



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JUDICIAL REVIEW NO. 23 OF 2019

IN THE MATTER OF AN APPLICATION FOR THE JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA,

FAIR ADMINISTRATION ACTION ACT 2015 AND THE LAND REGISTRATION ACT 2012.

BETWEEN

KENNEDY KIMATHI.....EX- APPLICANT

VERSUS

DISTRICT LAND REGISTRAR MERU NORTH.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

M'ITABARI M'MURIKI.....INTERESTED PARTY

JUDGMENT

1. This Judicial Review matter relates to the Notice of Motion filed 20/11/2019 brought pursuant to provisions of **Order 53 rule 3 (1) of the Civil Procedure Rules 2010 and Section 8 and 9 of the Law Reform Act**. The applicant seeks the following orders:

1) AN ORDER OF CERTIORARI bringing into this court for purposes of being quashed the proceedings, findings and /or decisions of the 1st Respondent in respect to land parcels No. ITHIMA/NTUNENE/4578 and 4579 as contained in the 1st respondents letter dated 7th November 2019 addressed to the ex- parte applicant.

2) AN ORDER OF PROHIBITION, prohibiting the 1st Respondent from cancelling the Ex-parte Applicants title deeds as stated in proceedings, findings and /or decisions of the 1st Respondent in respect to land parcels No. ITHIMA/NTUNENE/4578 and 4579 as contained in the 1st respondent's letter dated 7th November 2019 addressed to the ex- parte applicant.

2. The Notice of Motion was supported on the grounds set out on the face of the application, the statutory statement of facts and the verifying affidavit sworn by the ex parte applicant in support of the Chamber Summons application for grant of leave dated 19th November 2019 as well as the supplementary affidavit.

3. The ex parte applicant contends that he is the registered owner of all that property known as ITHIMA/NTUNENE/4578 and 4579, of which the 1st respondent lacks the necessary legal capacity and jurisdiction to cancel the said title deeds. The 1st respondent contravened the rules of natural justice by condemning the ex parte applicant unheard and failing to supply him with copies of proceedings. Thus the actions of the 1st respondent were improper, irregular, unprocedural, unreasonable and irrational, hence the decision made thereof was illegal and unreasonable.

4. The respondents opposed the suit vide the replying affidavit of the Meru North District Land Registrar, one N.N Njenga filed on 24th July 2020. He stated that he received a complaint lodged by the family of the interested party over the transfer of land parcel No. ITHIMA/NTUNENE/4578 and 4579, where it was alleged that the land was transferred without the interested party's consent. The deponent then convened a meeting on 28th October 2019 where the seller and purchaser both came with witnesses and it was agreed that the matter be referred to the clan for a solution.

5. The Land Registrar found it prudent to investigate the matter on his own by exercising his powers conferred to him by Section 14 (a) and (b) of the Land Registration Act. He discovered that the consent did not go through the Land Control Board as the consent for transfer was issued on 18th July 2019 while the one for sub division was issued on 15th August 2019. This according to the Land registrar was wrong as there was no way a transfer for a new number could have passed through the land control board because at that time, new numbers did not exist.

6. He avers that he called for cancellation of the title deed by virtue of Section 79(2) of the Land Registration Act and therefore, he acted within the law as required by his office.

7. The interested party also opposed the suit vide his replying affidavit dated 17th February 2010. He contends that he is the original registered owner of land parcel No. ITHIMA/NTUNENE/3103 and 3104, as per the green cards availed as "MM-01". **That he has two wives of which, he** gave parcel 3103 to the first house and parcel 3104 to the second house. That parcels ITHIMA/NTUNENE/4578 and 4579 arise from subdivision of parcel ITHIMA/NTUNENE/3175, which in turn is a subdivision of parcel 3103.

8. He avers that there is an illegality in the manner in which the parcel of land was sub-divided and transferred as he did not sell the suit parcels to the ex parte applicant. He contends that it was probably his 2nd wife who took advantage of his old age and the fact that he cannot read and write to try and defraud the children of the 1st house. That he only came to learn of the sale when the ex parte applicant asked him to stop trespassing on the land which prompted him to do a search and he learnt that the said parcels had allegedly been sold without his knowledge.

9. He reported the matter to the Land Registrar, who accorded them a hearing date on 25/09/2019 and each party was present and given an opportunity to be heard. That it was during the hearing that the Land Registrar discovered that the transfer was tainted with fraud as the sale agreement was dated 13/09/2019, while the title deed were issued on 11/09/2019. He invites the court to see annexures "MM-02 and MM-03" **which are the** green card and LCB consent. He added that the land control board consent was a forgery as it was dated 15/08/2019, while the mutation forms were registered on 26/08/2019. That following the meeting, it was evident that there was an error in the register whose correction was necessary which prompted the Land Registrar to write to the ex parte applicant seeking surrender of the titles.

10. He argues that the process being followed by the Land Registrar is not complete and the ex parte applicant should let justice prevail as they have the option of seeking an appeal or review if they are not satisfied. He avers that the proceedings before the Land Registrar were conducted within the confines of the law and this suit is incompetent, misconceived, misplaced and an abuse of the court process and thus it should be dismissed.

Submissions

11. The suit was heard by way of written submissions. The ex parte applicant filed his submission on 01.09.2020, the respondents on 05.10.2020, while those of the interested party were filed on 7.09.2020.

12. The ex parte applicant submitted that the 1st respondent infringed on his rights to fair administrative action as entrenched under Article 47 of the Constitution of Kenya which administrative action should be fair efficient, lawful, expeditious and reasonable. Further, that a private individuals proprietary interests cannot be arbitrary cancelled without the individual being afforded a chance to be heard. That the 1st respondent has not produced any letter via which he invited the parties to a meeting nor has he produced any evidence that the meeting took place which would be in the form of proceedings and that 1st respondent and the interested party are giving contrary dates as to when the meeting happened one claiming 25/09/2019 and the other 28/10/2019.

13. He submitted that only the court has powers to direct the cancellation of a title and the Land Registrar's powers are limited to rectifying errors, mistakes and omissions, hence the 1st respondent acted ultra-vires.

14. The exparte applicant relied on the following authorities; **Republic v The Registrar of Titles and 2 others Ex parte Redcliffe Holdings Limited [2016]eKLR**, **Larkin v. Nassau Electric R.R. Co. 98 n.e.465 (State of New York)**, **Satima Enterprises Limited v The Registrar of Titles and 2 others [2012]eKLR**, **Republic v Chief Land Registrar and another Ex parte Yosabia Kerubo Manyura [2018]eKLR**, **William Ouko Ogolla v AG and 2 others [2015]eKLR** and **Kenya National Human Rights Commission v Communication Authority of Kenya and 4 others [2018]eKLR** .

15. The respondents submitted that the process of cancellation of title is not final, that the 1st respondent carried out his duties diligently and he has not acted ultra vires. It was submitted that judicial review orders are discretionary and are not guaranteed as they are concerned with the decision making process and not the merits of the decision itself. That nowhere in the letter of 7.11.2019 did the Land Registrar indicate that the process of cancellation of the titles would be final upon the return of the title deeds to the Land Registrar, thus the exparte applicant is putting the cart before the horse. Citing the provisions of Section 79 (2) of the Land Registration Act, the respondents contend that the Land Registrar acted lawfully.

16. The respondents relied on the following cases; **Republic v Chairperson Business Premises Rent Tribunal & Another Ex parte Keiyo Housing Cooperative Society Ltd & Another [2014]eKLR**, **Peris Wambogo Nyaga V Kenyatta University [2014]eklr**, **Republic v Judicial Service Commission Ex parte Pareno [2004]eKLR**, **Republic v Director of Immigration Services & 2 others Ex parte**

Olamilekan Gbenga Fasuyi & 2 others [2018]eKLR, Republic v Kenya Revenue Authority & another Ex parte Tradewise Agencies [2013]eKLR.

17. The interested party submitted that the transfer was illegal as he did not sell the land to the ex parte applicant who is seeking court's protection of his dubious acts. He stated that the 1st respondent was properly within his powers to issue a notice in that manner. The mere fact that the 1st respondent had stated that he would put the machinery into action cannot be construed to mean that his mind was made up to revoke the applicant's title. Thus the 1st respondent acted lawfully within the meaning of Section 14 and 79 of the Land Registration Act.

18. The interested party further stated that the 1st respondent has not made a decision, hence there is nothing capable of being quashed. It was also submitted that to grant the orders sought would amount to impeding the 1st respondent from exercising their lawful discretion and statutory duty and therefore urge the court to dismiss the suit with cost.

19. The interested party relied on the following cases; **Munyu Maina v Hiram Gathiha Maina (2013) eKLR, Republic v AG & Another [2015]eKLR, Mureithi & 2 others V AG & 4 others KLR E&L page 707 and Mexner & Another v AG (2005) 2 KLR 189.**

Determination

20. Before I delve into the issues for determination, I do note that the sale agreement herein is dated 13th September 2019 and the title deeds were issued on 11th September 2019. This discrepancy has not been explained by the exparte applicant. The interested party is alleging fraud in the alienation of the suit land from his name. However, It is trite law that allegations of fraud or acquisition of titles through other irregular means can be ascertained through the legal forums such as a court of law, wherein evidence would be adduced and tested in the usual legal manner. See the case of **R.G Patel Vs Laiji Makanji(1957)EA 314**, where the court held that:-

“Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud”.

21. However, fraud and illegality of the titles are not the issues engraved in this suit, but rather the actions of the 1st respondent culminating in the issuance of the letter of 7.11.2019. After reviewing the pleadings and the submissions by the parties I find that the issues for determination in this matter are as follows:

i. Whether due process was followed before the ex parte applicant was issued with the letter of 7.11.2019 threatening the cancellation of his titles by the Land Registrar?

ii. Whether the Land Registrar acted in excess of his mandate and/or jurisdiction?

iii. Whether the ex parte applicant is entitled to the reliefs sought?

22. The 1st respondent by a letter dated 7th November 2019 required the ex parte applicant to return the two title deeds in respect of parcels 4578 and 4579 for cancellation within 14 days failure to which they would be cancelled under section 79(2) (a), on the basis that the consent attached at the time of transfer was improper.

23. On the issue of whether due process was followed, the ex parte applicant contends that he was never present at the alleged meeting, nor had a notice been issued to him. The parties (respondent and interested party) who are claiming that indeed a meeting took place in the presence of the parties cannot agree on the date the meeting occurred. The respondent claims the meeting took place on 28.10.2019 whereas the interested party mentions the date of 25.9.2019.

24. Further, the court has not been provided with any proof and/or document to show that indeed a meeting took place or that the ex parte applicant was informed of the meeting but never showed up. In the absence of any credible document to show that a meeting occurred, I cannot uphold the assertion that a meeting ever took place between the parties and I find that the ex parte applicant was never accorded a chance to be heard.

25. The provisions of **Article 47(1) and (2) of the Constitution** stipulate that :

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”.

26. The aforementioned provisions of the Constitution resonate well with the provisions of **Section 4(1), (2) and (3) of the Fair Administrative Action Act**, where it is stated that:

“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the

administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

26. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**, it was held that;

“Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including (c) responsive, prompt, effective, impartial and equitable provision of services” and (f) transparency and provision to the public of timely, accurate information.

.....

As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well”. (Emphasize added).

Also See- **Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [2018] eKLR**

27. In the Supreme Court of India case of **Sangram Singh vs. Election Tribunal Kotech AIR 1955 SC 664 at 711**, the court stated that;

“There must be ever present in the mind that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them”.

28. I find that there was no lawful basis for the 1st respondent to issue the exparte applicant with the letter of 7.11.2019. This is because there is no evidence of compliance with the provisions of **Article 47 of the Constitution** as well as **Section 4 of the Fair Administrative Action Act**, with regard to notification of a meeting, and there is no evidence of any proceedings conducted in the presence of the parties. Thus the respondents acted ultra-vires and were in breach of the rules of natural justice.

29. On the issue of the mandate and or jurisdiction of the 1st respondent, reference was made to the provisions of Section 79 of the Land Registration Act to buttress the claim by the respondents and the interested party, that the actions of the 1st respondent were lawful. The said section provides as follows;

“79 Rectification by Registrar

(1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;

- a) in any case and at any time with the consent of all affected parties; or
- b) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
- c) for purposes of updating the register;
- d) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless—

a) *the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or*

b) *it would for any other reason be unjust for the alteration not to be made,*

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration. “

30. The above section makes provisions for instances where the Land Registrar can effect rectification of the register. The wording in the letter of 7.11.2019 clearly indicates that the tiles held by the exparte applicant faced imminent cancellation under Section 79 (2) thereof.

31. In the case of Republic v Chief Land Registrar & another Ex-parte Yosabia Kerubo Manyura [2018] eKLR, it was held as follows:

“It is evident from the provisions of Section 79 that the Land Registrar’s powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the interests of any proprietor. Cancellation of a title quite clearly would materially affect the interest of the registered proprietor. In my view, it is only the court that under Section 80(1) of the Land Registration Act, 2012 that has the power to direct the cancellation of a registration.I therefore hold that the land registrar lacked the jurisdiction to cancel the applicant’s title and in doing so he acted ultra vires and his actions are amenable to an order of certiorari. Having held that the Land Registrar did not have jurisdiction to cancel the applicant’s title it follows that no due process was followed in effecting the cancellation of the title as the Land Registrar could only cancel the title if he was ordered to do so by the court. The Land Registrar in the circumstances of the case only had jurisdiction to place a restriction against the land pending determination of the issue whether or not the applicant was validly registered as the owner of the land by the court.”

Also see Kuria Greens Limited v Registrar of Titles & another [2011] eKLR.

32. The rectification as provided under section 79(2) of the Land Registration Act does not include the cancelling of title of a registered person. I opine that the Land Registrar in threatening to cancel the exparte applicant’s title as he did, acted outside the scope of his mandate and he had no jurisdiction to do so.

33. Having concluded that there was no procedural process leading to the decision of the 1st respondent, and that the 1st respondent acted outside his mandate, then I find that the prayers sought in the substantive motion are merited and are allowed. Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 25.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE