



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS APPLICATION NO. 36 OF 2015

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS,

PROHIBITION AND CERTIORARI

AND

**IN THE MATTER OF TITLE DEEDS OF LAND REFERENCE L.R NO 9214/3; L.R NO. 9214/5;
L.R NO. 9214/6; L.R NO. 9214/7;**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

SECTION 33, 79 (2) AND 80 (1)

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLE 22 (1) AND ARTICLE 23
(3) (F)**

BETWEEN

REPUBLICAPPLICANT

CHIEF LAND REGISTRAR.....1ST RESPONDENT

REGISTRAR OF TITLES.....2ND RESPONDENT

PETER KIMANI KURIA.....3RD RESPONDENT

***EX-PARTE:* KIHUUMWIRI FARMERS COMPANY**

LIMITED,

JOSEPH MUCHUI MUIRURI, PETER KARIUKI

MACHARIA AND JOHN MWANGI KARANJA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th February, 2015 the *ex parte* applicant herein, **Kihiumwiri Farmers Company Limited, Joseph Muchui Muiruri, Peter Kariuki Macharia and John Mwangi Karanja**, seek the following orders:

1. **An order of certiorari to remove and bring into this honorable court for purposes of quashing the decision of the Chief Land Registrar/ Registrar of Titles dated 11th December 2014 issuing provisional certificate of titles for land reference 9214/3, land reference 9214/5, land reference 9214/6 and land reference 9214/7.**
2. **An order of mandamus to compel the chief lands registrar of titles, Nairobi to recall and cancel the provisional certificate of titles issued on 11th December 2014 in respect of grants registered as L.R. No. 9214/3 (L.R.141893); L.R. NO. 9214/5 (L.R.141894); L.R. No. 9214/6 (L.R.141895) and L.R. NO. 9214/7 (L.R.141896).**
3. **All other necessary and consequential orders as the honorable court may deem just and expedient to grant.**
4. **That the costs of this application be in the cause.**

Applicant's Case

2. The Motion was supported by a verifying affidavit sworn by **Peter Kariuki Macharia**, the Chairman of the Board of Directors of the 1st Applicant, **Kihiumwiri Farmers Company Limited**, on 3rd February, 2015.
3. According to the deponent, the 1st Applicant is the registered proprietor of for Land Reference 9214/3, Land Reference 9214/5, Land Reference 9214/6 and Land Reference 9214/7 (hereinafter referred to as "the suit properties") as per copies of certificate of titles attached to the affidavit.
4. It was disclosed that on 23rd January, 2013, the 1st applicant was registered as proprietor following and that around the same period there were long running disputes as to the directorship of the 1st Applicant which were resolved in May 2013 by appointment of an interim board by the registrar of companies which board is still in office. Upon a resolution, the 1st respondent processed the original certificates of title of Land Reference 9214/3, Land Reference 9214/5, Land Reference 9214/6 and Land Reference 9214/7 in the name of the 1st Applicant and released the said titles to 1st applicant on or around 26th August 2013 which titles were collected by **Charles Ngugi Kamau, Joseph Thiongo Waweru** and the deponent in their capacity as the officials of the 1st applicant.
5. It was averred that since then the said titles have been and are in the custody of the 1st Applicant and held by the deponent as the chairman of the company and with the knowledge and authority of other board members and have never been lost or misplaced.
6. However, around September 2104 the 3rd respondent **Peter Kimani Kuria** without the authority of the Applicants applied for issuance of provisional certificates of the title for Land Reference 9214/3, Land Reference 9214/5, Land Reference 9214/6 and Land Reference 9214/7 allegedly because the original ones were lost which position he knew was false as he was always aware that the original titles were available and in custody of the Applicants. Upon learning of the said application, the applicants wrote to the chief land registrar that the said original titles were in their possession and followed up with the registrar and was advised that the said application will be rejected.
7. However, upon carrying out an official search of the properties on 8th January 2105 the applicants learnt in dismay that the Chief Lands Registrar/Registrar of Titles had on 19th September 2014 issued gazette notices No.6467, 6468, 6469 and 6470 to the effect that sufficient evidence has been adduced to him to show that the original certificate of title over land reference 9214/3, land reference 9214/5, land reference 9214/6 and land reference 9214/7 respectively had been lost and

- that he would proceed to issue provisional certificate of titles to that effect; that on 11th December 2014 issued provisional certificates of title for Land Reference 9214/3, Land Reference 9214/5, Land Reference 9214/6 and Land Reference 9214/7 and the same were recorded as entry No.2; and that the Chief Land Registrar/Registrar of Titles then released the said provisional certificate of titles to the 3rd Respondent.
8. According to the deponent, in gazetting the said application and subsequently issuing the said provisional certificates of title the chief land registrar/registrar of titles exceeded his authority as provided for in Section 33 of the **Land Registration Act** as the said certificate of titles were not lost; the registrar had notice that the said certificates were in the custody of the Applicants; and if in doubt the registrar ought to have made relevant inquiries under the powers granted by section 14 of the **Land Registration Act**.
 9. It was the applicants' position that no other remedy exists in law to protect and indefeasible titles held by the Applicant which titles are defeated by the issuance of provisional certificate of titles which were issued in substitution of originals and can be used genuinely in various business transactions in the name of the applicant without its knowledge and or authority hence the orders sought herein to protect and defend the indefeasible titles held by the Applicant.

3rd Respondent's Case

10. The 3rd Respondent, **Peter Kimani Kuria**, who ordinarily ought to have been joined as an interested party rather than a respondent since no judicial review can issue against him in his personal capacity, filed a replying affidavit sworn on 16th March, 2015.
11. According to him, he is a Director of the 1st Applicant and that it is not true that the 2nd, 3rd and 4th Applicants are the genuine directors of the 1st applicant but imposters and flagrantly disobeyed court orders dated 26th October 2011, 9th November 2011, 22nd August 2014, 30th October 2012, 7th may 2013, 11th February 2013, 4th April 2012, 16th May 2013 and 6th December 2012.
12. According to him, the 2nd and the 3rd Applicants are full of lies and they have not come to this honourable court with clean hands since on or about the 26th August 2013 they processed titles without respecting the court orders of 9/11/2011 and 26/10/2011 above to the effect that no person was to claim to be the director and were to render account and surrender assets of the company. In his view, the contempt in place is yet to be purged as the 2nd and 3rd Applicants have to date failed to render accounts and surrender forthwith assets which include land, records, documents, shareholders register and inventory of bank accounts and bank mandates and should be denied audience.
13. While conceding that the applicants possess the said titles, he averred that the said possession is illegal as they are trying to grab by trying to have the un-surveyed parcel registered in the names of the alleged *ex-parte* applicants who were procedurally removed from office and are not directors of the 1st Applicant.
14. He contended that he and their legally registered officials objected after realizing that the Applicants wanted to grab the land through fraud and collusion and wrote to the relevant authorities to stop the processing of the said titles.
15. In his view, the *ex-parte* Applicants have not demonstrated any reasonable ground why the current application should be granted and urged the Court not exercise its discretion in their favour as this would bring great injustice to the interested party and the public at large.

Determinations

16. I have considered the application herein, the statement and the affidavit in support thereof as well as the affidavit in opposition thereto and the submissions on record.
17. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001:**

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision

makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

18. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. It is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR**, R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285 and ***Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60***.
19. In order to succeed in it:

“...the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

See **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479.

20. Therefore in this application, the Court is not concerned with the determination of who the right officials of the 1st applicant are. In other words in this application, I am only concerned with the determination judicial of whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.
21. Section 33 of the ***Land Registration Act***. The said section provides as follows:

(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any

two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

22. In this case the applicants brought to the attention of the 1st and 2nd Respondents that the titles to the suit properties were not lost. Accordingly, the said respondents ought to have made further inquiries to determine whether or not that contention was correct before proceeding to issue provisional titles. That the titles in question were in possession of the applicants is admitted by the 3rd respondent who applied for the said provisional titles. The 1st and 2nd respondents had no power to issue the said provisional titles without being satisfied that the original were lost or destroyed.
23. Apart from that in the absence of any replying affidavit from the 1st and 2nd respondents, there is no evidence that the applicants' representations were considered by the said respondents before a decision which clearly adversely affected the applicants was made. That decision was clearly arrived at in breach of the rules of natural justice and in violation of the provisions of Article 47 of the Constitution.

Order

24. In the result I find merit in the Motion dated 11th February, 2015 and I hereby issue the following orders:
- 1. An order of certiorari removing and bring into this Court for purposes of quashing the decision of the Chief Land Registrar/ Registrar of Titles dated 11th December 2014 issuing provisional certificate of titles for land reference 9214/3, land reference 9214/5, land reference 9214/6 and land reference 9214/7 which decision is hereby quashed.**
 - 2. An order of mandamus compelling the Chief Lands Registrar of titles, Nairobi to recall and cancel the provisional certificate of titles issued on 11th December 2014 in respect of grants registered as L.R. No. 9214/3 (L.R.141893); L.R. No. 9214/5 (L.R.141894); L.R. No. 9214/6 (L.R.141895) and L.R. No. 9214/7 (L.R.141896).**
 - 3. The costs of this application is awarded to the applicants to be borne by the Respondents.**

Dated at Nairobi this 21st day of September, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Patricia