



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

JR MISCELLANEOUS APPLICATION NO. 82 OF 2017

(Formerly MACHAKOS JR MISC. APPLICATION NO. 242 OF 2010)

IN THE MATTER OF AN APPLICATION BY JOSEPH

NDEGWA KAMAU FOR ORDERS OF MANDAMUS,

CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE SUCCESSION ACT CAP. 160 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP. 300 LAWS OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORM ACT CHAPTER 26 LAWS OF KENYA

REPUBLIC.....APPLICANT

AND

THE LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

JOSEPH NDEGWA KAMAU.....EX PARTE

AND

DICKSON KOIPATON KETON.....1ST INTERESTED PARTY

GODFREY OLOISHORUA KETON.....2ND INTERESTED PARTY

AMOS MUNEI KETON.....3RD INTERESTED PARTY

JUDGEMENT

The application before Court for determination is a Notice of Motion dated 17th November, 2010 and filed on 18th November, 2010 brought pursuant to the Law Reform Act and all the other enabling provisions of the law. The Ex parte Applicant seeks the following orders:

1) An order of certiorari calling into this court the register of KAJIADO/ KISAJU/ 4157 and quash the entries number 4. 1.10.2010 RAPHAEL LERIONKA KAPAI (RL. 7)

5. 12. 10. 2010 MAGDALENE WAIRIMU LERIONKA together with the title deed issued.

2) An order of certiorari calling into this court the register of KAJIADO/ KISAJU/ 4158 and quash the entries number 4. 1.10.2010 RAPHAEL LERIONKA KAPAI (RL. 7) 5. 12. 10. 2010 MAGDALENE WAIRIMU LERIONKA together with the title deed issued.

3) An order of Mandamus compelling the District Land Registrar to revert the register for KAJIADO/KISAJU/ 4157 back to the testator the late Mosomba Ene Keton Koponi.

4) An order of Mandamus compelling the District Land Registrar to revert the register for KAJIADO/ KISAJU/ 4158 back to the testator the late Mosomba Ene Keton Koponi.

5) Costs of this application be borne by the respondents.

The application is supported by the statutory statement dated the 28th October, 2010 and the affidavit of JOSEPH KAMAU NDEGWA sworn on 28th October, 2010.

In the statutory statement, it highlights the reliefs sought and he states that the actions of the District Land Registrar Kajiado have contravened section 51 of the Law of Succession Act in that land parcel number KAJIADO/ KISAJU/ 3041 left behind by the late Mosomba Ene Keton Koponi upon her demise on 23rd April, 2005 was subdivided into parcels numbers KAJIADO/ KISAJU/ 4156, 4157 and 4158 respectively, by her sons before confirmation of Letters of Administration Intestate. Further when the Land Registrar, Kajiado registered a Mutation over KAJIADO/ KISAJU/ 3041 on 23rd December, 2009, he was promoting an illegality. Further, he registered the subdivisions and issued titles thereto in the deceased's name on 11th January, 2010. The two sons then applied for Grant in May, 2010 vide Kajiado Succession Cause No. 12 of 2010 – In the matter of the **Estate of Mosomba Ene Keton Koponi**, listing the aforesaid resultant subdivisions: land parcel numbers KAJIADO/ KISAJU/ 4156, 4157 and 4158 respectively, as assets of the deceased estate. The Letters of Administration Intestate were issued to Dickson Koipaton Keton and Godfrey Oloishorua Keton on 5th July, 2010. Further, on 1st October, 2010 and 12th October, 2010, the District Land Registrar registered the transfer of Land Parcel Number KAJIADO/ KISAJU/ 4157 and KAJIADO/ KISAJU/ 4158 and issued title deeds thereto to Raphael Lerionka Kapai and Magdalene Wairimu Lerionka respectively. Further, that the registration of the transfer to the two persons was done before the confirmation of the Grant in contravention of the Law of Succession Act as well as the Registered Land Act. That the registration of the transfer before distribution deprived the applicant the opportunity to assert his rights as a creditor to the estate, in the tune of Kshs. 933,000/= , in contravention to the Law of Succession Act that expects an administrator to satisfy creditors before distributing the net estate. That, the administrators procured the subdivision of KAJIADO/ KISAJU/ 3041 into KAJIADO/ KISAJU/ 4156, 4157 and 4158 respectively and registered the same by impersonating the deceased, which forgery was sanitized by the Registrar's registration of the same. The registration of the transfer and issuance of the title deeds to KAJIADO/ KISAJU/ 4157 and KAJIADO/ KISAJU/ 4158 to Raphael Lerionka Kapai and Magdalene Wairimu Lerionka respectively, be quashed and the same be reverted to the testator.

In the supporting affidavit of JOSEPH KAMAU NDEGWA sworn on 28th October, 2010, he deposes that the estate of MOSOMBA ENE KETON KOPONI is the subject matter in the Kajiado Senior Resident Magistrates Court Case Number 12 of 2010, which application for letters of Administration Intestate was lodged in May 2010 by Dickson Koipaton Keton and Godfrey Oloishorua Keton. Further, the Grant of Letters of Administration Intestate therein are yet to be confirmed. He avers that land parcel number KAJIADO/ KISAJU/ 3041 was subdivided to create KAJIADO/KISAJU/4157 and KAJIADO/ KISAJU/ 4158 respectively on 11th January, 2010, after the owner MOSOMBA ENE KETON KOPONI had died and could not have signed the mutation forms, which was in contravention with section 45 of the Law of Succession Act. He confirms that it was upon this realization that a restriction was placed on the said parcels of land. Further, that he is a creditor to the estate, having paid the two dependants a total of Kshs. 933,000/= in exchange for four (4) acres in land parcel number KAJIADO/KISAJU/3041 that was fraudulently subdivided and transferred. He explains that the transfer and identification of his portion of the four (4) acres was awaiting confirmation of Grant of Letters of Administration Intestate in respect to the estate of MOSOMBO ENE KETON KOPONI and he was dismayed to learn of the said transfer. He contends that he is moving to lodge his objection as a creditor in Kajiado SRM Court Cause No. 12 of 2010. He reiterates that if the transfer of the subdivisions of KAJIADO/ KISAJU/ 3041 are not quashed, the confirmation of Grant will be an exercise in futility and he will be unable to assert his rights as a creditor to the estate.

The 1st and 2nd Respondents opposed the application by filing Grounds of Opposition where they stated as follows:

1. That the ex parte Applicant's application is premised on an alleged mutation by the 1st Respondent on 23rd December, 2009 and subsequent registration on various date in October, 2010.

2. That the ex parte applicant's application raises matters which are evidentiary in nature calling for both further documentary evidence and viva voce evidence which in effect oust the amenability of the application to Judicial Review orders.

3. That by the fact of the allegations of fraud, the application should be subjected to the test of fraud being between the balance of probability and beyond reasonable doubt, the evidentiary material placed before the court to back up the application are insufficient and should be probed in civil court.

4. That the Respondents contend that this Honourable Court lacks jurisdiction to hear this matter due to the existence of the Environmental & Land Court and the matter should be placed before that court.

5. That the costs of this application be borne by the ex parte Applicant.

The applicant and Interested parties' filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the instant judicial review application, including the supporting affidavit, Grounds of opposition as well as the submissions relied upon; the following are issues for determination:

- Whether the ex parte applicant has demonstrated sufficient interest to be granted the orders sought.
- Who shall bear the costs of the application herein.

On the question as to whether the ex parte applicant has demonstrated sufficient interest to be granted the orders sought. It is the ex parte applicant's contention that the District Land Registrar Kajiado contravened section 51 of the Law of Succession Act in registering the resultant subdivisions from land parcel number KAJIADO/ KISAJU/ 3041, 11th January 2010 as there was no Confirmation for the Letters of Administration Intestate in respect of the state of Mosomba Ene Keton Koponi. He contends that the sons of the deceased Dickson Koipaton Keton and Godfrey Oloishorua Keton were issued with Letters of Administration Intestate on 5th July, 2010 and that on 1st October, 2010 and 12th October, 2010, respectively the District Land Registrar registered the transfer of Land Parcel Number KAJIADO/ KISAJU/ 4157 and KAJIADO/ KISAJU/ 4158 and issued title deeds thereto to Raphael Lerionka Kapai and Magdalene Wairimu Lerionka. He claims that the registration of the transfer before distribution of the deceased estate deprived him of the opportunity to assert his rights as a creditor to the tune of Kshs. 933,000/= as he had purchased four (4) acres to be excised from KAJIADO/ KISAJU/ 3041 from the two administrators of the deceased estate, before the deceased estate had been distributed. He sought for the registration of the transfer of the subdivisions from KAJIADO/ KISAJU/ 3041 to be quashed and the parcels of land revert to the testator. He produced the Mutation Forms and Sale Agreement dated the 25th July, 2006 as his exhibits, and submitted that it was wrong for the Interested Parties to apply for succession over the subdivided parcels of land and exclude him. He referred the Court to section 45 (1) and section 55 of the Law of Succession Act to support his arguments. He insisted the subdivisions were done without a valid Certificate of Confirmation of Grant and is hence irregular. He argued that the creation of KAJIADO/ KISAJU/ 4157 and KAJIADO/ KISAJU/ 4158 is illegitimate and should hence be reversed. He relied on several judicial authorities including the case of **High Court JR Number 689 of 2001 – Lillian Muranja vs Kajiado Land Disputes Tribunal; and Nairobi JR Miscellaneous Application NO. 76 of 2006 – Mohammed Zafar Niaz Saeed Chaudhry Vs Permanent Secretary, Ministry of Education** to support these arguments. He further relied on the case of **Ali Bin Hamisi Vs Salim Bin Hamisi Kirobe CA No. 18 of 1993 and Omega Enterprises Limited Vs KTDC and 2 others Civil Appeal No. 9 of 1993** where the Court stated that null and void acts do not confer legitimacy. He further submitted that he has demonstrated the nature of his interest, for the reversal of the subject parcels of land back to the deceased estate and the disinterment of KAJIADO/ KISAJU/ 3041. He averred that he will canvass the issue of locus in the succession cause.

The Interested Parties submitted that the Sale Agreement does not confer any right to the Applicant and further the Sale was voided due to lack of consent from the Land Control Board. They cited several judicial authorities including the case of **KARURI V GITURU CIVIL APPEAL NO. 25 of 1980; SIMIYU V WALUMBAMALA (1985) KLR 852** to support their arguments. The interested parties further submitted that the contract of Sale of Land was illegal hence unenforceable, and they relied on the case of **Patel V Singh (No. 2) (1987) KLR 585** to support their claim. They insisted the Applicant was not entitled to the orders of Certiorari and Mandamus in the circumstances of this case as he had failed to demonstrate an interest in the deceased person's estate. Further, that the said orders cannot issue unless the affected persons were all served. They contended that the Notice of Motion should be dismissed and the Applicant compelled to cater for the costs.

I note Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness”...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

In line with these set standards, it is hence pertinent to decipher whether the 1st and 2nd Respondent's actions in registering the subdivisions and transfers of KAJIADO/ KISAJU/ 4157 and KAJIADO/ KISAJU/ 4158 respectively, to Raphael Lerionka Kapai and Magdalene Wairimu Lerionka as proprietors was rational, reasonable and that he observed the basic rules of natural justice. In considering the respective parties arguments, I note the dispute herein arose from the aforementioned Sale Agreement between the Applicant and the Interested Parties. From a cursory look at the said Sale Agreement, it is clear the Applicant was well aware that the Interested Parties were entering into an agreement with him and yet they not endowed with the legal capacity to do so as they did not have letters of administration intestate. In the said Sale Agreement at the section on Special Conditions at Clause ‘1’ it reads: **The vendors are the sons and personal representatives of**

MOSOMBA ENE KETON and sell the property in that capacity and further undertake to obtain the grant of representation to the estate of the deceased for purposes of obtaining the consents to subdivide and transfer the same.'

In the circumstances, I find that the Applicant cannot hence turn around when there is frustration of contract and blame the Land Registrar, yet he was well aware that the vendors were yet to obtain letters of administration intestate in respect of deceased estate, before the contract was to be completed.

On the question of orders of Mandamus and Certiorari which are sought by the Applicant, the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** set out the parameters of judicial review and intimated as follows:

The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

It is the Applicant's contention that the Respondents sanitized the acts of illegality committed by the interested parties and registered the subdivisions that culminated in his rights being infringed upon. The Respondents opposed the application for judicial review and argued that the said application raises matters, which are evidentiary in nature calling for both, documentary evidence including viva voce evidence to be adduced which in effect oust the amenability of the application to Judicial Review orders. Further, that the allegations of fraud should be subjected to the test of fraud being between the balance of probability and beyond reasonable doubt, and currently the evidentiary material placed before the court to back up the application are insufficient and should be probed in a civil court.

I indeed concur with the respondents that the allegations of fraud contained in the application can only be determined once oral evidence is adduced and not in this instant application. It is trite law that where fraud is alleged, viva voce evidence ought to be adduced to enable the court make a proper determination. I hence find that the instant judicial review process is not the proper avenue where the Court can make a proper determination of the said allegations of fraud.

I note the Applicant seeks orders of mandamus and certiorari against the Land Registrar Kajiado to quash the registration of Raphael Lerionka Kapai and Magdalene Wairimu Lerionka and revert the register for KAJIADO/ KISAJU/ 4157 back to the testator the late MOSOMBA ENE KETON KOPONI. In the current scenario, insofar as the Applicant's right had been infringed upon, he has a legal remedy under the Law of Succession Act as well as to institute a civil case against the vendors for breach of contract and specific performance. The Applicant admits that he intends to lodge an objection within the abovementioned succession cause as well as seeking a remedy for judicial review herein. The Applicant seeks the Court intervention to reverse the registration of Raphael Lerionka Kapai and Magdalene Wairimu Lerionka yet from the perusal of the pleadings filed in the abovementioned succession cause, which were presented herein, they were indicated as creditors to the deceased estate and granted a share of the suit land in the said succession cause. It is hence my finding that this Court does not have the jurisdiction to reverse the proceedings relating to as succession cause but this can only be done within the succession cause at the High Court. I further find that the Land Registrar had the legal capacity to register the documents presented to him, since no party complained before the said documents were registered.

It is against the foregoing that I find the Notice of Motion dated 17th November, 2010 and filed on 18th November, 2010 unmerited and dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 17th day of July, 2018.

CHRISTINE OCHIENG

JUDGE