



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

MISCELLANEOUS JUDICIAL REVIEW APPLICATION NO. 1 OF 2020

IN THE MATTER OF AN APPLICATION BY JAMES NDUNGU KABIRU FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF MANDAMUS AGAINST REGISTRAR OF LANDS,

KIRINYAGA DISTRICT

AND

IN THE MATTER OF LAND REFERENCE NO. MWEA/MUTITHI/SCHEME/121

AND

IN THE MATTER OF ARTICLES 2(1), 3(1), 10, 21(1), 22(1) 23(3) (f), 27(1),

47(1) 62(1) (b), 165(6) & 159(2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LAND ACT NO. 6 OF 2012 AND LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 8(2) OF THE LAW REFORM ACT, CAP 26 OF LAWS OF KENYA

AND PART III OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

JAMES NDUNGU KABIRU.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

KIRINYAGA DISTRICT LAND REGISTRAR.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

JAMII BORA BANK.....INTERESTED PARTY

RULING

The application before me is the Chamber Summons dated 14th July 2020 where the Applicant is seeking the following reliefs:-

1. Spent.

2. This Honourable Court be pleased to grant leave to the applicants to file an application of Judicial Review seeking the following orders:-

a. An order of mandamus to compel the 2nd respondent to transfer property known as MWEA/MUTITHI/SCHEME/121 to the applicant.

b. Such further and other reliefs as this Honourable Court deems just and expedient to grant.

3. The leave granted do operate as stay and caveat against any actions on the register of property known as MWEA/MUTITHI/SCHEME/121.

4. Costs of this application be provided for.

The said application is based on the following grounds:-

a. On 14th September 2017, the interested party herein, through its agents, Antique Auctioneers Limited placed in the Daily Nation Newspaper an advertisement of sale by way of public auction of property known as MWEA/MUTITHI/SCHEME/121 (hereinafter referred to as (suit property) belonging to one Martin Robin Kinuthia.

b. On 28th September 2017, the applicant herein, being the highest bidder, purchased the suit property in a public auction for a sum of Ksh. 15,500,000/= which the said sum was paid to the interested party's bank account.

c. On 12th June 2018, the applicant paid a sum of Ksh. 310,000/= as stamp duty fees and further obtained the requisite statutory consents including the consent of Martin Robin Kinuthia and Mwea Land Control Board.

d. Thereafter, the applicant lodged the conveyance documents including duly filed transfer forms, title deed, Memorandum of transfer, consent letters, certificate of sale and payment receipts with the Land Registrar, the 2nd Respondent herein, to effect transfer and registration of the suit property in the name of the applicant.

e. However, despite presenting all the requisite conveyance documents, the 2nd respondent refused, neglected and/or failed to effect transfer and registration of the suit property in the name of the applicant, as the lawful proprietor, on the basis that there was a Court order pending/awaiting verification.

f. The action or inaction of the 2nd respondent in failing to transfer the suit property to the applicant has prejudiced his legal rights and is in bad faith, without authority, is unfair, violates his legitimate expectations and is taken in or made in abuse of the statutory powers.

g. It is in the interest of justice that leave be granted to the applicant to commence Judicial Review proceedings to seek a writ of mandamus to compel the 2nd respondent to transfer the said property to him as the bona fide purchaser for value.

h. That if leave is not granted to the applicant to commence Judicial Review proceedings to seek a writ of mandamus to compel the 2nd respondent to transfer the said property to him as the bona fide purchaser for value, he stands to suffer irreparable loss and damage.

i. It is thus fair and just if this application is heard, on priority basis and orders sought herein be issued forthwith as prayed.

j. This Honourable Court has supervisory jurisdiction over the respondent and power to make such orders or give any directions appropriate for fair administration of justice.

Applicants Statement of Facts

The applicant in his verifying affidavit deponed as follows:-

1. That on 14th September 2017, the interested party herein through its agents, Antique Auctioneers Limited placed in the Daily Nation Newspaper an advertisement of sale by way of public auction of property known as MWEA/MUTITHI/SCHEME/121 belonging to one Martin Robin Kinuthia.

2. That on 28th September 2017, he attended the above public auction at Ngurubani and being the highest and successful bidder, he purchased the said suit property for a sum of Ksh. 15,000,000/= which the said sum was paid to the interested party's bank account.

3. That thereafter, he conducted due diligence and further inquired from the interested party, which confirmed to him that this particular property was registered in the name of Robin Martin Kinuthia, who had charged it as security in favour of the Bank to secure loan facility of Ksh. 24,500,000/=.

