



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC JR 11 OF 2014

(Formerly NYERI HCC JR MISC. APPL. 21 OF 2012)

IN THE MATTER OF REGISTERED TITLES ACT, LAWS OF KENYA

AND

IN THE MATTER OF

LAND PARCEL NO. THEGENGE/KIANJOGU/374 AND THEGENGE/KIANJOGU/685

AND

IN THE MATTER OF NYERI CMCC NO. 380 OF 2004

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF LAW REFORMS ACT, CAP 26 LAWS OF KENYA

AND

**IN THE MATTER OF PROBATE AND ADMINISTRATION RULES CAP 160 LAWS OF
KENYA**

REPUBLIC OF KENYA.....APPLICANT

WILSON MBAUNI WAMATU.....EXPARTE

-VERSUS-

FRANCIS NDIRANGU THIRIKU.....1ST RESPONDENT

COUNTY COUNCIL OF NYERI.....2ND RESPONDENT

DISTRICT LAND REGISTRAR NYERI.....3RD RESPONDENT

THE CHIEF MAGISTRATE, NYERI LAW COURTS.....4TH RESPONDENT

EDITH WANJIKU MATU.....5TH RESPONDENT

RULING

1. Pursuant to leave granted on **22nd October 2012**, to commence Judicial Review Proceedings and for that leave to operate as a stay, the exparte applicant filed a Notice of Motion dated **7th November, 2012** seeking the following orders:

(i) That an order of certiorari do issue quashing the proceedings in Nyeri CMCC No. 830 of 2004 and the registration of the 1st and 5th respondents as the right owners of L.R Thegege/Kianjogu/685 and Thegege/ Kianjogu/374 and other consequential orders.

(ii) That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the application and is supported by the affidavit of **Wilson Mbauni Wamatu** sworn on **7th November, 2012** in which he deposes that:

(i) The original L.R. No. Thegege/Kianjogu/374 was registered in the names of the applicant's father one Wamatu Githaga (deceased) and L.R. Thegege/Kianjogu/566 (now Thegege/Kianjogu/685) was registered in the name of the County Council of Nyeri (the 2nd respondent herein).

(ii) The deceased prior to his death had agreed to exchange his land No. Thegege/Kianjogu/374 with that of the 2nd respondent for purpose of market extension.

(iii) The deceased took physical occupation in L.R. Thegege/Kianjogu/685 and the 2nd respondent took possession in L.R. Thegege/Kianjogu/374.

(iv) The said Wamatu Githaga died before the formal cross transfer of the said land was effected.

(v) on 7th December 1994, the 3rd respondent transferred L.R. Thegege/Kianjogu/374 to the 1st and 5th respondents and to one Peris Wanjiku Wanjohi (deceased)

(vi) On 24th August 2012, the 2nd respondent with the connivance of the 3rd respondent transferred L.R. Thegege/Kianjogu/685 to the 1st and 5th respondents.

(vii) All these transactions were made by the 1st, 2nd 3rd and the 5th respondents without grant of letters of administration of the estate of the late Wamatu Githaga (deceased) thus concealing material facts on a point of law.

(viii) L.R. Thegege/Kianjogu/374 and 685 are now registered in the names of the 1st and the 5th respondents.

(ix) The illegal acts of 1st, 2nd, 3rd and 5th respondents have rendered the rightful beneficiaries of the estate of the late Wamatu Githaga (deceased) destitute.

(x) Sometime in June 2012, strangers in the company of the 1st respondent and the police invaded L.R. Thegege/Kianjogu/685 and started subdividing the same.

(xi) Upon enquiry, the applicant learnt that they were executing an order issued by the 4th respondent on 15th March, 2012 in favour of the 1st respondent against the 2nd and 5th respondents

vide Nyeri CMCC No. 830 of 2004.

(xii) The acts of the 1st, 2nd, 3rd and 5th respondents offends **Section 6** CAP 302 of the Land control Act.

3. The application is opposed vide a notice of preliminary objection by the 2nd respondent dated **8th August, 2015** and filed on 9th June, 2015 on the grounds that the application was filed more than six months after the orders and proceedings it seeks to quash were issued contrary to **Order 53, Rule 2** of the Civil Procedure Rules.

4. It is this objection that is before me for determination directions having been taken on 9th June, 2015 that it be heard first.

5. On the hearing date **Mr. Muthoni** holding brief for **Mr. Kariuki** applied for an adjournment on the grounds that this matter had been referred to the National Land Commission and prayed for ninety days to enable National Land commission conclude their investigations. Counsels for the other parties denied any knowledge of the matter been referred to the National Land Commission. Dissatisfied with the explanation by counsel for the applicant, the court directed that the application proceed for hearing.

6. **Mr. Wahome Gikonyo** Counsel for the 2nd respondent, submitted that under **Order 53 Rule 2** of the Civil procedure rules(CPR), Judicial Review Proceedings seeking orders of Certiorari should be filed within six months of obtaining an order and/or judgement. In the instant suit, the application for leave was filed on 19th October, 2012; that in paragraph 3 (e) of the statement of facts, it is stated that the suit property was transferred on 7th December, 1994; execution took place on 15th March, 2012 (paragraph 3 (k)). The order marked as WM7 was issued on 15th March, 2012, therefore six months ended in September 2012. Counsel for the 2nd respondent urged the court to strike out the application with costs as it clearly contravened **Order 53 Rule 2** of the CPR.

7. Counsels for the 1st, 3rd, 4th and 5th respondents associated themselves with the submissions of Mr. Wahome and prayed that the application be dismissed with costs. Mr Wachira holding brief for Mr Andrew Kariuki did not submit on the preliminary objection but merely stated that his Instructions were limited to seeking an adjournment.

8. The law on prerogative orders is found in **Section 9** of the Law Reform Act, CAP 26, Laws of Kenya and **Order 53** of the Civil Procedure Rules. **Section 9 (3)** provides: -

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law or the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

Order 53 Rule 2 of the CPR 2010 provides:

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made no later than six months after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings is subject to appeal and the time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

9. From the above provisions of the law, an *ex parte* applicant must file an application seeking leave to apply for orders of certiorari within a period of 6 months of the decision. The execution order annexed by the applicant was granted on 15th March, 2012. The application for leave was filed on 19th October 2012, 7 months and 4 days after the court authorised the executive officer to execute all necessary documents to effect subdivision of L.R Thegenge/Kianjogu/685.

10. Although the applicant did not attach minutes from the Land Disputes Tribunal showing when the award was made and proceedings from the Magistrates court showing when the award was adopted as a judgement of the court, it is not in contention that the Tribunal rendered its decision which was adopted pursuant to the provisions of **Section 7** of the Land Disputes Tribunal Act (now repealed by the Environment and Land Court Act, Act No. 19 of 2011, which commenced on 30 August 2011) as a judgment of the court before the execution orders were issued. Under the circumstances, there is no doubt the application for leave was filed out of time and is therefore incurable.

11. For the reasons given, I dismiss the application with costs to the 2nd 3rd and 4th respondents.

Dated, signed and delivered at Nyeri this 31st day of October, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms. Ndegwa h/b for Andrew Kariuki for the *ex parte* applicant

Mr. Muhoho for the 1st respondent

C.N. King'ori h/b for Wahome Gikonyo for the 2nd respondent

N/A for 3rd, 4th and 5th respondents

Court assistant - Esther