



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW CASE NO. 3 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS IN THE NATURE OF ORDERS FOR MANDAMUS AND PROHIBITION**

AND

IN THE MATTER OF

VIRGINIA WANGARI NJENGA APPLICANT

(Suing as Administratrix of the Estate of CHARLES NJENGA MUKUNA)

VERSUS

LAND REGISTRAR, MURANG'A.....1ST RESPONDENT

EDWARD KINYUA NDURIRI.....2ND RESPONDENT

(The Administrator of the Estate of HENRY NDURIRI NYAGA)

ELIUD NICHOLAS GITONGA3RD RESPONDENT

JUDGMENT

Having obtained leave on 24th April 2015, the Applicant filed this Notice of Motion seeking the following two remedies:-

1. *An order of prohibition barring the Land Registrar Muranga from entertaining any further transaction or from making any further entries against the parcel of land known as LOC 2/MAKOMBOKI/86 at the request of the 1st and/or 2nd Respondents (the applicant must have meant the 2nd and/or 3rd respondents because the 1st respondent is infact the Land Registrar against whom the orders sought were being directed).*
2. *An order of mandamus ordering the Land Registrar Muranga to remove the entries against the parcel of land No. LOC 2/MAKOMBOKI/86 made on 9th September 2014 i.e. removal of caution in favour of the Applicant herein and transfer of the parcel of land No. LOC 2/MAKOMBOKI/86 to the 3rd respondent.*
3. *Costs of the proceedings be provided for.*

The basis of this application as can be discerned from the documents herein, is that the land parcel No. LOC 2/MAKOMBOKI/86 (herein the suit land) was the subject of High Court Civil Case No. 146 of

2011 Nyeri pending judgment before Hon. Justice Ombwayo between the Applicant and the 2nd Respondent. A caution had been placed on the suit land by the Applicant and the suit at Nyeri was finalized on 20th

December 2013 and was pending judgment before Hon. Justice Ombwayo on 21st February 2014 but the said Judge was transferred to the High Court Eldoret before delivering the said judgment. While the judgment was pending, the 1st and 2nd Respondent removed the said caution without hearing the Applicant in violation of the rules of Natural justice and therefore the order removing the caution was ultra-vires the **Land Act 2012**.

Though served, neither of the Respondents filed any replying affidavit. Since the 1st Respondent is required to be represented by the Hon. Attorney General, this Court made orders on 13th July 2015 that the said Attorney General be served rather than the 1st Respondent. This was complied with and Ms Chilaka did attend Court on 27th July 2015 and sought time within which to file a reply and was given fourteen (14) days within which to do so together with any submissions. However, the Attorney General did not file any response nor submissions.

This application is therefore not opposed. I have considered the application, un-opposed as it is, together with the other supporting documents and the submissions of Mr. Mugo counsel for the Applicant. Judicial Review is concerned with the decision making process and not with the merits of the decision itself – **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 of 2001**. While prohibition issues to forbid some act or decision which would be ultra vires, typical applications for mandamus are meant to enforce statutory duties. The orders sought herein are to prohibit the Land Registrar from entertaining any further transaction on the suit land and also to remove the entries against the suit land made on 9th September 2014 which resulted in removal of the caution placed thereon by the Applicant. It is clear from the certificate of search in respect of the suit land herein that the Applicant had placed a caution on the suit land claiming a purchaser's interest. Under **Section 73(1) of the Land Registration Act**, the Registrar may remove a caution but it is clear from **Sub-section (2)** that a notice should be served on the cautioner warning him that such caution will be removed at the expiration of the time stipulated in the notice. A similar provision is found in the now repealed **Section 133 (1) and (2) of the Registered Land Act** under which the suit land was registered. The Applicant states that no such notice was served upon her by the Land Registrar before the caution that she had lodged on the suit land was removed. That was ultra vires and therefore calls for this Court's intervention. Further, any other transactions on the suit land when the caution is in place and also pending the determination of Nyeri High Court Civil Case No. 146 of 2011 would be ultra-vires and also done in bad faith. Where power to act is granted, it must be exercised on sound reason and within the law and not arbitrarily. In the circumstances of this case, it is clear to me, from the un-controverted evidence of the Applicant, that the 1st Respondent did not afford the Applicant an opportunity to be heard before removing the caution as required by law. It is also clear to me that the 1st Respondent may continue to act in a similar manner unless prohibited by the Court. This application is therefore well merited.

Ultimately therefore, I enter judgment for the Applicant as prayed in her Notice of Motion dated and filed herein on 30th April 2015. No order as to costs.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Abubakar for Mugo for Applicant – present

No appearance for Respondent

COURT: Judgment delivered this 9th day of October, 2015 in open Court.

Mr. Abubakar for Mr. Mugo for Applicant present

No appearance for Respondent

Right of appeal explained.

B.N. OLAO

JUDGE

9TH OCTOBER, 2015