



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**MISC NO 36 OF 2015**

**IN THE MATTER OF SUBDIVISION NO.1872 (ORIG NO.2889/36) CR.31535 IN THE MATTER OF LOSS OF TITLE DEED OF SUBDIVISION NO.1872 (ORIG. NO 289/26) CR.31535)**

**FRANCIS WAIGANJO KIMANGA AND**

**LUCY WANJIRU KIMANGA.....APPLICANTS**

**RULING**

1. By an Ex Parte Notice of Motion dated 20<sup>th</sup> April 2017 brought under Section 13 of the Environment and Land Court Act, Sections 1A, 1B, 3, 3A, 63 (c) and (e) of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, the Applicants are seeking the following orders:

**1) THAT this application be certified as urgent and the same be heard Ex-Parte in the first instance.**

**2) THAT the Chief Land Registrar advertises the loss of Title Deed CR 1872, Plot No.289 Section V/MN.**

**3) THAT the Chief Land Registrar opens a new file in respect of the said title.**

**4) THAT the Chief Land Registrar be pleased to issue Title Deed in terms of entry No.27 of the Original Title CR.1872 on Plot No.289 Section IV/MN to one Francis Waiganjo Kimanga and Lucy Wanjiru Kimanga, the Applicants who are the bona fide owners of Subdivision 1872 (Original No.289/36), Area 2.075 HA and CR.No.31535.**

**5) THAT this Honourable Court be pleased to make such other orders it may deem fit and convenient in the circumstances.**

**6) THAT costs if this Application be in the cause**

2. The Application is founded on the following grounds:

**i. THAT the Applicants are the registered owners of all that parcel of land known as Plot No. Subdivision No.1872 (Original No.289/36) CR.31532 Section V/MN as per the entry 27 of the record of the mother title on the aforesaid plot.**

**ii. THAT the Applicants had gone through the process that is required in the acquisition and transfer of the said title and the same had been issued in their names.**

**iii. That the Chief Land Registrar does not have the mother file for the suit property and the same has been deemed lost and/or misplaced.**

**iv. THAT the said land is not in any dispute and the Applicants are ready to indemnify the Government and/or the Registrar of any eventuality that may arise.**

**v. THAT the title for the said plot NO.1872 (Original No.289/26) Section V/MN and CR.31535 had always been in the Applicants' possession was lost and/or misplaced in the Applicants' house and its whereabouts cannot be ascertained despite diligent search made and undertaken such that it is now believed that the same is irredeemably lost.**

**vi. THAT the Applicants have reported the loss of the same at Nyali Police Station, Mombasa and obtained OB No.58/4/2015.**

**vii. THAT the Chief Land Registrar has admitted the loss of the said mother file to the Applicants after several visits.**

**viii. THAT the Applicants now want the said loss be advertised, the Chief Land Registrar open a new file in terms of entry no.27 and the new title issued to the Applicants.**

3. The Application is supported by the affidavit of Francis Waiganjo Kimanga sworn on 20<sup>th</sup> April 2017. He has deposed that they are the registered owners of the parcel of land known as **Plot No. Subdivision No.1872 (Original No.289/26) CR.31535 Section V Mainland North** having gone through the process that is required in the acquisition and transfer of the same. He has annexed copies of sale agreement, transfer, deed plan, application for consent, letter of consent, letter from surveyor, survey plan and a copy of the mother title. He has deposed that the title for the said plot which has always been in his possession got lost and/or is misplaced in his house and its whereabouts cannot be ascertained despite diligent search made and believes that the same is now irredeemably lost. He has further deposed that the loss was reported at Nyali Police Station, Mombasa vide **OB No.58/4/2015** and were issued with a police abstract, a copy of which he has attached to the said affidavit. He has deposed that they followed up with the lands office and that after several visits, the Chief Land Registrar admitted the loss of the mother file to the said parcel of land. The Applicants now want the loss of the Title Deed of the said plot and the mother file to be advertised and the Chief Land Registrar to open a new file in terms of **Entry No.27** of the Original Title and to issue the Applicants with a new Title Deed. He deposed that they have always been in possession of the said property from the time they bought it.

4. The Application is expressed to be ex-parte, hence has no respondent. However, it is clear from the Application that the Orders sought are directed at the Chief Land Registrar who is not listed as a party. In this regard, when the Application came up before me under Certificate of Urgency on 25<sup>th</sup> July 2017, I declined to certify it as urgent and directed the Applicants to serve the Application on the Honourable Attorney General and fix a date for the hearing of the Application. The office of the Attorney General was duly served but they never filed any response nor attended during the hearing.

5. In his submissions, Mr. Birir, Counsel for the Applicants submitted that the Application is basically an ex-parte motion and he relies fully on the affidavit in support of the Motion and urged the court to grant the orders.

6. I have considered the Application herein and the Affidavit in support thereof. I note that the Application is brought under the provisions of Section 13 of the Environment and Land Court Act, Sections 1A, 1B, 3, 3A and 63 (c) and (e) of the civil Procedure Act. The Application relates to lost or destroyed certificate or registers.

7. Lost or destroyed certificates and registers are covered by Section 33 of the Land Registration Act, which provides as follows:

**1) Where a Certificate of Title or Certificate of Lease is lost or destroyed, the Proprietor may**

**apply to the Registrar for the issue of a duplicate Certificate of Title or Certificate of Lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of Title or Certificate of Lease.**

**2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the Certificate of Title or a Certificate of Lease has been lost or destroyed.**

**3) If the Registrar is satisfied with the evidence proving the destruction or loss of the Certificate of Title or Certificate of Lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of Title or Certificate of Lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspaper, whichever is first.**

**4) If a lost Certificate of Title or Certificate of Lease is found, it shall be delivered to the Registrar for cancellation.**

**5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in in the Gazette.**

8. It is clear from the aforesaid provision of the law that it is the registered proprietor of a Title or certificate of Lease where the same is lost or destroyed that can move the Registrar for the issuance of a duplicate thereof after following the process laid down above. The registered proprietors and in the case of a company, the director, and where the property has been charged, the chargee are required to make a statutory declaration that the Certificate of Title or a Certificate of Lease has been lost or destroyed. And before issuing a duplicate Certificate of Title or Certificate of Lease the Registrar must be satisfied with the evidence proving the destruction or loss. In other words in issuing the duplicate certificate the Registrar exercises a discretion.

9. In this case the Applicants allege that they are the registered owners of the parcel of land known as **Plot. No. Subdivision No.1872 (Original No.289/26) CR.31535 Section V Mainland North** as per the entry No.27 of the record of the mother title. They further state that they had gone through the process that is required in the acquisition and transfer of the said title and the same had been issued in their names. However, they allege that the said title which has always been in their possession got lost and/or misplaced in their house and they reported the loss at Nyali Police Station, Mombasa and were issued with **OB. No.58/4/2015**. It is their contention that they made a follow up with the Lands Office and after several visits; the Chief Land Registrar admitted the loss of the mother file to the said parcel of land. They now want an order directing the Chief Land Registrar to advertise the loss of **Title No.CR.1872 Plot No.289 Section V/MN** and to open a new file and issue a new title to them.

10. From the material placed before me, there is no evidence that the Registrar considered the matter. Whereas the Applicants allege that they made a follow up with the lands office and that after several visits the Chief Land Registrar admitted the loss of the mother title, there is no evidence from the Registrar about the alleged admission. Moreover, there is no evidence that the Applicants made and submitted the statutory declarations to the Registrar as required. In my view, for the Registrar to act and exercise his discretion, he must satisfy himself by being supplied with all the relevant material as required by the law.

11. The Application herein is ex-parte. The Registrar is not a party. To grant the orders sought herein without the full benefit of the input from the Registrar who is bound to act on the orders and who is not a party, in my view may place this court and its orders in a very awkward situation. It may very well be futile and impossible to implement as it would be directed to a third party who is not a party to these proceedings and who may as well not have been given all the required material by the Applicants.

12. In this case, the issues raised, in my view required action by the Registrar in terms of the Provisions of

Section 33 of the Land Registration Act as an administrative action. The court has not been told that the Registrar has declined to perform his administrative duties to warrant the intervention by the Court. Even where a party requires the Court's intervention, he must approach the Court through the correct legal procedure to warrant the issuance of any orders. To me, the orders sought are impossible to grant and they are not supported by any law. I think it is upon the Applicants to find appropriate legal channels for redress.

13. In the result, I find no merit in the Notice of Motion dated 20<sup>th</sup> April 2017 which I hereby dismiss and with no order as to costs since it has no respondent.

It is so ordered.

**Ruling dated, signed and delivered at Mombasa this 8<sup>th</sup> day of November 2017**

C. YANO

JUDGE