



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT JUDICIAL REVIEW NO. 4 OF 2015

IN THE MATTER OF APPLICATION BY NYAKWAMA NYAMOSI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (CERTIORARI AND PROHIBITION)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF KISII COUNTY LAND REGISTRAR

BETWEEN

NYAKWAMA NYAMOSI EX PARTE APPLICANT

VERSUS

KISII LAND REGISTRAR 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

JOSEPH OMBOGO INTERESTED PARTY

RULING

1. The ex parte applicant’s application dated 15th April 2015 is for leave to apply for an order of certiorari to quash the 1st respondent’s decision/report dated 25th March 2015 and for leave to apply for an order of prohibition prohibiting the execution of the decision/report of the 1st respondent dated 25th March, 2015. The applicant further prays that the grant of leave do operate as a stay of the implementation and execution of the 1st respondent’s decision. The application is supported on the grounds that appear on the body of the ex parte chamber summons, the supporting affidavit sworn by the ex parte applicant and the statutory statement and verifying affidavit filed simultaneously with the chamber summons.

2. When the application was presented before the Hon. Justice Okong’o in chambers on 15th April 2015 he did not grant leave but directed that the application for leave be served for hearing interpartes on 6th May 2015 and ordered that pending the hearing, the parties were to observe and maintain the status quo. Upon being served the interested party and the land registrar filed affidavits in reply. Hon. Justice

Okong'o in declining to grant leave at the ex parte stage observed thus:-

“I have noted that the dispute between the applicant and the interested party over the boundary of Majoge/ Magenche/1120 and 1122 has been going on for several years and has been the subject of at least two (2) cases before this court. In the circumstances I am of the view that the interest of justice would be well served if the present application is heard interpartes.”

3. The ex parte applicant basis his application for leave inter alia on the grounds that:-

(i) The 1st respondent acted in excess of her jurisdiction in the decision or report dated 25th March 2015 purportedly under Section 18 and 19 of the Land Registration Act 2012.

(ii) That the 1st respondent illegally ordered for quashing or setting aside of the report dated 30th December 2014 through her summons dated 16th March, 2015.

(iii) The 1st respondent failed to appreciate the fact that this matter had since been determined by the decision of 30th December 2014.

(iv) That the 1st respondent through the summons dated 16th March 2015 had no capacity known in law to quash or set aside its own decision dated 30th December 2014.

(v) That the decision/report dated 25th March was made in bad taste and against the principles of natural justice.

4. The ex parte applicant through the supporting and verifying affidavit affirms that he is the registered proprietor of land parcel **Majoge/Magenche/1122** and that there has been a boundary dispute with land parcel **Majoge/Magenche/1120** which was the subject of the decision by the land office as per the report dated 30th December 2014 and contends that the 1st respondent had no basis to issue fresh summons for hearing of the dispute on 16th March 2015 thereby setting aside the decision as per the earlier report of 30th December 2014 and that by doing so he acted without jurisdiction and his decision of 25th March 2015 was therefore a nullity.

5. The land registrar, one **David Dunya Ongol** filed a replying affidavit sworn on 30th April 2015 and denies that he acted in excess of his jurisdiction in making the decision or report dated 25th March 2015 under the **Land Registration Act, 2012**. He averred that the matter could not have been determined vide the decision dated 30th December 2014 as there was pending a suit in court that had not been disposed of.

6. The interested party, **Joseph Ombogo** filed a replying affidavit sworn on 30th April, 2015 and depones that he is the registered owner of land parcel number **Majoge/Magenche/1993** and avers on 4th November 2014 an officer purporting to be from Lands office, Kisii County carried out a boundary demarcation on his parcel of land **Majoge/Magenche/1993** without any notification to him. The interested party states he was never served with any summons of any intended demarcation of boundary relating to land parcel **Majoge/Magenche/1993**. The summons served related to land parcel number **Majoge/Magenche/1120** which is not owned by the interested party. The interested party thus contends the boundary demarcation affecting his said parcel of land carried out on 24th November 2014 was illegitimate and unlawful which prompted the interested party to institute **Environment and Land Court Case No. 493 of 2014** at Kisii challenging the unlawful acts of the applicant and the surveyor of interfering with his parcel of land and seeking an order that they be restrained.

7. Upon advise and before **Environment and Land Court Case No. 493 of 2014** could be heard the interested party withdrew the suit to enable him to pursue the settlement of the boundary dispute as provided under the **Land Registration Act, 2012**. The County Land Registrar, Kisii issued a notice to

the parties dated 18th February 2015 clearly referenced **“RE: MAJOGGE/MAGENCHE/ 1993 –VS- 1122: BOUNDARY DISPUTE”** inviting the parties for the determination of the dispute at the site on 24th February 2015. The land registrar heard the dispute on 24th February 2015 in the presence of all the parties and adjourned the matter for further hearing on 25th March 2015 when again the parties were present. The land registrar compiled and filed the report dated 25th March, 2015 which is now the subject of this application.

8. The issue for determination at this stage is whether on the material placed before the court by the applicant and having regard to the responses made by the respondent and the interested party considering the application was directed to be heard *interpartes*, the application satisfies the threshold upon which leave may be granted. Order 53 Rule 1 provides that applications for mandamus, prohibition and certiorari may only be made with leave. Though required to be made *ex parte* to a judge in chambers the proviso to rule 1 of Order 53 provides:-

“-that where the circumstances so require the judge may direct the application be served for hearing *interpartes* before grant of leave.”

This is the proviso the judge invoked to direct service of the application for *interpartes* hearing before leave was granted. The grant of leave is not automatic. The applicant is required to demonstrate his case is not frivolous or vexatious and the applicant ought to demonstrate without going into the details of the matter that he has an arguable case which upon full ventilation may lead the court to grant him the reliefs sought.

9. Hon. Justice Waki (as he then was) in the case of **Republic –vs- County Council of Kwale & Another *ex parte* Kondo & 57 Others 1 KLR (E&L)** while considering the necessity for leave in Judicial Review matters observed thus:-

“The purpose of the application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration.”

10. On the considerations the court ought to take into account in an application for leave the judge stated:-

“Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at the full *interpartes* hearing of the substantive, application for judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

I agree with **Waki, J.** as to the principles which the court has to consider in determining whether leave should be granted. Does the applicant’s application satisfy these principles? I do not think so.

11. The applicant premises his application principally on the ground that there had been a previous determination of the boundary dispute between land parcel number **Majoge/Magenche/1122** and **1120**. On the material availed the owner of land parcel number **Majoge/Magenche/1120** is not disclosed and no ownership or title document in respect of parcel **1120** has been exhibited. The interested party has demonstrated that he is the registered owner of land parcel **Majoge/Magenche/1993** and has exhibited a copy of his title deed. The interested party states he did not participate and had no notification in regard to the determination of the boundary dispute that resulted in the report dated 30th December, 2014. It is not shown that the interested party was given any notification as required under the **Land Registration Act, 2012** and as is clear from the report the determination related to boundary dispute relating to **Majoge/Magenche/1120** and **1122** and did not relate to the interested party’s parcel number **1993**.

12. On the face of it the determination by the land registrar of the dispute relating to land parcels

Majoge/Magenche/1993 and 1122 appears to have been made in accordance with Sections 18 and 19 of the **Land Registration Act, 2012** as there is evidence the requisite notice under the Act was duly given and both the applicant and the interested party participated in the proceedings. The record shows they gave their statements of evidence. The land registrar under Sections 18 and 19 of the **Land Registration Act, 2012** is the person mandated to carry out the responsibilities envisaged thereunder. The person who made the report of 30th December 2014 purports to have been acting on behalf of the land registrar but does not state he was infact authorized by the land registrar to undertake the exercise. Is there a possibility he could have been acting at the bidding of the applicant behind the land registrar's back? It is probable otherwise why would the land registrar disown the report?

13. The upshot is that I am not satisfied the applicant has demonstrated he has an arguable case with any probability of succeeding at the full hearing of the notice of motion if leave is granted. I accordingly decline to grant leave and order the applicant's chamber summons dated 15th April 2015 dismissed with costs to the interested party. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 12th day of February, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendant

J. M. MUTUNGI

JUDGE