



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Appli 1682 of 2005**

**NICHOLAS BUNGEI RUTO.....APPLICANT**

**Versus**

**CHIEF LAND REGISTRAR.....RESPONDENT**

**JUDGMENT**

By the Notice of Motion dated 9<sup>th</sup> February 2006, the ex parte Applicant, Nicholas Bungei Ruto seeks the following orders:-

- (1) An order of certiorari to remove into this court for purposes of being quashed, the decision of the Chief Land Registrar Nairobi made on 9<sup>th</sup> November 2004 to expunge all records relating to LR NRB/BLOCK 37/71;
- (2) Costs of the Application.

The Application was said to be premised on the Affidavit of the Applicant dated 23<sup>rd</sup> November 2005 and the Statutory Statement dated 30<sup>th</sup> November 2005. The Applicant also filed skeleton arguments on 27<sup>th</sup> April 2006. The Application was opposed and Teresia Mburu, the Chief Land Registrar swore an Affidavit dated 13<sup>th</sup> July 2007; Anastacia Wangechi Mbau an Interested Party, and who is the Administrator of the Estate of Paul Mbau also swore an Affidavit dated 15<sup>th</sup> June 2006 while the 2<sup>nd</sup> Interested Party, Juma Ibrahim filed an Affidavit dated 4<sup>th</sup> July 2006 in support of the Application.

The Applicant was represented by Mr. Kwengu Advocate, the Respondents by Miss. Mwaniki, the 1<sup>st</sup> Interested Party by Mr. Kiura and 2<sup>nd</sup> Interested Party by Mrs. Nyaencha.

It is the Applicants case that he is the registered proprietor of the suit land NRB/BLOCK 37/71 which he sold to the 2<sup>nd</sup> Interested Party, Juma Ibrahim as per sale agreement dated 18<sup>th</sup> September 2003 and after the said sale, the Land Registrar refused to transfer the said premises to the 2<sup>nd</sup> Interested Party and the 2<sup>nd</sup> Interested Party filed Judicial Review proceedings to compel the Registrar to effect the transfer and pending hearing of that Judicial Review Application the Registrar transferred the plot to the 2<sup>nd</sup> Interested Party on 17<sup>th</sup> June 2005 and the 2<sup>nd</sup> Interested Party withdrew the case. However, on 9<sup>th</sup> November 2005, without any notice or provocation, the Registrar did communicate her decision to expunge all

records relating to the said plot and yet the Applicant was never invited to explain his position. It is the Applicants contention that the said Registrar breached rules of natural justice, the Registrar's actions are illegal; unprocedural and were actuated by malice.

In her Affidavit in Reply, Teresia Mburu, the chief Land Registrar deponed that the suit property was on 10<sup>th</sup> July 2002 leased to Nicholas Bungei Ruto by the City Council of Nairobi for 99 years from 1<sup>st</sup> April 1981 and a certificate of lease was issued. Nicholas Bungei transferred the land to Juma Ibrahim on 26<sup>th</sup> November 2003 for a sum of Kshs.2,300,000/= and a certificate of lease was issued on 17<sup>th</sup> June 2005. On 23<sup>rd</sup> February 2004 the Registrar received a letter from Riungu Raiji and Co. Advocates claiming that NRB BLOCK 37/71 belonged to his client one Paul Mbau. The Registrar started investigations on the land and the investigation revealed that the plot is also parcel 209/11092/18 registered as IR 627/71 in the names of Paul Mbau under Registration of Titles Act, Cap 281 Laws of Kenya before conversion to the provisions of the Registered Land Act. On 19<sup>th</sup> October 2005 the Respondent sought clarification from City Council of Nairobi as to who was the genuine owner and was informed that there were no records showing that the Applicant was the owner nor were there records in respect of Juma Abraham. The Registrar wrote to the Applicant that records relating to the plot for the 2 Applicants would be expunged from the records. Instead of expunging the records, a restriction was registered by the Registrar against the titles to enable the claimants settle their disputes.

Anastacia Wangeci Mbau, the widow of Paul Mbau deponed that her husband owned LR 209/11092/18 since 14<sup>th</sup> July 1994 when it was allocated to him by the Nairobi City Council in 1979. She exhibited a copy of the title in the name of the deceased.

It is her case that the Applicant has been aware of the fact that the deceased was claiming the land in issue since 26<sup>th</sup> January 2004 as per letters exchanged between the two parties' Advocates. That in January 2004, her husband discovered that one Juma Ibrahim was trespassing on the land and claimed to have title and his Advocate Riungu Raiji raised the issue with the Registrar on 23<sup>rd</sup> February 2004. That Advocate discovered that a Judicial Review Application had been filed without serving the Interested Party and that is when she requested to be enjoined to these proceedings. In 2005, the Applicant withdrew the Application which sought an order of mandamus and the 2<sup>nd</sup> Interested Party resumed construction on the suit land and it forced the 1<sup>st</sup> Interested Party to file NRB HCC 1291/05 which halted the erection of structures on the disputed land. Again, the Applicant filed this Application for Judicial Review without serving them but it was discovered by the Advocate and she was then enjoined to these proceedings.

In addition Mr. Kiura Counsel for the 1<sup>st</sup> Interested Party submitted that the letter of the Land Registrar only showed an interest in expunging the documents but did not do so. That what is before the court is a land dispute which cannot be determined by way of a Judicial Review Application.

The 2nd Interested Party Juma Ibrahim in his Replying Affidavit deponed that he is the registered proprietor of LR NRB/BLOCK 37/71. He exhibited the certificate of official search dated 3<sup>rd</sup> October 2005 and certificate of lease issued on 17<sup>th</sup> June 2005. He is aware that on 9<sup>th</sup> October 2005 the Chief Land Registrar decided to expunge all records relating to the suit land but he was not given any hearing before that decision was taken and that the decision was taken in total disregard of Rules of natural justice in that he was not given a hearing. That he is a bona fide purchaser for value without notice of defect in the title and will suffer irreparably if the decision persists and the Registrar's decision should be brought up and quashed.

I have considered all submissions by Counsel, Affidavits on record and annexures thereto. In the amended Notice of Motion, the Applicant seeks to have quashed a decision of the Land Registrar dated 9<sup>th</sup> November 2004. I have looked at the annexures, and even the submissions by Counsel on record, there is no such decision in existence. The decision that the Registrar made to expunge records relating to the disputed land is by letter of 9<sup>th</sup> November 2005. I note that in the Statement the Applicant referred to the Registrar's decision as dated 9<sup>th</sup> November 2005. Since all the parties never noted this discrepancy

and the Chamber Summons and the Statement refer to the impugned decision as being dated 9<sup>th</sup> November 2005, this court will take it that the impugned decision is one of 9<sup>th</sup> November 2005.

There is no doubt from the documents before the court that the ownership of the land 209/11092/18 also known as NRB/BLOCK 37/71 is highly contested and the Land Registrar does confirm that it is the same piece of land initially registered in the name of Paul Mbau but later allocated the Applicant and sold to Juma Ibrahim the 2<sup>nd</sup> Interested Party. The 1<sup>st</sup> Interested Party has deponed that they have moved the High Court over ownership of the same land.

The chief Land Registrar denies having expunged the records relating to NRB/BLOCK 37/71 but that instead, she entered a restriction on the said titles to enable the parties resolve the dispute as to ownership. Part of the impugned letter reads:-

**“Under the circumstances, all records relating to NRB/BLOCK 37/71 shall be expunged from our records for want of validity and those of LR NO. 209/11092/18 maintained as the sole valid records of the parcel of land in question.”**

A reading of the portion of the letter indicates that the Registrar was going to act, and expunge the records. There is however no evidence that the Registrar went ahead to effect that decision. May be a search at the Lands Office after the date of the 9<sup>th</sup> November 2005 would have confirmed what the position of the records is. The Registrar claims to have registered a restriction instead. Under S. 136 of the Registered Land Act, the Registrar has authority to place a restriction on a title for its preservation but should notify all parties that may be affected by the said restriction. The Registrar did not indicate whether all parties have been notified of this restriction or not. Now that there is no evidence that the contents of the letter of 9<sup>th</sup> November 2005 were put into effect, there may not be any decision for this court to quash.

Besides, the court cannot ignore the fact that there is a dispute over ownership of the land in question. The Land Registrar was made aware of the dispute in 2004 though the Registrar's office went ahead to issue a title deed to Juma Ibrahim on 17<sup>th</sup> June 2005.

It is also apparent that the Applicant and 2<sup>nd</sup> Interested Party have been aware of this dispute since 2004 as evidenced by communication between Counsel for the Applicant and the 1<sup>st</sup> Interested Party. A suit is said to be pending in court filed by 1<sup>st</sup> Interested Party to stop the 2<sup>nd</sup> Interested Party from further construction and to determine the issue of ownership. Though no

pleadings were exhibited, that fact was not disputed. It is only in a Civil Suit where evidence can be adduced by the parties to establish who the owner of the land is. It cannot be established by way of Judicial Review. In Judicial Review the court does not look at the merits of the case but reviews the process by which a decision was arrived at. In the instant case there is already a dispute over ownership of the land which would need the going to the merits of the title. If the court grants the orders sought, in the event that expunging has been effected, the effect would be that the court is awarding the land to the Applicant and therefore to the 2<sup>nd</sup> Interested Party. Judicial Review is a discretionary remedy and the court may not grant in some circumstances even if it was deserved. It will issue only if the court finds that it is the most effective remedy in the circumstances. In this case I doubt that the order of certiorari, even if it were deserved, would serve the interests of all the parties but will be favouring one. This court would not grant an order of certiorari. The parties should be heard in a Civil Court where their rights over the disputed piece of land can be determined once and for all. The Notice of Motion Application is therefore dismissed with the Applicant bearing costs of the Application.

**Dated and delivered this 17<sup>th</sup> day of October 2007.**

**R.P.V. WENDOH**

## **JUDGE**

Read in the Presence of:-

Mr. Abuga holding brief for Ms Nyaencha for 2<sup>nd</sup> Interested Party.

Mr. Kiura for 1<sup>st</sup> Interested Party

Daniel: Court Clerk