



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 46 OF 2012

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF REGISTRATION OF LANDS ACT, CAP 300-REPEALED; THE LAND
REGISTRATION ACT, 2012 AND THE LAND AND ENVIRONMENT COURT, 2011**

AND

**IN THE MATTER OF THE DECISION OF THE DISTRICT LAND REGISTRAR, NAROK
DISTRICT MADE ON 2ND MAY, 2012 TO REGISTER THE LEASE DATE 20TH APRIL, 2012
AND ISSUE A CERTIFICATE OF LEASE TO KINGDOM KENYA 01 LIMITED**

BETWEEN

STANLEY OLONANA NTUTU.....1ST APPLICANT

LEMITA NTUTU.....2ND APPLICANT

PARSINTEI NTUTU..... 3RD APPLICANT

STANLEY NTUTU.....4TH APPLICANT

NGEREWA NTUTU.....5TH APPLICANT

TETEE NTUTU.....6TH APPLICANT

SIKONA NTUTU.....7TH APPLICANT

TURANTA NTUTU.....8TH APPLICANT

KOINATO NTUTU.....9TH APPLICANT

LOOYIEYO NTUTU.....10TH APPLICANT

NAINI NTUTU.....11TH APPLICANT

NADUPOI NTUTU.....12TH APPLICANT

SILANTOI NTUTU.....13TH APPLICANT

AND

THE DISTRICT LAND REGISTRAR, NAROK.....RESPONDENT

AND

JOHN HARRISON KINYANJUHI.....1ST INTERESTED PARTY

THOMAS MUTISO MUTUNGA.....2ND INTERESTED PARTY

KINGDOM KENYA 01 LIMITED.....3RD INTERESTED PARTY

RULING

Pursuant to leave granted on 21st August, 2012 allowing the *ex-parte* applicants to apply for certiorari, mandamus and prohibition the *ex-parte* applicants filed the notice of motion dated 28th August, 2012 seeking the following orders:-

1. An order of certiorari to bring to this court and quash the certificate of lease, to Kingdom Kenya Limited 01 in respect of title No. NAROK/CISMARA/OLCHORO-OIROWUA/24 registered in the name of Lerionka ole Ntutu (deceased).
2. An order of certiorari to bring to this court and quash entries No. 1 and 2 in part B-proprietorship section in the register of land parcels known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 entered on 2nd May, 2012.
3. An order of mandamus to compel the respondent to cancel and/or delete entries No. 1 and 2 in part B-proprietorship section in the register of land parcels known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 entered on 2nd May, 2012.
4. An order of prohibition to prohibit the respondent from acting on or purporting that Kingdom Kenya 01 Limited is a Lessee of Lerianka Ole Ntutu in respect of Land parcel known as **L.R NAROK/CISMARA/OLCHORO-OIROWUA/24** for a term of 15 years from 1st April, 2012.
5. Costs of the application.

The application is supported by the affidavit of Stanley Olonana Ntutu (sworn on 30th July, 2012) and is premised on the grounds that the decision to register the lease dated 20th April, 2012 and issue certificate of lease to Kingdom Kenya 01 Limited (the third interested party) is illegal and null and void; That the decisions of the respondent in respect of the lease dated 20th April, 2012 is unreasonable and constitutes abuse of power; That the respondent in making the decision to register the lease dated 20th April, 2012 and to issue a lease to the third interested party acted in breach of the rules of natural justice; That registration of the lease dated 20th April, 2012 was in breach of the applicant's legitimate expectation that the registrar would not register it for non compliance with the laws and that the decision of the respondent to register the lease dated 20th April, 2012 and issue a certificate to the third interested party contravened Articles 10 of the Constitution.

The application is also supported by the 1st interested party but opposed by the 2nd interested party, the 3rd interested party and the respondent.

In their replying affidavits sworn on 18th October, 2012, 16th October, 2012 and 25th January, 2013 the third interested party, the 2nd interested party and the respondent respectively have vehemently denied all allegations of illegality and breach of law leveled against the respondent and maintained that the registration of the lease herein and the subsequent issuance of certificate of lease to

the third interested party was proper and lawful. They have also averred that the application is an abuse of the court process as the issues raised are capable of being sorted through other pending cases.

From the pleadings and the submissions by the respective parties it is clear that the 1st and the 2nd interested parties were the administrators of the suit property. It is also clear that the applicants were some of the beneficiaries of the suit property.

The bone of contention is that the lease, the transfer and registration of lease in favour of the 3rd interested party was done unlawfully; that the transfer was neither executed by the 1st interested party (one of the administrators) nor was he notified of the transaction, yet it affected his rights as an administrator of the estate. It is therefore, submitted that the decision of the respondent to register a transfer in favour of the third party without involving the third party was unlawful, unreasonable and in breach of the rules of natural justice.

Although the respondent, the 2nd interested party and the 3rd interested party have sought to explain the basis and justification for dispensing with the 1st interested parties involvement in the transfer, notwithstanding that justification, if the respondent, by failing to consult the 1st interested party, acted in excess of his jurisdiction or contrary to the laws of the land or contrary to the rules of natural justice then his decision would be subject of judicial review. See **Kenya National Examination Council V. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others**; Civil Appeal No. 266 of 1996.

To justify their actions the respondent, the 2nd and 3rd interested parties cited a clause in a consent order signed between the parties herein as the basis of excluding the 1st interested party from the transaction which gave rise to the application herein. The relevant clauses of the consent order are as follows:-

“(5). The current legal Administrators being Emanuel Ole Ntutu, Nanyiku Ole Ntutu and Parsui Ole Ntutu, shall step down from their representative capacity as the legal administrators of the estate of the deceased, on their sooner performance of Consent Orders Number 14, 15, 16 and 17 below.

(6). In place of the aforementioned administrators, the following two administrators being Harrison Kinyanjui and Tom Mutunga have been hereby appointed to manage the estate of the deceased and also act as administrators under the provisions of the Law of Succession Act, Chapter 160 laws of Kenya.

- 7. That the outgoing Administrators of the estate of the deceased shall hand over all records, bank and cheque books, and all other materials held by them on behalf of the estate to the administrators appointed under consent order Number 6 above immediately upon their appointment.**
- 8. That the aforementioned administrators under consent order Number 6 above shall, with a view to managing the estate professionally and in an acceptable manner, perform their duties in close consultation with a majority members being 75% of the family members, and shall not make any decisions thereon unless approved by such majority family members.”**

A plain reading of the aforementioned consent order reveals that the administration of the estate of the deceased would vest in two administrators, namely, the 1st and the 2nd interested parties. Whereas the consent order obliged the administrators to work in consultation with a majority of the beneficiaries of the estate (75%), I find nothing in it empowering the beneficiaries to oust one of the administrators or to fill a vacuum left by one of the administrators. Moreover, under Section 82 of the Law of Succession Act, it is only personal representatives who have power to:-

- (a) Enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;
- (b) To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of

their duties, all or any part of the assets vested in them;

(c) To assent, at any time after confirmation of grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of continuing trust, as may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of respective assets and liabilities of the estate, and to make any transfer which may be requisite for giving effect to the appropriation...

Whereas under Section 109 of the Registered Land Act (now repealed) the registrar has power to dispense with execution of instruments by certain parties thereto, he is prohibited from dispensing with the execution an instrument by the transferor or transferee. The section provides:-

“109(1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and all other parties to the instrument:

Provided that the Registrar may dispense with execution by any particular party (other than the transferor or transferee) where he considers that the execution is necessary.”

From the foregoing it is clear that neither the consent order above nor the law allowed the Registrar to dispense with the 1st interested parties execution of the lease herein. Therefore, by dispensing with the 1st interested party's execution of the instrument the Registrar clearly acted in excess of his powers under the Registered Land Act and/or the Land Registration Act, 2012. By failing to consult the 1st interested party or failing to get his reasons for failure to execute the instrument, the Registrar also acted unreasonably and in breach of the rules of natural justice. See **Commissioner of Land V. Kunste Hotel Ltd** (1995-1998) EA 1 CAK where the Court of Appeal observed:-

“The appellant was exercising his statutory power under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Limited. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by its decision...It is, therefore, our view and we so hold, that the appellant should have consulted the hotel before he decided to allot the plot to the interested party.”

An order of judicial review would issue if a public body acted in excess of its jurisdiction or contrary to the laws of the land or contrary to the rules of natural justice. See **Kenya National Examination Council** (*supra*).

Having determined that the respondent acted in excess of its powers, unreasonably and in breach of the rules of natural justice, I find and hold that its contact is subject of judicial review.

Before considering whether the applicants have made up a case for granting the orders sought or any one of them, there are two preliminaries issues that are raised in the pleadings that need to be addressed first. These are:-

(a) Whether the applicants had *locus standi* to institute these proceedings? and

b) Whether the herein is *res judicata* Milimani HCCC 769 of 2005.

Regarding the first issue, the evidence on record, namely the court order herein, leaves no doubt that the applicants are merely beneficiaries of the suit property. As such, by dint of the provisions of Section 82 of the Law of Succession Act, chapter 160 Laws of Kenya, they lack capacity to institute the current proceedings. Be that as it may, under Article 159 of the Constitution as read with Rule 73 of the Probate and Administration Rules this court, once seized of a matter, has power to make such orders as may be necessary for ends of justice. To this end, despite the applicant's lack of capacity to institute these proceedings, from the record before, I find that all the parties interested and/or affected by the proceedings have got an opportunity to present their case. This being the case, none of the persons interested in the application or affected by it will be prejudiced if this court proceeds with the matter and makes a determination thereon. Turning to the contention that the application is *res judicata* Milimani HCCC NO 769 of 2005, I adopt the decision in **Welamondi v. The Chairman, Electoral Commission of Kenya** (2002) 1 KLR 486 where Ringera, J. (as he then was) observed:-

- “1. Judicial review proceedings under order 53 of the Civil Procedure Rules are a special Procedure; which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings.**
- 2. In exercising powers under order 53, the court is exercising neither civil nor a criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction *sui generis*. It therefore follows that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure Act and Rules and section 42, 79 and 80 of the Constitution of Kenya.”**

Having determined that the issues raised herein fall within the purview of judicial review, and that in considering and determining judicial review applications the court exercises special jurisdiction, I find and hold that the issues raised herein could not be handled through the pending suit and that they are neither *res judicata* nor *res sub judice*.

As pointed out earlier, in this application the applicants pray for the following orders:-

0. **Certiorari:-**

An order of certiorari is issued to quash a decision already made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. See **Kenya National Examination Council V. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others** (*supra*). An order of certiorari can only issue in respect of decisions which were not made more than 6 months before the application to quash them was instituted. See **Aga Khan Educational Service Kenya V. Ali Seif & 3 others** C.A No. 257 of 2003.

The application herein was instituted on 8th August, 2012 to quash the respondent's decisions made on 2nd May, 2012, barely three months after the decision was made.

As pointed out earlier in making the impugned decision, the respondent acted in excess of its powers under Section 109(1) of Registered Land Act. It also breached the rules of natural justice in that it failed to accord the interested party a hearing yet it knew of his interest in the suit property. As an order of certiorari where a public body has acted in excess of its powers, unlawfully or in disregard of the laws of natural justice, this is a good example of a situation in which an order of certiorari should issue to remove to this court and quash the certificate of lease to Kingdom Kenya 01 Limited in respect of title No.NAROK/CISMARA/OLCHORO-OIROWUA/24 registered in the name of Lerionka ole Ntutu and to bring to this court and quash entries No. 1 and 2 in part B-proprietorship section in the register of land parcels known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 entered on 2nd May, 2012 the same having been made in blatant disregard of the laws of the land.

(2). **Mandamus**

An order of *mandamus* is issued to compel performance of a public duty but not to compel

performance of the duty in a certain manner. See **Kenya National Examination Council** (*supra*).

In the instant application the applicants' seek an order of mandamus to compel the respondent to cancel and/or delete entries No.1 and 2 in part B-proprietorship section in the register of land parcels known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 entered on 2nd May, 2012.

Under section 143 (1)of the Registered Land Act, this Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

However, the power of this court is restricted to order under Section 143(2) To the extent that the register shall not be rectified so as to affect the title of a proprietor who is in possession and who acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud, or mistake or substantially contributed by his act, neglect or default to the registration.

The foregoing is the context under which this court must consider the applicants prayer for *mandamus*.

There is no doubt that the proprietor of the lease herein knew of the applicants and the 1st interested party's interests and rights over the suit property. Nevertheless, it substantially contributed to the unlawful registration of the transfer and issuance of a certificate of lease in its favour. For that reason, although it acquired the lease for valuable consideration, its leasehold interest is subject to cancellation if an order of Mandamus is issued pursuant to the application herein.

The other point for consideration before an order of mandamus is granted is whether the applicant has a legal right to performance of a legal duty by the person against whom the order is sought. See **Prabhul Gulabchand Shah V. Attorney General & Erastus Gathoni Miano**; Civil Appeal No.24 of 1985 the Court of Appeal held:-

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of public rather than private nature.”

There is no doubt that the respondent owes the applicants a legal duty to cancel or rectify the impugned entries if ordered by this court to do so. On the other hand, even though the applicants are not administrators of the estate herein, there is no doubt that as beneficiaries thereof, they have substantial interest therein to warrant the granting of the orders sought.

The upshot of the foregoing is that the applicants have made up a case for granting of an order of mandamus to compel the respondent to cancel and/or delete entries No. 1 and 2 in part B-proprietorship section in the register of land parcels known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 entered on 2nd May, 2012.

3. **Prohibition**

Prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceeding thereon in excess of its jurisdiction or in contravention of the laws of the land. See **Kenya National Examination Council** (*supra*).

Having found that an order of *certiorari* should issue to quash the lease herein, I am of the view that an order of prohibition should, also issue to prohibit the respondent from acting on or purporting that Kingdom Kenya 01 Limited is a Lessee of Lerianka ole Ntutu in respect of Land parcel known as L.R NAROK/CISMARA/OLCHORO-OIROWUA/24 for a term of 15 years from 1st April, 2012.

The upshot of the foregoing is that the notice of motion dated 28th August, 2012 is allowed as prayed.

Dated Signed and delivered in open Court at Nakuru this 26th Day of July 2013.

L WAITHAKA

JUDGE

PRESENT

Mr Morendat holding brief for Mr Chelanga for the 2nd IP.

Mr Chelanga for the 2nd Interested Party

N/A for the Applicants

N/A for 1st & 3rd Interested Party

Ms Katambi for Respondent

Stephen Mwangi : Court Clerk.