



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISC. APPLICATION NO.95 OF 2014

IN THE MATTER OF TITLE NO. KISUMU/KOCHIENG/2842

AND

IN THE MATTER OF RECTIFICATION OF TITLE UNDER

SECTION 79(1) OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO

APPLY FOR AN ORDER OF CERTIORARI

BETWEEN

ADONJAH OGINGA OTIENO.....1ST APPLICANT

PATRICK LUMUMBA OTIENO.....2ND APPLICANT

AND

KISUMU EAST DISTRICT LAND REGISTRARRESPONDENT

JONATHAN OCHARE ONYANGO.....INTERESTED PARTY

JUDGMENT

1. By notice of motion dated 22nd October 2014, **Adonijah Oginga Otieno** and **Patrick Lumumba Otieno**, the 1st and 2nd Exparte Applicants, seeks for an order of certiorari to remove into this court and quash the decision of the **District Land Registrar, Kisumu East District**, dated 19th November 2013 to reconstruct and rectify the green card of land parcel **Kisumu/Kochieng/2842**, registered in the name of Helida Otiende Otieno as sole proprietor, and substituting thereof Helida Otiende Otieno and Onyango Onyango as joint owners with $\frac{1}{2}$ share each. The application is based on the grounds on the statutory statement and affidavit of Patrick Lumumba Otieno sworn on the 22nd October 2014. The Exparte Applicants' case is that upon completion of the adjudication process land parcel **Kisumu/Kochieng/2842** was registered with their late mother namely Helida Otiende Otieno on the 29th May 2003. That Helida Otiende Otieno had passed on the 21st September 1996 and their efforts to have a title deed issued has not born fruits. That in late November 2013, the Exparte Applicants were informed that the green card for

the said land had been reconstructed and that they could now process a title deed. That they confirmed that the green card had been reconstructed on the 19th November 2013 with the effect of adding the name of Onyango Onyango as a co-proprietor of the land. That as the Exparte Applicants were not given an opportunity to be heard before the Land Registrar made the decision that affected the interest of Helida Otiende Otieno's estate over the said land, and they instructed counsel to lodge a formal complaint and demand notice. That the Exparte Applicants then filed Kisumu H.C. P& A Cause NO.402 of 2014 and obtained letters of administration Ad litem issued on 30th May 2014.

2. The application is opposed by Jonathan Ochare Onyango, the Interested party, through his replying affidavit sworn on the 27th January 2015. The Interested Party's case is that the land was registered in the joint names of Otiende w/o Otieno and Onyango Onyango on first registration on the 29th May 2003 and that he was unaware of the Land Registrar's decision of 19th November 2013 to add the name of Onyango Onyango to the said title. That in any case if the decision that the Exparte Applicants seeks to impugn exists, it was properly made and under **Section 28 of the Registration of Land Act** (Now repealed), the decision is indefeasible as it was a first registration. That the application seeks to impugn a decision made 11 years ago and hence is incurably defective and should be dismissed with costs.

3. The Attorney General entered appearance through the memorandum dated 7th April 2015 for Kisumu East District Land Registrar, the Respondent, but did not file any replying papers to the notice of motion.

4. The counsel for the parties appeared before the court on the 2nd June 2016 when directions on filing written submissions on the notice of motion were given by consent. There were subsequent mentions on the 13th July 2016, 28th September 2016 and lastly on the 7th December 2016 when today's date for judgment was fixed.

5. The counsel for the Exparte Applicants filed their written submissions dated 12th July 2016, while the Interested Party's counsel filed theirs dated 7th September 2016. The counsel for the Exparte Applicant filed undated reply to the Interested Party's submission on the 14th November 2016. The counsel for the Respondent did not file any submissions. The following is a summary of the submissions filed.

SUBMISSIONS:

- That leave to file the substantive application was granted on the 1st October 2014 and the notice of motion was filed on the 22nd October 2014 which was within the 21 days given.
- That the letters dated 12th June 1992 and 14th July 1994 confirm that the Interested Party had known the suit land was registered with Helida Otiende Otieno as a sole proprietor which prompted him to lodge a complaint to the Lands office. That no action was taken and once the adjudication exercise was complete the suit land was registered on 29th May 2003 with Otiende w/o Otieno as a sole proprietor.
- That on the 1st November 2013 the Interested Party did a further letter to the District Land Registrar referring to his earlier complaint which had not been acted upon. The letter was copied to the land adjudication officer who subsequently did a letter dated 19th November 2013 to the District Land Registrar.

In the letter, the District Land Adjudication and Settlement Officer stated that the duplicate adjudication record for the suit land had only one name of Otiende w/o Otieno. That he had also seen the letters dated 20th August 1992 and 14th July 1994 mentioning the inclusion of the name of Onyango Onyango to the suit land but could not get the copy of the demarcation sketch book and original adjudication record for confirmation of the inclusion of the second name.

- That following the receipt of the letter dated 19th November 2013, the land Registrar reconstructed the register of land parcel **Kisumu/Kochieng/2842** on the same date, 19th November 2013, without offering the Exparte Applicants, as persons with beneficial interests to the estate of the late Helida

Otiende Otieno, a hearing.

- That the Land Registrars whose powers under **Section 14 of the Land Registration Act 2012** bestows on the office quasi – judicial function must in their actions and decisions meet the requirements of natural justice and fair hearing. The learned counsel referred to the case of **Commissioner of Lands –V- Kuste Hotel Ltd**, Nakuru C.O.C.A No.234 of 1995 KLR (E&L) 1 page 249 and **English Case of Chiefs Constable of North Wales Police –V- Evans** (1992) 1 WLR 1155.
- That the Land Registrar’s decision to rectify and reconstruct the register for the said land without giving the registered proprietor Helida Otiende Otieno or her children an opportunity to be heard on the Interested Party’s complaint was an infringement on their fundamental right to fair administrative justice and the decision thereof was ultra vires, null and void and should be quashed by an order of certiorari.
- That the contents of the letters dated 20th August 1992, 14th July 1994, 1st November 2013 and 19th November 2013 did not suffice to change the content of the copy of the duplicate Adjudication Record that was duly executed, authenticated and the only available official documentary proof of the person registered with the suit land during the adjudication process.
- That the addition of the name of Onyango Onyango as a co-proprietor of the suit land on the 19th November 2013 was beyond the powers of the Land Registrar under **Section 79 of the Land Registration Act 2012**. That the addition of Onyango Onyango in the register could not be said to be “a formal matter” or “an error or omission not materially affecting the interest of any proprietor” as it had the effect of taking half share of the suit land from Otiende w/o Otieno and bestowing it on Onyango Onyango.
- That the Exparte Applicants got to know of the land Registrar’s decision in the late November 2013 and sought leave within time to file for orders of certiorari. That upon leave being granted on 1st October 2014, the notice of motion was filed within 21 days on the 22nd October 2014. That the leave granted can only be challenged on appeal and not at this stage. The learned counsel referred the court to the case of **Republic –V- County Council of Kwale & Another Exparte Kondo & 57 Others** Misc. Civil application No.384 of 1996 KLR (E & L) 1 303.
- That the failure by the Respondent to file a reply despite being served with the notice of motion should be taken to mean they have conceded to this application. That the application should therefore be allowed with costs.

B. THE INTERESTED PARTY COUNSEL’S SUBMISSION

- That the notice of motion that seeks to impugn the Land Registrar’s decision of 19th November 2013 was filed eleven months two days after the decision. That considering the provision of **Section 9(3) of Law Reform Act Chapter 26 of Laws of Kenya and Order 53 Rule 2 of the Civil Procedure Rules**, the application was filed out of time as more than six months had lapsed.
- That the leave had been obtained exparte and the earliest opportunity the Interested Party got to be heard was after being served with the notice of motion. That the Interested Party is therefore in order to challenge the leave granted and it is erroneous for the exparte Applicant to hold that challenge can only be mounted through an appeal. The learned counsel referred to the following decided cases;
 - a) NBI H.C. MISC APPLICATION No.316 OF 2012, **James Murithi Ngothio & 4 Others –V- Judicial Service Commission** [2012] eKLR.
 - b) E & L MISC. APPLICATION NO.5 OF 2014, **Rosaline Tubei & 7 Others – V- Patrick K. Cheruiyot** eKLR.
 - c) NBI H.C. MISC. APPLICATION N.284 OF 2011, **Jitesh Shah & High Textiles Limited –V- Nairobi District Land Registrar** [2013] eKLR.
- That the decision the Exparte Applicants seeks to be impugned was made on 29th May 2003 when the land parcel **Kisumu/Kochieng/2842** was registered in the joint names of Otiende w/o Otieno

and Onyango Onyango in equal shares. That as the registration was a first one, it is indefeasible by virtue of **Section 28 of the Registered Land Act** which was the Act regulating registration of land at the time. That the Exparte Applicant's application to quash the decision on registration made 11 years ago is belated and should not be granted.

- That the land Adjudication officer's letter dated 20th August 1992 and addressed to the Interested Party had been copied to Mrs. Otiende w/o Otieno and she did not take any step to challenge the decision to have the land registered in her name and that of Onyango Onyango. That the exparte Applicant's application is therefore an abuse of the process of the court.
- That the **Kunste case** cited above has no relevance to the instant matter while the **Kwale Council case** supports their case.

6. The following are the issues for determination by the Court;

a) Whether the decision of the Land Registrar to add the name of Onyango Onyango as an equal proprietor to Otiende w/o Otieno was made and effected on the 29th May 2003 or 19th November 2013.

b) Whether the court process to seek the order of certiorari to quash the Land Registrar's decision was made within the six months.

c) Whether the Land Registrar offered all the parties to be affected by his decision an opportunity to participate in the proceedings in respect of the Interested Party's complaint and present their case before making their decision.

d) Whether the Land Registrar's decision was ultra vires his powers.

e) What orders to issue.

f) Who pays the costs.

7. The court has carefully considered the grounds on the statutory statement of facts, affidavit evidence, submissions by counsel and come to the following determinations;

a) That the office of a Land Registrar is an office established under **Section 12 of the Land Registration Act No.3 of 2013** and hence a public office. The qualification for appointment into that office are set out in **Section 13** of the said Act, while the powers of the Land Registrars are set out in **Section 14 of the said Act**. The powers include, but are not limited to, requiring persons to produce documents, summoning any person to appear and give information or explanation and causing oath or declarations to be administered. These are powers of a quasi-judicial entity and the decision taken in the exercise of such powers are amenable to this court's judicial review jurisdiction.

b) That the copy of the green card or register for land parcel **Kisumu/Kochieng/2842** availed to the court by the Exparte Applicant indicates that the land was first registered on the 19th May 2003. The Exparte Applicant case is that it was registered in the name of their late mother Otiende w/o Otieno as a sole proprietor but on the 19th November 2013, the register was reconstructed on application of the Interested Party to add the name of his late father, Onyango Onyango as an owner in common with equal share. The Interested Party has disputed the Exparte Applicant's contention insisting that the land was on first registration on the 29th May 2003 registered in the joint names of Otiende w/o Otieno and Onyango Onyango and therefore the registration is indefeasible under **Section 28 of the Registered Land Act (repealed)**. The court has noted that the Interested Party did not disown the letter dated 1st November 2013 that the Exparte Applicants contended that he did to the Land Registrar and copied to the Land Adjudication Officer. The letter is referenced "**Complaint P/NO 2872 – KOCHIENG ADJUDICATION SECTION DATED 20 - 8 - 1992.**"

The body of the letter is as follows;

“ Following my complaints to P/No.2842 Kochieng Adjudication Section dated 20th August 1992. The complaint vide your letter as dated above as (has) not been rectified up to date. As per todote I request that the confirmation be done by CERTIFIED COPIES OF THE ORIGINAL LAND ADJUDICATION RECORDS.

The records were to contain the names of Helida Otiende/Onyango Onyango PN 2842 Kocheing Adjudication Section. Our search has not been coming out clearly.”

The letter referred to that is dated 20th August 1992 is annexed and carries a similar reference. The letter is addressed to the Interested Party by the Senior Land Adjudication and Settlement officer and copied to Mrs. Otiende w/o Otieno among others. That paragraph 2 of the said letter states as follows;

“I wish to inform you that according to the investigations carried out by this office, it was discovered that the name Onyango Onyango was cancelled in the original Adjudication Record by mistake which has been corrected. The land Plot 2842 is recorded in the names of the two landowners with equal shares in common.”

The copy of the Duplicate Adjudication Record for Kisumu Kochieng Adjudication Section parcel No.2842 that was availed to the court dated 10th May 2003 has the name of Otiende w/o Otieno as the sole owner. The Interested Party has not availed any other document to challenge the contents of the Duplicate Adjudication Record and the Respondents have not disputed its authenticity. The court has noted that the Land Adjudication and Settlement officer had in his letter to the District Land Registrar dated 19th November 2013 disclosed that he was unable to get the copy of the Demarcation sketch Book and Original Adjudication Record which would have been the only other reliable source documents to confirm the basis and veracity of the contents of the letter dated 20th August 1992.

c) That flowing from the finding in (b) above, the court finds that the inclusion of the name of Onyango Onyango as co-owner of land parcel **Kisumu/Kochieng/2842** could not have been done on 29th May 2003 when the land was first registered with Otiende w/o Otieno. That had that have been the case, then the Interested Party and the Land Adjudication officer would not have done the letters dated 1st November 2013, and 19th November 2013 respectively. That the court therefore makes a finding that the name of Onyango Onyango was entered in the register of the said land on the 19th November 2013 which can be the only explanation for the entry of the word **“Reconstructed”** above Part B of the register and a signatures to its right with a date of 19th November 2013.

d) That the Land Registrar’s decision and action of adding the name of Onyango Onyango as an equal co-owner of land parcel **Kisumu/Kocieng/2842** cannot pass to be a formal matter or an act of correcting an error or omission on the register of the said land as it materially affected the interest of the estate of Otiende w/o Otieno to the land. The Land Registrar’s action was essentially beyond the powers exercisable by that office under **Section 79** of the Land Registration Act No.6 of 2012 and hence ultra vires, null and void.

e) That the Land Registrar was obligated to invite the beneficiaries of the estate of Otiende w/o Otieno and give them an opportunity to be heard on the complaint lodged by the Interested party vide his letter of 1st November 2013 before making the decision he made. The failure to do so contravened **Articles 50 and 40** of the Constitution on fair hearing and right to property respectively.

f) That the application for leave was initiated through the chamber summons dated and filed on 19th May 2014. That the Exparte Applicants have indicated that they got to know of the decision of 19th November 2013 in late November 2013. That the specific date has not been disclosed but on 2nd

December 2013, their advocate did their demand letter to the District Land Adjudication & Settlement officer which was copied to the District Land Registrar and another. That the six months from 19th November 2013 lapsed on or about the 19th May 2014. That as the Exparte Applicants claim that they got to know of the decision in late November 2013 has not been rebutted, then the process initiating the court action to impugn the decision of 19th November 2013 was started within the six months in compliance with **Section 9(3) of Land Reform Act Chapter 26 of Laws of Kenya and Order 53 Rule 2 of Civil Procedure Rules.**

8. That the Exparte Applicants have established that the decision and action of the Land Registrar to add the name of Onyango Onyango as an equal co-owner of land parcel **Kisumu/kochieng/2842** was ultra vires the powers of the Land Registrar under **Section 79** of the Land Registration **Act No.3 of 2012** and further that it was arrived at without giving them and other beneficiaries of the estate of Otiende w/o Otiendo a fair hearing in contravention of **Articles 50** of the Constitution. That therefore prayer 1 of the notice of motion dated 22nd October 2014 is hereby granted and the Land Registrar decision to reconstruct the register of the said land on the 19th November 2013 is called into this court and quashed. The Interested Party will pay the Exparte Applicants costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF APRIL 2017

In presence of;

Applicants Absent

Respondent Absent

Interested party Absent

Counsel M/S Ayiela for Exparte Applicant

M/S Langat for Respondent

M/s Bagwasi for Interested Party

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017

5/4/2017

S.M. Kibunja Judge

Oyugi court Assistant

Parties absent

M/S Langat for Respondent

M/S Bagwasi for Odongo for Interested party

M/S Ayiela for Amondi for Exparte Applicants

Court: Judgment dated and delivered in presence of M/S Ayiela,

M/S Langat and M/S Bagwasi for the Exparte Applicant Respondent and Interested Party respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017