



Republic v County Land Registrar, Kisii & another; Onyango (Exparte) (Judicial Review Application 2 of 2021) [2023] KEELC 188 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
JUDICIAL REVIEW APPLICATION 2 OF 2021**

M SILA, J

JANUARY 26, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR, KISII 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

DR. OMARI ONYANGO EXPARTE

RULING

1. Before me is an application dated 28 February 2022 and filed on 18 March 2022 by the ex parte applicant. The application seeks costs of this suit. The same is opposed by the respondents.
2. To put matters into context, through an application dated 22 September 2021, the ex parte applicant sought leave to apply for an order of mandamus to compel the Land Registrar, Kisii County, and the Chief Land Registrar, to issue him with a certified copy of the white card to the land parcel Kisii Municipality/Block I/556. The application for leave came up before my predecessor, Onyango J, who directed it to be served before it can be allowed or declined. On 23 November 2021, Mr. Ngaine counsel holding brief for Ms. Nyaboke for the ex parte applicant, and Ms. Osebe, counsel for the respondents, agreed that the application for leave be compromised by an order that the Land Registrar, Kisii County do issue to the ex parte applicant a certified copy of the white card within 7 days of service of the order failure to which the ex parte applicant would be at liberty to file the substantive application for the order of mandamus. The substantive motion was never filed ; instead, this application, seeking costs, was filed. The application is based on the grounds that the ex parte applicant is the registered owner of the land parcel Kisii Municipality/Block I/556 (hereinafter referred to as ‘the suit land’); that on 5 July 2021, he personally lodged an application to be furnished with a certified copy of the white



card with the legitimate expectation that it will be availed promptly; that without giving reason, the Land Registrar refused to furnish it to him; that the ex parte applicant lodged another application now through his advocates, who applied for the white card vide a letter dated 5; that various follow ups were met with unlimited excuses to the effect that the document was awaiting the Land Registrar's signature; that later on the 11th day, the applicant was informed to present the original Certificate of Lease before being issued with the white card; that on 25 August 2021, his advocates wrote yet again seeking to be provided with the white card but the same was not issued; that this was despite the ex parte applicant paying the requisite fees; that previously on 1 July 2019, the applicant had been issued with the white card without any conditions. The supporting affidavit, sworn by the ex parte applicant, is along the above lines.

3. The application is opposed through the replying affidavit of Oswera Cecilia Harriet, the Deputy Land Registrar, Kisii County. She has deposed that procedurally, before one is issued with a copy of the white card, they require to be supplied with a copy of the lease certificate for purposes of verification. She has averred that the ex parte applicant was requested to supply their office with a copy of lease that had a legible seal and stamp. She states that in this instance, the ex parte applicant did not supply them with a clear copy of the certificate of lease to enable her officer process the white card, a position which she contends the ex parte applicant has not refuted. She has referred to the ineligible copy of certificate of lease annexed to the ex parte applicant's application for leave dated 22 September 2021. She contends that the ex parte applicant did not comply with the procedures and therefore this suit was brought prematurely. She urges that the ex parte applicant should not be allowed to benefit from his own omissions and is not entitled to costs.
4. In her submissions, Ms. Nyaboke for the ex parte applicant, refuted the claim by the Deputy Land Registrar that her client supplied an ineligible copy. She mentioned that even the copy in the application for leave is legible. She stated that her client had submitted a coloured copy and attached the same in her submissions for reference. She submitted that it is not refuted that the original certificate of lease was demanded. She added that it is settled law that the successful party should get costs and referred to the case of *David Kiptum Korir vs Kenya Commercial Bank & Another* (2021) eKLR.
5. For the respondent, it was submitted by Ms. Osebe that the ex parte applicant failed to avail the original lease. She referred to section 27 of the *Civil Procedure Act*, which addresses costs, and similarly referred to the case of *David Kiptum Korir vs Kenya Commercial Bank & Another* on the factors the court considers when determining the costs of a suit. She submitted that in this case, leave was never granted to file the judicial review motion and parties never proceeded to hear the substantive motion. She added that the matter was settled by consent and this should not be taken to mean that the other party succeeded in the suit. She closed her submissions by stating that the suit was filed prematurely and considering the circumstances each party should bear their own costs.
6. I have taken note of all the above.
7. Section 27 of the *Civil Procedure Act* deals with costs and it provides as follows:-

27.Costs

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:



Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.
8. It will be seen from the above that costs are in the discretion of the court though generally the costs should follow the event unless for good reason the judge otherwise orders. In her submissions, Ms. Nyaboke submitted that costs in this instance also need to follow the event. That may be so, but as submitted by Ms. Osebe, it is doubtful whether there was any substantive litigation which may entitle a party to costs or indeed whether the court pronounced any successful litigant in the matter.
9. All that was filed prior to this application for costs was an application seeking leave to commence judicial review proceedings. That application was in fact never heard because the parties agreed by consent to have the ex parte applicant supplied with the white card. I understand that the same was supplied. It follows that no leave to commence suit was ever granted and no substantive motion filed. It is the substantive motion which is actually the suit in a judicial review motion. The preceding application is only one for leave, which is akin to seeking permission to file the suit. In this instance no permission to file suit was ever given and no substantive suit filed. We cannot for sure tell whether leave would have been granted as the issue was never considered. It does appear that the respondent pre-empted the canvassing of the application for leave by supplying the ex parte applicant with the document that he wanted. If I proceed to award costs, it will be akin to awarding costs where no suit has been filed. I think in those circumstances, it would be best that each party bears his/her own costs, which is what I will order.
10. That should be the end of the matter but my interest has been pricked by the averments herein and it will be remiss for me not to weigh in. It was deposed that the ex parte applicant was not supplied with a copy of the white card because he failed to supply either the original or a clear copy of his certificate of lease. It was said that this is the procedure. I have not seen any procedure in the Land Statutes which demand that an owner of land supplies an original or clear copy of his certificate of lease before he can be issued with a certified extract of the register. If there are any such internal processes, I would fault the same in so far as they relate to the registered proprietor. I do not see any basis of asking a person holding title to supply his own title so that he can get an extract of the register. The Land Registrar has custody of the records and knows who the registered proprietor is. I would assume that the land officers even have a copy of the title in their records as they are the ones who issued title. Why would there be obstacles put to a registered proprietor when he wishes to find out what is recorded in the register? There could be reason to have such strictures placed against an outsider but not against the registered proprietor. What if the registered owner has lost his certificate of lease and had not made copies? Would this disentitle him from finding out if there has been any tampering of the register? I see no reason for denying a registered proprietor from accessing the records in the land registry or placing impediments in his way. I would propose that so long as the Land Registrar is satisfied that this request is coming from the registered proprietor, and so long as any requisite payment is made, then the registered proprietor should be supplied with copies of the green card or white card, solely based on such application, without any other hurdle being put in place. I say this obiter, as I have already dealt with the substance of the application, which is that in the circumstances of this case, each party to bear his/her own costs.
11. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 26 DAY OF JANUARY 2023



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT KISII

