



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC MISC. APPLICATION NO. E057 OF 2020

KENYA COMMERCIAL BANK LTD.....APPLICANT

VERSUS

ALCON HOLDINGS LIMITED.....RESPONDENT

RULING

What is before me is a Notice of Motion application dated 6th October, 2020 brought by the applicant, Kenya Commercial Bank Ltd. seeking the following orders;

1. That the Land Registrar, Nairobi be directed to dispense with the production of the original title deed in respect of L.R. No. 12467, Industrial Area (“the suit property”) in effecting the transfer by chargee under the supervision of the court.
2. That the Land Registrar, Nairobi be directed to dispense with the requirement of Gazettement before issuance of a provisional title.
3. That the applicant be directed to execute the transfer documents and other necessary documents without the production of the original title deed.
4. That this Honourable court be pleased to issue any other order that it may deem just and expedient in the interest of justice.

The application which is brought under sections 31 and 33 of the Land Registration Act, 2012 has been brought on the following grounds; the applicant and the respondent had along protracted court case which ended when the parties entered into a consent dated 8th November, 2017 which allowed the respondent to sell the suit property and pay the applicant Kshs. 90,000,000/= on account of a charge that was registered against the title of the suit property in favour of the applicant on 16th October, 1995. The respondent failed to secure a purchaser for the suit property. This led to the consent of 8th November, 2017 being varied on 25th October, 2018 to allow the applicant to source for a buyer for the suit property. The applicant secured several offers for the purchase of the suit property and when it was in the process of entering into a sale agreement with a potential purchaser, it discovered that it could not trace the title for the suit property from its archives. The misplacement or loss of the said title has occasioned delay in effecting the consents that had been reached by the parties to the detriment of both parties in that the same has frustrated the sale of the suit property.

The applicant has averred that it is only just that the court grants the orders sought so as to fast track the procurement of a provisional title. The application is also supported by the affidavit of the applicant’s Director of Legal Services, Bonnie Okumu dated 6th October, 2020 to which he has annexed among others, an offer to sell the suit property that the applicant had made to Alfalah Logistics Ltd. on 8th July, 2020 which was accepted by the said company on 9th July, 2020 and a consent dated 23rd October, 2020 in which the applicant and the respondent agreed that the orders sought herein be granted.

Following directions that were given by the court on 24th February, 2021, the application was served upon the respondent and the Chief Land Registrar. They however did not respond to the application. When the application came up for hearing on 12th July, 2021, Ms. Ndirangu who appeared for the applicant relied entirely on the grounds on the face of the application and the supporting affidavit and urged the court to grant the orders sought.

I have considered the application together with the affidavit filed in support thereof. As I have stated earlier, the application has been brought under Section 31 and 33 of the Land Registration Act, 2012 (“the Act”). Section 31 of the Act provides that unless the Land Registrar dispenses with the production of a certificate of title or a certificate of lease, the same must be produced during the registration of any dealing with the land or lease to which it relates. Section 33 of the Act on the other hand deals with the procedure for replacement of lost or destroyed certificates of title and registers of land. It provides that, in case of loss or destruction of a certificate of title or certificate of

lease, an application for replacement is to be made to the Land Registrar by the proprietor of the land or lease accompanied by evidence of such loss or destruction. If the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette and in any two local newspapers of nationwide circulation.

There is no provision in either section 31 or 33 of the Act allowing the court to intervene in the exercise by the Land Registrar of his powers under those sections of the Act. This court in my view does not have inherent jurisdiction to direct the Land Registrar generally in the exercise of his powers under the Act. The court has been given express power under Section 86 of the Act to review the exercise by the Land Registrar of the powers conferred upon him under the Act. Section 86(1) of the Act gives the court power to review decisions made by the Land Registrar in exercise of any power or in the performance of any duty conferred or imposed on the Land Registrar by the Act on an application made by an aggrieved party.

Section 31(1) of the Act allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under Section 86(1) of the Act in case a party is aggrieved by the decision of the Land Registrar on the issue. There is no evidence before me that an application for dispensation with the production of the certificate of title for the suit property had been made to the Land Registrar. This court cannot order the Land Registrar to dispense with the production of the said certificate of title in the absence of evidence that an application for such dispensation has been made to the Land Registrar and the Land Registrar has unreasonably refused to dispense with the production of the same. Furthermore, the court can only intervene when moved to exercise its review jurisdiction under section 86(1) of the Act aforesaid.

As I have stated earlier, section 33 of the Act provides for the procedure for applying for replacement of a lost or destroyed certificate of title or lease. The Act has not given the court power to direct the Land Registrar to dispense with any of the steps set out in the said section which are to be followed before a lost or destroyed title is replaced. In my view, the said steps are intended to protect the land registration system and sanctity of title. They are intended to prevent fraud and other illegal dealings with land. Even if I had power to direct the Land Registrar to dispense with some of the requirements before replacing a lost or destroyed title, I would do so only in exceptionally circumstances and for very compelling reasons. I nevertheless have no such power. I am also not convinced that any compelling reason exists in this case that would justify dispensation with some of the requirements for replacement of a lost title. I am of the view that the parties herein will suffer no harm if they wait for a replacement certificate of title to be issued in the normal manner before completing the sale or selling the suit property.

Due to the foregoing, I find no merit in the Notice of Motion dated 6th October, 2020. The application is dismissed with no order as to costs.

DELIVERED AND DATED AT NAIROBI THIS 27TH DAY OF JULY, 2021

S. OKONG'O

JUDGE

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

Ms. Ndirangu for the Applicant

N/A for the Respondent

Ms. C. Nyokabi - Court Assistant