No. 2816

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

JUDICIAL REVIEW NO. 80 OF 2010

IN THE MATTER OF THE REGISTERED LAND ACT, CHAPTER 300 LAWS OF KENYA

AND

IN THE MATTER OF REGISTERED LAND PARCEL NUMBERS SHARTUKA/512-514, 516, 518-524, 545-569, 570, 571, 573-593,595-611, 620-639, 641-674, 676-693, 695- 700-714, 717, 719-739, 743-744, 746, 748, 753-759, 762-771, 774-787, 789, 791, 792, 794, 818-821, 823, 824, 826-835, 838, 852-54, 857-859, 17, 18, 26, 29, 36, 45, 63, 85, 92, 103, 111, 112, 117, 126, 127, 130, 147, 149, 155, 180, 182, 206, 213, 221, 223, 240, 251, 254, 258, 297, 319, 316, 332, 320, 370, 369, 368, 356, 362, 350, 388-400, 386, 385, 372-382, 401-407, 409, 411-416, 418-511 inclusive

AND

IN THE MATTER OF EXPUNGING OF THE TITILE DEEDS BY THE CHIEF LAND REGISTRAR

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES, CHAPTER 21, LAWS OF KENYA

AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY MOSES LAMASHON KORINKO, SIMON LEPARAIKO TIEPOO, DAVID NTUDAI,

SAMSON KELIAN, SAMWEL M. NAIDUYA, JACKTON KUROMONGI (and 428 other registered land owners.)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR)

DISTRICT LAND REGISTRAR, TRANS-MARA).....RESPONDENTS

EX-PARTE

1. **MOSES LAMASHON KORINKO,**
2. **SIMON LEPARAIKO TIEPOO,**
3. **DAVID NTUKAI**
4. **SAMSON KELIAN**
5. **SAMWEL M. NAIDUYA**
6. **JACKTON KUMORONGI (and 428 others)**

RULING

From the pleadings, it appears that the instant application is a culmination of a dispute which has been raging between the applicants and respondents from as way back as 1995. However the instant proceedings were triggered by the 1st respondent's action in publishing a **Gazette Notice Number 4984** on 25th July, 2003 nullifying various titles which had been issued earlier on in favour of various members of **Shartuka Group Ranch** in or about 1998, the applicants included purportedly pursuant to the court of appeal order dated 15th September, 1998. The titles involved are set out in the intitulement of these proceedings above. Those affected by the cancellation numbered 434 and led by **Moses Lamashon Korinko, Simon Leparaiko Tiepoo, David Ntukai, Samson Kelian, Samwel M. Naiduya** and **Jacton Kuromongi,** hereinafter ***"the ex-parte applicants"*** they challenged the **Gazette Notice** aforesaid by way of the instant **Judicial Review Proceedings.** They sought and obtained leave before **Wambilyanga J** (as he then was) to commence **Judicial Review Proceedings** in the nature of certiorari to remove into this court and quash the decision of the respondent dated 14th July, 2003 and contained in the **Kenya Gazette Notice** dated 25th July, 2003 aforesaid. They also prayed that leave so granted do operate as stay. **Wambilyanga J** granted both prayers. In granting the prayers though, **Wambilyanga J** directed that since he had previously handled a matter related to the same subject matter, the substantive application should not be filed before his court. It was on that basis that the substantive Notice of Motion was filed in the High Court of Kenya at Kakamega.

G.B.M. Kariuki J heard the substantive Notice of motion and allowed it on 4th June, 2004. The judge remarked ***"…it is my finding that the Gazette Notice No. 4984 by the Transmara District Land Registrar dated 25th July, 2003 hinged on the ruling of the C.A. in C.A application No. 195 of 1998 in its purport that the plots it enumerated were irregularly issued but as the No. 237/98 on which the ruling had been issued was struck out the Gazette Notice lost the legal basis on which it had been issued. No longer could the Land Registrar purport to have legal justification to make the claim regarding irregular issuance of plot to non members of Shartuka Group Ranch. In the result, an order of certiorari shall issue to remove into this court for quashing the decision of the Chief Land Registrar dated 14.07.03 contained in the Kenya Gazette of 25.07.03 purporting to expunge from the Land Registrer as null and void title deeds relating to the parcels refered to in the said Gazette Notice and the application…"***

Subsequently, the ex-parte applicants extracted the order aforesaid and served it upon the respondents jointly and severally for compliance. That order was endorsed with a **Penal Notice**. It would appear that the respondents, despite being aware of the order aforesaid went ahead and issued a letter dated 30th April, 2009 impeaching the titles hitherto issued and held by the ex-parte applicants. This was obviously in breach and utter contempt of the order issued by **G.B.M. Kariuki J** as aforesaid.

The ex-parte applicants as expected moved to court for leave to take out contempt proceedings against the respondents, which leave was duly granted by the **Said J. Chitembwe J**. on 20th May, 2009. The substantive contempt proceedings were subsequently heard and determined by the same judge. In a ruling dated 24th June, 2009, the judge delivered himself thus ***"…it is therefore my finding that the respondents, being aware of the order of this court issued on 4th June, 2004, have breached and /or disobeyed the same. The purported registration of the suit property is in contravention of the court order as the properties are already registered in the names of the applicants. I am further convinced that the respondents are fully aware of the order of this court as a Notice of appeal was duly filed on 23rd February, 2006 by the Attorney General on behalf of the two respondents. This Notice is in respect of the decision of this court. The respondents, having been duly served with the order of this court, have decided to turn a blind eye to the same. They were duly served with the current application but have decided not to attend court presumably in the hope that this court will not take any action against them. I am satisfied that the respondents are in contempt of court for breaching and /or disobeying the order granted by this court on 4th June, 2004 and I do proceed to cite them accordingly…".*** The judge then proceeded to issue Notices to show cause why the respondents should not be punished for contempt of court.

Though the respondents were duly served with the Notices to show cause as aforesaid, they failed to appear in court and on 21st July, 2009 on the application of **Mr. Oguttu**, learned counsel for the ex-parte applicants, warrants of arrest were issued against the Chief Land Registrar, **Mrs. T. N. Mburu** and **Mr. Alois Komnlo**, District Land Registrar, Transmara District. The OCPD, Kileleshwa Police Station was directed to effect the warrants of arrest against the Chief Land Registrar and the OCPD, Transmara Police Division was to effect the warrants against the Transmara District Land Registrar.

On 30th July, 2009, the 2nd respondent was brought to court under arrest. However, **Miss Kimeli** appearing for both respondents pleaded for the lifting of the warrants to enable her obtain proper instructions from the respondents. The application was opposed by the ex-parte applicants. In a ruling delivered on the same day, the Judge stated that as the respondent had been brought to court under arrest and following an undertaking by their counsel that she would avail them at the next hearing, he suspended the warrants of arrest against the respondents with a rider however, that the finding that the respondents were in contempt of court still stood.

Notwithstanding the foregoing, it would appear that the respondents went ahead and issued new titles from the premises forming part of this litigation to **Kipoki Ole Tasur, Samwel Ole Pere** and **David Ole Salala,** hereinafter ***"the interested parties".*** When this fact was brought to the attention of the **Chitembwe J** on 30th September, 2009, he ordered that all titles issued to the interested parties in May and June, 2009 respectively for the same suit property be recalled and brought before court at the next hearing date on 7th December, 2009. The 2nd respondent was to ensure that there were no transactions by the interested parties on the suit premises. Finally, he ordered that the new index map sheet 1-39 be availed in court on the next hearing date for cancellation.

When the matter came up next for mention on 15th March, 2010, **Chitembwe J** had left the station. The matter was then taken over by **Lenaola J**. **Mr. Kipkogei**, litigation counsel, too had come on record in place of **Miss. Kimeli.** He sought an adjournment in order to be fully briefed. The request was granted.

The matter next came before **Lenaola J** on 19th July, 2010 and **Mr. Kipkosgei** indicated that there were ongoing negotiations with a view to settling the dispute out of court and prayed for stay of execution of the warrants pending settlement. **Mr. Oguttu** was unaware of such negotiations and therefore opposed

the application. Nonetheless, the judge granted last mention and pushed the matter to 4th October, 2010. Come that day and there was no progress made in the alleged negotiations for settlement. Exasperated, the judge issued warrants of arrest against the respondents forthwith and they were to appear for committal as soon as they were arrested.

The respondents were duly arrested and brought to court on 22nd October, 2010. On the same day however, they had filed an application dated 21st October, 2010 seeking in the main the following prayers; ***"…that the court do stay the warrants of arrest issued on 4th October, 2010, temporarily pending the hearing and determination of the application inter-partes, that the court do interpret the orders made on 14th June, 2004 and 4th June, 2004 in relation to the Gazette Notice published on 25th July, 2003, the court do set aside, vary or otherwise discharge the order granting leave to institute contempt proceedings and costs of the application be provided for…".*** It is important to note at this juncture that it is this application which is the subject of this ruling.

Confronted with the application, **Lenaola J** felt that he needed to give directions on the same. Having pondered over the application, he decided in the exercise of his discretion to grant an order of temporary stay of execution of the warrants. He also directed that the matter be transferred to this court for hearing since it was nearer the **Locus in quo**. This is how this court found itself seized of the matter.

It has been necessary to set out the history of the dispute so as to disabuse the respondents of the motion that they did not know what was expected of them. That motion is still being propagated as can be captured in prayer (c) on the face of the application.

The grounds in support of the application are that the respondents had been found to be in contempt of court orders of 4th June, 2004 which had the effect of quashing the **Kenya Gazette Notice** dated 14th July, 2003. That the effect of the quashing order was that the titles referred to therein were deemed to be regular by court. That a **Gazette Notice** was later published in somewhat not too dissimilar terms which again was quashed by **Muchelule J in Kisii HCMA No. 52 of 2009**. That it was the publication of the said **Gazette Notice** and the letter dated 30th April 2009 which was alleged by the respondents as constituting contempt of court. That the applicants had not done any other act after the order of certiorari so as to constitute a breach of the court order. Otherwise, the applicants were ready and willing to abide by any orders which the court may give to effectuate its earlier orders. Finally, they stated that they had not deliberately disobeyed the court's order and to the extent that it can be interpreted that they had done so, they were remorseful and contrite.

Two affidavits were sworn in support of the application. The first one was by the 1st respondent. The same reiterates and expounds on the history of the dispute as I have endevoured to set out in this ruling as well as grounds upon which they had made the application. Suffice to add that as a result of the orders of this court, the maps and registers in respect of the lands in question the subject of the said orders had been stored away with no action being taken on them either by way of issuance of searches, green cards or further disposal of interests supposedly recognized therein. As such, there had been total recognition of the court orders. The foregoing notwithstanding, members of **Shartuka Group Ranch** had continued to agitate that their interest in the suit parcels be considered and allowed to transact on that interest by way of transfers, charges e.t.c. The Transmara District Security Intelligence Committee, alarmed by the disputes regarding ownership and boundaries as between members entered the fray, investigated the matter and came to the conclusion that the problems largely cut across all the departments in the Ministry of Lands as well as the Ministry of Internal Security. They decided to form an all inclusive committee to look into all the allegations and chart the way forward. The committee came up with a report which was widely accepted by the beneficiaries of the ranch and it was upon the relevant Government departments to

find a mechanism of implementing it of course taking into account the provisions of the various statutes. He was otherwise apologetic to the extent that his acts could be interpreted as being contemptuous of the court. Whatever he did in the course of his duties was in good faith, believing that the same was lawful and was never a deliberate intention to disparage the dignity and stature of the court and the course of justice. He beseeched the court to accept his humble apology.

The 2nd affidavit in support of the application was sworn by the 2nd respondent. He deponed that his office acted on the advice and directions of its superiors as was the case in the circumstances leading to the orders which had been issued in this matter. His office never intended to act in a manner which would bring the court's dignity into disrepute or contempt. He therefore beseeched this court to issue such directions and give such orders as would be necessary to effectuate the court's order.

The application was opposed through a replying affidavit filed by the 1st ex-parte applicant. That affidavit also sought to elaborate on the history of the dispute. Suffice to add that according to the ex-parte applicants, the orders issued on 4th June, 2004 nullified the **Gazette Notice** by the respondent which purported to cancel their titles. That decision had the effect of confirming that the titles of the ex-parte applicants were regular and valid. Those orders were devoid of ambiguity and that at any rate, the respondent understood their purport. Notwithstanding the clear terms of the order, the respondents had engaged in activities calculated to besmirch the integrity of the court by issuing a Gazette Notice on 1st February, 2008 purporting to cancel the title deeds issued in favour of the Ex-parte applicants, which had been quashed earlier by this court. They also issued a letter dated 30th April, 2009 whose contents were to cancel the titles issued in favour of the ex-

parte applicants and occasion fresh registration, regardless and in contravention of the orders of the, 2004. The respondents were afforded an opportunity to explain their case and show cause why they should not be punished for contempt but they ignored and or refused to attend court. Consequently, they forfeited the opportunity. Otherwise the conduct of the respondents had been wrought or fraught with deliberate actions and they cannot contend not to have been aware of the purport of the orders to warrant this court's interpretation of the same. The respondents having been found guilty of contempt, it is imperative that they purge the contempt first before they can be afforded any audience by the court. Finally, that owing to the circumstances obtaining herein, the application by the respondent was a classic case of abuse of the due process of court and ought therefore to be dismissed **Ex-Debito Justitiae.**

When the application came up for interparties hearing before me on 1st March, 2011, **Mr. Oguttu** and **Mr. Kipkogei** continued to act for the ex-parte applicants and respondents respectively. However, **Mr. Nyambati**, learned Counsel appeared for the interested parties. They all agreed to canvass the application by way of written submissions. Eventually, however, only the ex-parte applicants and respondents filed their respective written submissions. The interested parties only realized very late in the day that the application pitted the respondents against the ex-parte applicants and not themselves. Accordingly, they opted not to file their written submissions. Nonetheless, I have carefully read and considered the written submissions on record and the authorities cited therein.

