Republic v Land Registrar, Nyamira County & another; Nyabero (Exparte); Mikae (Interested Party) (Environment and Land Judicial Review Case E002 of 2023) [2024] KEELC 1044 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1044 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023

JM KAMAU, J

FEBRUARY 14, 2024

BETWEEN

REPUBLIC .... APPLICANT

AND

THE LAND REGISTRAR, NYAMIRA COUNTY .... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR .... 2ND RESPONDENT

AND

MATOKE NYABERO .... EXPARTE

AND

PATROBA ONSERIO MIKAE .... INTERESTED PARTY

JUDGMENT

1. This is a Judicial Review case for a *certiorari* order seeking to bring into this court for purposes of quashing the Decision of the 1st Respondent contained in the letter referenced Nm/boisanga/934 dated the 21/2/2023 addressed to the *ex parte* Applicant which sought to revoke and/or rectify the registration pertaining to LR No North Mugirango/boisanga/934 which directive, according to the *ex parte* Applicant, was made without observing the doctrines of Natural Justice in that although the statutory Notice was issued before action was taken the Response thereto was not considered. The *ex parte* Applicant further avers that the powers invoked by the 1st Respondent under Section 79 of the *Land Registration Act*, 2012 are limited, restricted and/or otherwise circumscribed. He also pleads that the Decision made by the 1st Respondent was *res judicata* since the 1st Respondent re-opened the case and made changes to the suit land contrary to the court edicts rendering the Decisions of the court a mockery. He further states that the Decision was ultra vires, oppressive, arbitrary and whimsical and a

violation of the Applicant's fundamental rights and freedoms contrary to Articles 10,20(1) 27,29(d), 47 and 50(1) of the *Constitution* of Kenya, 2010 and also contrary to the *Fair Administrative Actions Act*, 2019 and the doctrines of Natural Justice.

2. In the 1st Respondent's Replying Affidavit sworn on the 31/10/2023, Patroba Onserio Mikae depones that he is the bona fide proprietor of LR No North Mugirango/boisanga/934 which he acquired through succession. He similarly depones that the *ex parte* Applicant had approached him with a view to purchasing the same property but failed to meet his part of the bargain. He acknowledges the existence of court cases referred to by the *ex parte* Applicant but that after being declared the lawful owner of the suit land, the Applicant "relaxed" by failing to pay the purchase price despite several promises to do so which the 2nd Respondent considered in his action to make changes to the Register in respect to the suit land. He also depones that the Respondent found out that there was a likelihood of fraud on the part of the Applicant since he did not have the relevant documents i.e. Consent of the Land Control Board, evidence of payment of the purchase price and sale agreement to facilitate the transfer. He further faults the court order by saying that in spite of the Judgment of the court, the agreement spelt that no Title would be transferred without the purchase price being fully paid. The Interested party was a witness in the case in court.

3. On his part, the 2nd Interested party Nyamira Land Registrar Mr. Martin Manwari Osano, in a Replying Affidavit sworn on 22/3/2023 said that when the matter was brought before him for determination, he was informed that there was a case in court, Nyamira CMCC ELC No 35 of 2019 in which the 1st Respondent informed him that the same was heard and determined without the latter being involved or heard and that they could not understand how the same could have been so. He was later presented with succession papers from Kisumu High Court Succession cause No 676 of 2003 by the Interested Party and also the said Interested party told him that the sale between him and the Applicant could not stand for want of consent of the Land Control Board as well as full payment of the purchase price of Kshs 2,000,000/=. And failure to get a Response from the *ex parte* Applicant impelled the Land Registrar to "rectify" the Title after discovering that there was an element of fraud on the part of the Applicant and under Section 79(2) of the *Land Registration Act*, he reverted the ownership of the suit land to the Interested Party.

4. The Applicant's rights have been violated and part of what he claims to be his land taken away without him being heard. This amounts to a back allay judgment. What was so difficult in setting down the case for hearing?

5. One of the Rules of National Justice demands that no one should be condemned unheard.

6. It was held in *Pastoli v Kabale District Local Government Council and others* [2008] 2 EA 300 that:

> "In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

7. In *Republic v The Honourable The Chief Justice of Kenya & others ex parte Moijo Mataiya Ole Keiwua*, Nairobi HCMCA No 1298 of 2004it was held as follows:

> The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/ likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence…"
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> *Halsbury's Laws of England*, (supra) states:
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> > " Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."

8. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, *Halsbury's Laws of England*, 5th Edn. Vol. 61 page 545 at para 640 states:

> " The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."

9. Being heard also means that a party's Response must be considered before the final Decision is made.

10. Although the 1st Respondent attempted to have explained his action, the same was not plausible in view of the subsisting Court orders.

11. There is no doubt that the Land Registrar has powers under Section 79(2) of the *Land Registration Act*. Nonetheless, acting contrary to the Orders of the Court is unlawful and despicable. The action is unlawful. The Land Registrar cannot justify his departure from the findings and orders of the Court. This leads to a presumption that the Decision was not made in good faith.

12. It was completely contrary to the law, to act as did the 1st Respondent, hence "overturning" the Decision of the Court. There was already a Decision determining ownership in favour of the *ex parte* Applicant. It is important to protect the authority of courts established under our Constitution. Equally important is the respect for decisional independence of the Courts.

13. The Land Registrar disregarded the Decision of a superior court, which demands that every person is bound by the Courts of law.

14. The jurisdiction of the Court is limited to interrogation of the process, not the substance of the case.

15. Once the 1st Respondent received information that the ownership of the suit property had been determined by the Court he was not at liberty to ignore it. Section 4[2] of the *Fair Administrative Actions Act*, imposes an obligation on Administrators to give written reasons for their decisions. Section 6[2] of the Act, allows every person, affected materially or adversely by any administrative action, to be supplied with written reasons for the administrative action. The preceding section ,5 [2] [b] and [c], allows affected persons to apply for review of an administrative action or decision, by a Court of competent jurisdiction in exercise of his or her right, under the *Constitution* or any written law, and to pursue such remedies as may be available under the law. Failure by an Administrator to supply reasons for the decision, in the absence of proof to the contrary, leads to a presumption that the decision was made without good reason.

16. Suffice it to say, it is declared that the decision made by the 1st Respondent against the *ex parte* Applicant Contravened Articles 1, 10, 27 (1) & (2) 47, 48, 50 (1), 159(1) & (2) 162(2) of the *Constitution*, and substantive statutory rights under the Act.

17. The court should not make orders in vain. Any and all interlocutory orders lapsed upon delivery of judgment after the full and final determination of a suit. Since the court had already made Orders on the ownership of LR No North Mugirango/ Boisanga /934 the 1st Respondent acted improperly and indeed in error by reversing the said Orders. He was under a duty to obey and ensure the said Orders are maintained. The law is well established that Court orders are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal by a higher Court. The validity or otherwise of the suit cannot in my view, constitute a passport for disobeying an order made by a Court of competent jurisdiction. If parties and their counsel were given a blank cheque to decide on the validity of court orders, the dignity of the courts would be severely eroded. It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly and ensure that they are followed. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. As long as it existed it must not be disobeyed. If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course. Parties should not take it upon themselves to decide on their own which court Decrees are to be obeyed and which ones to be overlooked. Where a Court order is couched on such terms as to be incomprehensible, ambiguous, nebulous and imprecise it is safer to move back to Court for clarity rather than acting blindly.

18. In the premises, I hereby issue an order of *certiorari* bringing into this court and quashing the Decision of the 1st Respondent contained in the letter referenced NM/Boisanga /934 dated the 21/2/2023 addressed to the *ex parte* Applicant revoking and rectifying the registration pertaining to LR No North Mugirango /boisanga/934. For the avoidance of doubt, the same is hereby nullified. The costs of this suit are awarded to the *ex parte* Applicant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 14TH DAY OF FEBRUARY 2024.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: - Brenda

Mr. Wafula for the Applicant

Mr. Ranah for Respondent

Mr. Osano Land Registrar also present

Ms. Bundi for the Interested Party.