



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR CASE NO 172 OF 2012

REPUBLIC.....APPLICANT

VERSUS

CHAIRMAN OF THE PUBLIC
COMPLAINTS & RESOLUTION COMMITTEE.....1ST RESPONDENT
PERMANENT SECRETARY
MINISTRY OF LANDS.....2ND RESPONDENT
LAND REGISTRAR3RD RESPONDENT
ATTORNEY GENERAL4TH RESPONDENT
LAWRENCE NGINYO KARIUKI1ST INTERESTED PARTY
DOMINIC OBEL.....2ND INTERESTED PARTY

Ex-parte

KOIYAKE OLE SAKUDA
MAXIMINUS E MAASE
STEPHANIA ACHOM
HESKETH M MBOTHU

JUDGEMENT

Koiyake Ole Sakuda, Maximinus E. Maase, Stephenia Achom and Hesketh M. Mbothu are the 1st to 4th ex-parte applicants in these proceedings. The 1st to 4th respondents are the Chairman of the Public Complaints and Resolution Committee, the Permanent Secretary of the Ministry of Lands, the Land Registrar and the Attorney General. Lawrence Nginyo Kariuki is the 1st Interested Party whereas Dominic Obel is the 2nd Interested Party.

Through the notice of motion dated 14th May, 2012 the applicants pray for orders that:

- a. **An order of certiorari to move into this Honourable Court and quash the 1st Respondent's decision directing the 3rd Respondent to move into site and do a re-survey of the original plot number 525 (1949-1950 vs 1950 (29967 – 30001), 525, (37009-39013) 29989, 29985, (30788-29973) or 29967-29973, 29975–29979, 29980–29981 and/or to determine any boundary dispute between the alleged parcel and Ngong/Ngong/525 (37009-37013)**
- b. **An order of prohibition directed against the said Respondents from visiting the said parcel for the purpose of determining the alleged dispute on 27th April 2012 or any other date pending the hearing and determination of this matter or until further orders of the court.**
- c. **An order of certiorari directed against the 1st and 2nd Respondents to remove to this Honourable Court, the ruling, order, decree, determination or the proceedings conducted on 16th April 2012 for the purpose of its being quashed.**
- d. **An order of mandamus to compel the 3rd Respondent to restore the entries pertaining to land parcels numbers 37009, 37010, 37011, 37012, 37013 unlawfully combined, duplicated, obliterated, expunged and/or cancelled with the same numbers and/or other numbers to safeguard their proprietorship and/or ownership.**
- e. **The costs of this application be in provided for.**

The application is supported by the chamber summons application for leave, the statutory statement and the verifying affidavit of the 3rd applicant sworn on 26th April, 2012. The application is also supported by a further affidavit sworn on 4th May, 2012 by the 3rd applicant and another affidavit sworn by the same deponent on 5th October, 2012.

From the papers filed in Court these proceedings arise from a long running land dispute. According to the applicants, the act that triggered the filing of these proceedings is that on 12th April, 2012 the 3rd applicant received a complaint that the 1st respondent in company of surveyors, land officials, cartographers and the area chief were surveying her plots to wit Ngong/Ngong 37009, 37010, 37011 and 37012. Together with other land owners they raised objections and they were advised to go to Ardhi House. At Ardhi House they were directed to appear before a quasi-tribunal chaired by the 1st respondent and which had allegedly been formed to investigate a complaint by the 1st Interested Party.

At this juncture, it is imperative to state the applicants' case as contained in the verifying affidavit of the 3rd applicant. The 3rd applicant avers:

17. THAT on 12th April 2012 at about 11.00 O'clock, that a neighbor whose name I can't recall, called me with information that, the 1st Respondent in the company of Surveyors, Land Officials, Cartographers, the Area Chief were actually on the plots surveying the same.

18. THAT I together with other owners, confronted them and raised objections and were advised to visit Ardhi House, 4th Floor with our necessary documents.

19. THAT I alerted my Advocate on record who accompanied me together with my husband and the son of the 1st Applicant to Ardhi House where we were directed to the 12th Floor.

20. THAT what appeared to us to be simple issue of being informed in writing as to the nature and scope of the 1st interested party's complaint, turned out to be a panel constituted into a quasi-tribunal court with the 1st Respondent as the coordinator and chairman with powers to hear and determine land disputes and issue verdicts.

21. THAT my Advocates on record requested to be served with the written complaint to enable the parties to be heard but the 1st Respondent vehemently refused asserting that there exists a complaint addressed to the Permanent Secretary.
22. THAT my Advocates sought for a referral of the proceedings to enable him obtain proper instructions and the complaint which application was by a show of hands denied.
23. THAT the 1st interested party was against the rules of Natural Justice, accorded a chance to orally present his complaint without producing any written complaint, a presentation was heavily redacted, ignored all previous complaints and verdicts and was clearly sub-judice to the existing cases.
24. THAT the panelists referred to documents, diagrams without even attempting to give us copies at all insisting that we can make arrangements to obtain certified copies from Kajiado.
25. THAT the panelists appeared to have clearly discussed, formed opinions or reached conclusions exclusively by listening to one party and that out hurried summons and appearance was a vain attempt to legitimize a fundamentally flawed process.
26. THAT the ruling, decision, orders, directive by the 1st Respondent is a clear case of putting the cart before the horse.
27. THAT I verily believe that exercise is also fundamentally flawed as the surveys done by Dominic Obel for our parcel of land were also done for the 1st interested party and forms the basis of the latter's complaint.
28. THAT my Advocates delivered a letter to the 1st Respondent on 25th April 2010 where the process server was instructed to obliterate the letter "Coordinator and Chairman of the Public Complaints Committee" and replace the same with The Permanent Secretary, Ministry of Lands. I annex hereto a copy of the said letter marked as "SA 17". Her affidavit is filed separately herein as further testimony.
29. THAT this cast doubts about the existence of the said tribunal and the validity of the decisions.

According to the statutory statement one of the grounds upon which the relief is sought is the 1st respondent's decision of 16th April, 2012 is an abuse of power in that the 1st Respondent has no legal mandate to hear and determine land disputes. The second ground is that the 1st to 3rd respondents' decisions, actions and directives are sub judice and have grave effects on **ELC Judicial Review Application No. 101 of 2010** and general administration of justice. The applicants further argue that the 1st to 3rd respondents' decisions, actions and directives are *res judicata*, the matter having been dealt with in **ELC No. 137 of 2007 ROSE WANJIRU KARIUKI V KOIYAKE OLE SAKUNDA & 2 OTHERS**. Another ground upon which the relief is sought is that the 1st Interested Party's claim is time barred and the proposed re-survey will deny the parties the plea of limitation.

The respondents opposed the application by way of grounds of opposition dated 11th June, 2013. Those grounds are:

1. THAT the applicants' application herein is unmerited and an abuse of the

due process of the court.

2. THAT the application herein raises matters of ownership which are not amenable to judicial review.

3. THAT the application is defective as the applicant has not attached the decision to be quashed and therefore an order of certiorari cannot be issued.

4. THAT the respondents acted within its mandate and made mere observation/recommendation.

5. THAT judicial review orders are discretionary in nature and cannot be issued where there is an alternative remedy.

The 1st Interested Party also opposed the application but the 2nd Interested Party did not file any reply.

In the further affidavit he swore on 4th May, 2012 the 3rd applicant talks of an attempted survey on 27th April, 2012 but which **“exercise was curtailed due to some difficulties emanated on the grounds and conflicting information”**-see Paragraph 15.

In the affidavit sworn on 5th October, 2012 the 3rd applicant disputes the contents of the 1st Interested Party’s replying affidavit sworn on 26th June, 2012.

It is important to note that the applicants on 11th December, 2012 filed a notice motion seeking to be granted leave to amend the substantive notice of motion dated 4th May, 2012. The applicants annexed a draft amended notice of motion which shows that the applicants intended to introduce a sixth prayer for an award of **“damages occasioned by the encumbrances on the suit properties due to their inability to exercise their proprietary interests thereon.”** The parties to these proceedings have proceeded as if the said application was allowed and the amendment effected. However, the correct position is that on 24th July, 2013 Mr. Mwaniki for the applicants informed the Court that:

“We have withdrawn the application for amendment dated 11th December, 2012. It is now the main N/M which will be heard. I have filed our submissions.”

The application to amend was therefore not prosecuted and neither was it allowed. The application for the consideration of this Court is therefore the notice of motion dated 14th May, 2012 already reproduced in this judgment.

Another important issue to note is that no order of stay was issued in these proceedings when the Court granted leave on 27th April, 2012. The applicants’ counsel was directed to served the application, as to whether leave was to operate as stay, for *inter partes* hearing on 3rd May, 2012. On 3rd May, 2012 the order in the court file reads:

“Mention 24th May, 2013. Interim order extended until then.”

There is no evidence on record that any order of stay was ever issued.

It is important to briefly state the facts of the other cases referred to in this application. In **Nairobi High Court ELC No. 137 of 2007 ROSE WANJIRU KARIUKI v KOIYAKI OLE SAKUDA, STEPHEN MAYIAN SAKUDA AND PETER KARAIYA SAKUDA**, the plaintiff was seeking two main orders:

1. That a declaration be and is hereby issued declaring that there is no land existing between parcel No. NGONG/NGONG/3129 and parcel No. NGONG/NGONG/1950 and that the creation of an alleged piece is a fraud.

2. THAT the register be rectified and the registration of NGONG/NGONG/37009, NGONG/NGONG/37012 be cancelled and they be consolidated and registered as part of parcel No, NGONG/NGONG/3129.

Together with the plaint the plaintiff did file a chamber summons application seeking an order to restrain the defendants from interfering with the four mentioned plots and her parcel number NGONG/NGONG/3129. Dismissing the application, in a ruling delivered on 11th July, 2007, Rawal, J (as she then was) observed that there were other parcels of land between the plaintiff's land and parcel No. NGONG/NGONG/1950. She also noted that the owners of those parcels of land had not been enjoined in the case. The fate of that case was sealed by Msagha Mbogholi, J on 4th June, 2009 when he allowed the defendants' application to have the matter dismissed for want of prosecution.

The other case is **Machakos High Court ELC No. 101 of 2010 LAWRENCE NGINYO KARIUKI V ATTORNEY GENERAL & 24 OTHERS**. In that case, one of the prayers by the plaintiff who is the 1st Interested Party herein is an order directing the 1st to 25th defendants to undertake a fresh and proper resurvey and sub-division of the suit property. That suit is premised on the allegation that certain sub-divisions had been conducted fraudulently and those sub-divisions gave rise to several parcels of land including NGONG/NGONG/37010, NGONG/NGONG/37011, NGONG/NGONG/37012 AND NGONG/NGONG/37013. The above parcels of land are the subject of these judicial review proceedings.

The grounds upon which the applicants seek the orders have already been stated. They argue that the 1st respondent has no powers to hear land disputes.

The respondents and the 1st Interested Party replied that the applicants have not exhibited the decision allegedly made by the respondents. In response the applicants submitted that their lawyer applied for the decision and the same was never given to him. They submit that they have complied with the requirement of Order 53 Rule 7(1) of the Civil Procedure Rules by giving a satisfactory account as to why they were unable to exhibit the impugned decision.

The respondents and the Interested Party also contend that judicial review is not the most efficacious remedy in the circumstances of this case.

I have closely examined the documents placed before this Court. It is clear that the 1st Interested Party and the applicants have had a protracted tussle over a particular parcel of land. The 1st Interested Party alleges that the applicants obtained title to the parcels of land fraudulently. The applicants insist that their titles are genuine. Although the applicants are not parties to the ELC case pending at Machakos High Court, it is clear that their parcels of land are mentioned in that matter.

The wider interests of the administration of justice would demand that the applicants participate in that case which will, hopefully, unearth the truth as regards their properties. The issue as to whether the doctrine of *res judicata* is applicable would also be decided in that case. From the pleadings of the applicants it is clear that they are not the only parties to that dispute. Several other plots were affected and issuing orders may affect other plot owners who did not participate in these proceedings. It is also clear that the applicants have not pinpointed the decision which they are challenging. They claim that there was a hearing on 16th April, 2012 but there is no evidence that such a hearing took place.

When the applicants came to Court on 27th April, 2012, the resurvey was taking place on the ground. There is evidence that the applicants were aware of the resurvey and that is why they were at the site. Although the resurvey that took place on 27th April, 2012 has not been challenged, it cannot be said that the resurvey did not comply with the rules of natural justice. It is in the best interests of everybody that the parties concentrate their energies on the matter before the High Court at Machakos so that the dispute can be determined once and for all. Issuing orders in this case will only end up muddling the issues. The jurisdiction of a judicial review court is limited and is not appropriate in matters where the facts are disputed.

In my view, this is not one case in which the Court should exercise its discretion in favour of the applicants. They were already aware of the case at Machakos High Court when they filed this matter. They ought to have applied to be enjoined in that case. A multiplicity of suits between the same parties on the same issues should be discouraged.

In conclusion, I find that the application before this Court fails. The same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 14th day of May, 2014

W. KORIR,

JUDGE OF THE HIGH COURT