



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

JUDICIAL REVIEW APPLICATION No. 35 OF 2012

BETWEEN

MWARIKI FARM LIMITED.....APPLICANT

AND

LAND REGISTRAR NAKURU.....RESPONDENT

AND

ERNEST MAINA.....1ST INTERESTED PARTY

JOSPHAT KAMAU KURIA.....2ND INTERESTED PARTY

JUDGMENT

1. By Notice of Motion dated 18th June 2012, the applicant herein sought the following orders:

a) THAT this honourable court be pleased to issue orders of certiorari against the respondent to bring to this court and quash the decision of the respondent to award the title documents of Kiambogo/Kiambogo Block 2/541 and 558 to the interested parties herein without the authority of the applicants as per the provisions of section 79(2) of the Land Registration Act No. 3 of 2012.

b) THAT this honourable court be pleased to issue orders of mandamus against the respondent herein (Land Registrar Nakuru) to compel him to issue the applicants with a title to all that piece of land within Mwariki Farm known as Kiambogo/Kiambogo Block 2/541 and 558 which was set aside for a secondary school and a primary school respectively as per the provisions of section 25 of the Land Registration Act No. 3 of 2012 and to compel the respondent to summon the interested parties to give information on requisition as per section 14 of the Act.

c) THAT costs be provided for.

2. The application is supported by an affidavit sworn by the Jim K. Kairu, the chairman of the board of directors of the applicant. It is deposed therein that the applicant owns the parcel of land known as Kiambogo/Kiambogo Block 2 and that the parcel of land known as Kiambogo/Kiambogo Block 2/541 (hereinafter plot 541) was set aside by the applicant for the establishment of a secondary school. That the said plot was subdivided and registered behind the backs of the applicant's directors as new parcels being Kiambogo/Kiambogo Block 2/14283 (hereinafter plot 14283) and Kiambogo/Kiambogo Block 2/14284 (hereinafter plot 14284) in the names of the 1st and 2nd Interested Parties. Despite complaints by the applicant, there was no response from the respondent.

3. The respondent opposed the application through a short replying affidavit sworn by Caleb W. Sunguti, the County Land Registrar Nakuru. It is deposed therein that the suit property was registered in the name of the 2nd Interested Party on 5th March 2004 and that the said title has since been closed upon subdivision of the property into several plots. Further, that there is no indication in the green card that the plot belongs to a school.

4. The 1st Interested Party opposed the application through his affidavit sworn on 26th June 2013. He deposed therein that he bought plot 14284 from the 2nd Interested Party and that he was later issued with a title in respect thereof. The said plot was earlier on part of plot 541. Plot 14284 no longer exists since he later subdivided it into other plots and sold them. He no longer has any interest in the subdivisions.

5. Despite being served, the 2nd respondent neither filed any response to the application nor participated in its hearing.

6. The application was heard by way of written submissions. The applicant argued in its submissions that since plot 541 belonged to it and

was set aside for a secondary school, it was incumbent upon the respondent to show how the plot was alienated in favour of the Interested Parties. In the absence of such evidence, the applicant urged the court to find that the alienation was irregular and to grant the orders sought.

7. On his part, the 1st Interested Party submitted among others that the prayer for certiorari is time barred, that the orders sought are not merited and that mandamus is not an appropriate and efficacious remedy in the circumstances.

8. I have considered the application, the affidavits filed, submissions and authorities cited. The issues that emerge for determination are firstly whether judicial review is an appropriate and efficacious remedy in the circumstances; secondly whether the orders sought are merited and finally who bears costs of the case.

9. The applicant's case is that it owns the parcel of land known as Kiambogo/Kiambogo Block 2 and by extension plot 541 which is apparently a subdivision of Kiambogo/Kiambogo Block 2. That plot 541 was subdivided and registered without its knowledge or consent into plot 14283 and plot 14284. The new plots were registered in the names of the 1st and 2nd Interested Parties. According to the applicant, the respondent has failed to show how plot 541 and its subdivisions were alienated in favour of the Interested Parties. Consequently, the applicant maintains that the orders sought should issue.

10. Though the applicant also sought orders in respect of another plot being Kiambogo/Kiambogo Block 2/558, a perusal of the record shows that leave to commence judicial review proceedings as granted on 5th June 2012 was only in respect of Kiambogo/Kiambogo Block 2/541. Accordingly, the orders sought cannot issue in respect of Kiambogo/Kiambogo Block 2/558. Indeed, the applicant has not mentioned Kiambogo/Kiambogo Block 2/558 in both the affidavit in support of the Notice of Motion and in the submissions.

11. A perusal of the prayers in the Notice of Motion shows that the applicant essentially seeks cancellation of registration of the respondent as proprietor of plot 541 and an order compelling the respondent to register the applicant as proprietor of the said plot. The reasons advanced for the proposed cancellation are that the plot was registered in favour of the interested parties irregularly and without the consent of the applicant which claims to have been the owner. Nevertheless, the applicant acknowledges in the affidavit in support of the Notice of Motion that plot 541 has since been subdivided into new plots being plot 14283 and plot 14284. This is confirmed by the Certificates of Official Search as at 22nd February 2011 annexed to the affidavit as JKKVI and JKKVII. Further confirmation of this is also found in the replying affidavit of the 1st Interested Party wherein he states that he bought plot 14284 from the 2nd Interested Party and that he later subdivided it into other plots and sold them to other persons who are not parties to this case. He annexed a copy of a mutation form which shows that the plot was subdivided into 22 new plots. The upshot of all this is that plot 541 and plot 14284 no longer exist on the register following the subdivision.

12. Pursuant to the provisions of **sections 25 and 26 of the Land Registration Act**, the rights of a registered proprietor of land are protected and such ownership can only be challenged on limited grounds. The sections provide:

25. Rights of a proprietor

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...

13. It follows therefore that to successfully challenge the titles herein the applicant would need to plead and prove its allegation that plot 541 and its resultant subdivisions were registered in favour of the interested parties irregularly, illegally or unprocedurally and further show that the interested parties were party to such ills. In my view, that would require a hearing where oral evidence is taken. Judicial review proceedings which are by way of affidavit evidence are not appropriate and efficacious for that kind of a situation. In any case, there is a clear avenue for nullification for titles under the **Land Registration Act**. The applicant has not shown any reason why it could not move the court through regular proceedings by way of a plaint.

14. In **Maurice Adongo Anyango v Kenyatta International Convention Centre [2018] eKLR**, the Court of Appeal stated:

We do not think given the circumstances of this case that the judicial review orders sought were the most efficacious remedies.

Furthermore, this Court has in several decisions held that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. See for instance Speaker of the National Assembly v Karume (supra). The appellant's claim was based on a contract of employment. A specialized court exists to deal with employment matters and it would cause jurisdictional rivalry and/or confusion if courts would allow litigants to shuffle between any courts, even if they are of equal status. Accordingly, we cannot fault the Judge for determining the application on that narrow issue. It was sufficient to dispose of the application. ...

15. In view of the foregoing, I answer issue number 1 by finding and holding, as I now do, that judicial review is not an appropriate and efficacious remedy in the circumstances of this case.

16. That leads me to issue number 2: whether the orders sought are merited. Having answered issue number 1 by holding that judicial review is not an appropriate and efficacious remedy in the circumstances of this case, it seems to me that the matter can rest there and that I really don't have to address issue number two. Nevertheless, I will address it for completeness of the record.

17. As I understand it, the applicant is contending that there were no proper or valid reasons for the respondent to register the interested parties as owners of plot 541 and its resultant subdivisions. That amounts to inviting the court to revisit the merits of the respondent's actions. Needless to state, the judicial review orders of certiorari and mandamus which the applicant is seeking are concerned not with merits of a decision but the decision making process. As such, the judicial review orders of certiorari and mandamus cannot issue to the applicant on that ground.

18. Further, as I have previously noted herein, plot 541 and plot 14284 no longer exist on the register following their subdivision and sale. The applicant is aware of the fact of the subdivisions. Some of the purchasers of the new subdivisions have not been joined to this matter. Naturally, they have a right to be heard before any orders affecting their properties are made.

19. Though the orders sought are only in respect of plot 541 and not its subdivisions, it would be futile to issue the orders in view of the fact that the plot no longer exists on the register following the subdivisions. A court of law does not act in vain. I have said enough to show that I am convinced that the orders sought are not merited. That settles issue number 2.

20. In the end, I dismiss Notice of Motion dated 18th June 2012 with costs to the respondent and the 1st Interested Party. I award no costs to the 2nd Interested Party since he did not participate in the proceedings.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 26th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Katithi for the applicant

No appearance for the respondent

No appearance for the 1st Interested Party

No appearance for the 2nd Interested Party

Court Assistant: Gichaba