



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. MISCELLANEOUS APPLICATION NO. 45 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF THE DECISION BY THE NATIONAL LAND COMMISSION CONVEYED

BY ONE M. HALAKHE, COUNTY COORDINATOR – KAJIADO DATED 10TH JANUARY, 2019

ALLOCATING PLOT NO. A 101 (FORMERLY 104/BUS) NOONKOPIR

TRADING CENTRE TO FREECAM INVESTMENT

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

SAMUEL KIMONDO THEURI.....EX PARTE APPLICANT

AND

THE COUNTY GOVERNMENT OF KAJIADO.....1ST INTERESTED PARTY

FREECAM INVESTMENT LIMITED.....2ND INTERESTED PARTY

MILKA WAITHERA MWANGI, ANNE NYAMBURA MWANGI, JOSEPH WAINAINA

THUO & PETER GACHIGI THUO(BEING ADMINISTRATORS OF THE ESTATE OF

JUDGMENT

Through a Notice of Motion Application dated 9th December, 2019 the Ex parte Applicant seeks for the following orders;

- a. An order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent conveyed by one M. HALAKE, County Coordinator-Kajiado dated 10th January, 2019 purporting to allot Plot No. A101 (Formerly 104/BUS) NOONKOPIR TRADING CENTRE to FREECAM INVESTMENT LIMITED.
- b. An order of Certiorari to remove into this Honourable Court and quash the decision of the Respondent conveyed by one M. HALAKE, County Coordinator – Kajiado dated 10th January, 2019 purporting to direct the Chief Officer Lands the decision purporting to allot Plot No. A101 (Formerly 104/BUS) NOONKOPIR TRADING CENTRE to FREECAM INVESTMENT LIMITED.
- c. Costs of and incidental to the application be provided for.
- d. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.

The 1st Interested Party opposed the Application and filed Grounds of Opposition dated the 8th March, 2021 where it contends as follows: Application is incompetent and an abuse of the judicial process and instant proceedings do not meet the threshold for grant of prerogative writs of certiorari; the instant application is in direct conflict and affront to the provisions of Section 9(2) of the Fair Administrative Action Act and Rule 30 of the National Land Commission (Review of Grants and Dispositions of Public Land) Regulations 2017 which directs as well as provides for a forum to a party who is aggrieved or dissatisfied with the decision of the Respondent; the Ex parte Applicant has failed to demonstrate there exists exceptional circumstances warranting exemption from the obligation to exhaust any other remedy available to him under the law; procedure for redress should be adhered to; the issues raised herein can only be resolved in a merit hearing forum and which the Ex parte Applicant has availed himself as he instituted a suit in *Kajiado Chief Magistrates Court ELC Case No. 144 of 2018* which is pending hearing including determination; the Respondent and the 1st Interested Party in their decision has committed no fundamental error of law, illegality, irrationality, bias, unfairness, abuse of office, discrimination and violation of the rules of natural justice towards the Ex parte Applicant to warrant intervention of the court through exercise of supervisory jurisdiction; and the Ex parte Applicant is challenging the decision of the Respondent and not the decision making process.

The 2nd and 3rd Interested Parties opposed the application and filed Grounds of Opposition dated the 18th November, 2020 where they stated thus: the application is frivolous and an abuse of the court process; the application is *sub judice* as the subject matter is directly and substantially in *Kajiado ELC No. 144 of 2018 Samuel Kimondo Theuri Vs Milka Waitheera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo & Peter Gichigi Thuo (being administrators of the estate of Francis Thuo Mwangi) and Others* where the Chief Magistrates Court is fully competent to hear as well as determine the issues herein; the Ex parte Applicant has not come to court with clean hands and is forum shopping.

The Application was canvassed by way of written submissions.

Analysis and determination

Upon consideration of the Notice of Motion Application dated 9th December, 2019, including the respective parties' affidavits, statutory statement, annexures as well as the rivaling submissions, the following are issues for determination:

- Whether this suit is *sub judice*
- Whether the Ex parte Applicant is entitled to the Judicial Review orders sought?
- Who shall bear the costs of the application.

The Ex parte Applicant in his submissions provided a history of the disputed land and stated that in arriving at the controversial decision, the Respondent contravened the established tenets of rules of natural justice of fair hearing as he was not notified of any hearing nor case in respect to the suit land and was not afforded an opportunity to be heard. Further, he was never afforded an opportunity to interrogate or cross examine the evidence presented by the 3rd Respondent. He avers that despite lodging a complaint with the 2nd Respondent against the 2nd Interested Party with respect to Plot No. A 101 (Formerly 104 BUS) NOONKOPIR TRADING CENTRE, the same was awarded to a total stranger who was never a party to the dispute. Further, that he was denied minutes and reasoning of the impugned decision. He reiterates that this suit does not offend the doctrine of exhaustion of statutory dispute resolution mechanism. He insists the instant application is not *sub judice* as the Chief Magistrates' court is subordinate to this court and the two courts are incapable of issuing contradictory verdicts. He reiterates that he is entitled to the orders sought. To buttress his averments, he relied on the following decisions: **Republic V Standards Tribunal, Harleys Limited (Interested Party) Ex parte Kenya Bureau of Standards (2020) eKLR; Joel Kenduiyo V District Criminal Investigation Officer Nandi & 4 Others (2019) eKLR; National Institute of Mental Health & Neuro Sciences V C Parameshwara (2005) 2 SCC cited in Republic V Paul Kihara Kariuki , Attorney General & 2 Others Ex parte Law Society of Kenya (2020) eKLR; Kenya Akiba Micro Financing Limited V Ezekiel Chebii & 14 Others (2012) eKLR and David Oloo Onyango V Attorney General (1987) eKLR.**

The 2nd and 3rd Interested Parties in their submissions insist this application is *sub judice* and an abuse of the court process. Further, that the Ex parte Applicant has instituted several actions whose main question in contention is to confirm rightful owner of the suit land. They reiterate that the Ex parte Applicant has been engaged in forum shopping. To support their arguments, they rely on the following decisions:

Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR; Kenya Bankers Association V Kenya Revenue Authority (2019) eKLR and Catherine Njeri Maranga V Serah Chege & Another (2017) eKLR.

