



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO 45 OF 2018

1. MWANAJUMA KIBWANA KHAMISI

2. MARIAM SALIM MWADUNDUWA.....PLAINTIFFS

VERSUS

1. THE LAND REGISTRAR MOMBASA

2. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. The Application for determination is dated 2nd March 2018 brought under the provisions of Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 40 of Civil Procedure Rules. The applicants seek grant of orders that:

1. Spent

2. THAT this Honourable Court be pleased to order and/or direct the Defendants/Respondents herein, jointly and severally to proceed and reconstruct and/or open a skeleton file without gazettelement for the property known as PLOT NO. 321/II/MN measuring approximately 2.7 acres or thereabouts and contained on title number CR. 1152 with freehold interest.

3. THAT this Honourable Court be pleased to order and/or direct the 1st Defendant/Repondent to proceed and issue a provisional title document for the property known as PLOT No.321/II/MN measuring approximately 2.7 acres and contained on title number CR.1152, in favour of the Plaintiffs/Applicants forthwith without gazettelement.

4. THAT this Honourable court be pleased to order and/or direct the 1st Defendant/Respondent to dispense with the production of the completion documents, if any, that may be need during the reconstruction of the file and issuance of the provisional title deed for the freehold property known as PLOT NO.321/II/MN measuring approximately 2.7 acres and contained on title number CR. 1152 without gazettelement.

5. THAT this Honourable Court be pleased to declare that the Plaintiffs/Applicants have acquired proprietary interests in the property and thus they are the beneficial, legal and/or registered owners of the property known as PLOT NO.321/II?MN measuring approximately 2.7 acres and contained on title number CR. NO. 1152.

6. THAT this Honourable Court be pleased to order and/or direct the 1st Defendant/Respoondent to proceed and issue a provisional title document in the names of MWANAJUMA KIBWANA KHAMISI and MARIAM SALIM MWADUNDUWA, both being administrators of the Estates of Mohamed Bin Salim, Mariam Binti Salim, Mwana Khamis Binti Salim and Khamis Bin Salim without gazettelement.

2. The application is premised on the grounds inter alia; i) that the applicants are the administrators of the estates of Mohamed Bin Salim, Khamis Bin Salim, Mariam Binti Salim and Mwana Khamis Binti Salim who are proprietors of **PLOT NO.321/II/MN** ii) That the plaintiff entered into sale agreement of the plot in 2012 and have received payment of Kshs.3.6 million iii) That the applicants cannot complete the sale because the parcel file is lost. iv) That the applicants stand to incur additional costs which can be avoided at this stage.

3. The Applicants annexed to their supporting affidavit copies of the certificates of confirmation of grants issued to them as well as the sale agreement dated 6th November 2012 and another dated 16th July 2013 together with a police abstract issued on 10th October 2013 recording loss of title of deed for parcel of land **NO.321/II/MN**.

4. The Application is opposed by the Respondents by the grounds of opposition dated 25th March 2018 listing the following grounds:

1. THAT the Application misconceived, vexatious and an abuse of the process of court.

2. THAT the application contravenes the express provisions of Section 33(3) of the Land Registration Act.

3. THAT the application contravenes the express provisions of Section 33(5) of the Land Registration Act.

5. The parties relied on the pleadings as filed and asked the court to render its determination. Section 33(5) of the Land Registration Act provides thus *“The Registrar has powers to reconstruct any lost or destroyed land register after making inquiries as may be necessary and after giving due notice of sixty days in the Gazette.”*

6. The title was reported lost on 10th October 2013. The Applicants have not demonstrated to the court the steps they have taken to ensure that the file is reconstructed and or the loss of the title deed is gazetted. Secondly the Applicants pleaded that the parcel file is lost but they did not annex any evidence that they applied to be supplied with copies of the register and the same was not given to them. It is noteworthy that the agreement was drawn in November 2012 and July 2013 yet the applicants did not pursue the matter until 2018 when they brought the present application in March 2018. For the foregoing reasons, I will order the 1st Defendant to reconstruct the file but the applicants must allow for time provided by the law of gazetting the loss of title as well as pay for the costs of such gazetting.

7. The applicant in prayer 5 sought for declaration that they are the owners of the suit property. This order is mandatory in nature and there are basic principles to be met e.g. that the case must be special, simple, and clear before such an order can issue. The applicants have not shown any iota of evidence that the case is special or simple. (The government agencies sued have also not been linked to have an interest in the suit property to warrant the grant of such an order.)

8. In conclusion I shall allow prayer (2) and (3) for the interests of justice to be served but on condition that after the file is reconstructed the applicants shall meet the cost of gazetting the loss of the title as well as allow for the sixty day period to lapse from date of gazettelement before provisional title is issued. Prayer No. (4), (5) and (6) is disallowed. The same can be dealt with during the hearing of the main suit if at all. Each party to meet their cost of the application.

Ruling delivered, dated and signed at Mombasa this 14th day of December 2018

A. OMOLLO

JUDGE