



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW NO. 4 OF 2017

**IN THE MATTER OF AN APPLICATION FOR JUCICAL REVIEW ORDERS OF
PROHIBITION CERTIORARI MANDAMUS**

AND

**IN THE MATTER OF ARTICLE 2, 10, 19, 40 AND 64 (B) OF THE CONSTITUTION OF
KENYA 2010**

AND

IN THE MATTER OF SECTIONS 76, 77 AND 78 OF THE LAND REGISTRATION ACT 2012

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM
ACT, CAP 26, LAWS OF KENYA**

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACT 2015

BETWEEN

REPUBLICAPPLICANT

AND

CHIEF LAND REGISTRAR1ST RESPONDENT

THIKA DISTRICT LAND REGISTRY.....2ND RESPONDENT

AND

EARTHLINE PROPERTIES LIMITED.....INTERESTED PARTY

-EXPARTE-

1. PATRICK MBAU MALIKA

2. MERWIN HOLDINGS LIMITED

3. MERCLAIRE HOLDINGS

4. GLADYS KARAMBU MIRITI

5. SAMUEL KARONJI KIMANI

6. ARBEE LOGISTICS LIMITED

7. HIRAM KAGO MUKUNA

JUDGMENT

1. The Applicants have approached the Court for Judicial Review orders by way of Notice of Motion dated 01/02/2017. All the orders sought are related to a decision unilaterally made by the Land Registrar, Thika District Land Registry to register restrictions over certain parcels of land owned by the *Ex Parte* Applicants. Principally, the *Ex Parte* Applicants seek for orders of certiorari quashing the decision to unilaterally place the restrictions; orders of mandamus compelling the Respondents to remove the offending restrictions; and, finally, orders of prohibition proscribing the Respondents from placing any future restrictions on the parcels of land without following the due process of the law.

2. On 31/01/2017, I certified the matter urgent, granted leave to the *Ex Parte* Applicants to bring the Judicial Review Application and required the *Ex Parte* Applicants to file and serve the substantive Notice of Motion Application within seven (7) days. I scheduled the hearing of the Notice of Motion on 22/02/2017.

3. When the advocate for the *Ex Parte* Applicant appeared before me on 22/02/2017 and demonstrated that they had duly served the Respondents, as a matter of exercise of abundance of caution, I directed that they serve the Interested Party and then serve the Respondents again and appear for the hearing of the Application on 01/03/2017.

4. The *Ex Parte* Applicants' advocates obeyed the Court's directions and so served the Respondents and the Interested Party. However, when the matter was called out on 01/03/2017, none of the Respondents and the Interested Party were present. The matter, therefore, proceeded *Ex Parte* with the *Ex Parte* Applicants relying on their written submissions filed in Court on 01/03/2017.

5. In my view, the case is pretty straightforward. The *Ex Parte* Applicants have placed evidence on record to show that they are bona fide proprietors of the subject parcels of land having purchased them for value without any notice of any illegality from the Interested Party.

6. The *Ex Parte* Applicants have demonstrated to the Court that they exercised due diligence before purchasing the parcels: they obtained the requisite consents from the Land Control Board, performed official searches at the Land Registry both before and after registration of their interests in the subject parcels. Through all this processes, they were re-assured that the Interested Party was the bona fide registered owner of the subject parcels. They therefore proceeded to transfer the subject parcels to themselves.

7. However, the *Ex Parte* Applicants were surprised to learn that a restriction had been placed on all the subject parcels on 20/09/2016. Apparently, this was done on the instructions of the 1st Respondent. It turned out that the restrictions were placed on all the subject parcels without giving any notice to the *Ex Parte* Applicants who are the registered owners of the parcels. The *Ex Parte* Applicants were not given any reasons for the restrictions being placed on their property. What is worse, the Respondents have completely refused to give any reasons for their unilateral decision to place the restrictions. The *Ex Parte* Applicants are not aware of any dispute concerning the subject parcels and neither are they aware of any legal proceedings respecting them.

8. As a result of the restrictions placed on their parcels of land, the *Ex Parte* Applicants cannot enjoy their rights of alienating, quiet possession or engage in any commercial transactions over the subject parcels.

9. The *Ex Parte* Applicants find the decisions and conduct of the Respondents to be manifestly unjust, arbitrary, irrational, illegal and a breach of their constitutional rights to enjoy the right to freely own property as enshrined in Article 40 of the Constitution.

10. In particular, the *Ex Parte* Applicants find the decision to place a restriction on their parcels of land without notice, before giving them an opportunity to be heard and without giving reasons for the restriction to be particularly oppressive; illegal; administratively unfair and irrational.

11. Article 40 of the Constitution protects the right to own property in Kenya. This article must be read together with Article 47 of the Constitution which provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

12. There is no doubt that the right to property is constitutionally protected in Kenya and a person can only be deprived of that right as provided under the Constitution. Similarly, that right can only be curtailed in any way if due process is followed. Both under the Constitutional and the relevant statutory provisions a registered proprietor's title to land cannot be arbitrarily curtailed by placing a restriction without the proprietor being afforded an opportunity to be heard. A decision by the Registrar to unilaterally place a restriction without giving notice or an opportunity for the registered owner to be heard flies in the face of express constitutional and statutory provisions.

13. Section 76(1) of the Land Registration Act, No. 3 of 2012 provides as follows:

For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land

... and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land...

14. Further, Section 77(1) of the Land Registration Act, No. 3 of 2012 provides as follows:

The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.

15. In the instant case, the *Ex Parte* Applicants complain that they were never notified about the restriction and were never given an opportunity to be heard when the restriction was placed on their parcels of land. It requires only a straightforward application of the law to conclude that the Registrar acted unlawfully and oppressively. That illegality and oppression is compounded by the Registrar's high handed refusal to engage or deal with the *Ex Parte* Applicants at all conduct that has been extended to the Registrar's refusal to respond to the present suit. As the Learned Justice Gitumbi pointed out in ***Itrade Company Limited v Jane Mukami Mwangi & Another [2015] eKLR***:

The law is quite clear that the Registrar is required to give the affected proprietor a chance to make representations to him prior to proceeding to enter a restriction on any property. This was not done. Further, the Registrar is bound by the law to notify the affected proprietor of a restriction which has been entered against their property. This was also not done in this case. Clearly, the Applicant was condemned unheard and has suffered great financial loss as a result.

16. So it is here. The Registrar(s) in this case acted illegally and unlawfully by placing a restriction without giving the Registered Owners notice and compounded the unlawfulness by refusing to give them an opportunity to be heard. They have further aggravated the situation by refusing to engage the *Ex Parte*

Applicants. The Court must intervene at this stage. It will do so now by issuing all the orders prayed in the Notice of Motion dated 01/02/2017.

17. Orders accordingly.

Dated and delivered at Kiambu this 23rd day of March, 2017.

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JOEL NGUGI

JUDGE