



**Republic v County Land Registrar, Busia & 2 others; Oyalo & another (Exparte) (Environment and Land Judicial Review Case E001 of 2021) [2022] KEELC 3913 (KLR) (8 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3913 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2021**

**AA OMOLLO, J**

**JUNE 8, 2022**

**IN THE MATTER OF ORDER 53 RULE 2 & 3 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF  
KENYA 2010, ARTICLES 22(1), 23(1)(3) AND 25(C)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY LAND REGISTRAR, BUSIA ..... 1<sup>ST</sup> INTERESTED PARTY**

**OGANGA MGOMBE ODUNGA ..... 2<sup>ND</sup> INTERESTED PARTY**

**JOSEPH EGESA ..... 3<sup>RD</sup> INTERESTED PARTY**

**AND**

**THOMAS WANDERA OYALO ..... EXPARTE**

**ONYANGO VINCENT OYALO ..... EXPARTE**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> ex parte applicants brought an application dated March 18, 2021 section 1, 1A, 1B, 2, 2A, 3, 3A and 63 (e) of the Civil Procedure Act, order 42 and 52 of the Civil Procedure Rules as read together with article 159 of the Constitution of Kenya 2010 and all enabling provisions of the law seeking for the following orders;
  - a. That a writ of *certiorari*, mandamus and or prohibition calling into this honourable court the decision, findings and or verdict of the Land Registrar Busia County made on the January 21, 2021 for purposes of being quashed.



- b. That the Land Registrar Busia be prohibited from revoking title deeds Nos Bukhayo/Mundika/10836 and 10837.
  - c. That the Land Registrar Busia County be ordered by a writ of *mandamus* calling upon him and or compelling him to restore title deeds Nos Bukhayo/Mundika/10836 and 10837 in the names of the *ex parte* applicants.
  - d. That costs of this application be provided for.
2. The application was supported the affidavit of Thomas Wandera Oyalo and Vincent Oyalo and on the grounds *inter alia*;
    - i. That the interested party (Land Registrar, Busia County) acted *ultra vires* in making an order of trusteeship when such orders can only be made by the High Court.
    - ii. That the interested party acted *ultra vires* by recommending the revocation of title deed for LR No Bukhayo/Mundika/807 that had been lawfully registered in the names of the *ex parte* applicants.
    - iii. That the Land Registrar Busia County in arriving at his decision acted against his powers in failing to appreciate that the title deed held by the *ex parte* applicants was obtained pursuant to court orders in succession causes and doing so he purported to overrule court orders.
    - iv. That the interested party acted *ultra vires* his powers purporting to interfere with a first registration.
  3. Annexed to the supporting affidavit were copies of consent to partition, copies of the titles to L.R. 10836 and 10837, copy of certificate of confirmation of grant, copy of official search of L.R. 10836, copy of impugned proceedings conducted by the Land Registrar.
  4. The 2<sup>nd</sup> interested party filed a replying affidavit on June 7, 2021 deposing that the original land in question, Bukhayo/Mundika/807 belonged to his father Mbomere Odunga and before the demise of their father he had settled all his children on the land. Each of his father's sons were in occupation of this land with each having distinct boundaries of the portions occupied. He stated that the *ex parte* applicants are the sons of Peter Oyalo Mbomere – deceased. That in the year 2013, the 1<sup>st</sup> *ex parte* applicant armed with papers hoodwinked him to sign paper that the original land was being subdivided among the 5 sons of their late father. He agreed to the same only to discover that the land was being subdivided into 2 portions. From his personal knowledge, his late brother Peter Oyalo died on September 4, 2013 and was buried on September 14, 2013 and it was strange that stamp duty was paid on September 10, 2013 and a title issued on September 12, 2013 a period when his said late brother was in the mortuary.
  5. The 2<sup>nd</sup> interested party accused the applicants of taking advantage of his ignorance to have the land partitioned into 2 since they were only meant to hold the land in trust for their brothers and themselves and not to seek to disinherit their other siblings who have since passed on though their families still occupy their respective portions. Before demise Peter Oyalo they had lived peacefully on their marked boundaries on the land and it is only after his death that his sons started upsetting the apple cart. It is for those reasons that they sought the intervention of the Land Registrar to come and help them sort the mess created by the applicant.
  6. The 3<sup>rd</sup> interested party also filed his replying affidavit on June 29, 2021 and deposed that Thomas Wandera Oyalo the 1<sup>st</sup> applicant removed the boundary marks between LR Bukhayo/Mundika/5194 and 807 (which has been subdivided into LR 10836 and LR 10837) and encroached into his land



