



Republic v The Chief Lands Registrar & 2 others; A & E Gashe Construction Co. Ltd (Exparte); Mutua & 5 others (Interested Parties) (Judicial Review Application E010 of 2022) [2023] KEELC 15731 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15731 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION E010 OF 2022
A NYUKURI, J
FEBRUARY 15, 2023
IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE
ACT
AND
IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF
2015
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF LANDS REGISTRAR 1ST RESPONDENT

DIRECTOR OF SURVEY AT THE SURVEY OF KENYA 2ND RESPONDENT

MAVOKO SUB-COUNTY PHYSICAL PLANNER 3RD RESPONDENT

AND

A & E GASHE CONSTRUCTION CO. LTD EXPARTE

AND

JOHN KIOKO MUTUA INTERESTED PARTY

SARAH NZEMBI MUTUA INTERESTED PARTY

BERNARD MASINGI MALUKI INTERESTED PARTY



ALPHONCE MBATHA KISYULA INTERESTED PARTY
JOSHUA MUTETI KILONZO INTERESTED PARTY
DAVID OSANO RAGIRA INTERESTED PARTY

RULING

Introduction

1. By Chamber Summons dated October 19, 2022, the Exparte Applicant sought leave to apply for Judicial Review orders of certiorari and prohibition against the Respondents. They also sought that the leave so granted do operate as stay of the cancellation of the 285 title deeds, respective green cards therein and the RIM of Mavoko Municipality Block 98/2-286 by the 1st and 2nd Respondents. In addition, they sought that the leave granted do operate as stay of the intended issuance of RIM in the proposed subdivision of Mavoko Municipality Block 98 into the proposed thirty five plots and subsequent issuance of title deeds in favour of the 1st and 2nd Interested Parties herein, their agents, assigns, Legal Representatives and or any other persons claiming ownership under/through them.
2. On October 24, 2022, this court granted leave to apply for Judicial Review orders as sought by the Exparte Applicant but ordered that the question of whether leave should operate as stay to be heard in 7 days, in view of the fact that the pleadings, disclosed existence of other pending court cases between the same parties over the same property without disclosing the status of those matters.
3. The prayer for stay was opposed. The 1st Interested Party on her behalf and on behalf of the 2nd Interested Party filed a 68 paragraph replying affidavit in opposition to the application. Their case was that land known as LR No 29666 (formerly LR No 13208/2) (suit property) is held in common in equal shares by James Kasyula Mutua, Ruth Kalekye Mutua, Sarah Nzembi Mutua, Ann Nduku Mutua, David Mutua Kasyula, John Kioko Mutua, Simon Mutua, Moses Wambua and Peter Mweu. That the above persons held the suit as tenants in common in equal shares as lessees from the Government of Kenya for a term of 99 years 10 months from August 1, 2008. They also stated that the above persons were registered proprietors of LR No 28056 (IR No 119953/1) and LR No 28055 (IR No 119954/1). They also stated that the 1st and 2nd Interested Parties held letters of administration to the estates of Ruth Kalekye Mutua, Ann Nduku Mutua and David Mutua Kasyula.
4. They further stated that the suit property was originally LR No 13208 measuring 412 Hectares, registered in the name of DCK Athi Limited for a term of 934 years 10 months with effect from January 1, 1974. That the said parcel was transferred to the 1st and 2nd Interested Party's family members on November 12, 1976 and in 2007 they successfully sought to subdivide it into three parcels namely LR No 28055 measuring 8.9. Ha, LR No 28056 measuring 4.04 Ha and LR No 13208/2 measuring 357.70 Ha. That the condition for subdivision which was agreed by the 1st and 2nd Interested Party's family was that the new lease would run for only 99 years from August 1, 2008.
5. They stated that LR No 13208/2 was given a new title No LR 2966 after approval of change of user and subdivision by the 3rd to 6th Interested Parties. That while they waited for a new certificate of title, approvals were made by the Respondents in collusion with the 3rd to 6th Interested Parties resulting in 286 sub plots referred to as Mavoko Municipality Block 98/2-286. That the 1st and 2nd Interested Parties were issued with the certificate of title for that parcel on January 16, 2020 as IR 214142/1 for a term of 99 years from August 1, 2008. According to them, the records at the Land Titles Registry-Nairobi show that as at January 17, 2022, the suit property was registered in the names of the 1st and



- 2nd Interested Parties family members stated hereinabove, for a term of 99 years from 1st August 2008 of the parcel of land known as 29666 (Original 13208/2) measuring 357.70 Ha. They observed that the title by the 3rd to 6th Interested Parties indicated the parcel of land as LR No 2966 (Original Nil), which means that the title is forged as there can be no description as original being nil.
6. They also stated that there were other matters where the Applicants and the 3rd to 6th Interested Parties did not comply with court orders; namely; Machakos ELC Petition No 7 of 2019, Machakos ELC No 27 of 2020 and Machakos ELC No 62 of 2018. Further that the 3rd to 6th Interested Parties who purported to sell the suit property to the Exparte Applicant have been charged with the offence of uttering false documents, conspiracy to defraud, forgery and making false documents in Kiambu Criminal Case No 121 of 2020. The 1st and 2nd Interested Parties were of the view that the application is an abuse of the due process.
 7. The 3rd, 4th, 5th and 6th Interested Parties filed a replying affidavit sworn on November 4, 2022 through Benard Masinyi Maluki the 3rd Interested Party in this matter. They stated that they were aware of pending cases between the parties herein being Judicial Review No 7 of 2020, Constitutional Petition No 7 of 2019, ELC No 62 of 2018, ELC No 116 of 2019 and ELC No 27 of 2020. They stated the Judicial Review Case No 7 of 2020 was meant to compel the Land Registrar to register Titles Machakos/Mavoko Municipality Block 98/2-286 and create binders for their signed and sealed green cards. According to them, their titles were issued lawfully.
 8. They further stated that Case Number 116 of 2019 had since been withdrawn as the same dealt with the issue of squatters. Further that ELC No 62 of 2018 was filed by 1st and 2nd Interested Parties and based on trespass against the 3rd to 6th Interested Parties and the case is still pending. That Petition No 7 of 2019 was to stop the County Government of Machakos from consenting to the subdivision of change of user of LR No 29666 which petition was disallowed. Also, that Case No ELC 27 of 2020 was instituted by the current title holders against the 3rd to 6th Interested Parties seeking to allow them to develop their parcels which prayer was allowed. That the 1st and 2nd Interested Parties were joined to ELC No 27 of 2020 and the case is pending.
 9. They sought that status quo orders be granted so that the substratum of the suit property is preserved pending determination of this suit.

Submissions

10. Parties were directed to file submissions in 14 days from November 7, 2022. On record are the Exparte Applicant's submissions filed on November 21, 2022. Counsel for the Exparte Applicant submitted that the suit property was originally known as LR No 13208 belonging to White Settlers who cultivated sisal, with a lease of 934 years 10 months. Counsel argued that the 3rd to 6th Interested Parties took lawful steps to acquire the property from the Government of Kenya after the same had been "left behind" by the White Settlers. Counsel argued that the 3rd to 6th Interested Parties obtained a letter of allotment on October 22, 2008 and a certificate of title subsequently issued.
11. According to counsel, the transfer of land from DCK Athi Limited to them was not explained. Counsel argued that the Exparte Applicant had shown prima facie evidence that they owned the suit property. Counsel maintained that although there were several suits in court between the parties none of the suits sought prohibition and certiorari. Counsel was of the view that failure to take a step in a matter may be a mistake of an advocate and not a party. Counsel argued that the provisions of Order 53 Rule 1(4) was to stop any party from unduly benefiting from the excess of an administrative body.



Analysis and Determination

12. I have carefully considered the application, the responses and the Exparte Applicant's submissions. An order of stay under Order 53 Rule 1(4) of the Civil Procedure Rules is not a matter of course or a right which any of the parties is entitled to. It is a discretionary order, which any claimant seeking such order must demonstrate that they deserve the court's discretion in their favour. While the parties went in detail on the merits of their respective substantive cases, I will restrict myself to the question of stay of execution as the merit on their case will be determined in the substantive motion.
13. It is not in dispute that as of 2020, there were already five civil cases between the parties herein and one Criminal Case; namely, Judicial Review Case No 7 of 2020, Constitutional Petition No 7 of 2019, ELC No 62 of 2018, ELC No 116 of 2019, ELC No 27 of 2020 and Kiambu Criminal Case No 121 of 2020. The reason this court ordered the application for stay to be argued inter parties was due to the several matters already filed and pending between the parties. It was for the sake of guarding against abuse of the court process. The Applicant and the 3rd to 6th Interested Parties argue that the subject matter ought to be preserved pending hearing of this suit but they have not told court why they have not sought for orders to preserve status quo of the suit property in the other five pending cases. An application of judicial review will not in any way determine the lawful ownership of the suit property as the powers for judicial review are meant to interrogate the Constitutionality of decisions made by quasi-judicial bodies and pronounce whether they acted Constitutionally.
14. As can be gleaned from the substantive orders sought pursuant to leave, to wit, orders of certiorari and prohibition, to quash the decisions of the Chief Land Registrar and Director of Surveys as well as prohibiting subdivisions of the suit property into thirty five plots and issuance of title to the 1st and 2nd Interested Parties, this suit has nothing to do with establishment of the real owner of the suit property.
15. Therefore the arguments by the Exparte Applicant and the 3rd to 6th Interested Parties that the substratum of the suit should be preserved before the winning party can be allowed to use the same at the end of this matter, is untenable. If indeed the Applicant was interested in preserving the suit property, nothing stopped them from doing so in the five civil matters already pending before this court. In my view, the prayer for stay is an abuse of the court process. In the premises, I am not convinced that the Exparte Applicants are deserving of the orders sought.
16. The upshot is that prayers VI and VII in the Chamber Summons dated October 19, 2022 seeking for the order of leave to operate as stay are hereby declined.
17. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 15TH DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Orlando for Exparte Applicant

Ms. Katasi for the 1st and 2nd Interested Parties

No appearance for the 3rd, 4th and 5th Interested Parties

No appearance for the Respondents



Josephine – Court Assistant

