



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC MSC. APPLICATION NO. 9 OF 2018

DAVID OTIENO OHANDO.....APPLICANT

VERSUS

HENRY OPIYO AKAMA.....1ST RESPONDENT

DISTRICT LAND REGISTRAR – SIAYA2ND RESPONDENT

DISTRICT LAND SURVEYOR – SIAYA3RD RESPONDENT

RULING

David Otieno Ohando, (*hereinafter referred to as the applicant*) filed an application by way of *ex-parte* Chamber Summons on 25th April 2018, seeking leave to apply for various judicial review orders against the survey conducted on the disputed parcels NORTH GEM/MALANGA 11132 and 1117 by the 3rd Respondent, and the findings of the 3rd Respondent based on the survey. The application was heard and granted on all prayers, save for prayer 6 praying that the leave granted do operate as a stay of implementation of the decision of the 3rd Respondents, which is the issue for determination herein. The parties proceeded by way of written submissions.

Applicant's Submissions

Counsel for the Applicant submitted that the law on grant of leave to operate as a stay is now well established, citing *James Mburu Gitau t/a Jambo Merchant v Subcounty Public Health Officer Kiambu County [2013] eKLR* for the proposition that leave to operate as stay may only be granted when the Applicants show that the substantive notice will be rendered nugatory or that the outcome will render the outcome of the judicial review nugatory.

Counsel asserted that of the leave sought does not operate as a stay, the application will be rendered nugatory as the 3rd Respondent's decision will be implemented in breach of the Applicant's Constitutional property rights and the 1st Respondent will continue with his acts of trespassing into and/or interfering with the land parcel NORTH GEM/MALANGA 1132.

Counsel submitted that the Applicant subjected himself before the 3rd Respondent twice for a survey and re-survey which did not take into account consideration of the National Road Reserve as at 1986 when the sale was conducted but the new survey of 2013 with fresh demarcations of the National Road Reserve.

Counsel submitted that the Applicant subjected himself to Section 18 of the Land Registration Act and it is the aftermath of the decision that he seeks to quash. That the decision of 7th March 2018 by the 3rd Respondent has not been implemented. That the survey done on 23rd February 2018 was false as it considered an area of the land that was not in dispute, and that the area in dispute (Northern Side) was not addressed in the report, hence the application has established a prima facie case with a real chance of success.

1st Respondent's Submissions

Counsel for the 1st Respondent submitted that the decision whether or not to grant a stay pursuant to leave is an exercise of judicial discretion, and that various factors have to be taken into account. That the first factor is whether the decision or action sought to be stayed has been fully implemented.

Counsel submitted that the instant judicial review would contravene the doctrine of exhaustion of alternative remedies that is review of the land registrar's act provided by Section 86 of the Land Registration Act which provides for aggrieved persons to state their case for the

opinion of the court.

Counsel cited the case of *Jared Benson Kangwana v Attorney General Nairobi HCCC No. 446 of 1995* for the holding that stay of proceedings should only be granted where the situation may result in a decision which ought not to have been made being concluded.

Counsel submitted that the second factor for consideration is the public interest, citing Majanja J. in *R v Capital Markets Authority ex parte Joseph Mumo Kivai* who held that public interest is a relevant consideration in the granting of stay orders. That in this case, the leave should not operate as stay as it involved the protection of selfish individual interests and not for the interest of the general public. Counsel also cited *R (H) v Ashworth Special Hospital Authority (2003) 1 WLR 127* for the proposition that where there is a public interest element involved, the court should strike a balance between the individual's rights and the public interest, and stay should not be granted unless there is a strong, and not merely arguable case that a tribunal's decision was unlawful.

Counsel submitted that the Applicant's case was neither strong nor arguable enough to meet the required threshold for granting of leave to operate as a stay since it contravened the provisions of Section 18 and 86 of the Land Registration Act. That the Applicant ran to court to falsify findings of the survey that were scientifically done upon his own requests on the disputed boundary.

Counsel submitted that the registrar has the powers to fix and ascertain boundaries. That this action is reversible by rectifying the boundaries by fixing new ones, therefore the order of the court shall not be rendered nugatory.

Issues for Determination

1. Threshold for leave to operate as stay in judicial review proceedings

Order 53 Rule 4 of the Civil Procedure Rules provides that the grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise. The decision is therefore revolved on the judicial discretion of the judge which should be exercised judiciously.

Maraga J. (as he then was) in *TAIBA, TAIB V MINISTER FOR LOCAL GOVERNMENT & 3 OTHERS [2006] eKLR* expounded on the purpose of stay in such proceedings:

“The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some think. It also encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such body if it has been taken. A stay is only appropriate to restrain a public body from acting.”

Korir J. in *Republic V County Council Of Kiambu & Another Ex-parte Githunguridairy Farmers Co-operative Society [2012] eKLR* held that:

“The threshold for granting a stay of proceedings is however a high one. Unless a law being challenged will cause irreparable harm to those who are supposed to comply with it, the courts will be reluctant to suspend the operation of such a law. In saying this, I am persuaded by the words of Lord Goff who explained in *R V SECRETARY OF STATE FOR TRANSPORT EX P. FACTORTAME (NO.2) [1991] A.C. 603 HL* that:-

“the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless, it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based to justify an exceptional course being taken.”

2. Whether prayer ought to be granted

Regarding the status of the implementation of the boundary dispute report, it is apparent that upon the failure of the Applicant and 1st Respondent to reach an agreement on where to place their mutual border within the required two weeks, the 3rd Respondent gave a notice to the parties that the boundaries shall be fixed as demarcated on the 22nd February 2018. Consequently, the beacons were fixed on 19th April 2018, before the Applicant brought this application. The decision and implementation of the decision of the 3rd Respondent based on the boundary dispute report as provided for under Sections 18 and 19 of the Land Registration Act have both been completed.

Regarding the Applicant's challenge to the validity of the 3rd Respondent's decision, the Applicant claims that the survey was carried out in accordance to an alleged new National Road Reserve width measurement of 32 metres as opposed to the alleged old measurement of 20 metres that applied in 1986 when the mother title was subdivided. However, the Applicant has not adduced evidence indicating that there had been a change in the measurement of the National Road Reserve as alleged, and that the survey was carried out in accordance with a new National Road Reserve measurement.

The Applicant also challenged the report with the assertion that survey did not address the actual dispute which was in regard Northern and Southern sides of NORTH GEM/MALANGA 1117, but instead found that the Applicant had encroached on the parcel on the rear side. The report stated that:

“I asked David to show me where he thought his land was supposed to be and then the extent which was encroached by the

Defendant. He (David) showed me. In fact, he pointed at the middle of the house as the place that was sold. The findings on the ground correspond with what is on the mutation. In fact David Otieno is the one who is occupying land belonging to Henry.”

The survey was undertaken with due regard to the area by the Applicant to be in dispute and found the disputed boundaries on the ground to correspond with the mutation as signed by the Applicant. The 3rd Respondent cannot be faulted for ascertaining all the boundaries and finding an encroachment on the part of the Applicant on the rear boundary between the parcels. The 3rd Respondent’s action can only be viewed as a complete and diligent exercise of his duties under Section 19 of the Land Registration Act. Therefore, at this stage, the Applicant has not presented a prima facie case warranting the granting of leave to operate as a stay.

Furthermore, the application will not be rendered nugatory if a stay is not in force. If the Applicant proves his case, the 3rd Respondent will be obligated to carry out a resurvey to rectify the boundaries as ascertained on 22nd February 2018.

From the foregoing, it is my view that the prayer seeking that the leave granted operate as a stay ought not to be granted. The application is dismissed with costs.

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Mr Okumu for applicant

M/S Otieno for respondent

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE