's letter to the National Land Commission, the applicants initiated these proceedings, contending that the respondent had acted without jurisdiction or in excess of jurisdiction by declaring that their property belonged to Otieno Aggrey Ambala and Lucy Akinyi Ambala yet the respondent knew that they (the applicants) were the registered proprietors of the suit property at that time. They added that the respondent's actions/decision had infringed their constitutional rights relating to ownership of property. They further faulted the respondent for failing to conduct a proper hearing upon the 2nd interested party lodging the caution.

Respondent and 2nd Interested Party

7. The respondent did not file a response to the motion despite being granted the opportunity to do so. Similarly, he did not file submissions on the motion. The applicants filed an affidavit of service sworn by Jacob Malanda Okwemba indicating that the **2nd interested party** was served on 13/12/2019 at *Gem-Dudi*. He did not, however, file a response to the motion.

1st Interested Party's Case

8. The first interested party filed grounds of opposition dated 27/11/2019 in which she opposed the motion on the ground that this court lacked jurisdiction to entertain the motion because it was filed outside the 21 days period given at the time of granting leave. She filed supplementary grounds of opposition dated 10/7/2020 in which she further opposed the motion on the ground that the reliefs sought in the motion varied from the reliefs outlined in the statement of facts. She also opposed the motion on the ground that the applicants were neither authors nor recipients of the letter dated 9/2/2021, hence they lacked competence to produce it in evidence.

9. In addition to the two sets of grounds of opposition, the 1st interested party filed an unsworn and undated document titled "Replying Affidavit". The said document was drawn in the name of **Mercy Mathai** as the intended deponent. For reasons that will be outlined in this judgment, the unsworn and undated document cannot be said to be an affidavit.

Applicants' Submissions

10. The applicants, through M/s W G Wambugu & Company Advocates, filed written submissions dated 20/8/2020. Counsel for the applicants set out a detailed background to the motion. She submitted that there was no pending dispute over the transfer of the suit property to the applicants. Counsel argued that the respondent had acted *ultra vires* and in excess of his jurisdiction by stating in the letter dated 9/2/2017 that the suit property belonged to the late Otieno Aggrey Ambala and the 1st interested party. Counsel added that the respondent's decision to decline to remove the caution as requested by the 2nd interested party violated the applicant's constitutional right to property.

1st Interested Party's submissions

11. The 1st interested party filed written submission dated 14/7/2020 through M/s W Mathai & Associates. She further filed supplementary written submissions dated 25/9/2020 through the same law firm. Counsel for the 1st interested party itemized the following as the four issues falling for determination in the motion (i) Whether this court has jurisdiction to hear the substantive motion herein; (ii) In the alternative, whether the substantive motion herein was filed without unreasonable delay; (iii) Whether the substantive motion is fatally defective in view of the fact that the reliefs sought in the substantive motion are substantially variant from the reliefs sought under the statutory statements, and (iv) Whether the applicants were competent to produce the impugned letter dated 9th February 2018 in evidence given that they were neither the authors nor recipients of the said letter.

12. Counsel submitted that **Order 53 rule 3(1)** required the applicants to file the substantive motion within 21 days from the date of grant of leave. Counsel contended that because there was no compliance with that requirement, the motion was incompetent. Counsel added that there was unreasonable, unexplained, and unjustified delay on part of the applicants. Counsel for the interested party further argued that the letter dated 9/2/2017 offended the rules of evidence in view of the fact that the applicants were neither the authors nor the recipients of the letter. Counsel did not, however, specify the rules of evidence which the letter offended. Lastly, counsel cited **Order 53 rule 4(1)** of the **Civil Procedure Rules** and submitted that because the reliefs sought in the motion and the reliefs outlined in the statement of facts which accompanied the application for leave were at variance, both the court and the parties to the motion were left to guess which reliefs the applicants were seeking. Counsel urged the court to dismiss the motion.

Analysis and Determination

13. I have considered the motion, the response to the motion, the parties' respective submissions, and the relevant law. The following seven issues fall for determination in the motion: (i) Whether the applicant's failure to bring the present motion within 21 days from 22/5/2019 divested this court of jurisdiction to entertain the motion; (ii) Whether disparity in the reliefs sought in the motion and those outlined in the statement of facts is fatal to the present judicial review motion; (iii) Whether the letter dated 9/2/2017 is inadmissible by dint of the fact that it was not addressed to the applicants; (iv) Whether the respondent acted in excess of his jurisdiction by declaring in the letter dated 9/2/2017 that the late Otieno Aggrey Ambala and the **1st Interested Party** were the registered proprietors of the suit property as at 9/2/2017; (v) Whether the respondent acted unprocedurally and/or in violation of the law in failing to withdraw the caution lodged by the 2nd Interested Party upon the 2nd Interested Party presenting a notice of withdrawal of caution in the prescribed form; (vi) Whether the applicants are

entitled to any of the reliefs sought in the motion dated 2/7/2019; and (vii) What order should be made in relation to costs of this suit. I will make sequential pronouncements on the seven issues in the above order.

14. Before I make pronouncements on the above issues, it is important to state that the respondent did not file a response to the motion. He similarly did not file submissions on the motion. The 1st interested party filed grounds of opposition dated 27/11/2019 and supplementary grounds of opposition dated 10/7/2020. In addition, the 1st interested party filed an undated and unsworn (unsigned) document titled "Replying Affidavit" bearing the name of **Mercy Mathai** as the intended deponent. The said undated and unsworn (unsigned) document titled "Replying Affidavit" was filed electronically and uploaded on 13/7/2020 at 10.07:14.

15. In view of the fact that the purported replying affidavit is unsworn (unsigned) and undated, it cannot be construed to constitute an affidavit within the meaning of **Section 18** of the **Oaths and Statutory Declarations Act** and **Rule 10** of the **Oaths and Statutory Declarations Rules**. Consequently, the court cannot admit or place reliance on the unsworn document as a form of evidence. The court will, in the circumstances, rely on the 1st interested party's two sets of grounds of opposition.

16. Secondly, it is to be noted that although the respondent was served, he elected not to respond to the motion. Indeed, Mr Kamau of the Attorney General's Office attended court on 29/10/2019 and requested for seven (7) days within which to file a response to the motion. No response was, however, filed. Similarly, the 2nd interested party who together with the **1st interested party** are said to be administrators of the estate of the late Otieno Aggrey Ambala did not respond to the motion upon service. Consequently, the motion is unopposed by the respondent and the **2nd interested party**. I now turn to the issues falling for determination in the motion.

17. The first issue is whether the applicant's failure to bring the present motion within 21 days from 22/5/2019 divested this court of jurisdiction to entertain the motion. It is not in dispute that the motion was preceded by a chamber summons application dated 5/3/2018 through which the applicants sought prior leave of the court to initiate judicial review proceedings against the respondent. It is also not in dispute that the court granted leave and directed the applicants to bring the substantive motion within 21 days from 22/5/2019. The **1st interested party** contends that because the applicants brought the motion after expiry of the 21 days, this court lacks jurisdiction to entertain the motion.

18. I do not agree with the above view taken by the **1st interested party**.

First, the directions requiring the applicant to bring the motion within 21 days did not contain a default clause vacating the leave or invalidating any motion brought outside the 21 days. Secondly, on 29/10/2019, Ms Mathai, counsel for the **1st interested party**, appeared before this court and submitted that the applicant had brought the motion outside the 21 days. She sought time to file grounds of opposition together with a substantive response to the motion. It was during this particular court session that the respondent, through state counsel, similarly asked for seven (7) days within which to file a response to the motion. The court considered the matter, and allowed the respondent and the **1st Interested Party** to file a substantive response to the motion. The **1st respondent** duly responded to the motion through the two sets of grounds of opposition. Thirdly, subsequent to the grant of leave, the High Court [Korir J] rendered a judgment in **Felix Kiprono Matagei v Attorney General; Law Society of Kenya [Amicus Curiae] [2021]eKLR** in which it declared that the requirement for leave before bringing judicial review proceedings was rendered unnecessary by the provisions of the **Constitution of Kenya 2010** and the provisions of the **Fair Administrative Action Act of 2015**. The totality of the foregoing is that the objection raised by the **1st interested party** is belated, moot and overtaken by events and the law. Consequently, my finding on the first issue is that notwithstanding the fact that the motion herein was brought after expiry of 21 days from 22/5/2019, this court properly allowed the motion to proceed to substantive hearing and therefore the court has jurisdiction to entertain and dispose the motion dated 2/7/2019.

