



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 383 OF 2012

BETWEEN

REPUBLIC APPLICANT

AND

MINISTER FOR LANDS 1ST RESPONDENT

THE KITUI LAND ADJUDICATION

& SETTLEMENT OFFICER 2ND RESPONDENT

KITUI LAND REGISTRAR 3RD RESPONDENT

AND

PETER KIMANZI UKUMU INTERESTED PARTY

EX PARTE

MUTIA NZAA

JUDGMENT

Introduction and Background

1. Pursuant to the leave granted on 22nd October 2012, the *ex-parte* applicant (“applicant”) moved the court by a Notice of Motion dated 12th November 2012 supported by the applicant’s verifying affidavit and further affidavit sworn on 12th November 2012 and 7th March 2014 respectively seeking, inter alia, the following:
 - a. That an order of prohibition by way of judicial review issue prohibiting the respondents herein, their servants, agents and/ or employees from enforcing the judgment/finding which were never delivered in Land Appeal (Minister) Case No. 137 of 2003.
 - b. That an order of certiorari by way of judicial review be granted directing that the undelivered findings and judgment relating to the parcel of land known as ITHUMULA/IKANGA/941 in Land Appeal (Minister) Case No. 137 of 2003 *MUTUA NZAA v. PETER KIMANZI UKUMU* be brought unto this court and be quashed forthwith.

- c. *That there be temporary stay of the enforcement of the undelivered judgment and/or findings in in Land Appeal(Minister) Case No. 137 of 2003 MUTUA NZAA V. PETER KIMANZI UKUMU pending the hearing and determination of this application.*
2. The interested party opposed the application through his replying affidavit sworn on 15th November 2013. The respondents, on their part, filed grounds dated 20th March 2014 in opposition to the application.
3. This matter concerns a dispute between the applicant and the interested party involving land parcel No. ITHUMULA/IKANGA/941 (“the suit property”). The applicant claims that he acquired the suit land in the year 1972 before it was demarcated. After demarcation, the interested party filed an objection with the Kitui Land Adjudication and Settlement Officer. The parties were heard and an award was made in favour of the interested party.
4. The applicant, being dissatisfied with the Adjudication and Settlement Officer’s decision, filed an appeal being ***Appeal No. 137 of 2003*** (“the Appeal”) to the Minister for Lands in accordance with the ***Land Adjudication Act (Chapter 284 of the Laws of Kenya)***. The Minister delegated the hearing and determination of matter to the Kitui District Commissioner who dismissed the appeal. In effect the decision of the Adjudication Officer was affirmed. The interested party thereafter moved to be registered as the proprietor of the suit property. He was issued with a certificate of registration under the ***Registered Land Act (Chapter 300 of the Laws of Kenya)***, which was applicable at the material time, on 20th May 2008.
5. The issue is contention is whether the District Commissioner delivered the judgment and if not, whether the applicant is entitled to the prayers in the motion.

The Applicant’s case

6. The applicant’s case that his appeal to the Minister was heard by the District Commissioner in the year 2003 but that the judgment was not delivered. He depones that he obtained a certified copy the proceedings and the judgment on 2nd October 2012 after persistent inquiries at the District Commissioner’s Office when he was referred to the office of the Director of Land Adjudication. He learnt that a judgment was delivered on 28th January 2004 by the District Commissioner.
7. The applicant depones that he was not notified of the delivery of the judgment. He avers that the judgment was neither delivered in his presence nor in open court as required by the law. The applicant laments that the proceedings do not indicate the date on which the matter was heard and the manner of swearing of the witnesses. The applicant also attacks the decision on the ground that the District Commissioner did not demonstrate the considerations he took into account in arriving at the decision. As a result, the applicant contends that the proceedings and the judgment are incompetent and defy the fundamental principles of fair hearing and adjudication and are therefore null and void ab initio.
8. The applicant is also aggrieved by the fact that the interested party has already acted on the judgment and acquired a title deed to the suit land. It is the applicant’s position that the interested party holds an irregular title having acted on an irregular judgment.

Respondent and Interested Party’s Case

9. The respondents and the interested party oppose the application. They contend that the judgment was delivered by the District Commissioner on 28th January 2004. Consequently they argue that the application offends the mandatory provisions of ***Order 53 rules 2*** of the ***Civil Procedure Rules*** and ***section 9(3)*** of the ***Law Reform Act*** since six months have lapsed since the delivery of the judgment the ex parte applicant seeks to quash.
10. They further contend that an order of prohibition to stop the respondent from enforcing the

judgment cannot be issued as the same has been overtaken by events as the judgment has been implemented by the Chief Land Registrar who issued a title to the suit property on 20th May 2008. They rely on the Court of Appeal holding in ***Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge and Others*** CA Civil Appeal No. 266 of 1996 [2011]eKLR that prohibition cannot lie to correct what has already been done.

11. The respondents also submit that the dispute between the applicant and the interested party is about the ownership of the suit property and therefore judicial review orders are not available and the parties must pursue the matter in an ordinary cause to enable parties adduce evidence to determine the rightful owner of the property.
12. The interested party contends that the jurisdiction of this court being a special jurisdiction, the form of the pleadings is prescribed and failure to file proper pleadings is fatal to the applicant's case. He further contends that a perusal of the statutory statement dated 18th October 2012 does not disclose any of the known grounds for instituting judicial review to warrant this court's intervention. He particularly contends that the applicant has not cited any irregularity in the process with which the respondents issued the interested party with his title.

Determination

13. The first order sought in the Motion is one of prohibition. In ***Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge and Others (Supra)***, the Court of Appeal discussed the scope of the order of prohibition, it stated, "*What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings*"
14. It is not in dispute the decision made by the District Commissioner has now been implemented as the interested party has now been registered as the proprietor of the suit property and issued with a certificate of title. An order of prohibition cannot therefore issue in the circumstances to, in effect, cancel or set aside the title deed issued to the interested party.
15. As regards the prayer for an order of certiorari, the question is whether the District Commissioner's judgment should be set aside for lack of procedural impropriety in the sense that it was not delivered as contended by the applicant. As regards the order of certiorari, the Court of Appeal stated in the ***Kenya National Examination Case (Supra)*** that, "*Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reason.*"
16. Both parties take opposing views on the issue whether the judgment was actually delivered. In my view, it is not necessary to decide this question for two reasons. First, the District Commissioner's judgment has already been acted upon by the Land Registrar registering the interested party as the proprietor of the suit property. Under **section 28** of the ***Registered Land Act (Repealed)***, applicable at the time provided as follows, "*The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.....*" In the circumstances it is clear that the order of certiorari will not serve any purpose and issuing it would be contrary to the statutory intent to confer indefeasible title to the registered proprietor. Once the certificate of title has been issued the court cannot re-open the process of adjudication

17. The second reason flowing from the first, is that the issue of the applicant's interest in the suit property is subject of a pending suit; ***Kitui SRMCC No. 28 of 2011, Peter Kimanzi v Mutia Nzaa***. In the said suit, the applicant, as the defendant, has filed a counterclaim in which he seeks, "A declaration that the Defendant has overriding interest on the parcel of land known as Ikanga/Ithumula/941 of possession and occupation."
18. Notwithstanding what I have stated, I am convinced that on the basis of the evidence, the judgment was delivered by the District Commissioner. The certificate of title to the suit property could only be issued on the basis of a judgment determining the appeal in accordance with the ***Land Adjudication Act***. The applicant concedes that the appeal was heard as evidenced by the certified proceedings exhibited in court. The interested party has deponed that at delivery of the judgment the applicant, his wife Syongo and son were present at the delivery. This averment is neither denied nor disputed.
19. As proof of the fact that the judgment was not delivered, the applicant points to a letter dated 27th September 2012 from the Kitui District Commissioner's Officer to the Director, Land Adjudication and Settlement, stating that the applicant's case file was returned to the Director for verification and return and the same has not been returned to the Commissioner. In my view, this letter is written in response to two letters and without the full tenor of the correspondence it is not helpful at all as it only deals with the case file and not whether the judgment was delivered.
20. I find it difficult that the applicant would have remained silent after hearing the hearing of the appeal in 2003 only to file these proceedings nine years later without so much as a demand letter to the District Commissioner calling for the long standing judgment to be delivered. I conclude that this case is an attempt to reverse the adjudication process once the applicant realised that the title had been issued to the interested party when it filed the defence and counterclaim in ***Kitui SRMCC No. 28 of 2011***.
21. It has been held time and again that orders of judicial review are discretionary and the court will not issue them when it is apparent that they are not efficacious. This is the position in this matter.
22. In light of what I have decided, it is not necessary to deal with the procedural defects to the Notice of Motion raised by the respondents and the interested party.

Disposition

23. The Notice of Motion dated 12th November 2012 is dismissed with costs to the interested party.

DATED and DELIVERED at NAIROBI this 5th day of May 2014

D.S. MAJANJA

JUDGE

Mr Mutemi instructed by Nzamba Kitonga Advocates for the *ex-parte* applicant.

Ms Chilaka, Litigation Counsel, instructed by State Law Office for the respondents.

Mr Kamotho instructed by Kamotho Njomo and Company Advocates for the interested party.