



Membley Baptist Church v Registrar of Titles, Nairobi; Ojunga (Interested Party) (Miscellaneous Application E003 of 2021) [2023] KEELC 808 (KLR) (13 February 2023) (Ruling)

Neutral citation: [2023] KEELC 808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
MISCELLANEOUS APPLICATION E003 OF 2021
JG KEMEI, J
FEBRUARY 13, 2023**

BETWEEN

MEMBLEY BAPTIST CHURCH APPLICANT

AND

REGISTRAR OF TITLES, NAIROBI RESPONDENT

AND

SAMUEL OJUNGA INTERESTED PARTY

RULING

1. The applicant moved the court by way of notice of motion dated January 18, 2020 seeking the following orders;
 - a. That this application be certified as urgent and the same be heard *ex-parte* in the first instance and service of the same be dispensed with.
 - b. That this honourable court be pleased to issue an order directing the Deputy Registrar of this honourable court to execute the transfer documents in favour of the applicant with respect to land reference number 14870/250 on behalf of the interested party as well as an application to the respondent for issuance of a replacement title to the suit property.
 - c. That this honourable court be pleased to issue an order directing the respondent to issue a replacement certificate of title with respect to land reference number 14870/250 after the publication of such notice in the gazette.
 - d. That the costs of this application be provided for.
2. The application is supported by the affidavit of Benson Kuiru sworn on the December 18, 2020 who stated that he is the presiding pastor of the applicant. It is averred by the applicant that it entered



into a sale agreement with the interested party for the purchase of the suit land as per the copy of the agreement of sale. It was his evidence that both parties fulfilled their part of the agreement with the applicant paying the full purchase price to the interested party and the vendor deposited the original title with the joint advocates of the parties for purposes of effecting registration. However, the advocates failed to effect the registration of the suit land despite the applicants having been put into possession of the land since 2006. With the desire to complete the transaction, the advocate informed the applicant that he has retired from practice and cannot trace the original documents. In addition, the applicant averred that information in its knowledge is that the interested party immigrated to Australia in 2006 and cannot be traced making it impossible to effect the transfer of the suit land since the original documents as well as the interested party cannot be traced. It is averred that there is no dispute with regard to the suit land and the court is being urged to intervene to allow for the registration of the land in the name of the applicant.

3. The application is opposed by the respondent via grounds of opposition dated the May 28, 2021 on the grounds that;
 - a. That the applicant has not annexed a current official search showing the status of the suit property.
 - b. That the *Registered Titles Act* (repealed) has provided for the procedure to be followed in the event of a grant or certificate of title being lost or destroyed.
 - c. That there is no evidence by the applicant of an application to the registrar of titles under section 71 *Registered Titles Act* (repealed) such as to necessitate the intervention sought before the court.
 - d. That the applicant has not provided evidence in form of a statutory declaration or police abstract from the Kabaki & Company Advocates on loss of the completion documents and or title.
4. Despite service upon of the application upon the interested party, the interested party failed to file any response thereto.
5. Parties elected to canvass the application by way of written submissions which I have read and considered.
6. As to whether the application is merited the applicant urged the court to exercise its inherent powers of the court under section 3A of the *Civil Procedure Rules* and as buttressed by the authors of *Halsbury's Law of England*, 4th Edition Vo 37 para 14 which states as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source



of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

7. Similarly, that the court in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited T/ A WYCO Paints* (2016) eKLR stated as follows;

“The courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

8. The applicant submitted that the circumstances of this case necessitates the exercise of the courts inherent power to enable the transfer be registered in the name of the applicant as neither the original documents including the title nor the vendor can be traced.
9. The respondent filed its submissions through the learned state counsel who submitted that the sale agreement relied by the applicant falls short of the requirements of the law of contract for want of attestation thus lacks the basic fundamentals of a valid contract. In addition, that the applicant failed to present any documentation to indicate that the applicant is the registered owner of the land as no current search was produced in that regard. Further that the applicant has not adduced evidence that he has not been able to trace the vendor. That the applicant has not discharged its legal burden of proof.
10. As to whether the prayer for replacement of the title should be granted, the respondent submitted that section 3(3) of the *Land Registration Act* provides clear steps to be taken in the event that a title is lost or cannot be found. The respondent relied on the decision of the court in the case of *Kenya Commercial Bank Limited v Alcon Holdings Limited* (2021) eKLR where the court held as follows;

“Section 31(1) of the Act allows the Land Registrar to dispense with the production of a certificate of title to land or lease during the registration of any dealing with the land or lease. The application for such dispensation should be made to the Land Registrar who shall determine whether to allow it or not. The court can intervene in the matter under section 86(1) of the Act in case a party is aggrieved by the decision of the Land Registrar on the issue. There is no evidence before me that an application for dispensation with the production of the certificate of title for the suit property had been made to the Land Registrar. This court cannot order the land registrar to dispense with the production of the said certificate of title in the absence of evidence that an application for such dispensation has been made to the Land Registrar and the Land Registrar has unreasonably refused to dispense with the production of the same. Furthermore, the court can only intervene when moved to exercise its review jurisdiction under section 86(1) of the Act aforesaid.”

11. The respondent submitted that there is no evidence that the applicant has initiated the steps required to replace the original title.
12. The key issue is whether the application is merited.
13. The applicant’s case is that it purchased the suit land from the interested party in 2006, paid the full purchase price, the sale agreement was executed as well as the transfer documents and the original title were left with their joint advocate who acted for both parties. That it was put in possession immediately. It is its case that later they approached the lawyer with a view to pursuing the completion of the transaction and learnt that the said counsel had retired from private practice and secondly could



not trace the documents which included the original title to enable the applicant to complete the transaction hence the applicant has moved the court to seek its intervention in that regard.

14. I agree with the respondent that there is a clear procedure provided for in the [Land Registration Act](#) where a title is lost and requires replacement. The court cannot intervene before the applicant moves the Land Registrar under section 33 of the [Land Registration Act](#). In any event the law provides for review of the Land Registrar's decision under section 86 (1) of the [Land Registration Act](#).
15. As to whether there is a valid contract between the applicant and the interested party, the respondent has argued that the copy of the agreement of sale on record is undated, unattested and hence incomplete does not comply with the provisions of section 3 (3) of the [Law of Contract](#) which states as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless:-

 - (a) The contract upon which the suit is found-
 - (i) Is in writing
 - (ii) Is signed by all the parties thereto; and
 - (b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”
16. I have perused the agreement and when matched with the provisions of section 3 (3) of the [Law of Contract](#), I find that though the agreement is in writing, the signatures have not been authenticated and therefore do not comply with the provisions of the law. It is to be noted that the applicant has not challenged this position.
17. According to the applicant's application as far as I can glean, the applicant is adverting a right to the suit land by way of a purchase. I find that the applicant has invoked the jurisdiction of the court in an improper manner. I say so because the right forum should be to file a suit so that proper evidence is adduced. I find that there is no competent suit before the court.
18. In the end the application is unmerited and I proceeded to dismiss it with costs to the respondent.
19. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Wanjiru HB Mr. Ondiek for Applicant

Respondent – Absent

Interested Party – Absent

Court Assistant – Esther/Kevin

