



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC MISC. APPLICATION NO. 28 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE LAND ADJUDICATION AND SETTLEMENT

SCHEME MWATATE.....1ST RESPONDENT

VALERY KADARI.....2ND RESPONDENT

AND

JULIUS MAGHANGA LUKINDO..... EX-PARTE APPLICANT

RULING

(Suit seeking order of certiorari to compel Land Adjudication officer to avail a decision; certiorari would ordinarily be a quashing and not a compulsive order; in any event no evidence of any decision made; application dismissed)

1. It is not easy to appreciate the prayers in the motion before me, which has certainly been contributed to by some rather convoluted drafting, but I can fathom that it is a judicial review motion, which as drawn, seeks the following prayers :-

i. That an order of certiorari do issue against the 1st respondent herein the land adjudication and settlement office Mwatate to compel them to avail their decision dated 28th June 2019 to deny the applicant herein JULIUS MAGHANGA LUKINDO the consent to file a suit against the 2nd respondent.

ii. That the order of certiorari do operate as a stay of the 1st respondent's actions and decision dated 28th June 2019 to deny the exparte applicant a consent to file a suit to protest the interest of the estate of LUKINDO NYANGE, DECEASED from being intermeddled by the 2nd respondent who has commenced construction of a house structure over and above the land that was given to her by LUKINDO NYANGE, DECEASED which was approximately 0.329 Ha.

2. There are 13 grounds listed in support of the application which I see no need rehashing here but from what I can decipher, the ex-parte applicant seems to be saying that his late father held some land which the ex-parte applicant contends is a Plot No. 146 in the survey plans of 1993, 1996, and 2009. The area where this land is located is mentioned to be in an area that underwent an adjudication process which was stopped by an order of the court in the year 1998 and all adjudication committees dissolved. It is said that officers from the land adjudication and settlement office in Mwatate, took advantage and started giving land to strangers and this is what led to the process being cancelled. The ex-parte applicant avers that his late father donated some land to the 2nd respondent but the 2nd respondent has gone beyond the boundaries of the land that she was allocated. In his supporting affidavit, the ex-parte applicant deposes that in the month of April 2019, he went to the 1st respondent's office for assistance hoping that the 1st respondent would inform the 2nd respondent to stop the alleged encroachment but he was not assisted. He then asked for consent to file suit in vain. He avers that the 2nd respondent has now commenced a house construction which encroaches on their land. He states that in the month of June 2019, he went to the 1st respondent's office but he was told that he will not be given consent. He thus seeks the intervention of this court as sought above. To his affidavit, he has annexed a grant of letters of administration, some letters and photographs.

3. The respondents have not filed anything to oppose the motion. I have gone through the material presented and the submissions of Mr.

Gekonde for the ex-parte applicant. In his submissions, Mr. Gekonde inter alia stated that the 2nd respondent has encroached into the plot No. 146, has fenced off the land, and has commenced construction. He submitted that his client wants to file suit but cannot do so for want of consent.

4. I have gone through the motion and the prayers sought. The first prayer is of certiorari to compel the 1st respondent to avail a decision dated 28 June 2019. A compulsion order would not be in the nature of an order for certiorari but one for mandamus. No order of mandamus has been sought in this application. An order of certiorari is a “quashing order” but not a compulsive order. One may argue that this is a mere technicality but it is important for a respondent to be clear on what suit he is facing to enable him prepare a response to it. Prayer (i) cannot therefore be granted as prayed. Even if I am to assume that it is an order of mandamus seeking to compel the delivery of a decision made on 28th June 2019, I am not satisfied from the material before me that there was ever any decision made on 28th June 2019 which can be presented to the ex-parte applicant or to this court. The supporting affidavit does not refer to any specific meeting of 28th June 2019 where a decision was made by the 1st respondent. In fact, one of the grounds upon which the application is founded is that the ex-parte applicant went to the land adjudication office on 28 June 2019 to explain himself, but on that date, the officer was not in office. I have not also seen any letter written by the ex-parte applicant or his advocates, asking the 1st respondent for consent, so that it can be said that a request was made and rejected. I cannot therefore compel the production of a decision which I am not sure exists in the first place. For the above reasons, prayer (i) is dismissed.

5. Prayer (ii) of the motion seeks that the orders of certiorari do operate as a stay of the 1st respondent’s decision of 28 June 2019 denying the ex-parte applicant consent to file suit. I have already mentioned that I do not have any evidence of any decision made on 28 June 2019. I am therefore unable to grant this prayer.

6. Apart from the above, I think the ex-parte applicant has concealed very material issues which makes the court hesitant to give him any orders. I have seen a letter dated 19 March 2010, annexed to his affidavit which makes reference to some cases that were before the Land Disputes Tribunal. I think it would have been prudent for the ex-parte applicant to explain what these cases were all about and what the end result was. There was also mention of a 1998 case that is said to have stopped the adjudication process. That decision was not tabled to enable this court appreciate its import. I need not belabour the point that any party wishing to have the court exercise its discretion in his/her favour must table all material facts. I do not think that the ex-parte applicant has done so.

7. Given the above discourse, I have no option but to dismiss this motion. None of the respondents bothered to oppose it and I therefore make no orders as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 5th day of March, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF: