



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC.MISC.APPL. NO.236 OF 2017
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW ORDERS IN THE NATURE OF
CERTIORARI AND PROHIBITION
BETWEEN
COMMERCIAL BANK OF AFRICA LIMITED.....APPLICANT
VERSUS
NATIONAL LAND COMMISSION.....1ST RESPONDENT
CHIEF LAND REGISTRAR.....2ND RESPONDENT
HON. ATTORNEY GENERAL.....3RD RESPONDENT
AND
APEX STEEL LIMITED.....1ST INTERESTED PARTY
PETER NZUKI NDETI.....2ND INTERESTED PARTY
RULING

What is before me is an ex parte Chamber Summons application dated 1st December, 2017 by Commercial Bank of Africa Limited (hereinafter referred to only as “the applicant”) seeking leave to institute judicial review application for orders of Certiorari and Prohibition against the respondents and for such leave if granted to operate as a stay of the decision sought to be challenged. The application has been brought on the grounds set out in the body thereof and in the statement and verifying affidavit of Dr. Jacob Ogola both dated 1st December, 2017. The applicant has contended that the 1st interested party is the registered owner of all that parcel of land known as Land Reference Number 337/4775 (formerly known as Land Reference Numbers 337/973, 337/3212 and 337/1868) (hereinafter referred to as “the suit property”). The applicant has contended that the 1st interested party created a charge and further charge over the suit property in favour of the applicant on 9th June, 2011 and 8th September, 2015 respectively to secure an aggregate sum of Kshs. 801,000,000/-. The applicant has contended that the charge aforesaid

has been registered against the title of the suit property while the further charge is awaiting registration. The applicant has contended that by virtue of its registration as a chargee in respect of the suit property, it had and still has a constitutionally recognized proprietary right over the suit property by dint of Articles 40 and 260 of the Constitution. The applicant has averred that through Gazette Notice No. 197 published on 17th July, 2017, the 1st respondent purporting to act under section 14(5) of the National Land Commission Act, 2012 directed the 2nd respondent to revoke the 1st interested party's title over the suit property and to uphold the title of the 2nd interested party in respect of the same property.

The applicant has contended that the 1st respondent published the said Gazette Notice while there was a petition namely, Petition No. 1028 of 2015 pending before this court involving all the parties herein in which the court had issued conservatory orders on 14th December, 2015 staying the determination that had been made by the 1st respondent with regard to a claim that had been made by the 2nd interested party against the 1st interested party in respect of the suit property and in which the 1st respondent had recommended the revocation of the 1st interested party's title. The applicant has averred that following the publication of the said Gazette Notice, the applicant through its advocates on record wrote to the 1st respondent pointing out that the said Gazette Notice was issued in flagrant disregard of the conservatory order mentioned above. The applicant has averred that on receipt of the said letter, the 1st respondent published another Gazette Notice on 10th November, 2017 ("the second Gazette Notice") in which it purported to stay the revocation of the 1st interested party's title in respect of the suit property pending the determination of the petition in which the said conservatory order was made. The applicant has contended that the purported stay of the impugned Gazette Notice of 17th July, 2017 was without jurisdiction and did not in any way purge the contempt of the orders that were issued in Petition No. 1028 of 2015 aforesaid. The applicant has contended that only this court has jurisdiction to revoke or stay the said Gazette Notice of 17th July, 2017 and as such the purported stay of the said Gazette Notice by the 1st respondent through the second Gazette Notice aforesaid was ineffectual for the purpose for which it was intended by the 1st respondent.

The applicant has contended that in purporting to revoke the 1st interested party's title over the suit property, the 1st respondent acted in excess of the jurisdiction that was conferred upon it under section 14 of the National Land Commission Act, 2012 as read with Articles 62, 64, 67 and 68(c)(v) of the Constitution. The applicant has contended that the 1st respondent's jurisdiction was limited to reviewing grants or dispositions in respect of public land. The applicant has averred that the suit property being private land, the grant or disposition in respect thereof was not amenable to review by the 1st respondent. The applicant has averred further that as a chargee in respect of the suit property, it was entitled to be notified of the proceedings that took place before the 1st respondent pursuant to which a decision to revoke the 1st interested party's title was made. The applicant has contended that it had no notice of such proceedings and as such was denied an opportunity to be heard before a decision that was prejudicial to its interest was made. The applicant has contended that its right to a fair administrative action guaranteed by Article 47 of the Constitution was violated by the 1st respondent. The applicant has contended further that failure by the 1st respondent to afford it an opportunity to be heard was contrary to the express provisions of section 14(3) of the National Land Commission Act.

The applicant has sought the following prayers:

1. THAT leave be granted to the applicant to apply for an order of Certiorari to remove into this Honourable Court and quash the decision of the 1st Respondent to revoke the title to the suit property as contained in its Gazette Notice No. 197 of 2017 dated 17th July, 2017.
2. THAT leave be granted to the applicant to apply for an order of Prohibition to prohibit the 1st respondent from purporting to conduct hearings, issue directives and/or make any further decisions in respect of the ownership the suit property as contained in Gazette Notice No. 197 of 2017 dated 17th July, 2017.

3. THAT leave be granted to the Applicant to apply for an order of Prohibition to prohibit the 2nd respondent from purporting to enforce the directive by the 1st respondent to revoke the title to the suit property.

4. THAT the grant of leave herein do operate as a stay of the decision of the 1st respondent as contained in Gazette Notice No. 197 dated 17th July, 2017 pending the hearing and determination of the Judicial Review application herein.

5. THAT the costs of and occasioned by this Application be provided for.

I have considered the application together with the statement and verifying affidavit filed in support thereof. I have also considered the submissions that were made before me by the applicant's advocate on 18th January, 2018. I am satisfied from the material before me that the applicant has established an arguable case against the respondents with regard to the 1st respondent's decision to revoke the 1st interested party's title over the suit property that was published in the Kenya Gazette of 17th July, 2017. In the Court of Appeal case of Njuguna vs. Minister for Agriculture [2000] 1 E.A 184, it was held that:

“the test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”

In the case of Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa (1998) 1 KLR (E&L) Waki J. (as he then was) set out the rationale for seeking leave as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications 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 fit for further consideration.”

The applicant has demonstrated that it was at all material times the proprietor of a charge that was registered against the title of the suit property on 27th September, 2011 to secure a sum of Kshs. 251,000,000/- that was advanced by the applicant to the 1st interested party. The applicant has contended that it was not heard before the 1st respondent's title against which the said charge was registered as a security was cancelled. Section 14 of the National Land Commission Act provides as follows:

“14. (1) Subject to Article 68 (c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.

(2) Subject to Articles 40, 47 and 60 of the Constitution, the Commission shall make rules for the better carrying out of its functions under subsection (1).

(3) In the exercise of the powers under subsection (1), the Commission shall give every person who appears to the Commission to have an interest in the grant or disposition concerned, a notice of such review and an opportunity to appear before it and to inspect any relevant documents.

(4) After hearing the parties in accordance with subsection (3), the Commission shall make a determination.

(5) Where the Commission finds that the title was acquired in an unlawful manner, the Commission shall, direct the Registrar to revoke the title.

(6) Where the Commission finds that the title was irregularly acquired, the Commission shall take

appropriate steps to correct the irregularity and may also make consequential orders.

(7) No revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in the title.

(8) In the exercise of its power under this section, the Commission shall be guided by the principles set out under Article 47 of the Constitution.

(9) The Commission may, where it considers it necessary, petition Parliament to extend the period for undertaking the review specified in subsection (1).”

There is no doubt that the applicant has substantial interest in the suit property. It is arguable whether or not it was entitled under section 14(3) and (8) of the National Land Commission Act to be notified of the proceedings that resulted in the revocation of the 1st interested party's title to the suit property against which its charge was registered. It is also arguable whether the Gazette Notice that was published on 17th July, 2017 was validly issued in view of the conservatory orders that were made by the court on 14th December, 2015 in Petition No. 1028 of 2015 which is pending hearing before this court. It is also arguable whether the grant or disposition of the suit property was amenable to judicial review. I am satisfied from the foregoing that the intended judicial review application is not frivolous and as such the applicant is entitled to the leave sought.

Whether or not leave to apply for an order of certiorari or prohibition should operate as a stay is a matter for the discretion of the court. Like any other discretion, it must be exercised judicially and in accordance with the established legal principles. I am of the view that the application for stay has no merit. The applicant has not demonstrated that it would be prejudiced in any way if the stay sought is not granted. The applicant has placed before the court a Gazette Notice that was published by the 1st respondent on 10th November, 2017 in which the 1st respondent indicated that it had stayed its decision to revoke the 1st interested party's title over the suit property pending the hearing and determination of Petition No. 1028 of 2015. Whether or not the said Gazette Notice is valid or not cannot be determined at this stage. What is not in doubt is that the 1st respondent has given an indication that it will not proceed with its decision to revoke the 1st interested party's title until the said petition is heard and determined. I don't think that it is necessary for this court to stay a decision that has been stayed by the maker. In any event, I am of the view that the interested party's interest in the suit property is well protected by the conservatory orders that were issued in Petition No. 1028 of 2015. Since the said order is still in force, it not necessary to issue yet another conservatory order in respect of the suit property. In my view there is no likelihood of the suit property being alienated while the intended judicial review application is pending.

The upshot of the foregoing is that the application dated 1st December, 2017 succeeds in part. The same is allowed in terms of prayers (2), (3) and (4) thereof. The costs of the application shall abide the outcome of the judicial review application.

Delivered and Signed at Nairobi this 19th day of April 2018.

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:-

Mr. Muchiri for the Applicant

Mr. Waweru Court Clerk