As to whether this suit is *sub judice* and if the Ex parte Applicant is entitled to the Judicial Review orders sought. The Ex parte Applicant sought for an order of Certiorari to quash the decision of the Respondent dated 10th January, 2019 purporting to allot Plot No. A101 (Formerly 104/BUS) NOONKOPIR TRADING CENTRE to FREECAM INVESTMENT LIMITED as well as the directive to the Chief Officer Lands purporting to allot the said Plot No. A101 (Formerly 104/BUS) NOONKOPIR TRADING CENTRE to FREECAM INVESTMENT LIMITED.

From the documentation annexed to respective affidavits, I note the Respondent vide its letter dated the 10th January, 2019 annexed as 'SKT 6' addressed to FREECAM INVESTMENT informed them that they retain ownership of plot A 101. I will proceed to highlight an excerpt from the said letter; **The purpose of this communication is to inform you that based on thorough analysis of this matter, it has been decided that Freecam Investment retains the plot as the owner whose new number is A101, vide min 2/7/09/2018 (case 23). By a copy of this letter, the Chief Officer lands is requested to ensure implementation of the decision with regards to official records.'**

The Interested Parties insist the Ex parte Applicant is forum shopping and this suit is *sub judice*. On the question of *sub judice*, I wish to make reference to Section 6 of the Civil Procedure Act which provides that: **'No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'**

In the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** the Court observed that: **'In order to check this very problem, there exists the concept of *sub judice* which in Latin means "under Judgement." It denotes that a matter is being considered by a court or judge. The concept of *sub judice* that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage. 20. In this regard, Section 6 of the Civil Procedure Act[6] expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..... The mere addition of a party or parties does not alter the pith and substance of the suit. The Black's Law Dictionary [7] defines *lis pendens*, as a Latin expression which simply refers to a "pending suit or action." The Oxford Dictionary of Law[8] defines the expression in similar terms. In the context of Section 6 of the Civil Procedure Act [9] which encapsulates the principles that underpin the rule, it simply means that no court ought to proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding; and or the previously instituted suit or proceedings is between the same parties; and or the suit or proceeding is pending in the same or any other court having jurisdiction to grant the reliefs claimed..... Paraphrasing what I said in the above case, the key words in applying *sub judice* rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the *sub judice* rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.'**

See also the cases of **the Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) and Thiba Min. Hydro Co. Ltd V Josphat Karu Ndwiga (2013) eKLR.**

In this instance, the Ex parte Applicant challenges the process the Respondent used in allocating the suit land to FREECAM INVESTMENT LIMITED who was not a party to the proceedings before it. On perusal of the Amended Complaint dated 25th March, 2019 in the **Kajiado ELC No. 144 of 2018 Samuel Kimondo Theuri Vs Milka Waithera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo & Peter Gichigi Thuo (being administrators of the estate of Francis Thuo Mwangi) and Others**, I note FREECAM INVESTMENT LIMITED is actually named as a 2nd Defendant in the said suit. Further, it is confirmed that it claims ownership of the suit land which forms the fulcrum of the dispute herein. Further, from a perusal of the impugned letter, I note it concerned confirmation of ownership of the suit land.

Based on the facts as presented while relying on the legal provisions cited above as well as associating myself with the cited decision, I find that the instant judicial review application is indeed *sub judice* as the fulcrum of the dispute is directly and substantially in issue in **Kajiado ELC No. 144 of 2018 Samuel Kimondo Theuri Vs Milka Waithera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo & Peter Gichigi Thuo (being administrators of the estate of Francis Thuo Mwangi) and Others**. I opine that no amount of extra coating would change the fulcrum of the dispute herein as the aforementioned case which was filed earlier is still pending determination. Further, it does not make sense why the Ex parte Applicant sought for confirmation of ownership of suit land from the Respondent and once the determination was communicated, he now seeks to quash it. It has also emerged that the instant JR was filed during the pendency of the **Kajiado ELC No. 144 of 2018 Samuel Kimondo Theuri Vs Milka Waithera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo & Peter Gichigi Thuo (being administrators of the estate of Francis Thuo Mwangi) and Others** and to my mind, the doctrine of *lis pendens* actually kicks in.

Since I have held that this suit is *sub judice*, I need not proceed to deal with the issue as to whether the Ex parte applicant is entitled to orders of certiorari as I find no justification to sustain the instant suit as the substance of this suit is wholly identical to **Kajiado ELC No. 144 of 2018 Samuel Kimondo Theuri Vs Milka Waithera Mwangi, Anne Nyambura Mwangi, Joseph Wainaina Thuo & Peter Gichigi Thuo (being administrators of the estate of Francis Thuo Mwangi) and Others**.

In the circumstance, I also find that this suit amounts to an abuse of the court process as the Ex parte Applicant seeks to file parallel proceedings on the same issue involving the same parties which can culminate in the risk of the various courts granting conflicting orders.

It is against the foregoing that I find the application the Notice of Motion Application dated 9th December, 2019 unmerited and will proceed to strike it off with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE