



Republic v County Land Registrar, Kisii; Bosire & another (Interested Parties); Masese (Exparte) (Judicial Review Application 14 of 2020) [2023] KEELC 20275 (KLR) (27 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
JUDICIAL REVIEW APPLICATION 14 OF 2020
M SILA, J
SEPTEMBER 27, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR, KISII RESPONDENT

AND

DAVID BOSIRE INTERESTED PARTY

MICHAEL NGOGE MOTUKA INTERESTED PARTY

AND

OGEMBO MASESE EXPARTE

JUDGMENT

(Judicial review motion seeking orders of certiorari to quash decision of Land Registrar; Land Registrar purported to cancel title of the *ex parte* applicant; title cancelled after a boundary dispute was heard after which the Land Registrar formed opinion that the title number which the *ex parte* applicant contends to be proprietor of was unlawfully procured; within the boundary dispute, 2nd interested party being the person recognized as having title to the suit land and not the *ex parte* applicant; apparent that there is an ownership dispute between the *ex parte* applicant and the 2nd interested party; disputes over ownership of land not suitable to be heard by way of judicial review and are best determined through an ordinary suit; 1st interested party, wrongly joined to the suit as he was not the owner of the land that gave rise to the boundary dispute; motion dismissed)

1. This is a judicial review motion seeking orders of certiorari to quash the decision of the Land Registrar, Kisii, dated 4 August 2020. The *ex parte* applicant purports that this decision cancelled his title to the land parcel West Kitutu/Bogusero/5204 (the suit land). It is his contention that the decision should



be quashed for the reasons that the Land Registrar has no jurisdiction to cancel title to land; that he (as registered owner) was not accorded an opportunity to be heard; that he (as registered owner) was not party to the proceedings that led to the cancellation of the title; and that the decision of the Land Registrar was unlawful, irregular and improper. Leave to commence the judicial review motion was granted on 24 December 2020 when the *ex parte* applicant was directed to file the main motion within 21 days, and the main motion was filed on 26 January 2021. The motion is opposed by the respondent and the two named interested parties.

2. I have gone through the material supplied by the *ex parte* applicant. It is his case that his title was unfairly cancelled by the Land Registrar on 4 August 2020 after a boundary dispute had been referred to the Land Registrar. The dispute was over the boundaries of the land parcels West Kitutu/Bogusero/3642 (parcel no 3642) and the suit land i.e West Kitutu/Bogusero/5204 (parcel no 5204). The site of the disputed land was visited by the District Land Surveyor, Kisii, on 17 October 2019, and he made a report dated 24 October 2019. From the report, it is discernible that those present included one Michael Ngoge Matoke as proprietor of the suit land (2nd interested party) and David Bosire (the 1st interested party) on behalf of Beatrice Bosire, the proprietor of the land parcel West Kitutu/Bogusero/3642. The complainant in the dispute was Beatrice Bosire and the dispute appears to have been over a road of access that was to serve her parcel no 3642. The report of the surveyor notes that a house had been built on part of the 6m road of access. This house was said to have been built on what is the land parcel no 5204 (the suit land). It was the opinion of the surveyor that this land parcel no 5204 purportedly resulted from a subdivision of a land parcel no 4843. He opined that the subdivision of parcel no 4843 went beyond its original boundaries so as to create the parcel no 5204 on a road of access, the result being that this parcel no 5204 completely lies on the 6m road. In his conclusion, he advised the complainant to seek legal redress to cause the house on the 6m road to be removed. He also sought the advice of the Land Registrar on the fate of the title West Kitutu/Bogusero/5204.
3. On 4 August 2020, the Land Registrar endorsed the following on the report of the District Surveyor :-

“Bogusero 5204 cancelled. Subdivision was irregular. For eviction to seek legal redress from court.”
4. It is this action that prompted the *ex parte* applicant to file this suit and it will be recalled that it is his contention that the action of the Land Registrar was illegal.
5. In his supporting affidavit, the *ex parte* applicant avers that he is the registered owner of the suit land and he has annexed a copy of the title deed bearing his name. He has deposed that he went to conduct a search, but was issued with none, and instead, he was given a document stating that the land belongs to Michael Ngoge Motuka, the 2nd interested party. He requested the Land Registrar to explain to him the status and it is then that he was supplied with a copy of the surveyor’s report, and informed that it had been acted upon by cancellation of his title. He deposes that he was not a party to the report and neither was he given an opportunity to be heard. He insists that the decision of the Land Registrar was made without jurisdiction, and is unlawful, and he believes that his remedy lies in *certiorari*.
6. The Land Registrar, filed a replying affidavit to oppose the motion. He deposed that from their records, the suit land emanated from a subdivision of the land parcel West Kitutu/Bogusero/4843. He deposes that this land parcel no 4843 was allegedly subdivided into the parcels no 4746, 4747, 4748, 5203 and 5204 (the suit land). He contends that the proper subdivision was only confined to the parcels no 4746, 4747 and 4748, and that the parcels no 5203 and 5204 were added irregularly. He has explained that subdivision needs to be sequential. He deposed that due to the irregularities noted, the Lands office



did not issue any title deed to the parcels no 5203 and 5204, and that the title deed that the *ex parte* applicant holds did not emanate from their office.

7. The 1st interested party also filed a replying affidavit. In it, he wondered why he has been named in the suit, as he did not contribute to the cancellation of the *ex parte* applicant's purported title. He deposes that it is within his knowledge that there was a boundary dispute between the parcels no 5204 and 3642 but the land parcel no 3642 is owned by Beatrice Kemunto Bosire who is his wife. He does not understand why the *ex parte* applicant sued him and not Beatrice Kemunto Bosire. He has nevertheless referred to the report of the surveyor and points out that it was observed that the suit land is on a 6 metre road reserve hence the title was irregularly procured.
8. No appearance was entered for the 2nd interested party and nothing was filed on his behalf.
9. I directed the motion to be canvassed through written submissions, and I have seen the submissions of Mr. Soire, learned counsel for the *ex parte* applicant, and Mr. Anyona, learned counsel for the 1st interested party. Mr. Wabwire, learned State Counsel, for the respondent, stated that he would not be filing submissions. I have taken note of the submissions filed before arriving at my decision.
10. This is a judicial review motion seeking orders of *certiorari*. It is first necessary to outline the place of judicial review. Judicial review is a discretionary remedy and it is not in all instances that the court will be persuaded to exercise its discretion to grant prerogative orders. There are situations and instances which would militate against the court exercising its jurisdiction in judicial review. One such instance, in my view, is where it is apparent that there is contention on ownership of land. The question of ownership of land requires an in-depth examination which may not be adequately done in a suit for judicial review. Such dispute is best suited to be heard via an ordinary suit, where parties can be given an opportunity to present their evidence, to enable the court arrive at a determination on who is the rightful proprietor of the land in issue. Thus where two or more parties seek a resolution on who ought to be the rightful owner of land, it is best that such a matter proceeds by way of an ordinary suit, rather than judicial review.
11. In our case, the *ex parte* applicant contends to be the rightful owner of the suit land. However, when you look at the report of the District Land Surveyor, the person who is claimed to be the proprietor of the suit land is the 2nd interested party. In fact, it is the 2nd interested party, and not the *ex parte* applicant, who was invited to attend the boundary dispute between the suit land and the parcel no 3642. Even when the Land Registrar made the endorsement that the title to the suit land ought to be cancelled, I think that he had in mind the title of the 2nd interested party, and not that of the *ex parte* applicant. The fact that the *ex parte* applicant has joined the 2nd interested party in this suit informs one that the *ex parte* applicant recognizes that he has an ownership dispute over the title to the suit land with the 2nd interested party. In his affidavit, the *ex parte* applicant has indeed deposed that when he went to seek a search to the land, he was informed that he is not the proprietor, but proprietorship is with the 2nd interested party. Thus, even before going into whether or not the Land Registrar had power to cancel title, it is apparent that there is an ownership dispute over the suit land, which dispute, I am afraid, cannot be resolved within such proceedings. It will be improper for this court to make an order that the title of the *ex parte* applicant be recognized and be restored, without substantially dealing with the ownership dispute between himself and the 2nd interested party, which can only be done through an ordinary suit. I see no prejudice to the *ex parte* applicant because he can as well challenge any cancellation of his title by the Land Registrar through the same suit.
12. It is therefore my opinion that the dispute herein is ill-suited to be heard through judicial review. The *ex parte* applicant, if he wishes to pursue the matter, ought to file an ordinary suit.



13. In his reply to the motion, the 1st interested party raised issue that he has been wrongly sued. I agree, as he is not the proprietor of the land parcel West Kitutu/Bogusero/3642. The proprietor is one Beatrice Kemunto Bosire, and it is her, not the 1st interested party, that the *ex parte* applicant ought to have joined in this suit.
14. For the above reasons, I find no merit in this suit. It is hereby dismissed with costs to the respondent and the interested parties.
15. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 27 DAY OF SEPTEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

