



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L JUDICIAL REVIEW NO. 3 OF 2016

REPUBLICAPPLICANT

VERSUS

NATIONAL LAND COMMISSION RESPONDENT

WELLINGTON BARASA & 74 OTHERS.....INTERESTED PARTY

KIBOGY PROPERTIES LIMITED.....EXPARTE APPLICANT

JUDGMENT

Kibogy Properties Limited, (hereinafter referred to as the Exparte applicant) came to this court against the National Land Commission(hereinafter referred to as the Respondents) and Wellington Barasa Lusweti & 74 others (hereinafter referred to as interested parties) seeking for leave to apply for an order of certiorari to bring into the Environment and land Court for purposes of quashing the summons and the directives of the respondent dated 31st August, 2016 over ownership and / or possession, legality and proprietorship of LR.8319 and 8321. The exparte applicant further sought leave to apply for an order of prohibition prohibiting the respondent in any manner from investigating, adjudicating any claim, re-opening and hearing dispute over LR.8319 and 8321 pursuant to summons dated 31st August, 2016 and any other decision or orders giving ownership and/or possession of LR.8319 and 8321. The Leave sought was to operate as a stay of proceedings of the decision of the respondent to review the legality of titles of the suit lands herein.

Leave was granted to the Exparte applicant to file the application for Judicial Review as prayed. The said leave operated as a stay of the intended action by the respondents and the application for judicial review was to be filed within 21 days. The order was made on 26.9.2016. The substantive application for Judicial Review orders by way of Notice of Motion was timeously filed on 28.9.2016.

The Exparte applicant sought an **Order of Certiorari** to be issued quashing the summons and the directives of the respondent dated 31st August, 2016 over ownership and / or possession, legality and proprietorship of LR.8319 and 8321.

He further sought an **Order of Prohibition** be issued prohibiting the respondent in any manner from investigating. Adjudicating any claim, re-opening and hearing dispute over LR.8319 and 8321 pursuant to summons dated 31st August, 2016 and any other decision or orders giving ownership and / or possession of LR.8319 and 8321. That costs of the application were to be awarded to the Exparte applicant.

The application is based on affidavit of Jeremy Kiptoo Kibogy and grounds that the ex parte applicant was the registered owner of the suit lands herein and was in actual and physical possession of the same. The Honourable Court determined the dispute over proprietary rights over the suit lands between the interested parties and the exparte applicant vide judgment dated 30th October, 2014 in Eldoret ELC 931 of 2012. Upon dismissal of the interested parties' appeal vide ruling dated 24th August, 2015 in Eldoret Court of Appeal Civil Application No. 23 of 2015, in a usual move, the interested parties contemptuously lodged a complaint before the National Land Commission, the respondent herein, which acted on the complaint vide a summons dated 31st August, 2016 informing the applicant that it had decided to review the legality of the titles of the suit lands herein.

The respondent purported to investigate the suit lands herein and set the matter for mention on 14th October, 2016 for exchanging documents when it is fully aware that the legality of the title of the suit lands herein was determined by this Honourable Court vide Eldoret ELC No.931 of 2012 and therefore res judicata. The matter therefore was res judicata and interested parties could not open it afresh through the respondent.

The Respondent and the interested parties were bound by the judgment of the Honourable Court in Eldoret E&LC No.931 of 2012.

The interested parties are not only purporting to use diversionary strategy but also attempting to create an alternative way of circumvent the decree of the Honourable Court notwithstanding the clear provisions of section 30 (b) of the National Land Commission Act.

The actions of the respondents are likely to render the proceedings an academic exercise and an exercise in futility unless the orders sought were granted. The application was brought without any undue delay and in the best interest of justice.

The ex parte applicant believes that unless the prayers sought were granted the applicants stand to suffer substantial and irreparable loss. The Honourable Court therefore ought to grant leave for the purposes of issuing orders of prohibition and certiorari to remove into this court the decision of the respondent.

The respondent was duty bound to comply with the law and the aforementioned actions by respondent exposes it to judicial review remedies. In overall, the respondents' decision was unlawful and ultra vires and should therefore be quashed.

Wellington Barasa Lusweti swore an affidavit that the suit property was not registered in the name of the Ex parte applicant. Moreover, that the applicant has no locus standi as it is no longer in existence. That the interested parties have been using the land as their only source of livelihood. They believe that the National Lands Commissioner has the unlimited powers to investigate historical injustices under section 14, 13 and 17 of the National Land Commission Act no 5 of 2012 and Article 67 of the constitution of Kenya. That the Ex parte applicant can't prove that he came into occupation and acquisition of the land.

The Ex parte applicant submits that the matter herein is res-judicata and the interested parties can't open it afresh through the respondent.

He relies on Section 30 (b) of the National Land Commission Act no 5 of 2012 which provide that notwithstanding the provisions of the act any function or transaction, civil proceedings or any other legal or other process in respect of any matter carried out in relation to the administration of public land, by or on behalf of the ministry of lands before the commencement of the Act, shall be deemed to have been carried out under the Act.

The applicant submits that the title has been adjudicated upon by the court and therefore any attempt to adjudicate on the title is a procedural impropriety by the respondent. The applicant submits that the respondent exceeded the powers and acted ultravires. In summary, the Ex parte applicant argues that reopening issues which they litigated and concluded vide Eldoret Environment and Land case no. 931 of 2012 is an illegality and therefore an order of prohibition is available to prohibit the respondent in any manner from investigating, adjudicating any claim, reopening and hearing dispute over LR 8319 and 8321 pursuant to summons dated 31.8.2010.

The respondent submits he did not act ultra-vires in the issuing summons article 67(b) of the Constitution of Kenya 2010 empowering the respondent to institute investigations on its own motion. Moreover, the respondent has the duty to give notice to any person affected to appear before it. The respondent submits that summons in the nature of a notice of institution are not available to be quashed. The summons was validly issued and within the law and are not available to an order of certiorari.

Lastly, the respondent submits that an order of prohibition can't issue as the respondent was carrying out its mandate to review grants and disposition on land to establish their legality and proprietary.

The gravamen of the interested parties' submission is that the N. L. C is a statutory body established pursuant to the provision of Article 67(1) of Constitution of Kenya 2010 to inter alia manage public land on behalf of the National and county government.

The Interested party submits that the applicant has failed to demonstrate that the decision is tainted with illegality, irrationality and Procedural impropriety. The Interested party argues that the applicant company does not exist.

I have considered the application for judicial review and the affidavit of Wellington Lusweti and do find that the claim before the National Land Commission by Wellington Lusweti Barasa and the 74 others is similar to their claim in Eldoret Environment and Land Court No.931 Of 2012 formerly High Court Civil Case no 49 of 2008, the petitioners are the same to subject matter is the same but the arbitrator has changed to the National Land Commission from the Environment and Land Court. When the matter was before the Environment and Land Court., the interested parties herein approached the court by way of adverse possession. The court found that the Interested Parties were licences and therefore could not claim adverse possession. The Honourable Court found the title of the 2nd Defendant proper. It is a fact that the Interested parties have not appealed against the decision of the Honourable Judge dated and delivered on 30.10.2014. Having participated in the above proceedings where judgment was entered against them, the interested parties through the respondent herein cannot purport to re-open the issue of whether the Title Deeds were obtained illegally or irregularly. It goes without saying that Article 159 (1) of the Constitution, judicial authority vests in and is exercised by the courts and tribunals established by the Constitution and that Article 162 (2) (b) of the Constitution mandates the Environment and land court to hear disputes relating to the environment and the use and occupation of, and title to land and that after a dispute has been filed in this court relating to the environment and the use and occupation of, and title to land, the National Land Commission, the respondent herein is obliged to participate in those proceedings, if the issues raised in the suit falls within its mandate, and where it does not appear, to abide by the decision of the court. The Respondent cannot re-open the issue of the propriety or legality of the suit properties on the ground that it did not participate in those proceedings because it has no legal authority to do so.

Hon. Justice Angote has held that even where the decision of the court was made before the Respondent was established, the Respondent cannot re-open the issues which were litigated upon before its establishment. I do agree with the same. (*see Republic v National Land Commission Ex-parte Holborn Properties Limited [2016] Eklr at paragraph 91*)

This court finds that the action of the respondent to investigate the title herein is shrouded in illegality as the court has already pronounced itself on the title. It is also made in procedural impropriety because it is trite in law that a person who is not satisfied with a decision of the Environment and Land Court appeals to the Court of Appeal, not to the National Land Commission. Moreover, the decision by the National Land Commission. to investigate the title after the pronouncement of the court is irrational and unreasonable as the court has already made its pronouncement.

Ultimately, the application is allowed, however the request for an ***Order of Certiorari*** quashing the summons and the directives of the respondent dated 31st August, 2016 over ownership and / or possession, legality and proprietorship of LR.8319 and 8321 is declined as the same were processes that are not amenable for quashing. The proper order that can issue is an ***Order of Prohibition*** and is hereby issued prohibiting the respondent in any manner from investigating. Adjudicating any claim, re-opening and hearing dispute over LR.8319 and 8321 pursuant to summons dated 31st August, 2016 and any other decision or orders giving ownership and/or possession of LR.8319 and 8321. That costs of the application are awarded to the Exparte applicant. Orders accordingly.

Dated and delivered at Eldoret this 28th day of June, 2018.

A. OMBWAYO

JUDGE