



REPUBLIC OF KENYA

High Court at Eldoret

Judicial Review 76 of 2011

IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA

AND

REPUBLIC APPLICANT
=VERSUS=

THE DISTRICT LAND REGISTRAR

UASIN GISHU RESPONDENT

JONAH KARIUKI MWAURA EX-PARTE APPLICANT

AND

BYRON KIPNGETICH GAWON CHOGE INTERESTED PARTY

JUDGMENT

The proceedings before me are by way of Judicial Review. The Ex-parte applicant seeks the following reliefs:-

“ (a) An Order of Judicial Review for Orders of Certiorari be and is hereby issued to remove to this Honourable Court, for the purpose of being quashed, the Responent's decision as contained in the Kenya gazette Notice Number 13868 dated 4th November, 2011, in respect of Ex-parte applicant's parcel of land known as ELDORET MUNICIPALITY /BLOCK 12/404;

(b) An Order of Judicial Review for Orders of Prohibition be and is hereby issued to prohibit the District Land Registrar, Uasin gishu District, the Respondent herein, from effecting cancellation of the Certificate of Lease issued to JONAH KARIUKI MWAURA, the Ex-parte Applicant herein, in respect of all that parcel of land known as ELDORET MUNICIPALIT/BLOCK 12/404; and further that the Respondent be and is hereby prohibited from effecting registration or issuing a title document to JIM KIPTUM CHOGE or to any other person;

(c) Costs of this application together with costs of the application be borne by the Respondent.”

In answer to the application, the Respondent filed a Replying Affidavit. By the said Affidavit, she explained that the transfer of the suit property to the Ex-parte applicant and the issuance of a title document to the said person was established to have been fraudulent.

Following the verification by the Respondent that the title document held by the Ex-parte applicant was fraudulent, the Respondent decided to cancel it.

In order to give effect to the intended cancellation, the Respondent caused the publication in the Kenya Gazette, of a Notification of the intention to cancel the registration of the Ex-parte applicant, as the owner of the suit land.

By the same said Notification, the Respondent indicated that she would register the land in issue, in the name of JIM KIPTUM CHOGE.

As far as the Respondent, (the Uasin Gishu Land Registrar), was concerned, JIM KIPTUM CHOGE was the person who was lawfully entitled to be registered as the proprietor of the suit land. The Respondent explained that on 17th March, 2000, the official Receiver was duly constituted as the receiver of the Estate of JIM KIPTUM CHOGE when the Christ Unlimited Bible Training Limited had successfully, instituted and prosecuted bankruptcy proceedings against the said JIM KIPTUM CHOGE.

It was the contention of the respondent that the title document of the suit property was in the hands of the Official Receiver. However, the said document went astray. The insinuation was that the title document was somehow used, unlawfully, to procure the registration of the Ex-parte applicant as the proprietor of the suit land.

On 15th October, 2002, the High Court discharged the Receiving order against JIM KIPTUM CHOGE. Therefore, as far as the Respondent was concerned, the title document of the suit land ought to have been surrendered to JIM CHOGE.

When the Advocates acting for Estate of JIM CHOGE asked for the title documents, the Official Receiver was unable to hand it over.

The Respondent says that the title in the name of the Ex-parte applicant was procured fraudulently,. That is the reason why she called for the surrender of the said title, which she considered to be a nullity.

The Respondent intended to have the land in issue registered in the name of JIM KIPTUM CHOGE.

The Ex-parte applicant says that the Respondent has no authority, in law, to cancel the title registered in his name. If the Respondent was convinced that the Ex-parte applicant had obtained the title irregularly, the said applicant asserts that the Respondent ought to have used due process to challenge the validity of the title.

It is the contention of the Ex-parte applicant that section 33 of the Registered Land Act did not empower the Respondent to cancel or revoke any title. In any event, the failure by the Land Registrar, to give due notice to the registered proprietor, before the Registrar purported to cancel or revoke the title, is said to constitute a violation of the applicant's right to a fair trial.

Meanwhile, BYRON KIPNGETICH GAWON CHOGE, entered into the fray, in the capacity of an Interested Party. Byron K.G. CHOGE described himself as one of the Administrators of the Estate of his late father, JIM CHOGE. He is a son to the said JIM CHOGE.

The Ex-parte applicant raised a Preliminary Objection to the participation of BYRON in these proceedings. He produced copies of pleadings in **NRB SUCCESSION CAUSE NO. 934 OF 2008; IN THE MATTER OF THE ESTATE OF JIM KIPTUM CHOGE.** Those records show that the High Court, sitting in Nairobi, issued a Grant of Letters of Administration to BENJAMIN KICHWEN CHOGE

and NOREEN ALI SHARIFF.

In answer to that contention, BYRON submitted that the Letters of Administration were issued to EVA CHEROGONY, NOREEN SHARIFF and BYRON KIPNGETICH GAWON CHOGE. It is important to note that the said submissions were not supported by any documentary evidence.

I pause here to emphasise that submissions can never form a substitute to actual evidence. Therefore, if the Interested Party intended to respond to the contents of the Grant of Letters of Administration exhibited by the Ex-parte applicant, he ought to have exhibited other evidence.

He failed to do so. In the circumstances, it does appear that the Grant exhibited by the Ex-parte applicant remains uncontroverted. There is therefore nothing made available to this court, to show that BYRON KIPNGETICH GAWON CHOGE is one of the Administrators to the estate of his late father JIM KIPTUM CHOGE.

In the circumstances, I find that the said BYRON K.G. CHOGE has failed to satisfy the court that he has legal authority to participate in these proceedings.

The Replying Affidavit sworn by BYRON KIPNGETICH GAWON CHOGE states, at the heading thereof, that it was filed pursuant to leave that was granted by AZANGALALA J. (as he then was), on 17th January, 2012.

I perused the whole record, but failed to trace any proceedings on the given date. In any event, the Replying Affidavit did not address the issues regarding whether or not the Ex-parte applicant was given an opportunity to be heard by the Land Registrar before the said Registrar made the decision on the legality of the title document. The Replying Affidavit also did not respond to the contention that the Respondent lacked legal authority to revoke or cancel a title document.

Meanwhile, the Respondent did not make any submissions to justify how she obtained legal authority to revoke or cancel a title deed through a gazette notice. To my mind, there is no doubt that these proceedings do not provide the forum for the determination of the merits or otherwise of the proprietorship claimed by the Ex-parte applicant, on the one hand, and the Estate of the late JIM KIPTUM CHOGE, on the other hand.

These judicial proceedings are about the contention that the Ex-parte applicant was condemned unheard; and also that the Respondent had acted ultra vires.

The Respondent's Gazette Notice identified the Ex-parte applicant as the registered proprietor of the suit land. It went on to indicate that the Land Registrar had discovered irregularities in the transfer of the title document.

As a result of the alleged irregularities, the Land Registrar indicated that he had made all efforts to trace the title document held by the applicant, with a view to having the title cancelled.

The Ex-parte applicant swore an affidavit, indicating that he was not aware of any efforts to trace him, so that he could surrender the title. It is interesting to note that in her replying affidavit, the Respondent did not give any particulars of the efforts made by her office, to have the Ex-parte applicant surrender the title document.

The respondent also failed to show the court how she notified the Ex-parte applicant that she intended to give him an opportunity to justify the legitimacy of his title document.

The notice issued by the Respondent was said to have been pursuant to section 33 of the Registered Land Act. That section reads as follows:-

(1) If a title deed or a certificate of lease has been issued, then, unless it is filed in the registry or

the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate shows all subsisting entries in the register, a note of such registration shall be made on the certificate;

(2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in such case a new certificate may be issued to the new proprietor;

(3) If the disposition is a charge, the certificate shall be delivered to the chargee”.

In a nutshell, that section provides that whenever there was a dealing with land, in respect to which a title deed or a certificate of lease had been issued, that instrument will always be produced on the registration of any such dealing. However, the registrar is empowered to dispense with the requirement for the production of the instrument.

There is nothing in section 33 of the Registered Land Act which empowers the Land Registrar to cancel or revoke the title of the registered proprietor, through a gazette notice.

Was the Ex-parte applicant condemned unheard, as he alleged? The answer to that question starts with the evaluation and assessment of the Gazette Notice. The said Notice is in the following terms:-

“THE REGISTERED LAND ACT

(Cap 300, section 33)

REGISTRATION OF INSTRUMENTS

WHEREAS JONAH KARIUKI MWAURA is the registered proprietor of that piece of Land known as ELDORET MUNICIPALITY/BLOCK 12/404, SITUATED IN THE DISTRICT OF Uasin Gishu, and whereas the District land Registry discovered irregularities in the transfer of the title document herein, and whereas all efforts made to recover the title deed have failed, notice is hereby given that after the expiration of thirty (30) days from the date hereof, provided no valid objection has been received within that period, I intend to dispense with the production of the said title deed and proceed with the registration of the said (sic!) to JIM KIPTUM CHOGE, of Po Box 8101 – 30100, Eldoret, and upon such registration, the title deed issued to JONAH KARIUKI MWAURA, shall be deemed to be cancelled and of no effect.

Dated the 4th November, 2011.

TOM CHEPKWESI

LAND REGISTRAR,

UASIN GISHU DISTRICT”.

That notice acknowledged that JONAH KARIUKI MWAURA was the registered proprietor of the suit land. However, the Land Registrar had discovered irregularities in the said registration. The land Registrar had made all efforts to trace the title document, so that she could cancel it. However, the said efforts had failed to recover the title document.

Consequently, the Land Registrar issued the Notice that she would cancel the title document, unless a valid objection was received by her within 30 days of the notice dated 4th November, 2011.

In the event of cancellation of the title document held by the Ex-parte applicant, the Land Registrar made it clear that another title would be issued in the name of JIM KIPTUM CHOGE.

Effectively, therefore, the Land Registrar had concluded that the title document held by the Ex-

parte applicant was irregular. For that reason the title needed to be cancelled. But before cancellation could be effected, the Land Registrar was affording an opportunity to any person who had a valid objection to the cancellation of the title document, to present the said objection to her.

The Ex-parte applicant came to court before the title deed was cancelled. That fact distinguishes this case from the authorities cited by the Ex-parte applicant, as in all the 3 cases, the title registered in the name of each of the Ex-parte applicants, had already been revoked or cancelled.

In **KURIA GREENS LIMITED -VRS- THE REGISTRAR OF TITLES & ANOTHER, PETITION NO. 107 OF 2010**, the Gazette Notice notified the public at large, that the Government had revoked the titles cited in the Notice. The court held that:-

“The 1st respondent (the Registrar of Titles) ought to have given the petitioner an opportunity to state its case before reaching the decision

that has such far reaching ramifications. The petitioner ought to have been called upon to explain how it had acquired the suit land, considering that the 1st respondent had himself issued a Certificate of Title to the petitioner.”

Meanwhile, in the case of **KONGOWEA MARKET ESTATE LIMITED -VRS REGISTRAR OF TITLES, MSA MISC. APPLICATION NO. 92 OF 2010**, the court came to:-

“the conclusion that in revoking the ex-parte applicant's title to the suit property, the respondents acted outside their jurisdiction, as it was not within their power to revoke the title. Secondly, the revocation of the ex-parte applicant's title was unlawfull as it was contrary to Article 40 of the Constitution of Kenya; and thirdly, the respondents breached the rules of natural justice by failing to give the ex-parte applicant a hearing before revoking the title.”

Although those cases dealt with scenarios in which the title documents had already been revoked, I find and hold that the legal reasoning that informed the said decisions have full application to the matter at hand. I so hold because section 33 of the Registered Land Act did not bestow on the Land Registrar, power to cancel the title document issued to the ex-parte applicant.

By coming to court before the title document was cancelled, the ex-parte applicant cannot be said to have acted prematurely. That is because if he did not take appropriate action, his title would have been deemed as cancelled and of no effect.

As the Land Registrar has no legal authoirty to cancel the title document, through the procedure she had set out, justice demands that this court stops her from taking further steps in that direction.

Accordingly, I do now grant an Order of Certiorari and quash the decision contained in the Kenya Gazette Notice Number 13868, dated 4th November, 2011. In effect, the Land Registrar's decision to have the title document in the name of the ex-parte applicant's name be deemed cancelled and of no effect, is quashed.

I further grant an Order of Prohibition against the Land Registrar, prohibiting him from effecting cancellation of the Certificate of lease issued to JONAH KARIUKI MWAURA, through the process commenced by the impugned Gazette Notice No. 13868, of 4th November, 2011.

However, as I do not recognise that the issues being raised by the Respondent appear to have some basis I order that for the next 12 months, the Ex-parte applicant shall be restrained from transferring or sub-dividing the land in issue, or from encumbering the title thereof in any manner. This order has

been made because the court believes that it is only fair to accord the Respondent and the Estate of the late JIM KIPTUM CHOGE, a fair opportunity to follow the due process of the law, in the pursuit of that which they perceive to be their legitimate claims to the title.

The Respondent will pay to the Ex-parte applicant, the costs of this application.

DATED, SIGNED AND DELIVERED AT ELDORET,

THIS *9th* DAY OF *May*, 2013.

FRED A. OCHIENG

JUDGE