



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 244 OF 2014

REPUBLIC OF KENYA.....APPLICANT

VERSUS

LAND REGISTRAR.....1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND RESPONDENT

Ex ParteECOBANK KENYA LIMITED

AND

MATHEW NDOGA KABAU.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th June, 2014, the *ex parte* applicant herein, **Ecobank Kenya Limited**, seeks the following orders:
1. **AN ORDER OF CERTIORARI** removing into the High Court for purposes of quashing the Order 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 1/1105 by which he restrained all dealings until investigations conducted by the Ethics & Anti Corruption Authority.
2. **AN ORDER OF MANDAMUS** compelling the Land Registrar and/or such designated Officer to upon presentation register a Discharge of Charge and Transfer by Chargee of ALL THAT PROPERTY KNOWN as NYERI/MUNICIPALITY/BLOCK 1/1105 to Mr MATHEW NDOGA KABAU or such other persons in favour of whom such Transfer Instrument may be executed.
3. **THAT** costs of this Application be provided for.

Ex Parte Applicant's Case

2. The application is supported by a verifying affidavit sworn by Jack Kimathi, the *ex parte*

- applicant's legal officer on 23rd June, 2014.
3. According to the applicant, it granted a loan facility for Kshs 4,376,680.00 to Agro-Chemicals Limited which facility was secured by inter alia a Charge of land parcel no. Nyeri Municipality/Block 1/1105 (hereinafter referred to as "the suit property") after duly conducting an official search thereof which confirmed that the property was owned by **Mr Nderitu Wachira** (herein referred to as "the Borrower") and that there were no encumbrances thereon.
 4. After carrying out the necessary processes the 1st Respondent registered the Charge thereon on 15th July, 2010 and the applicant proceeded to advance the facility sought.
 5. Following the Borrower's default, the suit property was after the exercise of due diligence sold by public auction on 8th August, 2012 to the interested party at the sum of Kshs 2,150,000.00. However when the applicant sought to complete the sale, its attention was drawn to the registration of a restriction on the order of the 2nd Respondent barring all dealings on the suit property pending investigations.
 6. It was the applicant's case that it was neither notified nor was an inquiry undertaken against the suit property hence the registration of the restriction was illegal and in breach of the duty owed to it and the registered owner of the suit property.
 7. Consequently the applicant has been unable to complete the sale in favour of the interested party yet no investigations have been conducted on the matters prompting the unlawful registration of the said restriction. In the applicant's view the 2nd respondent has not acted with expedition to conduct any investigation despite the lapse of 2 years.
 8. It was therefore contended that the Respondents' actions were not only *ultra vires* but also against the rules of natural justice hence the Court ought to intervene and grant the orders sought herein.

2nd Respondent's Case

9. In opposition to the application, the 2nd respondent filed a replying affidavit sworn by **Faith Ng'ethe**, an investigator with the 2nd respondent on 15th September, 2014.
10. According to the deponent, in December, 2011 the 2nd respondent received complaints regarding illegal excision and alienation of land comprising compounds occupied by various government houses within Nyeri County and pursuant to the powers conferred upon it by the ***Anti-Corruption and Economic Crimes Act***. Cap 65, Laws of Kenya to carry out investigations on suspected cases of corruption and economic crimes reported to it, investigations were commenced which indicated that the suit property was illegally excised from NYERI/HOU/MG/6A&B which is one of the government houses occupied by a civil servant.
11. It was contended that a restriction was placed following a request by the 2nd respondent in order to protect unsuspecting and innocent third parties who may be duped to purchase and hold properties as collateral to their loss. Taking into account numerous complaints revolving around public properties, it was the deponent's view that there is a need to preserve them through the placement of restrictions. As the nature of the investigations are complex and involving a series of properties to their loss. Since the nature of the investigations is complex and involves a series of properties, it was deposed that the same was bound to take considerable time before completion.
12. It was averred that the said sale took place after the restriction was placed hence the interested party ought to have carried out due diligence to ascertain the status of the suit property. In the 2nd respondent's view the restriction ought to remain in place as investigations are at an advanced stage and are due to be concluded soon upon which conclusion legal proceedings will be commenced to recover the suit property.

Determinations

13. In determining the issues raised herein the Court must always be alive to the scope of judicial review jurisdiction.
14. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

15. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. It is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60.***
16. Therefore, in this application the Court is not concerned with the determination of how the suit property came to be registered in the name of the Borrower. To determine that issue would necessarily require the parties to call witnesses whose evidence would be subjected to cross-examination before the Court would be in a position to resolve the parties’ rivalling contentions some of which may touch on fraud and illegality. See **Commissioner of Lands vs. Hotel Kunste Ltd Civil Appeal No. 234 of 1995 and Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354.**
17. Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review applications do not determine ownership of a disputed property but only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.
18. Therefore in this case 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 that the 2nd respondent 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 was irrational in the sense that his 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 action was tainted with procedural impropriety in the sense that he 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 1st Respondent is enjoined to exercise his 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**
19. 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.
20. 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.”

21. 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.

22. 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.”

23. 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.

24. 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.

25. 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*** was 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.”

26. 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.

27. This Court agrees with the decision of Maraga, J (as he then was) in Republic vs. Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 where he expressed himself as follows:

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution.”

28. Similarly, Nyamu, J (as he then was) held himself in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443. as follows:

“Should the *Land Acquisition Act* give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”.....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “*kayas*” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

29. In the same vein in Chemei Investments Limited vs. The Attorney General & Others Nairobi Petition No. 94 of 2005 at para. 64 it was held:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra)* where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through

persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

30. Having said all that any attempt to nullify title to land must be in accordance with the law. Due process must therefore be adhered to in recovery of public land and any attempt to short circuit the due process can only lead to anarchy and disaster. Article 40(3) of the Constitution bars the State from depriving a person of property of any description, or of any interest in, or right over, property of any description unless certain conditions including the requirement that the deprivation be carried out in accordance with the Constitution. Therefore Article 47 of the Constitution must be complied with before a person is deprived of his or her interest in any property of any description. That Article requires that the process be procedurally fair and one of the ingredients of a fair procedure is the right to be afforded an opportunity of being heard before a decision is made.
31. 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.
32. This does not mean that this Court promotes the “grabbing” of public lands. In this respect I agree with the dissenting opinion of **Omolo, JA** in **The Town Council of Ol’kalou vs. Ng’ang’a General Store Civil Appeal No. 269 of 1997**, where he expressed himself as follows:
- “Let me say at the outset, lest I be misunderstood, that like every one else, I equally deplore the practice by the Commissioner of Lands of alienating public plots to persons for their private use. That practice raises serious moral issues and must, of necessity, be slow to rebuff a party such as this appellant, who seeks to question the legal authority of the Commissioner of Lands to make such allocations. But having said that, it is well for the courts to remember that we do not administer morals in the courts. The basic function of the courts in this country as I understand it, is to administer justice according to the laws that are there, not according to the law which we think ought to be there.”**
33. It follows that the Applicant’s application is merited.
34. 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.
35. 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.”**
36. 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. However, public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by Parliament in my view without proper reasons would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.
37. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. Whereas we appreciate the fact that the decision whether or not to register the transfer in favour of the applicant by the Respondents is an exercise of discretion this Court is empowered to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an

improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

38. As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996.** where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. In my view the 1st Respondent is under an obligation to consider an application to discharge the charge and register the transfer in favour of the transferee. However, this Court cannot by way of an order of *mandamus* compel the 1st Respondent to register the subject Discharge of Charge and Transfer by Chargee. The Court can only compel the 1st Respondent to consider the same and make a decision one way or the other. However the 1st Respondent is obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant and where no reasons are given, the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised.

Order

39. 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 1/1105 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.**
- 3. The 1st Respondent will bear the applicant's costs of this application.**

40. It is so ordered.

Dated at Nairobi this day 3rd day of March, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wandati for the ex parte applicant

Cc Patricia