



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C PETITION NO. 5 OF 2019**

**JAMES OMARE AKUMA.....PETITIONER**

**VERSUS**

**PASKARIA MOIGE ONTITA**

**LAND REGISTRAR, KISII COUNTY.....RESPONDENTS**

**RULING**

**INTRODUCTION**

1. The Petitioner filed this Petition against the Respondent challenging the Land Registrar's cancellation of title No. CENTRAL KIT UTU/MWAMANWA/2720. He seeks orders that the purported cancellation of title No. CENTRAL KITUTU/MWAMANWA/2720 is illegal null and void. He also seeks an injunction to restrain the Respondents from interfering with the suit property whose boundaries are delineated on the ground.
2. Contemporaneously with the Petition, the Petitioner filed a Notice of Motion seeking a temporary injunction to restrain the Respondent from interfering with the marked boundary features in respect land parcel No. CENTRAL KITUTU/MWAMANWA/2720. The Petition and Notice of Motion were subsequently amended to bring on board the 1<sup>st</sup> Respondent.
3. The 1st Respondent filed a Replying affidavit and Notice of Preliminary objection challenging the competence of the Petition. The Preliminary objection was canvassed by way of written submissions and both parties filed their submissions which I have considered.

**RESPONDENT'S SUBMISSIONS**

4. Learned counsel for the 1<sup>st</sup> Respondent submitted that the Petitioner ought to have approached the court by way of Judicial Review under Order 53 of the Civil Procedure Rules. It was his contention that under the said Order 53, Parliament gave the superior courts supervisory powers over the actions of quasi-judicial bodies, public bodies and/or civil servants. He submitted that the Land Registrar being a civil servant, his actions could only be interrogated through the process of judicial review by seeking orders of mandamus, prohibition or certiorari. He argued that in the instant suit since the Petitioner claims that the Land Registrar unlawfully cancelled his title deed, he ought to have filed an application for Judicial Review. He further submitted that the Land Registrar's action of cancelling the title was lawful as the Petitioner had sub-divided land parcel number CENTRAL KITUTU/MWAMANWA/34 contrary to the judgment of the court in Kisii HC Succession Cause No.209 of 2000.

**PETITIONER'S SUBMISSIONS**

5. In opposing the Preliminary Objection learned counsel for the Petitioner submitted that the Preliminary Objection was based on flimsy grounds as there were many options open to the Petitioner to challenge the action of the Land Registrar and the Petitioner had opted for one of them. He submitted that article 159(2) (a) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities. He argued that it was a principle of justice that a party who has come to court should be heard. It was his contention that the Land Registrar has no powers to cancel a title he has issued after following the due process of law. He therefore prayed that the Preliminary Objection be dismissed with costs to the Petitioner.

**ISSUE FOR DETERMINATION:**

6. The singular issue for determination is whether the suit ought to have been commenced by way of judicial review instead of Petition and if so whether the Petition is incompetent.

**ANALYSIS AND DETERMINATION**

7. The starting point is to define what a Preliminary Objection is so as to isolate the wheat from the chaff.

The case of **Mukisa Biscuits Manufacturing Limited V West End Distributors Ltd (1969) E.A 696** held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”*

8. Of the two grounds raised by the Respondents, only the first one qualifies as a preliminary point as it does not require any facts to be ascertained nor does it require the exercise of judicial discretion. In order to determine the second ground, the court would need to examine the facts of the case before making a determination on whether the Land Registrar was right or wrong. In view of this finding, I will only deal with the first ground as a Preliminary point.

9. Counsel for the Respondent submitted that the Petitioner ought to have moved the court by way of Judicial Review as he is challenging the decision of the Land Registrar. In his Petition he seeks a declaration that the purported cancellation of title No. CENTRAL KITUTU/MWAMANWA/2720 is null and void. In the case of **Johana Nyakwoyo Buti –V- Walter Rasugu Omariba (suing through his attorney) Bentah Onsomu Rasugu & 2 others**, Kisumu C.A. No. 182 of 2006 (unreported) the Court of Appeal held that the High Court has jurisdiction to issue declaratory orders on the decision of a Tribunal which acted in excess of jurisdiction. An objection had been raised on the ground that one could only challenge the decision of the Tribunal by way of Judicial Review.

10. Additionally, Article 159 2(d) of the Constitution enjoins the court to administer justice without undue regard to procedural technicalities. I am therefore inclined to agree with counsel for the Petitioner that under the current constitutional dispensation, the court is more concerned with administering substantive justice as opposed to being bogged down by matters of form.

11. In view of the foregoing the Preliminary Objection lacks merit and it is hereby dismissed with costs to the Petitioner.

**Dated, signed and delivered at Kisii via zoom this 28<sup>th</sup> day of May, 2020.**

**J.M ONYANGO**

**JUDGE**