



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 253 of 2006

REPUBLIC.....APPLICANT

VERSUS

DISTRICT LAND REGISTRAR NAKURU.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

AND

HON. NJENGA KARUME..... Legal Representative of the Estate of WARIARA NJENGA &

MARGARET NJERI.....INTERESTED PARTY

RULING

The applicant filed an application by way of a Notice of Motion under **Order LIII rule 3(1) and (2)** of the **Civil Procedure Rules** and **Section 8(2), 9(1)(b)** of the **Law Reform Act**. He prayed for an order of certiorari to remove into this court for purposes of quashing a decision of the District Land Registrar, Nakuru, dated 2nd February 2006. He also prayed for an order of Mandamus directed to the District Land Registrar, Nakuru and the Commissioner of Lands compelling them to restore the applicant's name in the register as the proprietor of a lease hold interest in **NAKURU MUNICIPALITY/BLOCK 5/40** (hereinafter referred to as "**the suit premises**") and to cancel the names of Wariara Njenga and Margaret Njeri (both deceased) from the register.

According to an affidavit sworn by Mohammed Salim Mohammed, the company secretary of Kisibet Investment Limited, the ex-parte applicant, the applicant was registered as the lessee of the suit premises on the 3rd day of June, 1992 and was issued with a Certificate of Lease on 28th October, 1992. The certificate of lease that was annexed to the affidavit of Mr. Mohammed and marked as "**MSM 1**" showed that the lessor thereof was the **Government of Kenya** and the applicant had been given a ninety nine (99) years lease from the 1st of October, 1991 at a revisable annual rent of Kshs.4,670/-.

The applicant stated that it acquired the suit premises from **Shalimar Farms Ltd** for valuable consideration and thereafter proceeded to renovate them extensively.

On 30th August 2005, the first respondent wrote to the applicant informing it that the suit premises had been leased to Wariara Njenga and Margaret Njeri for a term of 99 years from the 1st of October 1908 and therefore the Government had irregularly leased a private property.

The applicant was requested to surrender the certificate of lease that had been issue to it for cancellation.

According to a Certificate of an Official Search that was annexed to the applicant's affidavit, Wariara Njenga and Margaret Njeri became the registered proprietors of the said leasehold interest on 28th October 1983, and were issued with a certificate of lease. The term of 99 years had therefore not expires as at 3rd June, 1992 when the Government of Kenya purported to lease the suit premises to the applicant.

On 2nd February 2006, the first respondent wrote to the applicant and informed her that he had rectified the register in respect of the suit premises for the reasons as earlier advised and once again requested the applicant to return the certificate of lease for cancellation.

The applicant requested their advocates, M/S Kiplenge, Ogola & Mugambi, to write to the first respondent which they did on 30th March 2006, and seek a confirmation as to when the register was rectified. The first respondent replied that he amended the records on 2nd February 2006. He gave the reasons for so doing as follows:-

- “1. The said documents purported to give your client somebody else's property when the same had been allocated to them and not re-possessed and/or surrendered. This could not have been possible legally and thus the documents were invalid.***
- 2. You had told me orally that your client had bought land from an Asian. Once again, this was not possible as the green card shows your client was a first allottee.”***

The applicant alleged that the first respondent abused his jurisdiction and also acted in violation of the principles of natural justice in that he did not give a hearing to the applicant before he proceeded to rectify the land register as aforesaid. He also stated that the first respondent acted contrary to the law.

The respondents and the interested party were served with the application and a hearing notice but they neither entered appearance nor filed any replying affidavit. From the letters that the first respondent wrote to the applicant, it would appear that the suit premises were irregularly leased to the applicant because at the time when the applicant allegedly acquired a lease hold interest over the property, the same had been leased out to Wariara Njenga and Margaret Njeri and was not therefore available for lease to any other party by the lessor, the Government of Kenya, without consent of the two registered lessees. It is illegal and contrary to the provisions of **Section 32(1)** of the **Registered Land Act** for there to be two different certificates of lease in respect of the same parcel of land issued to different people. Any purported attempt to dispose of a lease otherwise than in accordance with the provisions of the Registered Land Act is ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in any land, lease or charge.

That notwithstanding, the first respondent acted contrary to the provisions of **Section 142** of the **Registered Land Act** in rectifying the register in terms of his letter dated 2nd February 2006. Under that section, the Registrar can rectify the register or any other instrument presented for registration in the following cases only:-

- (a) in formal matters and in the case of errors or omissions not materially affecting the interest of any

proprietor;

(b) in any case and at any time with the consent of all persons interested.

(c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar has first to give notice to all persons appearing by the register to be interested or affected by his intention to so rectify.

Where registration has been obtained by fraud or mistake, rectification of the register can only be ordered by the court. This is according to Section 143(1) of the Registered Land Act. The alleged fraud or mistake must sufficiently be proved by whoever is alleging the same. It should, however, be noted that the above does not apply to a first registration.

In this matter, the first respondent exceeded his statutory powers by purporting to rectify the register by removing the name of the applicant and substituting the same with the names, Wariara Njenga & Margaret Njeri, without consent of the applicant. If the Government realised that it had irregularly granted a lease to the applicant or if it came to light that the applicant had fraudulently secured the lease over the suit premises, an action for rectification of the register should have been filed in court by either the Registrar or by the rightful proprietor of the lease or by any other appropriate person. The applicant had spent a considerable amount of money in renovation of the suit premises upon acquisition of the lease in 1992. The court would have investigated how the acquisition of the lease was obtained and make appropriate orders.

In **Judicial Review Proceedings**, the court is not determining the merits of a particular decision, the court is interested in finding out whether the decision was arrived at procedurally and in compliance with rules of natural justice. In this matter, I am satisfied that the first respondent acted without jurisdiction and in excess of his statutory powers as provided by **Section 142(1)** of the **Registered Land Act**. I therefore grant the prayers as sought by the applicant in the notice of motion. The respondents will bear the costs of the application.

DATED, SIGNED and DELIVERED at Nakuru this 20th day of December, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Gai holding brief for Mr. Ogola for the applicant and N/A for the respondent.

D. MUSINGA

JUDGE