



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

JUDICIAL REVIEW APPLICATION NO. 1 OF 2021

(FORMERLY NYERI ELC JR NO. 3 OF 2017)

IN THE MATTER OF

AN APPLICATION BY PETERSON NGUCHU KABURI FOR AN

ORDER OF MANDAMUS AGAINST THE LAND

REGISTRAR, LAIKIPIA COUNTY

AND

IN THE MATTER OF

SECTIONS 4(1), 7 (1) (a) & (b), 7 (2) AND 9 OF THE FAIR

ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF

SECTIONS 131 AND 133 OF THE REGISTERED LAND ACT (REPEALED) AND

SECTIONS 71, 72 AND 73 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF

ARTICLE 40 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF

SECTION 8 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, LAIKIPIA COUNTY RESPONDENT

PETERSON NGUCHU KABURIEX PARTE APPLICANT

JUDGEMENT

1. Through the chamber summons dated 17/5/2017 the *ex parte* Applicant ('the Applicant') sought leave under Order 53 (1) of the Civil Procedure Rules to apply for an order of mandamus to compel the Respondent to remove the caution registered on 12/8/2010 against the land known as Nanyuki/Naibor Block 1/22 (Kairunga Farm) ("the Suit Property") upon the application of Joseph Thuku Kabure.
2. Upon leave being granted on 11/10/2017, the Applicant filed the notice of motion dated 31/10/2017 on 01/11/2017 seeking an order of mandamus to direct the Land Registrar, Laikipia County, to remove the caution from the register of the Suit Property and for costs of the application. The grounds under which the Applicant seeks relief are contained in the Applicant's Statutory Statement and the verifying Affidavit both dated 17/5/2017.
3. It is the Applicant's case that he is the registered owner and sole proprietor of the Suit Property having obtained registration procedurally and lawfully on 17/1/1996. He averred that a certificate of official search issued to him on 11/8/2011 showed neither inhibitions, cautions nor restrictions against his title and that the only entry against was to the effect that: "no dealings, Land Tribunal Case number 108 of 2007". He further averred that subsequent certificates of official searches issued by the lands office on 29/6/2012, 3/2/2016 and 18/4/2017 indicated that the Respondent had registered a caution dated 12/8/2010 against the Suit Property upon the application of Joseph Thuku Kabure. The Applicant contended that this entry could only have been done fraudulently as it ought to have been reflected in the search issued on 11/8/2011.
4. Further, the Applicant contended that he was not served with a notice of the caution as required by Section 132 of the repealed Registered Land Act (RLA) and was therefore unlawful, null and void seeing that the requirements of Sections 131 and 132 of the repealed RLA were not met. Additionally, that at the time of lodging the caution, Nanyuki Senior Principal Magistrate's Court Civil Case No. 2 of 2010 was pending between the Applicant and Joseph Thuku Kabure which was determined in favour of Joseph but that decision was ultimately set aside by the Court of Appeal at Nyeri and substituted with the dismissal of Joseph Kabure's application which was before the Senior Principal Magistrate. The Applicant averred that his Advocates wrote several letters to the Respondent appraising them of the court proceedings while seeking to have the caution removed in accordance with Section 73(1) and (2) of the Land Registration Act. The Applicant contended that the Land Registrar acted in excess of jurisdiction, abdicated his powers and wrongfully exercised his discretion by refusing to set in motion the process of removing the caution.
5. The Respondent's case, which was canvassed through the replying affidavit sworn by Pamela Mutegi, the Land Registrar Nanyuki County, on 12/4/2018 was that there existed an order for stay of execution pending Civil Appeal no. 114/2011 through a court order which was registered the Suit Property on 30/11/2011. The Respondent denied that the Applicant had made an application for withdrawal of the caution in accordance with Section 73(2) of the Land Registration Act. The Respondent admitted that the green card shows the registered proprietor of the Suit Property to be the Applicant but noted that there was a caution lodged by Joseph claiming beneficial interest in the Suit Property. The Respondent averred that the cautioner should have been included in the suit as the outcome will prejudice his interests. Ms. Mutegi added that the Applicant should have been directed to amend the application and add the cautioner to this suit.
6. In the Applicant's further affidavit which he swore on 28/2/2018, he insisted that he had moved the Registrar to remove the caution. He maintained that the cautioner did not need to be joined in the application since the Registrar refused to act in accordance with Section 73(2) of the Land Registration Act, whereby the cautioner would have been required to explain himself. The Applicant was emphatic that in any case, the Registrar had not shown sufficient reason for registering the caution against the Suit Property. He further pointed out that on the abstract of title it seemed that the Respondent removed the caution on 13/10/2016 only to unprocedurally cancel the entry without any explanation.
7. The Applicant filed written submissions dated 5/6/2021 in which he cast doubt on the existence of the application for registration of the caution and the statutory declaration made by the cautioner as required by the repealed RLA and the Land Registration Act, which was the procedure to be followed by the Respondent before registering a caution in the land register. It was also submitted that the Respondent's failure to give the Applicant notice of the caution was a mandatory requirement which was not adhered to which rendered the caution null.
8. The Applicant contended that the Respondent had repeatedly acted in contempt by refusing to act on or even acknowledge receipt of the Applicant's letters dated 4/2/2016, 13/4/2016 and 30/4/2016 requesting the Registrar to remove the caution in compliance with the law. Further, that the Respondent through the Attorney General, failed to address the issues raised in those letters thus casting further doubt on whether the application for registration of the caution was made in the first place. The Respondent did not file submissions.
9. The dispute over the Suit Property is somewhat a long winded one but it is necessary to understand its history. It first commenced before the now defunct Land Disputes Tribunal under the repealed Land Disputes Act as Tribunal Case no. 108 of 2007 where the tribunal ruled in favour of Joseph Thuku Kabure. Thereafter the matter came to the courts when Joseph Thuku Kabure filed a chamber summons dated 10/2/2011 before the Senior Principal Magistrates' Court at Nanyuki in Case no. 2 of 2010 seeking the adoption of the Tribunal Award. The present Applicant opposed that application citing various anomalies in the award including issues such as that it was not dated, it was signed by strangers and that it did not emanate from the Laikipia East Land Disputes Tribunal and hence was incompetent before the Court.
10. The Senior Principal Magistrate dismissed the objections while stating that the function of the court under Section 7(2) of the Land Disputes Tribunal was to enter judgment in accordance with the decision of the Tribunal and that it could not refuse to enter judgment even if there were flaws in the award. The Learned Magistrate delivered a ruling on 22/7/11 in terms of the award filed in court on 28/4/2012.
11. The matter first went on appeal to the Nyeri Environment and Land Court as ELC No. 114 of 2014 filed by the Applicant. The appeal was dismissed by the Honourable Waithaka J in a judgment delivered on 12/3/2015. It went on second appeal to the Court of Appeal in Nyeri Civil Appeal No. 18 of 2015. The Court of Appeal found that the purported award was a sham and did not bear the essential minimum requirements for a valid award which a court of law could act upon. The Court added that it could not be countenanced that a court would lend its authority and prestige to a document that was so strange as to amount to a cheap forgery. The Court of Appeal allowed the appeal, set aside the judgment of the ELC Judge and substituted it with an order that the application dated 10/2/2011 was dismissed with costs.

12. With the history and background of the matter and how it led to the instant application being clear, the court will now consider the present application, statement of facts and the affidavits sworn in support of and in response as well as the submissions of the Applicant. It is worth noting that the matter was heard before another Judge in Nyeri ELC up to the filing of submissions. It was then transferred to the newly established Environment and Land Court at Nanyuki on 28/7/2021.

