



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CIVIL MISC APPL NO. E001 OF 2020

REPUBLICAPPLICANT

VERSUS

THE COUNTY LAND REGISTRAR,

MAKUENI LANDS REGISTRYRESPONDENT

AND

PHILES MWIKALI KIOKO

ESTHER NDULU KIOKO

SAMUEL MUNGUTI NDAMBUKI *alias*

SAMMY NDAMBUKI (the Administrators

of the Estate of NDAMBUKI KINGUTU

MAITHA(DECEASED)EX-PARTE APPLICANTS

JUDGEMENT

1. The application for determination is the one dated 29th October, 2020 and is brought under Order 53 Rule 3(a) of the Civil Procedure Rules, 2010. It seeks;

i) That an order of mandamus to move into this Honourable Court compelling the County Land Registrar, Makueni Lands Registry to reconstruct the green card and/or the title in respect of Land Parcel Number MAKUENI/UNOA/143 and subsequently comply with the Honourable Court's orders in Makueni High Court Succession Cause No. 444 of 2017 in the matter of the estate of Ndambuki Kingutu Maitha (deceased) issued on 24/09/2019.

ii) Costs of this application be provided for.

2. The application is supported by the statement of facts, verifying affidavit and supporting affidavit of Samuel Mungi Ndambuki alias Sammy Ndambuki, the 3rd Ex parte Applicant, dated 21st October, 2020 as well as his further affidavit sworn by him on 27th April, 2021. He has deposed that he has the authority to swear the affidavits on behalf of his Co-Applicants who are his family members.

3. The dispute herein revolves around land parcel number Makueni/Unoa/143 which forms part of the estate of the late Ndambuki Kingutu Maitha who was the father of the 3rd Ex parte Applicant.

4. He has deposed that the said estate of the late Ndambuki Maitha was subject to the proceedings in Makueni High Court Succession Cause number 444 of 2017 wherein letters of Administration Intestate was granted jointly to the Ex parte Applicants and was subsequently confirmed on 24th September, 2019. A copy of the grant and confirmed grant are exhibited as SMN – 1(a) and (b) respectively.

5. He went on to depose that before the said grant was issued and confirmed, the subject parcel of land had been transferred to the previous Administrator of his late father's estate, one Leonard Kioko Ndambuki (now deceased), and a title deed had been issued. A copy of the title deed issued to the father of the Ex parte Applicant and the one issued to Leonard after transfer are exhibited as SMN-2 and SMN-3. He deposed that the Succession Court ordered that the parcel of land, do revert to the original owner (his late father) to give effect to the

confirmed grant and further directed that the subject parcel of land be distributed amongst the beneficiaries of his late father's estate as agreed. A copy of the court order is exhibited as SMN-4.

6. It was also his deposition that although the court order was served upon the Land Registrar, the said officer declined to execute the court orders on the grounds that the green card and the original records relating to the said subject land were missing from the land registry. The 3rd Ex parte Applicant has further deposed that their requests to have the green card reconstructed by the Land Registrar have been ignored and/or declined notwithstanding that they had earlier on been issued with a copy of green card and a survey map extract for purposes of the said court proceedings. A copy of the letter from the Land Registrar dated 22nd March, 2017, a copy of the green card and the map are exhibited as SMN-6(a)m (b) and (c).

7. Arising from the above, the 3rd Ex parte Applicant deposed that the Land Registrar Makueni Lands Office failure to accord the Applicant's issue the consideration he is supposed to, he has acted injudiciously and it amounts to miscarriage of justice.

8. The application is opposed by the Respondent through the grounds of opposition dated 23rd November, 2020 and filed in court on 8th December, 2020. The grounds are: -

1) **THAT Section 33(5) of the Land Registration Act, No. 3 of 2012 provides for the procedure of reconstruction of lost land registers and the Applicants should follow the said procedure.**

2) **THAT the Applicants should follow the procedure for reconstruction of lost registers set down under Regulation 28 of The Land Registration (General) Regulations, 2017.**

3) **THAT there is a clear procedure for reconstruction of lost registers set down under Land Registration Act and The Land Registration (General) Regulations, 2017 and as such where there is a clear procedure for the redress of any particular grievance prescribed by an Act of Parliament, that procedure should be strictly followed.**

4) **THAT this application is misconceived, mischievous and an abuse of the court process.**

9. In rejoinder the 3rd Ex parte Applicant has deposed inter alia that the suit property was transferred to his late brother one Leonard Ndambuki after he secretly petitioned and obtained letters of administration, that the grant issued to the late Leonard Ndambuki was revoked and the Succession Court further ordered that the property do revert to the original owner's name, Ndambuki Kingutu Maitha (deceased). That he has been advised by his Advocates on record, which advise he truly believes that it is within the power of the Respondent to reconstruct any lost green card as by law provided, that they have been further advised that the outlined procedure on applications for reconstruction of lost abstract as argued by the Respondent, only applies to registered proprietors whilst in this case, they are not proprietors and/or the administrators of the estate of Leonard Ndambuki who is currently registered as the proprietor thus the outlined procedure is not mandatory and that the Respondent who is the custodian of land documents has not denied the fact that the title abstract is missing and has also not demonstrated any prejudice, he is likely to suffer if such orders are granted.

10. The application was canvassed by way of written submissions.

11. In her submissions, the counsel for the Ex parte Applicants framed the issue for determination as follows;

i) Whether or not the order of mandamus sought by the Ex parte Applicants can be granted noting the fact of lost title abstract has not been denied by the Respondent.

12. The counsel went on to cite Section 33(5) of the Land Registrar Act which provides;

“The Registrar shall have the powers to reconstruct any lost or destroyed land register after making enquiries as may be necessary and after giving due notice in the Kenya Gazette.”

13. The counsel reiterated the provisions of the above mentioned Section 33(5) of the Land Registration Act and submitted that being custodian of the land records/title abstract, the law gives the Respondent the duty/mandate to reconstruct such lost/damaged title abstracts.

14. It is further submitted that the Respondent's contention that the Ex parte Applicants should have first followed the procedure outlined under Regulation 28 of The Land Registration (General) Regulation, 2017 is misplaced since such provision only provides for a person claiming to be a registered proprietor. The counsel pointed out that the Ex parte Applicants are only administrators of the estate of the original owner who is now deceased.

15. It was further submitted that nothing bars this court from issuing the orders sought and that assuming that the Ex parte Applicants were the registered proprietors, the statute does not make the outlined procedure mandatory in that it provides *inter alia*: -

“..... a person claiming to be a registered proprietor may apply to the Registrar for reconstruction of the register.....”

16. The Ex parte Applicants relied on the case of **Republic Vs Chief Land Registrar & 2 Others; Ex parte Trojan Nomineer Ltd [2020] eKLR.**

17. On the other hand, the counsel for the Respondents framed the issue for determination as follows;

“Whether the Applicants have exhausted the procedure set down for reconstruction of a lost green card register provided by law.”

18. In answer to the above issue, the counsel paraphrased Section 33(5) of the Act. She further cited Regulation 28 of the Land Registration (General) Regulations, 2017 which provides;

(1) On loss or destruction of the land register, a person claiming to be a registered proprietor may apply to the registrar for reconstruction of the register in Form LRA 14 set out in the Sixth Schedule.

(3) Where the applicant under paragraph (1) is a natural person, the application shall be accompanied by a statutory declaration in Form LRA 16 set out in the Sixth Schedule.

(4) An applicant under paragraph (1) shall provide an indemnity in Form LRA 17 set out in the Sixth Schedule to the Registrar.

(5) Upon receipt of an application made under paragraph (1), the Registrar shall notify the loss by notice in the Gazette in Form LRA 18 set out in the Sixth Schedule.

(6) After the expiry of the notice in paragraph (3), the Registrar shall obtain clarification on the parcel status from

(a) the office or authority responsible for survey;

(b) the office or authority responsible for land administration; and

(c) any other office the Registrar may deem necessary.

(7) Upon clarification under paragraph (4) and no objection has been raised against the application made under paragraph (1), the Registrar may reconstruct the land register.

19. The counsel submitted that the Ex parte Applicants have not exhausted the laid down statutory procedure for reconstruction of the register/green card.

20. Having read the application, the grounds of opposition and the rival submissions by the counsel on record for the parties, I am of the view that the only issue for determination is whether the orders sought by the Ex parte Applicants should be granted.

21. At this juncture, it is important to reproduce Section 33 of the Act which provides as follows;

Lost or destroyed certificates and registers

(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the charges that the certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of lease upon the expiry of sixty days from the date of publication in the gazette or circulation of such newspapers, whichever is first.

(4) If lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquires as may be necessary and after given notice of Sixty days in the gazette.

(6) Upon the issue of replacement of certificate no further dealings shall be carried out using the replaced certificate.

22. It is common ground that it is Section 33(5) of the Act which is relevant in the application before me. My understanding of the above Section is that it deals with the powers of the Registrar to reconstruct any lost or destroyed land register. The Registrar is required to make enquires as to the loss or destruction of the land register sought to be reconstructed. And after being satisfied of the loss or destruction, the Registrar issues a notice of Sixty (60) days in the Gazette and in any local newspapers of nationwide circulation before reconstructing the lost or destroyed land register.

23. As was correctly submitted by the counsel for the Ex parte Applicants, the Registrar and not the Applicants is the custodian of the land

registers sought to be reconstructed. There is no denial that the green card and the original record relating to land parcel number Makueni/Unoa/143 are lost and/or missing. That information came from the Respondent himself and not the Ex parte Applicants.

24. The Respondent cannot be heard to insist that the Ex parte Applicants ought to follow the procedure provided for under Section 33(1), (2) and (3) of the Act since they are not the registered proprietors of land parcel number Makueni/Unoa/143 and nor are they responsible for the loss of the register that was in the custody of the Respondent.

25. It should be noted that there is a valid court order dated 24th September, 2019 (SMN-4) which requires that land parcel number Makueni/Unoa/143 which is the sole property of Ndambuki Kingutu Maitha (deceased) do revert to his name for the purpose of giving effect to the grant (SMN-6) issued by the Succession Court in succession cause number 444 of 2017 amongst other requirements. Court orders are never issued in vain. It seems to me that the Respondent herein is not willing to perform a public duty imposed upon the office by the provisions of Section 33(5) of the Act. As can be seen, the Respondent's failure to perform the duty required of that office is detrimental to the Ex parte Applicants who have a legal right to expect the Respondent to perform the said duty so as effect to the said order of the aforementioned Succession Court.

26. The upshot of the foregoing is that I am satisfied that the Notice of motion application dated 29th October, 2020 has merits and I hereby proceed to allow it as hereunder: -

1) That an order of mandamus to move into this Honourable Court compelling the County Land Registrar, Makueni Lands Registry to reconstruct the green card and/or the title in respect of Land Parcel Number MAKUENI/UNOA/143 and subsequently comply with the Honourable Court's orders in Makueni High Court Succession Cause No. 444 of 2017 in the matter of the estate of Ndambuki Kingutu Maitha (deceased) issued on 24/09/2019.

2) Costs of this application be provided for.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 9TH DAY OF SEPTEMBER, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi