



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

MISC. CIVIL APPLICATION NO. 7 OF 2016

REPUBLIC.....APPLICANT

VERSUS

RONALD BARASA.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

LAND REGISTRAR TRANS NZOIA.....3RD RESPONDENT

CABINET SECRETARY, LANDS

HOUSING & URBAN DEVELOPMENT.....4TH RESPONDENT

RULING

1. The parties in this suit agreed to have the preliminary objection dated 13/3/2017 disposed of by way of written submissions. That was on 6/4/2017. All the parties save the 3rd and 4th respondents thereafter filed submissions in respect of the preliminary objection. The Notice or Preliminary objection dated 13/3/2017 has five limbs as follows:-

1. The application is incurably defective for want of form as it offends the provisions of the law as prescribed under Order 53 Rule (1) and (2) of the Civil Procedure Rules.

2. The matter pleaded by the applicant are *sub-judice* and this court has no jurisdiction to try them as they are being directly and substantially in issue in Kitale ELC Case No. 107 of 2015 – Austine Richard Gathogo-vs- The Land Registrar Trans-Nzoia and the Chief Land Surveyor Trans-Nzoia. The subject matter of the suit is the same being property known as LR. No. 13420 in which the applicant herein is a co-owner.

3. That the orders sought by the applicant are also *res judicata* and this court has no jurisdiction to try them as they were substantially dealt with in Kitale ELC Case NO. 107 of 2015 – Austine Richard Gathogo –vs- The Land Registrar Trans-Nzoia and The Chief Land Surveyor Trans-Nzoia and a ruling was delivered on 12/10/2015.

4. That if this court were to make any orders it would be in effect be making a declaration over a matter that has been partially dealt with and is still pending full determination before another court of concurrent jurisdiction.

5. That the application is an abuse of the court process and it ought to be dismissed with costs.

2. The background to the preliminary objection is as follows:- The *ex parte* applicants filed the Chamber Summons dated 4/10/2016 seeking the following orders:

1. The Land Registrar Trans-Nzoia County be restrained from registering parcels excised from LR. No. 2198/1.

2. The National Land Commission, the Land Registry Trans-Nzoia County through the Cabinet Secretary Lands, Housing and Urban Development be restrained from further processing the issuance (sic) of titles to anybody out of LR. No. 2198/1 for areas excised surveyed.

3. The first respondent be restrained from dealing with or transacting the process of issuance of titles to anybody out of LR. No. 2198/1.

4. There be temporary orders restraining the carrying out of activities as stated in 1, 2, 3 above until the substantive application is heard and determined.

5. There be orders for filing of the substantive application.

6. There be other orders as the court may deem just and expedient.

7. The costs of this application do abide in the substantive application.

3. The Chamber Summons is supported by the verifying Affidavit of Erastus Kirera Marete sworn on 4/10/2016. A statement of Robin Festus Kinyua dated 4th October 2016 is also filed together with the Chamber Summons. Robin Festus Kinyua and Erastus Kirera Marete are described as Exparte Applicants in that statement.

4. The statement shows that the Ex-Parte Applicant's case is as follows:-Erastus Kirera Marete left Kitale in the year 2008; He has sold 10acres out of LR, No. 2198 Robin Festus Kinyua, his son for Kh.400,000/=. He wants the issuance of title documents to people on that land stopped as he believes the process is flawed as it is family land. He avers that he has been paying land rates in respect of LR No.2198/1 without contribution from any other person; however he exhibits a land rent demand notice mailed to him by the Department of Lands, dated 10/6/2008 instead of a rates demand note. He avers that he and his family members would be prejudiced by the conduct of the 2nd and 3rd respondents if the respondents issued titles to other persons as the Ex-parte applicant and his family may lose their land. He avers that he has been denied details of the persons with land on LR No. 2198/1 and the acreage each occupies and the map indicating the location of each plot. He further states that he was denied a hearing by the officers of the Titling Programme and the 1st Respondent when he sent his son to confer with them. He states that Ronald Barasa as Chairman of Wangama Farm had no power to lock him and his son out of the titling process and that he was biased. He avers that there was abuse of discretion, failure to take account of all relevant considerations and unreasonableness. He avers that the exclusion is not proportionate to the interests or rights of those affected." And that the "administrator" action violates the legitimate expectations of the persons to whom relates" and is unfair, and an abuse of power.

5. If this was meant to be a commencement of a Judicial Review application it is not surprising that the first objection raised by the 1st respondent is that no leave has been sought in the Chamber Summons to apply for an order of prohibition and that the prayers sought are in the form of restraining orders of injunction which cannot be sought in a miscellaneous civil application. The respondent has also objected to the proceedings on the basis that the statements on record do not comply with the strict requirements of **Order 53 Rule 1(I) of the Civil Procedure Rules 2010**.

6. More revelations are made in the Replying Affidavit: that LR No.13420 is registered in the joint names of Erastus Kirera Marete, Austin Gathogo and Reuben Wairichu as tenants in common in equal shares; that part of LR. 13420 measuring 10.11Ha (being LR No.13420/6 was on 20/12/90 transferred to Francis Mudida and Nina Mudida as joint tenants; that LR No.5779/3 to which the application relates (this is an erroneous statement) is non-existent; that vide **Kitale ECL Land Case No. 107 of 2015 -Augustine Richard Gathogo –vs- The Chief Land Registrar, Trans Nzoia and Chief Land Surveyor Trans Nzoia**, an order of injunction was sought to restrain the defendants from dealing with LR No.13420 which application was dismissed by this court on 12/10/2015 and the suit ELC Land Case No.107 of 2015 is still pending before this court. It is alleged that the Chambers Summons is a back door attempt to obtain orders that were denied by the court on 12/10/2015 in Kitale ELC Land Case No.107 of 2015.

7. I have considered the grounds in the Notice of Preliminary Objection and I have concluded that ground No. 2 to 5 (inclusive) do not amount to good grounds for preliminary objection in that, first grounds No. 2 – 4 (inclusive) requires evidence to be tabled before the court and ground No. 5 is too general or rather lacks specificity.

8. The court will consider grounds Nos.1, of the Preliminary Objection only; grounds Nos. 2, 3, 4 and 5 are struck out for the reasons given herein above.

9. On whether the application is incurably defective for want of form for offending the provisions of the law as prescribed in **Order 53 Rule 1 Sub Rule (1) and (2) of the Civil Procedure are relevant Rules.** **Order 53 Rules 1 Sub rules (1) and (2)** state as follows:-

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

10. It is obvious that the chamber summons dated 4/10/2016 does not seek any leave. It proceeds to seek substance orders straight away. An application for leave is normally made ex parte to a judge in chambers and is accompanied by a statement setting out the name and description of the Applicant, the relief sought and the ground on which is sought and by an affidavit verifying the facts relied on; that is what **Order 53 Rule 1 and 2** demand.

11. An examination of the chambers summons and the attached documents shows that the same is supported by what are supposed to be statements of both the 1st and 2nd Exparte Applicant. The Rules do not require more than one statement. However, the question here is not whether inclusion of multiple statements may or may not be fatal, but whether the form and content of the statements or rather two statements are fatal to the chamber summons. The statement is supposed to only contain the name, description of the applicant and the relief sought. There is no requirement that evidence be contained in the statement. A look at the two statements attached to the chambers

summons shows that rather than give the particulars required by **Order 53 Rule 1(2)** they attempt to provide evidence and, like Affidavits, they even have annexures attached to them. This is irregular and in breach of the order 53 Rule 1(2). In addition the verifying Affidavit which should contain all the evidence and annexures is devoid of any such requisite evidence. It is clear that there is no evidence in support of the chamber summons.

12. In *Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Onema Owaki T/A Marenge Filing Station Civil Appeal No. 45 of 2000*, the Court of Appeal expressed itself as follows:

“We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appears to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

‘The application for leave “By a statement” – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). “The statement” should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.’

At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:

“The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction”.

13. Further in the case of *Tana River Pastoralists Development Organization & 4 Others V National Environment Management Authority & 6 Others* [2009] eKLR, the court observed as follows:

“From the arguments so ably presented before this court by all counsel involved, from the decided cases cited, and I have taken the liberty to also make a reading of the text by P. L. O. Lumumba and P. O. Kaluma on “Judicial Review of Administrative Actions in Kenya. Law and Procedure” (Jomo Kenyatta Foundation), - the jurisprudence that is established is undoubtedly that all evidential facts should be set out in an affidavit, not in the statement. Failure to file an affidavit setting out the facts relied upon renders the application incompetent for want of evidence. I would borrow from the words of my brother Nyamu J (as he then was) in the decision of *Paul Imison V The AG and 3 others Misc. Civil Appl. 1604 of 2003* that:-

“It is clear both on the interpretation of Order 53 Rule 1 (2) and the Mireng Filling Station case, that the facts must be exclusively contained in the affidavit. The statement is therefore not capable of being adopted by an insufficient affidavit. The statement has no evidential value both under the Rule and as interpreted in the Mireng Filling Station case.”

14. The Court in the Tana River case above concluded as follows:

“I therefore find that there is merit in Preliminary Objection raised and the same is upheld on the application is therefore struck out for failure to comply with Order 53 rule 1(2). Costs shall be borne by applicants”.

15. The statements and the verifying affidavits in the instant chamber summons are fatally flawed; besides, even if there were any evidence, the chambers summons itself is fatally flawed as it is devoid of any prayer seeking leave.

16. For the above reasons, I find that the Chamber Summons dated 4/10/2016 has no merit. The same is hereby struck out with costs.

Dated, signed and delivered at Kitale on this 24th day of August, 2017.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Wanyama holding brief for Kiarie for 1st Respondent

Mr. Wambua for Ex-Party Applicant

Mr. Ngumbi for 3rd and 4th Respondents

Ruling read in open court.

MWANGI NJOROGE

JUDGE

24/8/2017