



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

PETITION 11 OF 2019

IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES 2013

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 2, 10 (2), 20, 22, 40 & 47 REGARDING PROTECTION OF RIGHTS TO PROPERTY AND FAIR ADMINISTRATIVE ACTION AND ACCESS TO JUSTICE

AND

IN THE MATTER OF LAND REGISTRATION ACT 2012

AND

THE LAND ACT 2012

BETWEEN

JOE NYAWANGA OYIEKE..... 1ST PETITIONER

VITALIS ALOYS OGOLA.....2ND PETITIONER

DAVID ODHIAMBO OBUDHO.....3RD PETITIONER

ENG PAUL ONALO.....4TH PETITIONER

CURILUS NYABUTE ONYANGO.....5TH PETITIONER

JOHN OKELO OPIYO.....6TH PETITIONER

VERSUS

LAND REGISTRAR KISUMU

NYANDO, MUHORONI, NYAKACH.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

AND

LEONARD OMONDI.....INTERESTED PARTY

JUDGEMENT

PETITIONERS CASE

Joe Nyawanga Oyieke, and 5 others have come to court by way of petition against the Land Registrar, Nyando, Muhoroni, Nyakach District and the Hon Attorney General claiming that on 19th July 2019 the 1st respondent published in the Kenya gazette vol. CXXI. No. 90 gazette notice no. 6533 that in reference to section 79 (2) of the Land Registration Act and pursuant to the Chief Land Registrar's directions under the said section the title deeds no. KISUMU/BORDER/3979, 3998, 3999,4000, 4001, 4002, 4003, 4004, 4005 & 4006 ISSUED TO VARIOUS PERSONS (PETITIONERS) IN Nyando District shall be deemed cancelled at the expiry of 60 days from 19th July 2019.

The Petitioners contends that the gazette Notice No. 6553 is brazen violation of the law and especially Article 40 of the Constitution of Kenya which guarantees the right to property.

The petitioners further contend that they were never made aware of the directions of the Chief Lands Registrar alluded to in gazette notice no. 6533 in brazen contravention of Article 47 of the constitution of Kenya 2010.

That the petitioners further contends that they bought the parcels of land numbers KISUMU/BORDER/3979, 3998, 3999,4000, 4001, 4002, 4003, 4004, 4005 & 4006 identified for cancellation whereas the petitioners followed the due process provided for in the law to wit obtaining the necessary consents and approval of Mr. Ayuko Omenya Orwa the registered owner of parcel of land number KISUMU/BORDER/1488 which gave rise to no. KISUMU/BORDER/3997-4006 due for cancellation never complained and is infact supporting the petitioners.

The Petitioners contend that Mr. Leonard Omondi the complainat and a son to the registered owner of the parcel of land number KISUMU/BORDER/1488 which was sub divided to give rise to kisumu/border/3997-4006 reneged on the family agreement to sell the land and use the proceeds to settle elsewhere and only come back to complain after squandering the proceeds of the sale and failing to acquire an alternative land to settle on.

The petitioners contend that the issue regarding the purchase and transfer of parcels fo land number KISUMU/BORDER/3997-4006 has been arbitrated over by the provision administrative in 2009 and a resolution passed that the parcels be transferred to the registered owners and that further that the vendor Mr. Ayyuko Omenya Orwa to transfer land to his sons who were still staying on the land then.

The Petitioners' further contends that the complaint by Mr. Leonard Omondi to the Ministry of Lands that has resulted to the gazette notice to cancel titles of parcels of land number KISUMU/BORDER/3997-4006 was fraught with misrepresentation of material facts and a well chorographical scheme to defeat the petitioner right to property guaranteed under Article 40 of the Constitution of Kenya 2010.

The Petitioners contend that the National Land Commission whose recommendation the respondent relied in decreeing the cancellation of the petitions titles did not have jurisdiction to cancel. The petitioners contend that the respondents acted contrary to provisions of Article 40 of the Constitution of Kenya that guarantees right to protect.

The Petitioners contend that the legitimate expectations of the petitions as to own property are being violated by the 1st respondents. The petitioners aver that under Article 2 of the Constitution of Kenya 2010 supreme Law of the republic of Kenya and bind all persons and all state organs at all levels of government. The Petitioners further aver that under article 10, all state organs, state officers and all public offices are bound by the National values, particularly values of governance, accountability, transparency, integrity, equality and non-discrimination and **that** pursuant to Article 22 (1) have a right to institute proceedings on their own behalf and general public.

The Petitioners aver that all the violations stated above are direct affront and violation of their fundamental rights to property.

The Petitioners pray a declaration that the National Lands Commission lacked jurisdiction to enforce their recommendation pursuant to Section 5 of the National Land Commission Act 2012 and an order of Certiorari calling to this court the letter dated 15th January 2015 by Muhammed A. Swazuri the chairman of the National Land Commission and quashing the same. Lastly, an order of Certiorari calling into the Honourable court and quashing the gazettee notice no. 6553 of 19th July in the Kenya gazette Vo. CXXI- No. 90 of 19th July 2019. Such other orders (s) as this Honorable Court shall deem just.

In the supporting affidavit of **Ayuko Omenya Orwa** he states that he was the sole proprietor of KISUMU/BORDER/1488. He is married to 2 wives and that they are blessed with 14 children. He states that his family entered into agreement to sell KISUMU/BORDER/1488 to buy a bigger parcel of land elsewhere. According to the deponent his sons identified buyers of the land and indeed sold their portions. He executed the relevant documtns since he was the registered owner. The Interested Party did not do as agreed and squandered his money according to the deponent. The interested party sold his portion to 4th petitioner and to 8th petitioner. After selling KISUMU/BORDER/1488, the interested party with his brothers were given KISUMU/BORDER/2387 where he was settled and put up a home.

In the affidavit sworn by Joe Nyawanga Oyieke, having been authorized by the other petitioners to swear on their behalf, he states that that Mr. Ayuko Omenya was the registered proprietor of land parcel no. KISUMU/BORDER/1488 measuring approximately 4.6Ha with absolute rights to deal with it and in consultation with his family members.

Mr. Ayuko Omenya Orwa had 14 children and as such he divided his land to his sons and he requested the sons to foot the cost of the sub division. (Annexed hereto and produced as JNO-1 is a copy of the narration by Ayuko Omenya on the history of the land parcel no. KISUMU/BORDER/1488).

The sons of Mr. Ayuko Omenya came up with the idea that Awasi being a township, they would sell their respective portions bequeathed to them by their fathers and use the proceeds to purchase bigger portions elsewhere.

Owing to the fact that land parcel number KISUMU/BORDER/1488 was registered in the names of Ayuko Omenya Orwa, the sons searched for prospective purchasers introduced them to their father who processed the sale and handed over the proceeds to the sons to get alternative

parcels of lands elsewhere only from the township that is bigger as opposed to the smaller portions that they would get if they were to remain in KISUMU/BORDER/1488. The sons to Mr. Ayuko Omenya Orwa used the proceeds for the sale of their respective parties to purchase bigger parcels of land elsewhere save for the 5th son Leonard Omondi who lodged a frivolous complaint with the National Land Commission and the Ministry of Lands which resulted into gazette notice no. 6553 which is the subject of this application and portion.

Mr. Ayuko Omenya Orwa bequeathed an acre of KISUMU/BORDER/1488 to Leonard Omondi and Mr. Leonard Omondi who was to foot costs of the sub divisions however he could not finance the sub division thus he introduced Mr. Carilus Nyabute Onyango petitioner who was to buy a portion of the one acre gifted to him so that he could use the proceeds of the sale to process the subdivision and transfer of the remainder of the portion given to him to his name as he squandered the proceeds.

Sometimes later, Mr. Leonard Omondi introduced yet another purchaser eng. Paul Oduol Onalo to his father Mr. Ayuko Omenya Orwa and the remaining portion of the one acre was sold and the proceeds handed to Leonard Omondi but yet against he could not purchase alternative land.

The subdivision of parcel of land number KISUMU/BORDER/1488 was done procedurally with the consultation of the family members of Mzee Ayuko Omenya Orwa.

The registered proprietor of land parcel number KISUMU/BORDER/1488 applied to the land Control Board and was issued with the consent to sub divide.

Leonard Omondi reneged on the family agreement after squandering proceeds of the sale of his portion and complained to provincial administration and the matter resolved by the DC that all the purchasers be transferred to their respective portions and the sons to be given their respective portions by the vendor Mr. Ayuko Omenya Orwa.

Mr. Leonard Omondi complained to the authorities that due procedure was not followed in that the application for consent of the land control board was to sub divide the land into 2 however in the initial sitting of the land control board the consent was not granted since it emerged that there were other people in the land and as such the sitting was deferred to another date and it was on the second sitting that the consent was granted to all the purchasers (petitioners) herein to sub divide the land into 10 portions.

INTERESTED PARTY'S CASE

The interested party states that AYUKO MENYA is his biological father and was the registered absolute owner of ancestral land parcel known as KISUMU/BORDER/1488. That AYUKO OMENYA was married to two wives, and was blessed with fourteen (14 CHILDREN) JOE NYAWANGA OYIEKE is not one of the sons of AYUKO OMENYA to have sat with the family and hold brief for them, this is a great liar who is on oath and does not want help the court to get the truth. That AYUKO and his family was of the opinion that since his children were by the year 2009 are all adults, he would sub-divide the ancestral land into two then distribute accordingly into first and the second house.

That the affidavit is sworn by JOE NYAWANGA OYIEKE is only meant to mislead the court, he does not indicate to court whether they are still on the said land in question and has not annexed to the court the parcel number they migrated to.

That his father AYUKO OMENYA is still alive and they are still staying in their ancestral land being the land in question.

That this matter had already been adjudicated before this honourable court and same was dismissed.

That the worry of Mr. Joe Oyieke is that he compromised the land surveyor to adjust for him much acreage than what they agreed with his father, the whole issues is all about the fact that every petitioner got more than what they agreed on.

The land registrar found that there was some mischief in transferring this parcels of land, there was no any consent of transfer, payments of stamp duty, registration as required by land registration act.

That the petition is res-judicata, brought in bad faith with intent to defraud, misconceived, therefore be dismissed with the cost. He denies having squandered proceeds of any land. He insists that the petitioners especially the 1st petition fraudulently subdivided his father's land into 10 portions.

RESPONDENTS CASE

According to the respondent, the parcel of land was registered in the names of AYUKO OMENYA ORWA. He applied for subdivision into 2 parcels of land. A letter of consent was presented to the 1st respondent for subdivision into 10 portions instead of 2 portions.

The land was subsequently sub-divided into 10 portions namely 3997, 3998-4006. A complaint was lodged by the Interested Party that his father's land was being subdivided illegally.

That on 20th April 2012, the Assistant Director of Information PCRC, wrote to the 1st Respondent informing him that a ground visit would be conducted by a team of 7 members to investigate the complaint which had been lodged by the Interested Party herein. That a report on the ground visit which was conducted on 10th September 2012 to 21st September 2012 was issued and which recommended that sub-division which were carried out on the parcel of land KISUMU/BORDER/1488 be nullified and the subsequent titles be surrendered to the 1st respondent.

That subsequently on 26th July 2013, the National Land Commission wrote to the 1st respondents directing him to implement the recommendations of the Public Complaints Resolution committee to nullify the sub-divisions and revoke the titles issued.

The 1st respondent proceeded to write to the affected owners of the sub-division on 1st August 2013 notifying them of the intention to revoke their titles and reinstate it back to KISUMU/BORDER/1488.

That the Applicants/Petitioners herein quickly rushed to Court and file KSUMU HCC EC MIS. APPLICATION NO. 192 FO 2013 and obtained orders of stay against the 1st respondent's decision to commence enforcement of the National Land Commission's letter dated 26th July 2013.

That the 1st Respondent thereafter could not continue any dealings with the said parcels of land with the orders in force.

That despite the said order, the 1st Respondent continued receiving communications from the Chief Land Registrar seeking to know the progress made on the recommendations of the site visit conducted. That it is only until 9th July 2018 that the 1st Respondent received a decree in KISUMU HCC ELC NO. 51 OF 2017 (formerly Misc 192 of 2019) where an order of dismissal of the suit had been made on 30th May 2018 .

That on 10th July 2018 the 1st respondent issued Notices of Cancellation of title for gazette to the Government Printers based on the earlier communication to the parties and in full compliance of the recommendations of the National Land Commission in their letter dated 26th July 2013. That on 8th June 2018, the chief Land Registrar wrote to the 1st Respondent to implement the decision of National Land Commission since an order of dismissal had been issued by the Honourable Court.

ANALYSIS AND DETERMINATION

I have considered the petition, supporting affidavits and the replying affidavits and supplementary affidavits and rival submissions and do find that the land in dispute does not belong to the Interested Party but belongs to the father. The dispute basically is that the interested party's father sold the suit properties to the petitioner without considering the interested party. The Interested Party does not have any proprietary interest in the suit property. Section 26 of the land Registration Act Provides:

“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.”

The Interested Party's complaint to the National Land Commission should not have been considered in disregard of the position taken by the owner of the land that the land had been sold to the Petitioners. The land holder did not complain of any fraud by the Petitioners. It is evident that the registered owner of the land sold the same to the petitioners. The petitioners became the registered owners of the suit property resultant from the subdivision.

Article 40 of the constitution of Kenya protects the interest of the petitioner in the suit properties since when it was found to have been illegally acquired. There are no proceedings by the National Land commission produced to show that the land was found to have been illegally acquired. The National Land Commission made recommendation for cancellation without affording the petitioners a hearing.

This court further finds that the disputes between the Interested Party, his father and the Petitioners is guided by private law as the property in dispute is private property. The claim by the interested party was to be dealt with under private law between the parties. The National Land Commission had no jurisdiction to entertain a dispute of this nature between private persons.

On res-judicata, I do find that the Kisumu Judicial Review Application no. 51 of 2017 (Formerly Misc 192 of 2013) was not determined on merit as the same was dismissed on technically.

The upshot of the above is that the petition is merited as the process of cancellation of the petitioners title was tainted with procedurally improperly as the petitioners were not called for hearing. Moreover the decision to cancel the title was tainted with illegality as the land in dispute was private property that did not belong to the complainant (Interested Party) and therefore the National Land Commission did not have the pre-requisite jurisdiction to determine the dispute. Moreover, that the petitioners were informed of the cancellation after the decision had been made and therefore were not afforded a hearing before the same was made.

I do find the petition merited and do grant the following prayers namely a Declaration that the National Lands Commission lacked jurisdiction to enforce their recommendation pursuant to Section 5 of the National Land Commission Act 2012 and an order of Certiorari calling to this court the letter dated 15th January 2015 by Muhammed A. Swazuri the chairman of the National Land Commission and quashing the same. Lastly, an order of Certiorari calling into the Honourable court and quashing the gazette notice no. 6553 of 19th July in the Kenya gazette Vo. CXXI- No. 90 of 19th July 2019. Costs to the Petitioners. Orders accordingly.

DATED AND DELIVERED THIS 30th DAY OF APRIL, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE