



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APPL NO. 256 OF 2009

IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

IN THE MATTER OF KISUMU MUNICIPALITY/BLOCK 7/530

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, PROHIBITION AND MANDAMUS

REPUBLIC *Ex-Parte*

JOHANNES AKELO OMBOTO

GRADUS OMBOTO AKELO.....APPLICANTS

VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT
THE DISTRICT LAND REGISTRAR, KSM.....2ND RESPONDENT

JUDGMENT

On the 16th of September, 2009 the court granted the ex parte applicants leave to institute judicial review proceedings in the nature of certiorari, prohibition and mandamus against the 1st respondent the **Commissioner of Lands** and the second respondent the **District Land Registrar**, Kisumu. The ex parte applicants are **JOHANNES AKELO OMBOTO** and **GRADUS OMBOTO AKELO** (a minor).

Pursuant to the leave a notice of motion was filed on the 5th of October, 2009 seeking for the following orders.

1. That this Honourable Court be pleased to grant to the applicants an order of judicial review in the nature of certiorari to remove into this court the decision of the 1st respondent contained in the letter dated 10.3.2009 and purporting to revoke, cancel and annul the applicants' title and leasehold interest over KISUMU MUNICIPALITY BLOCK 7/530 for purposes of it being quashed on the basis that it was made in excess of jurisdiction, contrary to the rules of natural justice, the provisions of The Registered Land Act and in violation of the applicant's Constitutional Right to own land property. (sic)

2. That this Honourable Court be pleased to grant to the applicants an order of judicial review in the nature of certiorari to remove into this court the decision of the 2nd respondent by which it cancelled the applicant's title and leasehold interests over KISUMU MUNICIPALITY/BLOCK 7/530 for purposes of it being quashed on the basis that it was made in excess of jurisdiction, contrary to the rules of natural justice the provisions of The Registered Land Act and in violation of the applicant's Constitutional Right to own landed property.

3. That this Honourable Court be pleased to grant to the applicants an order of judicial review in the nature of prohibition directed at the 1st respondent and prohibiting it from arbitrarily, irregularly and unlawfully issuing any Letter of Lease over that parcel of land situate within rules of natural justice, the provisions of The Registered

Land Act and in violation of the applicant's Constitutional Right to own landed property.

4. That this Honourable court be pleased to grant to the applicants an order of judicial review in the nature of prohibition directed at the 2nd respondent and prohibiting it from arbitrarily, irregularly and unlawfully accepting and/or registering lease over the parcel of land situate within Kisumu Municipality and known as KISUMU MUNICIPALITY/BLOCK 7/530 so as to defeat the applicant's interest in excess of jurisdiction contrary to the rules of natural justice, the provisions of The Registered Land Act and in violation of the applicant's Constitutional Right to own landed property.

5. That this Honourable court be pleased to grant to the applicants an order of judicial review in the nature of mandamus directed at the 2nd respondent and commanding him to reinstate the registration of the applicant as the leasehold interest comprised in that parcel of land situate within Kisumu Municipality and known as KISUMU MUNICIPALITY/BLOCK 7/530.

6. That the applicants also pray that the costs of this application be awarded to the applicants.

The application was supported by the verifying affidavit and statement of facts signed by the first applicant and on the grounds on the face of the application as follows; the respondent acted *ultra vires* the provisions of the law more particularly the Constitution and the Rules of natural justice by purporting to revoke, cancel and annul the applicant's title without a notice or court order, the respondents did not acknowledge the existence of HCC NO. 53 OF 2006 (KSM), the actions of the respondent are manifest contempt of the law and glory to impunity, there was no legal or lawful; justification for the actions of the respondent.

Despite service of the application the respondent's failed to file an affidavit or grounds of opposition. **Miss Kamau**, State Counsel confirmed from the bar that indeed the title was cancelled and the 1st and 2nd have failed to sign an affidavit.

As things stand the only information available to the court and which remains uncontroverted is that of the ex parte applicant as follows; the 1st and 2nd respondent are the rightful registered proprietors of land title **NO. KISUMU MUNICIPALITY BLOCK 7/530** having purchased the same for value from Hodima Construction Company Limited in 2005 when they immediately took possession; that in 2006 the Kenya Railways Corporation sought to be paid rent and at which point HCCC NO. 53 OF 2006 was instituted, the case is still pending, that without notice or a court order and for no justifiable reason the respondents inconsistently and illegally cancelled the ex parte applicants title.

The court has no explanation why the title herein was cancelled. The court has not been furnished with a court order as the suit between the applicants and Kenya Railways is still subsisting and rent being banked in a joint account of lawyers for the parties. For consideration also is whether the respondents have any mandate in law to cancel or revoke a title on their own motion.

The title subject matter is registered under the Registered Land Act Chapter 300 of the Laws of Kenya. Nowhere in this Act does the Registrar or Commissioner of Land have powers to cancel or annul indeed under S. 142 the Registrar is only permitted to do what I would refer to as minor rectification of errors that may not affect the interest of any proprietor or with consent of parties.

The power to cancel is placed on the court by virtue of Section 143 which provides:-

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”

“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act neglect or default.”

The above Sections of the Law are clear that even where the court is to rectify due to a mistake, omission, fraud or sheer mistake, a proprietor whose interest is likely to be affected must have prior knowledge.

From the facts of this case the proprietors were not notified of the cancellation. In any event the respondents do not have the mandate and their action was therefore *ultra vires*, illegal and unconstitutional.

For the aforementioned reasons I will grant all the 4 prayers as sought for.

For the evidence of doubt the respondents are directed to reinstate the names of the *ex parte* applicants as the proprietors of **KISUMU/MUNICIPALITY BLOCK 7/530** forthwith.

I also award the costs of the suit to the *ex parte* applicants.

DATED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2012.

ALI-ARONI

JUDGE

In the presence of:

..... for the plaintiff/applicant(s)

..... for the defendant/respondent(s)