



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC MISCELLANEOUS APPLICATION NO. 4 OF 2020**

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

**ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAW REFORM ACT**

**SECTION 8 AND 9 CAP 26 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, 2012**

**AND IN THE MATTER OF THE LAND ACT, 2012**

**BETWEEN**

**JOSEPH N. NYAKWAMA.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR, KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

**DIRECTORATE OF CRIMINAL INVESTIGATIONS,**

**KISII SUB-COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL....3<sup>RD</sup> RESPONDENT**

**RULING**

**BACKGROUND**

1. The Ex-parte Applicant approached the court vide Chamber Summons dated 24<sup>th</sup> January, 2020 seeking the following orders:

a. Spent

b. That the Applicant be granted leave to apply for Judicial Review orders of Certiorari to remove into this honourable court and quash the 1<sup>st</sup> Respondent's decision dated the 14<sup>th</sup> day of January 2020, purporting to cancel the title deed for land title number WANJARE/BOGIAKUMU/8039.

c. That the Applicant be granted leave to apply for Judicial Review orders of Prohibition to remove into this honourable court and prohibit the 1<sup>st</sup> Respondent and officers working under him from cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039

d. That the leave so granted do operate as a stay of the decision of the Land Registrar cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039 and stay of any further investigations by the 2<sup>nd</sup> Respondent and the preference of any criminal proceedings relating to and touching on the said land parcel.

e. That the costs of and incidental to the application be provided for

2. The application is anchored on the grounds stated on the face of the Chamber summons, the statutory statement and applicant's verifying affidavit sworn on the 24<sup>th</sup> January 2020.

3. In his statutory statement the Applicant states that it was unreasonable for the 1<sup>st</sup> Respondent to cancel the Applicant's title deed to land title number WANJARE/BOGIAKUMU/8039 without hearing the applicant and giving him ample time to prepare a response or a written memorandum on how he acquired the said title deed.

4. In his Verifying affidavit, the Applicant deposes that he was the registered owner of land parcel number WANJARE/BOGIAKUMU/8039 vide a title deed issued to him on 10<sup>th</sup> August 2016. He further deposes that on 14<sup>th</sup> January 2020, without any prior notice, he received a letter from the 1<sup>st</sup> Respondent informing him that his title deed to the suit property had been cancelled on the ground that the same was acquired fraudulently and irregularly. He deposes that immediately after receiving the said letter from the Respondent, he received summons from the Sub-County Criminal Investigations Officer, Kisii South summoning him to appear before the said officer to answer charges of forcible detainer and fraudulent acquisition of the title to the suit property. He contends that the actions of the said 1<sup>st</sup> and 2<sup>nd</sup> Respondents were aimed at preferring criminal charges against him with a view to dispossessing him of the suit property where he has lived for many years and carried out substantial developments. He deposes that a letter from his advocates seeking an explanation for the unilateral decision to cancel his title did not elicit any response from the Land Registrar.

5. In response to the application the 1<sup>st</sup> Respondent filed a Replying Affidavit, in which he stated that the suit property was originally known as BOGIAKUMU /893 and registered in the names of Isabella Mokuu, Bosire Mokuu and Omachi Mokuu on 21.9.1974 before the name of Omachi Mokuu was replaced by that of Magati Omache. He contends that the consent to transfer was issued on 21.4.2016 yet the consent letter is dated 17.4.2016. He states that Omachi Mokuu died without transferring his share in the suit property; hence his beneficiaries ought to have applied for letters of administration before transferring the suit property to someone else. It is upon this background that he exercised his powers under section 79 of the Land Registration Act to cancel the title to the suit property for having been obtained fraudulently.

6. In his Further Affidavit the Applicant deposes that he bought the suit property from Omachi Mokuu alias Joseph Omachi Magati in the 1990s. He deposes that the said Omachi Mokuu died on 31.5.2019 while the Applicant was issued with a title deed on 10.8.2016

7. The court directed that the application be heard inter partes and counsel for both parties made their oral submissions, basically highlighting what is contained in the affidavits.

## **ISSUES FOR DETERMINATION**

8. Having considered the Chamber Summons, statutory declaration and rival affidavits as well as counsel's submissions, the issues for determination are as follows:

i. Whether the Applicant should be granted leave to the applicant to apply for judicial review orders of certiorari to quash the decision of the 1<sup>st</sup> Respondent to cancel the applicant's title deed in respect of land parcel number WANJARE/BOGIAKUMU/8039

ii. Whether the Applicant should be granted leave to apply for judicial review orders of Prohibition, to prohibit the 1<sup>st</sup> Respondent and officers working under him from cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039

iii. If the answer to i) and ii) is in the affirmative, whether the leave should operate as a stay of the decision of the Land Registrar cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039 and a stay of further investigations by the 2<sup>nd</sup> Respondent and the preferring of any criminal proceedings relating to and touching on the said parcel of land.

## **ANALYSIS AND DETERMINATION**

9. Order 53 rule 1 of the Civil Procedure Rules provides as follows:

“Rule 1(2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied upon.

Rule 1(3).....

Rule 1(4) 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.

Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require, the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

**10.** Before granting leave to apply for judicial review the court must satisfy itself that the Applicant has met certain minimum criteria. In the case of **Agutu Wycliffe Nelly v the Office of the Registrar Academic affairs Dedan Kimathi university of Technology DKUT ( 2016 ) eKLR** the court held as follows:

“The leave stage is used to identify and filter out at an early stage claims which may be trivial or without merit. At this stage the applicant must show that he/she has sufficient interest in the matter otherwise known as locus standi. The applicant must demonstrate that he/she is affected in some way by the decision being challenged.

...The application must be concerned with a public law matter, that the action must be based on some rule of a public body. The decision complained of must have been taken by a public body that is established by statute or otherwise exercising a public function.

Thus at the leave stage the applicant has the burden of demonstrating the decision is illegal, unfair and irrational as discussed above. ....The applicant must show that the application has been made within 6 months from the date when the challenged decision was made”

**11.** In the instant case the Applicant is challenging the decision of the Land Registrar to cancel his title without any notice to him. The said decision was communicated to the applicant vide the Land Registrar’s letter dated 14<sup>th</sup> January 2020 which is annexed to the Applicant’s verifying affidavit. The 1<sup>st</sup> Respondent has justified his decision by stating that he exercised his powers in accordance with section 79 of the Land Registration Act 2012, as in his opinion the applicant had the suit land transferred to him without obtaining a grant of letters of administration. The complaint is therefore arguable and the merits thereof can only be dealt with if the applicant is granted leave to apply for Judicial Review. However, I am not persuaded that the court should issue a blanket order staying any investigations the 2<sup>nd</sup> Respondent intends to carry out with respect to the suit property as this would not serve the ends of justice.

**12.** In view of the foregoing, I find merit in the application and I grant it in the following terms:

a. Leave is hereby granted to the Applicant to apply for judicial review orders of certiorari to quash the decision of the 1<sup>st</sup> Respondent to cancel the Applicant’s title deed in respect of land parcel number WANJARE/BOGIAKUMU/8039.

b. Leave is hereby granted to the Applicant to apply for judicial review orders of Prohibition to prohibit the 1<sup>st</sup> Respondent and officers working under him from cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039

iv. The leave so granted shall operate as a stay of the decision of 1<sup>st</sup> Respondent cancelling the title deed for land title number WANJARE/BOGIAKUMU/8039 on condition that the Applicant files his application for judicial review within 21 days.

Each party shall bear his own costs.

**Dated signed and delivered at Kisii this 4<sup>th</sup> day of March 2020**

**J.M ONYANGO**

**JUDGE**