



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

JUDICIAL REVIEW NO. 38 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR UASIN GISHU

DISTRICT THROUGH THE ATTORNEY GENERAL..... RESPONDENT

EX PARTE: SALLY K KIBET & ESTHER J KIRUI

JOSEPH OUMA RASAWO

MAURICE OMONDI AKECH

PASCALIA OPANY AKECH

PHILIP RABURU

MURIGI WANYOIKE.....INTERESTED PARTIES

RULING

The applicants filed an application dated 3rd June 2011 seeking the following orders;

- a. An order of certiorari to quash gazette notice no. 4974 of 6th may 2011 together with any other proceedings and decisions connected therewith.
- b. An order of prohibition against the respondent to prohibit him from rectifying the register to the land parcel known as PIONEER/NGERIA BLOCK 1 (EATEC)/9622 and expunging any records relating to the ex parte applicants contained therein.

APPLICANT'S CASE

The applicant premised the application on the grounds in the statement of facts, that the respondent has no powers under section 142 of the Registered Land Act to expunge documents from land registers. The respondent had no jurisdiction to determine whether a title was illegal.

The ex parte applicants are joint registered proprietors of the suit parcel and are in possession of the title. The 5th respondent claimed the property and the claim is subject of the suit HCCC No. 157 of 2010. The respondents summoned the applicants by a letter dated April 1st, 2011 and they replied to the letter by informing them that the dispute was before a court. Despite being informed of the same the 5th respondent proceeded on 26th may 2011 to enter a notice in the Kenya Gazette issue no. 41 Vol. CXIII under notice 4974 seeking to rectify the register of the parcel known as PIONEER/NGERIA BLOCK 1 (EATEC)/9622 and in addition to expunge the documents and cancel the ex parte applicant's title.

The ex parte applicants did not consent to the rectification of the register as required by *Section 142(1)* of the *Registered Land Act*. They relied on the case of **Satima Enterprises Ltd. V Registra of Titles & 2 others (2012) EKLR** on the issue of the power of the registrar of titles to revoke title. They submitted that he acted ultra vires.

The 5th respondent would not accord them a fair hearing and was motivated by ulterior motives as there was no complaint that had been lodged.

The applicants are entitled to an order of prohibition as the respondent intends to act beyond the law. The RLA(repealed) never granted the respondent powers to expunge documents from the register of any land parcel. They relied on the case of **Franns Investments Limited v Registrar of Titles, Mombasa & 2 others. Mbs. Petition no. 63 of 2012.**

RESPONDENT'S CASE

The respondent has not filed any submissions on the application dated 3rd June 2011.

5TH INTERESTED PARTY'S CASE

The 5th Interested party filed a replying affidavit on 22nd June 2011 in opposition of the application. He deponed that the gazette notice was procedurally issued and that the applicants illegally obtained title to the same. The interested parties purchased the suit land from Lonrho Agribusiness and he bought 5 acres as well.

The interested party proceeded to explain how he acquired the suit land. I however note that these being judicial review proceedings, the court is more interested on how the decision to issue the gazette notice and expunge documents from the register was done.

He deponed that the registrar has powers to deal with a title deed illegally or unprocedurally acquired. Further, that the registrar is not under duty to name a complainant in the gazette notice. He termed the application incompetent as it was not supported by facts or a verifying affidavit and his name was included after leave had been granted. That the application had no interested parties.

ISSUES FOR DETERMINATION

- a. Whether the District Land Registrar acted ultra vires
- b. Whether the orders for Certiorari should issue
- c. Whether the order for prohibition should issue

WHETHER THE DISTRICT LAND REGISTRAR ACTED ULTRA VIRES

The district land registrar published a Gazette Notice No. 4974 on 6th May 2011 to the effect of which he expunged the records of the Ex Parte Applicants as a rectification of the register.

Section 142 of the *Registered Land Act* states;

142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases -

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all persons interested;

(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

The interested persons as shown, must consent to any rectification. The ex parte applicants did not consent to any rectification and the same is deemed to be ultra vires and is not in accordance with the law.

WHETHER THE ORDERS OF CERTIORARI SHOULD ISSUE

In the case of **Chief Constable of North Wales Police vs Evans 1982 1 WLR 155 At Page 1160**, Lord Halsham LC said,

“It is important to remember in every case that the purpose of (the remedy of Judicial Review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The decision of an inferior court or public authority can be quashed where the authority or court acted without jurisdiction, exceeded jurisdiction or failed to comply with the rules of natural justice or where there is an error on the face of the record or a decision that is unreasonable.”

The Court of Appeal in the case of **Kenya National Examination Council and Republic Exparte Geoffrey Gathenji Njoroge and 9 others civil appeal no. 266 of 1996.** stated as follows: -

“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 the premises, it has been proven that the registrar acted ultra vires therefore orders for certiorari are entitled.

WHETHER THE ORDERS FOR PROHIBITION SHOULD ISSUE

In Kenya National Examination Council and Republic Exparte Geoffrey Gathenji Njoroge And 9 Others Civil Appeal No. 266 Of 1996, the court of appeal held;

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”

Prohibition operates in the future to prohibit any persons or tribunal from acting unlawfully. Given that the rectification is quashed by the orders of this court, then the orders of prohibition should issue in order to protect the applicants from the violation of the law by the district land registrar.

The orders for prohibition to issue as sought by the applicants. It is trite law that costs follow the event and therefore I find that the costs of the proceedings be awarded to the ex parte applicants. In short, the application is allowed as prayed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of March, 2020

In the absence of:

Mr. Kandie holding brief for Mr. Kigamwa for the Appellant

Attorney General for the Respondent

Mr. Momanyi for interested party

Mr. Eululo- Court Assistant