



Republic v District Land Registrar, Uasin Gishu County; Ethics & Anti-Corruption Commission (Interested Party); Chemey Investments Limited (Exparte) (Judicial Review 39 of 2010) [2019] KEELC 4885 (KLR) (24 January 2019) (Judgment)

Republic v District Land Registrar, Uasin Gishu County; Ethics & Anti-Corruption Commission (Interested Parties) Ex parte Chemey Investments Limited [2019] eKLR

Neutral citation: [2019] KEELC 4885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
JUDICIAL REVIEW 39 OF 2010
YM ANGIMA, J
JANUARY 24, 2019**

BETWEEN

REPUBLIC APPLICANT

AND

THE DISTRICT LAND REGISTRAR, UASIN GISHU COUNTY RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION INTERESTED PARTY

AND

CHEMEY INVESTMENTS LIMITED EXPARTE

JUDGMENT

1. Pursuant to leave granted by the court on 3rd November 2010, the ex-parte Applicant (hereinafter called the Applicant) filed a notice of motion dated 22nd November 2010 seeking the following orders;
 - a. That this honorable court be pleased to issue an order of judicial review for orders of certiorari to remove to this honourable court the gazette notice number 11538 contained in gazette published on 1st October 2010 in respect of property known as Eldoret Municipality Block 4/57 and any consequential title which may be issued to any person/institution/entity subsequent hereto.



- b. That this honourable court be pleased to issue an order of judicial review for orders of prohibition to prohibit the Respondent from issuing a new title to any person/institution/entity in respect of the property known as Eldoret/Municipality/Block 4/57.
 - c. That the costs of this application be provided for.
2. The said application was based upon the Applicant's statutory statement dated 21st October 2010 and verifying affidavit filed during the application for leave under Order 53 of the [Civil Procedure Rules](#).
 3. The gist of the application for judicial review was that the Respondent had revoked the Applicant's certificate of lease for Title No. Eldoret Municipality Block 4/57 (hereinafter called the suit property) without due process. It was also contended that the Respondent's action was ultra vires since he had no statutory power to do so in the first instance.
 4. The Applicant was also aggrieved by the takeover by the Government of Kenya of the suit property. The said property has since been given to Uasin Gishu District Hospital which is currently in possession.
 5. According to the statutory statement and verifying affidavit in support of the application for leave, the Applicant had acquired the suit property for valuable consideration from Ekima Junior Academy Ltd (hereinafter Ekima) in 1998. The said vendor had also acquired the suit property from Biimarsha Property Development Consultants (hereinafter Biimarsha) and Japhet Magut, Amge Kipkorir Kiptui trading as Kuinet Hardware Ltd (hereinafter Kuinet).
 6. The interested party herein filed a replying affidavit sworn by Oscar Ongote on 17th April 2012. He stated that he was a member of the team investigating the alienation of the suit property under the provisions of the [Anti-corruption and Economic Crimes Act, 2003](#). He contended that investigations had revealed that the suit property constituted public property reserved for public purposes which was illegally alienated to the original allottee Wilfred Kimalat and Japhet Magut. The latter was at one point the Mayor of Eldoret.
 7. The interested party further stated that the Applicant had previously filed a constitution petition being Nairobi High Court Petition No. 94 of 2005 challenging the action by the Government of Kenya of repossessing the suit property. It was contended that the Applicant had failed to disclose to this court the outcome of the said petition in which it lost. The interested party annexed a copy of the said judgement dated 19th December 2011 as an exhibit.
 8. The Respondent herein filed a replying affidavit sworn by Hellen Kharemwa on 4th June 2012. The deponent was at the material time the District Land Registrar, Uasin Gishu. She stated that according to the documents in her custody, the suit property was public land in actual occupation of various government offices including the Uasin Gishu District Hospital.
 9. The Respondent also raised the issue of the judgement in Nairobi High Court Petition No. 94 of 2005, *Chemey Investments Ltd Vs The Attorney General* and the Permanent Secretary, Ministry of Health. The Respondent contended that the instant application for judicial review was an abuse of the court process.
 10. It would appear that the parties herein agreed to dispose of the said application through written submissions. The record shows that the Applicant filed its submissions on 10th November 2014 whereas the Respondent filed its submissions on 10th December 2014. The interested party on the other hand filed its submissions on 28th November 2014.
 11. The court would like to deal with the propriety of the instant proceedings in view of the contention by the Respondent and the interested party that the Applicant had filed a constitutional petition on



the same cause of action which it lost. It is, therefore, imperative for this court to interrogate whether or not the instant proceedings could constitute an abuse of the court process before dealing with any substantive issues.

12. The court has perused the Applicant's submissions on the issue of the constitutional petition which was filed in Nairobi. This is what the Applicant's advocate submitted.

“The suit Nairobi H.C. Misc No. 94 of 2004 between the Applicant herein and the Respondent and another was solely about ownership and restitution of the Applicant to the suit property from which it had been forcefully evicted. Judgement in the matter was rendered on 19th November 2011 when these proceedings had already commenced and ongoing before this honourable court. The Applicants being dissatisfied by the judgement in the latter suit lodged an appeal at the Court of Appeal and the same is yet to be determined.”

13. The court does not find the first part of the submission to be convincing at all. The Applicant is simply trying to split hairs. The instant suit and Petition No.94 of 2004 arose out of the same transaction or series of transactions. The Applicant was aggrieved because it considered that its property rights had been violated by the actions of the Government of Kenya. A multiplicity of suits is not a suitable manner of resolving such disputes.

14. The second reason why the explanation is even less convincing is that the instant application for judicial review was commenced in 2010, that is, several years after filing of the constitutional petition. The mere fact that judgement in the petition was delivered during the pendency of the instant proceedings is not a good explanation either. The Applicant had the option of discontinuing the instant proceedings and proceeding on appeal in the petition.

15. The court is of the view that the Applicant is simply trying to have a second bite at the cherry having lost in the constitutional petition. According to the material on record, the Applicant was seeking the following substantive reliefs in the petition;

- a. That a declaration be and is hereby issued declaring that the Applicant is the lawful registered proprietor of the leasehold interest in land parcel Eldoret Municipality/Block 4/57 together with all the developments and improvements thereon.
- b. That a declaration be and is hereby issued that eviction of the Applicant from land parcel Eldoret Municipality Block 4/57 by the 2nd Respondent and subsequent occupation of the said property by Uasin Gishu District Hospital amounts to unlawful and therefore unconstitutional acquisition thereof and therefore null and void.
- c. That a declaration be and is hereby issued declaring that Uasin Gishu District Hospital should vacate the said property and the Applicant do henceforth take possession thereof.

16. If the Applicant lost its bid to obtain the said declarations in order to secure the suit property, the court does not see how the prerogative orders sought in the instant proceedings would provide an effective remedy to the Applicant. The court is of the opinion that the Applicant is simply trying his luck in a different forum in the hope of obtaining a favourable relief.

17. In the case of *Kamunye & Others Vs The Pioneer Assurance Society Ltd* [1971] EA 263, the test for *res judicata* was stated thus;

“The test whether or not a suit is barred by *res judicata* seems to me to be – is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a



new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at the time.”

18. The last part of the Applicant’s response was that having filed an appeal against the judgement in the earlier petition, the matter was still pending in the Court of Appeal. That may have been the case at the time the Appellant filed its submissions on 10th November 2014. It was certainly not the position as at 2nd November 2018 when the matter was mentioned for the purpose of fixing a judgement date.
19. The court is aware that the said appeal was fully heard and concluded vide a judgement dated 26th January 2018. According to the judgement, the Court of Appeal (in Civil Appeal No. 349 of 2012 *Chemey Investment Ltd Vs Attorney General*) upheld the decision of the High Court and dismissed the appeal in its entirety. The determination of the appeal was certainly known to the Applicant as at 2nd November 2018 but the Applicant did not alert the court that the appeal had been concluded.
20. The court has perused the judgement rendered by the Court of Appeal. All the pertinent issues were fully considered and determined. The court found that the Applicant was not a *bona-fide* purchaser for value without notice and that its appeal had no merit whatsoever. This court cannot possibly arrive at a different conclusion were it to consider the substantive application for judicial review. The corrupt scheme in the alienation of the suit property was exposed and laid bare by the Court of Appeal.
21. In the said case, the Court of Appeal held, *inter alia*, that;

“Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example *Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others* [1996] eKLR; *Funzi Island Development Ltd & 2 Others v. County Council of Kwale*(supra); *Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others*KLR (E&L) 1, 563; *John Peter Mureithi & 2 Others v. Attorney General & 4 Others* [2006] eKLR; *Kenya National Highway Authority v. Shaliten Masood Mughal & 5 Others* (2017) eKLR; *Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others* [2015] eKLR; *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR and *Milan Kumarn Shah & Others v. City Council of Nairobi & Others*, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”

22. In the circumstances of this case the court finds, and holds, that the application for judicial review is a gross abuse of the court process. The Applicant is simply trying to re-litigate matters which were adjudicated upon by both the High Court and the Court of Appeal. It is trying to reclaim the suit property through judicial review proceedings whereas it failed to do so in a constitutional petition.
23. The court is, therefore, of the opinion that the instant application for judicial review ought to be struck out. The Applicant’s notice of motion dated and filed on 22nd November 2010 is hereby struck out with costs to the Respondent and the interested party.
24. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT ELDORET THIS 24TH DAY OF JANUARY, 2019.



In the presence of the Mr. Kuria for the Attorney General for the Respondent

Mr. Ngigi Mbugua & Co. for the Ex-parte Applicant - Absent

No appearance for the Interested Party

Court clerk - Emmanuel

Y.M. ANGIMA

JUDGE

24.01.19

