



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW APPLICATION NO. 26 OF 2014

I THE MATTER OF AN APPLICATION FOR LEAVE FOR ORDER OF CERTIORATI AND PROHIBITION

AND

IN THE MATTER OF AMENDMENT OF CADASTRAL MAP/REGISTRY INDEX MAP TO PLOT NO. PDP NO. ISL/117/96/64

AND

IN THE MATTER OF ARTICLE 40 (30) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF SECTIONS 15 AND 16 OF THE LAND REGISTRATION ACT 2012

BETWEEN

ALBERT MWANGI GACHORE.....EX-PARTE APPLICANT

VERSUS

THE DIRECTOR OF SURVEYS.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL...4TH RESPONDENT

AND

MOHAMED SUNKAR.....1ST INTERESTED PARTY

MOHAMED ABDULRADIR2ND INTERESTED PARTY

J U D G M E N T

Pursuant to leave granted on 31.07.14, Exparte Applicant filed a substantive motion on 19.08.14 praying for orders :-

- 1) That an order of certiorari do issue to remove to the Court the decision or proceedings of the Director of Surveys of 01.04.2014 to amend or cancel the registry index map relating to Plot No. PDP/ISL/117/96/64 for the purposes of its being quashed.
- 2) That an order of prohibition do issue to prohibit the 2nd and 3rd Respondent from effecting or implementing the decision of the Director of surveys of 01.04.2014 for purpose of quashing the same.
- 3) That costs of this application be in the motion.
- 4) That the Court do make any other or such better orders which it may deem fit to grant in the circumstances.

The grounds in support of the motion are:-

- i. The Exparte Applicant is the owner in possession and with proprietary interest in Plot No. ISL/117/96/64 situated in ISIOLO TOWNSHIP measuring 150X50X30 feet.
- ii. The 2nd Interested Party is the owner in possession of a plot that was previously un surveyed and identified as Plot No. ISL/117/96/64.
- iii. Both plots share a common boundary and on 17/06/2013 the Exparte Applicant instituted ISIOLO CMCC NO. 25 OF 2013 against the 2nd interested party based on a claim of trespass to property.
- iv. On 01.04.2014 the Honourable trial Magistrate ruled that an order of injunction do issue relating to the portion of both suit lands agreed by both parties to be disputed.
- v. The 1st Interested Party was in the meantime enjoined in ISIOLO CMCC No. 25 of 2013 on 12/09/2013 as a 2nd Defendant upon his own application.
- vi. The 1st Interested Party further caused the survey of ISIOLO/PDP/117/96/66 resulting in the delineation of the Exparte Applicant's Plot No. ISL/PDP/117/96/64 on 01.04.2014.
- vii. The Exparte Applicant was not afforded an opportunity to be heard prior to the decision by the 1st Respondent to unilaterally delineate his property.
- viii. The Exparte Applicant has as a consequences of the 1st Respondent's and 1st Interested Parties' conduct been deprived of his property un-procedurally.
- ix. There is an imminent danger that the Exparte Applicant's interest will inevitably be defeated by the issuance of a certificate of lease by the 2nd Respondent and the 3rd Respondent.

The suit has been opposed by the Respondent and the 1st Interested Party. The second Interested Party did not file any responses.

EX PARTE APPLICANT CASE

Ex-Parte applicant avers that he bought a plot No. ISL/117/96/64 on 01.05.11 from one Mburugu M'Kiaugia who had in turn been allocated the plot by the Government. However, a dispute arose between Exparte Applicant and 2nd Interested Party who allegedly owned plot No. ISL/117/96/66 and hence Exparte Applicant decided to institute Civil Case No. Isiolo CMCC 27/13. Ex parte applicant states that as the suit was progressing, the 1st interested party mischievously caused the alteration of the Registry index map relating to plot No. ISL/117/96/66 resulting in delineation of Exparte Applicant plot No.

ISL/117/96/94. That the director of survey then amended the registry Index Map on 01.04.11 which had the effect of consolidating Exparte Applicant's plot into that of 1st Interested Party and causing a new number parcel 77 to be reflected thereof. Exparte Applicant submits that he was not given a chance to be heard and hence the decision by director of survey violates the rules of Natural Justice.

CASE FOR THE INTERESTED PARTIES

The 2nd Interested Party didn't not file any response or any submissions. It is however clear that his interests are being taken care of by the 1st interested party. The 1st Interested Party sold the disputed plot to 2nd Interest Party. 1st Interested Party states that he was allocated plot No. ISL/17/96/66 in 1997 and that the plot is still in his name as the formal transfer to 2nd Interested Party has not been done at the lands registry.

1st Interested Party further states that when he sold the plot to 2nd interested party, the latter started to develop it and that is when Exparte Applicant instituted the suit CMCC 27 of 113.

The 1st Interested Party avers that the 2nd Interested Party is the true and genuine registered owner of the suit land. 1st Interested Party submits that he doesn't work at the Government offices of the Respondents hence the allegation that he caused the delineation of Exparte Applicant plot is not true.

He also submit that the alleged decision and proceedings of 1st Respondent do not exist.

Finally the 1st Interested Party states that the case filed by Exparte Applicant the same being Isiolo CMCC No. 27 of 2013 was dismissed for want of prosecution on 13.06.17 and that this is evidence of the Exparte Applicant disinterest in the matter.

Case for Respondents

The Respondent aver that the suit is incompetent in that the decision referred to dated 01.04.14 is none existence and that no proceedings to that effect have been attached.

Further, Respondent submits that Exparte Applicant has not demonstrated whether he has acquired any proprietary interest in the suit land. It is argued for the Respondent that Exparte Applicant filed the CMCC 27 of 13 in order to ventilate the issue of ownership and hence this is not the venue for the Exparte Applicant to prove that he owns the parcel of land.

Finally, Respondents submit that the Exparte-Applicant has not demonstrated that the part Development Plan for ISL/PDP/117/96/64 relating to the suit property had been approved by the Director of Physical Planning and whether the Registry Index Map had been approved by director of survey. Finally, it is submitted that the physical Planning Act is the one which has procedures dealing with applicant's issue.

DETERMINATION

I sum up the issues for determination as follows:-

1. Whether the Exparte Applicant has Rights of proprietorship in the suit land.
2. Whether proceedings and decision of 1st Respondent of 01:04:14 exists.
3. What is the bearing of the Isiolo CMCC 27/13 in the present case.
4. Whether the dispute Resolution on mechanisms have been followed.

Rights of Proprietorship

Exparte Applicant's claims to the ownership of the property are contained in the bundle of documents produced as GM 11. True, all the documents do make reference to Plot No. ISL/117/96/64. However, none of these documents is an allotment letter, a title deed or a certificate of lease.

I am therefore in agreement with Respondents assertions that:-

“Once it is evident that the Exparte Applicant proprietary interest have crystalized, it is at this point that any acquired interest could be examined”.

This case is therefore distinguished from the case of Beatrice Wairimu Kiiru vs. Director of Survey & 2 others is (cited by Exparte Applicant) in that in the cited case, the Exparte Applicant was the registered proprietor of the suit land and ***“his interest in the land was clearly shown in the register and had a legitimate expectation that he would be heard before any steps are taken to effect those interests”.***

The Ex parte applicant admits that a dispute regarding the owner ship of the land arose and that is why he filed the ISIOLO CMCC no. 27/13. His assertions that he is the legal owner of the suit land as alleged in paragraph 5 of his supporting affidavit is misplaced in so far as these proceedings are concerned. It is trite law that Judicial Review proceedings are concerned with the decision making process and hence the court cannot make a determination as to whether Ex parte Applicant is the proprietor of the suit property.

Proceedings and decision of 01.04.14 by 1st Respondent (The right to be heard).

He who alleges must prove. That is trite law. Exparte Applicant is the one who alleges that he was not given an opportunity to be heard when the decision of 01.04.14 was made.

Neither the proceedings nor the decision of the director of survey of 01.04.14 have been availed before this court.

What the Exparte Applicant refers to as the decision (as per his submissions is the map Identified as GMVI. That map however doesn't capture a decision of 01.04.14. No other map has been annexed to show the status of the suit land before the alleged alteration.

If this Court was to allow the motion, the question is which decision would stand to be quashed?. I find that Exparte Applicant has not laid a basis for his assertion that there existed a decision of 1st Respondent dated 01.04.14.

If the decision and the proceedings sought to be challenged are not there, then the question of being denied a chance to be heard doesn't arise and therefore, the case of ***“Mombasa J.R No. 45 of 2017 R vs. Chairperson BPRT Exparte-Ibrahim Sheikh Abdulla & 2 others”*** cited by Exparte Applicant is not applicable.

The Isiolo CMCC 27/13.

The existence of this case is not disputed. The plaint thereof, availed by Exparte Applicant in his supporting documents clearly shows that it is the issue of ownership of the plot that was to be resolved.

A serious issue has however been raised by the 1st Interested Party in his submissions that this case was dismissed for want of prosecution on 13.06.17. Is this true?. The Exparte Applicant has made no comments on this issue. If indeed the lower case was dismissed, it means that the Ex parte Applicant is attempting to assert his claims of ownership all over again. The court has already ruled that such a determination cannot be made in the Judicial Review Proceedings.

Dispute Resolution Mechanism.

One of the Exparte Applicant documents to support his claim is the PDP showing a departmental

Reference No. ISL/117/96/64. 1st Interested Party too has a PDP for ISL/117/96/66. The physical planning committees would be in a better position to resolve the impasse concerning these PDP's. The physical planning Act has elaborate mechanisms particularly under section 13 and 15 on how an aggrieved person can seek redress.

Conclusion.

All in all, the Judicial Review Motion is not meritorious. I dismiss the same with cost to 1st Interested Party and all Respondents.

SIGNED, DATED AND DELIVERED IN OPEN COURT AT MERU THIS 27TH DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Miss Nyaga H/B for J.G. Gitonga for Exparte Applicant

Muthoka Mr. for 1st Interested Party

Hon. L. N. MBUGUA

ELC JUDGE