4. That further, he was reliably informed that the said Robin Martin Kinuthia had defaulted in repayment of the loan as a result of which the interested party's statutory right of sale crystallized prompting the sale by way of public auction.
5. That subsequently, he proceeded and applied for requisite consents, and on 12th June 2018, he successfully obtained the consents of Martin Robin Kinuthia and that of Mwea Land Control Board as required under the law.
6. That after obtaining all the consents on 10th September 2018, he paid a total sum of Ksh. 310,020/= to the Kenya Revenue Authority as stamp duty fees for the purchase of the foregoing property.
7. That thereafter, he lodged the conveyance documents duly executed, transfer forms, title deed, Memorandum of transfer, consent letters, certificate of sale and receipts with the 2nd respondent herein to effect transfer and registration of the suit property in his name as the lawful proprietor.
8. That however, despite presenting all the requisite conveyance documents, the 2nd respondent refused, neglected and/or failed to effect transfer and registration of the suit property, while noting on top of his application for registration form that his documents could not be processed because ".....there is a Court order pending/awaiting verification...."
9. That he later learnt that the 2nd respondent has written to the Deputy Registrar of High Court at Embu on 11th February 2016 seeking clarifications on the effects of this Court order on the pending registration, but it elicited no response.
10. That he is further aware that on 8th June 2020, the interested party herein successfully obtained a Court order in Misc. Application (J.R.) No. 2 of 2018 Republic Vs Ndoro Ritho Alias Ndoro Njinjo & 2 others Ex-parte Samuel Kanja Kinunu & J.B.B (Interested party) whereby the Court set aside the impugned Ruling of 20th April 2015.
11. That in this regard, he is duly advised by his Advocates on record that having lifted the said Court Ruling of 20th January 2015, there is absolutely nothing legal or otherwise, currently barring the Land Registrar from effecting the changes to reflect the recent transactions by registering him as the lawful proprietor of the suit property.
12. That therefore, the action or inaction of the 2nd respondent in failing to transfer and register the said property in his name as the lawful owner, has not only prejudiced his legal rights, but is also in bad faith, without authority, is unfair, violates his legitimate expectations and is taken in or made in abuse of the statutory powers.
13. That it is in the interest of justice that this Honourable Court do grant leave to allow him to commence Judicial Review proceedings to seek a writ of mandamus against the 2nd respondent and that the said leave granted do operate as a stay and caveat against any actions on the register of property known as MWEA/MUTITHI/SCHEME/121.
14. That he is reasonably apprehensive that if leave is not granted as sought, he stands to and continue suffering irreparable loss and damage. He annexed all the documents referred herein above.
15. That he verified and stated that the entire contents of the statutory statement are true and correct.

Ordinarily an application for leave to apply for orders of mandamus prohibition or certiorari under **Order 5 B Rule 1 & 2** is made Ex-parte. However, when the application was placed before me under certificate of urgency, I directed the Ex-parte applicant to serve the same upon the respondents and the interested party. When the application came up for hearing on 7th October 2020, and after being satisfied that the respondents and the interested party were duly served, and there being no grounds of opposition or a replying affidavit in response to the said application, the Court allowed the same to proceed Ex-parte.

Legal Analysis and Decision

I have considered the Chamber Summons application dated 14th July 2020, the statutory statement and the verifying affidavit. I have also considered the annexures to the verifying affidavit and the submissions by the Ex-parte applicant's counsel. It is trite law that in an application for leave to apply for the aforesaid orders, an applicant must demonstrate that he has an arguable case. The Court must therefore inquire into the averments contained in the statutory statement, the verifying affidavit and the grounds upon which the relief(s) are sought whether the application meets the threshold for the orders sought. In the case of **Republic Vs County Council of Kwale & another Ex-parte Kondo & 57 others (1998) 1 K.L.R**, it was held as follows:-

“The purpose of the application for leave to apply for Judicial Review is firstly to eliminate at the early stage any application for Judicial Review which are either frivolous, vexatious or hopeless and secondly, to ensure that the applicant is only allowed to proceed to the substantive hearing if the Court is satisfied that there is a case fit for further consideration.

5. Leave may only be granted, if on the material available the Court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter-partes hearing of the substantive application for Judicial Review. It is an exercise of the Court's discretion but as always it has to be exercised judicially”

I agree with the decision by the Superior Court. In the present application, the applicant has annexed numerous material documents which in my view are prima facie evidence of an arguable case to be allowed to proceed to the next stage. These documents include a copy the extract

of Daily Nation Newspaper placed by Antique Auctioneers Limited for the advertisement of sale of the suit property by public auction dated 14th September 2017. The other document is a copy of certificate of sale and Memorandum by the said Antique Auctioneers Ltd dated 29th September 2017. The other documents are copies of certificate of title and extract of charge instrument dated 14/9/2015, copies of consents dated 12th June 2018, copies of receipts dated 10th September 2018, copies of duly executed conveyance documents and a copy of application for Registration form bearing 2nd respondent's hand written notes. In light of the foregoing, I find the ex-parte application dated 14th July 2020 merited and the same is hereby allowed in the following terms:-

1. The Ex-parte Applicant is granted leave to apply for an order of mandamus to compel the 2nd respondent to transfer and register him as the proprietor/owner of land parcel No. MWEA/MUTITHI/121.

2. The Judicial Review application referred in paragraph (1) above to be filed within 21 days from today.

3. The leave granted under paragraph (1) & (2) above do operate as stay and caveat against any action on the register or property known as MWEA/MUTITHI/SCHEME/121.

4. The costs of this application to abide the event.

READ, SIGNED and DELIVERED via e-mail at Kerugoya this 10th day of November, 2020.

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E.C. CHERONO

ELC

JUDGE