



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT KISUMU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2018

IN THE MATTER OF AN APPLICATION BY UNITED MILLERS LIMITED FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 50(1) AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 78 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF TITLE NO. KISUMU MUNICIPALITY/BLOCK 12/40

BETWEEN

REPUBLIC.....APPLICANT

EX-PARTE UNITED MILLERS LIMITED

VERSUS

THE COUNTY LAND REGISTRAR,

KISUMU COUNTY LAND REGISTRY.....1ST RESPONDENT

STATE DEPARTMENT OF HOUSING & URBAN DEVELOPMENT

KISUMU COUNTY DIRECTOR OF HOUSING.....2ND RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

AND

THE AGRICULTURE AND FOOD AUTHORITY.....INTERESTED PARTY

JUDGEMENT

Exparte Applicant's case

United Millers Ltd (*hereinafter referred to as the exparte*) applicant, has come to court through the Republic of Kenya by way of Judicial review seeking an order of ***Mandamus*** to compel the Respondents to jointly and/or singularly remove the restriction registered as entry No. 6 on the 15th day of May, 2008 against Title No. Kisumu Municipality/Block 12/40 and an order of ***Prohibition, prohibiting*** the Respondents jointly and/or singularly from further placing any restriction, caution and/or encumbrance against Title No. Kisumu Municipality/Block 12/40

The application is supported by the affidavit of Sunil Narshi Shah sworn on 23/1/2018 and a statement dated 3rd January 2018 and filed on the 10th of the same month, whose gist is that the applicant has been granted leave to present this application as required by law. Moreover, that the Ex-parte Applicant is the registered proprietor of the leasehold interest of all that parcel of land known as Title No. Kisumu Municipality/Block 12/40. The Ex-parte Applicant acquired the subject property in February 1998 on a willing buyer willing seller basis from the then Cotton Board of Kenya (formerly Cotton Lint & seed Marketing Board) a statutory body established under the Cotton Act, Cap 335 Laws of Kenya, which is now repealed by the Crops Act No. 16 of 2013.

The placement of a restriction registered as entry no. 6 against the subject property by the 1st and 2nd Respondents on the 15th day of May 2008, was marred by procedural impropriety as the Ex-parte Applicant was condemned unheard, thus violating the rules of Natural Justice.

The continuance existence of the said restriction lacks proportionality to the aim it seeks to achieve as it violates the Ex-parte Applicant's constitutional right to own and enjoy its property.

The 1st Respondent issued thirty (30) days' notice to the 2nd Respondent, giving notice of intention to remove the restriction lodged by the 2nd Respondent against the subject property at the end of thirty (30) days from the date thereon unless a written objection is received by the 1st Respondent at the end of the notice period.

The 1st and 2nd Respondent has acted ultra vires its mandate by failing to remove the said restriction despite the lapse of the thirty (30) days' notice issued to the 2nd Respondent without any objection to the removal of the said restriction being lodged at the 1st Respondent offices.

By virtue of the fact that there was no objection to the removal of the said restriction, the Ex-parte Applicant had a legitimate expectation from the 1st Respondent to remove the restriction in accordance with the law and allow the Ex-parte Applicant to enjoy its constitutional right to own and enjoy its property.

The 3rd Respondent lacks jurisdiction to carry out any review of grants or disposition of public land on its own motion.

It is the function of the National Land Commission established under Article 67 of the Constitution to inter alia manage public land on behalf of the national and county governments and to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress.

It is the National Land Commission that had the powers under Section 14 of the National Land Commission Act, 2012 to review all grants or dispositions of public land in order to establish their propriety or legality within five years of the commencement of the Act.

In the exercise of its powers under section 14 of the National Land Commission Act, the National Land Commission recorded no complaint with respect to the subject property herein from the national government, county government, the Ethics and Anti-Corruption Commission or any member of the public.

The National Land Commission exercised its powers of undertaking review of all grants and dispositions of public land in various counties within the country including Kisumu County and issued its notice in the Kenya Gazette on the 17th day of July 2017, vide Gazette Notice No. 6862, Vol. CXIX, establishing the propriety or legality of the various parcels of public land contained in the said gazette notice.

The subject property in question herein is not contained in the said Gazette Notice issued by the National Land Commission on the 17th day of July 2017.

Response by 3rd Respondent

The 3rd Respondent states that there are ongoing investigations on a series of properties comprising Government housing in Milimani area of Kisumu City which were illegally alienated to private entities among them Kisumu Municipality Block 12/40, pending conclusion of investigation and filing of substantive suit, the 3rd Respondent, applied to have the properties restricted to forestall deals which would complicate the reviewing process.

Charles Kiptanui an investigator with the Ethics and Anti-corruption Commission and the investigating officer inquiring into the illegal alienation of Kisumu Municipality Block 12/40 filed a supplementary affidavit stating that the suit property was originally allocated to Cotton Lint Seed Marketing Board on 1st August 1955. That the said suit property was sold to the Ex Parte Applicant by the Cotton Board of Kenya which was the successor in title of the aforementioned Cotton Lint Seed Marketing Board.

His preliminary investigations indicate that the laid down procedure for sale of state corporation property was not followed in the sale of the suit property as there was no Board approval for the charging, sale or transfer of the suit property.

That from his knowledge of grants or leases of such property by the Government to a state Corporation or agency performing a special condition that the suit property could not be charged, sublet, sold, transferred or in any way disposed of without the prior written approval of the Government.

That investigation have established that the correspondence file which should contain the lease has not been availed and efforts to ask the ex parte Applicant to avail a copy thereof has not yielded any results as they have failed to co-operate.

That his investigations have further established that the Ministry of Housing did not at any time own the suit property as it was the property of the Cotton lint Seed Marketing Board, a state Corporation, which was subsequently succeeded by the Cotton Board of Kenya.

That the interested party herein is a successor in title of the Cotton Board of Kenya. That the interested Party being a public body, the recovery of its property that has been irregularly disposed of falls within the legal mandate of the 3rd Respondent herein.

That the said notice of intention to remove a Restriction was thus served on the wrong party as the proper recipient of the notice would have been the interested party herein and the 3rd Respondent herein who registered the restriction in the first place.

That it is in the interest of justice and in public interest that the said restrictions remain in place pending the hearing of the Applicant's application herein in order to safeguard the suit property.

ANALYSIS AND DETERMINATION

I have considered the evidence on record and the submissions of the Ex-parte Applicant and the 3rd respondent and do find the following facts proved. The Exparte Applicant is the registered proprietor of the suit land. There is no declaration so far that he holds the property illegally and that there is no suit filed before any court of law seeking such a declaration that the property was illegally obtained.

Section 24 of the Land Registration Act provides that subject thereto:—

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

16. **Section 25 of the Land Registration Act** states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

17. **Section 26** states as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

However **Section 40 (6) of the Constitution of Kenya 2010** envisages property that is unlawfully acquired which cannot be protected by the court. A finding of unlawful acquisition referred to in **Article 40(6)** of the Constitution must be through a legally established process and not by forceful occupation of property by State institutions or by preventing a person from enjoying the incidences of ownership of the

property.

Thus, it was held in the case of *Adan Abdirahani Hassan and 2 Others v The Registrar of Titles and Others Nairobi Petition No. 7 of 2012 [2013]eKLR* that,

“[30] Even if the Respondents held the view that the Petitioners had no right to own the suit property because the property was reserved for a public purpose, which view they were entitled to hold being the custodians of public land, the Petitioners had legitimate expectation in the proprietorship of the property and they should have been accorded a hearing before any administrative action could be taken in respect of the suit property.”

It is only after investigation that it can come out clearly whether title was legally or unlawfully obtained. Moreover there has to be a finding after due process of law. Though the Ethics and Anti-corruption Commission is investigating the transaction relating to the suit parcel the restriction was placed by the Ministry of housing

The Ethics and Anti-corruption Commission Act No. 22 of 2011 is relevant on the above fact. Section 11 (1) J of the Act provides:

“(1) in addition to the functions of the Commission under Article 252 and Chapter Six of the Constitution, the Commission shall—

(j) Institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

Section 11 (3) provides that:

“(3) The Commission may cooperate and collaborate with other State organs and agencies in the prevention and investigation for corruption.”

It emerges from the above that the Ethics and Anti-Corruption Commission has power to investigate and commence proceedings relating to recovery of public property and therefore the Ethics and Anti-Corruption Commission was acting within its mandate and power when it intervened in the matter.

The Land Registrar had the powers to register the restriction pursuant to the provisions of section 76 of the land registration Act. Section 76 (1) of Land Registration allows the Land Registrar to make an order known as a restriction For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause

Section 76 subsection (1) precisely provides as follows:-

“ For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

Subsection 2 provides that a restriction may be expressed to endure , for a particular period; until the occurrence of a particular event; or until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions and the restriction are to be registered in the appropriate register.

Section 78(1) and (2) of the Land Registration Act provides for the removal and variation of restrictions thus that the registrar may at any time and on application by any person interested or at the registrar’s own motion , and after giving parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction. Secondly, that upon application of a proprietor affected by a restriction and upon notice to the registrar , the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

In this matter it is clear that by the letter dated 19th April 2017 addressed to the Ministry of housing, the 1st respondent had the intention to remove the restriction under the provisions of **Section 73(2) of the Land Registration Act No 3 of 2012** that provides for removal and withdrawal of cautions. I do hasten to find that this was a wrong provision of law as the relevant law is espoused in **section 78(1) of the Land Registration Act No 3 of 2012**.

The Land Registrar gave a 30 days’ notice to the Ministry of housing at the County Government of Kisumu but there as no response.

The main issue in this matter is whether an order of Mandamus can be issued in these circumstances. This issue was settled in the case of **National Examination Council versus Republic Exparte Geoffrey Gathenji Njoroge & 9 others** namely:

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation 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 the defects of justice

and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Further that:

“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 duty leaves discretion as to the mode of performing the duty in the hands 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.”

In the instant case, the only party opposing the removal of the restriction is the Kenya Anti-Corruption Commission. I do note that the restriction was placed on 15/5/2008 more than 10 years ago. The Kenya Anti-Corruption Commission has not filed any case in court to recover the land. The delay in concluding the investigations is unreasonable. Restriction can't be placed *sine die*; it has to be followed with an investigation and a decision. The Registrar placed a restriction and left all aspects of investigations to the Kenya Anti-Corruption Commission. The Kenya Anti-Corruption Commission has not explained why they have not instituted a civil case to recover the parcel of land against the exparte applicant 8 years after the restriction was placed in the register.

The 1st respondent having given a 30 days' notice of the intention to remove the restriction to the Ministry of housing, the ministry having failed to respond and the Kenya Anti-Corruption Commission having failed to conclude its investigations, the exparte applicant is entitled to the order of Mandamus sought.

I do issue an order of mandamus compelling the Land Registrar Kisumu County to remove the restriction registered as entry No. 6 on the 15th day of May, 2008 against Title No. Kisumu Municipality/Block 12/40 .

I do decline to issue an order of prohibition as no evidence has been placed before me that the 2nd respondent will infringe on the rights of the exparte applicant in future. Costs to the exparte applicant. Orders accordingly.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 3rd DAY OF January, 2020.

In the presence of:

Mr Ogejo for exparte applicant

Mr Bii for 3rd respondent

N/A for 1st and 2nd respondents

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE