



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC MSC. APP NO. E001 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR**

**JUDICIAL REVIEW IN THE NATURE OF CERTIORARI TO**

**QUASH THE GREEN CARD ILLEGALLY CONSTRUCTED**

**BY THE KISII LAND REGISTRAR WITH RESPECT TO LAND**

**TITLE NO. CENTRAL KITUTUT/DARAJA MBILI/3960 BY WHICH**

**A CERTIFICATE IS SHOWN TO HAVE BEEN RE-ISSUED ON 2<sup>ND</sup> MAY 2016**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL**

**REVIEW IN THE NATURE OF CERTIORARI TO QUASH THE CERTIFICATE**

**OF TITLE PURPORTEDLY, ALBEIT ILLEGALLY RE-ISSUED ON 2<sup>ND</sup> MAY 2016**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL**

**REVIEW IN THE NATURE OF MANDAMUS TO COMPEL THE KISII LAND**

**REGISTRAR TO RECONSTRUCT A GREEN CARD SHOWING ALL THE LAWFUL**

**BONA FIDE ENTRIES WITH RESPECT TO LAND TITLE NO. CENTRAL KITUTUT/**

**DARAJA MBILI/3960 INCLUDING THE FIRST LEGAL CHARGE DATED 14<sup>TH</sup> DECEMBER, 2015**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE**

**ACTIONS ACT NO. 4 OF 2015 LAWS OF KENYA**

**BETWEEN**

**KISII COUNTY LAND REGISTRAR.....1<sup>ST</sup>RESPONDENT**

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

AND

THOMAS OGETO KEBISA.....1<sup>ST</sup> INTERESTED PARTY

RICHARD KERONGO MOTUKA.....2<sup>ND</sup> INTERESTED PARTY

SBM BANK (KENYA) LIMITED.....EX-PARTE APPLICANT

## RULING

### INTRODUCTION

1. The Applicant filed a Miscellaneous Application vide a Notice of Motion dated 2<sup>nd</sup> July, 2020 seeking orders that;

a) Spent

b) Leave be and is hereby granted to the Ex-parte Applicant to seek an order of judicial review in the nature of certiorari to bring to this court for purposes of quashing;

i. The Green Card illegally constructed by The Kisii Land Registrar with respect to Land Title No. Central Kitutu/DarajaMbili/3960 issued on 2<sup>nd</sup> May 2016 (hereinafter referred to as the *suit property*) by which a certificate of title is shown to have been re-issued on 2<sup>nd</sup> May 2016.

ii. The certificate of title purportedly issued on 2<sup>nd</sup> May 2016.

c) Leave be and is hereby granted to the Ex-parte Applicant to seek an order of judicial review in the nature of mandamus, to compel the 1<sup>st</sup> Respondent to reconstruct a green card showing all lawful and bona fide entries/encumbrances with respect to the suit property including the 1<sup>st</sup> Legal Charge held by the Applicant dated 14<sup>th</sup> December, 2015.

d) Leave so granted to seek judicial review orders do operate as stay on the registration of any disposition(s) by the 1<sup>st</sup> Respondent, his agents, assigns and/or other person(s) acting in his name and under his title or directions whatsoever pending hearing and disposal of the substantive Notice of Motion.

e) The Ex-parte Applicant be at liberty to apply for any or all further, necessary and/or consequential orders as may be expedient in the circumstances.

f) Costs of and incidental to this Application do abide the substantive Notice of Motion.

2. The application is supported by the affidavit of Egidia Mecha, the Debt Recovery Officer of the Ex-parte Applicant sworn on 29<sup>th</sup> May 2020. In the said affidavit he deposes that the 2<sup>nd</sup> Interested Party applied for loan facilities from the Ex-parte Applicant which loan facilities were secured by a legal charge over the suit property. The Ex-parte Applicant then discovered that the green card and the title had been altered in favor of the 1<sup>st</sup> Interested party and the same did not disclose the legal charge as an encumbrance. He deposed that according to the Ex-parte Applicant, no known, lawful and proper application had been made for the re-issue of the title since it still held the title documents and had not surrendered the same to the Land Registry. He therefore contended that the 1<sup>st</sup> Respondent did not have legal authority to reconstruct an illusory green card without prior notice to the bank who held a charge against the suit property.

3. In response to the application, the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed a Notice of Preliminary Objection dated 9<sup>th</sup> April 2021 claiming that;

the application for leave was null and void as it offended section 9(3) of the Law Reform Act as read together with Order 53 of the Civil Procedure Rules as it was filed outside the 6 months' statutory period stipulated in the said section.

4. The Court directed that the Preliminary Objection be disposed of first as a matter of procedure. The court further directed that the Preliminary Objection be disposed of by way of written submissions. Both parties have since filed their submissions.

### ISSUES FOR DETERMINATION

5. Having considered the pleadings, Notice of Preliminary Objection and the written submissions filed by both parties, the sole issue for determination is:

Whether the Application is time barred pursuant to the provisions of section 9(3) of the Law Reform Act Cap 25 Laws of Kenya as read together with Order 53 rule 2 of the Civil Procedure Rules, 2010.

## ANALYSIS AND DETERMINATION

6. **Section 9(3) of the Law Reform Act** is the relevant provision on the stipulated timelines for the application for an order of certiorari. The Section provides as follows:

*“In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. (emphasis, mine).*

7. The wording in **Order 53 Rule 2 of the Civil Procedure Rules, 2010** mirrors the provisions of the **Law Reform Act. Rule 2** provides as follows:

*“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired. (emphasis, mine).*

8. The provisions are clear, that upon the lapse of six months from the date of any judgment, order, decree, conviction or other proceeding, the court will be disabled from granting leave to apply for an order of certiorari aimed at quashing the relevant judgment, order, decree, conviction or other proceeding.

9. In the instant case Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties has submitted that the application was filed after the expiry of six months which goes against the provisions of Section 9 (3) of the Law Reform Act as read together Order 53 rule 2 of the Civil Procedure Rules highlighted hereinabove.

10. In his rejoinder, Counsel for the Ex-parte Applicant in his submissions contends that the order of certiorari that the Ex-parte Applicant is seeking was for purposes of quashing the green card and title altered by the 1<sup>st</sup> Respondent in favor of the 2<sup>nd</sup> Respondent. He contends that the issuance of a green card and certificate of title do not fall within the category of a Judgment, order, decree conviction or other proceedings contemplated in section 9 (3) of the Law Reforms Act.

11. It is clear from the arguments of the parties that the main issue in contestation is whether the decision to re-issue a green card and certificate of title qualify to be regarded as either formal orders mentioned therein or “other proceedings” which require leave to be sought before the expiry of 6 months.

12. In **Republic vs Kenya National Highways Authority & 2 others Ex-parte Amica Business Solutions Limited 2016 eKLR** the Court of Appeal rendered itself as follows:

*“It is our considered view that Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings where there was a hearing, all affected parties were informed, or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other Interested Parties, like the case here.*

*We are persuaded by the High Court decision in **The Goldenburg Affair Ex-parte Hon. Mwalulu & Others HCMA No. 1279 of 2004 (2004) eKLR** and **Republic V The Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** where the court held that the six months limitation period set out in Order 53 Rule 2 and 7 only applied to specific formal orders mentioned in Order 53 Rule 2 and 7 and to nothing else, certainly not to contents of one private letter in response to another.*

*We are also persuaded by the Tanzania Court of Appeal decision in **Mobrama Gold Corporation Limited V Minister for Water, Energy and Minerals & Others, Dar es Salaam Civil Appeal No. 31 of 1999 (1995-1998) 1 EA 199**, in which case the court held that the phrase “other proceedings” has to be construed ejusdem generis with judgment order or decree and conviction as having reference to quasi-judicial proceedings as distinct from acts and omissions for which certiorari may be applied for.*

*We hold the view therefore that the six month limitation would not apply to decision, judgment, order, decree or other proceedings as contemplated under Order 53 Rule 2 of the Civil Procedure Act”.*

13. Applying the principles in the above-cited authorities to this case, the decision sought to be quashed does not fall within the formal orders contemplated under section 9 (3) of the Law Reform Act as read with Order 53 Rule 2 of the Civil Procedure Rules. This is because in the instant case, the decision by the 1<sup>st</sup> Respondent to alter the register and issue a Certificate of title to the 2<sup>nd</sup> Interested Party at the instigation of the 1<sup>st</sup> Interested Party is not a formal order or proceeding that would require one to seek leave to have it reviewed. It is therefore my finding that the application is not time barred.

14. The upshot is that the Preliminary Objection by the Interested Parties lacks merit and it is hereby dismissed with costs to the Ex-parte

Applicant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 19<sup>TH</sup> DAY OF OCTOBER 2021.**

.....

**J.M ONYANGO**

**JUDGE**