



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

MISC. CIVIL CASE NO. 39 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF LAND PARCEL NO. KERICHO/KONGOTIK/899

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF RECTIFICATION AND CANCELLATION OF THE

REGISTER BY THE BOMET COUNTY LAND REGISTRAR

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 S 8 AND 9

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR, BOMET.....1ST RESPONDENT

ELIZABETH CHEPKEMOI KIGEN.....2ND RESPONDENT

AND

SIMON KIBET CHEPKWONY.....EX-PARTE APPLICANT

RULING

1. By a Notice of Motion dated 29th July 2017, the Applicant herein sought leave Apply for the orders of Certiorari to remove into the High Court (sic) for the purpose of being quashed the order/decision made by the Bomet County Land Registrar under the Land Registration Act No. 3/2012 on 25th May 2016 and subsequent cancellation of the Applicant's registration as owner of Kericho/Kongotik/899 and registration of the 2nd Respondent (Elizabeth Chepkemoi Kigen) as the owner.

2. The Application was supported by grounds on the face of it as well as on the verifying Affidavit of Simon Kibet Chepkwony the Applicant herein.

3. Pursuant to service of the said application, there was no response from the 1st Respondent however the 2nd Respondent, Elizabeth Chepkemoi Kigen filed her Replying affidavit sworn on the 5th March 2020 to the effect that the Applicant had no claim on the suit land and the application was preferred to frustrate her efforts to utilize her rightful parcel of land and which would gravely be prejudicial to her.

4. The application was disposed of by way of written submissions to which the Applicant submitted whistle giving a brief history of the matter in question to the effect that his late grandmother Chemarus Kigen had allocated him parcel of land No. Kericho/Kongotik/899 wherein he had proceeded and obtained title on the 23rd May 2014 pursuant to the judgment delivered in Bomet Court Civil Suit No 166 of 2003 between Chemarus Kigen w/o Kigen and Elizabeth Chepkemoi Kigen the 2nd Respondent herein, who was one of two wives of the Applicant's grandmother, in a woman to woman marriage.
5. That after he had procured title, the Bomet Land Registrar had cancelled the same and had advised the 2nd Respondent to move into the suit land. That the 2nd Respondent had violently complied, moved into the suit land and displaced the Applicant.
6. That the Applicant is aggrieved by the decision of the Land Registrar of cancelling his title deed which had been rightfully issued to him pursuant to a court order.
7. The ex-parte Applicant framed the issues for determination as follows;
 - i. Whether the title deed issued to the ex-parte Applicant namely No. Kericho/Kongotik/899 was valid pursuant to a judgment and Decree of the court vide Bomet Civil Suit No. 166/2003
 - ii. Whether the Bomet Land Registrar's decision to cancel the title deed No. Kericho/Kongotik/899 issued to the ex-parte Applicant and registering the second Respondent as the owner upon overturning the court Decree/order was done in excess of jurisdiction and illegal.
 - iii. Whether the title No. Kericho/Kongotik/899 issued by the land Registrar to the 2nd Respondent is illegal, null and void and should be revoked and registered to the ex-parte Applicant's name.
8. On the first issue for determination, it was the ex-parte Applicant's submission that pursuant to an award issued in an Arbitration chaired by the District Officer Longisa, the same had been adopted by the Bomet Court in Civil Suit No. 166 of 2003 wherein through the court's judgment and Decree, he had been granted ownership of the suit land with the remainder of the land owned by Chemarus Kigen to be divided amongst her two wives.
9. That pursuant to the pronouncement of the said judgment and Decree, he had registered himself as proprietor of the suit land No. Kericho/Kongotik/899 and had subsequently obtained title. That the Elders had exercised the powers given to them by the court when the dispute had been referred to them and no appeal had been filed against the said judgment.
10. In regard to the second issue for determination, it was the ex-parte Applicant's submission that the provisions of Section 79 of the Land Registration Act gave power and jurisdiction to the Registrar on matters of rectification of titles and provided that no alteration affecting the title of the proprietor could be made pursuant to without the proprietor's consent unless the proprietor had by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission, or it would for any other reason be unjust for the alteration not to be made.
11. That the Land Registrar's action of cancelling his title and registering it to the 2nd Respondent was illegal under the act, excess of his jurisdiction and in breach of the rules of natural justice and the rights to be heard.
12. That the Land Registrar had violated the court order in Bomet Civil Suit No. 166 of 2003 and Sotik Civil Suit No. 1 of 2015 as he had lacked the jurisdiction to sit on Appeal against the court's Decree which legally and rightfully had given the land to the ex-parte Applicant. It was the Applicant's submission that he had proved his case on a balance of probability and the court ought to grant the application for Judicial Review to quash the Land Registrar's decision dated 25th May 2016. He also prayed for costs.
13. In opposing the application, the 2nd Respondent herein filed their written submissions albeit out of time for reason that they had not been served with the Applicants submissions. Their submissions was to the effect that the 2nd Respondent was married to Chemarus Kigen (deceased), under the Kipsigis customary law in a woman to woman marriage, who was the registered proprietor of No. Kericho/Kongotik/899. That the late Chemarus Kigen was also married to Esther Kigen under the same arrangements and that she had settled her two wives on the suit property.
14. That thereafter, there arose wrangles as to the division of the property between the two wives wherein the dispute was presented to the Land's Disputes Tribunal wherein a decision had been made on 20th December 2004 that the suit land be divided equally amongst these wives. The said decision was subsequently adopted by the court.
15. The Respondent's submission was that the subject suit having been registered on the 1st December 1970 the Land Tribunal had usurped its mandate in dealing with the registered parcel of land as the same fell outside its purview of jurisdiction.
16. The Respondent's issue for determination was as follows;
 - i. What is the effect of the Land Disputes Tribunal's decision of 20th December 2004?
 - ii. Whether the orders sought are capable of being granted.
17. On the first issue for determination, the 2nd Respondent relied on the provisions of Section 3 of the Land Disputes Tribunal Act to

submit that the mandate of the Tribunal did not extend to registered parcels of land.

18. That the ex-parte Applicant had sought for the cancellation of a title which had been issued pursuant to a decision of the Land Tribunal which decision had been adopted by the Magistrate's Court and the impugned title issued.

19. That there was no proper title in the first place capable of being cancelled by the 1st Respondent since whatever proceedings that flowed from the Land Disputes Tribunal's decision were null and void and proceedings that arose out of a nullity could therefore not be legal as the decision was null ab initio.

20. That it was a nullity when the Magistrate's Court had adopted the decision of the Land Disputes Tribunal and the title in respect to No. Kericho/Kongotik/899 could only be impugned under the regime in which it had been registered. That the Judicial Review application ought to be dismissed for if the orders sought were granted, then it would be sanitizing and illegality.

21. On the second issue for determination the 2nd Respondents' submission was that the orders sought by the ex-parte Applicant could not issue at all. That orders were not to be issued in vain as the same would serve no purpose as the proceedings that gave rise to the title in question were a nullity in law and hence incurably bad. That if the ex-parte Applicant believed he had a bona fide claim then he had other means to approach the court but not through the current procedure. That the 1st Respondent's decision to cancel the title documents though irregular as it may be, could not override the fact that the impugned title was procured the irregularly.

22. That the 2nd Respondent has been in occupation of the suit land for more than 50 years a fact that was not disputed, and therefore she stood to suffer prejudice if she were evicted from the suit land.

23. In conclusion, the 2nd Respondent submitted that the orders sought by the ex-parte Applicant could not issue as he was seeking to sanitize a nullity through the honorable court. They sought for the application to be dismissed with costs.

Determination

24. I have considered the application herein, the response thereto, the submissions filed, the authorities' cited, as well as the relevant law. Briefly, the ex-parte Applicant's grievance is to the effect that following an adoption into a judgment and decree of an Award by the Disputes Land Tribunal, by the Bomet Civil Suit No. 166 of 2003, he had been registered as proprietor to the suit land No. Kericho/Kongotik/899. That the Land Registrar, Bomet subsequently cancelled the title registered to his name, and issued a new title in the name of the 2nd Respondent despite the fact that he had no jurisdiction to do so.

25. The Applicant has therefore filed the present application seeking to remove to this court for the purpose of being quashed, the order/decision made by the Bomet County Land Registrar.

26. There was no response from the 1st Respondent however, the 2nd Respondent in opposing the application submitted that the ex-parte Applicant had sought for the cancellation of a title which had been issued pursuant to a decision by the Land Tribunal, which decision had been adopted by the Magistrate's Court and the impugned title issued. That there was no proper title in the first place capable of being cancelled by the 1st Respondent since whatever proceedings that flowed from the Land Disputes Tribunal's decision were null and void and therefore proceedings that arose out of a nullity could not be legal as the decision was null ab initio. That the 1st Respondent's decision to cancel the title documents though irregular as it may be, could not override the fact that the impugned title was procured the irregularly

27. Thus, from the parties' submissions, the issues this court is called upon to determine is **whether the Applicant has established any grounds for Judicial Review order of Certiorari.**

28. In the present case, the Applicant vide an application dated 29th July 2017 has sought an order of Certiorari to quash the order/decision made by the Bomet County Land Registrar on 25th May 2016 which subsequently cancelled the Applicant's registration as owner of Kericho/Kongotik/899 and registered the 2nd Respondent instead.

29. The law under Order 53, rule 2. of the Civil Procedure Rules provide as follows:

Leave shall not be granted to apply for an order of Certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

30. In the case in **Republic -vs- Kenya National Highways Authority & 2 others ex-parte Amica Business Solutions Limited [2016] eKLR** the Court of Appeal observed as follows:

"The decision complained of is unique in the sense that the decision of the 1st Respondent arose out of the request by the 3rd Respondent. At no time were there formal proceedings leading to the decision. The decision was in a letter responding to 3rd Respondent's request for permission to erect and maintain billboards and gantries. The elephant in the room here is whether that communication qualifies as one of the acts contemplated under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

There has been debate as to whether the six months limitation envisaged in order 53 Rule 2 of the Civil Procedure Rules applies strictly to “any judgment, order, decree, or conviction, or other proceedings’ ’or whether this also includes decisions of other kinds, or letters such as the one that is the subject of this case.

In our considered view, Order 53 Rule (2) was meant to cover both judicial and quasi-judicial proceedings, where there was a hearing; all affected parties were informed; or were aware of the proceedings and where there was a judgment or decision capable of being disseminated and accessed by all affected parties. This could not in our considered view have been meant to cover letters which were sent to specific persons in response to theirs which were not even copied to other ostensibly interested parties, like in the case here.”

31. In the instant case, I find that although the Applicant herein filed his application outside the six months limit as envisaged under Order 53 Rule 2 of the Civil Procedure Rules, yet the decision complained of arose out of a letter dated the 25th May 2016 written by the Land Registrar Bomet and copied to the Applicant herein. Such communication, I find did not qualify as one of the acts contemplated under Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules and I associate myself fully with the sentiments of the court in **Republic v Ministry of Lands, Housing and Urban Development & 4 others; Jeremiah Otieno Okenye (Interested Party) Exparte Osoro Kennedy Omwoyo [2019] eKLR** where the court opined that;

*‘In the circumstance, I find that the court in its discretion to grant leave made no error on its part and I fully associate myself with the initial orders of the court granting leave for the application to be made. It is also important to note that under the Constitution of Kenya, 2010 specifically under **Article 47 the administrative processes are more of a constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law but is to be measured against the standards established by the Constitution.**’*

32. To this effect, I find that the application herein is merited and granted, with costs. The Applicant shall file his substantive motion within 30 days upon delivery of this ruling

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 9TH DAY OF DECEMBER 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE