



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc Appli. 297 of 2006**

**PETER G.N. NGANGA.....APPLICANT**

**Versus**

**THE COMMISSIONER OF LANDS & OTHERS.....RESPONDENTS**

**JUDGMENT**

This is a Judicial Review application brought pursuant to Order 53 Rules 1, 2 & 3 of the Civil Procedure Rules and S 3A Civil Procedure Act in which the ex parte Applicant, Peter G.N. Ng'ang'a, seeks orders against the Commissioner of Lands, the Chief Lands Registrar as Respondents, Standard Chartered Bank (K) Ltd., Harrison Maina Kariuki and Kenya Revenue Authority as Interested Parties. He prays that an order of mandamus do issue compelling the Registrar and Commissioner of Lands to impeach and cancel title documents in respect of LR 9508 Kasarani, Nairobi as issued to the 2<sup>nd</sup> Interested Party herein pursuant to a fraudulent and unlawful transfer registered on 10<sup>th</sup> May 2000; a similar order to compel the Registrar and Commissioner of Lands to impeach and cancel entry number 22 made unlawfully on the certificate of title by the Registrar of Lands in respect of LR No.9508 Kasarani, Nairobi in favour of the 2<sup>nd</sup> Interested Party and lastly that an order of certiorari do issue for purposes of quashing the fraudulent and unlawful decision of the Registrar of Lands given on 10<sup>th</sup> May 2000 as appears in entry number 22 of the Certificate of Title without the consent of the Commissioner of Lands. The grounds in support of the application are found in the statutory statement dated 7<sup>th</sup> June 2008 and a verifying affidavit of the Applicant dated the same day and a further affidavit dated 15<sup>th</sup> October 2008.

The application was opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Interested Parties. Grace Mukulu, the Manager of the 1<sup>st</sup> Defendant's Group Special Assets Management swore an affidavit dated 12<sup>th</sup> June 2007 while the 2<sup>nd</sup> Interested Party swore an affidavit dated 23<sup>rd</sup> November 2006. The 3<sup>rd</sup> Interested Party opposed the motion on points of law. The Applicant was represented by Mr. Ngoge, the 1<sup>st</sup> Interested Party by Mr. Chege while the 3<sup>rd</sup> Interested Party was represented by Mr. Lekaraii.

A brief background of this case is that the Applicant was the registered owner of LR 9508 Kasarani which was charged to the 1<sup>st</sup> Interested Party for a loan of Kshs.3,000,000/= advanced to Olympic Fruits processors Ltd. The said company was placed under receivership on 3<sup>rd</sup> February 1994. The applicant claims to have paid the 1<sup>st</sup> Interested Party a sum of Kshs.2.4 million but that on 10<sup>th</sup> May 2000 the applicants property was transferred to the 2<sup>nd</sup> Interested Party. It is the Applicant's contention that the transfer was done fraudulently, unlawfully because the Interested Party did not take into account the

monies that had been paid, that the 1<sup>st</sup> Interested Party never gave the Applicant any statutory notice or notification of sale, and the Commissioner of Lands never gave his consent to transfer. The Applicant is therefore contends that the decision of the Respondent is illegal and in breach of rules of natural justice and hence the filing of this Judicial Review application.

Mr. Ngoge submitted that the transfer instrument that led to the 2<sup>nd</sup> Interested Party being issued with the title was illegal as it was attested to by Jane Nyamweru Chege Advocate who had no practicing certificate at the time. He annexed at page 52-3 of the verifying affidavit a letter (PC NN 5) from the Law Society that the said Jane Nyamweru had last held a practicing certificate in 1990. He relied on Section 9 of Advocates Act, and 58(1) of the Registration of Titles Act which require an Advocate to attest to the documents and he cited several authorities where plaints were struck out when filed by lawyers who had no practicing certificates.

1. **DELPHIS BANK LTD V BEHAL & OTHER HCC 266/02**

2. **GEORFFREY ORAO V MARTHA KOOME CA 146/00**

In the 2<sup>nd</sup> case a Notice of Appeal was struck out because it was filed by an advocate who had no practicing certificate.

The 2<sup>nd</sup> point raised by Mr. Ngoge is that the consent of the commissioner of Lands was not obtained before the transaction was effected. He relied on the case of **PATEL V LAWRENSON & ANDERS WATZEN DORES DAN CA 18/1956** where the court held that a sale was inoperative for lack of approval by the Governor.

Counsel also argued that the rates and land clearing certificate from Nairobi City Council were not obtained prior to the transaction and the ex parte Applicant still receives the water Bills which is contrary to the special conditions of sale. That the property was grossly under valued to avoid payment of stamp duty and that the Commissioner of Lands did agree in his affidavit that there were irregularities in the manner that the transaction was done.

Counsel denied that the application is Res judicata because the Registrar and Commissioner of Lands had not been sued before and that in any case, Judicial Review proceedings are neither civil nor criminal in nature. He urged that though this application is brought outside 6 months, an order of certiorari can be sought outside the mandatory 6 months if fraud is proved. That the 3<sup>rd</sup> party is properly on record since the orders sought are likely to affect him. He contends that it does not matter that the Applicant was willing to pay the loan. What is in issue is the procedure that was used in the transaction.

The 1<sup>st</sup> Interested Party submitted that this matter is Res judicata and hence an abuse of the court process and lastly he submitted that the transfer that the court is being asked to quash is the subject matter in Milimani Commercial Court **PETER NG'ANG'A V STANDARD CHARTERED BANK HCC 1364/01 (page 32 of the verifying affidavit)** and that the Applicant seeks the same orders as in this Judicial Review application. That the Civil Case comes up for hearing on 21<sup>st</sup> June 2008. That there is a prayer seeking to rescind the sale of the said land which the court in Milimani is also being asked to do. That the suit in Milimani was filed in 2001 while the current one in 2006.

The 1<sup>st</sup> Interested Party also submitted that the application is filed out of time since the transfer under challenge was registered in 2000 which is 8 years ago and that even if made fraudulently, an order of certiorari cannot lie.

That court was referred to the replying affidavit sworn by the 1<sup>st</sup> Interested Party, the letter dated 10<sup>th</sup> July 2008 where the Applicant admitted the outstanding sums and allowed the 1<sup>st</sup> Interested Party to sell the property without any further notice. That the commercial court declined to grant injunction orders and the Applicant used the backdoor to obtain order of stay in this matter.

In reference to the issue of attestation, Mr. Chege urged that it is different from this case as the transfer was drawn by Munene Advocate.

Mr. Munene Counsel for 2<sup>nd</sup> Interested Party urged that the Notice of Motion is fatally defective for having been brought outside the 6 months allowed under Order 53 Civil Procedure Rule and that the Applicant has not complied with the Government Proceedings Act, that the proceedings be brought within 6 months. Counsel also submitted that the Registrar of Titles is not bound to examine a document to see whether a chargee exercised its powers properly and debts such as rates and rents should be paid by the Applicant but they passed them to the buyer and the Applicant cannot claim that the said debts cannot be paid.

That the Commissioner of Lands Mr. Gordon Ochieng has not made any finding in his affidavit because he deponed that he will await the findings of the court despite the fact that he noticed irregularities in the transfer process. Counsel relied on Sections 38, 39, 46, 76 and 77 of the Registration of Titles Act.

It was also Mr. Munene's submission that this motion is a total abuse of the court process and he referred to paragraph 16 of the 2<sup>nd</sup> Interested Party's affidavit which lists the pending cases before the court and annexed the complaints and appeals. He added that this application is therefore an afterthought the other suits having been filed earlier.

It is also the 2<sup>nd</sup> Interested Party's argument that the Applicant lost his standing in this matter when the chargee signed the contract of sale and that the only available remedy that the Applicant has is in damages unless he proves fraud which he seeks to do in the Commercial Court Cases. He relied on the case of **YU YANG V NOVA INDUSTRIAL PRODUCTS LTD 2003 EALR 363** where the court held that the existence of a sale agreement extinguished the equity of redemption and that the Applicant had no remedies on the property against the mortgagee or the person who bought the property. Lastly, Counsel submitted that one party has no duty to examine a document to verify that the Advocate attesting has a valid practicing certificate and such a lapse cannot be visited on the client. He urged the court to dismiss this motion.

Mr. Lekarai, Counsel for the 3<sup>rd</sup> Interested Party urged this court to strike out the motion for reasons that it is not the mandate of the 3<sup>rd</sup> Interested Party to carry out valuation but that after the Government valuer did the valuation and the applicant was informed, that there was undervaluation of stamp duty and that steps would be taken to recover the said duty. That it is the 3<sup>rd</sup> Interested Party's duty to collect the under valued stamp duty and whether or not they will be affected by an order of the court is an issue between the Applicant and 2<sup>nd</sup> Interested Party. He said that their position would not affect anybody and they therefore sought costs for being dragged into the matter.

I have considered the motion, all the affidavits on record, the submissions by Counsel and the authorities that were relied upon by Counsel. An Applicant who comes to this court for a speedy remedy of Judicial Review has a duty of candour, and a duty to make a full frank disclosure of all facts that are relevant to his case, be they adverse to his case or not. In the instant case, the Applicant at para 7 of this verifying affidavit disclosed the existence of Milimani Commercial Court HCC 1364/01 which challenges the whole exercise of the transfer of the suit land the subject of these Judicial Review proceedings. The amended complaint (PGMM 4) and defence are exhibited. The applicant seeks several declarations to the effect that the transfer of the suit land to the 2<sup>nd</sup> Interested Party was unlawful, procedures were not followed, a reversal be made of the process and damages be paid. In this Judicial Review application he seeks that the decision of the Respondents be quashed by certiorari and mandamus to issue to compel the Respondents to cancel the said title. The effect of the orders sought herein and those sought in the Milimani Case is the same that is, to reverse the decision of the Respondents. I however note that the Milimani Case which was filed in 2001 is not the only case pending in respect of the suit land and the parties herein. At paragraph 16 of the 2<sup>nd</sup> Interested Parties affidavit, he listed several cases that are pending including the one at Milimani; CA 49/05 – **Peter and Keziah Ng'ang'a v Standard Chartered Bank, Harrison Maina Kariuki, Kinyanjui Wanjui Advocate and James Gachoka**

Advocate. It is an appeal from **HCC 1364/01; CA 85/01 Peter Nganga v Standard Chartered Bank of Kenya & Harrison Maina Kariuki** and appeal from 1037/00.; **149/03 Peter Nganga & Keziah Nganga Harrison Maina Kariuki**, an appeal from **HCC 1364/01**; All of these matters deal with the suit land LR 9508. It is Mr. Ng'anga's submission that it was sufficient to disclose the existence of HCC 1364/01 but that is not correct. All the facts relating to this matter especially the cases that have been filed relating thereto and the decisions of the various courts should have been brought to the attention of this court so that the court does not make a decision that may be embarrassing or in conflict with an already existing decision. Michael Fordham's **Judicial Review Handbook 3<sup>rd</sup> edition at page 352** says this of the duty to disclose; **"21.5 Claimants duty of candour" A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw attention to matters which are adverse to the claim, in particular;**

- 1) any statutory restriction on the availability of Judicial Review;**
- 2) any alternative remedy;**
- 3) any delay/lack of promptness and so need for an extension of time.**

**In facing upto adverse points, the claimants will have an early opportunity to explain why these points are not fatal and why the case should be permitted to proceed (i.e confess and avoid). The duty of "full and frank disclosure" herks back to the time when permission for Judicial Review was ex parte (without notice to the defendant/11) That has changed."**

In Kenya the position is that applications for leave in Judicial Review are heard ex parte and are only heard interpartes when the court directs so. The position in England has changed with the amendments made to the law in 1977. In the instant case, the Applicant should have made a full and frank disclosure of all facts which includes those cases which had been filed in respect of this matter. So far this court has no idea what the decisions on the appeals were. This court can only guess.

It is noteworthy that the matter in Milimani HCC 1364/01 was filed in 2001 and thereafter there has been other litigation in the High Court and Court of Appeal. The Applicant has not explained the delay in bringing this application if indeed it was an efficacious remedy under the circumstances, because Judicial Review remedies should be sought expeditiously. I would agree with the Interested Parties that the motion is brought as an after thought and it is because it was not the most suitable remedy in the circumstances.

There are allegations of fraud as against the Respondents. Though the Applicant is only challenging the decision making process there is need for the Applicant to specifically plead the allegations of fraud and then prove the said allegations. That can only be done by way of filing a plaint and adducing evidence in support thereof. The result is that this is not a case that can be disposed of by affidavit evidence in a Judicial Review application.

In my view, I would find that the filing of the various suits on the same subject matter is an abuse of the court process. In **HMISC APPLICATION 899/03 REP V THE HON. THE ATTORNEY GENERAL & PM'S COURT MAKADARA**, the judge cited and associated himself with the reasoning of **BINGHAM** Lord Chief Justice in **AG V BAKER. (The times 7/2000)** where he considered what abuse of court process entails. He said;

**"Although the term abuse of the court process is not defined in the rules or practice directions, it has been explained in another context as,**

**"using that process for a purpose or in away significantly different from its ordinary and proper use"**

**It is an abuse to bring vexatious proceedings i.e. two or more sets of proceedings in respect of the same subject matter which amounts to harassment of the defendant in order to make him fight the**

**same battle more than once with the attendant multiplication of costs, time and stress. In this context, it is immaterial whether the proceedings are brought concurrently or severally.”**

I agree with the above observation. The multiplicity of suits involving the same subject matter and moving this court 5 years after the matter in Milimani court was filed seeking orders with the same effect is in my view an abuse of this court process as it seems the applicant wants to vex the Respondents.

It is immaterial that some of the parties were not enjoined in the civil matter because there is no reason why they were not enjoined to the proceedings earlier.

It was urged that this matter is Res judicata as it has been urged else where in HCC 1364/00. In my view this matter is not Res judicata because Judicial Review does not deal with the merits of a case but the process by which the decision was arrived at. For a matter to be Res judicata it must involve the same parties, same issues and be determined on merit. HCC 1364/01 has not yet been heard and determined on merit in order for the matter to be Res judicata.(See S.7 Civil Procedure Rules)

As regards the submission that the application is incompetent because it was brought outside 6 months, I do agree that Order 53 Rule 2 Civil Procedure Rules provides that one seeking an order of certiorari has to bring the application within 6 months of the making of the impugned decision. In this case the decision was made way back in 2000, 5 years before the filing of this motion. If indeed the impugned decision is a nullity, then it means there was no decision made and so an order of certiorari can be sought even after 6 months. A three bench court held so in **Rep v AG ex parte MWALULU HMISC 1279/04** that nullities can be quashed even after 6 months. If this case was properly before this court, it would not have been defective for the reason that it was brought after 6 months. I also wish to observe that these are a Judicial Review proceedings and the Civil Procedure Act or Rules made thereunder and the Government proceedings Act do not apply. In **KUNSTE HOTEL LTD. V COMMISSIONER FOR LANDS CA 234/1995** the Court of Appeal held that the Government proceedings Act and the Civil Procedure Act and Rules do not apply to Judicial Review. (See also Section 8(1) of the Law Reform Act) what this court is saying is that this application should not have been filed before this court. There is no need for this court to go to the merits of this application because the same will be canvassed & determined in HCC 1364/01. The decision of that court will be the best remedy in the circumstances and I accordingly strike out the Notice of Motion with costs to the Interested Parties and Respondent.

Dated and delivered this 3<sup>rd</sup> day of October 2008.

R.P.V. WENDOH

JUDGE

**Present:-**

Mr. Ngoge for Applicant

Mr. Muiruri for Respondent

Mr. Muthee for 1<sup>st</sup> Interested Party

Ms. Odundo for 3<sup>rd</sup> Interested Party

Daniel: Court Clerk