



**REPUBLIC OF KENYA**

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

**ELC. MISC APPLICATION NO. E5 OF 2020**

**IN THE MATTER OF: AN APPLICATION BY PRIME ALMS**

**LIMITED TO APPLY FOR JUDICIAL REVIEW ORDERS OF**

**CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF: ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES 2010**

**PRIME ALMS LIMITED.....APPLICANT**

**VERSUS**

**REGISTRAR OF TITLES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Vide a Notice of Motion Application dated 19<sup>th</sup> October, 2020, filed pursuant to **Order 53, Rule 3 of the Civil Procedure Rules** and the Law Reform Act, the *Ex parte* Applicant (the Applicant) sought for the following orders:

*a) That an order of MANDAMUS be issued by this honourable court directing the Registrar of Titles to reverse and or annul the transfer over title no. 12715/1*

*b) That an Order of CERTIORARI do issue from this Honourable Court revoking and or setting aside the transfer of title number 12715/1*

*c) That an Order of PROHIBITION be issued restraining the respondent from disposing of or in any way dealing with the suit property title no. 12715/1 in a manner adverse to the Applicant's interests including but not limited to registering any interest over the same or in any manner adverse to the interests of the Applicant.*

*d) The costs of this application be in the cause.*

2. The Application was supported by the Affidavit of the Applicant's Managing Director who deponed that the Applicant filed Machakos ELC No. 55 of 2017 (previously Nairobi ELC 826 Of 2007) suing the Defendants over **parcel LR No. 12715/1** (herein after the suit land).

3. The Applicant's Managing Director deponed that the Applicant filed an Application on 4<sup>th</sup> December 2003 in the aforesaid suit in which the court granted injunctive orders restraining the Defendant from dealing in any way with the suit land and that on 12<sup>th</sup> February 2003, the injunctive orders were extended pending the issuance of any further orders.

4. According to the Applicant's Managing Director, despite there being injunctive orders against the transfer of the suit land, the same was transferred to one George Ngure Kariuki, which transfer was registered by the Respondent; that the Respondent's decision to register the suit land in favour of a third party was illegal, unlawful and unprocedural because it is to the detriment of the Applicant's right and interest over the suit land and that it is the Applicant who purchased the suit land from the seller, John Nzioka Makau (deceased) in 1998 and took vacant possession of the same.

5. The Applicant's Managing Director deponed that the Applicant was bound to suffer irreparable loss and damage if the court does not intervene by issuing the orders prayed for in the application and that the Respondent should be compelled to diligently carry out his public duty.

6. The Application was opposed vide a Notice of Preliminary Objection dated 26<sup>th</sup> February 2021 in which the Respondent averred that the suit was an abuse of the court process and *sub judice* in view of the pendency of **Machakos ELC No. 55 of 2017 Prime Alms Limited v John Nzioka Makau & Others** (Previously Nairobi ELC 826 of 2007).

7. It was averred by the Respondent that the Application offends **Section 6** of the **Civil Procedure Act**; that the Applicant should have filed an Application in respect of the impugned transfer in the pending suit and that the suit amounted to forum shopping and should not be entertained by this court.

### **Submissions**

8. The Application was canvassed by way of written submissions. The Applicant's counsel submitted that under **Section 7** of the **Fair Administrative Action Act**, 'any person aggrieved by an administrative decision may apply for review of the decision to a court in accordance with the Act; and that an Application for Judicial Review cannot be filed in the substantive suit.

9. Counsel submitted that the Respondent acted *ultra vires*; that the land registrar had no jurisdiction to determine the matter and therefore had no powers to revoke the title and that the Respondent's act of registering a transfer in favour of a third party while the matter was still in court was an affront to private proprietary rights which are guaranteed in the Constitution. Counsel relied on the decision of Lord Diplock in **Council of Civil Service vs Minister for Civil Service (1985) AC 374**.

10. Counsel for the Respondent submitted that the Applicant had numerous other remedies at his disposal, including making this Application in the pending suit and that the Applicant is abusing the court process by filing this unnecessary suit. Counsel relied on the case of **Gurbachan Singh Kalsi vs Yowani Ekor Civil Appeal No. 62 of 1958 (referred in Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR)** where the former East African Court of Appeal stated as follows:

*"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

11. Counsel also relied on the case of **Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** where the court held that:

*"...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."*

12. It was submitted by the Respondent's counsel that the matter in issue in Machakos ELC 55 of 2017 (previously **Nairobi ELC 826 of 2007) - Prime Alms Limited vs John Nzioka Makau & others** and this Miscellaneous suit is over ownership of land parcel title number 12715/1 and that the Applicant had not enjoined one John Nzioka Makau, who is the 1<sup>st</sup> Defendant in the other suit.

### **Analysis and Findings**

13. The Applicant in this matter is seeking for Judicial Review orders of Mandamus, Certiorari and Prohibition as against the Respondent. In the Application, the Applicant has stated that he filed Machakos ELC No. 55 of 2017 (previously Nairobi ELC 826 Of 2007) suing the Defendants over parcel LR No. 12715/1 (herein after the suit land).

14. It is the Applicant's case that it filed an Application in the aforesaid suit in which the court granted injunctive orders restraining the Defendants from dealing in any way with the suit land. However, despite there being injunctive orders against the transfer of the suit land, the same was transferred to one George Ngure Kariuki.

15. The Applicant has faulted the Respondent for transferring the suit land to the said George Ngure during the pendency of Machakos ELC No. 55 of 2017 (previously Nairobi ELC 826 Of 2007). According to the Applicant, he is the one who is entitled to the suit land having purchased the same from one John Nzioka Makau (deceased) in 1998 and took vacant possession of the same.

16. The Applicant has acknowledged that there is a pending suit in respect to the suit property. Although the said suit is pending, the Applicant filed the current suit without joining the parties in the other suit in this suit as Interested Parties. It is not clear how the Applicant expects this court to make orders in respect of the suit property without hearing the other parties in Machakos ELC No. 55 of 2017.

17. Considering that the issue of ownership of the suit property will be determined in Machakos ELC No. 55 of 2017 (previously Nairobi ELC 826 Of 2007), the Applicant should have moved the court in Machakos ELC No. 55 of 2017 (previously Nairobi ELC 826 Of 2007) to determine if the transfer of the suit land to a third party was legal or not, and for the court to issue any other declaratory orders, including cancellation of the title and not to file a separate suit.

18. Having not enjoined the Defendants in Machakos ELC No. 55 of 2017 and the person who purportedly bought the suit property during the pendency of Machakos ELC No. 55 of 2017 in this suit, and in view of the private nature of the dispute in respect of the suit property and the pendency of Machakos ELC No. 55 of 2017, it is my finding that the current suit is not only an abuse of the court process, but also not meritorious.

19. For those reasons, I dismiss the Notice of Motion dated 19<sup>th</sup> October, 2020 with costs.

**DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 8<sup>TH</sup> DAY OF OCTOBER, 2021**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

.....for the Applicant

.....for the Respondent

Court Assistant – John Okumu