



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 172 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

AND

CHIEF LANDS REGISTRAR.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION

COMMISSION.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

MATHEW NDOGA KABAU.....INTERESTED PARTY

EX PARTE: K-REP BANK LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th April, 2016, the *ex parte* applicant herein, **K-Rep Bank Limited**, seeks the following orders:

1) An order of certiorari removing into the High Court for purposes of quashing the order made by the Chief Lands Registrar that led to the registration of a restriction on 8th February, 2012 against land parcel no. Nyeri/Municipality/Block 1/1381 by which he restrained all dealings until investigations conducted by the Ethics & Anti-Corruption Commission.

2) An order of mandamus compelling the Chief Land Registrar and/or such designated officer upon presentation to register Discharge of Charge and Transfer by Charge of land parcel no. Nyeri/Municipality/Block 1/1381 to Mr Mathew Ndogo Kabau or such other persons in favour of whom such Transfer instrument may be executed.

3) That the costs of the application be provided for.

2. According to the applicant, it granted a loan facility to one **Evan Gikandi Maina** on the security of land parcel no. Nyeri/Municipality/Block 1/1381 (hereinafter referred to as “the suit land) and following

the borrower's default the suit property was sold by public auction in the exercise of the applicant's statutory power of sale to the interested party herein. However when the applicant sought to complete the sale, its attention was drawn to the registration of a restriction barring all dealings on the suit land pending investigations by the 2nd Respondent herein.

3. It was the *ex parte* applicant's case that as it was not notified of the same, the registration of the said restriction was illegal and in breach of the duty owed by the 1st Respondent to the applicant

4. The applicant averred that despite several demands to the 1st Respondent to remove the restriction the 1st Respondent has declined to do so yet the interested party is an innocent purchaser for value without actual or constructive notice

5. It was therefore contended that the 1st Respondent's decision was *ultra vires* and against the rules of natural justice. These contentions were highlighted by **Mr Busiega** learned counsel for the applicant who relied on **Republic vs. Land Registrar & Another ex parte Ecobank Kenya Limited & Another [2015] eKLR** and **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140.**

6. On behalf of the Respondents it was contended through their learned counsel, **Mr Opondo** and **Ms Chimau** that as bad in law for failure to comply with the provisions of Order 53 rule 7 of the ***Civil Procedure Rules*** which requires that the decision sought to be quashed be exhibited hence the applicant was seeking to quash a non-existing order.

Determinations

7. I have considered the application, the grounds thereof, the verifying affidavit and the submissions filed.

8. Before dealing with the merits of the application, it was contended that the application was incompetent due to the failure by the applicant to comply with Order 53 Rule 7 of the ***Civil Procedure Rules***. Under the said provision the applicant is not entitled to question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court. The general legal position was restated by this Court in **Republic vs. National Highway Authority & 7 Others [2013] eKLR,**

“where the *ex parte* applicant for any reason is unable to exhibit the decision sought to be quashed, he ought to satisfy the Court on his failure to exhibit the decision which decision is required to be verified by affidavit with the registrar. Failure to comply with this mandatory provision renders the application incompetent. In my view it is important to annex a copy of the impugned decision not only for the court to satisfy itself as to the time it was made and also to be certain that the decision actually exists.”

9. However, in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998,** it was held that where a decision is not formal in the sense that the maker does not identify the decision and the date he made the decision formal, there is nothing capable of being exhibited under Order 53 rule 7 since the Court, in a deserving case, can call up the file and quash whatever decision is said to be unlawful or which constitutes an error of law.

10. In this case the applicant has exhibited a copy of official search which clearly discloses the existence of the impugned restriction. The Respondents have not sworn any affidavit controverting the existence of the said restriction. In my view the Respondents cannot successfully challenge the existence of the said restriction in light of prima facie evidence of its existence by way of a certificate of official search, based on submissions from the bar. Whether or not the restriction exists is a factual matter whose existence or non-existence can only be proved or disproved by evidence. In the absence of any affidavit to the contrary, this Court must find that there in fact exists a restriction registered on the suit land. The attempts by the Respondents to create doubt as to the authenticity of the certificate of official search cannot hold in

the absence of a replying affidavit.

11. In my view, in matters such as these, the certificate of official search constitutes evidence of a decision since the decisions to register restrictions are normally not made in separate decisions apart from simply registering the same against the title.

12. This being a judicial review application, the Court is only concerned with determination of the issue whether the process of registration of the restriction on the suit parcel was illegal in the sense that the Land Registrar committed an error of law in the process of the said registration or acted without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles; whether in so doing he/she was irrational in the sense that his/her action amounted to such gross unreasonableness that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision and hence was in defiance of logic and acceptable moral standards; or whether his/her action was tainted with procedural impropriety in the sense that he/she failed to act fairly in the process of taking a decision by either non-observance of the Rules of Natural Justice or to act with procedural fairness towards the Applicant. An instance of such unfairness is failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which the Respondent is enjoined to exercise his/her jurisdiction to make a decision. See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300; Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**

13. The restriction which is subject of this application was registered on 8th February, 2012. The date of commencement of the ***Land Registration Act***, No 3 of 2012 was 2nd May, 2012. Therefore the legality of the said restriction must be looked at in the light of the provisions of the ***Registered Land Act*** Cap 300 Laws of Kenya, now repealed.

14. Section 136(1) of the said Act provided:

“For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land. Lease or charge.”

15. The said section is similar in material respects to the provisions of sections 76(1) of the ***Land Registration Act***, 2012 which provides:

For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

16. It is therefore clear both under the old legal regime and the current regime that before the Registrar registers a restriction on any land he must direct such inquiries to be made and notices to be served and hear such persons as he considers fit. This position was confirmed in **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140** where it was held that:

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented.”

17. In my view, in exercising his discretion on whom to hear the Registrar must take into account the provisions of the relevant law and the Constitution and with respect to the Constitution, Article 47 thereof provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

18. As discussed elsewhere in this judgement procedural fairness encompasses that an opportunity of a hearing be afforded to the persons who are likely to be affected by the administrative decision. In my view some of the people who ought to be given an opportunity of being heard before a restriction is registered are the proprietor of the land in question and a person who has a registered interest therein such as a chargee.

19. In this case the 1st respondent has not sworn any replying affidavit to explain the circumstances under which the restriction was registered. It was the onus of the 1st Respondent to shed light on whether the provisions of section 136(1) of the ***Registered Land Act*** were complied with. As far as the Applicant was concerned its position was that it was not notified before the restriction was registered. In other words it was asserting a negative and as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:**

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises.”

20. Similarly, the Supreme Court of Uganda in **Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30** was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

21. In this case, in the absence of any evidence that the 1st Respondent complied with the provisions of sections 136(1) of the ***Registered Land Act*** as re-enacted in section 76(1) of the ***Land Registration Act***, this Court has no option but to find that the 1st Respondent’s action in placing a restriction on the suit land was tainted with procedural irregularity.

22. It follows that the Applicant’s application is merited.

23. However, apart from seeking an order of certiorari to quash the decision registering a restriction on the suit parcel, the applicant also seeks an order of *mandamus* compelling the Land Registrar, upon presentation, to register a Discharge of Charge and Transfer by Chargee of the suit parcel to **Mr Mathew Ndogo Kabau** or such other persons in favour of whom such Transfer Instrument may be executed.

24. Section 14(c) of the ***Land Registration Act***, Cap 300 Laws of Kenya, however provides that the Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by the Act **“refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”**

25. It is therefore clear that the decision whether or not to register any instrument, certificate, document, plan, information or explanation is an exercise of discretion.

Order

26. Accordingly the orders which commend themselves to me and which I hereby grant are as follows:

1. An order of certiorari removing into this Court for the purposes of being quashed the decision made by Land Registrar that led to the registration of a Restriction on 8th February, 2012 against all that property known as Nyeri/Municipality/Block 1/1381 by which he restrained all dealings until investigations conducted by the Ethics & Anti Corruption Authority which decision is hereby quashed.

2. An order of mandamus compelling the 1st Respondent to consider the applicant's application to register a Discharge of Charge and Transfer by Chargee of all that property known as Nyeri/Municipality/Block 1/1105 to Mr Mathew Ndogo Kabau or such other persons in favour of whom such Transfer Instrument may be executed within 30 days from the date of service of this order and to furnish the applicant with reasons therefor in the event that the decision is adverse to the applicant's interests.

3. In default of compliance an order of mandamus shall issue compelling the 1st Respondent to register a Discharge of Charge and Transfer by Chargee of all that property known as Nyeri/Municipality/Block 1/1105 to Mr Mathew Ndogo Kabau or such other persons in favour of whom such Transfer Instrument may be executed.

4. The 1st Respondent will bear the applicant's costs of this application.

27. It is so ordered.

Dated at Nairobi this 2nd day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Litooro for Mr Opondo for the 2nd Respondent

CA Mwangi