On 1st March, 2011, when the application had been scheduled for hearing interparties, counsel for the respondents informed the court that he was abandoning prayers (a) and (c) on the face of the application. That request was duly granted by the court. In the premises and in this ruling, we shall only be concerned with prayers (b), (d), (e) and (f). However, prayer (b) was dealt with by **Lenaola** and granted. It is thus spent and not now available for consideration. In any event, the prayer sought for the stay of execution of the warrants of arrest issued on 4th October, 2010 pending the hearing and determination of the application. Since the application has already been heard interparties and is being determined now, that prayer on its own is spent.

In prayer (d) the respondents have asked this court to set aside, vary or otherwise discharge the order granting leave to institute contempt proceedings. I have looked through the grounds and affidavits in support of the application, and have yet to come across reasons advanced by the respondents as to why I should undertake such drastic action. Such a prayer cannot be granted in **vacuo** and yet that is what the respondents expect me to do. In any case, I think the request is coming too late in the day. The respondents should have had their intervention immediately after the leave had been granted and when they were served with the substantive motion. There is no doubt at all that the respondents were served with the substantive Notice of motion going by affidavits of service on record. They however failed, refused and or neglected to file papers in response or in opposition to the application and raise therein the issues which they are now raising in this application. They also failed to attend court personally or physically so that they could orally canvass the issues they are now raising. It is too late in the day for the respondents to seek the order aforesaid since, after the leave was granted, the substantive motion filed, heard and determined. As it is therefore no useful purpose will be served by granting the order. The respondents are coming to the staple when the horse has already bolted. The respondents have not told me what should happen to the ruling delivered on the substantive Notice of motion following the grant of leave now sought to be impugned by the respondents. They have not sought in that prayer that the leave and all consequential orders or proceedings be set aside, varied or otherwise discharged. So that even if I was to grant the order as framed, the ex-parte applicants will still be left holding a valid court ruling in their favour. A party can only be granted the orders sought. In this regard it will be an exercise in futility to grant the order sought. Indeed, the court would be acting in vain if it was to grant the order. It is trite law that court orders are not issued in vain.

Having granted leave and the leave having been acted upon by the determination by court of the consequential Notice of motion, this court is now **functus officio**. Therefore the order granting leave cannot be revisited before the same court. I do not even know whether that is permissible in the appellate court.

Even if the order had been properly sought and I had jurisdiction to entertain the application, I doubt whether I would have allowed it. Why? Essentially, what the respondents are asking me to do is to sit on an appeal on the order of a court of co-ordinate jurisdiction and declare that the judge in granting leave was mistaken and did not know the law which is not permissible. As correctly submitted by counsel for the ex-parte applicants, such a cause, would bring the rule of law to disrepute and agitate anarchy.

The wording of the prayer also suggests that the respondents are seeking a review. However no single ground for review as we know it has been advanced in support of the application. But even, assuming that the review sought is perhaps on a point of law, I would still deny the respondent the prayer for the simple reason that a point of law not canvassed before the trial court, cannot find an application for review. The agitation of a new point of law not canvassed before or prior, would in fact be tantamount to re-agitating the application for leave as correctly observed by the ex-parte applicants. The upshot of all the foregoing is that prayer (d) sought in the application is not available to the respondent.

The other prayer sought in the application being prayer (e) is that this court be pleased to make such orders or give such directions as to enable the due compliance of the orders by the respondents. Nothing really turns on this prayer. All that I can tell the respondents is that they have already been adjudged to be in contempt of court, they must take immediate and obvious steps to purge the contempt. This they can do by complying with or heeding the orders issued herein on 4th June, 2008 and 30th September, 2007 respectively. They must avail or make available the green cards and registers in respect of the parcels of land to enable the respondents transact business on their respective parcels of land as they may deem fit and just.

Prayer (f) is about costs. Ordinarily, costs follow the event. Since the application is for dismissal, the respondents will have to meet the costs of the ex-parte applicants.

The application is dismissed with costs to the ex-parte applicants. I now invite the respondents to show cause why they should not be punished.

Ruling dated, signed and **delivered** at Kisii on this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE