



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW CASE NO.91 OF 2010

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF CANCELLATION OF LAND PARCEL NO.GILGIL TOWNSHIP BLOCK 3/675 FROM REGISTRY INDEX MAP

BETWEEN

**BEATRICE WAIRIMU KIIRU.....EX-PARTE/
APPLICANT**

AGAINST

**DIRECTOR OF SURVEYS.....1ST
RESPONDENT**

**COMMISSIONER FOR LANDS.....2ND
RESPONDENT**

**DISTRICT LANDS REGISTRAR, NAIVASHA.....3RD
RESPONDENT**

RULING

Pursuant to leave granted to her on 5th October, 2010, the applicant, Beatrice Wairimu Kiiru, has now brought the instant motion for *certiorari* to quash the decision of the 1st respondent (the Director of Surveys) made on 23rd September, 2010 amending the Registry Index Map by replacing the applicant's title No.GILGIL/TOWNSHIP BLOCK 3/675 with No.GILGIL/TOWNSHIP BLOCK 3/673. She further seeks an order of prohibition to prohibit the Commissioner of Lands (the 2nd respondent) and the District Land Registrar, Naivasha, (the 3rd respondent) from effecting the aforesaid decision of the Director of Surveys. The application is premised on the grounds that the applicant is the registered proprietor of GILGIL/TOWNSHIP BLOCK 3/675; that the Director of Surveys in amending the Registry Index Map did not give the applicant a hearing yet the amendment of the Registry Index Map affected her title; that the Commissioner of Lands and District Land Registrar, Naivasha may effect the decision of the Director of Surveys thereby depriving the applicant of her lawful title to the suit property.

The application was duly served upon the Attorney General and Mr. Njuguna from that office appeared before the court and was granted time and leave to respond to the application. He was also aware of the date for the argument of the application the date having been taken in his presence. No replying affidavit was filed and no counsel appeared on behalf of the respondents when the matter came up for arguments.

The applicant, through her counsel has filed well-researched skeleton arguments and authorities which I have duly considered. From the annexures to the application and the submissions, I am satisfied that the applicant is the registered proprietor of the suit property. It is similarly clear to me that the applicant lawfully acquired the property from the previous owner after conducting due diligence and after being satisfied that the title was regular. It is also common ground that the Director of Surveys made a decision on 23rd September, 2010 to cancel the suit property in the index map and to replace it with GILGIL/TOWNSHIP BLOCK 3/673. The effect of this decision is to adjust proprietary rights of the applicant to her detriment.

It is now settled that an order of *certiorari* will issue if the impugned decision is found to have been made without or in excess of jurisdiction or where the rules of natural justice are not complied with. Similarly, an order of Prohibition will issue to stop a tribunal or a public body from continuing with proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies also where the tribunal or public body in arriving at its decision departs from the rules of natural justice. See **Kenya National Examination Council Vs. Republic Exparte Gathenji Njoroge & Others**, Civil Appeal No.266 of 1996. No doubt the Director of Surveys is empowered under the **Registered Land Act** to do certain things in respect of the registered land. For instance, **Section 18** of the **Act** vests in the Director of Surveys the power to prepare and thereafter maintain the registry map for every registration district. Similarly he has the power to alter the registry map and to prepare new editions if required so to do by the Registrar and with the agreement of all parties concerned.

Section 19(1) specifically provides that:

“19(1) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form and the mutation form shall be filed.”

(Emphasis supplied)

The main issues in this matter are whether the Director of Surveys exceeded his powers or whether he was in contravention of the laws of the land and finally whether he failed to comply with the rules of natural justice when he made the decision to amend the index map. I reiterate that the Director of Surveys has powers to alter the registry map, subject to clearly stated conditions.

For him to make those adjustments there must be instructions by the Registrar in the form of mutation forms. Secondly, the alterations envisaged must relate to correction of the line or position of any boundary shown on the registry map. Thirdly, any correction that is likely to affect any person's interest shown by the register can be affected only with the agreement of that person.

The respondents having failed to defend this application, I find no evidence that the above procedure was followed in this exercise. It is trite, by dint of **Section 17** of the **Act** that only the Registrar can cancel any

entry in the register which in his opinion has ceased to have any effect. Secondly, the applicant has averred that when the decision in question was taken, he was not involved or notified. That averment has not been challenged. Judicial review proceedings is concerned with the decision-making process of the tribunal or a public body. Its purpose is to ensure that the individual before it is given a fair treatment. See **Chief Constable of the North Wales Police Vs. Evans** (1982) 1WLR 1155.

Regarding a fair hearing, the applicant whose interest in the suit land was clearly shown in the register had a legitimate expectation that he would be heard before any steps are taken to affect those interests. The Court of Appeal in the case of **The Commissioner of Lands Vs. Kunste Hotel Limited**, Civil Appeal No.234 of 1995 stated the law thus:

“The issue we are concerned with here, and which is the crux of the matter in this appeal, is not whether Kunste Hotel Limited has any right to the plot, but whether its interest in the subject plot was sufficient and, in the circumstances of this case so obvious that the appellant was obliged to consult or hear it prior to his decision to allot the plot to the interested party.”

Finally, the Director of Surveys’ action in this matter did not only violate the provisions of the **Registered Land Act** but also of the Constitution. By arbitrarily amending the register to remove the applicant’s title, the 1st respondent was in breach of **Article 40 (3)** of the **Constitution** which prohibits the State from depriving a person of private property arbitrarily.

For all the reasons stated, I find that the 1st respondent exceeded his jurisdiction, violated the law and failed to give the applicant a hearing before making the decision in question. The decision made in that manner cannot, therefore, be enforced by the 2nd and 3rd respondents. In the result, the impugned decision will be and is hereby quashed by an order of *certiorari*. Similarly, the 2nd and 3rd respondents are prohibited from effecting the decision of the Director of Surveys.

This application is allowed with costs to the applicant.

Dated, Delivered and Signed at Nakuru this 8th day of April, 2011.

W. OUKO

JUDGE