



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC. MISCL. APPL. NO. 001 OF 2018 (FORMERLY HCC MISC NO. 356 OF 2005)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAND CONTROL ACT CAP 302 AND LAND DISPUTES
TRIBUNAL ACT 1990.**

REPUBLIC..... APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, SIAYA.....1ST RESPONDENT

THE SENIOR RESIDENT MAGISTRATE, SIAYA.....2ND RESPONDENT

AND

ANDREW OCHIENG NYANGA.....1ST INTERESTED PARTY

ANDREW OKOTH NYANGA.....2ND INTERESTED PARTY

JOHN OUMA NYANGA.....3RD INTERESTED PARTY

AND

ELIJAH OTIENO NYANGA.....THE EXPARTE APPLICANT

RULING

1. Andrew Ochieng Nyanga, Andrew Okoth Nyanga and John Ouma Nyanga, the Interested Parties, moved the court through the notice of motion dated 2nd November, 2017 seeking for setting aside of the order of 8th December 2005 staying the orders of Siaya S.R.M. in Criminal Case No. 1380 of 2003, discharge of prohibitory order registered against Siaya/Masumbi/1688 on 10th February 2016 and caution registered against the said land by Exparte Applicant on the 26th October 2005 plus costs. The application is based on the six (6) grounds on its face marked (a) to (f) and supported by the affidavit of John Ouma Nyanga sworn on the 2nd November 2017.

2. The application came up for hearing on the 9th May 2018 and Mr. Odeny for the Interested Parties asked for the orders sought.

3. The issues for determination by the court are as follows;

a) Whether the orders sought for setting aside were issued by the court.

b) Whether the Interested Parties have made case for their lifting.

c) Who pays the costs.

4. The Court has carefully considered the grounds on the notice of motion, the affidavit evidence, counsel's submissions, the record and come to the following findings;

a) That the proceeding was commenced through the Chamber Summons dated 7th December 2005 seeking for leave to apply for

certiorari order to call into the court and quash the transfer of Siaya/Masumi/1688 and decree in Siaya S.R.M CR. C. NO. 138 OF 2003 issued on the 31st October 2005. That the summons also sought for leave to apply for prohibition order prohibiting the Respondents from enforcing the transfer order and the decree of 31st October 2005. Further the Exparte Applicant prayed at prayer 4 for the **“leave granted herein to the Applicant do operate as a stay of enforcement and/or execution of the said court order in Siaya S.R.M CR. C. NO. 1380 OF 2003”**.

b) The Chamber Summons was heard on the 8th December 2005 and granted in the following terms.

1. “Leave is hereby granted to the Applicant to file an application for Judicial Review in the nature of orders of Certiorari and Prohibition as prayed.

2. Let the leave operate as a stay of execution and or enforcement of orders of Siaya Senior Resident Magistrate Criminal Case No. 1380 of 2003 relating to transfer of parcel number Siaya/Masumbi/1688 as prayed.

3. Costs in the cause.”

c) The exparte Applicant consequently filed the notice of motion dated 22nd December 2005 seeking for the Judicial Review orders of Certiorari and Prohibition plus costs.

d) That the Respondents filed a notice of appointment of Advocate on the 21st March 2006 through the Hon. Attorney General. Several hearing dates for the notice of motion were fixed without the hearing taking off cumulating with the last one of 28th October 2007 when the matter was stood over generally.

e) That the court then issued the notice to show cause why the matter should not be dismissed for want of prosecution under **Order 17 Rule 2 of Civil Procedure Rules**. The notice dated 19th April 2016 required the parties to come to court on the 4th May 2016. That none of the parties or their counsel came to court on that date and the notice of motion was dismissed. That it follows that order number 2 of 8th December 2005 which was to remain in force pending the final determination of the Judicial Review application automatically lapsed upon the application being dismissed on the 8th May 2016 for want of prosecution under **Order 17 Rule 2 of the Civil Procedure Rules**. That accordingly and for avoidance of doubt prayer 1 of the interested parties notice of motion dated 2nd November 2017 is hereby granted.

f) That the Interested Parties also seek for the Prohibitory Order registered on the 10th February 2016 and the caution registered on 26th October 2005 against Siaya/Masumbi/1688 to be discharged. The copy of the certificate of official search annexed to the application confirms those restrictions were filed at entries numbers 5 and 6. That entry number 5 clearly shows the caution was filed by Elijah Otieno Nyanga claiming beneficiary interest. That obviously, that caution was not derived from the court order of 8th December 2005 or any other order issued by this court in this proceeding. That as this suit has already been determined, the Interested Parties can only commence a fresh claim to pursue their interest in respect of the caution preferably with the Land Registrar under Section 73 of the Land Registration Act No. 3 of 2012. That as for entry No. 6, it is indicated to be a prohibition order issued in this suit. The court has perused the court record and there is no other order apart from the one of 8th May 2005 that could be the basis of that entry that appears to have been made on the 10th February 2006. That as the Interested Parties did not annex the copy of the court order that gave rise to the prohibition order allegedly registered on the 10th February 2016, and as the copy of the certificate of official search dated 22nd August, 2017 and annexed to the application do not have a prohibition registered on 10th February 2016, that prayer is incapable of being granted and is hence rejected.

g) That though the application was not defended, the Interested Parties are entitled to half the costs of this application as they have partially succeeded.

5. That the court finds that the Interested Parties notice of motion dated 2nd November 2017 has merit and is allowed in the following terms;

a) That prayer 1 is allowed and order number 2 of 8th December 2005 hereby set aside.

b) The Interested Parties awarded half the costs of this application to be paid by the Exparte Applicant.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 17TH DAY OF OCTOBER 2018

In the presence of:

Applicant	Absent
Respondents	Absent
Interested Parties	Absent
Counsel	Absent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE