



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC PETITION NO. 614 OF 2013

FALCON KENYA LIMITED.....APPLICANT

VERSUS

CHIEF LANDS REGISTRAR.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

ABDULLAHI MUIRURI MUIGAI.....1ST INTERESTED PARTY

RAYMOND MWANGI WAWERU.....2ND INTERESTED PARTY

KARIUKI NJOROGE.....3RD INTERESTED PARTY

PETER KARUMBI KEINGATI.....4TH INTERESTED PARTY

JOSEPH NDUATI NGENDO.....5TH INTERESTED PARTY

KIAMBU DANDORA FARMERS

CO. LIMITED.....6TH INTERESTED PARTY

RULING

The Petitioner filed this Petition on 14th May, 2013 against the Respondents seeking:

- (1) An order of mandamus directing the Respondents to release to the Petitioner forthwith all documents of title relating to L.R No. 13379/3 submitted to them by the Petitioner for purposes of discharge of charge.
- (2) An order that the Respondents do unconditionally register the discharge of charge on the title of the property within such time frame as may be deemed appropriate by the court.
- (3) That the court do make, issue and give further and/or such further consequential orders, directions and/or findings as it may find fair and just to grant for the purposes of restoring the dignity and integrity of the Respondents' offices and further for the purposes of enforcing or securing the enforcement of the mandatory provisions of the law as envisaged in the Constitution of Kenya and the orders of the court.
- (4) An award of aggravated, exemplary and/or general damages together with mesne profits for the loss of user of the land.
- (5) Costs and interest.

In its petition dated 9th May, 2013, the Petitioner averred that L.R No. 11379/3 (hereinafter "the suit property") was transferred to it by Dandora Housing Schemes Ltd. (hereinafter referred to as "Dandora Housing") in 1981. The Petitioner averred that sometimes in 1998, it charged the suit property and on 9th January, 2011, it presented its title together with a discharge of charge to the 1st Respondent for registration. The Petitioner averred that its title to the suit property together with the discharge of charge were confiscated by the 1st Respondent without any explanation and the same had not been returned. The Petitioner averred that the decision by the 1st Respondent not to return the said title documents without giving reason amounted to a violation of its right to a fair administrative action guaranteed under

Article 47(2) of the Constitution. The Petitioner averred that from the time it lodged the said title document and discharge of charge for registration, the 1st Respondent had not communicated to it as to what had happened to the documents which is a violation of its right under Article 47(1) of the Constitution to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The Petitioner averred that the aim of the Respondents was to dispossess it of the suit property in violation of Article 40 of the Constitution. The Petitioner averred that it had absolute rights over the suit property and was entitled to be given back its title. The Respondents have not responded to the Petitioner's Petition.

On 23rd July, 2015 the Interested Parties were added to the petition as parties. The Interested Parties responded to the petition through a replying affidavit sworn by the 6th Interested Party's director Joseph Mwangi Karanja on 15th October, 2015. In their affidavit, the Interested Parties contended that the suit property was owned solely by the 6th Interested Party and that its title is held on behalf of the 6th Interested Party by its trustees. The Interested Parties contended that the original title for the suit property was in their possession and that they had produced the same in court for inspection. The Interested Parties averred that the said original title was neither lost nor had it been kept by the 1st Respondent, the Commissioner of Lands or any other authority. The Interested Parties contended that the allegations contained in the Petitioner's Petition were all false and amounted to perjury. The Interested Parties termed the Petitioner's director, Cornelius Peterson Waithaka "a fraudulent character" who had been engaged in fraud and forgery involving the suit property that belonged to the 6th Interested Party. The Interested Parties averred that the dispute over the ownership of the suit property as between the Interested Parties, Cornelius Peterson Waithaka ("Waithaka") and the Petitioner was heard and conclusively determined in Nairobi HCCC No. 1348 of 1972 and Nairobi HCCC No. 1088 of 2000 in which the 6th Interested Party's title to the suit property was upheld.

The Interested Parties averred that Waithaka forged a Provisional Certificate of title for the suit property and made entries therein transferring the suit property to Dandara Housing Schemes Ltd. on 16th December, 1997 and thereafter to the Petitioner on 11th December, 1998 before charging the property to a company known as Simply Perfect Development Company Limited on the same day. The Interested Parties averred that the acquisition of the said Provisional title and the entries made on the title thereafter were fraudulent and that Waithaka was arrested on account thereof and charged at Makadara Senior Principal Magistrate's Court in Criminal Case No. 516 of 1999. The Interested Parties averred that the title for the suit property was not lost and that the purported Gazette Notice that was issued by the 1st Respondent about the loss of the said title and its intention to issue a Provisional Certificate of title to the Petitioner was a further act of fraud on the part of Waithaka for which he should be arrested. The interested Parties contended that the issues raised in the Petition herein are res judicata since the same were fully and finally determined in Nairobi HCCC No. 1348 of 1972.

What is now before me is the Interested Parties' Notice of Motion application dated 20th August, 2015 seeking to strike out the Petitioner's Petition with costs as an abuse of the process of the Court. The application which is supported by the affidavit of the 6th Interested Party's director Joseph Mwangi Karanja was brought on the same grounds set out in the Interested Parties' replying affidavit the contents of which I have highlighted at length above. The Interested Parties have contended that the Petitioner has sought an order of mandamus directed at the 1st Respondent to release to it the title relating to the suit property. The interested parties have contended that the Petition is based on falsehood and lies in that the title for the suit property is in the possession of the Interested Parties and that the same is not lost neither has it been surrendered to the 1st Respondent. The Interested Parties have averred that on 23rd July, 2015 the court had directed them to produce the original title for the suit property in court for inspection and they complied. The Interested Parties have contended that the Petitioner is taking the court for a ride and that the Petition has become moot after the production of the original title in court.

The application was opposed by the Petitioner who relied on several affidavits sworn by Cornelius Peterson Waithaka (Waithaka). In its response to the application, the Petitioner reiterated that the suit property was transferred to Dandora Housing pursuant to a court order that was made in Nairobi HCCC No. 1348 of 1972 and that Dandora Housing thereafter transferred the property to the Petitioner. The Petitioner has contended that the certificate of title held by the Interested Parties which they produced in court is a forgery and the entries made therein are false. The Petitioner has averred that the 1st Respondent who had custody of the certificate of title has never come to court to state the whereabouts of the same even after being ordered by the court to do so. The Petitioner has admitted that the issues raised in the Petition were determined in a previous suit but has contended that the same were determined in its favour. The Petitioner has accused the Interested Parties of engaging in fraud by producing false documents with the aim of subverting the cause of justice.

The Interested Parties' application was heard by way of written submissions. The Petitioner filed its submissions on 24th January, 2018. The Interested Parties filed their submissions on 15th November, 2017 and further submissions on 12th February, 2018. I have considered the Interested Parties' application together with the affidavit filed in support thereof. I am in agreement with the Petitioner that this is not an appropriate case for summary determination. I have at the beginning of this ruling summarised each party's case. What is in contention in the petition before the court is the ownership of the suit property and the whereabouts of the valid certificate of title for the property. The Interested Parties have contended that they are the bona fide owners of the suit property and that they have in their custody the Original Certificate of title in respect thereof. The Petitioner has also contended that it is the lawful proprietor of the suit property and that its certificate of title for the suit property is in the custody of the 1st Respondent who has declined to release the same. The Petitioner has termed the alleged original certificate of title held by the Interested Parties as fraudulent. The Interested Parties have likewise accused the Petitioner of holding a fraudulent title over the suit property. Both the Petitioner and the Interested Parties have admitted that they have been involved in several suits in which the issue of the ownership of the suit property has been determined. They are however not in agreement as to the decisions that were made on the issue in the said suits. The Petitioner has contended that the court in Nairobi HCCC No. 1348 of 1972 determined the issue of ownership of the suit property in its favour. The Interested Parties have contended to the contrary. The 1st and 2nd Respondents who are the custodians of land records have kept mum. I am unable to determine the issue of the ownership of the suit property and the whereabouts of its valid certificate of title on the conflicting affidavit evidence before me. I have looked at the copy of the Certificate of title that was produced by the Interested Parties in court on 23rd July, 2015. The title has the Interested Parties as the owners of the suit property. According to the title, the suit property has never been transferred to any other party since 8th April, 1970 when the title was issued. There is no doubt that this is not the same title the subject of the Petitioner's complaint before this court. The title which the Petitioner claims to have given to the 1st Respondent was in its name and had a charge registered on it. It is clear that the Petitioner and the Interested Parties are talking of different certificates of titles albeit for the same property. It will take a plenary hearing to determine the ownership of the suit property and the holder of a valid title as between the Petitioner and the Interested Parties. This court cannot determine the issues of fraud and forgery raised by both parties on affidavit evidence.

The up short of the foregoing is that the Interested Parties Notice of Motion dated 20th August, 2015 wrongly dated 20th August, 2014 has no merit. The application is dismissed with costs to the Petitioner.

Delivered and Dated at Nairobi this 12th day of November, 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Wangari h/b for Mr. Kihara for the Petitioner

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the Interested Parties

Catherine - Court Assistant