



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MOMBASA

PET NO. 56 OF 2019

HILDA WAMBUI KATUGA.....PLAINTIFF

VERSUS

THE CANIBENT SECRETARY FOR LANDS

& OTHERS.....RESPONDENTS

RULING

(Application for injunction, stay of a suit before the Magistrate's Court and transfer of the said suit to this court; applicant having a pending suit before the Magistrate's Court through which she has complained that her land has been given to another party and given another title; applicant wishing to have that title cancelled; applicant filing this constitutional petition seeking more or less the same orders; injunction ought to have been canvassed in the pending case; on the face of it, the petition is res judicata; no demonstration that the Magistrate's Court has no jurisdiction so that the suit may be transferred to this court; application dismissed)

1. The application before this court is that dated 16 December 2019 filed alongside the petition. It seeks the following orders:-

- i. Spent (certification of urgency)
- ii. That the court be pleased to stay proceedings in ELC No. 17 of 2018 pending in Mariakani Law courts until further orders of this court.
- iii. That the court be pleased to issue an injunction against the 7th respondent restraining him from dealing or interfering with the state of Plot No. Mariakani/Kawala B/50 until this petition is heard and determined.
- iv. The court be pleased to order ELC No. 17 of 2018 pending at the Mariakani Law Courts to be re-transferred to Mombasa for hearing and determination by this court.
- v. That costs of the application be provided for.

2. The application is based on several grounds and is supported by the affidavit of the petitioner.

3. In the petition, the applicant avers that she is the registered owner of the land parcel Mariakani/Kawala B/50 (the suit land) and has a title deed issued by the Kilifi Land Registry in November 2014. She avers that she acquired the land from the 8th respondent before titles were issued and that she filed an objection during adjudication which led to the adjudication records being changed in her favour. She avers that no appeal has been filed on the adjudication and she was subsequently issued with title. She has stated that she works in the United Kingdom and visits the country every year. In the year 2018 she visited the country and found her plot fenced and she could not gain access to it. She discovered that the fence has been put up by the 7th respondent. She then filed suit for vacant possession before the Environment and Land Court at Mombasa, which on its own volition, later transferred the case to Mariakani Magistrate's Court. That is the suit Mariakani E&L Case No. 17 of 2018. In July 2019, when she was served with the documents of the 7th respondent in response to the suit, she discovered that there were proceedings purporting to be an appeal to the Minister under the Land Adjudication Act, Cap 284 which was done without her knowledge. The effect of the decision was to rectify the area map such that the space where the suit land was located was removed, meaning that the petitioner remained with title but with no land. She believes that the appeal proceedings were a nullity. She avers that she has never had a dispute between herself and the 7th respondent before the Adjudication Committee and thus the 7th respondent could not present an appeal to the Minister. She asserts that since she owned the suit land she ought to have been informed of the dispute. She states that the acts of the respondents amount to taking away her property without due process and thus unconstitutional. In the petition she has asked for a

declaration that the decision of the Minister issued on 27 November 2015 is illegal, null and void; an order of mandamus to compel the 2nd and 3rd respondents to rectify the Kawala B registration section map and amend it to include the suit land; an order quashing the proceedings of 3 November 2015 and the subsequent decision of the Minister of 27 November 2015; stay of proceedings in Mariakani ELC No. 17 of 2018; general damages; costs and any other remedy deemed fit.

4. The 7th respondent has sworn an affidavit to oppose the motion. He believes that the application is a non-starter since it is the court on its own motion which transferred the case ELC No. 17 of 2018 to Mariakani Court. He avers that if the applicant was aggrieved, he ought to have filed an appeal and not this Constitutional Petition. He has deposed that the court in ELC No. 17 of 2018 denied the applicant any injunctive relief and it is an abuse of the court process for the applicant to now seek the same reliefs. He has contended that there is no provision for re-transfer of a suit. He has asserted that he is the registered owner of the suit land together with his two brothers, Alwi Shariff and Hassan Shariff. He has annexed a title deed which shows the land is described as LR No. 27383 Grant No. CR 51812. He avers that they purchased the said land from the previous owner one Yusuf Datey. He contended that the adjudication committee does not have jurisdiction over land that is already registered. He has further argued that what is being sought here is similar to what is sought in the suit ELC No. 17 of 2018.

5. I invited counsel to file written submissions but I have only seen the submissions of Mr. Oddiaga, learned counsel for the applicant. I have considered these submissions before arriving at my decision.

6. It is apparent that the applicant has a running parallel suit, that is Mariakani PMCC No 17 of 2018. There is an attached plaint of that suit to this application and I have gone through it. In that plaint, the plaintiff asserts ownership of the suit land and further avers that it was wrong for the 7th respondent herein (sued as 1st defendant in the said suit) to have the title LR No. 27383 for the same ground. She has further pleaded that it was wrong for the 7th respondent to be given the title that he holds through an adjudication process that did not involve her. In that suit, the applicant seeks orders inter alia to amend the map sheet for the area so that it shows the suit land on the map. There is also an order for a declaration that the Director of Adjudication and Settlement (sued as 3rd defendant in the said case) had no power to sit, hear and amend the map as he did on 3 November 2015. There is a further order to find the proceedings of 3 November 2015 to be a nullity and of no consequence. She finally wants orders to have her title recognized as the genuine one.

7. Now, if the applicant has the above suit with these pleadings, why does she need this petition? There is already pending a suit that can address her issues. If that suit is heard and determined, then this petition will be spent and will have no substance, for it will already have been determined who ought to have ownership of the disputed land.

8. I note that in this application, the applicant wishes to have an injunction. Yet again, that is a prayer that she had or has avenue to pursue in the pending suit. The other order that the applicant wishes to have is a stay of the suit Mariakani ELC No. 17 of 2018. I see no reason why I should stay that suit. That was the earlier suit and I have no reason to stay it. The final substantive order sought here is for a re-transfer of the case Mariakani ELC No. 17 of 2018. It has not been demonstrated to me why I should order a re-transfer of that case to this court for I have not been told that the said court has no jurisdiction. I can of course consider a transfer of that case to this court if it is shown to me that the said court has no jurisdiction, but that, as I have said, has not been exemplified in this application.

9. It will thus be seen that I see no merit in this application and it is hereby dismissed with costs.

10. My view, at face value, is that this petition may very well be a duplication of what the applicant has sought in Mariakani ELC No. 17 of 2018. The applicant thus needs to show cause why this petition should not be struck out for being res judicata. I will give directions on this at the time of delivery of this ruling.

11. This application is otherwise dismissed with costs to the 7th respondent.

12. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7 DAY OF OCTOBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

IN THE PRESENCE OF:

Ms. Mwainzi for the petitioner/applicant

Mr Mohamed or the 7th respondent

Ms Rukiya holding brief for Mrs Waswa for the 1st – 6th and 9th respondents

Court Assistant; Wilson Rabongo