REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO.76 OF 2011

IN THE MATTER OF LAND REFERENCE NO.8622 (LONGONOT KIJABE), LAND REFERENCE NO.2755/1 (NANYUKI), LAND REFERENCE NO.2781/2 (NANYUKI) AND LAND REFERENCE NO.2754/2 (NANYUKI) AND REREFENCE NO.10712 (NANYUKI)

REPUBLIC ..... APPLICANT

VERSUS

COMMISSIONER FOR LANDS .....1ST RESPONDENT

CHIEF REGISTRAR .....2ND RESPONDENT

LAND REGISTRAR NAIVASHA .....3RD RESPONDENT

LAND REGISTRAR NANYUKI ..... 4TH RESPONDENT

AND

ERERI CO. LTD. ..... EXPARTE APPLICANT

JESSEL RANCHING CO. LTD.

BILLY ARNOLD BLACKBEARD

MARY EIDA BLACKBEARD

JOHN CARPENTER HIUHU

NORTH TETU FARMERS CO. LTD

NAROMORU FARMERS CO. LTD.

FRANCIS KARIUKI MURANGA

JOHN KAROBA IROHA

JAMES MBUGUA KAROBA

JOHN KAMAU MURIGU .... INTERESTED PARTIES

RULING

Pursuant to the leave granted on 1/7/2011 the ex-parte applicant Ereri Co. Ltd, brought the notice of motion dated 7th July 2011 seeking for an order of certiorari to quash the decision of the Chief Land Registrar contained in his letter dated 15th June 2011, to the applicant declaring as validly issued Title Deeds for parcels allegedly excised from and for parcels arising out of sub-division of the applicants parcels of land **LR No.8622 (LONGONOT KIJABE), LR NO.2755/1 (NANYUKI), LR NO.2754/2 (NANYUKI) and LR NO.10712 (NANYUKI).**

Also sought is an order of mandamus to compel the 1st, 2nd and 3rd respondents, jointly and/or severally to recall, revoke and cancel all title documents issued under the Registered Land Act (RLA) by the Land Registry Nakuru (now Naivasha) being title documents to parcels alleged to be excisions from sub-division of the applicant's parcel No.8622 LONGONOT/KIJABE, and to cancel all registers opened at the Nakuru Land Registry in respect of the said titles under the RLA, and to compel the 1st, 2nd and 4th respondents jointly and severally to recall, revoke and cancel all the title documents issued under the RLA by the Land Registry Nanyuki being title documents to the applicant's parcel LR No.2755/1, 10712, 2781/2 and 2754/2 situated in Nanyuki.

It is contended that in November 1999, the District Land Registrar Nakuru, issued various fraudulent title deeds for parcels excised from LR No.8622 (LONGONOT) in the series LONGONOT/KIJABE..../IRERI. Thereafter various titles were issued which constitute the ones referred to in this motion.

The issuance of those titles is contested as having been illegally issued and that anyone holding them is doing so irregularly.

The suit lands were registered under the Registration of Titles Act (RTA) regime while the title documents issued by the Land Registrar Nakuru and Nanyuki were issued under the RLA (Registered Land Act) regime.

There has been no conversion of the suit property from the RTA to the RLA nor has any approval or consent for the subdivision of the suit land ever been obtained from the Commissioner of Lands, the Director of Physical Planning and the Local Authority of the area within which the suit lands fall.

It is deposed that by a letter dated 25th June, 1994 the Ministry of Lands Headquarters has expressly admitted that no surrender of titles to the suit land ever been registered to enable or give way for issuance of any title documents in respect of excisions from the suit land.

Further that when the Land Registrar in Nakuru and Nanyuki were issuing title documents under the RLA in respect of the suit lands, there were court orders in place, restraining such action, so the issuance was done in contempt of such orders. Reference is made to the orders dated 15th September, 1998 signed by M.J. Bhutt (the Deputy Registrar) which reads:-

> **"That an injunction be and is hereby issued, restraining the defendants and all of them or their servants or otherwise howsoever from allocating, distributing, transferring, or disposing in part or the whole of that piece of property known as LR No.882/..... and LR No.86222/1 Longonot, until the determination of this suit.**
>
> **2. The application be heard interpartes within 14 days."**

The various shareholders and Directors of the applicant, on several occasions petitioned the relevant

authorities to take action and correct the situation, as fraud was being alleged, but this did not yield anything. The issuance of the titles is said to inhibit the work of the company since it is unable to sub-divide the suit land among its members.

The contested issuance is alleged to have been done with connivance of the Land Registrars of Nakuru and Naivasha, and the Directors of the company who were in office illegally as no meeting of the company had been called in years, to elect them. The directors are accused of committing fraud by:-

i. Issuing titles in disregard of the court orders and while the original land was still intact.

ii. Issuing titles to persons who were not members of the company yet the company had not transferred any or part of its land to anybody.

iii. In any event such transfer of land could only be done by a members resolution at a general meeting – this never happened between the year 1984 and 2010, only two meetings were held following orders by the court, and the agenda was restricted to lection of Directors. In any event in the meeting of 1984, members resolved that there would be no sale of any more company shares and no new members have joined the company since then. A list of members shown in the annual returns is referred to.

It is pointed out that one of the non-members named VIRGINIA NYAKIO filed **Nakuru HCC No.220 of 2010** seeking injunctive orders against the applicants but the court ruled that the titles complained of were fraudulent – the ruling by Hon. Justice Emukule is dated 6th May 2011. After the ruling, applicants claim that, some of the holders of the fraudulent titles have offered the land for sale and have infiltrated the Ministry of Lands, led by former Director of the company who are architects and masterminds of the fraudulent titles to enable them hoodwink people into believing that they hold valid titles.

In this regard, a protest letter dated 26th May 2011 was written by the applicant's advocate herein. The response from the Chief Registrar, one J.K. Wanjau on 15th June, 2011 was that the titles issued were valid.

Further that although Nairobi HCCC No.3746 of 1998 and 3200 of 1990 were dismissed, HCCC No.1002 of 1993 is still on going and the orders made against the mother titles to the suit land subsist and in any event no raising orders have been registered even for the dismissed suits.

Meanwhile, the holder of titles complained of, have been harassing workers employed by the applicant within the suit lands and this affected the income generating activities on the land. Thus it has become necessary to seek orders compelling the respondents to recall, revoke and cancel all the title documents issued under the RLA by the Land Registries of Nakuru (now Naivasha) and Nanyuki and an order of certiorari quashing the decision of the Chief Land Registrar which declared the impugned titles as validly issued.

Basically what is being challenged is the decision to issue titles after surrender in 1991 with specific reference to titles issued in 1991 and 1998. What is sought to be quashed is the decision of the Chief Land Registrar as expressed in the letter of 15th June, 2011 which appreciated that Cap 281 Titles (subject of this case), had been surrendered to the Chief Land Registrar for cancellation. The letter acknowledged that the said titles were returned to James Kariuki Muchiriri (albeit avertedly) who purported to be the company secretary. The letter noted that the return of the titles was unprocedural and required the applicant (Ereri Co. Ltd.) to hand back the titles so that the process of converting them to RLA titles could be completed.

Mr. Njengo on behalf of 1st, 2nd, 3rd, 4th, 10th and 11th interested parties has submitted in writing that the letter does not constitute a decision capable of being quashed. He refers to the decision in **R v Ministry of Transport and Communication & 5 others Misc. Civil Application No.617 of 2009 KLR (E & L) page 563**, where the court declared a certain gazette Notice as a mere report by the Minister, for

consumption by the general public.

It is further argued that Order 53 Rule 3 of the Civil Procedure Rules, 2010 indicates that a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from proceedings. The letters are contested as not falling into any of these categories and this is fortified by the case of **R v Ministry of Transport and Communication** (*supra*) where the court held that:

> **"The letters containing decision of the KPL & C to terminate the licence issued did not contain a decision capable of being quashed by certiorari."**

Counsel argues that the comments made by the Chief Land Registrar in the letter did not constitute a decision capable of being quashed by an order of certiorari. It is also submitted that the applicants titles under Cap 281 were not absolutely indefeasible in law because the provisions of Section 23 of the Registration of Titles Act provides that a title under Cap 281 is:

> **"Conclusive evidence of proprietorship except where the same is challenged on the ground of fraud or misrepresentation to which the alleged proprietor is proved to be a party."**

Counsel contends that the applicant deliberately submitted the titles for surrender and cancellation and proceeded to sub-divide the land and disposed it to innocent 3rd parties for valuable consideration. Further that the filing of multiple suits was merely a red herring, intended to put roadblocks on the surrender process. The applicant is accused of having been a party to the alleged fraud and actually perpetuated it, so their titles are not indefeasible.

As regards indefeasibility of titles issued under Cap 300 given, the circumstances of this case, counsel submits that under Section 143 of the RLA, the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or substantially contributed to the same by his act.

In this instance the applicants contention is that they purchased the land for valuable consideration and they exercised due diligence to ensure that the land was properly registered and not encumbered before entering into the sale agreements, so, the burden of proving that the interested parties had knowledge of any omission, mistake or fraud lies with the applicant who is seeking cancellation of the titles.

It is also argued that the interested parties find protection under Section 39 of the RLA which recognises that no person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any concern:-

> **"(a) to inquire or ascertain the circumstances in or the consideration for which the proprietor or any previous proprietor was registered."**

This means a purchaser for valuable consideration is not duty bound to dig into the history of the registered parcel. Therefore the issue of whether the ex-parte applicant had held a meeting in accordance with the Memorandum and Articles of Association is an irrelevant factor considering the sanctity of the title issued to an innocent purchaser for valuable consideration.

It is counsel's contention that, once registration took effect, then under Section 27, of the RLA is conferred absolute proprietorship upon the interested parties.

Another argument which has been advanced on behalf of the interested parties is that there is no basis for issuing orders of mandamus because there is no public duty imposed on the respondent by statute. Reference is made to the Black's Law Dictionary 8th Edition definition of mandamus as:-

> **"A command which issues from the High Court, directed to any person, corporation, or**

inferior tribunal, requiring him/it to do some particular duty specified which appertains to his office and is in the nature of public duty."

From this definition, it is argued that there was no public duty imposed on the respondents by statute and in any case, it is not in line of 2nd respondent's duty to recall and revoke titles – the RLA being very clear that revocation and cancellation of titles rests with the High Court only and not the respondents. Counsel submits on the strength of **Municipal Council of Kisumu V Madowo (1986-1989)EA 373** that mandamus should not be sought to determine rights but ought to be used for enforcement of an existing right – which is not the situation obtaining here.

Counsel points out that the orders sought may issue where there is:-

i. Want or excess of jurisdiction.
ii. Violation or disregard of principles of natural justice.
iii. Error of law apparent on the face of the record.

It is submitted that the documents demonstrating surrender of Title and correspondence from the former Directors acknowledging the surrender shows that the suit is filed in bad faith.

In the replying affidavit sworn by John Kamau Murichu on behalf of the 13th and 14th interested parties, he deposes that as shareholders of the ex-parte applicant, a company which was incorporated to acquire and purchase land on behalf of its shareholders and is through it that they acquired their different parcels.

Further, in exercise of its functions under the Memorandum of Association, Ereri Company purchased the parcels in this matter for its shareholders, and original Titles were issued under RLA. The land was subsequently sub-divided and allocated to the shareholders of Ereri Company and titles issued, so the Head titles were surrendered to the Chief Land Registrar, as confirmed by a letter dated 16th January, 1992, and the Company Directors acknowledged surrender of the head titles by a letter dated 22nd August 1994.

The sub-division was approved by the Central Agricultural Board and Naivasha Land Control Board, so if the current Directors of Ereri Company are in possession of the original title, then the same were obtained unprocedurally and for selfish reasons.

The contention is that the validity of those titles was dependent on the letter dated 15th June 2011 signed by J.K. Wanjau, and there does not exist any decision capable of being quashed because what is complained of were comments by the Chief Land Registrar.

It is submitted on behalf of the 13, 14 and 15 interested parties that the applicants cannot utilize such extensive remedial orders to establish a right which does not exist.

The focus in this matter is the letter dated 15th June 2011 by the Chief Registrar to Ereri Company Ltd., advising it to surrender the Head Titles. The reason for such intimation was so as to enable the Chief Land Registrar's office to complete the exercise of conversion of titles to RLA titles. The recall was necessary (according to the letter) because the Head titles had been obtained unprocedurally from the lands office, before the exercise of conversion of titles was complete.

Is the said letter capable of creating a right, or whether was it an opinion which is not binding? Does the letter constitute a decision that can be quashed? These considerations are necessary because an order of certiorari issues where there has been a decision or proceedings making a determination and which is carried out in excess of jurisdiction or error of law on the face of the record or breach of the rules of natural justice – this position has been stated in several decisions which counsel in this matter have cited.

I have combed through this file, but failed to find any written submissions by the applicant's counsel. The contentious letter is reproduced in part here below – being entitled **Surrender of Head Titles**:-

> **"As you are aware the above titles were released on 25th August 1994 from this office to James Kariuki Muchiri who purported to be the company secretary. The same titles had been earlier surrendered to this office to facilitate registration of surrenders with an aim of converting the titles into RLA. The release of the titles back to the company through Mr. Muchiri was unprocedural.**
>
> **Under the circumstances, you are therefore required as a matter of urgency to surrender all the above named titles to enable this office complete the exercise of conversion it had commenced. In any case the titles are not in the custody of the Company, confirm to this office within twenty one (21) days from the date hereof to enable us gazette the titles for.... under Cap 281.Any members/party still interested with nullification of the already issued title deeds under RLA should seek redress from the court. On receipt of valid court orders, the issued title deeds will be cancelled but in the meantime they remain as valid as issued."**

My comprehension of the contents of the letter is that the Chief Land Registrar had made a decision on procedure followed regarding the release of the head titles applicants had and requested/advised them to surrender them. The letter explained that the surrender was so as to enable him complete his job. It was not a decision validating the titles, and it is misplaced for the applicants to state that the letter declared validity of Title Deeds for the parcels under reference. Indeed as submitted by Mr. Njengo, the letter merely pointed out that the Head titles were released in an unprocedural manner and called upon the applicants simply to confirm whether they were ready. It further indicated the steps to be taken in the event that the applicants did not have the titles and advised any aggrieved party to seek legal redress.

Surely the applicants would not be seeking redress over advise which they had choice to either accept or reject. They would only seek redress if what was being communicated to them was a decision adversely affecting them.

The major concern is whether this decision is capable of being quashed by way of certiorari. This court was urged to be guided by **R v Ministry for Transport and Communication and 5 others, Misc. Civil Application No.617 of 2003** where it was held that a gazette notice was a mere report by the Minister for consumption of the general public and therefore not capable of being quashed by an order of certiorari. The relevance of this comes in the light of provisions of Order 53 Rule 2 of the Civil Procedure Rules (2010) which is to the effect that a decision capable of being quashed would either be a judgment, order, decree, conviction or any decision emanating from a proceeding. It is argued on behalf of the interested parties that the letter by the Chief Land Registrar does not fall within the category.

The court's attention is also drawn to holding No.(a) which stated that:-

> **"The letters containing the decision of KPA to terminate the licence issued did not contain a decision capable of being quashed y way of certiorari."**

The question this court must consider is whether the Chief Land Registrar had a duty to act judiciously, and whether he had to consider any evidence at some stage?

My view is that this was decision arrived at by considering the procedure adopted in releasing those letters, and its contents did not constitute a decision capable of being quashed by way of certiorari. Having found that the release was unprocedural, the Chief Land Registrar simply communicated to say:-

> **"This was not corrected, we need those titles so as to convert them to RLA, please hand them over – if you are unhappy with the steps taken, please seek legal redress in court."**

There is also a prayer for mandamus to compel the 1st, 2nd and 3rd respondents to recall, revoke and cancel titles.

The applicants have raised the question of indefeasibility of title under Cap 281 – the relevant Section

being Section 23(1).

Certainly title under RTA is conclusive evidence of proprietorship except where it is challenged on grounds of fraud or misrepresentation.

In this case, following the request to surrender Head Titles on grounds of procedural defect, the applicants obliged then went ahead to sub-divide the land and dispose it to third parties as purchasers. Would this amount to fraud or misrepresentation and now that the Titles have been converted to RLA Titles would Section 143 of that statute then bar the applicants from seeking the orders on the basis of indefeasibility?

Section 143 RLA provides that the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought. The interested parties have demonstrated that they purchased the respective parcels as shown by the sale agreements and at the time of such agreement they confirmed it was properly registered and un-encumbered and there is nothing to show that applicants were party to any fraud, misrepresentation or mistake.

Indeed what emerges is that they exercised due diligence. Consequently the interest they hold under the RLA is absolute and finds protection in Section 27 of the said Act. Further Section 28 provides that the registered proprietor's rights shall not be defeated and are only limited and subject to existing lease, charge and other encumbrances. Such rights are subject to the overriding interests under Section 30 which provides:-

> **"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interest as may for the time being subsist and affect the same, without their being noted on the register.**
>
> **g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed."**

In this instance, none of the limitations or overriding interests is alleged to affect the Titles held by the interested parties.

I am persuaded that orders the court is being asked to compel the respondents to perform are outside their jurisdiction. In consequence of this, my finding is that the orders sought cannot issue and the application is dismissed.

Costs shall be borne by the applicants.

Dated, signed and delivered at Nakuru this 4th day of December, 2013.

H.A. OMONDI

JUDGE