



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2018

IN THE MATTER OF ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES ,2010

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION BY THE SENIOR LAND REGISTRAR DIRECTING REVOCATION OF THE TITLE DEEDS ISSUED TO JOSEPH OYIEKO OBAGA AND CANCELLING HIS PROPRIETARY RIGHTS THEREOF

AND

IN THE MATTER OF

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, NYAMIRA.....RESPONDENT

AND

CHRISTOPHER NYANGAU OBAGA

ZAKAYO MICHIEKA OBAGA.....INTERESTED PARTIES

RULING

INTRODUCTION

1. By a Notice of Motion dated 7th November 2018, brought pursuant to Order 53 Rule 3 of the Civil Procedure Rules,2010, the Interested Party filed an application seeking the following orders:

a) An order of Certiorari to remove into the High Court for the purposes of its being quashed, a decision made by the Senior Land Registrar, Nyamira County whereby it was adjudged and/ or decided that the title deeds issued to Joseph Oyieko Obaga be revoked and proprietary rights conferred thereof be cancelled from the register.

b) An order of mandamus be and is hereby issued compelling the Land Registrar, Nyamira County to reverse his decisions whereby it was adjudged and/or decided that the title deeds issued to Joseph OyiekoVObaga be revoked and proprietary rights conferred thereof be cancelled from the register and further that he reaffirms the title deeds issued to Joseph OyiekoVObaga in relation to the title deeds thereof

c) A declaration that the judgment and/or decision made by the Senior Land Registrar, Nyamira County whereby it was adjudged and/ or decided that the title deeds issued to Joseph OyiekoVObaga be revoked and proprietary rights conferred thereof be cancelled from the register was invalid, ultra vires, void and of no effect.

d) An order for costs.

2. The application is based on the grounds stated on the face of the Notice of Motion and supporting affidavit of Joseph Oyieko Obaga, the Ex-parte Applicant herein. In the said affidavit the Applicant depones that on 8th February 2016, the title for parcel No. 564 CENTRAL KITUTU/BOGETAORIO was closed after sub-division of the said parcel giving rise to new numbers No. 3187 and 3188 registered in the

name of Clement Obaga Mosei and Joseph Oyieko Obaga (Applicant). Thereafter on the 1st day of July 2016 the entry under paragraph 1 was cancelled and a title re-issued in the sole name of Clement Obaga Mosei. He depones that he was never summoned to any hearing that led to the above-sated decision where the titles No. 3187 and 3188 issued to Clement Obaga Mosei and Joseph Oyieko Obaga were nullified and cancelled from the register and he only came to learn of that fact on 14th August 2018. He contends that the District Land Registrar acted beyond his powers by revoking the two titles and cancelling the entries in respect of the same from the register.

3. The said application is opposed by the interested parties through the Replying Affidavit of Zacchaeus Michieka Obaga sworn on the 12th November 2019. In the said affidavit he depones that the suit property is registered in the name of Clement Obaga Mosei –deceased who died on 17th July 2017 and that the application is a ploy by the ex parte Applicant to intermeddle in the estate of a deceased person without a grant of representation, contrary to the provisions of section 45 of the Law of Succession Act. He further depones that the ex-parte Applicant was duly summoned and notified to stop the Applicant who is the interested party’s brother from dispossessing the estate of the deceased and the other beneficiaries of the said estate.

4. The application was canvassed by way of written submission and both parties filed their submissions which I have considered.

5. ISSUES FOR DETERMINATION

- i. Whether the application is incompetent.
- ii. Whether the application offends the provisions of section 45 of the Law of Succession Act .
- iii. Whether the ex-parte applicant is entitled to the orders sought.

ANALYSIS AND DETERMINATION

6. Learned counsel for the interested party has submitted that the application is fatally defective as it offends the provisions of Order 53 Rule 2 of the Civil Procedure Rules and section 9(2) of the Law Reform Act.

Order 53 Rule 2 of the Civil Procedure Rules 2010 provides as follows;

“Leave shall not be granted to apply for an order of certiorari to remove any judgement, order, decree, conviction or other proceeding for the purposes of its being quashed, unless the application for leave is made not later than six months after the date of proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

7. Section 9 (2) of the Law Reform Act Cap 26 Laws of Kenya provides that;

“9(2) subject to the provisions of subsection (3) rules made under subsection (1) may prescribe the applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings be made within six months or such shorter period as may be prescribed, after the act or omission for which the application for leave relates.”

8. It is Counsel’s submission that the decision of the Land Registrar which is the subject of this application having been made on 8th February 2016, and the application herein having been filed on 12th November 2018 without leave to file the same out of time, the said application is out of time and thus fatally defective.

9. The provisions of section ((2) of the Law Reform Act are quite clear that an application for Judicial Review must be filed within six months or such shorter period as may be prescribed. Counsel referred the court to the case of **Republic v Attorney General, Cabinet Secretary Ministry of Agriculture and Another (2018) eKLR** where the court refused to entertain an application for Judicial Review as it had been filed out of time.

Similarly, in **Rosaline Tubei & 8 Others v Patrick Cheruiyot & 3 others (2014) eKLR** the court held as follows:

“ It follows that a court cannot grant leave to a party seeking to file an application for Judicial Review out of time and if such leave is granted, it can be challenged at the substantive hearing of the motion. It is upon the applicants to find other avenues to pursue their grievances for the door to access the remedy of Judicial Review is now firmly shut and the key to open the door is not available for it was thrown into the proverbial sea by effluxion of time”

10. In the instant case, even though the ex-parte Applicant was granted leave to institute Judicial Review proceedings it was open for the interested party question the same at this stage as the decision being challenged was made more than 2 years before leave was sought. Even if the ex-parte Applicant has valid reasons for challenging the decision of the Land Registrar, his application was filed out of time.

I therefore find and hold that the application is incompetent.

11. In the event that I am wrong, I would need to determine the second issue which is whether the application offends the provisions of section 45 of the Law of Succession Act.

12. It is the contention of Counsel for the interested party that the ex-parte Applicant is challenging a decision made in respect of a parcel of land registered in the name of Clement Obaga Moseti who died on 17th July 2017. The said Clement Moseti Obaga- deceased was the father of the ex-parte Applicant and the interested parties and none of them has obtained a grant of letters of administration. The interested parties therefore have no locus to be sued. By seeking to have the title to the suit property cancelled and the same registered in his name, the ex-parte Applicant is in effect attempting to intermeddle with the property of a deceased person.

13. The upshot is that I find no merit in the application and I dismiss it with costs to the interested parties.

Dated, signed and delivered electronically via zoom this 23rd day of April, 2020.

J.M ONYANGO

JUDGE