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JUDICIAL REVIEW  
SETTING ASIDE EX PARTE ORDER FOR LEAVE – CIRCUMSTANCES LEADING TO  
THIS. INHERENT POWERS OF COURT INVOKED TO SET ASIDE  
· Exparte orders provisional  
· Failure to disclose material facts a ground for setting aside  
· Alternative remedy not pursued - a factor  
· Abuse of process a factor  
· Certiorari cannot be granted in the absence of an unlawful decision  
· Relevant case law considered and applied  
· Exparte order set aside including order for stay.

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO 1183 OF 2004**

**AND**

**IN THE MATTER OF ORDER OF CERTIORARI TO QUASH AND RECTIFY  
THE TITLE L R NO NGONG.NGONG/3348 REGISTERED UNDER THE NAME  
OF KIRSEK INVESTMENTS LTD ON THE 2ND DAY OF AUGUST 2004 BY THE  
LAND REGISTRAR OF KAJIADO**

**AND**

**IN THE MATTER OF RECTIFICATION OF TITLE NONGONG.NGONG/3348  
FROM 11.3 ACRES TO 10 ACRES BY THE LAND REGISTRAR KAJIADO**

**AND**

**IN THE MATTER OF THE SURVEY ACT CAP 299 OF THE LAWS OF KENYA**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**AND**

**LAND REGISTRAR KAJIADO AND**

**DIRECTOR OF SURVEY KAJIADO ..... 1ST RESPONDENT**

**KIRSEK INVESTMENTS LIMITED ..... 2ND RESPONDENT**

## **EX-PARTE**

### **RULING**

The application dated 21st October, 2004 seeks to set aside the ex parte order for leave and stay given by this court on 21st September, 2004. The stay prevents the subdividing, alienating or disposing or demarcating Ngong/Ngong/3348. It is supported by an Affidavit of one John Njoroge Kiege, sworn on 21st October, 2004. Kiege is a director of the 2nd Respondent company. It is further supported by an affidavit of Mareithi Mugo who is a licenced surveyor and he swore the affidavit on 21st October, 2004.

In opposition the Applicant for leave had filed a written preliminary objection on a point of law which was disposed of when the matter came up for hearing on 4th November, 2004. There is however a replying affidavit of one John Githi Kigunda sworn on 2nd November, 2004. The affidavit of Mr Kigunda makes the following points.

- 1) No file of Ngong/Ngong/3347 have been annexed
- 2) That the issue in dispute is acreage and not boundaries
- 3) That the matter is about rectification of title as the 2nd respondent has illegally fenced off the entire 11.3 acres instead of 10 acres.
- 4) That under Cap 299 section 35 it is an offence for unlicensed surveyor to demarcate boundaries and cause subdivision.
- 5) That under the Registered Land Act Cap 300 there is no provision for resolution of boundary disputes.
- 6) That the Respondent (wants to) unjustly enrich itself by illegally grabbing land.
- 7) That the application is bad in law and an abuse of the court process
- 8) That the licenced surveyor's report has not been challenged.

For the respondent the following main grounds have been urged before the court:-

- a) That the entire proceedings herein are an abuse of court process
- b) That the applicant failed to disclose that he has filed multiple actions seeking to frustrate the sale and transfer of the suit premises Ngong/Ngong/3348
- c) That the applicant failed to disclose that Ngong/Ngong/3347 which he claims to own was sold by public auction on 16th July 2004 to another party before the filing of this action and his equity of redemption was extinguished and as a result of the sale the applicant has no locus standi to institute any suit in respect of the said parcel of land
- d) The applicant failed to disclose that he has a pending appeal in respect of the suit premises.
- e) The applicant filed an action at the Thika Chief Magistrate's Court aimed at obtaining possession to the suit premises by false representation and procured and served an order containing mandatory orders that the Thika court declared not to be genuine.
- f) A party obtaining ex parte restraining orders must place all material facts before the court and must come to court with clean hands. The applicant failed to do both.
- g) The 2nd Respondent has tied up colossal sums of money in the suit premises and it stands to

suffer irreparably if the stay order remains in force as it will not be able to function.

h) The proceedings herein are mischievous and misconceived for the following reasons:

- I. They seek to cancel a certificate of title on the basis of an alleged boundary dispute
- II. The certificate of title in the Registered Land Act Regime does not affect boundaries
- III. The applicant has not followed the statutory provisions for resolution of a boundary dispute.

At the outset I must state very firmly that all the Civil Procedure Provisions relied on except Order 53 do not apply to judicial review and the only reason why this court has agreed to hear this matter is because the applicant has inter alia invoked this court's inherent jurisdiction in the application to set aside.

It is note worthy to record that except for a bare assertion in the replying affidavit of Mr Kigunda that the dispute is about acreage and not boundary and that under the Survey Act Cap 229 section 35 it is an offence for an unqualified person to carry out surveys and to demarcate boundaries and cause subdivisions the grounds set out in the applicant's grounds (a) to (h) have not been denied.

Failure to disclose the matters set out above is in the view of this court a very serious defect.

In the first place if the applicant has lost the right of redemption in respect of Ngong/Ngong/3347 and he has not joined the bank as chargee he would have no standing or loci standi. In this respect it is noted that as regards the ownership Ngong/Ngong/3348 the exparte applicant has filed several suits including HCC 492/2003 which was dismissed by Hon Mr Justice Mutungi. In the Chief Magistrate's court at Thika the exparte applicant did also file suit 885 of 2004 notwithstanding the apparent lack of jurisdiction of such a court in view of the undisputed value of the land and the geographical location of the court as compared to the location of land in Kajiado District. It follows that since after a successful auction and the acceptance of a bid at the auction the owner does loose his equity of redemption pursuant to s 72 of the Registered Land Act the ex parte's applicant standing is doubtful.

### Boundaries

It is not denied that the land in question falls under the Registered Land Act Regime and since a title in respect of Ngong/Ngong/3348 has already been issued the question of ownership (read acreage) can only be challenged by an application to set aside the title. On the other hand if it is a question of boundaries as is apparent the Registered Land Act has the necessary regulating provisions which in fact specifically excludes the courts from assuming jurisdiction over matters touching on the boundary see s 21 (4) of the Registered Land Act cap 300. Under s 21 the jurisdiction concerning boundaries is conferred on the Land Registrar and not the court. For clarity it is important to set out the provision in full. "21

(1) "Except where, under s 22 it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel

(2) Where any uncertainty or dispute arises as to the position of any boundary the Registrar, on the application of any interested party shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary

(3) Where the Registrar exercises the power conferred by subsection (2) he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to boundaries of

registered land unless the boundaries have been determined as provided in this section

(5) Except where as aforesaid it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may in any proceedings concerning the parcel receive such evidence as to its boundaries and situation as it thinks fit”

Section 22 of the Registered Land Act provides for a process of fixing boundaries and it is not contended by the applicant that he has invoked this section as well. Under s 22 the ex parte applicant can make an application to the Registrar of Lands Kajiado for the process to be set in motion.

It is also not contended that the applicant has applied under s 21 above. The court would also wish to observe that under the Registered Land Act regime the Director of Surveys involvement is as set out in s 22(3) ie to verify the plan where the dimensions and boundaries of a parcel have been defined by reference to a plan.

### **JURISDICTION**

It is not the ex parte applicants contention that the boundaries between 3347 and 3348 have been determined. It follows that if the boundaries have not been determined this court’s jurisdiction is clearly ousted by the clear provisions of s 21(4) – Notwithstanding the clear provisions of s 60 of the Constitution concerning the High Court’s original jurisdiction the clear terms of s 21 (4) clearly ousts the jurisdiction as explained in the case of NAROK COUNTY COUNCIL v TRANSMARA COUNTY COUNCIL see [ 2000] 1 EA 161 CA 162.

### **NON DISCLOSURE**

The ex parte applicant has not denied failure to disclose material facts as set out in grounds (b) to (h) herein. All the facts are material including ownership of 3347 and whether or not the boundaries had been determined pursuant to s 21 and 22 of the Registered Land Act and also the fact that there were many previous suits on ownership filed prior to the application for leave including the obtaining of a false order in the Chief Magistrate’s court at Thika.

In the case of SHAH v RESIDENT MAGISTRATE NAIROBI [2000] 1 EA 208 the Court of Appeal in following O RELLY v MARKMAN AND OTHERS [1982] 3 ALL ER 1124 adopted this passage at pg 1130

**“First leave to apply for the order was required. The application for leave which was ex-parte but could be and in practice often was, adjourned in order to enable the proposed Respondents to be represented had to be supported by a statement setting out inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on, so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such official was required to satisfy the requirement of uberrimae fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing relief sought in substantive application for which leave has been obtained on the strength of the affidavit”**

I therefore find and hold that failure to disclose facts set out in grounds (b) to (h) is fatal to the ex-parte order obtained in ignorance of the grounds because the ex-parte applicant did not disclose them either deliberately or by a calculated omission. The application to set aside the ex-parte order must succeed on this ground as well.

**NATURE OF EX-PARTE ORDER FOR LEAVE** It is now accepted that an ex-parte order for leave is in many cases provisional because firstly it is granted on the material available without the other side and is secondly granted upon the establishment of an arguable case on such ex-parte material see NJUGUNA v MINISTER OF AGRICULTURE [2000] IEA 184 (CAK) Again the English Court of Appeal case of

WEA RECORDS LTD v VISIONS CHANNEL 44 & others [1983] 2 ALL ER 589 Although substantially an intellectual property matter it did generally describe the nature of ex-parte orders at pg 593 in these words:

**“As I have said ex-parte orders are essentially provisional in nature. They are made by the Judge on the basis of the evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of the evidence. ...?”**

### **CERTIORARI DOES NOT LIE**

Generally an order for certiorari which is the substantive remedy sought against the Land Registrar Kajiado brings a unlawful decision for quashing by the High Court.

In retrospect and on the basis of evidence so far presented the alleged an unqualified surveyor has not been made a party in these proceedings. It is alleged that it is him who committed the offence under the Survey Act nor has the Director of surveys been made a party nor has it been alleged that he has made an unlawful decision concerning his work or that he threatens to make such a decision. For this reason in the opinion of the Court none of the respondent has made any unlawful decision for quashing. It is not the function of a judicial review court to quash a certificate of title unless the decision leading to its issue is under attack which is not the case here. In the context of the governing law an aggrieved party can file suit to have the title set aside for fraud or mistake under s 143 of the RLA and there is a state guarantee of Title under s 144 of RLA. When there is no challenge the interest conferred upon registration is an absolute interest as per s 27 of the Registered Land Act and cannot be defeated under s 28 except as provided for under the Act. The only possible challenge can only be on grounds of mistake or fraud.

Finally as indicated above, no evidence has been presented to this court that the Land Registrar Kajiado's powers as per that Act have been invoked. If the ex-parte applicant has not moved the Registrar to invoke his powers certiorari does not lie, nor has the Land Registrar refused to perform his statutory duties and therefore a mandamus order does not lie and shall not issue.

### **SUMMARY**

1. These proceedings are an abuse of the court process. More than three undisclosed suits concerning the subject matter have been filed.
2. The applicant has an alternative statutory remedy under s 21 and s 22 of the RLA cap 300 which he has failed to invoke
3. This court's jurisdiction on boundaries is ousted by the clear provision of s 21 (4) of RLA cap 300 and or it can only be exercised in the terms of the terms set out in both s 21 and s 22. The preconditions for its exercise have not been met.
4. The effect of failure to disclose material facts disentitles the applicant of the orders sought.
5. CERTIORARI being the substantive order sought in the main application does not and will not lie in the absence of an unlawful decision by the Registrar to whom it is directed
6. This court has the inherent power to set aside an ex-parte order for leave.

### **CONCLUSION**

For the above reasons either singly or collectively the order for leave including the order for leave

to operate as stay are herein set aside or discharged with costs to the respondents/applicant herein.

DATED and delivered at Nairobi this 16th day of November, 2004.

**J G NYAMU**

**JUDGE**