



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT OF KENYA
AT MIGORI
ELC CASE JUDICIAL REVIEW NO. 6 OF 2018
IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE ACT

AND
IN THE MATTER OF AN APPLICATION FR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

MIGORI COUNTY LAND REGISTRAR.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2nd RESPONDENT

HUSSEIN MKUU SALIM.....INTERESTED PARTY

MARY ZERESH OTSYULA.....EX-PARTE APPLICANT

JUDGMENT

1. On 6TH July, 2018, this court granted leave to the Ex-parte applicant, Mary Zeresh Otsyula to commence the instant Judicial Review application. The ex-parte applicant is represented by firm of M/s. Kwanga Mboya and Company Advocates in this application.

2. As a result, on 24th July, 2018, the ex-parte applicant brought this Judicial Review application by way of a Notice of Motion dated 23rd July, 2018 under **Order 52 Rule 3 (1) of the Civil Procedure Rules,2010, sections 8 and 9 of Law reform Act Cap 26,Articles 40,47,50 and 165 (7) of the Constitution , section 8 of Fair Administration Action Act 2015,**(the application herein) whereby is seeking the following reliefs.-

a) An Order of Mandamus compelling the 1st respondent, the Migori county Land Registrar to restore the Ex-parte applicant's certificate of title in respect to Land parcel LR NO. SUNA EAST/WASWETA 1/23467.

b) An Order of certiorari to remove into this honourable court and quash the decision of the 1st respondent; the Migori County Land Registrar to nullify the ex-parte applicant's certificate of title in respect of land parcel LR NO. SUNA EAST/WASWETA 1/23467.

c) The costs of this application be awarded to the applicant.

3. The application is premised on the ex-parte applicant's statutory statement and her 20-paragraphed replying affidavit annexed to the chamber summons dated 7th June 2019 for leave to file the instant application. Briefly, the ex parte applicant claims that she is the registered proprietor of the suit land, LR NO. SUNA EAST/WASWETA 1/23467. That on 29th May 2018,the ex-parte applicant did discover that the 1st respondent unilaterally, nullified her certificate of title in respect of the suit land without any legal justification or at all thus it precipitated the present application.

4. On 23rd August 2018, the applicant filed her list of annexures dated 22nd August, 2018. The annexures are copies of certificate of title,

transfer instruments and green card marked as “MZ01, “MZ01” and MZO 3” respectively.

5. By a 17 paragraphed replying affidavit sworn on 25th July, 2019, the 1st respondent denied the application, termed the same misconceived, an abuse of the court process and away of enrichment by the applicant thus sought dismissal of the application with costs. The 1st respondent deposed inter alia, that equity can not aid the applicant who has come to court with dirty hands. That there was Migori ELC Misc. Application No. 6 of 2017; **Abdi Rahman –vs- Migori Land Registrar** concerning NO. SUNA EAST/WASWETA 1/1829 which originally belonged to **MKUU SALIM MKUU** (deceased) who later sold and transferred the same to **FATUMA MOHAMED** (deceased) as shown in transfer documents dated 24th February 1981 and marked as “PKI”, among other documents.

6. The interested party namely Hussein Mkuu Salim duly served as revealed in affidavits of service sworn on 20th November 2018 and 20th September 2019 and filed in court on 20th November, and 3rd December 2019 respectively. It also affirmed in the court proceeding of 3rd December 2019, 21st March 2019 and 21st November 2018. He did not respond to the application.

7. On 21st March 2019, this court directed that the application be argued by written submissions ; see also **Order 51 Rule 16 of the Civil Procedure Rules,2010 and Practice Directions number 33 (a) of the Environment and Land Court Practice Directions 2014.**

8. Consequently, on 13th June 2019, learned counsel for the ex-parte applicant filed submissions dated 10th June 2019 whereby he gave the background of the matter, issues for determination numbers (ii) to (vii) which include whether the 1st respondent’s decision to annul or revoke the applicant’s title to the suit land is amenable to judicial review proceedings hence should be quashed as sought herein and whether the 1st respondent failed to follow due process before making the said decision.

9. Counsel submitted that the 1st respondent revoked the ex-parte applicant’s title without notice issued to her contrary to **section 79 (2) of the Land Registration Act, 2016 (2012)**. Counsel relied on the High Court decision in **Republic –vs- Kenya Revenue Authority and another (2013) eKLR and Court of Appeal decision in Municipal Council of Mombasa –vs- Republic and Umoja Consultants Ltd, Civil Appeal No. 185 of 2001** on the requirements of an application for judicial review.

