



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC JR CASE NO. 5 OF 2018

IN THE MATTER OF APPLICATION FOR LEAVE TO COMMENCE PROCEEDING IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LAW REFORMS ACT SECTION 8 AND 9

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT

OLUOCH AMOLLO.....APPLICANT

VERSUS

DIRECTOR OF LAND ADJUDICATION.....1ST RESPONDENT

THE LAND REGISTRAR HOMA-BAY.....2ND RESPONDENT

JUDGMENT

1. On 21st January 2019, the ex-parte applicant, Oluoch Amollo (the applicant herein) through Nyauke and company Advocates filed a notice of motion dated 21st September 2018 pursuant to Order 53 Rules 3 and 4 of the Civil Procedure Rules,2010, sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya, and Article 47 (1) of the Constitution of Kenya 2010, (hereinafter referred to as the application). Notably, the application was brought further to leave of the court granted on 17th September 2018. The orders sought in the application are:-

i. An order in the nature of mandamus to compel the 2nd respondent to remove the caution registered in land parcel number Lambwe East/88.

ii. An order in the nature of mandamus to compel the 1st respondent to implement the Minister’s order with respect to land parcel number Lambwe East/88.

iii. That the cost of this application be provided for.

2. The application is anchored on the grounds set out in the statutory statement, the verifying affidavit of the applicant sworn on 11th June 2018. Annexed to the said affidavit, are documents namely a copy of certificate of official search dated 6th April 2018 in respect of the suit land, title No Lambwe/East/88, letter Ref No dated Lambwe/East/88/5 dated 13th April 2018 by the Land Registrar, Homa Bay and letter dated 11th April 2018 as well as another one dated 30th May 2018 by counsel for the applicant marked AO1, AO2, AO3 and AO4 respectively.

3. Briefly, it is alleged, inter alia, that the applicant is the registered proprietor of the suit land which he bought from one Francis Ogolla Okoro (now deceased1) in the year 1980. That the applicant started cultivating the land. That surprisingly deceased1 purported to sell the suit land to Andrew Kamush Bodi (now deceased2) provoking a dispute which was determined in favour of the applicant by the Lands Minister. However, the minister’s Order has not been implemented by the 1st and 2nd respondents in spite of documents marked AO3 and 4 thus

precipitating the instant application.

4. The respondents were duly served as per affidavits of service sworn on 20th February 2019 and 18th July 2019 by learned counsel, Quinter Adoyo and learned counsel, Samwel O Nyauke respectively. However, they failed to respond to the application or at all.

5. On 21st February 2019, this court directed that the application be argued by written submissions. Consequently, on 11th July 2019, the applicant's counsel filed submissions dated 12th July 2019.

6. Learned counsel for the applicant framed three (3) issues for determination, analysed them and urged the court to allow the application in its entirety. The issues are;

a) Whether the 2nd respondent has a public duty to remove the caution registered in land parcel number Lambwe East/88.

b) Whether the 1st respondent has a public duty to implement the Minister's Order with respect to land parcel number Lambwe East/88 and to uplift the restriction therein.

c) Whether the applicant is entitled to the orders sought in the application.

7. Counsel relied on District Commissioner Kiambu v Republic and others ex-parte Ethan Njau (1960) EA 109 and R The Principal Secretary state Department of Interior and Coordination of National Government and Principal Secretary ex parte **Salim Awadh Saalim (2017) eKLR** that an order of mandamus is directed at the Registrar when an erroneous entry in the register is alleged to lie with the Registrar. Counsel also cited **Article 47 of the Constitution of Kenya, 2010**, in support of his submissions.

8. I have carefully considered the entire application and submissions herein. I adopt the issues for determination framed by the applicant's counsel in submissions.

9. It is important to note that judicial review remedy is concerned with the decision making process and not with the merits of the decision as held in several authorities including the case of **Republic v Kenya Revenue Authority ex-parte Yaya Tours Ltd(2008) eKLR**; see also the case of **District Commissioner Kiambu (supra)**.

10. The applicant contended that the 2nd respondent has refused to remove the caution registered on the suit land. That the 2nd respondent has not implemented the Minister's order.

11. I take into account that **Article 40 of the Constitution of Kenya, 2010** requires protection of right to property. I also note Article 47 of the same Constitution which provides for fair administrative action.

12. I am of the considered view that since the 1st and 2nd respondents refused to act in the circumstances in which they should act, the orders sought in the application would be appropriate. The 1st and 2nd respondents have a public duty to implement the Minister's Order and remove the caution in respect of the suit land respectively.

13. The instant application is unchallenged. The same has been proved against the respondent on a balance of probabilities; see **Kirugi and another v Kabiya and 3 others (1987) eKLR**.

14. Consequently and for those reasons, orders (1) and (2) sought in the application dated 21st September 2018 be and are hereby granted. Costs be in the cause.

DELIVERED, DATED and SIGNED at MIGORI this 18th day of SEPTEMBER 2019.

G.M.A ONGONDO

JUDGE

In presence of :-

Applicant – Present

No. appearance for defendants

Court Assistant – Tom Maurice