13. The main issue for determination is whether the Applicant has made out a case for the grant of the order he seeks. The nature of the order of *mandamus* and the circumstances under which it may be granted were considered by the Court of Appeal in **Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR** where the court quoted from **Halsbury's Laws of England (3rd Edition)** as follows: -

“...the order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

14. The following passage in **Prem's Law of Writs in India, England and America (2nd Edition)**, page 385 was quoted with approval in **Shah v Attorney-General (No 3) [1970] E A 543, 549**:

“Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of mandamus against executive officers of a Government unless some specific act or thing which the law requires to be done has been omitted. Courts proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of the Government”.

15. The Respondent is appointed under Section 13 and 13A of the Land Registration Act. The applicable statute at the material time was the repealed Registered Land Act. Section 7 of the RLA appointed the Land Registrars while Section 8 spelt out the powers of the Registrar. Section 131 set out the parameters of who could lodge a caution prohibiting registration of dispositions of the land or the making of entries against that land. A person who claimed a right to obtain some defined interest in some land, lease or charge, which interest could be created by a registrable instrument under the Act, or one who was entitled to a licence or one who had presented a bankruptcy petition against the proprietor of the land could lodge a caution for registration by the Registrar.

16. Section 131 RLA required the Registrar to inquire into the reason for a person seeking registration of a caution against a parcel of land while Section 131(3) gave the Registrar the discretion to require the intended cautioner to furnish a statutory declaration in support of the application for registration of a caution. The caution had to be in the prescribed form and the Registrar had the discretion to reject a caution which he considered unnecessary.

17. Section 132 (1) RLA enjoined the Registrar to give written notice of a caution to the proprietor whose land, lease or charge would be affected by the caution. The rationale for the notice was that as long as that caution remained registered, no disposition could be registered against that land except with the consent of the cautioner or by an order of the court. Section 133 of RLA provided for the manner in which the caution could be withdrawn or removed from the register. This could be done by the cautioner, or order of the court or by an order of the Registrar. On the application of a person interested, such as the Applicant in this suit, the Registrar was required to serve a notice on the cautioner warning him of the impending removal of the caution upon the expiry of the time stated in the notice. There is no evidence to show that the Registrar gave notice to the Applicant before registering the caution against his land.

18. Section 28 of the Act protected the rights of a proprietor and stipulated that a proprietor's rights could only be defeated in the manner provided under that Act. Since the registration of a caution against the title of an owner of land would restrict his freedom to deal with his land, it had to be lodged and registered in the manner prescribed by that Act. This must be why Section 135 of RLA imposed the liability to pay damages to the proprietor on any person sued for wrongfully lodging or maintaining a caution against his land.

19. The Land Registration Act of 2012, which repealed the RLA makes similar provisions on the lodging and registration of cautions at Sections 71 to 75. Section 72(1) enjoins the Registrar to give written notice of a caution to the proprietor whose land, lease or charge will be affected by the caution.

20. That was the applicable legal procedure yet in the present case, there is no evidence that the requisite notice was issued to the Applicant as the registered proprietor of the land nor is there any indication that the procedure prescribed by law was followed by the Respondent in registering the caution against the suit land. The Applicant unsuccessfully applied to the Respondent to have the caution removed.

21. Taking into account the authorities cited by the Applicant, the findings of the Court of Appeal in **Nyeri Civil Appeal No. 18 of 2015** and its implication on the ruling of the Senior Principal Magistrate in Case no. 2 of 2010, it would seem that the caution was ostensibly registered because of the court proceedings. The ruling of the Court of Appeal was to the effect that there was no valid award given by the Tribunal in favour of the cautioner. Considering the failure of the Respondent to show how the caution was registered against the Applicant's land, the court is inclined to find that the Applicant has made out a case for the grant of an order of mandamus for the removal of the caution registered against his land.

22. The court allows the application dated 31/10/2017 with costs to the Applicant.

DELIVERED VIRTUALLY AT NANYUKI THIS 28TH DAY OF OCTOBER 2021.

K. BOR

JUDGE

In the presence of:-

Ms. Hellen Njoki holding brief for Mr. Mwangi Kariuki for the Applicant

Mr. Paul Gisemba for the Respondent

Mr. Mahmoud Sheikh- Court Assistant