



Republic v Principal Magistrate Sotik & 2 others; Cheruiyot (Representative of the Estate of Annah Chesang Chepkwony - Deceased) (Exparte) (Environment & Land Miscellaneous Case 2 of 2018) [2022] KEELC 14724 (KLR) (10 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14724 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND MISCELLANEOUS CASE 2 OF 2018**

MC OUNDO, J

NOVEMBER 10, 2022

IN THE MATTER OF LAND PARCEL NO. KERICHO/CHEPTALAL/1222

AND

IN THE MATTER OF LAND REGISTRATION ACT NO.3 OF 2012

AND

IN THE MATTER OF THE SUCCESSION ACT CAP 160 (LOK)

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 S. 8 AND 9

BETWEEN

REPUBLIC APPLICANT

AND

PRINCIPAL MAGISTRATE SOTIK 1ST RESPONDENT

ROBBERT KIPKEMOI KORIR 2ND RESPONDENT

DAVID RONO 3RD RESPONDENT

AND

**JOSEPH CHERUIYOT (REPRESENTATIVE OF THE ESTATE OF ANNAH
CHESANG CHEPKWONY - DECEASED) EXPARTE**

JUDGMENT

1. On the March 6, 2019, the Applicant was granted 21 days leave to file his application for Judicial Review, wherein vide a Notice of Motion dated the March 22, 2019 and brought under the provisions



of Order 53 Rule 3(1) of the Civil Procedure Rules, the Law Reform Act Section 8 and 9 (cap 26) and all enabling provisions of the law, he sought for orders in the nature of certiorari to move to the High Court, for the purpose of being quashed, the Judgment/decision made by the Sotik Principle Magistrate on February 28, 2018 in Civil Suit No 238/2015 wherein he had awarded land to Robert Kipkemoi Korir despite the fact that the seller had no capacity to sell land because it belonged to a deceased person and no Succession proceedings had been filed in regard his estate being land parcel Kericho/Cheptalal/1222. That the Principal Magistrate had no jurisdiction to engage in such a transaction which was illegal null and void ab initio. The Applicant also sought for costs of the application.

2. The said Application was supported by the Applicant's statement as well as his Verifying Affidavit sworn on the May 30, 2018 and a supplementary affidavit sworn on September 24, 2019.
3. Despite there having been service effected upon the Hon Attorney General, the office had only entered their Memorandum of Appearance dated the November 4, 2019 and subsequently not filed any response.
4. I have perused through the proceedings here in and note that on June 19, 2019, Counsel for the 2nd and 3rd Respondents was present in court when he was granted 14 days to file their Replying Affidavit. On the October 22, 2019, Counsel was also present when the Applicant's Counsel sought to serve the Honorable Attorney General. On November 25, 2019 both Counsel for the Respondents and the Applicant were present when the hearing of the suit was set for February 17, 2020 on which day by consent Counsel sought to dispose of the suit by way of written submissions.
5. Of interest to note is that whereas there has been no response filed by the Respondents here in, the Applicant complied with the court's directions and filed their submissions. In essence thereof the Application dated March 22, 2019 is unopposed.
6. The Applicant's ground for the Judicial Review was that;
 - i. The Principal Magistrate made an error in law by awarding one acre to the 1st Respondent when the sale transaction was void due to lack of capacity to sell the land because the land belongs to a deceased owner and succession had not been made.
 - ii. The Applicant and his siblings have not filed succession proceedings since the demise of their mother and therefore the sale of land by one of the brothers by the name David Kipkemoi Rono was illegal.
 - iii. Principal Magistrate in giving his judgment failed to inquire about the ownership of the land in question and had he given a critical look at the ownership, he would not have arrived at the judgment giving one acre of land to the 2nd Respondent.
7. In his written submissions, the Applicant framed the issues for determination as follows;
 - i. Whether the sale agreement dated January 25, 2010 and the subsequent judgment dated February 28, 2018 relating to the parcel No Kericho/Cheptalal/1222 contravened the Law of Succession hence null and void.
 - ii. Whether the honorable court has jurisdiction to issue an order of Certiorari to remove in the High Court the judgment dated February 28, 2018 in Civil Suit No 238/2015 and order it quashed.
 - iii. Who is to pay the costs?



8. On the first issue for determination, Applicant relied on the provisions of Section 45(1) (sic), his verifying Affidavit sworn on the May 30, 2018 and a Supplementary Affidavit sworn on September 24, 2019 and annexures therein to submit that there having been a sale agreement between the 2nd and 3rd Respondents of one acre of land to be excised from land parcel No Kericho/Cheptalal/1222 and there having been a breach of the said sale agreement by the 3rd Respondent who failed to give vacant possession, the matter was filed in court for the enforcement of the said agreement. That the trial court consequently awarded vacant possession to the 2nd Respondent.
9. That there had been no evidence adduced in court that succession proceedings had been done before the sale agreement. The 3rd Respondent had no capacity to sell the land as it was in violation of Section 45(1) of the *Law of Succession*. That the trial Magistrate had no jurisdiction to purportedly enter judgment effecting the sale of the deceased's land. There was therefore meddling of the deceased property and therefore the judgment dated February 28, 2018 cannot stand and should be quashed for being illegal, null and void.

Determination.

10. Despite the Applicant's application having been opposed, the court shall however look at the Applicant's arguments in order to determine the same on its merit.
11. The purpose of Judicial Review as set out in the case of *Municipal Council of Mombasa v 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”.
12. After considering the matter before me, I find the issues for determination being-
 - i. Whether the Trial Magistrate had given an award in excess of his jurisdiction.
 - ii. If so, whether the application dated March 22, 2019 is merited.
 - iii. Who is entitled to costs of these proceedings?
13. In the instant case, the Applicant's main issue was that that the Sotik Principle Magistrate, on February 28, 2018 in Civil Suit No 238/2015, awarded land to Robert Kipkemoi Korir, the 2nd Respondent herein whereas the seller, the 3rd Respondent had no capacity to sell land that belonged to the deceased, before Succession proceedings had been conducted. That the Principal Magistrate had no jurisdiction to engage in such a transaction as it was illegal null and void ab initio.



14. I have considered the impugned judgment in Civil Suit No 238/2015 herein annexed to the Applicant's Supplementary Affidavit and marked as JC2(a) and the same is to the effect that:

“I have considered the evidence produced by both parties and the submissions by counsel for both parties. They appear to be at the same wavelength. If the defendant admits to have sold the portion of land at a consideration and again he says he has no issues as to the plaintiff utilizing the portion of land sold to him.

It is thus this court's order that the Plaintiff should forthwith take vacant possession of the vacant parcel of land and if any problem arises, he should report the same to the relevant authorities who are mandated to maintain peace, law and order and also protecting the property of individuals.

In respect to costs, I direct that each party to shoulder for its costs.

It is so ordered.”

15. The Applicant's case is that he seeks for an order of certiorari to bring to the High Court and quash the decision of the Senior Principal Magistrate's Court at Sotik in Civil Suit No 238/2015 delivered on February 28, 2018. In order to determine this issue, it is important to understand the role of the Magistrate's Court. Magistrates study the facts of a case and are advised on points of facts and law. Proceedings are always held in open court, and sometimes in situ, whereby they carry out inquiries into the trial based on the evidence adduced therein.

16. Indeed Section 7 of the *Magistrates Court Act* provides for the civil jurisdiction of a Magistrate's court as follows

- (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —
- (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.

17. And further, Section 9 of the *Magistrates Court Act* provides as follows:

A magistrate's court shall —

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (No 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —
- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;



- (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (v) environment and land generally.

18. I find that the Sotik Principle Magistrate entered judgment in compliance of the provisions of Section 9 of the *Magistrates Court Act* and therefore he did not act ultra vires or in excess of his jurisdiction. The judgment of the Court could now be followed by the usual process of decree and execution and/or an Appeal where the parties so desired. The order of certiorari cannot lie in the circumstance.

19. In the case of *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji & Another Civil Appeal No 266 of 1996* the Court 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...”

20. In the end, I find that the Applicant’s Application for Judicial Review dated the March 22, 2019 wherein he had sought for orders of certiorari to move to the High Court, for the purpose of being quashed, the Judgment/decision made by the Sotik Principle Magistrate on February 28, 2018 in Civil Suit No 238/2015, herein lacks merit and the same is dismissed with costs at a lower scale as the same was undefended.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 10TH DAY OF NOVEMBER 2022.

M C OUNDO

Environment & Land – Judge

