



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC J. R NO. 15 OF 2021

IN THE MATTER OF : AN APPLICATION FOR LEAVE TO COMMENCE

JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF MANDAMUS

UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF : SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF : SECTION 73(1), (2), (3) AND (4) OF THE LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF : FAILURE BY THE CHIEF LANDS REGISTRAR TO COMPLY

WITH THE STATUTORY PROCEDURE FOR REMOVAL OF CAUTION

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LANDS REGISTRAR.....RESPONDENT

EX PARTE: MARY WAMAITHA KAITTANY

JUDGMENT

A. Background

1. By a chamber summons dated 19th August, 2021 filed under Order 53 Rule 1 of the Civil Procedure Rule, 2010, the *ex parte* Applicant (hereinafter referred to as the Applicant) sought leave to apply for the Judicial Review Order of Mandamus to compel the Respondent to immediately perform its statutory duties under Section 73 of the Land Registration Act No. 3 of 2012 by removing the caution/caveat on Land Reference Number 12422/318 placed at the instance of the National Land Commission following complaints by one Margaret Wairimu Magugu.

2. Upon leave being granted on 23rd September, 2021, the Applicant filed the substantive motion on the same day seeking the following orders:

i. An order of Mandamus to compel the Respondent to immediately perform its statutory duties under Section 73 of the Land Registration Act No. 3 of 2012 by removing the caution/caveat on Land Reference Number 12422/318 placed at the instance of the National Land Commission following complaints by one Margaret Wairimu Magugu.

ii. Costs of the Application to be paid by the Respondent.

3. When the matter came up for directions on 19th October 2021, it was directed that the application for judicial review be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicant filed their submissions whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

B. The Applicant's Case

4. The Application for judicial review was based upon the grounds set out in the chamber summons dated 19th August, 2021, the statutory statement, and the verifying affidavit accompanying the said summons. It was the Applicant's case that she acquired proprietary interest in L.R No. 12422/318 pursuant to purchase of three sub-divisions being L.R Nos. 12422/343, 12422/344 and 12422/345.

5. It was contended that she had obtained the original mother title to L.R No. 12422/318 pursuant to a court order issued on 11th December 2019 in respect to **Nairobi ELC No. 355 of 2016 Mary Wamaitha Kaittany vs Njeri Kariuki**.

6. According to the Applicant, she has been unable to register the three subdivisions owing to an existing caution/caveat of the mother title L.R No. 12422/318 that was placed by the Respondent. It was further the Applicant's contention that the said caution/caveat was placed on the strength of a letter dated 21st April 2015 from the National Land Commission on allegations of fraud against Karura Investments Limited by Mrs. Margaret Wairimu Magugu in her capacity as the Administrator of the Estate of the late Arthur Kinyanjui Magugu.

7. The Applicant further stated that there had been several **suits Nairobi ELC No. 159 of 2017 and Nairobi Civil Appeal No.3 of 2018** wherein the court considered dismissed the allegations of fraud and as such there was no further reason hindering the removal of the subject caution/caveat from L.R No. 12422/318 and 12422/319.

8. It was argued for the Applicant that that the Respondent had a public duty to remove the caution/caveat, the Court is mandated to compel him to do so. In support, counsel cited the Court of Appeal case of **R vs Kenya National Examination Council ex-parte Gathengi & 8 Others [1997] eKLR** where the court stated;

"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." At paragraph 90 headed "the mandate" it is stated: "The order must command no more than the party against whom the application is made is legally bound to perform."

9. The Applicant's counsel in his submissions, also referred the Court to **Section 73 of the Land Registration Act** and urged the Court to grant the prayers sought.

C. The Respondent's Case

10. The Respondent despite being served and appearing in the virtual Court attendance on 19th October 2021 when the matter came up for directions on the hearing and disposal of the suit failed to file any response or submissions in respect to the Application.

D. Issues and Determination

11. The Court has considered the application for judicial review and the submissions filed by the Applicant. The court is of the opinion that the following key issues arise for determination herein:

i. Whether the Applicant have made out a case for the grant of the judicial review order sought.

ii. Who shall bear the costs of the application?

Issue No. I

Whether the Applicant has made out a case for the grant of the judicial review order sought.

The principles that guide the Court when dealing with an application for judicial review remedy of mandamus was stated in the Court of Appeal case of **Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR**. Wherein the court stated as follows:

"As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in Kenya National Examination Council v Republic Ex Parte Geoffrey Gathengi Njoroge & 9 others (supra) namely:

"The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”

12. This position was reiterated in the English case *of R vs Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741* where it was stated as follows:

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it."

13. **Section 73 of the Land Registration Act** makes provision for the removal or withdrawal of a caution. This section provides as follows:

73. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.

(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.

(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation.

14. Thus, cautions may be removed in three ways.

(a) By withdrawal of the same by the cautioner.

(b) By removal by order of the court.

(c) By removal by order of the Registrar.

15. These three ways are independent of each other, such that, it is not necessary for one to demonstrate that he has attempted to have the caution removed by the Land Registrar before moving the Court to remove the caution. It is however always advisable to have the Court arbitrate the matter as a last recourse

16. It is not in dispute that there exists a caution/caveat in respect to L.R No. 12422/318 that was placed by the Respondent. The Applicant also submitted that there have been several orders emanating from various proceedings requiring the removal of the caution/caveat but the same has not been removed.

17. The Applicant also submitted that in further compliance to **Section 73 of the Land Registration Act**, a formal application was lodged to the Respondent, but to date the caution has not been removed. From the foregoing it is apparent that the writ of mandamus will issue where there is a public duty to be performed by the Respondent and where no other appropriate remedy is available to the Applicant.

18. In the circumstances and as aptly submitted by the Applicant, the Court is satisfied that the Applicant has made out a case for grant of the judicial review orders sought and the appropriate order that comments itself for granting at this stage is an order of mandamus.

Issue No. 2

Who shall bear the costs of the application?

19. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. In the instant case, the Respondent did not resist the Application, no response and submissions were filed and, in the circumstances, I direct that each party will bear own costs of these proceedings.

20. Accordingly, for the reasons set out above, this Court finds that the Applicant's Notice of Motion is merited, and is allowed as follows:

i) A writ of Mandamus compelling the Chief Lands Registrar to remove the caution/caveat on Land Reference No. 12422/318

placed at the instance of the National Land Commission following complaints by one Margaret Wairimu Magugu is hereby issued.

ii) Each party to bear its own costs of the application.

21. It is so ordered.

Dated, Signed and Delivered at Nairobi this 17th day of November 2021.

E. K. WABWOTO

JUDGE

In the Virtual Presence of: -

Ms. Okumu h/b for Mr. Omulama for the Applicant.

Ms. Wanjiru for the Respondent.

Court Assistant: Caroline Nafuna

E. K. WABWOTO

JUDGE