- erecting a new boundary into his land. His father's land before he died was LR Bukhayo/Mundika/806 and after his death they filed succession proceedings which authorised the subdivision into four portions and he got registered as owner of LR Bukhayo/Mundika/5194. That his portion LR Bukhayo/Mundika/5194 shares a boundary with LR Bukhayo/Mundika/807.
7. He stated that he has no interest in LR Bukhayo/Mundika/807 and was not concerned with the subdivisions thereof except that the 1<sup>st</sup> applicant has encroached on his land by defacing the original boundary between parcel Nos Bukhayo/Mundika/806 and 807 by erecting a new boundary in his land. His complaint to the Land Registrar was that there was a boundary dispute of which the Land Registrar has power to hear and determine and he annexed a copy of the proceedings. He stated that he was not interested in the decision by the Land Registrar's attempt to revoke the subdivision of LR Bukhayo/Mundika/807 and the applicants have not shown any just cause against him to warrant his being made a party to this application.
  8. Two supplementary affidavits were filed by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> *ex parte* applicants. The first affidavit was sworn by Christopher Mbeere who stated that he was present and living with his grandmother Ajambo when she called his two sons, John Odwako and Stanislaus Bwire and told them that Peter Oyalo had come back and needed the land. Mbomere gave land to the two houses of the Nalala's and some portion remained and that Napunyi and Mbomere continued to stay on the remaining portion which was small. When his grandmother asked Bwire and Munyasia to vacate the land they were farming as they held the land in trust for Peter Oyalo and they agreed to vacate.
  9. Mr Mbeere deposed further that Oganga's family by then was staying on the land on the upper side and Oyalo continued to stay on the land as it had not been partitioned by that time. That Oganga and Oyalo agreed to partition the land around the year 2012 to 2013 when Oganga intended to sell the land to an Indian developer who they knew as the owner of Butali Sugar Company. They convened a meeting as a family in which we decided to measure the land acreage, conduct search and survey before partitioning. The land was to be partitioned for the benefit of the house of Namakangala where Peter Oyalo was the only son and Napunyi where Oganga was a son. Upon partitioning the land, Oganga was to hold their portion in trust for himself and his younger siblings but he refused to move into his portion as designated and encouraged his brothers to construct and stay on Oyalo's portion and they sold some portions of Bukhayo/Mundika/10837.
  10. The second supplementary affidavit sworn by Joseph Egesa who deposed that his grandfather Mbomere gave his son Bwire Mbomere land before he was born and the grandmother to Thomas at one point went away with Peter Oyalo. When Bwire (his deceased father) went to look for Peter and upon finding him, he came back with him and took care of him till adulthood and when their grandfather was still alive, Peter Oyalo went to Uganda. Upon coming back, his father Bwire Mbomere and Munyasia vacated the land which they were holding on behalf of Peter Oyalo and he went to Nairobi. On coming back, he found that Oganga had constructed on the said parcel allocated to Peter Oyalo.
  11. That in September 2020, he was called and informed that the land registrar was coming to solve the boundary dispute and demarcate the boundary between his parcel of land and that of the applicants. He has lived with the applicants in peace and only intended to correct the boundary between Bukhayo/Mundika/806 and Bukhayo/Mundika/807. He stated that he made a statement to the Registrar but he did not write it in English and neither did the Registrar read the statement to him to confirm. When he had statement read to him, he discovered that some of the information never came from him. He denied that he stated that there was a clear, distinct and well-marked boundary between LR 806 and LR 5194.



12. The parties agreed to dispense with the hearing of the application by way of written submissions. The *ex parte* applicants filed their submissions on December 7, 2021 and submitted that the averment by the 2<sup>nd</sup> interested party that he was hoodwinked by the 1<sup>st</sup> applicant is false, vexatious, frivolous, concocted and intended to mislead this honourable court. It was their submission that the land registrar has no powers of revocation, cancellation and/or annulment of a registered title and his powers are limited to determining boundary disputes of which thereafter the court may also determine such a matter where a party is aggrieved. They submitted that a trustee can be appointed by the court, the settlor, by the beneficiaries and in accordance with section 37 of the *Trustee Act* by the nominated appointee or other trustees and there is no statute that empowers the land registrar to determine who should hold land in trust for another person.
13. The 1<sup>st</sup> interested party filed their submissions on January 20, 2022 stating that in their report of January 21, 2021 they only recommended for peaceful co-existence between the persons residing on the suit parcels of land being Bukhayo/Mundika/10836 and 10837 which although being resided by the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties is registered in the names of the *ex parte* applicants. The revocation of the suit parcel Bukhayo/Mundika/10836 and 10837 can only be done through the court and hence the orders of prohibition being sought cannot apply. They further submitted that the dispute was to do with ownership of land as between the *ex parte* applicants and the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties since the *ex*-applicants are the registered owners of the two parcels of land having acquired them through Busia High Court Succession P&A No 582 of 2019 but the report indicate that the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties are also residing on the suit parcel of land. They urged the court to dismiss the application with costs.
14. Having looked at the parties' pleadings and opposing submissions, I opine that the issues that come up for determination are;
  - i. Whether the Land Registrar acted *ultra vires* his powers;
  - ii. Who should pay costs of this suit?
15. It is the applicants' contention that the 1<sup>st</sup> interested party acted *ultra vires* in making an order of trusteeship when such orders can only be made by the High Court and by recommending the revocation of LR Bukhayo/Mundika/807 that had been lawfully registered in the names of the *ex parte* applicants. The 1<sup>st</sup> interested party on the other hand has submitted that they only recommended for the peaceful co-existence of the parties on the suit land.
16. The impugned report of the Land Registrar annexed to the *ex parte* applicant's supporting affidavit and marked as 'TWO 6' had a verdict made in the following terms;

'That the boundaries remain as they currently are on the ground. That the partition that divided the land into two, excluding other beneficiaries, should be revoked and a new subdivision done to create five parcels for the five beneficiaries. That right of appeal to the high court of Kenya granted within 30 days from the date hereof January 21, 2021.'
17. The *ex parte* applicants relied on section 7(2) (e) which provides that a court or tribunal under subsection (1) may review an administrative action or decision, if the person who made the decision acted in excess of jurisdiction or powers conferred under any written law. The jurisdiction or powers of the Land Registrar are contained in the *Land Registration Act* in sections 14, 18 and 79. Section 79(2) of the *Land Registration Act* breaks down the situations where the Land Registrar may make alterations to a title as including where there is fraud, error, mistake or omission or where it would be unjust for the alteration not to be made.



18. In the present suit, though the Land Registrar did not out-rightly revoke the partition that divided the land into two portions, he recommended that the partition be revoked and a new subdivision done to create parcels for the beneficiaries who were left out. The *ex parte* applicants have also claimed that the Land Registrar made an order of trusteeship in his report. From my reading of the report, no such order was made by the Land Registrar in his verdict that is challenged. He just noted in his findings that Oganga, the 2<sup>nd</sup> interested party had acknowledged that though the register reads only his name and Peter Oyalo-deceased, the two names were registered to hold the land on behalf of all the five brothers.
19. On the powers given to the Land Registrar under law, I find that the Land Registrar in his report dated January 12, 2021 partially acted *ultra vires* in his recommendation that the partition dividing the land in two portions be revoked as the *ex parte* applicants had the land partitioned in to two following transmission of the land in Busia Succession Cause No 582 of 2019. In the decision in *Pastoli v Kabale District Local Government Council & others* (2008) 2 EA 300 at pages 303 to 304 the court held 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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).
- Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...”
20. An order of mandamus is given directing a party to do some duties to which he is supposed to do while an order of certiorari is given to quash a decision that is already made and to which that party has acted in excess of that jurisdiction or without jurisdiction. The *ex parte* applicants have asked that the Land Registrar be compelled to restore the title deeds Nos Bukhayo/Mundika/10836 and 10837 to their names but no evidence has been advanced to this court to show that the titles in the names of the *ex parte* applicants were indeed revoked. The 1<sup>st</sup> interested party in their submissions admitted that revocation of the suit parcels can only be done through court hence the order of mandamus would not apply herein.
21. Consequently, the notice of motion dated March 19, 2021 is allowed on the following terms;
- a. A writ of *certiorari* is hereby issued against the findings and verdict of the Land Registrar Busia County dated January 21, 2021 in so far as it recommended the revocation of subdivision of the suit plot into two and that a new subdivision be undertaken which verdict be and is hereby quashed. The first part of the verdict on the issue of boundaries is not set aside for being made within jurisdiction.
  - b. The Land Registrar Busia is hereby ordered and prohibited from revoking the title deeds No Bukhayo/Mundika/10836 and 10837.
  - c. Each party shall cater for their own costs.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 8<sup>TH</sup> DAY OF JUNE 2022.**

**A OMOLLO**

**JUDGE**

