



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

MISC. APP. NO. 5 OF 2017

IN THE MATTER OF AN APPLICATION BY YOSABIA KERUBO MANYURA

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW IN THE

NATURE OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF CIVIL PROCEDURE ACT AND CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF LR NO. KISII WANJARE/BOGIAKUMU/1660

BETWEEN

REPUBLIC.....APPLICANT

AND

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE KISII COUNTY LAND REGISTRAR.....2ND RESPONDENT

AND

YOSABIA KERUBO MANYURA.....EX PARTE APPLICANT

J U D G M E N T

1. The ex parte applicant, Yosabia Kerubo Manyura on 18th April 2017 filed a Notice of Motion seeking orders of judicial review following grant of leave to institute judicial review proceedings on 4th April 2017. By the Notice of Motion the ex parte applicant sought the following orders:-

a. That this honourable court be pleased to issue an order of judicial review in the nature of certiorari to remove unto this court and quash the decision of the Kisii County Land Registrar the 2nd respondent herein dated 11th January 2017 which wrongly and unlawfully cancelled the title deed issued to the Ex parte Applicant on 8th July 2002 and reverted back the ownership of the property to the original owner who is now deceased without considering Sections 14, 24, 25, 26 and 79 of the Land Registration Act, 2012.

b. This honourable court be pleased to issue an order of judicial review in the nature of prohibition prohibiting the

respondents especially the 2nd respondent from in any way or manner whatsoever registering any transaction(s) in the register of the suit property and/or dealing with or interfering with or tampering further with the register (green card) of LR No. Kisii Wanjare/Bogiakumu/1660.

c. That this honourable court be pleased to issue an order of judicial review in the nature of mandamus directing the 2nd respondent, the Kisii County Land Registrar to remove entry No. 6 in the register of LR No. Kisii Wanjare/Bogiakumu/1660 and restore the name of the ex parte applicant Yosabia Kerubo Manyura in the register as the sole owner of the said LR No. Kisii Wanjare/Bogiakumu/1660.

d. That this Honourable Court be at liberty to issue and/or grant such other order(s) or further relief(s) as it may see necessary and give any consequential directions in the circumstances of this case.

e. That the costs of this application be borne by the respondents.

2. The Notice of Motion was supported on the grounds set out on the face of the application and the affidavit sworn by the ex parte applicant in support of the Chamber Summons application for grant of leave dated 28th February 2017. The grounds set out by the ex parte applicant in support of the application are as follows:

a. That the applicant is the sole registered owner of all that property known as Kisii Wanjare/Bogiakumu/1660.

b. That the Kisii County Land Registrar lacked the necessary legal capacity and jurisdiction to make the decision complained of.

c. That the Kisii County Land Registrar acted contrary to the provisions of Sections 14, 24, 25, 26 and 79 of the Registered Land Act, 2012 (as amended).

e. That the decision of the Kisii County Land Registrar is ultra vires, frivolous and vexatious.

e. That the decision of the Kisii County Land Registrar is bad in law.

f. That the decision of the Kisii County Land Registrar was made without due regard to the doctrine of natural justice.

g. That the applicant was legally and lawfully registered as the owner of LR No. Kisii Wanjare/Bogiakumu/1660.

h. That this honourable court has jurisdiction to supervise and cross-check the actions of the quash-judicial bodies to ensure such bodies act within the law.

i. That the decision of the Kisii County Land Registrar was wrought with mala fides and illegalities.

j. It is for the interest of justice that this application be allowed.

3. The Land Registrar, Kisii filed a replying affidavit in opposition to the Notice of Motion dated 20th March 2018 and the ex parte applicant filed a supplementary affidavit in response thereof.

The Ex Parte Applicant's Case;

4. It is the case of the ex parte applicant that she has all the time been the duly registered proprietor of land parcel number **Wanjare/Bogiakumu/1660** (hereinafter referred to as "**the suit property**") since 24th July 2002 when the same was transferred to her by her late grandmother Gesare w/o Nyaana. The ex parte applicant was issued a title deed upon registration of the transfer on 24th July 2002 and has annexed a copy of the title as "**YKM-001**". The applicant states she took occupation and has possessed and has been using the said parcel of land ever since.

5. The applicant averred that on or about 3rd January 2017 she received a summons from the Land Registrar, Kisii the 2nd Respondent herein inviting her to appear before him on 11th January 2017 and to take with me the title to the suit land and any other documents relating to the property. Upon appearing on the said date as requested the applicant deposes that the Land Registrar demanded the surrender of the title and stated that the same was to be cancelled. The applicant stated that the Land Registrar did not explain to her why her title needed to be cancelled. She stated that the land registrar wrongfully and unlawfully proceeded to cancel her title and removed her name from the register without any justification. The applicant avers that the land registrar acted in excess of his jurisdiction and his actions were against the rules of natural justice and was therefore amenable to orders of certiorari quashing the same and prohibiting him from effecting any transactions relating to the suit property which were prejudicial to the interests of the applicant.

The Respondents Case;

6. The Kisii Land Registrar, Steve Mokaya filed a replying affidavit on behalf of the Respondents on 22nd March 2018. He stated that land parcel **Wanjare/Bogiakumu/1660** was initially registered in the names of Mr. Nyaana (deceased) and stated that the green card ("**SM1**") shows presently the land was registered in the ex parte applicant's name and there was no succession undertaken to facilitate the ex parte applicant to be so registered. The Land Registrar stated he registered a restriction against the title of the land so that the issue of succession

could be dealt with. He further stated the land has been the subject of family disputes following Mr. Nyaana's death. He stated the dispute was referred to arbitration of the Kisii Deputy Commissioner on 1st September 2016 and that it was resolved the suit land should be reverted back to the original status to enable succession to be undertaken. Copy of record of arbitration proceedings before the Deputy Commissioner annexed as "SM2". The Respondents stated the ex parte applicant's application lacked merit, was mischievous and an abuse of court process and prayed for its dismissal.

Ex parte Applicant's Response:

7. The ex parte applicant filed a supplementary affidavit on 26th March 2018 in response to the replying affidavit by Steve Mokaya, the Land Registrar. She averred that the suit property was never registered in the name of Mr. Nyaana but was first registered in the name of Gesara w/o Nyaana on 27th April 1976. The ex parte applicant further averred that Gesare w/o Nyaana was her grandmother and died on 14th June 2007 as per copy of certificate of death annexed marked "YKM001". She further stated that the said Gesare transferred the suit land to her in the year 2002 before her death and attached copy of transfer dated 25th January 2002 registered on 8th July 2002 marked as "YKM002". The ex parte applicant therefore asserted that no succession proceedings were applicable as the property was transferred to her by the registered owner during her lifetime. The ex parte applicant denied being involved in the alleged proceedings before the County Commissioner and at any rate averred that the County Commissioner could not direct the land registrar to cancel the title of a registered owner. The applicant reiterated that the Land Registrar had no power to cancel her title and in doing so he acted without jurisdiction and hence his action was ultra vires and prayed that the court grants the orders sought in the application.

8. The application was argued by way of written submissions. The applicant filed her submission on 3rd January 2018 while the respondents filed their submissions on 10th July 2018. After reviewing the pleadings and the submissions by the parties the issues for determination in this matter are as follows:

- i. Whether the Land Registrar in cancelling the ex parte applicant's title acted in excess of his mandate and/or jurisdiction?**
- ii. Whether due process was followed before the ex parte applicant's title was cancelled by the Land Registrar?**
- iii. Whether the ex parte applicant is entitled to the reliefs sought?**

9. The Land Registrar, Steve Mokaya as per his replying affidavit sworn in response to the application was of the view that the transfer in favour of the applicant was effected before any succession process was carried out. He further stated the applicant had not exhibited any documents to prove that succession was undertaken. On that basis he placed an inhibition against the title to enable the issue of succession to be sorted out. The Land Registrar ultimately relying on the decision of what is stated to have been arbitration proceedings before the Deputy County Commissioner dated 2nd September 2016 proceeded to cancel the applicant's title.

10. The applicant's simple answer was that the title was transferred to her during her grandmother's lifetime in 2002. She stated that her grandmother who was the registered owner died in 2007 and produced a death certificate to prove the fact. She stated she was not involved in the arbitral proceedings before the Deputy County Commissioner. If the transfer was effected during the lifetime of the registered owner, there would have been no basis for succession proceedings to have been carried out.

11. I have reviewed the documents tendered by the applicant in support of the application for judicial review notably the following:-

- i. Application for partition of title No. Wanjare/Bogiakumu/128 dated 22nd July 1975 which resulted in parcel No. Wanjare/Bogiakumu/1660 being transferred to Gesare w/o Nyaana.**
- ii. Transfer of title Wanjare/Bogiakumu/1660 from Gesare w/o Nyaana to Yosabia Kerubo Manyura dated 25th January 2002 but registered on 8th July 2002.**
- iii. Abstract of title (green card) for land parcel Wanjare/ Bogiakumu/ 1660.**
- iv. Title deed for Wanjare/Bogiakumu/1660 dated 24th July 2002 in the name of Yosabia Kerubo Manyura.**
- v. Death certificate dated 17th January 2017 for one Maritha Gesare Nyaana showing she died on 14th June 2007 and the death was registered on 31st July 2007.**

I have also reviewed the record of the arbitral proceedings before the Deputy County Commissioner of 1st September 2016.

12. On the basis of the documents adduced by the parties, it is clear Gesare w/o Nyaana was the first registered owner of land parcel **Wanjare/Bogiakumu/1660** on 27th April 1976. She transferred the land to the applicant as a Gift in January 2002 as per the transfer dated 25th January 2002. This transfer was properly assessed duty and was duly registered on 8th July 2002 and the applicant was on 24th July 2002 issued with a title deed and henceforth she became the absolute owner of the suit property. The certificate of death produced as an exhibit by the applicant, prima facie is evidence that Gesare Nyaana died on 14th June 2007 and therefore the assertion that she died in 2002 as stated before the Deputy County Commissioner is unsupported and without any basis. The allegation further that she was senile is without any basis and it cannot be presumed that because she was aged she was senile. The death certificate shows that the cause of death was pneumonia. In the absence of any credible medical evidence that she was senile and incapable of being able to know what she was doing in January 2002 when she is said to have executed the transfer in favour of the applicant, I cannot uphold the assertion that she was senile.

13. In the circumstances, I find the applicant was properly registered as the owner of the suit property and her title to the property could not be revoked and/or cancelled without due process. The Land Registrar in cancelling the applicant's title as he did, acted outside the scope of his mandate and he had no jurisdiction to do so. Section 79 of the Land Registration Act, No. 3 of 2012 makes provisions for instances where the Land Registrar can effect rectification of the register. The rectification that a Land Registrar can make does not include cancelling the title of a registered proprietor. Section 79 provides as follows:-

79.(1) The Registrar may rectify the register or instrument presented for registration in the following cases –

- a. in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor.**
- b. In any case and at any time with the consent of all affected parties; or**
- c. If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.**
- d. For purposes of updating the register;**
- e. For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.**

(2) No alteration affecting the title of a proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless-

- a. the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or**
- b. it would for any other reason be unjust for the alteration not to be made.**

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

(3) Upon proof of the change of the name or address of any proprietor, the Registrar shall on the written application of the proprietor, make an entry in the register to record the change/ (3A) A person aggrieved by the decision of the Registrar under this Section may apply to the court for any necessary orders.

(4) The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this Section and without prejudice to the generality of the foregoing, the regulations may provide for –

- a. The process of investigation including notification of affected parties.**
- b. Hearing of the matters raised; and**
- c. The criteria to be followed in coming up with the decision.**

14. It is evident from the provisions of Section 79 (above) that the Land Registrar's powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the interests of any proprietor. Cancellation of a title quite clearly would materially affect the interest of the registered proprietor. In my view, it is only the court that under Section 80(1) of the Land Registration Act, 2012 that has the power to direct the cancellation of a registration. Section 80(1) provides:

80(1) Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act neglect or default.

15. I therefore hold that the land registrar lacked the jurisdiction to cancel the applicant's title and in doing so he acted ultra vires and his actions are amenable to an order of certiorari.

16. Having held that the Land Registrar did not have jurisdiction to cancel the applicant's title it follows that no due process was followed in effecting the cancellation of the title as the Land Registrar could only cancel the title if he was ordered to do so by the court. The Land Registrar in the circumstances of the case only had jurisdiction to place a restriction against the land pending determination of the issue whether or not the applicant was validly registered as the owner of the land by the court. The land registrar fell in error in accepting the arbitral proceedings by the Deputy Commissioner, Kisii as affording him the authority to cancel the applicant's title.

17. The final result is that I find merit in the ex parte applicant's Notice of Motion dated 12th April 2017 and in consequence I direct an order

of certiorari to issue in terms of prayer **(a)** of the Notice of Motion. Orders of prohibition and Mandamus are also issued in terms of prayers **(b)** and **(c)** of the Notice of Motion. I make no order for costs and each party will bear their own costs of the application.

18. Orders accordingly.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

M/s Moracha for Momanyi for the ex parte applicant

N/A for the 1st and 2nd respondents

Ruth Court assistant

J. M. MUTUNGI

JUDGE