



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
ENVIRONMENT AND LAND COURT
HC.MISC.APP. NO.136 OF 2011

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR, NYERI.....RESPONDENT

JANE WANGECHI WARIARI (*suing as legal representative of the estate of*

HIRAM NDUNG'U NG'AYU (deceased).....EXPARTE APPLICANT

JAMES MWAURA KIGUTA.....INTERESTED PARTY

J U D G M E N T

The exparte applicant is the widow of Hiram Ndung'u Ng'ayu hereinafter referred to as the deceased. She seeks an order of *certiorari* bringing to this court for quashing the decision by the Land Registrar Nyeri, to cancel the registration of the deceased as the proprietor of leasehold interest in **LR No.NYERI/MUNICIPALITY BLOCK III/141** and an order of *Mandamus* requiring The Land Registrar, Nyeri to restore the deceased's registration as the proprietor of the leasehold interest.

The application is based on grounds that the deceased Hiram Ndung'u Ng'ayu was the applicant's husband and died on 19/10/2009. At the time of his death, the deceased was the registered proprietor of leasehold interest in L.R. No.NYERI/MUNICIPALITY BLOCK III/141. However the Land Registrar, Nyeri published a notice in the Kenya Gazette for cancellation of the deceased's name as the proprietor of the property for unknown reasons. The applicant believes that the action by the Land Registrar, Nyeri is ultra vires, illegal and unreasonable.

The statement "of facts" was filed on 19/7/2011 with a supporting affidavit of the exparte applicant. According to the exparte applicant she is the legal representative of the estate of her deceased husband, Hiram Ndung'u Ng'ayu who died on 19/10/2009. At the time of his death, the deceased was the proprietor of the leasehold interest in L.R. No.Nyeri/Municipality Block III/141. The deceased had purchased the subject land from the previous owner, Naomi Wanjiku Nderitu, who had obtained the land by transmission from her deceased husband's estate. Her late husband was registered as the proprietor thereof on 28/11/2008 and immediately took occupation and use of the land which she still occupies to date with her children as their residence. The deceased was issued with the certificate of lease on 28/11/2008, which document she still retains to date and continue to pay rates and rents.

That vide a notice in the Kenya Gazette No.2410 of 11/3/2011, the Land Registrar, Nyeri, had given notice of her decision to cancel the entry indicating her deceased husband as the proprietor of the subject property. The reason behind the said decision was unknown to her as she was aware that her deceased husband was a bonafide purchaser for value of the subject property and the same forms part of his estate, which is yet to be administered. The decision by the Land Registrar was otherwise made without giving the dependants of the deceased's estate an opportunity of being heard. The decision by the Land Registrar amounts to deprivation of the property, which belongs to the deceased estate and which is their only abode. The said decision by the Land Registrar should thus be annulled and the subject property do remain in her deceased husband's name pending administration of the same. She has incessantly tried to obtain a certificate of search for the suit land but her efforts have been inexplicably frustrated at the land's registrar, hence she is not aware whether the intended cancellation has been effected or not.

The application is brought out in the Notice of Motion dated 3/8/2011 and supported by the affidavit of the exparte applicant filed on 3/8/2011 which is similar to the supporting affidavit filed with the chamber summons. It was not necessary for the applicant to file another affidavit on the Notice of Motion as the law is very clear that the notice of motion is filed within 21 days with the affidavits filed with the statement hence any fresh affidavits require the leave of the court.

The Land Registrar Nyeri did not file a replying affidavit, however the interested party filed a replying affidavit stating he is also the holder of special Power of Attorney dated 8/6/2010 in respect of the suit plot. He read and understood the exparte applicant's application by Notice of Motion dated 3/8/2011 together with the supporting affidavit whose import was that the suit plot was initially registered in the name of Peter Mahugu Wairera in the year 1971 for 99 years. That around the year 2005, the suit plot was fraudulently transferred to Mathew Nderitu Rubia, deceased. Upon the death of the said Mathew Nderitu Rubia the said plot was transferred to Naomi Wanjiku Rubia by transmission. Naomi Wanjiku Rubia then transferred the same plot to Hiram Ndung'u Ng'uya, deceased and the husband to the exparte applicant. On or about 25/2/2005, investigations were initiated through the C.I.D offices, Nyeri police station. That upon investigations the anomalies were discovered that the consent to transfer allegedly by Peter Mahugu Wairera was a forgery. The fingerprint impression on the consent to transfer did not belong to the said Peter Mahugu Wairera. That there was no consent from Commissioner of Lands to transfer. There was no sale agreement between the said Peter Mahugu Wairera and Mathew Nderitu Rubia.

Upon the said investigations, the C.I.D office made a report dated 25/2/2011. This culminated into the publication of the Gazette Notice No.2410 with the intention of canceling the entry of Hiram Ndung'u Ng'ayu. The Lands Registry later published Gazette Notice No.5171 with the intention of both canceling the erroneous entry of Hiram Ndung'u Ng'ayu and reinstating Peter Mahugu Wairera as the correct registered proprietor. There being no objections within the periods stipulated by both Gazette Notice the entry of Hiram Ndung'u Ng'ayu was canceled and Peter Mahugu Wairera reinstated as the true registered proprietor and a lease was thus re-issued in the name of Peter Mahugu Wairera on 22/7/2011. The respondent believes that exparte applicant is guilty of laches as the application is overtaken by events and is guilty of material non-disclosure.

In his written submissions, the exparte applicant argues that her deceased husband was registered as the proprietor of the parcel of land known as NYERI/MUNICIPALITY BLOCK II/141 having been so registered on 28/11/2008. The original lessee was Petter Mahugu pursuant to a Power of Attorney in respect of the suit property. The suit property was transferred to the deceased by one Naomi Wanjiku Nderitu who had gotten herself registered upon transmission in her deceased husband's estate. The deceased husband was registered in place of the original lease represented by the interested party.

He argues that the respondent vide Gazette Notice No.2410 dated 11/3/2011 gave Notice of his desire to cancel the name of the exparte applicant's husband as the proprietor of the lease. The respondent later published Gazette Notice No.5171 of 13/5/2011 notifying of the intention to effect the cancellation desired in the Gazette Notice and restoring the original lessee as the proprietor of the land.

The applicant states that the respondent canceled her husband's name and reinstated the original leasee

despite the fact that the land registrar had no powers to revoke or cancel title to land, secondly that the action by land registrar amounted to inter-meddling with a deceased person property contrary to the law and that any alleged fraud does not affect the orders sought.

The interested party on the other hand argues that the Notice of Motion dated 3/8/2011 is misconceived and incompetent because it has failed to comply with order 53 rule 4(1) of the Civil Procedure Rules. He cites order 53 Rule (1) (2) of the Civil Procedure Rules as providing that the application for leave shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and grounds on which it is sought and by affidavits verifying the facts relied upon.

I do not agree with **Mr. Wahome** that this application is misconceived and incompetent on this ground because though the Notice of Motion was served accompanied with a fresh affidavit other than the one filed with the chamber summons, the same was a replica of the supporting affidavit filed with the chamber summons and that filing the fresh affidavit did not prejudice the interested party because the facts remained the same. However, I agree that filing the fresh affidavit without leave of the court was in breach of the provision of order 53 Rule 4(1) of the Civil Procedure Rules. The applicant reproduced the affidavits accompanying the application for leave and served the same instead of serving the Notice of Motion with the affidavit filed with the chamber summons. The applicant also reproduced the statement of facts filed at the leave stage and filed the same with the Notice of Motion.

Article 159 of the Constitution guides this court an exercise of judicial authority. It provides that the court should not put undue regard on procedural technicalities. I do find that the above grounds raised by the interested party are based on procedural technicalities that should be disregarded by the court .

The second issue raised by the interested party is that the court cannot issue orders not prayed for or decide on issues not canvassed before it. I agree with **Mr. Wahome** that the court cannot issue orders not prayed for as doing so will be contrary to the provisions of the Civil Procedure Rules 2010. The applicant has neither sought to quash the Gazette Notice No.1571 of 13/5/2011 that initiated the process of cancellation nor quash the Gazette Notice No.2410 of 11/3/2011.

In the statement of fact the applicant has sought for an order of certiorari bringing to this court for quashing the decision by the Land Registrar, Nyeri, to cancel the registration of the deceased as the proprietor of the leasehold interest in LR No.NYERI/MUNICIPALITY BLOCK III/141.

The **Notice of Motion** is at **variance** with the **statement of facts** as in the latter there is no prayer to quash Gazette Notice No.2410 of 11/3/2011. The notice of Motion appears amended. Order 53 rule 4(2) presupposes that no grounds other than the grounds in the statement shall be relied upon and **no relief** other than the relief sought in the statement shall be granted.

Mr. Wahome argues that Section 17 of the Registered Land Act Cap 300 Laws of Kenya (repealed) gave the land registrar the power to cancel the entry in the Registry which he is satisfied ceased to exist. **I agree**, however, in the case before court the cancellation was not in respect of an entry that ceased to exist but was in respect of an entry that was suspected to have been fraudulently entered thus **I agree with Mr. Kingori** that the Land Registrar could not exercise his powers under the said section.

However this court finds that Judicial Review is not the best process of settling this dispute as evidence on affidavits cannot be properly tested due to the fact that it does not involve cross-examination and re-examination. The facts herein are contested and therefore there is need for viva voce evidence in a suit filed in the proper manner.

The upshot of the above is that an order of **certiorari** cannot be granted as prayed in the Notice of Motion as it varies with the prayers sought in the statement.

On the order of **mandamus**, the relief court be granted as it seeks to compel the Land Registration to act in a specific manner.

An order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice directed to 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. Its purpose is to remedy the defects of justice and accordingly it will issue to the end justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy yet mode of redress is less convenient beneficial and effected.

The ex parte applicant has not demonstrated that the land registrar has the power to cancel the register where he has made wrong entries based on mistake or fraud. Moreover even if he had such powers, the court cannot direct him to exercise the same in an specific manner.

The prayer for mandamus is superfluous because once the decision of the Registrar is quashed the same becomes non-existent and therefore the record remains as prior to the decision. However, even if the same was available, it cannot be granted without an order of certiorari to quash the impugned decision.

Since this court has declined to grant the order of certiorari due to the fact that the prayer in the notice of motion is at variance with the prayer in the statement, and that mandamus cannot be issued without quashing the decision, the application herein is dismissed with costs.

Dated, signed and delivered at Nyeri this 5th day of November 2014.

A. OMBWAYO

JUDGE