



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPL. NO. 46 OF 2008

REPUBLIC.....APPLICANT

VERSUS

KISUMU DISTRICT LANDS OFFICER.....1ST RESPONDENT
COMMISSIONER OF LANDS.....2ND RESPONDENT

LTD HILDERLITH AMIMO,
GRACE A. OSEWE,
EXPORTE: M&L GATEWAY (K) LTD, HOMEBOUND (K)
EVANS ORANJA, PETER AGGREY ODUOR & JENNIFER
SYLVIA AKOTH OKUMU

RULING

The exparte applicant moved to the seat of justice by way of a chamber summons dated 14th day of April 2008 and filed on the 15th day of April 2008. It was brought under order LIII rule 1 (2) and (4) of the CPR seeking leave of court to apply for an order of prohibition restraining the “**Kisumu District Land Officer and Commissioner for Lands jointly and severally from canceling and/or expunging the records of land parcel No. Kisumu/Municipality/Block13/92-106 and that the grant of the said leave do operate as stay and that the costs of the application do follow the cause. “The said leave was granted paving the way for the filing of the application subject of this ruling dated 5-5-2008.**

The application is by way of notice of motion brought under order 53 rule 3 CPR. It seeks an order that “**this honourable court be pleased to grant the applicant an order of prohibition restraining the Kisumu Land Officer and the Commissioner of Lands jointly and severally from canceling and/or expunging the record of land parcel No. Kisumu/Municipality/ Block 13/92-106”.**

The grounds in support are contained in the body of the application, the verifying affidavit and the statement as well as annexures and the major one are as follows:-

- That there existed an unsurveyed plot marked D within Kisumu/ Municipality.
- That the said plot was subsequently sub divided and registered as Kisumu/Municipality/ Block 13/92,93,98,99,101,102,103,104,105 and 106.
- That the said sub divisions were allotted to various allottees.

- That these allottees then sold the said plots to the applicants for value.
- That the applicants purchased the said plots without notice.
- Upon the said purchase, the applicant duly paid land rents and rates to the Kisumu municipality.
- That they became aggrieved because the cancellation was effected without notice to them.
- They have been duly registered as proprietors under the registered land Act and their titles have been exhibited as annexures.
- That without any notification, the commissioner of lands issued a letter dated 16th day of October 2007 addressed to the District Land Officer Kisumu instructing the said area District Land Officer to cancel the said titles.
- That they have become aggrieved because the order on cancellation was issued without giving them a chance of being heard and this was in breach of the rule of natural justice.
- That they have made out a case to warrant the court's intervention in their favour in the manner sought.

There is a replying affidavit deposed by one **Gordon Odera**

Ochieng on 5th day of May 2011, and filed on the 6th day of May 2011. The salient features of the same are as follows:-

- The deponent is the chief land administration officer in the department of lands.
- Vide paragraph 3, that vide part development plan No. N9/98/71 the provincial planning officer Kisumu planned the suit lands and lettered the plots from A-R a total of 18 residential plots which plan was later on approved by the commissioner of lands on the 1st day of July 1998.
- Vide paragraph 5, that there were duly allotted and the allottees accepted the letters of offers and duly paid for the same.
- Vide paragraph 6, that the said allottees commissioned a licenced surveyor to survey the said plots which survey was approved by the Director of Surveys.
- Vide paragraph 7, that Kisumu/ Municipality/Block 13/92-106 was created by survey plan No. F/R 337/92 which was approved by the Director of surveys in April 2005, whereby the Director of surveys amended the registry index map (RIM) to reflect Kisumu/Municipality/Block B/92-109. Vide letter dated 3rd day of October 2006.
- Vide paragraph 9, that the leases for those who met the requirements were being processed.
- Vide paragraph 10, that at no time has the commissioner of lands ever allotted the suit land to the persons purported to have sold them to the exparte applicants.
- Vide paragraph 11, that the registration of the applicants is fraudulent as non of the property lease holders had acquired the said titles genuinely from the commissioner of land and as such they had no proprietary interests to convey to the applicants.
- Vide paragraph 12, that it is mandatory to have an amended RIM for all leases submitted for registration by the land registrar.
- Vide paragraph 13, that the certificate of leases in the custody of the applicants were not accompanied by registry index map (RIM) showing the location of the plots and corresponding sizes.
- Vide paragraph 14, that it is not true that the said plots were in existence in May and June 2003, as the correct position is that the said Kisumu/Municipality/Block 13/92-109 were created on 14th September 2006.
- Vide paragraph 15, that the applicants have not shown how the said suit plots came about, neither have they attached copies of letters of allotment and payment receipts and further there is no explanation how the purported sellers/vendors came to own the suit parcels.
- Vide paragraph 16, that the applicants have not attached copies of the transfer forms duly endorsed with the relevant stamp duties in respect of the purported transfer for reasons that no stamp duty was paid for the so called transactions of transfer into their names.
- Vide paragraphs 17, that the commissioner of lands acted within his powers when he directed that the applicants leases whose origin could not be traced, be expunged from the land Registry in Kisumu.
- Vide paragraph 18, that by reason of the commissioner of lands moving in the manner done, he was moving to correct the register because the mandatory procedure had not been followed.

Parties proceeded by way of submissions. Those of the applicants are dated 10th day of March 2011, and a perusal reveals that the following has been stressed:-

- **That some of the titles had been expunged but the said decision quashed by this court vide, the case of Republic –VS- The Kisumu District Land Officer and Others Kisumu HCMA NO. 80 of 2008.**
- **That there is no dispute that the said parcel of land are registered in the names of the applicants**
- **Contends the rules of natural justice were flouted with impunity**
- **No reasons were given in the offending letter as to why and how the commissioner of lands arrived at that decision.**
- **Contends that the Respondents have no powers under the R. L. A. to cancel the said titles. Section 142 R. L. A. under which the land Registrar acts only mandates rectification of the Register and not cancellation of titles.**
- **Contends that where a resurvey is done all interested parties are required to be notified something not done herein.**
- **The only alternative to the Respondents should have been to move the court to cancel the titles under Section 143 of the R. L. A.**
- **That by reason of the Respondents breaching the rules of natural justice, they intended to act ultra vires their powers.**

Those of the Respondent are dated 27th day of May 2011, and filed on the 30th day of May 2011, and a perusal of the same reveals that it is a reiteration of the content of the replying affidavit, followed by the stressing of the following points:-

- (a) **That at no time has the commissioner of lands allocated the suit parcels to the persons who are purported to have transferred the said titles to the applicants.**
- (b) **Contends that the Registration of the applicant lease was fraudulent as the vendors did not possess legitimate leases and for this reason they had no proprietary interest to pass to the applicants**
- (c) **That the applicant's documentations cannot be protected as the same had not been accompanied by an amended Registry Index Map when they were being registered.**
- (d) **The applicants have not shown how the first suit come about**
- (e) **Contends that the commissioner of lands acted within his powers in issuing the directive he did.**

No case law was referred to court. This court has given due consideration to the aforesaid rival arguments in the light of the paper work exhibited herein by both sides, and the court proceeds to make the following findings on the same:-

- (i) **It is undisputed that the applicants have title documents in each of their respective names.**
- (ii) **They have not asserted that they were the original allottees.**
- (iii) **Indeed they have stated that they are innocent purchaser for value without notice, and they should be protected. But as deponed by the Respondents, they have not disclosed the authority which allegedly allotted the suit parcels to the allottees from whom they purchased them.**
- (iv) **Also as asserted by the Respondents, the applicants have not exhibited allotment letter as well as payment receipts from the purported seller in order to reveal the allotting authority and also to show that the alleged allottees had acquired titles to the suit land procedurally.**
- (v) **There is also no exhibition of the subdivision plan showing the location of the said parcel on the land.**
- (vi) **In contrast the Respondent has filed a deponement supported by documentary proof which does not shield the applicants titles. In essence all that the Respondent is saying is that the applicants purported titles are tainted with illegalities, fraud and nullities, considering that they applicants have not exhibited allotment letters of allottees whereas the Respondent has and the applicants are not saying that the respondents are the same ones who sold to them.**

(vii) No leave was sought by the applicants to put in a deponement and exhibit documents controverting what the Respondent has used to controvert the deponements.

In view of what has been assessed in number 1 – 7 above, the question that this court has to pause to itself is whether on the facts the applicants have demonstrated the existence of a right in their favour which the Respondents in the exercise of their administrative power and discretion should have respected and by failing to so respect, the Respondents thereby infringed, a right to be enforced by the applicants and by reason of this breach, the applicants can be said to have rightly moved to the seat of justice to seek protection.

The titles are registered under the registered land Act Cap 300 Laws of Kenya. This court has searched through its provision and finds Section 18 thereof which makes provisions for the prevention of Registry index Maps. Vide Section 18 (4) the parcels in each registration section or block shall be numbered consecutively and the name of the registration and the number and letter of the blocks if any, and the number of the parcel, shall together be a fulfillment reference to any parcel vide section 19 there is power to alter the maps and vide 20 further surveys can be ordered. Section 27 (a) of the same land, makes provision that the registration of a person as the proprietor of land, shall vest that person. The absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

Section 28 on the other hand also makes provision that “the rights of a proprietor whether acquired on first registration or by an order of the court shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor together with all privileges and appurtenance belonging thereto, free from all other interests and claims whatsoever.....

This court has construed these provisions and applied them to the rival arguments herein and in this court’s opinion the right of a proprietor qualifies to be protected when the following are present:-

- (i) That these are in respect of land.**
- (ii) That this land is identifiable on the ground.**
- (iii) That the mode of identifying of this land is by means of reference to a registration area which registration area is backed up by a survey map, which survey map contains parcel numbers and that the said land bears a parcel number.**
- (iv) When ingredient (iii) above is applied to the rival arguments herein, it is clear that indeed the applicants have exhibited titles with parcel numbers. It is however noted that these parcel numbers are not accompanied by maps evidencing existence of a registration area containing registered parcels and that these parcels form part of the registration numbers in the block. In the absence of that section 28 is called into play by which a title can only be defeated by the provision of the same Act since.**

It therefore follows that the court when seeking to protect the rights of the applicants, it should not confine itself to the title documents but also interrogate the basis of the title documents. In these proceedings the basis is lacking. There is nothing to shield the applicants from the respondents assertions that the applicants if they are not themselves the perpetrators then they are victims of fraud, illegalities and nullities. The call to the court the sections 18,19,20, 27 and 28 of RLA is not to protect pieces of papers but to protect a title in the real sense of that word the way it is used and intended to be used by the said Act, meaning a title which does not exist on paper and but it is also identifiable on the ground. The applicants titles, have not been demonstrated to be falling into that category. It matters not that a court of concurrent jurisdiction has ruled otherwise on similar facts. This court is entitled to revisit the facts on the record apply the law and arrive at its own decision which it has done.

For the reasons given in the assessment the applicants application dated 5th May 2008 and filed on the 6th day of May 2008 be and is hereby dismissed with costs to the respondents. If still aggrieved the applicants will have to pursue further rights against the alleged sellers and /or allottees.

Dated, read and delivered at Kisumu this 23rd day of September 2011.

ROSELYN N. NAMBUYE
JUDGE

RNN/va