



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC MISCELLANEOUS APPLICATION NO. 29 OF 2016

IN THE MATTER OF AN APPLICATION BY MORRIS MOLO MIDIANGA & PAMELA ATIENO MIDIANGA FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION, MANDAMUS AND CERTORARI

AND IN THE MATTER OF SECTIONS 24-35 OF THE LAND REGISTRATION ACT (NO. 2 OF 2012 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF KISUMU/BLOCK 5/670 & KISUMU/BLOCK 5/671

BETWEEN

REPUBLIC.....EX-PARTE APPLICANT

AND

THE COUNTY GOVERNMENT OF KISUMU.....RESPONDENT

AND

JANE ATIENO OGUSO.....INTERESTED PARTY

RULING

1. Morris Molo Midianga and Pamela Atieno Midianga, the Exparte Applicants, filed the Chamber Summons dated 10th November 2016, seeking for leave to apply for an order of Prohibition, Mandamus and Certiorari to move into this court and quash to decision of the County Government of Kisumu, the Respondent, for tampering, interfering and or altering the original registration entries made on Kisumu/Block 5/670 and 671. They further pray that the leave do operate as a stay of the said decision and of ***“any acts and or proceedings and or resulting and or flowing from and or pursuant thereto and or therefrom.”*** They further sought that pending the hearing and determination of the substantive application and orders resulting thereto, the OCS Kondele Police Station do enforce and ensure the compliance of any interim orders and court directions. They also pray for costs.

The application is based on the five (5) grounds on its face and supported by the affidavit of Morris Molo Midianga, sworn on the 10th November 2016, and statement of facts of the same date.

2. The application was on 14th November 2016 ordered to be served for further mention on the 24th November 2016 when prayer (a) for leave was granted, and timelines for filing of replying papers in respect of prayer (b) for stay granted. The Learned Counsel for Jane Akoth Oguso, the Interested Party, and County Government of Kisumu, Respondent, filed the replying affidavits both sworn on the 30th November 2016. The Interested Party avers that the plot Kisumu/Block 5/671 was allotted to her by the Respondent and that she sold it to Godwin Seda Omolo Amadi who in turn sold it to Silas Okal Oudu vide the agreement dated the 28th April 2016 which she annexed. That Kisumu/Block 5/670 is registered in the name of Joel Mayaka as confirmed by the certificate of lease issued on the 27th May 2008 that she attached. Eric Omoro who swore the replying affidavit for the Respondent among others deponed that the plots were repossessed and allotted to the Interested Party in 1999.

3. The Respondent reported during the court appearance of the 1st December 2016 that they had filed a notice to raise a preliminary objection dated the 1st December 2016 on an issue of the law and the court directed that the preliminary objection be heard first among others. That during the subsequent court appearances of 8th March 2017 when only counsel exparte Applicant appeared, the court gave directions on filing of written submissions on the Chamber Summons dated 10th November 2016. Consequently the learned Counsel of the exparte Applicant filed their written submission dated the 9th November 2018 while counsel for the Respondent had earlier filed theirs dated 6th July

2017. The learned Counsel for the Interested Party had also earlier filed their submissions dated 12th May 2017, supporting that of the Respondent.

4. That from the foregoing, it appears the parties counsel have submitted on both the Respondent's preliminary objection and the Exparte Applicants' Chamber Summons. That accordingly this ruling is on both the preliminary objection dated 17th December 2016 by the Respondent, and the Chamber Summons dated 10th November 2016 by the exparte Applicants. The following issues are for determination by the Court;

a) Whether the application for leave was brought within the time required under the law.

b) Whether the Exparte Applicant have established a prima facie case with a probability of success for stay order to issue at this stage.

c) Whether the preliminary objection should be upheld.

d) Who pays the costs.

5. The Court has carefully considered the grounds on the Chamber Summons, the Preliminary Objection, the affidavit evidence by the Exparte Applicants and the Interested Party and come to the following determinations;

a) That though prayer (a) of the Chamber Summons dated the 10th November 2016 was granted on the 24th November 2016, and the substantive application directed to be filed and served in 21 days, there is no information given as to whether the notice of motion has been filed and served to date.

b) That the Respondent has raised a Preliminary Objection to the whole chamber summons vide their notice dated the 1st December 2016. That they effectively challenged the order of 24th November 2016 granting prayer (a). The prayer was granted before the Respondent and Interested Party could file their responses. The basis of challenge is first, that the application was filed outside the time set by the law. The Chamber Summons is clearly shown at the heading to be brought under **Order 53 Rule 1 (1) and (2) of the Civil Procedure Rules**. That under the said Order Rule 2, the application for leave to apply for the prerogative orders should be applied for within six (6) months from the date of the decision being challenged. That from the supporting affidavit, and the documents annexed to it, plus the statement of fact, the decision that the exparte Applicants seek to impugn was the subject matter of previous litigations in Kisumu HCCC No. 157 and 158 of 2010, which they alleged were later withdrawn, while the interested Party depones that they are still pending in court. That whether or not the said suits have been withdrawn, or still pending in court, it is not disputed that the Respondent's decision on the suit properties that the Exparte Applicants seek to challenge through the leave granted pursuant to prayer (a) of the Chamber Summons had already been made, and existed before the filing of the 2010 litigations. That this finding leads the court to the conclusion that the application for leave to file for prerogative orders was filed years after the lapse of six months from the date of the decisions. That accordingly, the Chamber Summons dated 10th November 2016 is fatally defective and an abuse of the court's process.

c) That the court concurs with the Respondent's submissions on the preliminary objection that what the Exparte Applicants seek to pursue is outside the scope of judicial review proceedings, as parties who are not enjoined in the Chamber Summons hold the documents of ownership in the form of certificate of lease and letter of allotment to the two suit properties. That the court cannot issue orders negatively impacting on the interest of the title holders who have not been given an opportunity to be heard as required by **Article 50 of the Constitution 2010**. The relief of prohibition may also not be available to the Exparte Applicants as the prohibition order takes care of the future and not what has already been done. The decision of the Court of Appeal in **Kenya National Examination Council vs Republic Exparte Geoffrey Gathenji & 9 Others [1997] eKLR** is relevant.

d) That this then is an appropriate case where the court should recall and or set aside the exparte order of 24th November 2016, granting leave, in view of the facts that have since been presented before the court after the granting of the prayer.

6. That in view of the foregoing, the court upholds the Respondent's Preliminary Objection dated the 1st December 2016 to the Exparte Applicants' Chamber summons dated the 10th November 2016 and orders as follows;

a) That the order of 24th November 2016, granting prayer (a) of the Chamber Summons dated 10th November 2016 is hereby set aside.

b) That upon upholding the Respondent's Preliminary Objection dated the 1st December 2016, the Exparte Applicants' Chamber summons dated the 10th November 2016 is hereby dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF MARCH 2019

In the presence of:

Exparte-Applicants Absent

Respondent Absent

Interested Party Mr. Lugano for Exparte Applicants

Counsel M/s Kwabo for Kiwanga for Interested Party

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE