



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC J.R NO. 48 OF 2019

REPUBLIC.....APPLICANT

VERSUS

JANE NYAMBURA THUO.....1ST RESPONDENT

REGISTRAR OF TITLES

MINISTRY OF LANDS, NAIROBI.....2ND RESPONDENT

EX-PARTE CHARLES JOSEPH MAINA THUO

JUDGMENT

This application for Judicial Review was filed on 30th September, 2019. The ex-parte Applicant (hereinafter referred to only as “the Applicant”) has sought the following orders;

1. That an order of certiorari be issued to remove into this Honourable Court and quash the decision of the 2nd Respondent contained in the Notice of Revocation of Power of Attorney presented on 4th April, 2017 and registered as number IP/A 69344/1 and in its place reinstate the Power of Attorney number IP/A 41103/1 and presented on 24th February, 2005.
2. That an order of prohibition be issued prohibiting the 2nd Respondent from revoking the Power of Attorney number IP/A 41103/1 and presented on 24th February, 2005 being the lawful power of attorney of the Applicant.
3. That an order of mandamus be issued compelling the 2nd Respondent to reinstate the Power of Attorney number IP/A 41103/1 and presented on 24th February, 2005 to the Registrar of Lands by the Applicant.
4. That the costs of the application be awarded to the Applicant.

The application is supported by a verifying affidavit and statutory statement filed together with the application for leave. The Applicant’s case is that on 20th December, 2004, the 1st Respondent sold to him a parcel of land known as Plot No.21 in Kayole Resettlement Scheme, Nairobi (hereinafter referred to as “the suit property”) at a consideration of Kshs. 50,000/-. On the same day, the 1st Respondent and he executed a sale agreement which was witnessed by Jackson Omwenga, Advocate. The suit property was allocated to the 1st Respondent by the City Council of Nairobi. The City Council of Nairobi (hereinafter referred to as “the Council”) required the 1st Respondent to donate an irrevocable power of attorney to the Applicant authorising him to deal with the suit property before transferring the ownership of the suit property from the 1st Respondent to the Applicant.

The 1st Respondent donated to the Applicant an irrevocable power of attorney vesting the Applicant with absolute and unfettered power to deal with the suit property which included power for the Applicant to transfer the suit property to himself or to any other person. Following their compliance with the requirements of the Council, the suit property was transferred by the Council from the name of the 1st Respondent to the Applicant and the Applicant was issued with a Plot Formalization Card in respect of the property.

The Applicant thereafter had both the agreement for sale and the power of attorney stamped. In addition, he registered the power of attorney as IP/A41103/1 on 24th February, 2005. The Applicant subsequently took possession of the suit property and developed the same with one room rental houses from which he was receiving a monthly rent of Kshs. 2,000/-.

In 2014, one Stephen Irungu Thuo went to the suit property and directed the tenants occupying the property to pay rent to the 1st Respondent

whom the said Stephen Irungu Thuo claimed to be the owner of the premises. The Applicant filed a suit against the said Stephen Irungu Thuo at the Chief Magistrates Court at Milimani in Milimani CMCC No. 2605 of 2014 (hereinafter referred to as "the lower court suit"). The lower court issued an injunction restraining the said Stephen Irungu Thuo from interfering with the suit property. In 2017, the Applicant filed a suit before this court in ELC No. 519 of 2017 (hereinafter referred to as "the ELC Suit") claiming ownership of the suit property. The ELC Suit was transferred to the lower court to be heard together with the lower court suit. During the prosecution of the ELC Suit, he learnt that the irrevocable power of attorney that was donated to him by the 1st Respondent had been revoked by the 1st Respondent on 4th April, 2017 which revocation was registered as IP/A 69344/1. The Applicant was not served with any notice before the said power of attorney was revoked. The Applicant learnt of the said revocation when the 1st Respondent served him in the said ELC Suit with a notice of revocation of power of attorney and a statutory declaration that had been lodged and registered by the 2nd Respondent.

The Applicant contended that the 2nd Respondent exceeded his statutory powers in revoking an irrevocable power of attorney donated for valuable consideration. The Applicant contended further that the 2nd Respondent exceeded his powers by failing to note that the irrevocable power of attorney was not subject to revocation. The Applicant contended that the 2nd Respondent denied the Applicant a fair hearing contrary to the provisions of the Constitution. The Applicant contended that the 2nd Respondent condemned him unheard.

The Applicant contended that such power of attorney could only be revoked through an order of a competent court of Law. The Applicant contended that the revocation of the said power of attorney was unconstitutional, unfair and unlawful and that it breached his right to own property. The Applicant contended that the actions of the Respondents were unreasonable, malicious, capricious and made in bad faith. The Applicant contended that the 2nd Respondent abused his office by colluding with the 1st Respondent to deprive the Applicant of the suit property.

The Respondents were served with the application and none responded to the same. The application was argued on 16th June, 2021. The Applicant argued that an irrevocable power of attorney cannot be revoked. The Applicant submitted that the power of attorney was given pursuant to a sale agreement between the Applicant and the 1st Respondent and that the Applicant was not given a fair hearing before the said power of attorney was revoked. The Applicant submitted that the 2nd Respondent should be compelled to reinstate the said power of attorney that was irregularly revoked.

Determination:

What I need to determine is whether the 2nd Respondent acted lawfully and within his powers in revoking the special power of attorney dated 20th January, 2005 registered on 24th February, 2005 as IP/A 41103/1. The said power of attorney was registered under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed).

Sections 50 and 51 of the Registration of Titles Act provides as follows:

50. The proprietor of any land, if not a minor, a lunatic or a person of unsound mind, may appoint any person to act for him in respect of the transfer or other dealing with the land in accordance with this Act by executing a power in form M in the First Schedule, and a duplicate or an attested copy thereof shall be deposited with the registrar, who shall enter in the register a memorandum of the particulars therein contained and of the date and hour of its deposit with him....

51. A power of attorney may be revoked by an instrument of revocation in form N in the First Schedule, and after the registration of revocation of the power the registrar shall not give effect to any transfer or other instrument signed pursuant to that power...

It is clear from the foregoing that a power of attorney registered under section 50 of the Registration of Titles Act may be revoked by registration of an instrument of revocation. The issue in contention is whether the special power of attorney dated 20th January, 2005 could be revoked. There is no dispute that the power of attorney dated 20th January, 2005 was an irrevocable power of attorney. It states as follows in part:

"This power of attorney is made and executed by me of my own free will and accord and the same is irrevocable."

In CCB v MIB & another [2014] eKLR, the court stated as follows on the character and features of an irrevocable power of attorney:

"15. An extract from the free Law Library describes an irrevocable power of Attorney as a power of Attorney that cannot be revoked by the principal. A power of Attorney lapses for legal reasons (by operation of law) such as for incapacity or death. An irrevocable power of Attorney will not lapse because it is continuing (enduring) and irrevocable, cannot be cancelled. An irrevocable power of Attorney must say that it is irrevocable and it must be given for valuable consideration.

16. From the definition given herein above, there are certain elements which must exist before a power of Attorney can be said to be irrevocable. One of those elements is that it must be given for valuable consideration. It is a power which only lapses by operation of law such as for incapacity or death."

As I have mentioned earlier, the power of attorney dated 20th January 2005 expressly states on its face that it is irrevocable. The evidence before the court also shows that the power of attorney was given by the 1st Respondent for valuable consideration. The 1st Respondent had sold the suit property to the Applicant at Kshs. 50,000/- and the power of attorney was to facilitate the transfer of the suit property to the Applicant. I am therefore satisfied that the power of attorney in question meets the criteria for an irrevocable power of attorney.

Since the power of attorney dated 20th January 2005 (hereinafter referred to only as “the power of attorney”) was irrevocable, the 1st Respondent had no right to revoke it and the 2nd Respondent should not have registered its revocation. The provisions of section 51 of the Registration of Titles Act are not mandatory. The 2nd Respondent had a discretion that he had to exercise reasonably. From her notice of revocation of the power of attorney dated 13th March 2017, the 1st Respondent contended that the said power of attorney was fraudulently registered by the Applicant. Since the said power of attorney stated on its face that it was irrevocable, the 2nd Respondent should not have registered the instrument for revocation of the same. I am in agreement with the Applicant that in registering the revocation of the said power of attorney, the 2nd Respondent acted unlawfully and in excess of his powers. I am also of the view that in the circumstances of this case, the 2nd Respondent should have given the Applicant a hearing before registering the revocation of the power of attorney. The power of attorney vested an interest in land upon the Applicant. The 1st Respondent sought to revoke the same on the ground that it was registered fraudulently. Since the registration of the said instrument of revocation was going to affect the interest that the Applicant had on the suit property, natural justice demanded that the Applicant be heard before that decision that was going to affect his interest was taken.

Article 47 (1) of the Constitution provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Section 4 (1), (2) and (3) of the Fair Administrative Action Act, 2015 provides as follows:

4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

Due to the foregoing, it is my finding that the decision by the 2nd Respondent to register the instrument of revocation of the power of attorney dated 20th January, 2005 was illegal, in excess of the 2nd Respondent’s powers and was made in breach of the rules of justice. The decision was also unconstitutional and in breach of the provisions of the Fair Administrative Action Act, 2015.

In Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land.... Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

In Halsbury’s Laws of England, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

“The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leave discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

Due to the foregoing, I am satisfied that the Applicant’s Notice of Motion dated 30th September, 2019 is well founded. The application is allowed on the following terms;

1. The decision of the 2nd Respondent made on 4th April, 2017 to register the Notice of Revocation of Power of Attorney dated 13th March, 2017 as IP/A 69344/1 is brought to this court and quashed.
2. An order of mandamus is issued compelling the 2nd Respondent to reinstate in the register the Power of Attorney dated 20th January, 2005 that had been registered as IP/A 41103/1 on 24th February 2005.
3. An order of prohibition is issued prohibiting the 2nd Respondent from registering the revocation of the Power of Attorney dated

20th January, 2005 that had been registered as IP/A 41103/1 on 24th February 2005 unless directed to do so by an order from a court of competent jurisdiction.

4. The orders issued herein shall in no way be interpreted as determining the ownership of Plot No. 21 Kayole Resettlement Scheme, Nairobi or the validity of the Special Power of Attorney dated 20th January, 2005 that was registered as IP/A 41103/1 on 24th February 2005. These are issues that can only be determined in a civil suit filed for that purpose in which the parties shall have an opportunity to adduce oral evidence.

5. Each party shall bear its costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Applicant present in person

N/A for the Respondents

Ms. Betsy Chelangat-Court Assistant