



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC JR NO. 2 OF 2021

REPUBLIC.....APPLICANT

-VERSUS-

THE LAND REGISTRAR, RACHUONYO EAST, SOUTH AND

NORTH SUB COUNTIES.....RESPONDENT

AND

OTIENO KENNEDY TINDI.....EX-PARTE APPLICANT

JUDGMENT

1. This matter was originally filed at Kisii Environment and Land Court. On 9th April, 2021, it was transferred to this court for hearing and determination.

2. In an application by way of Ex-parte Chamber summons dated 2nd April, 2021 and filed in court on 9th April, 2021, the Ex-parte applicant, Otieno Kennedy Tindi through M/s Mugo and Associates Advocates sought leave of the Court to file the present Notice of motion dated 3rd May 2021 and duly filed in court on 5th May 2021 (the motion herein). On 16th April 2021, Leave sought was granted accordingly.

3. So, by the motion, the ex-parte applicant is seeking the following orders; -

a) An order of certiorari do issue to quash the decision of the respondent in revoking Title No. Central Kasipul/Kawere Kamagak/2147 from the name of the ex parte applicant herein Otieno Kennedy Tindi to the name of the previous owner Jane Akinyi Odero as proprietor.

b) An order of mandamus do issue compelling the respondent herein to reinstate the ex-parte applicant Otieno Kennedy Tindi as the duly registered proprietor of the parcel of land known as Title No. Central Kasipul/Kawere Kamagak/2147.

c) An order of prohibition do issue directed against the respondent from revoking the ex-parte applicant's title as the duly registered proprietor of the parcel of land known as Title No. Central Kasipul/Kawere Kamagak/2147 without following the due procedure and compliance with the applicable provisions of the Constitution, Fair Administrative of Actions Act and the Land Registration Act.

d) A declaration that the decision and conduct of the respondent and in particular the revocation of title No. Kasipul/Kawere Kamagak/2147 in the name of ex-parte applicant Otieno Kennedy Tindi vide the letter dated 01/02/2020 is ultra vires, unlawful, unreasonable, unfair, manifestly unjust and in blatant disregard to the rules of natural justice.

e) Any other and further relief that this honourable court may deem fit and just to grant in the circumstances.

f) Costs of the application be provided for.

4. The motion is anchored on grounds (i) to (xiv) set out on it's face which I note accordingly. It is further supported by the statutory statement and the verifying affidavit of the ex-parte applicant in support of application for leave herein.

5. Briefly, the ex-parte applicant complains that he is the beneficial and registered owner of the suit land LR NO. Central Kasipul/Kawere

Kamagak/2147. That by a letter dated 1st February 2020, the respondent cancelled the ex-parte applicant's title in respect of the suit land without any reason whatsoever and or without according him opportunity to be heard or following the due process thus, precipitating the instant motion.

6. The respondent was duly served with the motion as disclosed in an affidavit of service sworn on 24th May 2021. The same is also shown in the court's proceedings of 26th May 2021. There is no response thereto.

7. On 26th May 2021, the court ordered and directed that the motion be argued by way of written submissions. Consequently, learned counsel for the ex-parte applicant filed a four (4) paged submissions dated 2nd June 2021 giving a brief background of the matter and framed issues for determination infra:-

- a) Whether the ex-parte applicant was accorded fair administrative action.
- b) Whether the respondent's decision to revoke the ex-parte applicant's title deed contravened the rules of natural justice, the ex-parte applicant's right to be heard as well as his legitimate expectation.
- c) Whether the Land Registrar Rachuonyo East, South and North Sub counties had jurisdiction to cancel the ex-parte applicant's title deed and,
- d) Whether the orders sought in the Notice of Motion are merited.

8. To buttress the submissions, counsel cited section 79 (2) of the Land Registration Act, 2016 (2012) and urged the court to grant the orders sought in the motion. Reliance was also made to, inter alia, **Judicial Service Commission (JSC) =vs= Mbalu Mutava and another (2015) eKLR, Halsbury's Laws of England 5th Edition 2010 Volume 61 paragraph 639 and Republic =vs= District Land Registrar, Thika Lands Registrar, Susan Mutiso and 2 others (interested parties), ex-parte Micheal Kamande Gachukia (2019) eKLR.**

9. I have noted the motion in its entirety, the fact that the respondent did not respond to it and the ex-parte applicants' submissions on record. I embrace the four issues for determination as identified in the said submissions.

10. The ex-parte applicant contended that by a letter reference Number RACH/LND/C&R/41/Vol IV/609 dated 1st February 2020, the respondent cancelled his title under section 79 (2) (supra) without affording him an opportunity to be heard and defend his title. He also referred to section 87 of the Land Registration Act (supra), sections 4,7 (2) (a) and (v) of the Fair Administrative Action Act and **Article 47 of the Constitution of Kenya, 2010.**

11. I take into account the assertion of the exparte applicant alongside the Constitution and statutory provisions relied upon in the motion. Plainly, the case law cited in the submissions fortify the assertion.

12. **Article 50 (1) of the Constitution of Kenya,2010** anchors the right to fair hearing. Indeed, the right to fair trial can not be curtailed as stipulated under Article 25 (C) of the same Constitution.

13. **In Re Hebtulla Properties Ltd (1976-80) 1 KLR 1195 at 1209** , it was held :-

"...The Tribunal had a duty to hear the landlord on the objection.It did not hear the landlord.There was in my opinion a violation of the audi alteram partem rule"

14. The **Audi Alteram Rule** is a fundamental principle of justice or constitutionality; see **Judicial Service Commission case and Halsbury's Laws of England (supra).**

15. The respondent's letter does not discern the process of investigations including written notification issued to the affected parties, that the complaint was heard and the criteria followed in cancellation of the ex-parte applicant's title to the suit land not provided for **section 79 (2) and (4) (supra)**. In view of this illegal process, there was violation of the ax-parte applicant's rights as noted in **Articles 47 ,50 (1) and Re-Hebtulla case (Supra).**

16. It is well settled that the burden was always on the plaintiff to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof ; see the Court of Appeal decision in **Kirugi and another =vs= Kabiya and 3 others (1987) KLR 347.**

17. The exparte applicant's claim was heard by way of formal proof. I find it to be steadfast, cogent and has been proved on the balance of probabilities.

18. In the upshot, the application by way of notice of motion dated 3rd May 2021 and duly filed herein on 5th May 2021 is hereby allowed in terms of orders 1, 2, 3 and sought therein and as set out in paragraph 3 hereinabove. Each party to bear own costs owing to the character of the application. Orders accordingly.

DELIVERED, DATED and SIGNED via email further to the earlier notice issued to the parties, this **29TH JULY 2021**

G.M.A. ONGONDO

JUDGE