



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 1102 of 2004

REPUBLICAPPLICANT

VERSUS

KIRWARA LAND CONTROL BOARD.....1ST RESPONDENT
RAHAB WANGECHO.....2ND RESPONDENT
TABITHA WANJIKU.....3RD RESPONDENT
LUCY NYAMBURA MAINA.....4TH RESPONDENT

EX-PARTE MAINA GAKURU

JUDGMENT

Pursuant to leave granted by this Court this judicial review application was commenced by Amended Notice of Summons Application dated 21st March 2005 the ex-parte applicant prays orders:

- a). That the decision of the Kirwara Land Control Board granting consent to sub-divide and transfer LR NO. Loc. 16/Kirwara/40 made on the 25th June 2004 be quashed.
- b) That the costs of this application be provided for.

The application is premised on the grounds that the Kirwara Land Control Board granted consent to subdivide the land despite a valid court order, ordering stay of execution which was served on them. In his affidavit the ex-parte applicant deponed that he filed Succession Cause no. 60 of 1999 in Thika in respect of his deceased father’s estate. That Judgment was given on 24.7.2002. That he was dissatisfied with the decision and filed Civil Appeal No. 42 of 2002 in the High Court in Nairobi. That he also filed an application for stay of execution which was granted on 8.4.2003. That on the 25.6.2004 the 4th Respondent although served with the order proceeded to grant consent to subdivide and transfer the land. That the board’s decision was meant to frustrate his appeal and the said decision should be quashed.

There is a Replying Affidavit to the application by the 2nd Respondent Rahab Wangecho on her own behalf and on behalf of the other 3rd and 4th Respondent. She depones that the judgment in the Succession Cause No. 60 of 1999 was made on the 24.7.2002 and Grant was issued on 6.8.2002. That subsequently the applicant was requested to execute the documents to facilitate execution of the judgement but he refused. That they made an application on the 22.8.2002 to have the executive officer Thika Law Courts to execute the transfer. That when this application come for hearing on the 25.9.2002 their advocate was advised that there was an application filed under certificate of urgency. That the application was heard on the 20.2.2003 and ruling reserved for the 8.4.2003 but was not delivered and was rescheduled to the 15.4.2003 when the court dismissed the application with costs.

She further stated that after the dismissal of the ex-parte applicant's application their application dated 22.8.2002 was scheduled for hearing on 14.5.2003. However the hearing was rescheduled to 11.6.2003 when orders were granted. She stated that although her advocates sought for certified copy of the ruling dated 8.4.2002 and paid for it the same has not been given up to date. That if the court granted orders of stay of execution it could not grant orders for execution of the transfer. That the Court was presented with the transfer RL19 and RL7 and duly executed. That she has never been presented with the order marked "MG" and prayed that the same be investigated.

Following the request by the Respondents to have the order of stay dated 8.4.2003 investigated the court made an order that the D.C.I.O of Thika to investigate the court file in Thika Succession cause No. 60 of 1999 with a view to determining the authenticity of the order dated 8.4.2003 annexed to the replying affidavit of Rahab Wangecho. The D.C.I.O Thika, H.M Meeme on the 2nd March 2005 returned his report on the issue and stated that he has established that a ruling was made on the 8th April 2003 before senior Principal magistrate Mr. Alex Anambo in Case no. 60 of 1999. He attached a copy of the ruling.

The parties argued the substantive application on the 23.6.05.

Counsel for the ex-parte applicant submitted that he relied on the application dated 21st march 2005 and the affidavit in support thereof. Counsel referred to the stay order which he submitted that it was served on the 1st Respondent. That the 1st respondent proceeded to grant consent leading to this application. He argued that there is no replying affidavit to show that the order was not served. That the order of stay should not have been disregarded. He prayed that the court allow the application.

Ms Mwaniki for the 1st Respondent in her submissions argued that the Magistrate who gave the order was removed in December 2003 that was before August 2004 when the orders were allegedly given. That the validity of this order is in dispute. That if the order never existed it could not be served.

Learned Counsel Ms. Muthoga for the 2nd, 3rd and 4th Respondents adopted the averments in the replying affidavit of the 2nd Respondent. She submitted that the executive officer was ordered to execute all necessary documents on the 11th June 2003. That this order would not have been granted if stay orders existed. That the stay was in relation to the orders of 28.7.2003. That judgment was on 24.7.2002 thus that the order of stay do not relate to the judgment. That no order can be signed "for" and the order is highly irregular and could not have been issued by the Court. She prayed that the application be dismissed with costs.

Counsel for the Ex-parte Applicant Mr. Kinga made a brief reply to the submission above. He argued that there was an application for stay of execution. That no order for dismissal was shown. That there was a typing error, judgment was delivered on 24.7.2002. That there are glaring discrepancies. That this is the mistake of officers and should not be visited upon the applicant.

I would begin by saying that the primary document forming the basis of this application is the Order for stay. It is on the strength of the existence of the order of stay that the ex-parte applicant argues that the 1st Respondent's decision of giving a consent to subdivide and transfer be quashed. The existence of the stay orders has been strenuously contested by the Respondents. This court was also put in a very difficult position to ascertain the existence of the stay order. The court had to direct the D.C.I.O Thika to investigate the matter and submit his report. The report was submitted to this court stating that the order was made on the 8.4.2003 by the Principal Magistrate Mr. Alex Anambo in Case no. 60 of 1999. He annexed a copy of the order. I have looked at the copy of the order and there is nothing to show that the order was issued on the said date. The order annexed state that the costs shall be in the cause, whereas the extracted order submitted by the ex-parte applicant states that the costs of the application shall be paid by the applicant. Further the respondents have taken issue with the signing of the extracted order. It was signed "for" which is not the practice in the courts. The extracted order also states that what is stayed is the decree and orders of the Court dated 24.7.2004 whereas the order is given on the 8.4.2003.

Counsel for the ex-parte applicant concedes that there are glaring inconsistencies in the order.

Further the ex-parte applicant prays for the quashing of the decision of the Kirwara Land Control Board granting consent to sub-divide and transfer LR NO. Loc 16/Kirwara/40 made on the 25th June 2004. This decision was not exhibited to court. It is not enough to state that the decision be quashed without exhibiting to the court the decision to be quashed.

I hold that the ex-parte applicant can best peruse his claim in the civil appeal which he has already filed. The appeal will not be rendered nugatory if this application fails. The High Court in the Civil Appeal can set aside the orders of the Magistrate's court and any steps taken will be undone if so ordered.

The issues in raised in this application with regard to the existence or otherwise of the stay orders calls for viva voce evidence which is not possible with judicial review application.

I therefore hold that the application fails and is dismissed with costs to the respondents.

Dated and SIGNED At Nairobi on this 22ND day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Nairobi on this 2ND day of OCTOBER 2012.

W. KORIR
Judge

In the presence of: