



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT HOMA-BAY**

**ELC JR No. 7 OF 2021**

***(FORMERLY MIGORI ELC JR NO. E001 OF 2020)***

**MICHAEL OTIENO OLOO.....APPLICANT**

**VERSUS**

**THE HOMABAY LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**NORAH B. OLUOCH.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1) At the outset, it is noteworthy that on 1<sup>st</sup> October 2020, the court granted leave to the Ex parte applicant, Michael Otieno Oloo represented by M/S Robert Ochieng and Company Advocates to apply for Certiorari, Mandamus and Prohibition orders in this matter. This was done pursuant to the Ex Parte applicant's application by way of Chamber Summons dated 30<sup>th</sup> September 2020 brought under **Article 23 (3) (f) of the Constitution of Kenya, 2010 (the Constitution herein) and Order 53 Rules 1 and 2 of the Civil Procedure Rules, 2010**, among other provisions of the law.

2) In the foregone, on 22<sup>nd</sup> October 2021, the Ex-parte Applicant filed a motion on notice dated 27<sup>th</sup> September 2021 (the application herein) for the orders infra;

a) Moot.

b) Leave be granted for the applicant to apply for ORDERS of:

A. **CERTIORARI** to remove into this Honourable court for the purposes of quashing the decision of the 1<sup>st</sup> Respondent as published in the judgment/ruling order of rectification dated and/or issued on the 3<sup>rd</sup> day of September 2020 cancelling the applicants title to land parcel No. KANYADA/ KOTIENO/KATUMA A/961 (the suit property)

B. **MANDAMUS** compelling the 1<sup>st</sup> respondent to reinstate the ex-parte applicant as the duly registered proprietor of the suit property.

C. **PROHIBITION** restraining the 1<sup>st</sup> respondent by itself, its agents or persons acting on its behalf from conducting a review of holding hearings or implementing any decision or resolution from a review relating to the suit property or from making and/or implementing decision that violates the Applicants right to property guaranteed under Article 40 of the constitution of Kenya other than through a lawful court order emanating from a competent court of jurisdiction within the republic of Kenya.

c) Moot.

d) Cost of any incidental to the application provided for.

3. It is also noted that order number 2 sought in the application as per paragraph 2 hereinabove, is for leave to apply for judicial review (JR herein). In light of the spirit of the application and since leave sought had been granted as noted in paragraph 1 hereinabove, I am of the

considered view that the words “*leave be granted for the applicant to apply for ORDERS of*” as indicated in the said order, are superfluous, erroneous and amount to a technicality of procedure. Thus, the same is hereby curable under **Section 19 (1) of the Environment and Land Court Act, 2015 (2011)** as aligned to **Article 159 (2) (d) of the Constitution**.

4. The application is anchored upon a statutory statement including grounds 1 to 11 (i) and (ii) as set out on its face. The same is further anchored on the Ex-parte applicant’s sixteen (16) paragraphed affidavit sworn on even date alongside the annexed documents and marked as “MOO-1”, “MOO-2”, “MOO-3” and “MOO-4” namely a title deed issued on 13<sup>th</sup> February 2019 in regard to the suit property, a notice of intention to rectify register dated 14<sup>th</sup> July 2020, a letter dated 3<sup>rd</sup> September 2020 from the Ex Parte Applicant’s counsel to Homa Bay Sub-County Land Registrar and a rectification order dated 3<sup>rd</sup> September 2020 respectively.

5. Briefly, the Ex parte applicant’s complaint is that he was the duly registered proprietor of the suit property as per “MOO-1” having purchased the same as a bona fide purchaser for value. That by “MOO-2”, the 1<sup>st</sup> respondent intimated the decision to rectify register of the suit property. This prompted counsel for the Ex parte applicant to react thereto by a letter (MOO-3). That however, the 1<sup>st</sup> respondent proceeded to revoke “MOO-1” in favour of the 2<sup>nd</sup> respondent by way of an order (MOO-4). That the Ex-parte applicant’s rights over the suit land under Article 40 of the Constitution, have been infringed hence, it provoked the instant application.

6. By a sixteen (16) paragraphed replying affidavit sworn on 17<sup>th</sup> March 2021 and duly filed in court on 18<sup>th</sup> March 2021 through M/S Moriasi Osoro and Company Advocates, the 2<sup>nd</sup> respondent denied the Ex Parte applicant’s allegations. She termed the application incompetent, brought in bad faith and an abuse of the process of the court. So, she prayed that the same be dismissed with costs.

7. The 2<sup>nd</sup> respondent deposed, inter alia, that the registration of the suit property in the name of the Ex-parte applicant was irregular and fraudulent. She pleaded the particulars of fraud at paragraph 8 (I) and (II) of the replying affidavit. She relied on a limited grant of letters of administration ad litem issued to Reuben Ondieki on 17<sup>th</sup> July 2020 in respect of the estate of Hellen Nyagechanga Nyanchama (Deceased), a certificate of death No. 227796 regarding the deceased and a ruling delivered on 28<sup>th</sup> June 2016 in Homa Bay High Court Succession Cause No. 8 of 2015 concerning the estate of the deceased annexed to the replying affidavit and marked as “NBO-1”, “NBO-2” and “NBO-3” respectively.

8. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents duly served, failed to file any reply to this application.

9. Initially, the application was lodged at Migori Environment and Land Court. On 26<sup>th</sup> October 2021, the application was transferred to this court, upon its establishment, for hearing and determination in the spirit of **Articles 6 (3) and 48 of the Constitution**.

10. On 2<sup>nd</sup> February 2021, the court ordered and directed that the application be argued by way of written submissions as provided for under **Order 51 Rule 16 of the Civil Procedure Rules, 2010; see also Practice Direction number 33 of this Court’s Practice Directions, 2014**.

11. In that regard, learned counsel for the Ex parte applicant filed a seventeen (17) paged submissions dated 27<sup>th</sup> September 2021 providing the gist of the application and the 2<sup>nd</sup> respondent’s contention herein. Counsel submitted that the application is for JR and seeks to look into the fairness and propriety decision making by authorities and persons rather than the substance or otherwise of the same. That the 1<sup>st</sup> issue for determination herein is the nature and scope of JR proceedings and the 2<sup>nd</sup> one is whether the 1<sup>st</sup> respondent had the power to cancel the Ex-parte applicant’s title. That the Ex parte applicant was not afforded a chance for hearing of the matter and that the 1<sup>st</sup> respondent’s decision was ultra vires.

12. To fortify the submissions, counsel relied on, inter alia, **Republic-vs-Kenya Revenue Authority Ex parte Yaya Towers Limited (2008) eKLR, Koinange and 13 others –versus- Nyati (1984) EA 425, Pastoli-vs- Kabale District Local Government Council and others (2008) 2 EA 300, Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. (1) (1) para 60. Rule 92 (3) of the Land Registration (General Regulations, 2017), sections 79 (1) and 80 (1) of the Land Registration Act, 2016 (2012) (The LRA herein)**. Counsel submitted that JR is concerned with judicial process itself and urged this court to allow the application with costs.

13. The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not file any submissions in this application.

14. On 27<sup>th</sup> January 2022, learned counsel for the 2<sup>nd</sup> respondent filed submissions of five (5) pages dated 25<sup>th</sup> January 2022 stating that the Ex-parte applicant had failed to prove the allegations against the respondents and termed the application both vexatious and brought in bad faith. Counsel framed three issues for determination including whether the 1<sup>st</sup> respondent had the power to make the impugned decision and whether proper and legal procedure was followed thereof. Counsel further submitted that the sale and transfer of the suit land to the Ex-parte applicant, was fraudulent. That therefore, the 1<sup>st</sup> respondent issued the requisite notice to which the 2<sup>nd</sup> respondent replied before arriving at the impugned decision.

15. Counsel discussed the three issues in favour of the 1<sup>st</sup> respondent’s decision and implored upon this court to uphold the same. That the Ex-parte applicant did not deny the alleged fraud and that the application must fail. To reinforce the submissions, counsel cited the **Land Registration (General Regulations, 2017) and section 79 of the RLA (supra)**.

16. I have thoroughly read and considered the entire application, the 2<sup>nd</sup> respondent’s replying affidavit and their respective submissions inclusive of the issues and authorities relied thereupon. On that score, the issues for determination in the instant application are condensed to whether:

a) The 1<sup>st</sup> applicant had the powers to rectify the Ex-parte title deed in respect of the suit land.

b) The 1<sup>st</sup> respondent followed the prescribed procedure in arriving at the impugned decision.

c) The Ex parte applicant is entitled to the orders sought in the application.

17. On the first issue, the Ex-parte applicant asserted that the 1<sup>st</sup> respondent was not seized of the powers to interfere with his title (MOO-1) over the suit land. That therefore, the 1<sup>st</sup> respondent's decision (MOO-4) was ultra vires in the circumstances.

18. **Section 79 of the LRA** governs rectification of land register by the Registrar. It provides, inter alia, that the Registrar may rectify the register or instrument presented for registration in formal matters and in the case of errors or mistakes and for purposes of updating the register. Sub-sections 2, 3A and 4 of the said Section read:

(2) No alteration affecting the title of a proprietor may be made pursuant to sub-section (i) 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 ninety days shall be given to the proprietor of such intention to make the alteration.*

(3A) A person aggrieved by the decision of the Registrar under this section may apply to the court for any necessary orders.

(4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this Section and without prejudice to the generality of the foregoing, the regulations may provide for:-

a) The process of investigation including notification of affected parties.

b) Hearing of the matters raised; and

c) The criteria to be followed in coming up with the decision

19. Rule 92 (2) and (3) as pointed out at paragraph 12 hereinabove, stipulates that;

a) *The Registrar shall issue a notice of intention to rectify the register under 79(2) of the Act, in Form LRA 91 set out in the Sixth schedule.*

b) *An order by a Registrar issued under section 79 of the Act shall be in Form LRA 92 set out in the Sixth Schedule.* (Emphasis added)

20. The Ex-parte applicant also asserted that it was the court's powers to rectify the title. Section 80 (1) of the LRA reads;

*Subject to subsection(2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*The Register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake of substantially contributed to it by any act neglect or default.*

21. **Black's Law Dictionary 10<sup>th</sup> Edition at page 1467** defines the term "Rectification of register" as;

*" A process by which a person whose name was wrongly entered in or omitted from the record can compel the recorder to correct the error."*

22. It is to be noted that the protection of right to property is enshrined under **Article 40 of the Constitution** which reads in part;

*"Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property---"*

23. **Article 65 of the Constitution** provides for landholding by non-citizens. Indeed, citizenship is covered under **Chapter 3 (Articles 12 to 18) of the Constitution.**

24. The right as stated in paragraph 22 hereinabove is not unlimited bearing in mind **Article 25 of the Constitution.** By dint of section 79 (1) (a) (d) and (2) (a) and (b) of the LRA as read with Rule 92 (supra), the 1<sup>st</sup> respondent had the powers to rectify the Ex-parte applicant's title over the suit land.

25. Regarding the second issue, it was the contention of the Ex-parte applicant that his rights and interests acquired under sections 24, 25 and 26 of the LRA and more fundamentally, under Article 40 (1) (supra), have been violated by the 1<sup>st</sup> respondent's decision who did not follow due process. That he was not given a fair chance to respond to any allegation made against him. However, the 2<sup>nd</sup> respondent opposed the allegations. She stated that after it was detected that "MOO-1" was acquired fraudulently, the 1<sup>st</sup> respondent followed the prescribed procedure in arriving at the impugned decision.

26. Clearly, the 2<sup>nd</sup> respondent distinctly pleaded fraud at paragraph 8 of his replying affidavit as held in **Kuria Kiarie case** (infra). This court is aware of the burden and standard of proof in civil cases as stated in **Eastern Produce (K) Limited (Chemomi Tea Estate)-vs-Bonfas Shoya (2018) eKLR**, **Kuria Kiarie and 2 others-vs-Sammy Magera (2018) eKLR**, **Koinange case** (supra), **Gladys Wanjiru Ngacha-vs-Teresa Chepsaat and others (2013) eKLR**, among other authorities.

27. Fraud is a ground of rectification of title under sections 26 (1) of the LRA as read with sections 79 (1) (a) and (2) (a) and (b) and 80 (1) of the same Act. The impugned decision (MOO-4) was made following the detection of fraud and after due process as shown in "MOO-1". MOO-2 annexed to the application and even as fortified, to a great extent, by the import of the documents marked as "NBO-1 to NBO-3" accompanying the replying affidavit herein. As such, the 1<sup>st</sup> respondent acted within the confines of law in rendering the impugned decision hence, not guilty of usurpation of power as stated in **Halsbury's Laws of England 4<sup>th</sup> Edition** (supra).

28. A fair opportunity to be heard (the audi alterman partem Rule) is a fundamental principle of justice; see **Halsbury's Laws of England 5<sup>th</sup> Edition 2010 Volume 61 paragraph 639** as well as **Articles 50 (1) and 25 (c) of the Constitution**.

29. **Article 47 (1) and (2) of the Constitution** provides for the right to fair administrative action. By "MOO-2" and "MOO-3" herein, the Ex-parte applicant was accorded a fair hearing and reasons for the action are discerned in "MOO-2 and "MOO-4." In my opinion, there was no violation of the Ex-parte applicant's rights as alleged in the application.

30. As regards the third issue, enforcement of Bill of Rights is captured at **Article 22 of the Constitution**. In any proceedings brought thereunder, a court may grant an appropriate relief including an order of JR as provided for under **Article 23 (3) (f) of the Constitution**. In the obtaining circumstances, is the order of JR available to the Ex-parte applicant?

31. From the foregoing analysis, the 1<sup>st</sup> respondent acted legally, rationally and with propriety in arriving at the impugned decision bearing in mind the decision in **Pastoli case** (supra), among other authorities. Thus, the Ex-parte applicant is not entitled to the orders sought in the application.

32. In the result, it is the finding of this court that the application dated 27<sup>th</sup> September 2021 and filed in this court on 22<sup>nd</sup> October 2021, is devoid of merit. The same is hereby dismissed.

33. In view of the circumstances of this case and being guided by the proviso to **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya** as well as the Court of Appeal decision in **Kamau-vs-Mungai and another (2006) 1 KLR 150 at 160**, each party to bear own costs of the application.

34. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 14TH FEBRUARY 2022.**

**G M A ONG'ONDO**

**JUDGE**

Present:

a) Mimba holding brief for Mr Moriasi Osoro, learned counsel for the Ex-parte applicant

b) Okello, court assistant

**G M A ONGONDO**

**JUDGE**