10. Learned counsel for the 1st and 2nd respondents filed submissions dated 25th July 2019 whereby she sought dismissal of the application with costs to the respondents. To buttress her submissions, counsel relied on **sections 26 and 79 of the Land Registration Act 2016 (2012), Article 40 of the Constitution of Kenya,2010 as well as the case of Isaac Gathungu –vs- Attorney General and others (2012) eKLR and Republic –vs- Kenya Revenue Authority (supra)**

11. The interested party did not file and serve any submissions or at all in this application.

12. I have carefully considered the entire application, the 1st respondent’s replying affidavit and rival submissions including issues framed therein as well as the authorities cited in support of the submissions. So, the issues for determination in the application are whether the decision of the 1st respondent is tainted with illegality, irrationality and procedural impropriety and whether the ex-parte applicant is entitled to the orders sought in the application herein.

13. The instant application was brought pursuant to the Constitutional and statutory provisions cited on it’s face. I note the same accordingly.

14. The ex parte applicant contended that she is the registered owner of the suit land which she lawfully purchased from the interested party. She deposed at paragraph 4 of her replying affidavit that the 1st respondent made the impugned decision as shown in a copy of the green card marked as “MZO3”.

15. On his part, the 1st respondent asserted inter alia that the suit land is a subdivision of LR NO. SUNA EAST/WASWETA 1/10344 which was a subdivision of LR NO. SUNA EAST/WASWETA 1/1829 originally owned by Mkuu Salim Mkuu (deceased) and he relied on documents marked as “PKI” to “PK6” annexed to his replying affidavit. He further drew this court’s attention to Migori ELC Misc. No. 61 of 2017 which I note was determined by dismissal of the application on 26th July, 2018.

16. The 1st respondent also deposed that he was not aware that succession has been carried out in respect of the suit land which is part and parcel of the estate of the deceased. In that regard, I am guided by the definition of the term “**Legal representative**” under **section 2 of the Civil Procedure Act Cap 21 Laws of Kenya** and the powers of personal representative under **section 82 of the Law of Succession Act Cap 160 Laws of Kenya**.

17. It is trite law that the estate of the deceased person is vested in the legal representative; see the Court of Appeal decision in **Trouistik Union International and another –v- Jane Mbeyu and another (1993) eKLR.**

18. The ex parte applicant asserted that the 1st respondent cancelled her certificate of title to the suit land without any legal justification. Notably, **section 26 (1) of the Land Registration Act, 2016 (2012)** provides for cancellation of a certificate of title on grounds including fraud; see also **Kuria Kiarie and 2 others –vs- Sammy Magera (2018) eKLR.**

19. I endorse the decision in the case of **Alberta Maet Gacii –vs- Attorney General and 4 others (2006) eKLR**, that certificate of title acquired deceitfully would not legally pass interest in land to a 3rd party. Similarly, in **Isaac Gathungu case (supra)** it was held that the right to property excludes property unlawfully acquired and that the acquisition must be by due process.

20. Admittedly, the 1st respondent had powers to rectify the land register under **section 79 (2) (supra)**. It is discernable from a true copy of the green card marked as “MZO3” in support of the applicant’s verifying affidavit and annexure marked as “PK6 to 1st respondent’s replying affidavit that the applicant was very aware of the impending cancellation of her title to the suit land. In the obtaining circumstances, there was no violation of the audi alteram partem rule.

21. Besides, ownership of the suit land is in question in the instant application and can not be determined thereby. In Migori **ELc Misc. Application No. 61 of 2017 (supra)**, this court held at paragraph 26 that :-

“ asince the ownership of the suit land is in question, the allegation by the applicant can not be determined in a Judicial Review application...”

22. Moreover, by the present application, the ex parte applicant’s contention is clearly pointed at the merits of the 1st respondent’s decision. As such, is the application tenable? In **Northern Construction Company Ltd –vs- Attorney General and 3 others (2008) KLR 328**, the Court of Appeal held that judicial Review is concerned with the decision making process and not with the merits of any decision.

23. In the end, I find that the instant application is devoid of merits. The same fails.

24. Thus, the application dated 23rd July, 2018 and filed on 24th July, 2018 be and is hereby dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 4TH DAY OF FEBRUARY 2020.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Ms. E. Opiyo learned counsel for the 1st and 2nd respondents

Mr. Mwitwa Kerario holding brief for Kwanga Mboya learned counsel for the ex parte applicant.

Court Assistant – Tom Maurice