



Republic v Land Registrar, Bomet & another; Chepkwony (Exparte) (Miscellaneous Civil Case 39 of 2016) [2022] KEELC 4885 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4885 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
MISCELLANEOUS CIVIL CASE 39 OF 2016
MC OUNDO, J
SEPTEMBER 22, 2022
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW
AND
IN THE MATTER OF LAND PARCEL NO. KERICHO/KONGOTIK/899
AND
IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012
AND
IN THE MATTER OF RECTIFICATION AND CANCELLATION OF
THE REGISTER BY THE BOMET COUNTY LAND REGISTRAR
AND
IN THE MATTER OF THE LAW REFORM ACT CAP 26 S 8 AND 9

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, BOMET 1ST RESPONDENT

ELIZABETH CHEPKEMOI KIGEN 2ND RESPONDENT

AND

SIMON KIBET CHEPKWONY EXPARTE



RULING

1. On the 9th day of December 2021, this court delivered its ruling on an Application dated the 29th July 2017, granting the Applicant leave to file his substantive motion within 30 days upon delivery of the ruling. It was subsequently brought to the court's attention that the said leave had earlier been granted ex-parte on the 10th July 2017 wherein the Applicant had filed the said substantive application and what was due for determination was a ruling on the main Motion. On the 18th May 2022, the Court took note of the said error and pursuant to the provisions of section 1A and 3A of the Civil Procedure Act, the court set aside and/or vacated the said ruling substituting it with an order that a ruling on the substantive motive motion shall now be delivered.
2. The pleadings, facts and submissions of the impugned ruling still remain the same and shall be reproduced in this decision.
3. By a Notice of Motion dated 29th July 2017, the Applicant herein sought leave for the orders of Certiorari to remove into the High Court (sic) for the purpose of being quashed, the order/decision made by the Bomet County Land Registrar under the Land Registration Act No. 3/2012 on 25th May 2016 and subsequent cancellation of the Applicant's registration as owner of Kericho/Kongotik/899 and registration of the 2nd Respondent (Elizabeth Chepkemoi Kigen) as the owner.
4. The Application was supported by the grounds on the face of it as well as on the verifying Affidavit of Simon Kibet Chepkwony the Applicant herein.
5. Pursuant to service of the said application, there was no response from the 1st Respondent who on the 4th April 2019 through its Counsel Mr. Mutai conceded to the same with no orders to costs. The 2nd Respondent, Elizabeth Chepkemoi Kigen filed her Replying Affidavit which was sworn on the 5th March 2020 to the effect that the Applicant had no claim on the suit land and the application was preferred to frustrate her efforts to utilize her rightful parcel of land which action gravely prejudiced her.
6. The application was disposed of by way of written submissions to which the Applicant gave a brief history of the matter in question to the effect that his late grandmother Chemarus Kigen had transferred to him parcel of land No. Kericho/Kongotik/899 wherein he had proceeded and obtained title on the 23rd May 2014 pursuant to the judgment delivered in the Bomet Court in Civil suit No 166 of 2003 between Chemarus Kigen w/o Kigen and Elizabeth Chepkemoi Kigen the 2nd Respondent herein, who was one of two wives of the Applicant's grandmother, in a woman to woman marriage.
7. That after he had procured title, the Bomet Land Registrar had cancelled the same wherein he had advised the 2nd Respondent to move into the suit land. That the 2nd Respondent had complied with the Bomet Land Registrar's directions wherein she had violently moved into the suit land and displaced the Applicant.
8. That the Applicant was therefore aggrieved by the decision of the Land Registrar of cancelling his title deed which had been rightfully issued to him pursuant to a court order, hence his decision to file the present application.
9. The ex-parte Applicant framed the issues for determination as follows;
 - i. Whether the title deed issued to the ex-parte Applicant namely No. Kericho/Kongotik/899 was valid pursuant to a judgment and Decree of the court vide Bomet Civil Suit No. 166/2003



- ii. Whether the Bomet Land Registrar's decision to cancel the title deed No. Kericho/Kongotik/899 issued to the ex-parte Applicant and registering the 2nd Respondent as the owner upon overturning the court Decree/order was done in excess of jurisdiction and illegal.(sic)
 - iii. Whether the title No. Kericho/Kongotik/899 issued by the land Registrar to the 2nd Respondent is illegal, null and void and should be revoked and registered to the ex-parte Applicant's name.
10. On the first issue for determination, it was the ex-parte Applicant's submission that pursuant to an award issued in an Arbitration chaired by the District Officer Longisa, the same had been adopted by the Bomet Court in Civil Suit No. 166 of 2003 wherein through the court's judgment and Decree, he had been granted ownership of the suit land with the remainder of the land, owned by Chemarus Kigen, to be divided amongst her two wives.
 11. That pursuant to the pronouncement of the said judgment and Decree, he had registered himself as proprietor of the suit land No. Kericho/Kongotik/899 and had subsequently obtained title. That the Elders had exercised the powers given to them by the court when the dispute had been referred to them and no appeal had been filed against the said judgment.
 12. In regard to the second issue for determination, it was the ex-parte Applicant's submission that the provisions of Section 79 of the Land Registration Act gave power and jurisdiction to the Registrar on matters of rectification of titles and provided that no alteration affecting the title of the proprietor could be made pursuant to without the proprietor's consent unless the proprietor had by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission, or it would for any other reason be unjust for the alteration not to be made.
 13. That the Land Registrar's action of cancelling his title and registering it to the 2nd Respondent was illegal under the act, was in excess of his jurisdiction and in breach of the rules of natural justice and the rights to be heard. Reliance was placed on the case in Githui vs Public Health Officer KLR {E & L} on breach of rules of natural justice by not following due process by agreement institutions.
 14. That the Land Registrar had violated the court order in Bomet Civil Suit No. 166 of 2003 and Sotik Civil Suit No. 1 of 2015 as he had lacked the jurisdiction to sit on Appeal against the court's Decree which had legally and rightfully given him the land. It was further the Applicant's submission that he had proved his case on a balance of probability and the court ought to grant his application and quash the Land Registrar's decision dated 25th May 2016. He also prayed for costs.
 15. In opposing the application, the 2nd Respondent herein filed her written submissions albeit out of time for reason that they had not been served with the Applicant's submissions. Her submissions was to the effect that she was married to Chemarus Kigen (deceased), under the Kipsigis customary law in a woman to woman marriage. That the said Chemarus Kigen (deceased) was the registered proprietor of No. Kericho/Kongotik/899. That Chemarus Kigen (deceased) was also married to Esther Kigen under the same arrangements wherein she, Chemarus Kigen (deceased), had settled her two wives on the suit property.
 16. That thereafter, there arose wrangles as to the division of the property between the two wives wherein the dispute was presented to the Land Disputes Tribunal and a decision had been made on 20th December 2004 that the suit land be divided equally amongst the wives. The said decision had subsequently been adopted by the court.



17. The 2nd Respondent's submission was that the subject suit having been registered on the 1st December 1970 the Land Tribunal had usurped its mandate in dealing with the registered parcel of land as the same fell outside its purview of jurisdiction.
18. The Respondent's issue for determination was thus as follows;
 - i. What is the effect of the Land Disputes Tribunal's decision of the 20th December 2004?
 - ii. Whether the orders sought are capable of being granted.
19. On the first issue for determination, the 2nd Respondent relied on the provisions of Section 3 of the Land Disputes Tribunal Act to submit that the mandate of the Tribunal did not extend to registered parcels of land.
20. That the ex-parte Applicant had sought for the cancellation of a title which had been issued pursuant to a decision of the Land Tribunal which decision had been adopted by the Magistrate's Court and the impugned title issued.
21. That there was no proper title in the first place capable of being cancelled by the 1st Respondent since whatever proceedings that flowed from the Land Disputes Tribunal's decision were null and void and any proceedings that arose out of a nullity could therefore not be legal as the decision was null ab initio. Reliance was placed on the decided cases in Republic vs. Chairman Bomet Land Disputes Tribunal & 2 Others [2018] eKLR and Republic vs. Kajiado North District Land Disputes Tribunal, Senior Resident Magistrate Kajiado [2014] eKLR.
22. That it had been a nullity when the Magistrate's Court had adopted the decision of the Land Disputes Tribunal and the title in respect to No. Kericho/Kongotik/899 could only be impugned under the regime in which it had been registered. That the Judicial Review application ought to be dismissed for if the orders sought were granted, then it would be sanitizing an illegality.
23. On the second issue for determination, the 2nd Respondents' submission was that the orders sought by the ex-parte Applicant could not issue at all. That orders were not to be issued in vain as the same would serve no purpose since the proceedings that gave rise to the title in question were a nullity in law and hence incurably bad. That if the ex-parte Applicant believed he had a bona fide claim, then he had other means to approach the court but not through the current procedure. That the 1st Respondent's decision to cancel the title documents though irregular as it may be, could not override the fact that the impugned title was procured the irregularly.
24. She further submitted that she had been in occupation of the suit land for more than 50 years a fact that had not been disputed, and therefore she stood to suffer prejudice were she to be evicted from the suit land.
25. In conclusion, the 2nd Respondent submitted that the orders sought by the ex-parte Applicant could not issue as he was seeking to sanitize a nullity through the honorable court. She thus sought for the application to be dismissed with costs.

Determination

26. I have considered the application herein, the response thereto, the submissions filed, the authorities cited, as well as the relevant law. Briefly, the ex-parte Applicant's grievance is to the effect that following an adoption into a judgment and decree of an Award by the Disputes Land Tribunal, by the Bomet Civil Suit No. 166 of 2003, he had been registered as proprietor to the suit land No. Kericho/Kongotik/899. That the Land Registrar, Bomet subsequently cancelled the title registered to his name,



- and issued a new title in the name of the 2nd Respondent despite the fact that he had no jurisdiction to do so.
27. The Applicant has therefore filed the present application seeking to remove to this court for the purpose of being quashed, the order/decision made by the Bomet County Land Registrar.
28. There was no response from the 1st Respondent however, the 2nd Respondent in opposing the application submitted that the ex-parte Applicant had sought for the cancellation of a title which had been issued pursuant to a decision by the Land Tribunal, and which decision had been adopted by the Magistrate's Court and a title issued. That there was no proper title in the first place capable of being cancelled by the 1st Respondent since whatever proceedings that had flowed from the Land Disputes Tribunal's decision had been null and void ab initio and therefore could not be legal. That the 1st Respondent's decision to cancel the title documents though irregular as it may be, could not override the fact that the impugned title was procured the irregularly.
29. Thus, from the parties' submissions, the issues this court is called upon to determine is whether the Applicant has established any grounds for Judicial Review order of Certiorari.
30. In the present case, the Applicant vide an application dated 29th July 2017 has sought an order of Certiorari to quash the order/decision made by the Bomet County Land Registrar on 25th May 2016 which subsequently cancelled his registration as owner of Kericho/Kongotik/899 and registered the 2nd Respondent instead.
31. The purpose of Judicial Review as set out in the case of *Municipal Council of Mombasa vs Republic, Umoja Consultant Ltd, (2002) eKLR* is :-
- “The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a Court hearing a matter by way of Judicial Review is concerned with and such Court is not entitled to act as a Court of Appeal over the decider. Acting as an Appeal Court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.
32. It is also trite that in Judicial Review, the Court does not deal with the merits of the case but the process of administrative decision making only. In the case of *Commissioner of Land v. Kunste Hotel Ltd, (1995-98) EA*, the Court of Appeal held that –
- “Judicial Review is not concerned with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected (*Republic vs. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 ALL ER 282* and *Chief Constable of the North Wales Police vs. Evans [1982] 1 WLR 1155* adopted)



33. In the case of Kenya National Examination Council. vs. Republic (Exparte Geoffrey Gathenji & 9 Others [1997] eKLR the Court of Appeal held that;-

“... an order of certiorari will issue if the decision is made without or in excess of jurisdiction or when the rules of justice are not complied with...”

34. Upon considering the matter before me, it is clear that the issue I should be dealing with in this instance is whether the process of administrative decision taken by the Bomet County Land Registrar on the 25th May 2016 that led to the cancellation of the Applicant’s registration as owner of LR No. Kericho/Kongotik/899 and the subsequent registration of the 2nd Respondent as its proprietor instead, was made with, without or in excess of jurisdiction.

35. It is not the duty of the Environment and Land Court in Judicial Review proceedings to evaluate the sufficiency or insufficiency of the evidence therein as that is the function of the trial Court in a normal proceedings that will require viva voice evidence. A Judicial Review Court should not usurp the functions of a trial Court, except in the clearest of the cases and this is not one of such cases.

36. In order to determine this issue it is important to understand the role of the Magistrate’s Court under the repealed Land Disputes Tribunal Act. Once the Magistrate received the award from the Tribunal, (s)he is under a statutory duty to enter judgment in terms of the award and it was not open to her/him to alter, amend, question or set it aside. That is the plain meaning of Section 7 (2) of the repealed Land Disputes Tribunals Act which reads:

“The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”

37. The duty of the trial Court has been re-affirmed in many cases including the case of Peter Ouma Mitai vs. John Nyarara [2008] eKLR, where Musinga, J (as he then was) following the decision in Zedekiah M Mwale vs. Bikeke Farm Directors & Another [2004] eKLR expressed himself as follows:

“The jurisdiction of the Land Disputes Tribunal is clearly set out in section 3 of the Land Disputes Tribunal Act. Once a Tribunal has determined a dispute, section 7(1) of the Act requires the Chairman to cause the decision to be filed in the magistrate’s Court together with any depositions or documents which have been taken or proved before the Tribunal....The provisions of section 7(2) of the Act are explicit as to what has to be done by the magistrate’s Court. That provision of the law does not leave any room for a magistrate to review, alter, amend or set aside the Tribunal’s award. If any of the parties are aggrieved by the said award they can either prefer an appeal to the Appeals Committee as provided under section 8(1) of the Act or if there are reasonable grounds for challenging the decision by way of a Judicial Review application, proceed to institute such proceedings before the High Court and not otherwise.”

38. It is therefore clear that upon the forwarding of the Tribunal’s Award to the Magistrate for adoption as a judgment of the Court, it was not open to the Bomet County Land Registrar to alter, amend, question or set aside the said judgment no matter how repugnant or unjust it was, as the said judgment could now be followed by the usual process of decree and execution and/or an appeal where the parties so desired.



39. Indeed the plain meaning of Section 7(2) of the repealed Land Disputes Tribunals Act read as follows;

“The Court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act”

40. In the present case the amended decree dated the 17th May 2006 issued by the Senior Resident Magistrates court at Bomet in Civil Suit No. 166 of 2003 between Chemarus Kigen w/o Kigen and Elizabeth Chepkemoi Kigen was to the effect that:

- a. “The whole parcel of land known as KER/KONGOTIK/899 be transferred to Simon Chepkwony.
- b. The remaining parcel of land to be sub-divided equally among Esther Kigen and Elizabeth Kigen.....”

41. The Tribunal having rendered its award in favour of the Applicant, the only two routes open to the 2nd Respondent was either to exhaust the appellate process under the Act, or seek, by certiorari, to quash the decision of the Tribunal. This was not done and Applicant went ahead to execute wherein he was registered as proprietor of the suit land and even if it were possible to surgically separate the award from the decree, it would be futile to quash it while the resultant decree remained unchallenged.

42. Indeed in the decided case of case of Florence Nyaboke Machani vs Mogere Amosi Ombui & 2 Others [2014] eKLR, the Court of Appeal agreed with the finding of High Court at Kisii in High Court Civil Case No. 139 of 2009 where Makhandia, J held as follows;

“It is trite law that a valid judgment of a Court unless overturned by an Appellate Court remains a judgment of Court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the Defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st Defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to Court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid Court judgment and decree.”

43. Having found that the award issued by the Tribunal became a Judgment of a Court of competent jurisdiction, and since the same was not varied, vacated, set aside or reviewed by the same Court, or by an Appellate Court, in appropriate proceedings, the Applicant herein had been installed as the proprietor of the suit land wherein his title was protected under the Registered Land Act (repealed), now governed under the Land Act and Section 26(1) of the Land Registration Act, 2012.

44. Having found so, it is herein decreed that the Bomet Land Registrar had no blanket power and/or jurisdiction to cancel the Applicant’s registration as owner of LR No. Kericho/Kongotik/899 and thereafter to register the 2nd Respondent as its proprietor instead. To this effect, the Applicant’s application is herein allowed in its entirety with costs to be borne with interest thereon by the 2nd Respondent herein.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 22ND DAY OF SEPTEMBER 2022

M.C. OUNDO



ENVIRONMENT & LAND – JUDGE

