



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

LAND CASE NO. 39 OF 2016

(FORMERLY NO. 119 OF 2011)

IN THE MATTER OF : AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: AN APPLICATION BY CIMARRON INVESTMENT LIMITED FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS & PROHIBITION DIRECTED AT THE CHIEF LAND REGISTRAR.

AND

IN THE MATTER OF: THE REGISTERED LAND ACT, CHAPTER 300 LAWS OF KENYA

AND

IN THE MATTER OF: THE REGISTRATION OF TITLES ACT, CAP 281 LAWS OF KENYA

BETWEEN

THE REPUBLIC OF KENYA

VERSUS

THE CHIEF LAND REGISTRAR.....RESPONDENT

EXPARTE CIMARRON INVESTMENTS LIMITED.....APPLICANT

RULING

1. This is the Notice of Motion dated 2nd November 2011. It is brought under Order 53 Rule 3 of the Civil Procedure Rules 2010.

2. It seeks orders;

i. That an order of Mandamus do issue directed at the Chief Land Registrar to compel the said Chief Land Registrar to cancel the register and recall the certificate of lease in respect of the parcel of land known as Kwale/Diani Beach/108 issued under the Registered Land Act chapter 300 Laws of Kenya on the 13th January 2010 and any other certificate of lease issued over the parcels of land known as Kwale/Diani Beach/108 after the 13th of January 2010.

ii. That an order of Prohibition do issue to prohibit the Chief Land Registrar from endorsing in the register any transfer in respect of land known as Kwale/Diani Beach/108 from Mwashame Ali Mwakuzimu Salimu Saidi and Wycliffe Gagai Madaga to who the title or lease for Kwale/Diani Beach/108 be issued to any other person.

iii. That the costs of this application be provided for.

3. The grounds are in the face of the application listed as paragraph 1 – 5. I do not need to reproduce them here. It is supported by the affidavit sworn by Sean White, a director of the Exparte Applicant sworn on the 2nd November 2011.

4. It is also supported by the statement filed pursuant to Order 53 Rule 1(2) and 2 of the Civil Procedure Rules. The facts are set out in Paragraph 1 – 9 of the said statement.

5. The reliefs sought are;

a. An order of Judicial Review by way of an order of Mandamus directed to the Chief Land Registrar to compel the said Chief Land Registrar to cancel the register and recall the certificate of lease in respect of parcel of land known as Kwale/Diani Beach/108 issued under the Registered Land Act on the 13th January 2010 and any certificate of Title issued subsequent to the said date.

b. An order of Judicial Review by way of Prohibition to prohibit the Chief Land Registrar from endorsing in the register in respect of the parcel of land known as Kwale/Diani Beach/108 from Mwashame Ali Mwakuzimu, Salimu Said Rachitu and Wycliffe Gagai Madaga to any other person or their parties.

c. The costs of this application be to the applicant.

6. The Ex-parte Applicant through its director, Sean White learnt that the Applicants parcel of Land Title No. CR.17658 L.R. No. 9650 was being offered for sale. It was under a different title registered under a different title registered in Kwale Land Registry.

7. Upon inquiring he was informed by the Land Registrar that on 13th January 2010 a lease for 99 years from 1/11/1996 was registered at Kwale lands office under the Registered Land Act as Kwale/Diani Beach/108 for the same parcel of Land.

8. That the Land Registrar wrote to the Chief Land Registrar requesting for investigation into the origin of Kwale/Diani Beach/108 since the exparte Applicant had title over the same parcel of land.

9. In a letter dated 5/10/2011, the Chief Land Registrar wrote to the District Land Registrar indicating that the Exparte Applicant title over the suit property was genuine and that Kwale/Diani Beach/108 was forgery.

10. The said Kwale/Diani Beach/108 was erroneously fraudulently registered in the names of Mwashame Ali Mwakuzimu, Salimu Saidi Rachitu, Wycliffe Gagai Madaga.

The said three necessary parties were served by advertisement in the Daily Nation Newspaper.

11. Despite service of Pleadings the necessary parties have not filed any papers in response or in any way opposing the orders sought by the Exparte Applicant.

12. The Attorney General through litigation counsel for the Chief Land Registrar, never filed any responses. They also neglected to attend court on 18/9/2011 despite being served.

13. The Exparte Applicant's application is therefore not opposed.

14. The issue for determination is whether the Exparte Applicant is entitled to the orders sought.

15. The letter dated 5/10/2011 for the Chief Land Registrar to District Land Registrar Kwale was to the effect that the title issued in respect of Kwale/Diani Beach/108 was a forgery.

This letter was annexed to the application and marked "SW8".

16. Another letter dated 16/12/2011 from the Chief Land Registrar addressed to the Exparte Applicant copied to Permanent Secretary, Nairobi, Senior Registrar of titles Mombasa, stating that title Number Kwale/Diani Beach/108 is a forgery and the same ought to be expunged from the Land Records.

17. The Exparte Applicant has been in quiet possession since 2005 when it purchased the property. That section 143 of the Registered Land

Act (Cap 300) Laws of Kenya provides

“For rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than 1st registration) has been obtained, made or omitted by fraud or mistake.”

In the case of *Munyu Maina –versus- Hiram Githiha Maina (2013) eKLR* cited by Counsel, the court of Appeal stated that;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted other register.”

18. Counsel for the Exparte Applicant also cited the case of *Republic –versus- Chief Magistrate, Milimani Commercial Court And 2 Others Exparte Violet Ndanu Mutinda And 5 Others (2014) eKLR*.

19. I have considered the facts in totality. I find that the Exparte Applicants application is uncontroverted. I find that it has satisfied this court that it deserves the reliefs sought.

Accordingly I make the following orders;

- i. That an order of Mandamus be and is hereby issued directed to the Chief Law Registrar to compel the said Chief Land Registrar to cancel the register and recall the certificate of lease in respect of the parcel of Land Known as Kwale/Diani Beach/108 issued under the Registered Land Act in the 13/1/2010 and any certificate of title issued subsequent to that date.
- ii. That an order be and is hereby issued prohibiting the Chief Land Registrar from endorsing in the register any transfer in respect of the parcel of Land Known as Kwale/Diani Beach/108 from Mwakuzimu, Salimu Said, Rachitu and Wycliffe Gagai Mandaga to any other person in third parties.
- iii. That costs of this application be in the cause.

It is so ordered.

Dated, signed and delivered at Mombasa on the 24th day of October 2017.

L. KOMINGOI

JUDGE

24/10/2017