



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

JUDICIAL REVIEW CASE NO. 3 OF 2017

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY LAND REGISTRAR, BUSIA COUNTY.....1ST INTERESTED PARTY

PHANICE NGAIRA2ND INTERESTED PARTY

AND

MAGRET AKOTH OMONDIEX-PARTE APPLICANT

J U D G E M E N T

1. For determination is the notice of motion dated 15th December 2017 premised on the provisions of Section 1, 1A, 3, 3A and 63(e) of the Civil Procedure Act and Order 53 of the Civil Procedure Rules together with all enabling statutes. The exparte applicant prayed to be granted orders;

a) That an Order of Certiorari, prohibition and Mandamus do and is hereby issued to call into the High Court and quash the decision of the County Land Registrar, Busia vide a letter dated 16/8/2017 which unilaterally purported and intended to cancel the Ex-parte Applicant's title deed, rights, interests, proprietorship and ownership of L.R No. Marachi/Esikoma/2717.

b) That costs of this application be borne by the Respondents.

2. The application was supported by the following grounds listed on its face;

a) That the County Land Registrar acted outside his jurisdiction by purporting to cancel the Ex-parte Applicant's title deed through a letter and without according the Exparte Applicant a right to be heard.

b) That the County Land Registrar acted ultra vires and in bad faith by revoking the exparte applicant's title whereas the subject of subdivision and creation of the exparte applicnat's title constitutes approximately 12.824 Ha that would clearly ensure that the interests of the 2nd Respondent and other alleged parties would adequately be taken care of.

c) That the County Land Registrar's directive and action to cancel and or revoke the Ex-parte Applicant's title deed over LR No. Marachi/Esikoma/2717 through a letter dated 16/8/2017 is and was ultra vires his powers.

d) That the County Land Registrar failed to recognise that there was no contractual obligation between the exparte applicant and the 2nd respondent herein to warrant the arbitrary cancellation of the exparte applicant's title.

e) That the action by the County Land Registrar Busia in arbitrarily cancelling and or revoking the ex-parte applicant's title over LR No. Marachi/Esikoma/2717 is and was illegal, oppressive and against the Constitution of Kenya 2010 and the Land Registration Act as no notice to show cause was ever served upon her, an innocent purchaser of value without notice.

f) That it is in the interest of justice that such action by the County Land Registrar Busia be quashed and or annulled and that the Exparte Applicant's title be restituted.

3. The application was further supported by the statutory statement and affidavit in support of the chambers summons application for leave to apply for the orders of judicial review together with the supplementary affidavit filed on 23rd January 2020. The applicant deposed that in June of 2016, he bought 1¾ acres of land from Obuya Muyodi comprised in land parcel No. Marachi/Esikoma/371. That the entire land

measures approximately 13.524ha.

4. The Applicant deposed further that the 2nd Interested Party had also purchased one (1) acre of land from the same seller Obuya Muyodi. The Applicant stated that he processed and obtained a title deed for his portion. That the 2nd Interested Party had also sued Obuya Muyodi to enable her get her portion. That there was no way of the Applicant's acquisition of portion measuring 1¾ acres would have impeded effectuation of the Court that gave the 2nd Interested Party her one (1) acre of land from the vast land. The applicant deposed that he was therefore shocked when he received through the area chief a letter dated 16/8/2017 by the Land Registrar cancelling her title.

5. It is her case that the Land Registrar cancelled her title without giving her a hearing yet she is an innocent purchaser for value without notice. That if any wrong was done to the 2nd Interested Party then she was to get her portion from the remainder title of Obuya Muyodi L.R No. Marachi/Esikoma/2716. The Applicant contends that the Land Registrar lost track and misdirected himself on very basic issues and his actions were thus unlawful, illegal and in contravention of Section 4 of the Fair Administrative Actions Act. The exparte applicant therefore urged the Court to have the letter dated 16/8/2017 by Mr. M. M. Osano brought before this court and be quashed and that the title to her land Marachi/Esikoma/2717 be restored.

6. The pleadings were served on both the Interested Parties. The 1st Interested Party did not file any document in response to the suit. The 2nd Interested party filed appearance on 4th February 2020 through the firm of Okeyo, Ochiel & Company Advocates. On the said date of 4th February 2020 Mr. Otanga advocate holding brief for Mr. Okeyo counsel for the 2nd Interested Party sought for 21 days to enable him file his response to the application together with their written submissions. Leave was thus granted for the response to be filed but none was filed by 11/3/2020 neither was any reply filed to date. In light of this scenario, the facts as set out by the exparte applicant are uncontroverted.

7. Section 4(3) of the Fair Administrative Actions Act provides thus;

“4(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) an opportunity to be heard and to make representations in that regard;**
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
- (d) a statement of reasons pursuant to section 6;**
- (e) notice of the right to legal representation, where applicable;**
- (f) notice of the right to cross-examine or where applicable; or**
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

Section 4(4) provides thus;

“4(4) The administrator shall accord the person against whom an administrative action is taken an opportunity to-

- (a) attend proceedings, in person or in the company of an expert of his choice;**
- (b) be heard;**
- (c) cross-examine persons who give adverse evidence against him; and**
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing”.**

8. The impugned letter at paragraph 2 read thus;

“It has come to our attention that the said order was not fully but partially complied with. According to the order the restriction placed on parcel No. Marachi/Esikoma/371 was to be removed on condition that the registered owner, within 90 days from 15th February, 2017 which expired on 15th May 2017, was to transfer to PHANICE NGAIRA the parcel of land which she had bought which was a portion of MARACHI/ESIKOMA/371 as clearly marked on the ground. The said registered owner went ahead and subdivided the land and instead of transferring the aforesaid portion as per the court order to PHANICE NGAIRA, he sold it to another person MARGARET OKOTH OMONDI ID No. 2052326 in clear contravention of the said order”.

9. The copy of the exparte applicant's title does show that she was issued with a title for her portion on 14th June 2017. This was after the lapse of 90 days of the order of the court issued in Busia CMCC 222 of 2012 which order stated thus;

“That the Interested party PHANICE NGAIRA do remove the restriction she placed on LR No. MARACHI/ESIKOMA/371, to facilitate the defendant OBURA MUYODI – the registered owner of L.R No. MARACHI/ESIKOMA/371, to within 90 days from the date hereof, subdivide, and transfer to PHANICE NGAIRA the parcel of land she bought which portion is part of L.R No. MARACHI/ESIKOMA/371 clearly marked and on the ground and that of the aforesaid OBURA MUYODI, do cause to be transferred that portion to PHANICE NGAIRA.”

10. The County Land Registrar stated in his letter that the portion sold to the exparte applicant occupied the same place on the ground as the portion belonging to the 2nd Interested Party. However the letter did not attach any minutes/evidence that enabled the drawer to reach the said conclusion. The 1st Interested Party also did not indicate that he summoned the exparte applicant to appear before him before cancelling her title. Lastly the order issued on 15/2/2017 in Busia CMCC 222 of 2012 did not state that the removal of the restriction was to enable the transfer to Phanice thus limiting the registered owner from dealing with the suit title in any other manner.

11. Section 79(1) of the Land Registration Act provides for rectification of the register or any instrument presented for registration in the following cases;

“(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all affected parties”. (Underline mine for emphasis)

Section 79(2) states that; **“no alteration affecting the title of a proprietor may be made pursuant to subsection (1) without the proprietor’s consent unless;**

(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission;
or

(b) it would for any other reason be unjust for the alteration not to be made”.

Provided that a written notice of 90 days shall be given to the proprietor of such intention to make the alteration. (Underline mine for emphasis).

12. The Land Registrar thus contravened both the provisions of Section 4(3) & (4) of the Fair Administrative Actions Act and Section 79(1) & (2) of the Land Registration Act. Instead of his letter of 16/8/2017 serving as a notice, it actually effected his intention without giving the exparte applicant an opportunity to be heard. The Land Registrar stated thus in 2nd last paragraph of the letter **“*meanwhile title Nos Marachi/Esikoma/2716 & 2717 are hereby cancelled and or revoked under Section 79(1) and (2) of the Land Registration Act*”.**

13. Section 79(1) & (2) gives him powers to rectify the register but only after following the procedure laid thereunder. Without doing so, he acted ultra vires the law and such action cannot be sanitized in the name of citing disobedience of the court order as the reason for non-compliance where the letter was done passed the 90 days given in the order. In any event, that order provided for the parties to report back the progress to court on 23/5/2017 which was prior to the issuance of the impugned letter of 16/8/2017. In view of the foregoing I am in agreement with the applicant that she is rightly aggrieved as her title was cancelled without being afforded a hearing therefore she deserves the orders of certiorari, prohibition and mandamus. Accordingly I allow the application in terms of **prayer (a)** of the motion. Costs of the application is awarded to the applicant payable by the 1st Interested Party.

Dated, signed and delivered at BUSIA this 25th day of June, 2020.

A. OMOLLO

JUDGE