



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MIGORI

ELC JR CASE NO. 3 OF 2018

JARED OTIENO AWELLO.....APPLICANT

Versus

LAND REGISTRAR HOMA- BAY COUNTY.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. On 15th May, 2018, the ex parte applicant namely **JARED OTIENO OWELLO** through M/s Nyauke and Company Advocates filed an application for Judicial Review by way of a notice of motion dated 10th May 2018 under **Order 53 Rules 3 and 4 of the Civil Procedure Rule, 2010** (The Rules), **sections 8 and 9 of the Law of Reform Act (Cap 26 Laws of Kenya)** and **Article 47 (1) of the Constitution of Kenya, 2010**. The application is brought pursuant to leave of this court granted on 23rd April, 2018. The orders sought in the application are :-

a) An order in the nature of mandamus to compel the 1st respondent to register the applicant as a co-owner to the land parcel number Kanyamwa/Kajwang/Kachola/kadwet/366, being the estate of the late Awello Andhao.

b) That the costs of this application be provided for.

2. The application is anchored on the ex parte applicant's affidavit verifying statement of facts sworn on even date and a statutory statement filed under **order 53 Rule (1) (2) of the Rules**. Also list of authorities including the provisions of the law under which the application is brought and the case of **Republic -v- Chief Land Registrar and 4 others ex parte Charles P. Chemmutut exparte (2017) eKLR**, accompany the application.

3. The gist of the applicant's case is that he is the son of Joseph Awello Andhao alias Awello Andhao (deceased). The said applicant obtained a grant of letters of Administration and a certificate of confirmation in respect of the estate issued in Ndhwa Senior Resident Magistrate's Court Succession Cause number 40 of 2016. That the estate is part of land parcel No. KANYAMWA/KAJWANG/KACHOLA/KADWET/366 which is registered in the name of OKUMU ANDHAO, AWELLO ANDHAO AND BENDA ANDHAO who are brothers. That the 1st respondent has blatantly refused to register the beneficiaries of the estate as the co-owner of the land in spite of several petitions made to that effect thus precipitating the instant application.

4. The 1st and 2nd respondents were duly served on 12th June 2018 for hearing of the application fixed for 17th October, 2018 as shown on affidavit of service sworn on 21st June, 2018 by the applicant's counsel. There was neither appearance nor response to the application on the part of the respondents hence hearing of the application proceeded accordingly.

5. During hearing, the court directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Rules**.

6. Learned counsel for the ex-parte applicant filed submission dated 21st January 2019. Counsel provided a brief background of the application and framed three (3) issues for determination which he analysed and urged the court to grant the reliefs sought in the application.

7. To buttress his submissions, counsel cited the following authorities;

a) **Section 3 of the Land Registration Act 2016 (2012)** relating to statutory requirement of the 1st respondent with regard to registration of interest in land under the Act.

b) **The Seventh Day Adventist Church (East Africa) Ltd -vs- The National Land Commission and 3 Others (2017) eKLR** where J. Mutungi J, held, among other things, that the Land Registrar can only register valid transfers.

c) **Republic –v- the Principal Secretary, State Department of Interior and Coordination of National Government and another ex-parte Salim Awadh Salim (2017) eKLR** whereby G.V. Odunga J, held inter alia, that an order of mandamus compels the performance of a public duty which is imposed on a person, body or persons by a statute.

d) **Cecilia Karuru Ngayu –v- Barclays Bank of Kenya and another (2018) eKLR** where J Mativo J, found no reason to deny the second defendant costs and in exercise of the courts discretion in a manner that meets the interest of justice.

8. I have examined the entire application including affidavit and statement duly filed as well as submissions by the ex-parte applicant's counsel. I embrace the issues for determination in the submission. Therefore, the issues for determination are whether (a) the 1st respondent has a public duty imposed by statute to register the ex parte applicant as co-owner of the land parcel No. Kanyamwa/Kajwang/Kachola/Kadwet/3667 and (b) whether the ex parte applicant sought is entitled to orders in the application.

9. The application is brought under **Sections 8 and 9 of the Law of Reform Act** (supra) which gives the court a special jurisdiction in the form of Judicial Review as noted in the case of **Khobesh Agencies Ltd and 32 others –v- Minister of Relations and 4 others (2013) eKLR**. This kind of remedy is not available where there is an alternative relief.

10. The ex-parte applicant contends that the 1st respondent has refused to register him as co-owner of the estate of the deceased. He craves for mandamus which is a prerogative order issued in certain cases to compel the performance of a duty imposed upon public officers by common law or statute; see **Shah –v- Attorney General (No. 3) Kampala HCMN No. 31 of 1969 (1970) EA 543**.

11. It must be noted that the order of mandamus compels the performance of only a legal duty; see the decision by Odunga J in **Republic –v- Attorney General and another ex-parte Jackson Musyoka Munyalo (2015) eKLR**

12. The function of the order of mandamus is illustrated in the case of **District Commissioner Kiambu –v- Republic and others Ex-parte Ethan Njau (1960) E.A 109** where the court held that :-

“Mandamus to the Registrar is certainly one method of putting right an erroneous entry in the register, and is peculiarly applicable when the fault is alleged to lie with the registrar. If that official refused to act in circumstances in which he should act, mandamus would appear to be appropriate. There seems to be no reason why it should not lie in case of where it is necessary to invoke the wider powers of a court..... Mandamus will not be granted in the performance if the act involves breach of the law.” (Emphasis added).

13. The ex-parte applicant averred that he is the legal representative of the estate of his father Joseph Owello Andhau alias Awelo Andhau as shown in the Kenya Gazette Notice No.6294 issued on 5th August 2016, a grant of letters of Administration intestate issued on 27th September 2016 and a certificate of confirmation of grant issued on 5th June 2017 in Ndhiwa Senior Resident Magistrate's Court Succession cause No. 40 of 2016. I bear in mind the definition of the term **“legal representative”** under **Section 2 of the Civil Procedure Act (Cap 21 Laws of Kenya)** which is relevant in the instant circumstances.

14. The powers and duties of personal representatives include that the property of deceased is to vest in personal representative. **Section 7a of the Law of Succession Act (Cap 160 Laws of Kenya)** provides:-

“ the executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

15. The ex-parte applicant averred further that the estate of the deceased is part of land parcel No. Kanyamwa/Kajwang/KacholaKaduwet/366 which is registered in the names of Okumu Andhau, Awello Andhau and Benda Andhau as discerned from a certificate of official search dated 19th June 2017 filed together with other documents herein on 23rd April 2018. The ex-parte applicant is entitled to be registered as the proprietor of the said land and upon transmission, it is the duty of the Registrar to issue him with certificate of title to the land as envisaged under Sections 3, 26 (1) and 30 of the Land Registration Act, 2016 (2012).

16. **Article 47 of the Constitution of Kenya 2010**, stipulates the right to fair administration action. The land Registrar has not given written reasons or at all for non-registration of the ex-parte applicant as the co-owner of the land in dispute. To that extend, the mandamus remedy is readily available in the current situation; see **District Commissioner Kiambu case (supra)**. I find that the ex-parte applicant has proved his claim to the required standard.

17. Wherefore, I grant the mandamus relief in terms of order number one (1) sought in the ex-parte applicant's Notice of motion dated 10th May, 2018.

18. By dint of the provisio to **Section 27 of the Civil Procedure Act (Cap 21)**, costs of any action, cause, matter or issue follow the event. In view of the circumstances of this case and the decision in the case of **Rai-v- Rai (2014) eKLR**, the parties shall bear their own respective costs.

DELIVERED, DATED and SIGNED at MIGORI this 13th day of February 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Mr. Owade Learned counsel holding brief for Mr. Samwel Nyauke for the ex-parte applicant

Tom Maurice – Court Assistant.