



No. 250

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND MISC. CIVIL APP. NO. 30 OF 2012

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE NATURE OF
MANDAMUS

AND

IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300

AND

IN THE MATTER OF CORRECTION AND OR RECTIFICATION OF THE NAMES OF A
REGISTERED PROPRIETOR OF LAND UNDER SECTION 142 OF THE REGISTERED LAND
ACT, CAP 300 LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR KISII.....RESPONDENT

AND

KISII HOTEL LIMITED.....INTERESTED PARTY

EX PARTE

ALLOYS MATAYA MOSETI

JUDGMENT

1. What is before me is the application brought by **Alloys Mataya Moseti** (hereinafter referred to only as “**the Applicant**”) by way to Notice of Motion dated 22nd May 2012 in which he has sought; an order of judicial review in the nature of mandamus to compel the Land Registrar, Kisii (hereinafter referred to only as “**the Respondent**”) to rectify the proprietorship section of the register in respect of the parcel of land known as **LR No. Kisii Municipality/Block III/6** (“hereinafter referred to as “**the suit property**”)

to read, Alloys Mataya Moseti instead of, **Diplo General Enterprises** (hereinafter referred to only as “**Diplo**”). The Applicant’s application is supported by the affidavit of the Applicant attached thereto which was sworn on 22nd May 2012. The Applicant’s application was brought on the grounds that the Respondent has refused and/or declined to exercise the statutory powers conferred upon it under the provisions of section 142 of the Registered Land Act, Cap 300 Laws of Kenya (hereinafter referred to as “**the RLA**”) (now repealed) to rectify the register of the suit property despite the request made to it in writing by the Applicant to do so. The Applicant has contended that this court has power to compel the Respondent to exercise its statutory mandate. In his affidavit in support of the application, the Applicant has stated that he trades in the name and style of Diplo General Enterprises (“Diplo”) and that he caused the suit property to be registered in the name of Diplo on 30th June 2008. The Applicant has stated further that he received advice from his advocates on record that Diplo is a non-legal entity and as such cannot hold property. Following this advice, he requested the Respondent in writing to rectify the register of the suit property and have the name of Diplo replaced with the name of the Applicant as the proprietor of the suit property which request was turned down by the Respondent. The Applicant has stated further that there is a pending civil suit between the Applicant, the Respondent and the Interested Party herein namely, **Kisii HCCC No. 235 of 2011, Alloys Moseti Mataya –vs- Kisii Hotel Ltd & The Land Registrar, Kisii Central** (hereinafter referred to only as “**the pending case**”) which case may be struck out on a technicality if the register of the suit property is not rectified.

2. The Applicant’s application has been opposed by the Respondent and the Interested Party. The Respondent filed a replying affidavit sworn by one, James S. Onary on 22nd June 2012 in opposition to the application while the Interested Party filed a replying affidavit sworn by one, George Omari Nyamweya on 19th October 2013 for the same purpose. In his affidavit James S. Onary who was the then Land Registrar, Kisii Central deposed that the suit property is registered in the names of two (2) different proprietors namely, Diplo and Kisii Hotel Limited, the Interested Party and that there are two (2) separate registers for the property one with Diplo as the proprietor and the other with Kisii Hotel Limited (the Interested Party) as the proprietor. He deposed further that by the time the Applicant requested him to rectify the register bearing the name of Diplo as the proprietor of the suit property and replace the name of Diplo as the proprietor with the name of the Applicant, there was already a court case pending (“the pending case”) pitting the Applicant, the Interested Party and the land registrar, Kisii in which case the ownership of the suit property was in issue. Mr. Onary deposed further that in view of the pending court case, he felt that the matter is sub-judice and as such should be left for the court to determine. He deposed further that Diplo was registered as the proprietor of the suit property pursuant to a transfer that was presented to the land registrar by the Applicant and as such the mistake if any in the registration of Diplo as the proprietor of the suit property is not on the part of the Respondent. Mr. Onary deposed further that the powers of the Respondent to rectify the register under section 142 of the RLA which had been invoked by the Applicant is limited only to correcting misspellings or omissions which do not affect the interest of any proprietor. In his affidavit sworn on behalf of the Interested Party, George Omari Nyamweya (hereinafter referred to only as “**Nyamweya**”) deposed that he is a director of the Interested Party and that the Interested Party is the owner of the suit property. He has stated further that the Interested Party has owned the suit property for several years. Nyamweya has set out in detail in his affidavit the history of the suit property which according to him was initially owned by one, William Barclay. Nyamweya has contended that the Applicant is seeking the assistance of this court to cure the defects in his pending suit against among others the Interested Party. He has claimed that the certificate of lease for the suit property in the name of Diplo is a forgery because, there is no way in which Diplo which was registered on 27th May 2009 by the registrar of business names could have been registered as the proprietor of the suit property on 30th June 2008 before such registration. Nyamweya has contended that a trial must be conducted to determine the ownership of the suit property which trial cannot be held in these proceedings. In conclusion, Nyamweya termed the Applicant’s application herein an abuse of the process of the court.

3. On 15th May 2013, the parties agreed to argue the application herein by way of written submissions. The Respondent filed its written submissions on 30th September 2013 followed by the Applicant who filed his submissions on 2nd October 2013. The Interested Party which joined the proceedings after the said order had been made filed its submissions on 22nd October 2013. I have considered the application

by the Applicant together with the affidavit filed in support thereof. I have also considered the affidavits filed by the Respondent and the Interested Party in opposition thereto. Finally, I have considered the parties' respective written submissions together with the authorities cited. What I need to determine in the application before me is whether the Applicant has made out a case for the grant of the order of mandamus sought. In Halsbury's Laws of England, 4th Edition paragraph 89, mandamus has been defined as;

“.....a command issuing from the High Court of Justice, directed at any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.”

In paragraph 90 of the same book, the authors have stated that;

“The order must command no more than the party against whom the application is made is legally bound to perform.”

In paragraph 91 of the same book, the authors have stated that:-

“The grant of an order of mandamus as a general rule is a matter for the discretion of the court. It is not granted as of right and it is not issued as a matter of course.”

4. It is on the basis of the foregoing principles that I need to determine whether the Applicant has made out a case for an order of mandamus. It is not in dispute that the Respondent had a statutory power to rectify a register of land when he was called upon to do so by the Applicant. The Respondent was conferred this power by section 142 (1) of the RLA which has been invoked by the Applicant herein. Similar powers are conferred upon the Respondent under section 79 of the Land Registration Act, 2012. The suit property is registered under the RLA and the request by the Applicant to the Respondent for the rectification of the register was made under section 142 of the RLA. In considering whether the Respondent unreasonably failed to perform a public duty conferred upon it by law, the point of reference would be the Respondent's powers under section 142 of the RLA. Having concluded that the Respondent had the power under section 142 of the RLA to rectify the register of the suit property, the next question that I need to answer is whether the powers conferred upon the Respondent under section 142 (1) of the RLA could apply to the rectification that was sought herein by the Applicant. The power of rectification conferred upon the Respondent under section 142 (1) of the Registered Land Act is very specific.

5. As rightly pointed out by the Respondent's advocates, the Respondent can only rectify the register under section 142 (1) of the RLA in the following instances; in formal matters, in the case of errors or omissions not materially affecting the interests of any proprietor, in any case and at any time with the consent of all persons interested, in cases where a dimension or area shown in the register is found to be incorrect upon resurvey and in cases where there has been a change of name or address of any proprietor of land. Any rectification outside the said parameters can only be carried out by the court pursuant to section 143 of the RLA. The Applicant has not come out clearly as to under what provision of section 142 he is seeking the rectification of the register of the suit property. If I understand the Applicant's submission well, the Applicant's case is that the suit property was registered in the name of Diplo wrongfully because Diplo is not a legal entity and as such cannot hold land. The Applicant claims that Diplo is his trading name and as such he is the one who should have been registered as the proprietor of the suit property. The rectification sought is therefore meant to correct this error in the registration of Diplo as the proprietor of the suit property instead of the Applicant.

6. As I have stated above, the Respondent has the power to correct errors in the register. However such correction can only be done provided that the same would not affect the interest of any proprietor. For the Respondent to be able to rectify the register of the suit property, the Applicant had to satisfy it that the registration of Diplo as the proprietor of the suit property was erroneous and that the correction of the same would not affect materially the interest of any proprietor. According to his advocate's letter dated 21st March 2012 addressed to the Respondent through which he sought the rectification of the register of the suit property, the Applicant sought that rectification on the ground that Diplo is not a legal entity and

as such cannot hold property. The Applicant did not state in that letter under what circumstances Diplo came to be registered as the proprietor of the suit property. This is an issue which the Applicant has also not tackled in his affidavit in support of the application herein and in his submissions. From the documents on record, Diplo was registered as the proprietor of the suit property on 30th June 2008. Diplo was however registered as a business name of the Applicant under the Business Names Act, Cap 499 Laws of Kenya on 27th May 2009 about a year after it became the proprietor of the suit property. The question that begs for an answer is how Diplo was registered as the proprietor of the suit property before it came into being.

7. Before the Respondent could exercise its power under section 142 (1) (a) of the RLA, the Respondent had to be convinced that the registration of the suit property in the name of Diplo was as a result of a mistake or error. There is nothing in the Applicant's advocate's letter requesting for rectification pointing out to any error or mistake. Assuming that the Applicant had shown that Diplo was registered as the proprietor of the suit property by mistake; did the Applicant discharge the second burden of showing that the rectification that was sought would not affect materially the interest of any other proprietor? As at the time the Applicant made the application for the rectification of the register for the suit property, the Applicant was aware that the suit property had two titles, one in the name of Diplo and the other in the name of the Interested Party and that there was already a pending case between the Applicant, the Interested Party and the Respondent over the ownership of the suit property. Infact the Applicant made it very clear in his affidavit in support of the application herein that he was seeking the rectification of the register of the suit property to support his case in the pending case. There is no doubt that if the rectification that was sought by the Applicant was allowed, it would materially affect the interest of the Interested Party who is also registered as a proprietor of the suit property and who has claimed that Diplo's registration as proprietor of the suit property was fraudulent. In its affidavit in reply, the Respondent explained that it could not carry out the rectification of the register that was requested by the applicant because of a dispute that was existing between the Applicant and the Interested Party over the ownership of the suit property and that it was of the view that such rectification would affect the interest of the Interested Party.

8. It is my finding from the foregoing that the Applicant not only failed to show that Diplo was registered as proprietor of the suit property through mistake, but also that the rectification of the register of the suit property would not affect the interest of any proprietor. In the circumstances, the Respondent was not under a duty or obligation under section 142 of the Registered Land Act to rectify the register of the suit property. In the absence of statutory or legal duty on the Respondent to carry out the rectification of the register that was sought by the Applicant, this court cannot issue an order of mandamus to compel the Respondent to carry out the said rectification.

9. As I have stated earlier in this judgment, the grant of an order of mandamus is a matter for the discretion of the court. It follows therefore that even where a case has been made out for the grant of such order, the court can still decline to issue the order if the circumstances are such that the issuance of such order would not be appropriate. In the circumstances of this case, I do not think that I would have granted the orders sought even if the Applicant had made out a case for the same. There is already a case pending between the parties to this application. The dispute revolves around the ownership of the suit property. In that case, it has been claimed by the Applicant that the Interested Party colluded with the Respondent and got registered as the proprietor of the suit property fraudulently. The Interested Party has made similar claims against the Applicant in its defence and the issue as to whether Diplo can legally hold property is in contention. To make any order that would affect the titles held by any of the parties to the pending case would prejudice the outcome of the pending case. Such an order would therefore be undesirable. I would have therefore exercised my discretion in favour of rejecting the application herein.

10. In conclusion, it is my finding that the Applicant has not made out a case for the grant of the order sought. The Applicant's Notice of Motion application dated 22nd May 2012 is hereby dismissed with costs to the Respondent and the Interested Party.

Delivered, dated and signed at Kisii this 16th day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Minda for the Applicant

N/A for the Respondent

Mr. Soire h/b for Nyamweya for the Interested Party

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE