



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL & LAND COURT AT KISUMU

JUDICIAL REVIEW NO. 4 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF THE RECTIFICATION OF THE APPLICANT CERTIFICATE OF LEASE, THE REGISTER

AND REFERENCE NUMBER OF APPLICANTS PARCEL OF LAND, KISUMU MUNICIPALITY BLOCK

11/223, F/RNO.196 AS PER THE BEACON CERTIFICATE BY SURVEYOR PHILIP OUMA DATED

30TH OCTOBER 2008 TO CORRECT THE MISTAKE CAUSED BY ALLOCATING IT AN

ALREADY EXISTING LAND REFERENCE NUMBER

AND

IN THE MATTER OF AMENDING THE LAND REFERENCE NUMBER OF THE APPLICANTS LAND IN THE

LAND REGISTER AND IN AREA APPROVED CADASTRAL MAP TO INCLUDE OR REFLECT THE

NEW REFERENCE NUMBER.

AND

IN THE MATTER OF SECTION 6 (3), 9(2)(D), (15(1)&(2), 17(1) &(D) 50(1) OF

THE LAND REGISTRATION ACT, 2002.

REPUBLIC APPLICANT

=VERSUS =

KISUMU COUNTY LAND REGISTRAR.....1ST RESPONDENT

KISUMU COUNTY LAND SURVEYOR2ND RESPONDENT

WALTER EDWIN OMINDEEXPARTE APPLICANT/ RESPONDENT

AND

ROSE C.A.NYASEME.....1ST INTENDED INTERESTED PARTY /APPLICANT

FRANKLINE O. NYASEME..2ND INTENDED INTERESTED PARTY /APPLICANT

E & L JUDICIAL REVIEW NO. 4 OF 2020

Rose Nyaseme and Frankline Nyaseme have come to this court as interested parties with an application dated 29th October 2020 seeking prayers that leave be granted to them to be enjoined as interested parties and that the court be pleased to set aside the ex parte orders issued herein on 2nd September 2020 in favour of the ex parte applicant. Moreover, that the applicant's counsel, Andrew Ombwayo be referred to the Advocates Disciplinary Committee by the court for action for engaging in acts that amount to professional misconduct or this court be pleased such action as it deems appropriate against Mr Andrew Ombwayo Advocate. That the Ex parte Applicant/respondent and/or his counsel be condemned to bear the costs of this Application.

The applicants rely on the grounds apparent on the face of the application and the supporting affidavit of Franklin Eric Odhiambo. They contend that the ex parte Applicant /respondent herein obtained orders on the 2nd of September 2020 compelling the Land Registrar to amend the certificate of lease to Parcel number KISUMU MUNICIPALITY BLOCK 11/223, F/R NO.196/12 as per the beacon certificate dated 30th October 2008. The said orders were obtained without the knowledge and/or involvement of the intended interested parties/applicants herein. He further averred that the orders being sought in this suit were similar to those being sought in Kisumu ELC No. 25 Of 2019 which was still pending in court where the exparte applicant herein is the plaintiff while the intended interested party is a defendant, and that the orders sought herein directly affect their interests.

The applicants learnt of the existence of this suit when they received information from the land registrar that an order had been made for amendment of the certificate of lease. They also stated that they were never served with this application and as a result did not attend court on the 2nd of September when this matter was scheduled for hearing. It was the applicant's further contention that the exparte applicant/respondent never informed court that the applicant herein was not interested in the matter but only mentioned that the Attorney General was absent.

He was baffled that the ex parte applicant's counsel never bothered to disclose to the court the existence of Kisumu Elc No. 25 Of 2019.

The respondent on his part filed submissions and a replying affidavit stating that he served the intended interested party's advocates M/s Owiti Otieno & Ragot with the pleadings herein on the 5th of June 2020 in accordance with Order 53 rule 3(2) of the Civil Procedure and that there was an affidavit of service and stamp of the advocates thereon.

He further stated that by failing to enter the proceedings the intended interested party/ applicant waived his right to be heard and that by lying that he had not been served he is unworthy of the court's discretionary orders.

Counsel for the ex parte applicant/respondent further argued that the pendency of Kisumu Elc No. 25 of 2019 did not bar them from seeking orders of mandamus which could not be granted in the civil proceedings.

In response counsel for the intended interested party/applicant stated that in KISUMU ELC NO. 25 OF 2019 the ex parte applicant/respondent was seeking the following orders:

1. a restraining injunction as well as a mandatory injunction compelling the 1st Respondent herein to rectify the register for land parcel **L.R. NO. KISUMU MUNICIPALITY BLOCK 11/223** by deleting the altered size of the said parcel of land to revert to the initial scale.
2. An order compelling the 2nd respondent to restore the ex parte Applicant's property **L.R NO. KISUMU MUNICIPALITY/BLOCK 11/223 TO** its initial position.

Counsel further submitted that the ex parte applicant/respondent had no intention of making him a party to these proceedings explaining why their names were not on the face of the Judicial Review application. That this omission therefore was in contravention of Order 53 Rule 3(1) of the Civil Procedure Rules which require that all parties directly affected by the proceedings be served.

He also submitted that the alleged service upon M/s Owiti, Otieno & Ragot Advocates was without basis as they were only advocates representing the intended interested party/applicant in a different matter. He further argued that the ex parte applicant's/Respondent's contention that he could only get help through Judicial Review proceedings was baseless as Article 23 of the constitution now allows courts to issue injunctive orders against the Government. It was his submission that counsel for the ex parte Applicant/respondent had acted unprofessionally and urged the court to refer him to the advocates' disciplinary committee.

From the foregoing the two issues for determination are whether the intended interested party/applicant would be adversely affected by the outcome of this suit so as to warrant their inclusion and participation and whether the court has power to refer Advocates to the Advocate's disciplinary committee.

On the first issue, the pleadings in both this suit and Kisumu Elc No. 25 should be scrutinized closely. This would also answer the question of whether the intended interested party should be enjoined in these proceedings. In Kisumu Elc No. 25 the ex parte applicant/respondent herein is the plaintiff while the intended interested party/Applicant is the 2nd Defendant. The following prayers are being sought in the plaint

- a) An order of permanent injunction to restrain the 1st and 2nd Defendants from encroaching onto the plaintiff's parcel of land no. KISUMU MUNICIPALITY/BLOCK 11/223 AND TO SPECIFICALLY restrain them from trespassing into and/or interfering with the Plaintiff's quiet ownership, possession, use and enjoyment of his parcel of land no. KISUMU MUNICIPALITY/BLOCK 11/223.
- b) An order of mandatory injunction compelling the 3rd defendant (the 1st respondent herein) to rectify the register for land parcel no. KISUMU MUNICIPALITY/ BLOCK 11/132 by deleting the altered size of the said parcel of land of the scale of HA to revert to the initial scale of ACRES and/or to convert the acreage of the said land to its proper equivalent HECTARES.

c) An order of mandatory injunction compelling the 4th Defendant (the 2nd Respondent herein) to rectify the survey map to restore the plaintiff's parcel of land no. KISUMU MUNICIPALITY/BLOCK 11/223 INTO its initial place and position and to restrain them permanently from ever interfering with the said map of the plaintiff's parcel of land.

In the Judicial Review proceedings herein, the ex parte applicant was seeking the following order;

1. An order of mandamus be and is hereby issued to compel the 1st Respondent to amend the certificate of lease to the applicant's property KISUMU MUNICIPALITY BLOCK 11/223, F/R NO.196/12 as per the beacon Certificate by surveyor Philip Ouma dated 30th October 2008, by giving it a new reference number and to rectify the Kisumu County Area Land Register and or the relevant register to reflect that amendment, and the 2nd Respondent to amend the area approved cadastral map to reflect the change in the reference number to the said property.

From the outset it is important to note that both parties do not refute the existence of these suits. In Kisumu ELC No. 25 the ex parte applicant/respondent is claiming that the intended interested party/applicant had caused an illegal transfer of KISUMU MUNICIPALITY BLOCK 11/132 into their names and created a dispute between land no. KISUMU MUNICIPALITY BLOCK 11/223 and KISUMU MUNICIPALITY BLOCK 11/132, by unlawful alteration of documents at the land registry with a view of dispossessing the ex parte applicant/respondent. The intended interested party/applicant on his part disagrees with this assertion in their defence.

From the foregoing it is quite clear that the intended interested party/applicant herein is an affected party within the meaning of Order 53 Rule 3 (2) of the Civil procedure rules 2010.

Further the fact that the ex parte applicant/respondent submitted that he served the intended interested party/applicant herein despite not including them as parties in the judicial Review proceedings is an indicator that they recognized them as interested parties.

The Black's Law Dictionary 8th Edition defines an interested party as a party who has a recognizable stake (and therefore standing) in a matter. From the foregoing it is easily decipherable that the intended interested party/applicant has a stake in the matter and should have been enjoined from the get go.

Another issue of great bearing to this is whether the Intended interested party/applicant was ever served with the Judicial Review Application. It is their contention that they were never served.

Order 53 Rule 3(3) of the Civil Procedure rules is very clear on this that; An affidavit giving the names and addresses of, and the place and date of service on, all persons who have been served with the notice of motion shall be filed before the notice is set down for hearing, and, if any person who ought to be served under the provisions of this rule has not been served, the affidavit shall state that fact and the reason why service has not been effected, and the affidavit shall be before the High Court on the hearing of the motion.

No such affidavit has been filed by the ex parte applicant/Respondent instead he only refers to a stamped copy of an application. This in my view doesn't amount to proper service. I rely on the case of James Toroitich Kisa & 3 others vs City Council of Nairobi [2010]Eklr where the court held that

“Order 53 Rule 3 is couched in mandatory term to ensure that no party is condemned unheard. If this Court were to go ahead and make orders or review NEMA's decision without hearing it, it would be in breach of the tenets of natural justice that no party should be condemned unheard.”

Further in the case of MEME v REPUBLIC & ANOTHER [2004] 1 KLR 637 the court had this to say about enjoyment of parties in judicial Review proceedings.

“We have seen clear merit in this proposition that in public law matters such as those falling under judicial review or constitutional reference, the High Court ought to satisfy itself that all persons who should be served with the trial papers and any supporting evidence, have been duly served. Counsel admitted, and we agree, that in public law applications of the type exemplified herein, it is desirable that the widest possible participation should be allowed.”

In view of the foregoing it is my considered view that the intended interested party should have been included in the proceedings hence has met the threshold for grant of prayers sought in the application.

On the second issue as to whether the court has power to refer Advocates to the Advocate's disciplinary committee, It was the intended interested party/Applicant's contention that the court should refer the ex parte applicant's advocate to the Advocates Complaints Commission. He referred to Sections 4 and 5 of the law society of Kenya Act and Section 55 and 56 of the Advocates Act.

Sections 4 and 5 of the Law Society of Kenya Act provide for the functions and objects of the Law Society and the general powers of the society respectively. None of these vests any powers in the court to lodge a complaint at the commission. Even though Section 53 (4) allows the commission to receive complaints from any party, I don't believe it is within the province of the court to lodge such complaints. Moreover, the court herein is not the aggrieved party. And in any case, it is the intended interested party/applicant who is seized with all the facts and evidence that is likely to be used at the Commission.

Nothing prevents the intended interested party/applicant from seeking the court's assistance in terms of evidence before the commission if need be.

The upshot of the above is that the leave is hereby granted to the applicants to be enjoined in this suit as interested parties and that the ex parte orders issued herein on 2nd September in favour of the ex parte applicant are set aside. The other prayer is not granted. Cost of the application to the applicants.

DATED AT KISUMU THIS 21st DAY OF MAY, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE