



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. APPLICATION NO.153 OF 2006

REPUBLICAPPLICANT

VS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE:

THOMAS NYONJE

AS CONSOLIDATED WITH:

MISC APPLICATION NO.156 OF 2006.

REPUBLICAPPLICANT

VS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. This judgment concerns Misc. Application No.153/06 and Misc. Application No.156/06. The two are consolidated cases. They were consolidated because they arose in similar circumstances, seek the same orders, are against the same respondents, and the decisions that gave rise to them are similar.

2. In Misc. NO.153/06, the **Chief Land Registrar and the District Land Registrar**, Kisumu, are named as 1st and 2nd respondents respectively while **Charles Ondiek Wariero** and **Yoma Ramogi Opiyo** are named as 1st and 2nd interested party. **Thomas Odhiambo Nyonje** is the Ex parte Applicant. The Land parcels involved are **KISUMU/KANYAKWAR”B”/1005. 1006. 1007 AND 1008** all registered in the name of the Exparte – Applicant.

3. In Misc. No.156/06, the **Chief Land Registrar and the District Land Registrar**, Kisumu, are named as 1st and 2nd Respondents respectively. And just like in the other case, **Charles Ondiek Wariero** and **Yoma Ramogi Opiyo** are named as 1st and 2nd interested party. The exparte applicant however was originally **WILLIAM OTIENO KWAME** but is now **JACINTA MONICA AKINYI**. Jacinta replaced Kwame vide a consent entered here on 29/5/2013. The parcels of Land involved are **KISUMU/KANYAKWAR "B"/1015 AND 1023** registered in the name of the original exparte applicant – **WILLIAM KWAME OTIENO**.

4. In both consolidated suits, the prayers are the same. I will set out the prayers in suit No.153/06. They are as follows:

Prayer 1: An order of Judicial Review and in particular an order of **CERTIORARI** do issue to bring to this court for purpose of being quashed and to quash 1st Respondents decision and/or circular dated 24/7/06 seeking for surrender and cancellation of Land title numbers **KISUMU/KANYAKWAR/"B"/1005, 1006, 1007 AND 1008**.

Prayer 2 : An order of judicial Review and in particular an order of **CERTIORARI** do issue to bring to this court for purpose of being quashed and to quash 2nd respondents decision and/or circular dated 28/7/006 seeking for surrender and cancellation of Land title numbers **KISUMU/KANYAKWAR/"B"/1005, 1006, 1007 AND 1008**.

Prayer 3 : An order of Judicial review and in particular an order of prohibition do issue to prohibit the respondents from using, applying , enforcing, effecting, executing and/or in any manner trying to enforce the said decision or circular dated 24/7/06 seeking for surrender and cancellation of Land title numbers **KISUMU/KANYAKWAR/"B"/1005, 1006, 1007 and 1008**.

Prayer 4 : An order of Judicial Review and in particular an order of prohibition do issue prohibiting the 2nd respondent from using, applying, enforcing, effecting, executing or in any manner continuing to enforce the said decision or circular dated 28/7/06 or for surrender and cancellation of Land title numbers **KISUMU/KANYAKWAR/"B"/1005, 1006, 1007 AND 1008**.

Prayer 5 : Costs of the application be paid for.

5. In No.156/06, the prayers are set out in exactly the same way and in the same sequence except that they are to issue concerning land parcel Nos. **KISUMU/KANYAKWAR B/1015, and 1023**.

6. The premise on which the prayers are sought is that the respondent acted in fragrant breach of the principles of natural justice; the decisions were made arbitrarily and are unreasonable and unfair; the respondent discretion was exercised oppressively and unjustly: and, lastly, the decisions are being used to deny exparte applicants their rights to absolute and indefeasible title to their respective parcels of land.

7. There is some history and background emerging both from statements of fact and verifying affidavits availed by both exparte Applicants. The first exparte Applicant – **THOMAS ODHIAMBO NJONJE** – stated that he purchased his parcels of land from **Gideon Okech Rayola** and **Stephen Nyanjua Agayi** in years 2003 and 2006.

He was subsequently issued with titles and had no knowledge of any claim on the titles by third parties.

8. But in July 2006, he received the letter dated 24/7/06 from 1st respondent asking for recalling of title from him for cancellation. He equally received another letter from 2nd respondent dated 28/7/2006 also seeking cancellation.

9. The 2nd Exparte Applicant, who was originally **William Otieno Kwame**, received similar letters during the same period and threatening the same action. Infact the letters bear similar dates as those sent to 1st Exparte Applicant and are similarly worded.

10. According to the two Exparte applicants, they were never given a hearing. The decisions were therefore oppressive and unreasonable and would occasion irreparable loss.

11. It is clear that the two respondents did not respond to the suits

12. In both suits, the response of the interested parties was made vide 40- paragraph replying affidavits sworn by **Charles A. Ondiek**. In the affidavits one reads a history. The history is this: there was originally one Land parcel – **KISUMU/KANYAKWAR/"B"/299**. The beneficiaries of the suit parcels decided to subdivide the land among themselves. Towards that end, there was re-survey and subdivisions resulting in creation of Land parcels **KISUMU/KANYAKWAR/"B"/892, 893, 894, 895, 896, 897, 898, 899, 900, and 901**.

13. The beneficiaries then presented the relevant documents to the Land Registry for issuance of title. But the Land Registrar instead issued titles in the names of strangers. The beneficiaries then made a fresh attempt for resurvey and requested for rectification of the wrong done. That appears to have been done and the earlier titles were cancelled.

14. A new development then took place. There arose a dispute between the beneficiaries and the strangers. The Land Registrar summoned all those involved in order to resolve the issue of ownership. The beneficiaries won. The strangers, who appear to include the exparte applicant, were not satisfied. They filed a dispute in the now defunct District Lands Tribunal. The strangers again lost. The land Registrar then became bound to issue titles to the beneficiaries for the parcels of Land resulting from sub-division.

15. But when gazetting the parcels of land for issuance of titles, the registrar left parcels **No.892 and 893**. These two parcels belonged to **V. Otieno Wariero** and **Charles A. Ondiek**.

16. But even before issuing titles for the gazetted parcels of land, the Lands office hastily sub-divided parcel No.893 creating in effect 24 new parcels viz: **KISUMU/KANYAKWAR/"B"/1005 to 1028**. This created a new round of disputes. The battle places for the new round of disputes were the various land offices and the courts.

This suit herein is an off- shoot of these disputes.

17. A crucial averment was-made in the replying affidavits. It was asserted that the 1st Respondent has powers in law to require any person to produce any document or instrument and such person is obliged to comply

18. The 2nd respondent was said to be exercising his lawful power vide the letter of 28/7/2006 when the applicant were called to avail the titles for investigations.

19. The exparte Applicants are said to be acting prematurely in filing this suit and are in effect trying to obviate investigations into their fraudulent activities. I will have occasion to revert to these crucial averments later on in in this judgment.

20. This matter was not heard; submissions were filed instead. I have read the rival submissions. The submissions of the interested party are essentially a restatement and amplification of what is contained in the replying affidavits. A repeat of the contents would be a laborious and unrewarding exercise. But it is necessary to point out that various decided authorities were availed by the interested parties to reinforce the various legal positions taken by them. And it is not only decided authorities that were availed; there was other legal literature too.

21 Some of the availed authorities are:

- a. Owners of the Motor Vessel "Lillian S" Vs CALTEX OIL (Kenya) LTD {1989} **KLR 38 – 42**.
- b. Koinange Investments & Development Limited Vs Nairobi City Council & 3 others(2009) eKLR

- Civil Appeal NO.535 of 2006.
- c. Festus Ogada Vs Hans Mollin (2009 Eklr (Civil Appeal No.100/07).
 - d. Mirugi Kariuki Vs Attorney General: Civil appeal No.70//1991.
 - e. The commissioner of Land Vs Kunste Hotel Limited: Civil Appeal No.234 of 1995
 - v. 22. Some of the legal literature is to be found in
 - a. Peter Kaluma: Judicial Review, Law, Procedure and Practice” Law Africa: pages 101, 105, 106, 118, 119
 - b. Halsbory Laws of England, 4th Edition, Volume 48, Butters Worths London, 200 at page 124(403).
 - c. The Law Reports, 1987, Supreme court of Judicature, Chancery Division Volume 1 at pages, 150 (196).

23. Some statutes too were availed.Those relied on were:

- a. **the Registered land Act, (cap 300)**
- b. **The government Land Act, (cap 280)**
- c. The lands control act (cap 302

24. The submissions of the Exparte Applicant were not much different from those of interested parties in terms of focus. They largely dwelt on what the application contained. It is a hardgoing affair trying to outline the contents bearing in mind that I have already highlighted the contents of the application.

25. I have read the two suits as filed, the responses made, the rival submissions, decided cases, legal literature and the relevant parts of the statutes availed. It is now time to decide.

26. I need, however, to point out a few things. Both sides have made averments that would be useful if the task at hand was to decide who owns, or should own, what. The exparte applicants for instance said they bought their parcels of land for valuable consideration and were issued with title deeds. They were not aware of any claims by the third parties and are therefore innocent purchasers without notice. Cancellation of title therefore would be an unjustifiable interference with ownership and an invasion of their rights to own property.

27. The interested parties on the other hand raised issues of fraud, non- disclosure of material facts, trust, consent of land control Board etc. The arguments subsequently proffered to articulate the issue seem to focus on the merits of the case.

28. The interested parties additionally availed decided cases and other material dealing with these issues.

29. I have deliberately avoided reliance on the material availed and have equally avoided the issue because judicial review is not about merits of the decisions that are made; rather, it is about how the decisions are arrived at and whether there is breach of both Procedural and Substantive law in arriving at them. I therefore do not understand when, for instance, the Exparte Applicants calls the court to decide whether they are the legal owners of the parcels of land they allege to have purchased.

30. What is appropriate is a finding as to whether the applicants were accorded a fair hearing or whether, the alleged decision was tenable in law.

31. I pointed out earlier that there were crucial averments made by the interested parties which I would revert to later. Simply put, the interested parties said the respondent had power in law to require any person to produce a document or instrument; that the respondent was trying to exercise these lawful powers; and that the application for judicial review is prematurely brought with a view to frustrating intended investigations.

32. The genesis of both suits is to be found in the contents of two letters; one dated 24/7/2006 and another dated 28/7/2006 . According the Exparte Applicants, there is already a decision to cancel their titles and the suits are precisely aimed at quashing the decisions and prohibiting various actions that may

be based on these decisions. Question is: Were there such decisions?

33. According to the Exparte Applicants the two letters constituted a decision to cancel their titles. Both applicants deponed in their verifying affidavit that they received the letter dated 24/7/2006 from 1st respondent ordering cancellations of their title. Both also deponed that they received the latter dated 28/7/2006 calling up their titles for cancellation. All this is clear from the verifying affidavits availed by the Exparte applicants.

34. Lets now look at the letters. I don't intend to reproduce the letters verbatim but I will state the essentials. The first letters dated 24/7/2006 are from Chief Land registrar to the District Land Registrar, Kisumu. It is copied to Lumumba, Mumma and Kaluma advocates, who are the counsels for interested parties. They were not at all copied to the exparte Applicants or their counsels. When the exparte Applicant say they received the letter from the Chief Land Registrar that position is not borne out by the letter itself.

35. What is clear is that the letter is essentially internal communication between two offices in the Ministry of lands, with a copy being deemed necessary to be given to a firm of advocates. The essentials are as follows: The District Land Registrar was ordered to reinstate restrictions on some land parcels. The restrictions had earlier on been ordered removed. The registrar was also ordered to recall any titles issued after restrictions were removed with a view to cancelling them. A period of 3 weeks was given to do so.

36. The letters of 28/7/2006 was each written to the Exparte Applicants by District Land Registrar, Kisumu. The letter asks for surrender of titles for **INVESTIGATIONS, NOT CANCELLATION**. It then informs the exparte applicants of placement of restrictions on the parcels of land.

37. Quite clearly, the first letter was internal communication between two government offices and did not constitute an official decision communicated to the Exparte Applicants to cancel their titles. The decision to cancel their title was yet to be made by the relevant office. And nothing shows that the letter was meant for Ex parte Applicants. Nothing shows it was copied to them and when they allege it was sent to them, they needed to demonstrate that well.

38. The second letter was meant to start investigations. This latter was written to Ex parte Applicants shortly after the first letter was written to the District Land Registrar. It was complying with the first letter. The letter is clearly not about cancellation of titles. It is about investigations. It seems to me that the District Land Registrar could not just cancel titles without investigations. He understood his role well.

39. And in my view, it is the decision of the District Land Registrar to cancel the titles that would be amenable to judicial review. It would be the binding decision. It is the decision that would be communicated to the Ex parte Applicants telling them their titles had been cancelled. At that point then, the Exparte Applicants could decide to challenge the decision. It is important to note that despite the first letter, the Exparte Applicants titles were not cancelled.

40. At the point at which the exparte Applicants decided to intervene, the respondents offices were only executing their lawful mandates. The way they were doing it may not have been pleasing to the applicants, but time had not yet come for the applicants to invoke the aid of judicial review orders. Why do I say so? Section 8 (a) and (b) of Registered Land Act (cap 300) (now repealed) states as follows:

Section 8: The Registrar may exercise the following powers in addition to any other powers conferred on him by this Act, that is to say:

(a) he may require any person to produce any instrument, certificate or other document or plan in relating to the Land, lease or charge in question, and that person shall produce the same.

(b) he may summon any person to appear or give any information or explanation respecting the Land, a lease or a charge, or an instrument certificate or other documents or plan relating to the Land, lease or charge in question, and that person shall appear and give the information or explanation.

41. It is clear that in an internal communication contained in the letter dated 24/7/2006 which was not at all intended for Ex parte. Applicants, the chief Land registrar directed cancellation of the titles. But the District Land Registrar seemed to know that you can not make such decision without following the law. He therefore decided to commence investigations, hence the letter of 28/7/2006. The letter was intended for the Exparte Applicants and it did not suggest cancellation. It called for investigations.

42. As one may easily realise, no court can stop a public body or office from executing its lawful mandate, yet the orders asked for herein are meant to do precisely that. It is therefore correct when the interested parties aver that the Exparte Applicants came to court prematurely. They were a tad too fast. They were abit rash.

43. It was only after an official decision to cancel the title deeds had been made by the District Land Registrar that the Exparte Applicants could come to court to allege what they are now alleging in the suits.

44. Which way then? I have already taken the position that the Exparte Applicants rushed to court prematurely. I have said too that at the stage the exparte Applicants came to court, the respondents were only doing what the law allowed them to do. I need to add however that had the formal official decision been made to cancel the titles, the exparte Applicants would be in order to come to court. But that is not the situation now.

45. Judicial Review orders are discretionary. In light of what I have said so far, it is clear that discretion can not be exercised in favour of Exparte Applicants. The

Ex parte Applicants have not proved or demonstrated what they allege in the suits.

Accordingly, I dismiss the two suits with costs to the interested parties.

A. K. KANIARU

ENVIRONMENT & LAND JUDGE

7/5/2015

7/5/2015

John Ogendo court clerk

Omondi T. For Wasuna for Applicants

Aluoch (absent) for respondents

Interpretation English/Kiswahii

Court Judgment read and delivered in open court.

Right of appeal 30 days.

A. K. KANIARU

ENVIRONMENT & LAND JUDGE

7/5/2015