



Ouam v Land Registrar, Kisumu County & 2 others (Environment and Land Judicial Review Miscellaneous Application E005 of 2022) [2023] KEELC 17499 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17499 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E005 OF 2022**

E ASATI, J

MAY 25, 2023

IN THE MATTER OF AN APPLICATION BY ODIPO EDWIN OUMA FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS AND IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORMS ACT (CAP 26 LAWS OF KENYA) AND IN THE MATTER OF: LAND REGISTRAR KISUMU OVER TITLE NO. KISUMU/KORANDO/2528

BETWEEN

ODIPO EDWIN OUAM APPLICANT

AND

THE LAND REGISTRAR, KISUMU COUNTY 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

CHRISTOPHER OTIENO ADHOCH 3RD RESPONDENT

JUDGMENT

Introduction

1. Leave to file the substantive Judicial Review Proceedings having been granted on September 8, 2022, the Ex parte Applicant brought the Substantive Judicial Review application vide the Notice of Motion dated September 20, 2022 and filed in court on October 5, 2022 seeking for;
 - a. An order of certiorari to bring to the court and quash the decision of the Land Registrar Kisumu to cancel entry numbers 4 and 5 in the register of title No Kisumu/korando/2528.
 - b. An order of Mandamus to compel the Land Registrar – Kisumu to restore entry number 4 and 5 in the register in respect of Title No Kisumu/korando/2528.
 - c. Further or such other orders as deemed fair and just.



- d. An order that costs of the application be in the cause.
2. The grounds upon which the application was brought are that the Ex Parte applicant bought the property known as Title No Kisumu/korando/2028 (the suit land herein) from the Interested Party. That on July 10, 2020 a caution was lodged against the suit property by the Interested Party claiming unspecified interest but subsequently removed upon an application by the Ex parte Applicant to the 1st Respondent for its removal. That on February 3, 2021, the 1st Respondent cancelled entry numbers 4 and 5 on the register on the grounds that the same were entered erroneously yet the said entries were made by the 1st Respondent upon the Interested Party transferring the subject property to the Ex parte Applicant. That the 1st Respondent un-procedurally, unlawfully, illegally and irregularly restored the Interested Party as the owner of the suit property without following the laid down procedure. That the Interested Party had sold the suit property to the Ex parte Applicant who then complied with all the legal requirements pertaining to the sale and transfer of the property and made all the statutory payments to the government. That the Interested Party may dispose of the suit property to a third party anytime from now and the Ex parte Applicant stands to suffer irreparable loss and damage. That the 1st Respondent has acted outside his mandate by tampering with the records he is holding in respect of the suit property. That no prejudice will be occasioned to the Respondent since the subject property was sold to the Applicant and the Interested Party received the agreed purchase price. That it is only just and fair that the orders sought be granted.
 3. The application was supported by the averments in the Supporting Affidavit sworn by the Ex parte applicant and the annexures thereto.
 4. The application was opposed vide the grounds of opposition dated October 12, 2022 filed by Callen Masaka, Principal Litigation Counsel for the Attorney General for the Respondents. The Respondents' case was that the Notice of Motion is totally defective for offending the mandatory provisions of Order 53 of the *Civil Procedure Rules*. That the Notice of Motion lacks sufficient facts and information to enable the Respondents to properly respond and as such the Notice of Motion on itself amounts to an harassment and embarrassment to the Respondents. That the subject action of the Respondents were done within the statutory powers of the 1st Respondent and upon following due procedure within the provisions of Section 73 and 79 of the *Land Registration Act* 2012. That the issues of law arising in touch on a contractual relationship between the Ex-parte applicant and the Interested Party and as such the best redress is by way of an ordinary suit and not by way of Judicial Review proceedings. That the Notice of Motion and the orders sought are intended to confer ownership interests on a suit land on a contractual relationship which has been put into question by the Interested Party. That this is not a fit case for Judicial Review orders as the same will not finally and completely determine the underlying disputes. The Respondents prayed that the Notice of Motion be dismissed with costs.
 5. The Interested Party did not respond to the Notice of Motion, Affidavit of Service sworn on February 10, 2023 by Paul Otieno Ado, who described himself as Court Process Server, shows that the Interested Party was served with Notice of Motion and other documents on February 9, 2023. I am satisfied that the Interested party was properly served with Notice of Motion dated September 20, 2022 and failed to respond.
 6. By consent, the Judicial Review application was canvassed by way of written submissions. Written submissions dated February 8, 2023 were filed on behalf of the Ex Parte Applicant while written submissions dated February 14, 2023 were filed on behalf of the Respondents.



7. From the pleadings filed and the submissions made, the following emerge as the issues for determination;
 - a. Whether or not the application offends the provisions of Order 53 Civil Procedure Rules, 2010.
 - b. Whether or not cancellation of entry numbers 4 and 5 of the register in respect of title number Kisumu/korando/2528 was un-procedural and irregular and calling for an of certiorari to issue;
 - c. Whether or not the applicant is entitled to orders of certiorari and mandamus as prayed.
8. On whether or not the application offends the provisions of Order 53 of the Civil Procedure Rules, one of Respondents' grounds of opposition to the application is that the application is totally defective as it offends the mandatory provisions of Order 53 Civil Procedure Rules. It was submitted on behalf of the Respondents that Order 53 Civil Procedure Rules provides that no application for judicial review should be made unless leave of the court has been sought and granted. Counsel relied on the case of *Republic -Vs- County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No 384 of 1996* and submitted that leave was not sought before the application was filed and that the matters raised do not fit into the preview of Judicial Review.
9. Perusal of the court file reveals that this matter was commenced on September 8, 2022 vide the Chamber Summons application dated September 7, 2022 brought under certificate of urgency. Among the orders sought in the Chamber Summons was leave to apply for Judicial Review orders of certiorari and mandamus. The court record further shows that on the same date, September 8, 2022, the court made an order granting the leave sought. The court record also shows that to the Chamber Summons were annexed Supporting Affidavit, Statement containing the facts and Verifying Affidavit. In the circumstances, I find that the application before court complied with the provisions of Order 53 of the Civil Procedure Rules.
10. The next issue is whether cancellation of entry Numbers 4 & 5 was un-procedural. A copy of register (green card) in respect of the suit land was annexed to the application and marked 'OEO4'. It shows that entry No 4 was made on November 5, 2013. The contents of the entry were that the name of the proprietor was Odipo Edwin Ouma I/D NO xxxx and the transaction was a transfer. Entry No 5 was made on the same date and it read; 'Title Deed PO Box 437, Ongata Rongai issued.' Entry No 6 was in respect of a caution lodged by Christopher Otieno Adhoch, the Interested Party herein claiming purchase interest. Entry No 7 was a cancellation of entry No 4 & 5 on the grounds that they were entered erroneously and thereby reverting the land back to entry No 3 in the name of the Interested Party.
11. The Ex parte applicant's contention is that the cancellations were un-procedural and irregular because the Interested Party had sold the suit land to him. That in cancelling the entries, the 1st Respondent (the Land Registrar – Kisumu) acted outside his mandate. That the Ex parte applicant was thus condemned unheard contrary to the rules of natural justice.
12. It was submitted on behalf of the Ex parte Applicant that the 1st Respondent unilaterally cancelled the Ex parte Applicants' title to the suit land without according him any hearing thus acting in contravention of Article 50 and 47 of the *Constitution* of Kenya.

That the ex parte Applicant was not notified of the cancellation or Counsel relied on the case of *Republic -vs- Land Registrar Thika Ex parte Maria Wairimu Michael, Wanjiku Mwaura (Interested*



Party) [2021] eKLR and submitted that in cancelling the Ex parte Applicant's title, the 1st Respondent acted beyond his powers as the 1st Respondent has no powers to cancel a title deed without a court order directing him to act as such.

13. Counsel also referred to section 79 of *Land Registration Act* and submitted that the powers donated to the 1st Respondent under Section 79 are only limited to rectification of register and that rectifications does not involve cancellation of title. Counsel referred the court to the case of *Republic – Vs- Naivasha District Land Registrar and 2 Others Ex Parte Grace Wanjiru Nganga & 2 Others (2022)eKLR* where the court held that;

' There is no doubt that the Ex parte applicant stood to be adversely affected by the Respondents' action of cancelling their acquired rights and interests in the suit property. In terms of Article 47(1) and (2) of the *Constitution*, the Respondents had a duty and obligation to ensure the Ex parte Applicants were notified and given an opportunity to be heard before any action that was adverse to their rights and interest being taken.

Indeed Section 79(2) of the *Land Registration Act* expressly provides that no alteration affecting the title of a proprietor may be made pursuant to the Section without the proprietors consent unless the conditions specified under the Section are fulfilled and that a written notice of ninety days must be given to the proprietor of the intentions to make the alteration. The ex parte applicants have stated that they were not notified and given an opportunity to be heard before actions complained of were taken. The Respondents have not disputed that position.

The cardinal rule of natural justice is that no person should be condemned unheard. There is evidence the ex parte applicants were accorded a chance of being heard before their titles were cancelled it is now settled law that a Land Registrar has no power to cancel a title and that cancellation only be done by a competent court of law.'

14. Counsel submitted further that the Ex parte applicant's title to the suit land was protected under article 40 of the *Constitution* of Kenya and Section 27, 28, 142 and 143 of the *Land Registration Act*. That the 1st Respondent acted in excess of his powers and thus the orders sought in the application will serve the interest of justice. Counsel further relied on the case of Nyeri Court of Appeal Civil Appeal No 5 of 2015 Between *Jane Wangechi Wariari (Suing as the legal representative of the estate of Hiram Ndungu, deceased –vs- the Registrar Ngeri & Another* and urged the court to find in favour of the Ex parte applicant and allow the application.

15. It was submitted on behalf of the Respondents that the issues raised in the application touch on the contractual relationship between the Ex-parte applicant and the Interested Party. That the case is not fit for Judicial Review as the orders sought will not finally and completely determine the underlying issue.

That the Respondent were within their statutory power of rectification of register as provided for in Section 73 and 79 of the *Land Registration Act*.

That the Ex parte Applicant has not made out a case for the grant of Judicial Review remedies as sought and the application should be dismissed with costs to the Respondents.

16. I have carefully considered the submissions by both parties. It is not in dispute that entry No 4 and 5 in the register in respect of the suit land existed and that the said entries consisted of the record of the ex parte applicant's proprietorship of the suit land. It is not denied that the 1st Respondent vide entry No 7 on the same register cancelled entry No 4 and 5 thereby in effect cancelling the Ex parte's proprietorship of the suit land and in effect his title thereto. Further, that by virtue of the cancellation,



title and proprietorship of the suit land reverted to the Interest Party from whom the suit land had been transferred to the Ex parte applicant. It is clear from the said register that the reason given by the 1st Respondent for the cancellation was that the entries were erroneous.

17. The Ex parte applicant has stated and submitted that he was neither given chance to be heard nor was he notified of the intention to cancel or the actual cancellation. This has not been denied by the Respondents. The Respondents tendered no explanation of what the error was that made the 1st Respondent cancel the said entries.

I am in agreement with the Ex parte applicant that title to land is protected by the Constitution and the law and for a party to be deprived of the same, due process of the law must be followed.

The rules of natural justice demand that a person be given a chance to be heard before adverse decision or action is taken against him/her. in this case this was not done.

18. It was submitted that the 1st Respondent's action of cancelling the register were in accordance with the provisions of Section 73 and 79 of the Land Registration Act.

Section 73 of the Land Registration Act provides for withdrawal and removal of caution. Section 79 of the Land Registration Act provides for Rectification of Register by the Land Registration, Section 79(2) provides that;

'No alteration affecting the title of the proprietor may be made pursuant to subsection (1) without the proprietor's consent unless:-

- a. The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- b. It would for any other reason be unjust for the alteration not to be made.

Provided that a written notice of timely days shall be given to the proprietor of which intention to make the alteration'.

19. It is clear that the alterations made by the 1st Respondent on the register adversely affected the title of the Ex parte Applicant as they in effect cancelled his title. There is no evidence that consent of the Ex parte Applicant was sought and obtained. There is no evidence that the Ex parte Applicant had by fraud or lack of proper care cause or substantially contributed to any error, mistake of omissions in the register or that it would be unjust not to make the alterations. There is no evidence that the 90 days' notice required under Section 79(2) was given to the Ex parte applicant.
20. Judicial Review proceedings are concerned with the manner in which the decision was made than the merits of the decision. The role of the court in the Judicial Review proceedings is supervisory – to ensure that the rules of natural justice are upheld, that decision making bodies do not act ultra vires their powers and that due process is followed.

In the present case, it is clear the 1st Respondent failed to follow the procedure failed to give the Ex – arte Applicant a chance to be heard and acted beyond its powers.

21. I find the application is merited and allow it. I make the following orders:-
- i. A Judicial Review Order of certiorari is hereby issued to bring to the court and quash the decision of the Land Registrar – Kisumu to cancel entry numbers 4 and 5 in the register of title No Kisumu/korando/2528.
 - ii. A Judicial Review Order of Mandamus is hereby issued to compel the Land Registrar – Kisumu to restore entry number 4 and 5 in the register in Title No Kisumu/korando/2528.



iii. Costs of the application to the ex parte applicant.

22 Orders accordingly.

**JUDGEMENT READ AND DATED AT KISUMU, DELIVERED VIRTUALLY THROUGH
TEAMS VIDEO CONFERENCING PLATFORM THIS 25TH DAY OF MAY 2023.**

E. ASATI

JUDGE

In the presence of:

Maureen — Court Assistant

No Appearance for the Ex Parte applicant

No Appearance for the Respondents

No Appearance for the Interested Party.