19. The second issue is whether disparity in the reliefs sought in the motion and those outlined in the statement of facts is fatal to the present judicial review motion. The requirement for a statement of facts was provided for under **Order 53 rule 1(2)** of the **Civil Procedure Rules**. The statement of facts would accompany the application for leave. In my view, leave proceedings have been declared unnecessary, it follows that a statement of facts is not a mandatory requirement under the present judicial review regime. Consequently not much focus would be placed on the statement of facts which would hitherto accompany the application for leave. What in my view is important is the substantive motion and the accompanying supporting affidavit. It therefore follows that the disparity between the motion and the contents of the paragraph relating to reliefs in the statement of facts is inconsequential and is not fatal to the present judicial review motion.

20. The third issue is whether the letter dated 9/2/2017 is inadmissible by dint of the fact that it was not addressed to the applicants. The letter dated 9/2/2017 was authored and signed by a Land Registrar by the name S M Nabulindo. The respondent has not contested the fact that the said letter emanated from their office. The letter relates to land which the applicants claim to own. There is no legal basis laid by the 1st interested party to support her contention that the said letter is inadmissible in judicial review proceedings where the decision or declaration contained in the letter is sought to be quashed. My finding on this issue is that the said letter has properly been exhibited as the subject of the judicial review motion and is properly admissible.

21. The fourth issue is whether the respondent acted in excess of his jurisdiction by declaring in the letter dated 9/12/2017 that the late Otieno Aggrey Ambala and the **1st Interested Party** were the registered proprietors of the suit property as at 9/2/2017. I have looked at the evidence presented to the court. On 14/11/2008, the respondent issued an official search confirming that the applicants were the registered proprietors of the suit property and were issued with a certificate of lease on 23/9/2005. On 27/11/2013, the respondent similarly issued an official search confirming that the suit property was registered in the names of the applicants. On 8/9/2009, the respondent wrote to M/s Namada & Co Advocates and copied the letter to the applicants. He confirmed in the said letter that the applicants were the registered proprietors of the suit property. He required the applicants to explain how they acquired the property. On 14/12/2016, the respondent wrote to the applicants indicting in paragraph 2 of the said letter thus:

" According to our records, the above parcel of land has been in dispute since the year 2009 with claims that you acquired the said parcel fraudulently"

22. Further, there is evidence before court confirming that the **1st Interested Party** filed Nairobi **HCCC No 227 of 2006** in which she

confirmed in paragraph 13 of the plaint dated 8/3/2006 that on 1/2/2006 she was advised that the suit property had been transferred to the applicants. She termed the said transfer as fraudulent. She itemized various particulars of fraud and prayed for the annulment of the registration of the applicants as proprietors of the suit property. The said suit was dismissed by Mbogholi Msagha J for want of prosecution on 12/5/2015. In his letter dated 14/12/2016, the respondent alluded to the fact that he had been advised about dismissal of the above suit.

23. The totality of the foregoing is that, the 1st respondent was fully aware that the suit property was as at 9/2/2017 registered in the names of the applicants. It is also apparent from the evidence presented in this judicial review motion that the respondent was aware of the dismissal of the suit which had challenged the applicants' registration as proprietors of the suit property. It is therefore apparent that the respondent acted in excess of his jurisdiction in asserting that the late Otieno Aggrey Ambala and the **1st interested party** were the registered proprietors of the suit property as at 9/2/2017 while fully aware that the applicants were the registered proprietors although their registration had at some point been challenged by the 1st interested party. The respondent should have laid the facts relating to the suit property the way they were, including the dispute relating to the applicants' registration as proprietors, instead of purporting to casually alter the true registration status of the suit property. In light of the above evidence, the court is in agreement with the applicants that the respondent acted in excess of his jurisdiction by declaring in the letter dated 9/2/2017 that the late Otieno Aggrey Ambala and the **1st Interested Party** were the registered proprietors of the suit property as at 9/2/2017.

24. The fifth issue is whether the respondent acted unprocedurally and/or in violation of the law in failing to withdraw the caution lodged by the **2nd interested party** upon the **2nd interested party** presenting a notice of withdrawal of caution in the prescribed form. There is no dispute that the only encumbrance on the parcel register relating to the suit property was the 2nd interested party's caution registered on 15/6/2006. There is also no dispute that the **2nd interested party** duly presented to the respondent a notice in the prescribed form withdrawing the caution. Thirdly, there was no encumbrance placed on the parcel register by the **1st interested party** at all material times. The **1st interested party** elected to challenge the applicants' registration through **Nairobi HCCC 227 of 2006** which was dismissed for want of prosecution in 2015. In the circumstances, the respondent had no proper legal basis for refusing to act on the cautioner's application withdrawing the caution. If any other person had an interest in the suit property, it was incumbent upon that other person to take steps to protect the interest. It was, however, wrong and illegal for the respondent to decline to act on the 2nd respondent's application to withdraw his caution. Based on the foregoing, the court entirely agrees with the applicants that the respondent acted unprocedurally, and/or in violation of the law in failing to vacate the caution lodged by the **2nd interested party** upon the **2nd interested party** presenting an application in the prescribed form withdrawing the caution.

25. The sixth issue is whether the applicants are entitled to any of the reliefs sought in the motion dated 2/7/2019. The first prayer in the motion is a plea for orders of *certiorari* directed to the respondent quashing his decision contained in the letter dated 9/2/2017 declaring that the suit property did not belong to the applicants. In light of my findings on the preceding issues, the plea will be granted.

26. The second prayer is an order of *mandamus* directed to the respondent commanding him to discharge his mandate and register the withdrawal of caution lodged on 31/10/2008 by Geoffrey Ochieng Ndeda and to thereafter issue the applicants with a search for the suit property. Similarly, in light of my finding on the preceding issues and in light of the evidence presented to the court indicating that the cautioner [2nd interested party] duly presented a notice of withdrawal of caution in the prescribed form but the respondent has failed to act on it, it is my finding that the applicants are entitled to the relief of an order of *mandamus*.

27. The last prayer is a plea for an order of prohibition prohibiting the respondent against interfering and/or stopping the applicants from dealing with the suit property. It does emerge from the evidence presented to the court that the respondent, for reasons that have not been explained to the court to the court, decided to be partisan in the dispute relating to the applicant's registration as proprietors of the suit property. The **1st interested party** challenged the applicants' registration in the High Court through a suit which she subsequently abandoned, leading to its dismissal. On his part, the **2nd respondent** lodged a caution which he subsequently applied to withdraw. Despite the **1st interested party** abandoning the judicial forum of dispute resolution and the **2nd interested party** presenting a notice withdrawing his caution, the respondent, for unknown reasons, elected to fight the applicants on behalf of unknown persons. It is not lost to the court that neither of the two interested parties swore any affidavit in these proceedings to allude to any form of fraud by the applicants. In the circumstances, the court agrees with the applicants that there is need to stop the respondent from infringing on their rights.

28. The last issue relates to costs of this suit. The party who necessitated these judicial review proceedings is the respondent. No explanation has been tendered by the respondent on why the general principle on costs should not apply in this suit. In the circumstances, costs will follow the event as provided under **Section 27** of the **Civil Procedure Act**, meaning that the respondent will bear costs of the suit.

29. Before I make disposal orders, I did observe from the submissions filed by counsel that subsequent to the institution of this suit, the respondent caused a fresh title in the name of the late Otieno Aggrey Ambala and the **1st interested party** to be issued. Before me is a judicial review motion focusing on the decision contained in the respondent's letter dated 9/2/2017 and the preceding actions and/or omissions of the respondent. The present judicial review motion does not focus on the subsequent decision made on 23/8/2018. My view regarding submissions by counsel relating to a new title allegedly issued on 23/8/2018 is that the decision allegedly made on 23/8/2018 is a separate and distinct cause of action which was not the subject of the present judicial review motion. Any party aggrieved by the alleged decision of 23/8/2018 is at liberty to seek appropriate redress on a different platform. I will therefore refrain from discussing that decision in the present motion.

Disposal Orders

30. In light of the above findings, the court hereby grants the following judicial review orders in tandem with the prayers sought in the notice of motion dated 2/7/2019:

a) An order of certiorari is hereby issued directed to the respondent, quashing the declaration/decision contained in the letter dated 9/2/2017 declaring that Title Number Nairobi Block 112/58 belongs to the late Otieno Aggrey Ambala and Lucy Akinyi Ambala.

b) An order of mandamus is hereby issued directed to the respondent commanding the respondent to discharge his mandate and register the withdrawal of caution lodged on 31/10/2008 by Geoffrey Ochieng Ndeda and thereafter issue the applicants with a search for the above property.

c) An order of prohibition is hereby issued prohibiting the respondent from interfering and/or stopping the applicants from dealing with the suit property.

d) The respondent shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF JUNE 2021.

B M EBOSO

JUDGE

In the Presence of: -

Mr Mugo for the Applicant

Mercy Mathai for the 1st Interested Party

Mr Omamo holding brief for Mr Namada for the 2nd Interested Party

Court Assistant: June Nafula