



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

JUDICIAL REVIEW NO.3 OF 2018

REPUBLIC.....APPLICANT

= VERSUS =

REGISTRAR OF LANDS, BUSIA.....RESPONDENT

CHARLES OKANDA OKOTH.....EX PARTE APPLICANT

DICKSON ISAYA ODANGA.....INTERESTED PARTY

J U D G M E N T

1. This judgment is on a judicial review Application filed on 29th May 2018, by the Ex-parte Applicant – **CHARLES OKANDA OKOTH** – against the Respondent, the **BUSIA LANDS REGISTRAR** for failing to issue a duly signed Certificate of Title over **Land Parcel No. SOUTH TESO/ANGOROMO/3211**, which he claims to have purchased from the Interested Party.

2. The Ex-parte Applicant seeks *inter alia* the following orders:

a. An order of Mandamus compelling the Respondent to register the whole parcel of land known as **L. R NO. SOUTH TESO/ANGOROMO/3211** situated within Busia County in the name of the Ex Parte Applicant.

b. An order of Prohibition prohibiting the Respondent from interfering with the Register relating to the suit property.

3. The Applicant relied on the Statement of facts and Verifying Affidavit of **CHARLES OKANDA OKOTH** attached to the Amended Chamber Summons Application for leave filed on 29th March 2018. He depones that on 16th January 2017, he purchased the suit property from the Interested Party and produced a copy of the sale agreement pertaining to the transaction. Prior to the sale he had conducted due diligence and confirmed by a certificate of official search that the Interested Party was the registered owner of the property. The Interested Party then applied to the Busia Land Control Board and obtained a letter of consent to transfer the property to the Ex Parte Applicant. Transfer documents were lodged with the Respondent who duly made an entry of the transaction in the register on 24th January 2017. The Ex parte Applicant claims that from that point the Respondent refused to register the property in his name despite the fact that he had paid the requisite fee. A title deed was issued in his name but the Respondent has since declined to sign it. He deems this inaction illegal, irrational and unreasonable for which he seeks redress.

4. The Respondent filed his response to the Application vide the Replying Affidavit sworn by the Busia County Lands Registrar -**MARTIN ONSANO** - on 24th July 2018 and filed on even date. He dismissed the Application as mischievous, frivolous and an abuse of Court process as the documents relied on for registration of the suit property are forgeries. He claims that the Interested Party is an impostor, not the true owner of the land and that the copy of the register marked as exhibit COO 10 to the Application is a forgery that does not originate from the Respondent's Office. Once discovered, they declined to register the property in the Ex Parte Applicants' name which action is within its powers under the Land Registration Act of 2012. The Respondent further contended that the Applicant's claim is improperly presented vide a judicial review application yet it should have been by way of a civil suit as the issue of land ownership is disputed. He termed the Application as an attempt to compel the Respondent to rubberstamp an illegality and prayed for its dismissal.

5. The Interested Party filed a Replying Affidavit on 20th April 2018. He deponed that he sold the suit property to the Ex-parte Applicant and was involved in the entire process of transfer hence his obligations were fully executed. He sought to be discharged from the proceedings and for his legal costs to be paid as he had no authority or mandate to issue a title deed.

6. Parties elected to canvass the Application by way of written submissions. The Applicants' submissions were filed on 12th November 2018. After rehashing the version of events in his pleadings counsel for the Applicant submitted that the sale of the suit property from the Interested Party to himself was valid. On the issue of sanctity of title he contended that the Applicant had no further obligation to investigate after conducting a search which revealed that the Interested Party was the registered owner of the suit property. He relied on the High Court cases of **Wainaina Kigathi Mungai vs The Land Registrar Kilifi & Another (2017) eKLR** and **Alice Chemutai Too vs Nicholas Kipkirui Korir & 2 Others (2015) eKLR** to buttress this point.

7. It was submitted further that the Respondent by failing to register the land in the Ex-parte Applicant's name without reasons was neglecting its duties under the Land Registration Act and was in violation of section 4 of the Fair Administrative Actions Act. Further, the alleged forgery and fraud spoken of by the Respondent has not been proved. Section 14 of the **Land Registration Act** empowers the Registrar to summon parties involved and call for the production of documents on any questions arising on a property failure to which the County Registrar can refuse to proceed with registration. The Ex-parte Applicant avers that the Respondent has never used the aforementioned statutory measures. He was not notified of any queries on the genuineness or otherwise of any issue hampering registration and transfer of the suit property even after being served with a demand note.

8. The Ex-parte Applicant further submits that he has no civil claim against the registrar hence the only appropriate remedy available to him in law is by way of judicial review. He takes issue with the Respondent's decision making process in discharging its mandate and seeks that the Application be allowed as prayed.

9. The Interested Party's submissions were filed on 23rd October 2018. He reiterates the contents of his Response, particularly that he sold the suit property to the Ex-parte Applicant and discharged his contractual obligations. Interestingly, even though the Interested Party's role is limited he washes his hands off the matter and prays that the Application be dismissed with costs yet the granting or otherwise of orders sought will have no effect on him.

10. The Respondent's submissions were filed on 6th December 2018. State Counsel condensed the issues for determination into two; namely whether the Application is a proper suit for judicial review and whether the Applicant is entitled to the orders of mandamus and prohibition sought. Counsel was of the view that this case is hinged upon land ownership hence improperly instituted by way of judicial review. He relied on the cases of **John Peter Mureithi & 2 Others Vs Attorney General & 4 Others (2006) eKLR** On the issue of entitlement to the remedies sought, the Respondent submitted that the Ex-Parte Applicant's claim does not warrant the remedies of mandamus and prohibition sought because they can pursue the claim through a civil suit. Counsel relied on the case of **Republic Vs Kenya National Examinations Council ExParte Gathenji & Others Civil Appeal No. 266** quoted in **John Peter Mureithi & 2 Others vs Attorney General & 4 Others (supra)** where the Court observed that where a statute which imposes duty leaves discretion as to the mode of its performance, mandamus cannot command that the duty be carried out in a specific way. He also argued that the order of prohibition if granted would be against public interest by curtailing the Respondent from performing its statutory duties hence the Application should be dismissed with costs.

11. I have considered the Application herein, the Statement of facts, supporting documents and submissions. While I agree with the Respondent that judicial review is an inappropriate way to deal with matters of land ownership, this does not generally rule it out as a remedy in land cases. The Ex-parte Applicant's claim is that he bought land from the Interested Party, in his view the transaction was above board and all requisite documents and fees were paid to the Respondent who is refusing to finalize the process by registering the suit property in his name; without any cogent reasons or explanations. The authority cited by the Respondent is distinguished from the case at hand in that that case involved trust land and private entities to which judicial review did not apply as they were not public bodies. Also, it hinged on land ownership. Further, the suggestion that a civil suit with provision for damages is more appropriate is misconceived considering the kind of relief expected to flow from the Respondent to the Ex-Parte Applicant. On what basis would such damages be awarded and how can they be calculated?

12. It is trite law that he who alleges must prove. The Ex-Parte Applicant has presented a sale agreement, An Application for Land Control Board Consent and the resultant consent, the Title Deed of the suit property as well as a Certificate of Official Search showing the Interested Party as the registered proprietor thereof. The Respondent, while alleging that the Interested Party is an imposter and the Ex-Parte Applicant is relying on forged documents, has not presented any evidence to justify its claims; documents of which the Respondent is ideally the custodian. If the Interested Party is an impostor, who is the real owner? What is the history of the property's ownership and where are there duplicate or duplicitous entries?

13. Judicial review allows the Court to scrutinize a public body's decision making process. The Respondent is well within its rights to interrogate the validity of a title deed and instruments of transfer. However, its duty of registration is not as general as it is painted to be. I agree with the Ex-Parte Applicant that the Respondent in exercising its duty needs to adhere to the statutory underpinning set by **Section 14 of the Land Registration Act**.

14. The question that remains is if the Ex-parte Applicant is entitled to orders sought. In as much as the Respondent's conduct falls short of the legitimate expectation of parties involved as well as the tenets of fair administrative action, the Court cannot place itself in the Respondent's shoes and make a blanket order compelling it to register the property in the Ex-Parte Applicant's name if there are indeed circumstances that preclude such action. The Court is not concerned with the merits of the Respondent's decision but with the process. In **Suchan Investment Limited Vs Ministry of National Heritage & Culture & 3 Others [2016] KLR**, the Court of Appeal held thus:

“The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.”

15. The remedy of prohibition looks to the future and forbids a public body from continuing proceedings in excess of its jurisdiction or in

contravention of the law of the land. In this case, such an order would be of no effect. I therefore decline to grant it.

16. What is necessary in this matter is for the court to take such action and/or issue such orders as will advance the interest of justice. It is helpful that the ex parte applicant anchored his application to some extent on the **Fair Administrative Action Act (No 4 of 2015)**. The Act is refreshingly liberal and adaptive to the realities of our time. It avoids the constricting technicalities of procedure that attended judicial review matters in the past and widens the scope of remedies that the court can grant. Section 10(1) is particularly enlightening and provides as follows:

10(1) An application for judicial review shall be heard and determined without undue regard to procedural technicalities.

17. I realise that the ex parte applicant had good reason to feel aggrieved. It was at the lands office that he conducted a search to satisfy himself that the interested party owned the land that he intended to buy. It is that office that gave him the results that persuaded him to transact with the interested party. And it is that office that accepted his papers after transacting with the interested party and started processing them with a view to issuing title. Yet at the last minute, and apparently without giving reasons, it declined to issue title.

18. I have already pointed out that it is usually not the business of the court to make decision for any administrative body. The merits of any decision is not what the court is concerned about. The court is normally concerned with the fairness attending the decision making process. If the court agrees with the Ex parte Applicant's wish that the respondent be compelled to issue title, that would be tantamount to making the decision for the respondent. Yet the respondent may have very sound reasons for its last minute refusal to issue title.

19. Section 11 of the Fair Administrative Action Act spells out various orders that the court may issue. Among the orders (see Section 11 (1) (c)) is one directing the administrator to give reasons for the administrative action or decision taken in a given matter. I find such order very appropriate in this case. In the course of proceedings, it was alleged that the interested party is an imposter; that the documents lodged were forged; and that the interested party is not the owner of the land he sold to the Ex parte Applicant.

20. The respondent needs to give detailed and cogent reasons for the stand taken disclosing frankly who the real owner of the land is, the forgery or fraud involved, and/or any other reasons that would justify refusal to issue title. Where necessary, documentary back-up should be availed. This is the kind of disclosure, or truth if you like, that would satisfy the Ex parte Applicant and enable him to take the necessary action.

21. As a penultimate measure therefore, this court orders that the respondent be furnished with the kind of information or reasons already mentioned. The adversarial nature of our system is such that this matter may have already created resentment or ill-feelings between the parties. For these reasons, let compliance with this order be made in open court.

22. Full and satisfactory compliance may make it un-necessary to take any other step. Non-compliance would on the other hand persuade the court that the respondent has ulterior motives in refusing to issue the Ex parte Applicant with title and that might render necessary invocation of sanctions against the office holder and/or issuance of the mandamus order that the Ex parte Applicant has prayed for. Compliance should be within 30 days after delivery of the judgment unless the court extends the period on request.

23. This judgment remains inconclusive to the extent that the court has not yet decided whether or not to issue the Ex parte Applicant with an order of mandamus. That decision must surely come or not depending on how the respondent is going to handle the order already issued. That is also the time the order on costs will be made. I leave it at that for now.

Dated, signed and delivered at Busia this 9th day of July, 2019

A. K. KANIARU

JUDGE

In the Presence of:

Ex-parte Applicant: Absent

Respondent: Absent

Interested Party: Absent

Counsel of Ex-parte Applicant: Absent

Counsel of Respondent: Absent

Counsel of Interested Party: Absent

Court Assistant: Nelson Odame