



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA
JUDICIAL REVIEW APPLICATION NO. 34 OF 2012
IN THE MATTER OF AN APPLICATION BY PARESH NARANDASH
SEDANI FOR ORDERS OF MANDAMUS, PROHIBITION
AND
IN THE MATTER OF LAND PARCEL NUMBERS
WEST BUNYORE/EBUSIKHALE/2153 AND
WEST BUNYORE/EBUSIKHALE/2154
BETWEEN
REPUBLIC
EX-PARTE PAREH NARANDASH SEDANI.....APPLICANT
VERSUS
THE LAND REGISTRAR, VIHIGA.....1ST RESPONDENT
THE RESIDENT MAGISTRATE-VIHIGA.....2ND RESPONDENT
AND
SAMSON ANGOLO TIMOTHY OSIRU.....INTERESTED PARTY

JUDGEMENT

This application is dated 2nd May 2012 and is brought under Section 53 Rule I (1)(2).(4) of the Civil Procedure Rules seeking the following orders;

1. That this Honourable Court be pleased to grant to the applicant an order of prohibiting the Principal Magistrate or any other magistrate officiating at Vihiga Court from granting the interested party Mr. Samson Angolo Timothy Osiro leave for the Executive Officer of the Honourable court to sign the transfer and any other forms transferring parcel West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154 into the names of the interested party Mr. Samson Angolo Timothy Osiro in Vihiga Magistrate's court Miscellaneous Civil Application No. 70 of 1998.
2. That this Honourable Court be pleased to grant to the applicant an order of Mandamus compelling the Land Registrar, Vihiga to cancel the entry of the decrees in the Registers of parcels West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154.
3. That the costs of this application follow the cause.

The applicant submitted that, sometimes in 2004 he purchased 2 parcels of land viz Parcel West Bunyore/Ebusikhale/2153 from the then registered proprietor Mr. Bahati Murwa for a consideration of Kshs.120,000.00(Kenya shillings one hundred and twenty thousand only)attached is a copy of the Agreement of Sale - Exhibit PNS - A.That he was informed by the said Bahati Murwa that the parcel

aforesaid West Bunyore/Ebusikhale/2153 was a parcel sub divided by the original proprietor Mr. Makutsa Pete into 5 separate parcels of land, each with a separate and distinct title deeds. That he, Bahati Murwa purchased this particular plot West Bunyore/Ebusikhale/2153 for a valuable consideration. That he had sight of the title deed for the parcel he purchased which showed Mr. Makutsa Pete to be the registered proprietor of the plot. That subsequent to the transfer of the said plot West Bunyore/Ebusikhale/2153 into his name, he obtained a title deed for the plot attached is a copy of the title deed as exhibit - Exhibit PNS 1. The applicant was not enjoined in the dispute before the Luanda Division Land Disputes Tribunal even though it had come to light that the plots in question had been excised from parent plot West Bunyore/Ebusikhale/464 and some or all the plots arising from the sub division had been sold to, inter alia, the applicant. The applicant was not aware that the parcels he had purchased had been the subject of any dispute in any court or tribunal. The Land Registrar, Vihiga erred in law in registering a decree which had expired i.e. was time barred at the time of registering it on the registers of the 2nd parcels of land.

The respondents submitted that they shall abide by the court order in this matter although the applicant has not enjoined the Tribunal in this matter.

The 1st Interested party submitted that, the land title issued to the second interested party was fraudulently issued after the court award, through the Luanda Land Dispute Tribunal decision of its findings of land ownership West Bunyore/Ebusikhale 2153, 2151 and 2209 arising from land parcel 464. That the parcel No. West Bunyore/Ebusikhale 2209 rises from the claimed land West Bunyore/Ebusikhale/464 which land was registered in the name of one Makutsa Peter in his trust. That agreed with Luanda Land Dispute Tribunal's decision 26/10/1998 since the one Makutsa Peter is his cousin and that he wanted to stay in peace with his family and accepted the award which award was decreed and the certificate issued and registered for his ownership.

The 2nd Interested Party submitted that, he purchased land parcel number West Bunyore/Ebusikhale/2209 from one Parshotam Ramji Kotecha on the 18th day of August 2005 after having done due diligence and establishing that the title was clean (annexed is the said sale agreement now marked as exhibit CSO 1). That he caused the same to be transferred and registered jointly in his name and that of his wife Caren Auma Sigu who is now deceased (annexed 1 a copy of her death certificate now marked as exhibit CSO 2). That they therefore became the absolute registered owners of the said parcel of land (annexed is the title deed of the said parcel of land now marked CSO 3). That in the first week of April 2012, him together with his late wife aforesaid approached the Kenya Commercial Bank – Luanda Branch with a view to seeking a loan thereof and the bank asked them to provide them with inter alia certificate of official search in respect of the said piece of land No. West Bunyore/Ebusikhale/2209. That pursuant of the bank conditions aforesaid he proceeded on the 13th day of April 2012 and obtained a certificate of official search and discovered that the land had been awarded to one Samson Angolo Timothy Osiru pursuant to a decree in Miscellaneous Application No. 70 of 1998 which was an award arising out of Luanda Land Disputes Tribunal claim (annexed is a copy of the certificate of official search now marked as exhibit CSO 4). That he then instructed his then advocates who informed him that the said Miscellaneous Application emanated from Luanda Land Dispute Tribunal which was between Samson Angolo Timothy Osiru and one Makutsa Peter as the objector and that he was never party to nor informed nor aware that such proceedings went on. That when he became aware of the award immediately applied to be enjoined to the Misc. Civil Application No. 70 of 1998. That the interested party herein has never mentioned the proprietor of the land in question throughout the proceedings at the Luanda Land Disputes Tribunal and therefore failing to disclose material facts to enable court to determine the real issues in dispute. That as on the 17th day of July 2006 he was the absolute registered owner together with his late wife of the said parcel of land and that come 20/5/2011 the interested party herein caused a decree to be registered on his said title. That on 17th April 2015 the interested party also caused an order from this judicial review application to be registered against his title as shown in the official search of 16th January 2018 (Annexed is a copy of the search dated 16th January 2018 now marked as exhibit No. CSO 5). That in 1998 the interested party went before the Luanda Land Disputes Tribunal claiming amongst other parcel and his parcel number West Bunyore/Ebusikhale 2209 which had already been mutated on the 28th February 1994 and registered in the name of Parshotam Ramji Kotecha (annexed are copies of the Vihiga Resident Magistrate's Court award and green card and mutation form in respect of title No. West Bunyore/Ebusikhale/2209 now marked as exhibit CSO 6).

This court has carefully considered the application and the submissions herein. In *Republic v Kenya Revenue Authority & another Ex-Parte Tradewise*

Agencies [2013] eKLR, para. 21 G.V. Odunga, J. in quoting from *Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300

observed thus:

“In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.....”

The preliminary issue in my view which is for determination is the jurisdiction of this Luanda Division Land Disputes Tribunal. The operative law was the Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

“3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4.”

The application is based on the following that sometimes in 2004 the applicant purchased two parcels of land viz Parcel West Bunyore/Ebusikhale/2153 from the then registered proprietor Mr. BahatiMurwa for a consideration of Kshs.120,000.00(Kenya shillings one hundred and twenty thousand only) attached is a copy of the Agreement of Sale - Exhibit PNS – A. That he was informed by the said BahatiMurwa that the parcel aforesaid West Bunyore/Ebusikhale/2153 was a parcel sub divided by the original proprietor Mr. Makutsa Pete into five separate parcels of land, each with a separate and distinct title deeds. Subsequently, the Luanda Division Land Disputes Tribunal made orders transferring parcel West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154 into the names of the interested party Mr. Samson Angolo Timothy Osiroas adopted in the Vihiga Magistrate’s court Miscellaneous Civil Application No. 70 of 1998 award. I find that the Luanda Division Land Disputes Tribunal had no jurisdiction absolutely to act as it did. The Luanda Division Land Disputes Tribunal grossly exceeded its jurisdiction in involving itself on issues of ownership of the suit parcels i.e West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154 which were registered parcels of land or whose fore runners had already been registered under the Registered Land Act. In this case, the tribunal meandered beyond its boundaries. In *M’Marete v Republic & 3 others*, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 [2004] eKLR the court held-

“In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction.”

I find that the proceedings and decision fell well outside the jurisdiction of the Luanda Division Land Disputes Tribunal. The proceedings prima facie violated the Land Disputes Tribunal Act (now repealed). In the case of *Masagu Ole Naumo v Principal Magistrate Kajiado Law Courts & another*, Nairobi, High Court, JR 370 of 2013 [2014] eKLR. In that case, Odunga J held as follows-

“In my view the view that the Tribunal had no powers to deal with registered land is incorrect. What the Tribunal was prohibited from undertaking is a determination with respect to title to land”.

The provisions of section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990 are very clear on what matters these tribunals had jurisdiction over claims of title to registered land is not one of the matters that can or could be laid in these tribunals.

In *Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited* [2008] e KLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made , but the decision making process itself. The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in *Halsbury’s Laws of England 4th Edition Vol. II page 805 paragraph 1508*, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In *Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003* [2004] 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See *Welamondi vs The Chairman, Electrol Commission of Kenya* (2002) 1 KLR,

“..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis”

In the case of *Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another* [2014] eKLR it was held that;

“Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book “Judicial Remedies in Public Law” by Clive Olive, it is noted that “there are varieties of considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy.”

In *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court

may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

From the foregoing the tribunal lacked jurisdiction to deal with this matter as it purported to cancel a title and order issuance of a new title which is not one of the powers given to it under Section 3(2) of the Act. I find the proceedings before it was an administrative action that was unfair, inefficient, unlawful, unreasonable and procedurally unfair. I find that the judicial review application has merit and I grant the following orders;

1. An order of prohibiting the Principal Magistrate or any other magistrate officiating at Vihiga Court from granting the interested party Mr. Samson Angolo Timothy Osiro leave for the Executive Officer of the Honourable court to sign the transfer and any other forms transferring parcel West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154 into the names of the interested party Mr. Samson Angolo Timothy Osiro in Vihiga Magistrate’s court Miscellaneous Civil Application No. 70 of 1998.
2. An order of Mandamus compelling the Land Registrar, Vihiga to cancel the entry of the decrees in the Registers of parcels West Bunyore/Ebusikhale/2153 and West Bunyore/Ebusikhale/2154.
3. No orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE