



Opiyo v Sub County Commissioner, Rachuonyo North Sub County & another (Environment and Land Judicial Review Case 2 of 2021) [2022] KEELC 3881 (KLR) (25 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2021**

GMA ONGONDO, J

JULY 25, 2022

FORMERLY MIGORI ELC JUDICIAL REVIEW NO. 7 OF 2018

BETWEEN

FESTO OMOLO OPIYO APPLICANT

AND

YUSUF OLOO KHAIRALLA, DECEASED (REPRESENTED BY ZUBIER OMOLO MADORO INSTEAD OF; HAKIM ABUOR MAFTA AND ISHMAEL OMOYO SIBIR) 1ST RESPONDENT

SUB COUNTY COMMISSIONER, RACHUONYO NORTH SUB COUNTY 2ND RESPONDENT

JUDGMENT

1. By a chamber summons application dated 1st October 2018 and filed herein on 11th October 2018 pursuant to, *inter alia*, Order 53 Rule 1 (2) of the [Civil Procedure Rules](#), 2010 (The Rules herein), the applicant namely Festo Omolo Opiyo through learned counsel, E.K Aroka, is seeking the orders infra;
 - a. An order of Certiorarito quash the eviction order preferred against the applicant by the Sub County Commissioner, Rachuonyo North on 1st April 2018.
 - b. The cost of this application to be costs in the cause.
2. The application is anchored on grounds 1, 2 and 3 set out on its face. The same is further anchored upon a verifying affidavit of nineteen paragraphs sworn on even date by the applicant and the accompanying documents marked as FOOI, FOO II and FOO III being an objection, a hearing notice and land certificate concerning the property in dispute, land reference number Central Karachuonyo/ Konyango/721 measuring approximately Zero Decimal Seven hectares (0.7Ha) in area, respectively.



3. Briefly, the applicant laments that he is a descendant of Rachuonyo and Onyango, his great grandfathers from whose names the property in dispute, is derived. That Khairallah Madoro (Deceased-1), the father of Yusuf Oloo Khairallah (Deceased-2) came into part of the said land in 1962 and was given a place to build a temporary a house for prayers. That upon the death of Deceased-1, several people including Deceased-2 and the applicant continued to live thereon. That Deceased-2 unlawfully obtained land certificate in respect of the property in dispute (F.O.O III) which influenced the impugned decision. Thus, it provoked this application.
4. The 1st respondent did not file any response to the application.
5. The 2nd respondent through the firm of Achillah.T.O and Company Advocates, opposed the application by way of his 15-paragraphed affidavit sworn on 12th March 2020 by Hakim Abuor Mafta for and on behalf of his co-respondent, Ismael Omoya Sibir and duly filed in court on 22nd July, 2020. He deposed, *inter alia*, that the applicant wrongly sued them as they are not legal representatives of the estate of Deceased-2. That there was no eviction order sought to be quashed by an order of certiorari as an appeal was pending before the Minister at the time of the application. That thus, the application is incompetent and premature.
6. The 2nd respondent relied on a copy of grant of letters of administration issued to Zabier Omolo Madoro (HAM 1) and a copy of a letter dated 24th July 2019 by the applicant's counsel (HAM 2) annexed to the replying affidavit. The 2nd respondent further deposed that the application is in bad taste, discriminatory and urged the court dismiss the same with costs.
7. The applicant also filed a replying affidavit sworn on 20th February 2021 on 24th May 2021. He deposed in part that the 2nd respondent as representative of the estate of deceased-2 appeared before the 1st respondent during the hearing of the appeal. That the proceedings sought to be reviewed began before the grant (HAM 1) was issued. That the title deed regarding the property in dispute (F.O.O III) was obtained fraudulently as the appeal before the Minister was still pending and adjudication process was incomplete.
8. Initially, the application was lodged at Migori Environment and Land Court. On 28th July 2021, the same was transferred to this court, upon its establishment, for hearing and determination in the spirit of Articles 6 (3) and 48 of the Constitution of Kenya, 2010.
9. The application was heard by written submissions pursuant to orders of this court made on 18th November 2020.
10. Accordingly, the applicant's counsel filed submissions dated 20th May 2021 on 24th May 2021 as well as submissions dated 2nd February 2022. Counsel submitted in part that that the 2nd respondent, the real legal representatives of the estate of Deceased-2 were joined to the proceedings replacing Hakim Abuoro Mafta and Ismael Omoya Sibir. That the registration of the property in dispute in the name of the 2nd respondent, was irregular and unlawful. That the impugned decision be declared and null.
11. The 2nd respondent's submissions dated 13th May 2022 and filed on 23rd May 2022 relied on submissions dated 19th May 2021 and filed on 24th May 2021. The defendant's counsel cited, *inter alia*, Order 53 Rules 1 (1) and 2 of the Civil Procedure Rules, 2010, Article 40 of the Constitution and Sections 24, 25 and 26 of the Land Registration Act, 2016 (2012) and urged the court to strike out the application with costs.
12. I have anxiously studied the entire application, the 2nd respondent's replying affidavits and their respective submissions. In that regard, has the applicant established his case for the grant of the orders sought in the application?



13. An order of certiorari is the principal order sought in this application. In *Black's Law Dictionary* 10th Edition at page 275, the term "Certiorari" is also termed "Writ of Certiorari" and it means;

"An extra ordinary writ issued by an appellate court, at it's discretion, directing a lower court to deliver the record in the case for review."
14. This court is aware of the property in dispute and proprietor's rights and interests in Sections 24, 25, 26 and 28 of the *Land Registration Act*, 2016 (2012). More fundamentally, the protection of right to property is anchored under Article 40 (1) of the *Constitution*.
15. It is common ground that at the heart of instant application is the decision of the Deputy Sub County Commissioner, Rachuonyo North for and on behalf of the Minister and rendered on 6th April 2018 in Appeal number 286 of 1988. The appeal was dismissed thereby.
16. Article 47 of the *Constitution* provides for the right to fair administrative action. That every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, among others. This provision is operationalized by, *inter alia*, Sections 3(b) and 4 (1) of the *Fair Administration Act*, 2013.
17. The applicant asserted that he was not accorded a fair hearing of the appeal before the Minister. A fair opportunity to be heard is a fundamental principle of justice; see *Halsbury's Laws of England* 5th Edition 2020 Volume 61 Paragraph 639.
18. The impugned decision was rendered on 6th April 2018 further to the process under *Land Adjudication Act* Chapter 284 Laws of Kenya. The same was final pursuant to Section 29 (1) of the said Act.
19. The 2nd respondent laments that the applicant did not comply with the express provision of the law which is mandatory in mounting this application. It is noteworthy that the applicant initiated the application without leave of the court contrary to Order 53 Rules 1 of the *Civil Procedure Rules*, 2010 which reads;

"No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule."
20. Further, the application was lodged in court on 11th October 2018, more than six months from the date of the impugned decision. This is contrary to the mandatory provision of Order 53 Rule 2 of the Rules.
21. It is trite that a litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in case of intestate succession; see *Rajesh Pranivan Chudasama v Sailesh Pranjivan Chudasama* (2014) eKLR.
22. It is also important to note that Hakimu Abuor Maftaand Ismael Omoya Sibirsued herein are not legal representatives of Yusuf Oloo Khairalla. Both of them have no *locus standi* herein as noted in Chudasama case (*supra*). Furthermore, the applicant did not originate an application for amendment of the pleadings to substitute them with one Zubier Omolo Madoroin this application.
23. *Black's Law Dictionary* 10th Edition at page 965 has defined the term "Joinder of parties" as the uniting of parties or claims in a single law suit. Order 1 Rules 3 and 10 of the Rules governs joinder of defendants, substitution and addition of parties. A replying affidavit sworn on 2nd February 2022 by one James Ouma Opiyo and filed together with the applicant's replying affidavit and submissions of even date, introduces another stranger to the application hence, must fail in the circumstances.



24. In the foregone, it is the finding of this court that the application is incompetent and unmeritorious. Article 159 (2) (d) of the Constitution of Kenya is not a panacea of the same in the circumstances.
25. Wherefore, the application dated 1st October, 2018 and lodged in this court on 11th October, 2018 be and is hereby struck out.
26. Given the character of the application and an element of public interest in the same, each party to bear owns costs; see also Samwel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others (2012) eKLR.
27. Orders accordingly.

DATED, DELIVERED AND SIGNED AT HOMA BAY THIS 25TH DAY OF JULY, 2022.

G M A ONGONDO

JUDGE

PRESENT

Applicant

Mr. Tom Achillah, learned counsel for the 2nd respondent

Angela and Fiona, court assistants

