



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ELC JUDICIAL REVIEW MISC APP NO. E001 OF 2021

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL
REVIEW PROCEEDINGS FOR PREROGATIVE ORDERS**

**IN THE MATTER OF ORDER 53 RULE 1 & 2 OF
THE CIVIL PROCEDURE RULES**

AND

**IN THE MATTER OF THE CONSTITUTION OF
KENYA ON THE RIGHT TO PROPERTY**

AND

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

AND

IN THE MATTER OF FAIR ADMINISTRATION ACT NO. 4 OF 2015

AND

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE ACT
AND IN THE MATTER OF THE FINDING OF THE COURT
OF APPEAL ON JUDICIAL REVIEW PROCEEDINGS**

AND

**IN THE MATTER OF BUSIA MUNICIPALITY/303,305,306,307,308,309
,310 AND 3011 BELONGING TO THE EXPARTE APPLICANTS**

BETWEEN

REPUBLIC.....APPLICANT

= VERSUS =

LAND REGISTRAR.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

AND

JOYCE ODHIAMBO.....EX PARTE APPLICANT

ROBERT ODUNDO.....EX PARTE APPLICANT

CHRISTOPHER OKOU OMODING.....EX PARTE APPLICANT

JACKSON ONYANGO MUBWEKA.....EX PARTE APPLICANT

DENNIS OGALLO OBANDA.....EX PARTE APPLICANT

FLORENCE ANYANGO AYIEYIE.....EX PARTE APPLICANT

J U D G E M E N T

1. For determination is the Notice of Motion dated 10th August 2021 brought under the provisions of Sections 8 and 9 of the Law Reform Act, section 73(1) of Land Registration Act, and order 53 Rules 3(1) and 4 of the Civil Procedure Rules. The orders sought in the application are:

a) The Respondents be and are hereby compelled to remove the restrictions registered on the Applicants land parcels referenced as Busia Municipality/303, 304, 305, 306, 307, 308, 309, 310 and 311;

b) Any such orders that this Court may deem fit.

2. The application is supported by the grounds on its face and on the Supporting and further Affidavit sworn by **DENNIS OGALLO OBANDA** on the 10th of August, 2021 and 22nd November, 2021 respectively. The grounds stated include;

a) That pursuant to the holding in the Court of Appeal init is trite and good law that judicial review proceedings be filed without leave of court where the facts are clear;

b) That the Land Registrar placed a restriction in the parcels of land at the instant of the Interested Parties herein on the 20/7/2020 and 15/2/2021 respectively;

c) That the exparte applicants who are the registered owners were never informed of the placement of such restrictions and have not to date been informed of the reasons for such restrictions now for over a year since the first restrictions were placed;

d) That further a competent court in civil suit ELC No. 56 of 2018 Maxmilla & 37 others vs. Agatha N. Okello & 7 others made a finding on the 17th of April, 2020 to the effect that the exparte applicants are the rightful owners of the parcels of land and no appeal has been filed to challenge the said finding;

e) That the exparte applicants have sought the removal of the said restrictions through the administrative duties of the 1st Respondent under the Land Registration Act in vain;

f) That the Applicants have also issued several demand notices to both the Respondents and the Interested Parties over the removal of the restrictions all in vain;

g) That the Applicants have also sought for intervention of the trial court vide Misc. Application No. E11 of 2021 but the same was withdrawn to give way to these proceedings;

h) That registration and removal of a restriction on any parcel of land is a statutory duty of the 1st Respondent who has refused/neglected without any justifiable reason to carry out his statutory duty hence these proceedings;

i) That the continuation to have the land restricted indefinitely and without reason is prejudicial to the registered owners and in breach to their rights to own and use their properties;

j) That further the placement of such restriction without giving the Applicant's a chance to be heard is contrary to the fair administration of action and breach to the constitutional rights of the Applicants;

k) That the wheels of justice tilt towards granting the orders sought;

l) That this Court has powers and jurisdiction to grant the orders sought.

3. The 2nd Respondent opposed the application through the Replying Affidavit of **WILFRED NYABERI** sworn on 6th October 2021. Mr. Nyaberi deposed that a restriction was lodged and registered against the suit parcels at the request of the National Land Commission and subsequently the Ethics and Anti-Corruption Commission on the grounds that the suit parcels were a subject of investigation into the ownership. That on receipt of the demand letters from the Applicants together with a court order, he wrote to the National Land Commission informing them of the development and seeking the way forward but was yet to receive any response. He deposed further he has not exercised the power to remove a restriction placed upon giving notice to parties concerned due to the fact that the two institutions have a Constitutional mandate to carry out investigations and he gave them the chance to make a finding and instruct him on the way forward. He concluded by stating that he has not refused or declined to carry out his statutory duties and he is ready and willing to so comply upon this Court's orders and/or the directions of the institution that placed the restrictions.

4. The 4th Respondent also opposed the application through the Replying Affidavit of **HILLARY OUNA** sworn on 10th November, 2021. Mr. Ouna deposed that he is part of the investigative team carrying out investigations into the matter having been mandated by section 11(1) (j) of the Ethics and Anti-Corruption Act to inter alia institute and conduct proceedings in its own name in Court for the recovery and protection of public property. That the Commission is carrying out investigations on properties number Busia Municipality/303, 304, 305, 306, 308, 309, 310 and 311 because preliminary investigations have revealed that they are public properties and that there was irregular and fraudulent acquisition of the same. That the restrictions sought on the 15th of February, 2021 were for the protection of the said public properties from further fraud and improper dealings. He deposed further that the investigations are at an advanced stage and it would be premature for the Applicants to seek the removal of the restrictions as the purpose of the restrictions is for stemming fraud or improper dealings.

5. The 4th Respondent deposes that the Applicants are yet to invoke the process provided in section 73(2), (3) and (4) of the Land Registration Act, 2020 as it is through that process that the Land Registrar may have determined if the Commission has an interest or not. That this application is therefore premature and should not be allowed as removal of the restrictions will be prejudicial to the 4th Respondents investigations which may lead to further investigations into third party dealings in the subject matter. The removal will also cause loss and damage on the part if the 4th Respondent's investigations, which will render the investigations nugatory and since the matter is public interest, the public will suffer.

6. The application was canvassed by way of written submissions and the Applicant, 2nd & 3rd Respondent and the 4th Respondent all filed their respective submissions. The Applicants filed their submissions on the 10th of January, 2022. They reiterated the facts of the case both before the lower court and the facts in this present petition. They submitted that the power to remove a restriction is provided under sections 73 and 78 of the Land Registration Act, 2012 which provisions are clear that a restriction can either be removed by an order of the Court or by the Registrar through an application by a person interested in the parcel of land. That the contention by the 4th Respondent that the application is premature does not hold any water as they have demonstrated that they made an application to the Land Registrar and it was after he declined to invoke his power that they filed the present application.

7. The Applicants submitted further that they hold valid Certificates of lease to the parcels of land and as such the land cannot be deemed to be public land as insinuated by the 4th Respondent. That the records indicating the acquisition of the land by the Applicants were well documented and in custody of the 2nd Respondent. Further, that the assertion that there are investigations into the irregular and fraudulent acquisition of the suit parcels is unsubstantiated as there exists a valid court order in Busia CMC ELCE No. 56 of 2018 wherein the Applicants were declared as the legal proprietors of the suit properties. That no notice was served upon the Applicants by the Respondents on their intention to place restrictions on the suit parcels therefore contravening sections 76 and 77 of the Land Registration Act. That the actions are also in contravention of the Applicants' rights to fair administrative action as provided under Article 47 of the Constitution of Kenya and section 4(3) of the Fair Administration Act. That due to the failure of the Respondents in invoking the provisions of the law before placing the restrictions, this Court be pleased to hold that the Applicants have established proprietorship over the suit parcels and there is therefore no basis of retaining the said restrictions.

8. The 2nd and 3rd Respondent filed their joint submissions on the 24th of January, 2022. They submitted on two issues for determination: whether due procedure was followed by the 2nd Respondent in placing the restriction on the suit parcel; and whether the applicant ought to have filed a civil suit as opposed to judicial review. On the first issue, the Respondents submitted that section 76 of the Land Registration Act empowers the 2nd Respondent to register a restriction on land in three instances: a) for the prevention of fraud; b) to curb improper dealings on land; and c) for any sufficient cause. That the Registrar may also have moved suo moto on the application of any person interested in the land. That the restriction placed on the land was pursuant to an application to the registrar by the 1st and 4th Respondents, pending investigations and the said restrictions are for purposes of preventing fraud or improper dealing. That proving that the titles were procured illegally or fraudulently is not for determination at this stage, only the protection of the suit land matters at this stage. They relied on the case of **Films Rover International Limited vs. Cannon Film Sales Limited (1986) 3ALL ER 772**.

9. On the second issue, these Respondents submitted that despite the Applicants swearing that they are the registered proprietors of the suit parcels, the 4th Respondent vide its affidavit have stated that the said parcels were obtained fraudulently and are public properties. That the 4th Respondent contends that they sought the restrictions for the protection of the properties from further fraud and improper dealings. The 2nd and 3rd Respondents submitted that it is imperative for this Court to hear oral evidence which though outside the scope of judicial review proceedings will help reconcile the diametrically opposed positions in this matter. That the case falls outside the province of judicial review and it is a misconceived shortcut designed to obtain orders in an otherwise civil dispute. They urged this Court to dismiss the Application with costs to the Respondents.

10. The 4th Respondent filed its submissions on the 16th of January, 2022. They submitted on the following issues for determination: whether the procedure was followed in placing the restrictions; whether it is in public interest to remove the restrictions; and the implications of the removal of restrictions in view of the outcome of the investigations. In the first issue, they submitted that section 136 of the Registration of

Land Act (now repealed) empowered the 4th Respondent to place restrictions so as to preserve the property whilst it carried out investigations. That the Applicants have not exhausted the procedure for withdrawal of caution under section 73(2), (3) and (4) of the Land Registration Act. That the attempt by the Applicants to demonstrate the process does not show any reference to the 4th Respondent and therefore no procedure has been carried out challenging the decision of the Land Registrar.

11. On the second issue, the 4th Respondent submitted that their preliminary investigations have revealed that there was irregular and fraudulent acquisition of the suit parcels and that they are public properties hence the need for the restriction place by them. That this is in compliance with section 76 of the Land Registration Act. They relied on the holdings of: **Macharia Kinyur vs. District Land Registrar, Naivasha & Another, Nakuru ELC Misc. Appl. No. 331 of 2016;** and **Matoya vs. Standard Chartered Bank (K) Limited & others (2003) I EA 140.**

12. While relying on the case of Films Rover International Limited (supra), the 4th Respondent submitted on the third issue stating that the removal of the restriction will be prejudicial to its investigations which may lead to further investigations into third party dealings in the subject matter. That this Court should take into consideration the risk involved if the restrictions are removed by the Applicants.

13. After considering the aforementioned submissions, the question herein is whether or not this Court can order for the removal of the restrictions on the suit parcels. Section 77 of LRA provides that: ***'(1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction. (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.'***

Further section 78 stipulates that: ***(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.'***

14. In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

“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...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorized by statute.”

15. The 2nd Respondent confirmed receiving a request from the Applicants to have the restriction removed. The 2nd Respondent took it upon themselves to write to the 1st and 4th Respondents requesting them on any way forward but no response was received from the said Respondents. The Registrar action of making the decision to register the Caution and also refusal to remove it without giving the Applicants a hearing amounts to a breach of the rules of natural justice. The Applicants pleaded that they were not aware of any investigations going on and the 1st and 4th Respondents are affecting the rights of the Applicants also without giving them an opportunity to present their case why the restriction should remain in the register.

16. Section 76 of the Land Registration Act provides as below:

1) 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, lease or charge, 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, lease or charge.

2) A restriction may be expressed to endure -

a) for a particular period;

b) until the occurrence of a particular event; or

c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

17. The 1st and 4th Respondents did not disclose any steps in compliance with section 76(2) of the Land Registration Act. The removal of the restriction in any event is not a bar to their taking steps to preserve the “public land”. For now, the orders sought will be granted on account of their actions having breached the rules of fair administrative action of the Applicants. In light of the foregoing, the application is allowed on the following terms;

a) The restrictions on the suit parcels shall be maintained for a period of sixty (60) days to allow the investigations to be completed and or any of the Respondents to take any recovery steps if they so choose.

b) Upon the lapse of the sixty (60) days, the 2nd Respondent is ordered to lift the restrictions unconditionally.

c) Each party shall bear their costs.

DATED AND SIGNED AT BUSIA THIS 21ST DAY OF APRIL 2022.

A. OMOLLO

JUDGE