REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 10 OF 2009

REPUBLIC..APPLICANT

VERSUS

SENIOR PRINCIPAL MAGISTRATE COURT AT NAROK.......1ST RESPONDENT

DISTRICT LAND REGISTRAR, NAROK...............................2ND RESPONDENT

AND

JOHN ALLAN ONCHIRI MASESE...SUBJECT

REUBEN MABIL..INTERESTED PARTY

RULING

By a notice of motion dated 16/02/2009, the exparte applicant JOHN ALLAN ONCHIRI MASESE, moved this court by way of Judicial Review for orders of certiorari to quash the order dated September 2008 issued by SPM Narok in which the District Officer Mulot Division was ordered to offer security to the District Land Registrar when visiting the ground for purposes of establishing the boundaries between parcel **CIS-MARA/ILMOTIOK/463, 464** and **465** respectively. Secondly that the order of certiorari also do issue to quash the letter dated 14th January 2009 of the District Land Registrar, which intended to implement the order dated 2nd September 2008.

The reasons for seeking these orders are that there is no decree which the respondent is purporting to implement in terms of section 7(2) of the Land Disputes Tribunal Act No. 18 of 1990. Further, that there is an open glaring discrepancy in the respondent's and intention vis a vis the findings of the Tribunal in Land Disputes Tribunal Case No. 6 of 2006. The order which the respondent in his letter dated 14/01/2009 intends to implement is described as a nullity and that it contravenes the prov1s1ons of the Land Disputes Tribunal Act because instead of entering the verdict of the Tribunal as a Judgment of the court, the trial magistrate went ahead to hear arguments from the advocates and Land Registrar.

Further, that the respondent's letter of 14th January 2009 does not tally with the numbers of parcels of land reflected in the order of 4th September 2008. This letter is faulted as a nullity on grounds that it purports to confer powers on the respondents which he does not have in law.

It is also contended that under **section 21** and **22** of the **Registered Land Act**, the respondent can only move on the issue of boundaries to land after complying with various steps set out thereunder, especially under section 21(4) which provides that:-

"No court shall entertain any action or proceedings relating to a dispute as to the boundaries of Registered Land unless the boundaries have been determined as provided in the section."

It is the applicant's contention that there is a jurisdictional error in the letter of 14th January 2009 and it is ultra vires the law relating to establishment of land boundaries.

In opposing the prayers, the Interested Party REUBEN KIPNGETICH MABIL has deposed in the replying affidavit that the orders sought are governed by malice and are founded on baseless arguments with no foundation in law. It is his contention that the applicant does not question the decree issued by the magistrate at Narok but is more concerned with the letter that seeks to provide security. The Respondent insists that the Mulot Land Disputes Tribunal's decision was adopted by the magistrate's court at Narok as its judgment and a decree issued in **Misc. Land Case No. 11 of 2007**. It took a while for the Registrar to implement the decree, so on 26/08/2008, the respondent raised the issue before court, and a summons was issued to the Registrar, and upon attendance, the latter was directed, in the presence of the exparte applicant to fix an appropriate date for a ground visit. Further, the District Office Mulot was ordered to provide security during the visit. On two occasions when the ground visit was scheduled, the applicant failed to turn up, and the letter dated 14th January 2009 was written by the Registrar, in implementation of the decree.

Respondent confirms that the Land Registrar also wanted to correct an error in calculation of distance between Richard Ngeno's parcel and his, during the visit - Richard Ngeno did not complain about that correction, and it is argued that the inclusion of his name, so there is really no discrepancy in the letter. The respondent explains that, prior to writing the letter in question, the Registrar had written several other letters, seeking to fix the boundaries on the ground but this never materialised. The present application is faulted as being intended to frustrate the execution of the court's decree.

The respondent wonders what harm the applicant will suffer when security is granted to the District Land Registrar, saying it is apparent that the applicant does not welcome the idea of having the boundaries established because he knows he is on the wrong and the exercising is likely to make a finding in the respondent's favour. He argues that there is no reason whatsoever to stop the Registrar from implementing the order given by the court. The reference to **section 7 (2)** of the **Land Disputes Tribunal Act** is said to be bad in law.

Directions were taken in 2012 to the effect that the application was to be disposed of by way of written submissions, but despite several mentions, the applicant's counsel failed to file any written submissions. The Interested Party's counsel filed written submissions in which it is argued that the motion is incurably defective by dint of **section 8** and **9** of the **Law Reform Act**, **Order 53 Rule 1(2)**, together with the Supreme Court of England Practice Rules 1976 which require that the facts must be contained in an affidavit, yet in this instance the applicant's own verifying affidavit refers to it as **"verifying all the averments and facts as set in the statutory statement."** Counsel submits that facts are proceedings in an affidavit and have great evidential value in an application for Judicial Review, whereas a statement carried no more than the description of the applicant, the reliefs sought and the grounds relied on. In this regard counsel submits that the statement in these proceedings cannot be alleged to carry and/ or verify facts to be relied on, and it means that the pleadings are incomplete. The court is urged to be guided by the cases of **Egerton University & Another V R and Another Appeal No.259 of 2004 Nku**, and the case of **Commissioner General, Kenya Revenue Authority through Republic V Silvano Owema Owaki Civil Appeal No.45 of 2000** Kisumu.

As regards the decree, counsel submits that there is a competent decree upon the court's adoption of the Mulot Land Dispute Tribunal's decision, and no appeal has been preferred against the Tribunal's decision or the decree after it was adopted by the court. Further, that by 26/08/2008, the decree was ripe for execution. It is pointed out that the orders of 2nd September 2008 were issued as a consequence of execution of a court's decree, and the PM's court was seized with jurisdiction to execute the decree after adoption of the Tribunal's decision.

As for the contents of the letter of 14th January 2009, counsel argues that the same bears no offensive

intention, and is a very honest plea and notice by the District Land Registrar to the litigants on the date of his intended visit on the ground for their own benefit and the letter is not ultra vires. Further that, it is ridiculous to ask the court to quash an event which ought to have been carried out in the year 2009.

The application is described as an abuse of court process and the court is urged to dismiss it with costs.

The issues which arise for determination are:-

(1) Whether the pleadings are defective in light of the averments in the verifying affidavits and what are described as facts in the statutory statements.

(2) Is there a competent decree?

(3) The status of the orders issued on 2nd September 2008 *vis a vis* the Land Disputes Tribunal Act and the Registered Land Act [Cap 300].

(4) Whether the letter dated 14th January 2009 is ultra vires.

Defective pleadings

I have considered the decisions cited in support of the form of procedure to be adopted when filing an application for Judicial Review. I have also perused the verifying affidavit and the Statement of Facts, actually apart from what is stated at para 2 of the verifying affidavit, the rest of verifying affidavit and statement of facts comply with the provisions of **Order 53 (1) (2) Civil Procedure Rules, section 8 and 9** of **the Law Reform Act (Cap 26)** and the Supreme Court Practice of England, and that averment is not fatal. The facts are alluded to in the said verifying affidavit but I will admit that they are not detailed. However in my view this is not fatal as the documents in totality clearly communicate the applicant's grievance. In any case **Article 159 (1) (d)** of the **Constitution of Kenya** offer the applicant refuge as procedural technicalities should not be a bar to substantive justice. I also note that the decisions cited in this regard were made before 2010 when technical faults could easily bar a party's pursuit to justice. I therefore decline to dismiss the application on this procedural technicality.

Competent Decree?

The dispute between the parties was deliberated upon by the Mulot Land Disputes Tribunal as was provided under section 3 (1) of the Land Disputes tribunal Act. The decision was then forwarded to the magistrate's court for purposes of adoption as judgment of the court, under **section 7(2)** of the same **Act** which provides as follows:

> **"7(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act."**

From the proceedings, the decision was adopted on 20/11/2007 in the following terms:-

> **"The award is stated (sic)and adopted as the judgment of the court."**

The decision by the Tribunal had stated inter alia:

> **"That the area being claimed by the claimant should be sorted out by the District Land Registrar and the owner be given his right portion compared to the map (R.I.M.) boundaries adopted from the Adjudication Map."**

Following the adoption (which meant that the decision was now a judgment of the court), a decree

issued, reproducing the very findings of the Tribunal. I am afraid I am unable to comprehend the argument raised by the applicant that there is no decree to be implemented - I confirm that there is infact a Decree on record and duly signed by the Principal Magistrate Narok. There is no order setting aside the Tribunal/s decision, or the court's decree, nor was any material presented to this court to the effect that there was an appeal lodged against the judgment. I therefore hold that there does exist a valid decree.

Status of Orders of 02/09/2011

From the court record, on the aforementioned date, the parties or their representative were present in court subsequent to a complaint raised by the respondent's counsel that the District land Registrar had fixed dates for visiting the ground to implement the court's decision several times, but on all the occasions, failed. As a result the court issued summons to the District Land registrar to show cause why he had not visited the ground.

Indeed on 2/9/2008 the Land Registrar attended court and explained his challenges, and expressed a willingness to visit the ground. Upon request by the applicant's counsel (which was not contested), the court directed that the D.O. Mulot Division provides security. That was necessary so as to give effect to the implementation of the decision. These directions did not in any way violate the provisions of section 21 and 22 of the Registered Land Act. It did not touch on the determination of the boundary, it was simply to facilitate the security of the individual who would carry out the exercise and the affected parties. I hold that in granting the prayer that the D.O. Mulot Division provides security, the Principal Magistrate did not act in excess of his jurisdiction.

Status of the Impugned letter

It is important to reproduce the contents of the letter dated 14th January 2006 and signed by the District Land Registrar P.M. MENGI, addressed to the applicant, the respondent, JAEL KIPRONO MUTAI and RICHARD NGENO. The subject is **Cis-Mara/llmotiok/463,464, 465, 3248**, and the letter reads:-

> **"The above subject matter refers. I will be visiting the above mentioned parcels of land in the company of the surveyor on 4th February 2009 to implement the same court order. You are therefore required to be on site at 10.00 a.m. for the exercise."**

The letter is copied to the District Officer Mulot Division with a note to provide security, the area Chief, and the District Surveyor. I note that the letter mentions parcel No.3248, which was not a subject of the court order **BUT** the applicant does not claim to be the owner of the parcel. There is absolutely nothing ultra vires or offensive in that letter. I am inclined to believe what the respondent says that the applicant is out to frustrate the exercise by raising every possible and imaginable object. The upshot is that the application has no merit and is dismissed with costs to the respondent.

Delivered and dated this 24th day of September 2014 at Nakuru

H.A. OMONDI

JUDGE