



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

PETITION NO. 510 OF 2017

IN THE MATTER OF ARTICLES 2 & 3 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHT TO INFORMATION UNDER ARTICLE 35 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS (CHAPTER 4) UNDER ARTICLES 22 & 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 6, 7, 10 & 12 OF THE LAND REGISTRATION ACT (2012)

BETWEEN

SIMON PASUA OLE KAANTO.....PETITIONER

VERSUS

CHIEF LAND REGISTRAR.....RESPONDENT

AND

1. SAFES & LOCKS (K) LIMITED

2. NATIONAL BANK OF KENYA.....INTERESTED PARTIES

RULING

What is before Court for determination is the Petitioner's Notice of Motion dated the 25th January, 2016 brought pursuant to Articles 22, 23 & 35 of the Constitution of Kenya and Rules 4, 13, 19, 23, & 24 of the Constitution of Kenya (Protection of Rights & Fundamental Freedoms) Practice & Procedure Rules (2013) and all enabling provisions of the law.

The application is based on the grounds which in summary is that the Petitioner was the previous registered owner of land parcel number KAJIADO/LORNGUSUA/28 hereinafter referred to as the 'suit land'. On 21st June, 1991 the Petitioner entered into an agreement for the sale of 100 acres out of the suit land to the 1st interested party. On 7th October, 1991 the Petitioner subdivided the suit land with the intention of transferring the 100 acres to the 1st interested party. The 1st interested party made partial payments to the Petitioner but the alleged directors /officers of the company disappeared since 1993 without clearing the outstanding balance. In 2014, the Petitioner was informed by Police officers and he established that the suit land was transferred to the 1st interested party on 21st July, 1992. The Petitioner did not sign the transfer form or facilitate the transfer of the suit land to the 1st interested party and the alleged transfer was done without his consent and knowledge. The Petitioner requested the Respondent to be furnished with the documents used in support of the subject transfer but the Respondent has failed to comply with his request. The Petitioner has a constitutional right to be supplied with the documents requested so as to establish how the subject transfer was effected. Between 2013 – 2014 the suit land was charged to National Bank of Kenya by the 1st interested party to secure payment of a loan of Kshs. 24 million, with the said land being advertised for sale by public auction on 13th November, 2015 and he is apprehensive that it is possible the said land may be sold at any time. It is in the interest of justice that the Respondent and interested parties be restrained from doing any dealings over the suit land so as to safeguard the interests of the Petitioner

over it.

The application is supported by the affidavit of SIMON PASUA KAANTO, the Petitioner herein where he deposes that on 22nd November, 1976 he was registered as the proprietor of land parcel number KAJIADO/LORNGUSUA/28 measuring 333 acres and between 1978 – 1986 he obtained loans from the Agricultural Finance Corporation on the security of the said title. He states that he defaulted in loan repayments and decided to sell 100 acres out of the said land to SAFE LOCKS (K) LIMITED (1st Interested party) so as to settle the outstanding loan. He confirms that on 7th October, 1991 he subdivided the said land into three portions with the intention of transferring to the 1st Interested party the suit land which was one of the resultant subdivisions. He contends that the 1st Interested party never paid the full purchase price nor take up possession of the suit land. He avers that sometime in 2014, Police Officers visited his home at IL BISSIL seeking to know the particulars and whereabouts of the directors of the 1st Interested party and they informed him that title to the suit land was registered in its name. He reiterates that upon conducting a search, he established that the subject title to the suit land was transferred to the 1st Interested party on 21st July, 1992 and the same was currently charged to the bank for Kshs. 24 million. He denies signing any documents on transfer of the suit land and does not know how the same was effected. He further avers that his advocates wrote to the Kajiado County Land Registrar requesting to be furnished with certified copies of the documents used in effecting transfer from his name to the 1st Interested party, but the said Land Registrar only furnished uncertified copy of the Land Register and the did not furnish the rest of the documents. He confirms the suit land was advertised for sale in the DAILY NATION Newspaper on 13th November, 2015 for reasons unknown to him and is apprehensive that it is possible the subject matter may be sold at any time before the final hearing and determination of the Petition. He insists in the event there is change of ownership of the suit land, he will suffer great prejudice with the Petition being rendered a nullity. He reiterates that it is in the interest of justice that the subject matter of the Petition be preserved to protect his interests over the suit land. Further that by failing to furnish him with the requested documents, the Respondent has denied him the right to information which will assist him know how the suit land was transferred from his name to the 1st Interested party. He further states that the subjected transfer was effected by the Respondent and the documents requested ought to have been furnished to the Respondent for processing. Further that the documents requested ought to be in the custody of the Respondents and constitute information held by the state.

The Respondent opposed the Petition and filed Grounds of Opposition dated 1st September, 2016 where he stated as follows:

- There are no constitutional matters raised in the Petition capable of sustaining a constitutional application
- Without prejudice to (1) above, even if there were constitutional issues raised in the Petition, such rights cannot be enforced against the Respondent
- The Petitioner is guilty of laches and the Court should dismiss the Petition with costs.

The 2nd Interested party also opposed the application and filed a replying affidavit sworn by SAMUEL MUNDIA who is the Head of Commercial Transactions & Litigation where he averred that the 1st Interested party was the owner of the suit land which it charged to the 2nd Interested party to secure a loan of Kshs. 24 million but defaulted in repaying the same. He states that the 2nd Interested party issued the requisite notices and instructed messrs Spotlight Intercepts Auctioneers to sell the suit property through public auction. He confirms the suit land was sold by public auction on 13th November, 2015 and the highest bidder CAWA ENTERPRISES purchased it for Kshs. 24.5 million. He claims the lawyers for CAWA ENTERPRISES messrs Kale Maina & Bundotich Advocates informed the bank that there was a restriction registered on the title on 30th September, 2014 which was entered four(4) months after the suit land had been charged on 9th May, 2014. He reiterates that the 2nd Interested legally exercised its statutory power of sale and there was no fraud, as indeed no claim of fraud has been pleaded against the bank. He reaffirms that the alleged restriction was registered twenty (22) years after the transfer of the suit land to the borrower, hence the Petitioner is guilty of laches.

The Petitioner further filed a supplementary affidavit where he reiterated his claim and deposed that in December 2013 he recorded his statement with the Police and was unable to get the documents used to transfer suit land from the Kajiado Land Registry and that the Sale by Public Auction was brought to his attention by his two sons. He states that he has filed this Petition against the Chief Land Registrar to establish how the suit land was allegedly transferred from himself to the 1st Interested party without his knowledge and consent. Further that in the present application, he is seeking conservatory orders over the suit land.

The Applicant, Respondent and 2nd Interested Party filed their respective submissions which were highlighted on 20th September, 2017 that I have considered.

Analysis and Determination

Upon perusal of the Petitioner's Notice of Motion application dated 25th January 2016 including the supporting, replying/further affidavits plus the annexures thereon as well as the grounds of opposition and submissions, the only issue for determination is whether conservatory orders should be issued restraining the respondents and interested parties from registering any transactions on the suit land pending the outcome of the Petition.

It is not in dispute that the Petitioner was the original owner of the suit land which he sold to the 1st Interested party. It is also not in dispute that the 1st interested party made partial payments of the purchase price. It is further not in dispute that the 1st interested party got registered as the owner of the suit land on 21st July, 1992. . It is also not disputed that the suit land was sold by public auction by the 2nd Interested party. What is in dispute is the mode in which the 1st Interested party got registered as the owner of the suit land without the Petitioner's knowledge and later charged the suit land to the 2nd Interested party for Kshs. 24 million that it failed to repay culminating in the auctioning of the suit land. The Petitioner contends that he did not sign the transfer form to facilitate the transfer and the same was done without his knowledge and consent. Further that the suit land was advertised for sale by public auction on 13th November, 2015. He claims the Land Registrar Kajiado has failed to furnish him with all the documents relating to the transfer of the suit land to the 1st Respondent and this offends his constitutional right to information. He relied on the case of **Giella Versus Cassman Brown** to support his application for

conservatory orders pending the outcome of the Petition. He states that he has a prima facie case with a probability of success as he is the original owner of the suit land and stands to suffer irreparable loss if the same is sold by the 2nd Interested party.

The Respondent on the other hand contends that there is no constitutional matter raised in the Petition and that the Petitioner is guilty of laches as he has waited for over 20 years to request for documents from the Land Registrar. The Respondent further states that it is not clear who is in possession of the suit property and that the right to information is not an absolute right. Respondent avers that equity aids the vigilant and not the indolent and that the Petitioner's claim is statute barred.

The 2nd Interested party contended that the Petitioner has not presented an arguable case because the Bank's Statutory of Sale had properly crystallized and legally exercised, following the default by the borrower whom a loan of Kshs. 24 million was advanced and secured by a legal charge over the suit property. The property was sold to the highest bidder for Kshs. 24.5 million. Petitioner has not demonstrated any right infringed by the bank and the Petition should be dismissed with costs.

The applicant contended that the Petition is not directed to the 2nd Interested party but seeks documents from the Respondents and because the Respondent only furnished him with one document, it amounts to a violation of his right to information. He stressed that Article 35 of the Constitution does not provide for limitation of time and an order should be made for the documents to be supplied within a limited period.

I note that the Petitioner is seeking conservatory orders but has not enjoined the new buyer of the suit land. In the case of, **Andy Forwarders Services Ltd. vs. Capital Markets Authority and another [2011]eKLR**, Mumbi Ngugi J. stated as follows:-

“..... two conditions need to be satisfied for a conservatory order to issue, as in this I would agree with the respondents' submissions. The first is that the situation requires “conservation” so as to maintain the status quo pending the hearing of the petition. If the order is not issued this petition would be rendered nugatory. The second is whether the petitioner or the other party seeking a conservatory order has established a prima facie case with a probability of success.”

Further in the case of Kenya Commercial Bank Co. Ltd Vs. Afraha Education Society and Others (2001) 1EA 86, the Court of Appeal held as follows:

‘A party who has no registered interest in the suit parcel of land cannot be said to have a prima facie case with a probability of success for the purposes of grant of injunction.’

In this instant case, the suit land has already been sold by public auction and transferred to a third party who is not enjoined in this suit. The Petitioner alleges the 1st Interested Party was registered fraudulently as the owner of the suit land and charged it, culminating in the same being auctioned after the loan was not paid, but the 1st Interested Party did not enter appearance nor file any response to this Petition.

Section 99(4) of the Land Act provides as follows: **‘(4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.’**

The Petition has not alleged fraud on the part of the 2nd interested party, but the allegations of fraud raised by the Petitioner against 1st Interested party ought to have been canvassed in a substantive suit and not via this Petition. Further, the Petitioner is seeking conservatory orders and yet he admits knowing the suit land had been advertised in the papers for auction but he did not stop the sale and let the property pass to a third party. I concur with the Respondent that the Petitioner is guilty of laches

In relying on the circumstances above and the cited cases, I find that the Petitioner has not established a prima facie case against the respondent at this interlocutory stage. I find that no prejudice will be suffered by the Petitioner since the suit land was transferred to the 1st Interest party almost 25 years ago but he registered a restriction on the same which restriction has not been removed. In the circumstances of this case, it is necessary to maintain the status quo as it is currently, pending the hearing and determination of the petition.

The upshot of the foregoing is that the petitioner's Notice of Motion application dated 26th January 2016 is not merited and the same is disallowed.

The costs of the application shall be in the cause.

Costs will be in the cause

Dated, Signed and Delivered in Kajiado this 7th February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

M/s Ndinda holding brief for Ms Fahia for Respondent

N/A for Petitioner