



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

MISC. CIVIL APPLICATION NO. 117 OF 2017 (JR)

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY
JURISDICTION AND PROTECTION AND FUNDAMENTAL RIGHTS AND**

FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND

PROCEDURE RULES 2013 ARTICLES 40(1), (2), (3), (4), (5),

AND (6) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CIVIL PROCEDURE ACT CAP 21 LAWS

OF KENYA AND CIVIL PROCEDURE RULES 53 RULE 1 (2)

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF: THE ESTATE OF LEKERA

KIKAE OLE REIPA (DECEASED)

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO

BRING AND FILE JUDICIAL REVIEW PROCEEDINGS

BY

MOHAMED SHAHID MOUGHAL (SUING AS THE BONA

FIDE OWNER OF 69 ACRES OF LAND ON PLOT

NO. KAJIADO/ IL DAMAT/3.....APPLICANT

AGAINST

1. NATIONAL LAND COMMISSION.....1ST RESPONDENT

2. LAND REGISTRAR, KAJIADO.....2ND RESPONDENT

3. ESTATE OF LEKERA KIKAE OLE REIPA....3RD RESPONDENT
4. MICHAEL MOOKE KIKAE.....4TH RESPONDENT
5. ATTORNEY GENERAL.....5TH RESPONDENT

RULING

The application before Court for determination is the Applicant's Notice of Motion dated the 21st August, 2017 brought pursuant to Order 53 rule 1, (2), (3), (4) Rule 2 Sub - rule 4(1) and 7 (2) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act of the Laws of Kenya and Articles 40(1), (2), (3), (4), (5) and (6) of the Constitution and all the enabling provisions of the law.

It seeks the following prayers:

1. Spent
2. The Honourable Court be pleased to grant leave to the Applicant to commence and file Judicial Review proceedings upon such terms it may deem fit and just.
3. That the Honourable Court be pleased to grant leave to file an Application seeking for orders of MANDAMUS, PROHIBITION and CERTIORARI against the 1st, 2nd, 3rd 4th and 5th Respondents herein.
4. Costs of this Application.

The application is supported by the affidavit of MOHAMED SHAHID MOUGHAL the Applicant herein where he deposes that he entered into a Sale Agreement with the 4th Respondent on 30th March, 2013 for 79 acres. He claims he has also fenced 69 acres of land which he owns pursuant to a Sale Agreement made with the 4th Respondent. He explains that he filed a caution on the said parcel of land and obtained a receipt from the Land Registry in Kajiado. He contends that the 4th Respondent applied for removal of the Caution vide a Notice to the Land Registry dated the 3rd July, 2014 which he objected to, by paying Kshs. 2000 on 15th July, 2014 vide receipt No. 3609399. He avers that the 2nd Respondent unlawfully removed the Caution without his permission, consent or Court Order as the matter was already in Court vide Nairobi ELC Case No. 999 of 2012. He reiterates that the action of the 2nd Respondent amounts to an abuse of office and misuse of the power bestowed on him by issuing titles to other people against the Sale Agreement that was duly executed.

The 2nd and 3rd Respondents filed Grounds of Opposition dated the 18th September, 2017 where they stated as follows:

- i. The subject matter of the instant application has been determined vide Cause No. 680 of 2010 to which the Applicant including the 3rd and 4th Respondents were parties and the same was determined in favour of the Respondent.
- ii. The Application is also an abuse of the Court process as it is subject of Nairobi HCCC No. 999 of 2012 but transferred to this Honourable Court on 23rd May, 2017 for hearing and final determination.
- iii. The subject matter formed the complaint in the proceedings, in criminal case No. 1691 of 2014 (Republic V Michael Kikaye Mooke) in which the Applicant filed a criminal complaint against them leading to his trial in the case that ended up with his acquittal.
- iv. The application is misconceived and lacks merit befitting dismissal.

The Applicant filed a further affidavit where he stated that the Land Registrar illegally issued titles to other people without a survey and or having made visits to verify if the land is empty or not. He insisted that the Land Registrar removed the caution he had registered 5 from the existing records so as to conceal the truth and further overlooked the objection he had raised on removal of the caution without a court order or his consent. He reiterated that the orders he was seeking are directed to the Land Registrar who made the entries to the land in dispute despite a caution having been registered on it, which orders he wants quashed to enable him process his title.

The 4th Respondent MICHAEL MOOKE KIKAYE filed a replying affidavit where he deposed that from the onset, the 3rd Respondent has been wound up following the distribution of the estate of the late LEKERA OLE REIPA since the year 2015. He contends that the subject matter of the intended Judicial Review proceedings is the subject matter in the Succession Cause No. 680 of 2010 which has been determined and the pending Cause No. 75 of 2017 which is before this Court pending determination. He avers that the intended Judicial Review Proceedings are intended to prejudice the aforementioned matters which have conclusively dealt with the issues raised in the instant matter. He claims the Applicant has forcefully trespassed on his land with protection from the Police Officers of Kajiado Police Station who are compromised so as to harass him after failing to sustain a conviction in the Criminal Charges levelled against him which were instigated by the Applicant vide Criminal Case No. 1691 of 2014 – Republic V Michael Kikaye Mooke. He avers that the removal of the alleged caution from his title was lawfully done and procedurally effected by the 2nd Respondent and there is no basis for the instant proceedings as the subdivision of the subject land was effected in the year 2015, with all the beneficiaries have taken possession of their titles as well as their respective pieces of land.

He reiterates that the application by the Applicant is an abuse of the Court process and intended to steal his property by force as the

Applicant is busy excavating soil from his land, cutting down trees and grazing animals thereon without due regard to the value of the property.

The applicant filed a supplementary affidavit where he reiterated his claim and insisted his application is properly before the Court. He contends that the 4th Respondent is trying to deny him his right to the land that he owns and is calling him a trespasser while he obtained money under an agreement which is still binding to date, and he is legally on the parcel of land he is occupying. He states that the 4th Respondent has also breached the agreement of Sale and he intends to seek a remedy for damages.

Both parties submitted on the application on 23rd January, 2018 which submissions I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion including the supporting/replying and further affidavits, Grounds of Opposition as well as the annexures thereon, I find that the only issue for determination is whether the Applicant is entitled to leave to commence judicial review proceedings

I note that the Land Registrar removed the caution on 14th March, 2012 and the Applicant submitted that he confirmed this one month later. The Respondents contend that the Applicant was served with a Notice for removal of Caution, which is one of the annexures herein, and was well aware there was an intention to remove the Caution, which he objected to. They insist the Applicant's application for leave had already been determined in another forum vide a Succession Cause and there is also a pending suit within this Honourable Court where the dispute over the suit land is yet to be determined.

In the case of **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996 Waki, J** (as he then was) provided the parameter for granting leave to file judicial review and stated 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 requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

I note in the current scenario the Applicant was indeed aware of the Land Registrar's intention to remove the Caution as he was notified in accordance with the Law. I further note that there is already a pending case within this Court which is yet to be determined that deals with the dispute relating to the suit land. Judicial review, is a remedy of last resort and should not be sought for, in an instance where other appropriate remedies exist to redress the complaint.

It is against the foregoing and relying on the judicial authority cited above that I decline to exercise my discretion and grant the Applicant the order sought for leave to institute judicial review. I proceed to strike out the proceedings herein as they are misconceived.

Each party to bear their own costs

Dated signed and delivered in open court at Kajiado this 12th day of June, 2018.

CHRISTINE OCHIENG

JUDGE