



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JUDICIAL REVIEW APPLICATION NO. 3 OF 2016

IN THE MATTER OF HON. MR. JUSTICE CHARLES P. CHEMMUTUT

FOR ORDERS OF MADNAMUS AGAINST THE CHIEF LAND REGISTRAR

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE LAND ACT

AND

IN THE MATTER OF THE NATIONAL COMMISSION ACT, 2012

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....RESPONDENT

AND

1. MBARU LEWA MBARU.....1ST INTERESTED PARTY

2. JACQLINE JOSEPHINE WANJIKU.....2ND INTERESTED PARTY

3. ALBERT TSUMA TONYA.....3RD INTERESTED PARTY

4. MABATU INVESTMENT LTD.....4TH INTERESTED PARTY

5. NATIONAL LAND COMMISSION.....5TH INTERESTED PARTY

6. HON. JUSTICE CHARLES P. CHEMMUTTUT...EX- PARTE APPLICANT

RULING

1. In a Judgment delivered herein on 19th September 2017, this Court allowed the Ex-parte Applicant’s Notice of Motion dated 11th July 2016. The resultant orders directed the Chief Land Registrar to revoke certain Grants made in respect of Land Reference No. MN/III/432-435 and to instead, issue a Certificate of Lease/Title to the Ex-Parte Applicant.

2. Aggrieved by the said decision the 2nd and 4th Interested Parties herein have now brought the current application dated and filed herein on 31st October 2017 seeking the following orders:-

3. ***That...this Court be pleased to set aside the Judgment delivered on 19th September 2017, and the 2nd and 4th Interested Parties be granted leave to defend the Judicial Review Notice of Motion dated 11th July 2016.***

4. ***That the costs of this application be provided for.***

3. The said application is grounded upon the annexed affidavit of Johnson Joshua Kinyanjui a director of the 4th Interested Party and is premised on the grounds:-

i) That the 2nd and 4th Interested Parties were never served with Notice from the 5th Interested Party informing them and inviting them to attend a public hearing to ventilate how they acquired the suit land being Plot numbers MN/III/434 and MN/III/435;

ii) That the determination of the 5th Interested Party issued on 8th October 2015 which the Respondent was required to implement was arrived at without the participation of the 2nd and 4th Interested Parties and their Constitutional right to be heard was violated;

iii) That the Judicial Review proceedings were also not brought to the attention of the Applicants as they did not see the newspaper adverts thereof and they did not therefore participate in the Court proceedings;

iv) That the Applicant applied for allotment letters for the Plots in question in the year 2000 and they obtained their titles procedurally in 2012 after following due process; and

v) That it is only fair and just that the Applicants be heard before this Court makes a final determination on the issues.

4. In response to the said application, the Ex-parte Applicant Mr. Justice Charles P. Chemmutut swore and filed a Replying Affidavit herein on 22nd November 2017 in which he refutes the 2nd and 4th Interested Parties contention that they were not served and were unaware of these proceedings.

5. The Ex-Parte Applicant avers that these proceedings were instituted following a complaint he lodged with the National Land Commission (the 5th Interested Party herein) way back in 2013. Subsequently, the Commission made a determination which was published via Gazette Notice No. 307 of 22nd January 2016.

6. The Ex-parte Applicant further avers that upon institution of these Judicial Review proceedings, the Court made an order for substituted service on 5th October 2016. Service was accordingly effected vide an advertisement carried out in the Standard Newspaper of 26th October 2016 and there is no valid grounds why the Judgment subsequently issued should be set aside.

7. I have considered the application and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the Parties. While the application is said to be brought by both the 2nd and 4th Interested Parties, I was unable to find anything by way of an explanation as to the interest of the 2nd Interested Party Jacqueline Josphine Wanjiku to this application. The only affidavits in support of the application were sworn by one Johnson Joshua Kinyanjui who is indicated therein as a director of the 4th Interested Party. The deponents of those affidavits neither makes reference to the 2nd Interested Party nor to how she came to acquire interest in the suit properties.

8. Essentially the Court's power in considering an application to set aside an ex-parte Judgment is discretionary. As was held in ***Patel –vs- EA Cargo Handling Services Ltd(1974) EA 75:-***

“There are no limits or restrictions on the Judge’s discretion to set aside or vary an Ex-parte Judgment except that if he does vary the Judgment, he does so on such terms as may be just. The main concern of the Court is to do justice to the parties and the Court will not impose conditions on itself to fetter the wider discretion given by the rules.”

9. In the same vein, in ***Shah –vs- Mbogo (1967) EA 166***, it was held that:-

“this discretion to set aside an ex-parte Judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

10. The facts leading to the application before me are quite clear and straightforward. It was the Ex-parte Applicant's case that on or about 5th June 1992, he applied to the Commissioner of Lands and was allocated LR No. MN/III/432-435 measuring 10.79 acres. It was further his case that he subsequently paid the requisite fees but was unable to develop the land immediately due to exigencies and demands of duty.

11. After a period of time, the Ex-parte Applicant applied to be issued with a title deed but was informed that the relevant file was missing. When he conducted an official search at the Mombasa Land Registry he found that the 1st to 4th Interested Parties herein had acquired title deeds for the same land that he had been allocated. The 2nd Interested Party was registered as the owner of Parcel No LR. MN/III/434 while Matabatu Investments Ltd (the 4th Interested Party) was registered as the owner of LR No. MN/III/435.

12. Consequently on or about 16th September 2013, the Ex-Parte Applicant filed a complaint with the National Land Commission (sued

herein as the 5th Interested Party) in which he alleged that the suit property had been irregularly issued to the 1st to 4th Interested Parties. Upon receipt of the complaint, the Commission wrote to the Interested Parties and also issued a notice dated 4th August 2013 which was published in the Daily Newspapers inviting those with interest on the Parcels of land to appear before the Commission for hearing on 28th August 2014.

13. As it turned out, only the Ex-parte Applicant appeared on the said date and made representations on how he had acquired the land. Subsequently by a Ruling rendered on 8th October 2015, the Commission determined and directed that:-

a) Title registered as Grant Number CR 55781, 55782, 55798 and 55799 be revoked because they were issued to the 1st to 4th Interested Parties unlawfully;

b) A Certificate of lease/title be issued to the Hon. Justice Charles P. Chemmutut, the Applicant; and

c) The Registrar of Titles Mombasa County be served with the Orders of the Commission for execution.

14. The Commission's determination and findings were subsequently published via a Kenya Gazette Notice No. 307 issued on 22nd January 2016. It was the Ex-Parte Applicant's contention that despite the determination and Gazette Notice being brought to the attention of the Chief Land Registrar (names as the Respondent in the Ex-Parte Applicant's Application), the Registrar had willfully and deliberately declined to implement the same thereby necessitating the Judicial Review Proceedings. The purpose of the Judicial Review Proceedings was therefore to compel the Chief Land Registrar as per the determination of the Commission through an Order of mandamus to revoke the grants of the subject parcels of land, expunge the same from the register and issue title documents for the said parcels of land in the name of the Ex-Parte Applicant.

15. As it were the findings and determination of the National Land Commission as Gazetted vide Notice No. 307 of 22nd January 2016 have neither been varied, revoked and/or set aside by any of the parties herein. The 2nd and 4th Interested Parties now state that they were unaware of the proceedings as they did not read the newspapers giving notices of the hearing. It is apparent that what the 2nd and 4th Interested Parties now seek by the application presently before me is for this Court to hear them and address the validity of their title. In my considered view, those are not matters that fall within the province of Judicial Review.

16. As the court of Appeal explained in *Kenya National Examination Council –vs- Republic Ex Parte Geoffrey Gathenji Njoroge & Others, Civil Appeal No. 266 of 1996:-*

“The order of mandamus is of a most extensive remedial nature, and is, in form a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet the mode of redress is less convenient, beneficial and effectual.....These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to be performed...”

17. In the matter before me, this Court is being called upon to set aside its Judgment rendered on 19th September 2017. That decision was only enforcing the decision of the 5th Interested Party which the Respondent had failed to implement in breach of his statutory obligations. That is the bedrock of an order of mandamus. The issues in regard to the validity of the title as I understand it were dealt with by the 5th Interested Party.

18. Again as was stated in *Kenya National Examination Council –vs- Republic Ex-Parte Geoffrey Gathenji Njoroge & Others(supra):-*

“...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

19. In the matter before me, the 2nd and 4th Interested Party have not applied for an order of certiorari against the 5th Interested Party's decision and I will not say any more in that regard.

20. From the above rendition, it must be clear that I did not find any merit in the Application dated 31st October 2017. The same is dismissed with costs to the Ex-Parte Applicant.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE