



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC JUDICIAL REVIEW CASE NO 15 OF 2018

WCYLIFFE ONYANGO..... 1 ST APPLICANT

JANE NJERI ONYANGO.....2 ND APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR..... RESPONDENT

LUCY AKINYI AMBALA..... INTERESTED PARTY

RULING

1. By a chamber summons dated 5/3/2018, the applicants, Wycliffe Onyango and Jane Njeri Onyango, seek four preliminary judicial review orders: (i) leave to apply for orders of certiorari directed against the respondent quashing the decision contained in the respondent's letter dated 9/2/2017 declaring that Title Number Nrb/Block 112/58 does not belong to the applicants; (ii) leave to apply for orders of mandamus directed against the respondent compelling the respondent to vacate the caution lodged on 3/10/2008 against the suit property; and (iii) leave to apply for an order of prohibition prohibiting the respondent against interfering and/or stopping the applicants from dealing with the suit property; and (iv) the leave so granted do operate as stay. The applicants also sought costs of the application.

2. The application is supported by the statement of facts dated 5/3/2018 and the 2nd applicant's affidavit sworn on 5/3/2018. The applicants' case is that they are the registered proprietors of the suit property; the respondent has claimed that the suit property does not belong to the applicants; since 2015, the respondent has declined to issue the applicants with official searches and has similarly declined to vacate the caution registered against the title; the respondent has acted without jurisdiction or in excess of jurisdiction by declaring that the suit property belongs to Otieno Aggrey Ambala and Lucy Akinyi Ambala; and that the applicants' right to property has been infringed by the respondent.

3. The applicants contend that they purchased the suit property from Otieno Aggrey Ambala and Lucy Akinyi Ambala (the interested party) in 1997, fully paid the purchase price, were duly registered as proprietors of the suit property, and they took possession of the property. Subsequent to the registration, they obtained an official search which confirmed they were the registered proprietors. They have since then been paying rates and land rent to the relevant authorities. In 2008, they discovered that one Geoffrey Ochieng had lodged a caution against the title, claiming to be administrator of the estate of the late Otieno Aggrey Ambala. Prior to that, the interested party had filed Nairobi HCCC 227 of 2006 against them laying claim to the suit property and alleging fraud and the said suit was dismissed by Mbogholi Msagha J on 12/5/2015 for want of prosecution. On 7/9/2009, the cautioner's advocates wrote to the respondent notifying him that the dispute leading to the filing of the caution had been resolved. Further, the cautioner executed and presented a notice of withdrawal of caution as required by the law but the respondent has declined to register the withdrawal. Aggrieved by the respondent's actions and inaction, the applicants seek the above judicial review orders.

4. The respondent opposes the application through grounds of opposition dated 3/4/2018. He contends that the application is frivolous, misconceived, vexatious and an abuse of the court process. Further, he states that the application is time-barred. Thirdly, he argues that the issue before court relates to ownership of the suit property and cannot be determined through judicial review proceedings but in a civil suit where oral evidence will be led.

5. The interested party opposes the application through grounds of opposition dated 5/7/2018. She contends that the application is time-barred and that the dispute herein requires viva voce evidence. Further, she contends that she stands to be prejudiced if the judicial review proceedings are initiated.

6. The application was canvassed through written submissions. The interested party responded through brief written submissions in which she reiterated her case as set out in the grounds of opposition. The respondent did not file written submissions.

7. Through the present application, the court is invited to exercise judicial discretion in favour of the ex-parte applicant. The criteria upon which this discretion is exercised is well settled. In **Republic vs County Council of Kwale and Another; Ex-parte Kondo & 57 others (1998)/KLR (E&L) Waki J** (as he then was) captured the rationale and purpose of leave proceedings as follows:

The purpose of the application for leave to apply for judicial review is firstly, to eliminate at an 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 substantive hearing if the court is satisfied that there is a case for further consideration

8. In **Uwe Meixner & Another vs Attorney General (2005) eKLR** the Court of Appeal of Kenya held that leave of court is necessary because it served to filter out frivolous applications and the grant or refusal of leave is an exercise of judicial discretion.

9. The key ground upon which the present application is opposed is that it is time-barred. I have considered that ground in the context of the prevailing legal framework on judicial review proceedings. Judicial review proceedings now have a constitutional underpinning and are regulated by the framework in the Fair Administrative Action Act. Section 9 of the Act sets out the procedure for taking out judicial review proceedings. The statutory framework does not prescribe a specific time-frame within which judicial review proceedings are to be taken. It however requires the applicant to initiate judicial review proceedings without unreasonable delay.

10. Reliance on the framework in the Law Reform Act to the exclusion of the framework in the Administrative Action Act, in my view, is misplaced. I say so because judicial review now has a constitutional underpinning and an operationalizing statutory framework. It would be illogical to lock the applicants out of the seat of justice on the basis of the Law Reform Act which is a pre- 2010 legislation that governed judicial review proceedings at a time when the procedure was that practised in the High Court of England. The procedure has since changed and there is an all-encompassing statutory framework. Neither the respondent nor the interested party presented evidence of unreasonable delay on part of the applicant. In the circumstances, there is no proper basis for locking the applicants out of the seat of justice.

11. The second key ground of opposition is that the applicants ought to have filed a substantive civil suit as opposed to judicial review proceedings. I have considered this ground too. The evidential materials before court indicate that the present application was preceded by a substantive suit lodged by the interested party against the applicants. The interested party abandoned the said suit and the suit was subsequently dismissed by Msagha J for want of prosecution. In the circumstances, it does not make legal sense to tell the applicants to go and file yet another suit against the very interested party who abandoned her claim in court. The applicants contend that they are the registered proprietors and the cautioner has already lodged a notice withdrawing the impugned caution but the respondent has failed to register the withdrawal. There is therefore no proper basis for insisting that the applicants must file a substantive civil suit to vacate the caution.

12. The applicants are aggrieved that despite the cautioner having executed a notice of withdrawal of the impugned caution, the respondent has failed to vacate the caution. As a result, the applicants cannot exercise or fully enjoy their proprietary rights in the suit property, including the right to mortgage or dispose the property. In my view, *prima facie*, the applicants appear to have a case which merits further consideration through judicial review proceedings. Put differently, the contemplated proceedings are not frivolous or vexatious.

13. In light of the foregoing, I am satisfied that the applicants have satisfied the criteria for leave and for stay. I accordingly allow the chamber summons dated 5/3/2018 in terms of prayers 2, 3, 4 and 5. Costs shall be in the cause. The substantive motion shall be filed within 21 days and shall have Geoffrey Ochieng Ndeda as a 2nd Interested Party.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MAY 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Odongo holding brief for Mrs Wambugu for the ex-parte applicant

June Nafula - Court Clerk