



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC JUDICIAL REVIEW CASE NO.1A OF 2016

(Formerly High Court Judicial Review Case No.45 Of 2011)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY WAY OF
CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE REGISTERED LAND ACT CHAPTER 300 LAWS OF KENYA
IN THE MATTER OF THE LAND ADJUDICATION ACT CHAPTER 284, LAWS OF KENYA**

AND

IN THE MATTER OF THE PARCEL OF LAND KNOWN AS

SIAYA/NYAGUDA/3655

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR BONDO.....1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION /SETTLEMENT

OFFICER BONDO.....2ND RESPONDENT

LAWRENCE ATINGA BONDO.....3RD RESPONDENT

EX-PARTE

THE CHAIRMAN, MANAGEMENT COMMITTEE OF ORENGO CATHOLIC CHURCH

AMBROSE DENNIS ACHIENG.....APPLICANT

J U D G M E N T

1. Through the notice of motion dated 19th October 2011, **Ambrose Dennis Achieng**, who is the Chairman, Management Committee of Orengo Catholic church, and hereinafter referred to as the Applicant seeks for an order of certiorari to call into this court and quash the following;

a) registration of Lawrence Atinga Oyundi, the 3rd Respondent, as proprietor of **Siaya/Nyaguda/3655** by the District Land Registrar, Bondo on 10th November 2010 in purported implementation of the Land adjudication officer's decisions of 12th April 2001.

b) the purported proceedings and decision of the Land Demarcation officer, Nyaguda Adjudication Section on the purported objection proceedings lodged by the 3rd Respondent in respect of **Siaya/Nyaguda/3655**.

The Applicant also prays for an order of prohibition restraining the Land Demarcation officer, Nyaguda Adjudication Section from purporting to hear and determine this purported objection proceeding from the 3rd Respondent in relation to **Siaya/Nyaguda/3655**. The application is based on the seven grounds on the notice of motion. It is also supported by the statement of facts dated 3rd October 2011 and the affidavit of the Applicant of even date. The grounds on the notice of motion, the statement of facts and the affidavit verifying facts are more or less the same and are as summarized herein below;

c) That Orenge Catholic Church had bought a piece of land from the 3rd Respondent before the adjudication process in the area commenced.

d) That the land was after adjudication registered as **Siaya/Nyaguda/3655** in the name of the church.

e) That the 3rd Respondent lodged an objection in accordance with **Section 26** of the Land Adjudication Act Chapter 284 of the Laws of Kenya.

f) That the objection was heard and determined by the Land Demarcation Officer, Nyaguda Adjudication Section without according the church a fair hearing and ruled in favour of the 3rd Respondent on 12th April 2001.

g) That the church learnt of the outcome of the objection proceedings in May 2001 and lodged a complaint with the District Adjudication Officer who nullified the objection proceedings and rulings thereof vide his letter dated 5th June 2001.

h) That while the church was waiting for fresh hearing of the 3rd Respondent's objection proceedings, they learnt on the 9th February 2011 that the Land Registrar Bondo had implemented the ruling of 12th April 2001 and registered the 3rd Respondent as proprietor of **Siaya/Nyaguda/3655** on the 10th November 2010 and had title deed issued on the 14th December 2010.

i) That the church engaged the Land Adjudication officer and Land Registrar Bondo to cancel the 3rd Respondent registration with the said land from March 2011 without any success.

j) That the Land Demarcation Officer, who heard and determined the objection proceedings, had no jurisdiction to do so as the powers under **Section 26 of the Land Adjudication Act** can only be excised by the Land Adjudication Officer.

2. The notice of motion is opposed by the 3rd Respondent through his replying affidavit sworn on the 24th May 2012 summarized as follows;

a) That he had entered into an agreement to sell to the Church a portion of his land parcel **Siaya/Nyaguda/3655** measuring 45 by 45 steps at Ksh.50,000/= which was to be paid after the construction of the church in 1976.

- b) That the church took possession of the plot and constructed their church.
- c) That upon the church failing to pay the purchase price as agreed, he filed an objection to their registration with the plot to the Land Adjudication Officer.
- d) That the objection was heard with the church being represented and ruled in his favour on 12th April 2001.
- e) That no appeal was filed and on 10th November 2010, he was registered as proprietor of the said land.
- f) That the Land Adjudication Officer had no power to nullify the objection proceedings and the decision thereof through a letter.

3. That though the District Land Registrar and District Land Adjudication/Settlement Officer Bondo, hereinafter referred to as the 1st and 2nd Respondents respectively, had been served with the notice of motion, they did not enter appearance or file any replying papers. The court has however noted that the two Respondents were represented by the litigation counsel in court on the 2nd February 2015, 31st May 2016 and 18th October 2016. That on the 18th October 2016, the counsel, Mr. Mutai, informed the court that they had opted not to file any submissions in the matter.

4. The counsel for the Applicant and 3rd Respondent filed written submissions which the court has considered.

5. The following are the issues for the courts determination;

- a) Whether the Applicant was denied fair hearing during the 3rd Respondent's objection proceedings that resulted to the decision of 12th April 2001.
- b) Whether the 3rd Respondent's objection proceedings resulting to the decision of 12th April 2001 was heard and determined by the Land Demarcation officer or the Land Adjudication officer.
- c) Whether the Land Adjudication Officer is empowered under **Section 11(b)** of the Land Adjudication Act, to nullify the objection proceedings and decision thereof undertaken under **Section 26 of the Act**.
- d) Whether the notice of motion is statute barred in view of **Section 9 (3) of the Law Reform Act** and **Order 53 Rule 2** of the Civil Procedure Rules.
- e) Whether the application before the court is one of violation of fundamental right under **Article 25 (c)** of the constitution to be enforced by way of judicial review proceedings under **Article 22 (1) and 23 (2) (f)** of the constitution.
- f) What orders to issue.
- g) Who pays the costs.

6. The court has carefully considered the grounds on the notice of motion, statement of facts, affidavit verifying facts, rival written submissions and come to the following determinations:

- a) That there is no dispute that the 3rd Respondent and the church had on or about 1976 entered into a land sale agreement pursuant to which the church took possession of the plot and constructed a church house. That the church has described the land they bought as **Siaya/Nyaguda/3655**, while the 3rd Respondent has stated it was plot of 45 by 45 steps out of **Siaya/Nyaguda/3655**. That this court is not

called upon to make a determination on whether or not the church entitlement is the whole parcel or a portion of it and that issue will be left for another forum.

b) That the basis of the Applicant's complaint on the objection proceedings and decision of 12th April 2001 is first, that it was heard and determined by a Land Demarcation Officer instead of a land Adjudication officer and secondly, that the church did not get a fair hearing. The court has perused the record of the objection proceedings of 28th July 1999, 12th August 1999, and decision of 12th April 2001 marked "ADA 2" and annexed to the applicant's verifying affidavit and noted the following;

- That the name of the person or officer presiding or who recorded the proceedings and decision is not given.
- That the proceedings are signed at page 2 and dated 28th July 1999 with initials "L A O" inserted just below the thumb print of Vitalis Okere Adede.
- That at page 4 below the decision is a signature with initials "L A O" and dated 12th April 2001 below it.

c) That the 3rd Respondent position in answer to the Applicant's complaint is that both parties were given a fair hearing and that the proceedings were before the Land Adjudication Officer who signed off with initials "L A O".

d) That the court having considered the Applicant's and 3rd respondent's affidavit evidence, the findings in (b) and (c) above finds that the applicant has not availed any documentary evidence to confirm their position that the objection proceedings and decision of 12th April 2001 was by a Land Demarcation Officer. The initials "L.A.O" in the proceedings cannot be understood to refer to Land Demarcation Officer but to Land Adjudication Officer.

e) That the letter dated 24th May 2001 by the District Land Adjudication/Settlement officer addressed to the Demarcation officer marked "**ADA 3(a)**" and annexed to the affidavit verifying statement does not in any way say that the objection proceedings and decision of 12th April 2001 were by the Land Demarcation Officer. The letter only conveyed to the Demarcation Officer the nature of the complaint received, and requested for specified details for further necessary action.

f) That there is nothing in the objection proceedings to support the applicant's claim that they sought for and were denied time to present other witnesses. That the 3rd Respondent's deposition that the church was represented by Vitalis Okere Adede who was heard has not been challenged.

g) That in view of the finding in (e) and (f) above, the court finds that the parties to the objection proceedings were given fair opportunity to present their case before the Land Adjudication Officer who in accordance with **Section 26(2) of the Land Adjudication Act** rendered a decision on 12th April 2001 in favour of the 3rd Respondent. That any party not satisfied should have filed an appeal to the Minister as provided for under **Section 29** of Land Adjudication Act.

h) That the provision of **Section 11(b)** of the Land Adjudication Act empowers the land Adjudication Officer to "**correct any error or supply any omission occurring in the adjudication register**". That power should not be taken to include nullifying the objection proceedings and decision undertaken in accordance with **Section 26 of the Land Adjudication Act**. That the provision of **Section 29** of the Land Adjudication Act provides for appeals on determination of objection proceedings under **Section 26 of the Act**. That in view of the foregoing the Land Adjudication/Settlement Officer's letter dated 5th June 2001 purporting to nullify the decision in objection proceedings No.82/96/97 in respect of parcel number **3655** was in excess of his powers and therefore **null and void ab initio**. That it was unfortunate that the church did not take the option of filing an appeal on the objection proceedings decision to Minister in accordance with **Section 29 of the Land Adjudication Act**.

i) That Land Registrar Bondo cannot be faulted for registering the 3rd Respondent as proprietor of land

parcel **Siaya/Nyaguda/3655** on 10th November 2010 as the office was obligated under **Section 28 of the Land Adjudication Act** to cause the registration in receipt of the adjudication register.

j) That the church got to know of the decision of 12th April 2001 in May 2001 and of the 3rd Respondent's registration with the land in February 2011 and under **Section 9(3)** of the Law Reform Act and **Order 53 Rule 2** of the Civil Procedure Rules, the Applicant should have filed the chamber summons for leave before the expiry of six months from those dates. That in respect of the decision of 12th April 2001, the application for leave should have been filed on or by October or November 2001 while the challenge on the registration of 10th November 2010 should have been filed on or before 9th August 2011. The court has perused the chamber summons for leave dated 3rd October 2011 and noted that it was filed on 6th October 2011 vide receipt number 4226206 which is clearly outside the six months statutory period from either of the dates.

k) That the court has considered the authorities cited by counsel for the Applicant and 3rd Defendant on whether or not the Applicant approached the court outside the time. These are as follows;

- **Nairobi High Court Misc. Civil Appl.No.1279 of 2004, Republic -V- Judicial Commission of Inquiry into the Goldenbag Affair.**
- **Nairobi High Court Misc. Civil Appl.963 of 2007, Republic -V- Maseno University Staff Disciplinary Committee & Another.**
- **Nairobi C.A. C.A No.200 of 2003 Nakumatt Holdings Ltd –V- Commission of Value Added Tax.**
- **Nairobi Miliman H.C. Jud Review Appl. No.248 of 2012, Nasieku Trarayia G. & Others.**

The court has also considered the decisions in the following other cases;

- **Kimanzi Mboo -V- Mulwa CACA No.233 OF 1996**
- **Wilson Osolo -V- John Ojiambo & another [1996] eKLR**
- **Busia H.C.MISC. Civil App.No.57 of 2004 Republic –V- Senior Resident Magistrate, Busia & Others.**
- **Busia H.C. Misc. Civil Appl. NO.24 OF 2009, Republic –V- Funyula Land Dispute Tribunal & 2 Others.**

l) That this court has had occasion to pronounce itself in several cases including the last two matters in (K) above to the effect that the six months period being specified by statute to apply for leave cannot be extended. That the position is confirmed by the court of Appeal in the three decisions in (K) above among others.

m) That the heading of chamber summons dated 3rd October 2011 and notice of motion dated 19th October 2011 indicate that they were brought under **Order 53** of the Civil Procedure Rules. The proceedings herein are therefore not based on any impingement of the fundamental right that are enforceable under **Article 22 (1) and 23 (2)(f)** of the Constitution 2010, or the Rules made thereunder. That in any case, the court has already made a finding in (g) above that the parties to the adjudication objection proceedings, including the church which is represented by the Applicant in this proceedings, were granted a fair hearing.

n) That the application before the court is about the process in arriving at the decision rather than the merit of the decision. That the court having found that the parties were afforded fair hearing to present their case, that the objection proceedings were undertaken in accordance with **Section 26 of the Land Adjudication Act** and that the Applicant approached the court long after the expiry of the six months set by the law to seek for leave comes to the finding that the notice of motion dated 19th October 2011 has no merit.

7. The notice of motion dated 19th October 2011 is for reasons set out above dismissed with costs to the

3rd Respondent.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND -JUDGE

DATED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2017

In presence of;

Applicant Absent

Respondents Absent

Counsel Mr. Olel for Ragot for Exparte Applicant

 Mr. Baganda for Kowinoh for 3rd Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND –JUDGE

1/2/2017

1/2/2017

S.M. Kibunja Judge

Oyugo court assistant

Parties absent

Mr. Olel for Ragot for Exparte Applicant

Mr. Baganda for Kowinoh for 3rd Respondent

Court: Judgment dated and delivered in open court in presence of Mr. Olel for Ragot for Exparte Applicant and Mr. Baganda for Kowinoh for 3rd Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND –JUDGE

1/2/2017