

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

JUDICIAL REVIEW NO. 85 OF 2010

JOHN THUO MACHARIA APPLICANT

VERSUS

THE HON. DEPUTY REGISTRAR NAKURU HIGH COURTRESPONDENT

RULING

1. The sole issue raised by the ex parte Applicant's Notice of Motion dated 28-10-2010 is whether an order of *certorari* lies against the decision of the Respondent, the Deputy Registrar, Nakuru High Court to extract an order from a judgment of this court and certify the same as being genuine, and emanating from this court. The exparte Applicant, argued to the contrary, that the Deputy Registrar has such jurisdiction and that if it had, then the Registrar acted in excess of such powers, and that the order and all subsequent action based upon such order should be set aside and quashed by an order of *certerari*.

2. Both counsel for the Respondent (Deputy Registrar) and the Land Registrar Nyandarua District, the first (interested party), and for the second interested party argued to the contrary, that provided the Deputy acted faithfully to the order made in the judgment, then he acted within powers conferred upon him by Order 49 rule 7 (b)(x) of the Civil Procedure Rules. Rule empowers the Registrar to hear and determine applications in relation to *inter alia* decrees for immovable property, under order 22, rule 29 which provides as follows-

29 (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refused to vacate the property.

3. The decree in question in this matter arose from the judgment of Hon. Kimaru J in Nakuru High Court Criminal Appeal No. 209 of 2001 in which the learned judge in his judgment delivered on 27th April 2007 in conclusion said-

.....I noted that the Appellant, by an oversight on the part of the trial magistrate, may actively (after the find that he had fraudulently obtained the transfer of the said parcel of land to him) benefit from his criminal actions. This court will rectify the anormally. Under the provisions of Section 177 Criminal Procedure Code, it is hereby ordered that the Land Certificate issued to the Appellant in respect of NYANDARUA/SILANGA/28 on 25th January 1983 is hereby canceled. If there are any other subsequent transactions the same are ordered canceled. The said parcel of land shall be registered in the name of the genuine owner. Kahonge Muthondu the appellent.

4. The Deputy Registrar, the Respondent herein issued the above order on 20th August, 2004 in these terms-

(a) Appeal against court is dismissed

(b) That under Section 177 of the Criminal Procedure Code, (Cap 75 laws of Kenya, it is hereby ordered that LAND CERTIFICATE issued to the Appellant in respect of NYANDARUA/SILANGA/28 on 25th day of January 1983, be and his hereby canceled).

(c) That subsequent transactions in respect of the said parcel are hereby canceled.

(d) That the said parcel NYANDARUA/SILANGA/28 be registered in the name of the genuine owner herein KAHONGE MUTHONDU.

5. That order was in terms of the judgment aforesaid. Acting in terms of Order 49, Rules 1 and 7(x) of the Civil Procedure Rules, and order 22 Rule 29 aforesaid, the Deputy Registrar acted within her jurisdiction and cannot legally be faulted on any of the well established grounds of either ***ultra vires***, or of any rule or principle of natural justice or illegality on the grounds of errors of law on the face of the record.

6. I discern no merit at all in the *ex parte* applicant's Notice of Notice dated 28-09-2010. I dismiss the same with costs to the 2nd interested party.

7. It is so ordered.

Dated, signed and delivered at Nakuru this 17th day of December, 2013.

M.J.ANYARA EMUKULE

JUDGE