



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
JUDICIAL REVIEW NO.1 OF 2013
IN THE MATTER OF AN APPLICATION FOR
JUDICIAL REVIEW ORDERS OF MANDAMUS & PROHIBITION

AND

**IN THE MATTER OF CIVIL PROCEDURE ACT 1A (1, 2, 3), 1B (a, b, c, d) AND CIVIL
PROCEDURE RULES**

AND

IN THE MATTER OF THE LAW REFORM ACT (CAP.26) SECTION 8 & 9

AND

IN THE MATTER OF AN APPLICATION BY:

MAURICE ODHIAMBO.....APPLICANT

VERSUS

JOEL KIPSANG A. NGENO.....1ST RESPONDENT

KENYA COMMERCIAL BANK LTD.....2ND RESPONDENT

DAWNING AGENCIES.....3RD RESPONDENT

DISTRICT LAND REGISTRAR, KERICHO.....4TH RESPONDENT

R U L I N G

Martin Maurice Odhiambo, the applicant herein, took out the Motion dated 5th August 2013 in which he sought for the following orders:-

- 1. That this Application be certified urgent and heard ex-parte on priority basis in view of its urgency and its service be dispensed with in the first instance.*
- 2. That status quo as at 18th April 1991 be maintained and the order dated 16th April 2013 be set aside till hearing and determination of this application.*
- 3. That the Respondents/Defendants be restrained jointly and severally by themselves, Directors,*

Employees, servants and or Authorized Agent from dealing in the Land Registered as Kericho/Kipchim/1690 till final disposal of this Application.

4. *That HCCC.386 of 1992 at Nakuru and HCCC.34 of 2003 at Kericho be consolidated with this Application for interparties hearing.*
5. *That the 2nd and 3rd Respondents be enjoined in this application.*
6. *That the Public Auction on 28th February 2003 be set aside on the grounds of irregularity and fraud as the 1st Respondent had received some payments from the Applicant on the same property and that here was a caution duly registered against any dealing in the property Kericho/Kipchimchim/1690 placed by the Applicant.*
7. *That an order that the 2nd Respondent gives a valid discharge of the property upon payment of Ksh.475,000/= within (90) Ninety days in the name of the Applicant as initially agreed and the title be released to the Applicant directly immediately the balance is paid in full.*
8. *Cost and interest of this application and any other relief which the court may deem fit to grant.*

The Applicant swore an affidavit he filed in support of the Motion. Kenya Commercial Bank Ltd, the 2nd Respondent in the Application, filed the replying affidavit of Isaac K. Njoroge, its legal Manager in the Litigation Unit to oppose the Motion. Though Joel Kipsang A. Ngeno, Dawning Agencies and the District Land Registrar, Kericho, were named in the motion as the 1st, 3rd and 4th Respondents respectively, the trio did not file any response to the Motion. However, when the Motion came up for hearing, Mr. Orina, learned advocate for the 1st Respondent was allowed to submit.

I have considered grounds set out on the face of the Motion and the facts deposed in the affidavits filed in support and against the Motion. I have further taken into account both the oral and written submissions. The history of this Motion started when Joel Kipsang A. Ngeno, the 1st Respondent herein, through the firm of E. M. Orina & Co. Advocates took out the summons dated 8th April 2013 in which he sought for the inter alia leave to file a motion for judicial review for an order of Mandamus to compel the District Land Registrar, Kericho, the 4th Respondent herein, to register the discharge of charge and effect the transfer of L.R. No. Kericho/Kipchimchim/1690 in favour of the Applicant. Mr. Orina, learned advocate for the Applicant, appeared before the Hon. Mr. Justice Mutava and successfully obtained the aforesaid order for leave. The order was extracted by the firm of E. M. Orina & Co. advocates which in effect was at variance with the order applied for and given. The order applied for was that of leave while the one extracted and served upon the 4th Respondent in essence compelled the 4th Respondent to register a discharge of charge and to transfer L.R. No. Kericho/Kipchimchim/1690 to the 1st Respondent. Fortunately, the District Land Registrar did not comply with the aforesaid order because there was already another order already registered against the aforesaid title. When this court noticed the anomaly, it issued an order directing the District Criminal Investigation Officer (DCIO) to investigate the matter. In a report filed before this court, that DCIO blamed the court registry staff and those of the advocate for making the mistake. Upon receipt of the aforesaid, this court issued orders directing the relevant authorities to act on the report and take the necessary action they deem fit for criminal culpability.

Having given in detail the brief background of this dispute, let me now consider the substance of the motion. I have already enumerated the sort of orders the applicant sought. The applicant made oral submissions in which he argued in detail over a dispute between him and the 2nd Respondent over an outstanding debt. It would appear the applicant had been given financial accommodation by the 2nd Respondent but he defaulted in repaying the loan prompting the 2nd Respondent to exercise its statutory power of sale to realize its securities. He complained that the wrongly extracted order could have been registered to his utter detriment were it not for the existence of a caution lodged against the title in dispute. Mr. Orina, learned advocate for the 1st Respondent urged this court to dismiss the motion since

the matter became spent when the 1st Respondent failed to file the substantive motion within the time stipulated by statute. It is curious to note that despite having obtained an order of leave, the 1st Respondent did not deem it fit to file the substantive application to be given the order of Mandamus. I am inclined in the circumstances to infer that the 1st Respondent and his legal advisers were aware of the existence of the extracted order fully granting the order of Mandamus hence there was no need to go back to court and obtain orders they already had, courtesy of an unscrupulous registry staff. With respect, I agree with the submissions of Mr. Orina, that the 1st Respondent, having failed to file the substantive Motion within 21 days from the date of the order of leave, the matter remained spent under Order 53 rule 3 (1) of the Civil Procedure Rules. The order of leave was issued on 11th April 2013 and the same lapsed after the expiry of 21 days. Mr. Ragot, learned advocate for the 2nd Respondent filed written submissions and also made oral submissions to resist the Motion. Mr. Ragot urged this court to find that this matter is already spent by operation of law hence nothing can flow from it.

It is further argued that the Applicant having failed to seek for leave to be enjoined, he cannot be allowed by law to simply jump in and file an application. In the motion, the applicant appears to have completely introduced new issues relating to the merits and demerits of the 2nd respondent's exercise of its statutory power of sale. Those issues can be raised in other proceedings and not in this file which is limited to dealing with the process of decision making as opposed to the merits of the decision. Even assuming that the matter was still pending, under Order 53 rule 6 of the Civil Procedure Rules, any party who desires to be heard in opposition and appears to be a proper person to be heard shall be heard notwithstanding that he has not been served. The order which was wrongly extracted still looms large and will obviously affect the rights of the Applicant. It cannot just be wished away. The same was never issued by the court but was created to meet certain purposes. The Applicant was right to come before this court upon realizing the error. It is only unfortunate that he introduced matters which were extraneous to the issues in question in this file. In my view the Applicant's concern should have been basically limited to the setting aside of the illegal orders and not to introduce matters relating to the dispute between him and his financiers. A critical examination of the orders sought by the applicant will reveal that the applicant did not apply for the offensive order of Mandamus to be set aside. He simply introduced issues relating to the dispute between him and the 2nd Respondent.

I find the motion misplaced and improperly before this court and in the wrong file. It is clear in my mind that this court did not issue the orders extracted and served upon the 4th Respondent. I hereby ex-debito justitiae set aside the order. The Motion dated 5th August 2013 is hereby ordered struck out for being incompetently before this court. In the circumstances of this case, a fair order on costs of the motion is to order that each party bears its own costs.

Dated, signed and delivered in open court this 4th day of April, 2014

J. K. SERGON

JUDGE

In open court in the presence of:

- Applicant in person
- Mr. Orina for 1st Respondent
- N/A for 2nd Respondent
- N/A for 3rd Respondent
- N/A for 4th Respondent