



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA

E.L.C. MISC APPLICATION NO. 23 OF 2014

**IN THE MATTER OF THE JUDICIAL REVIEW APPLICATION NO. 34 OF 2010 BETWEEN
THE REPUBLIC, DAUDI NGARI NJIRU AND ZAKAYO NJERU NJAGI**

AND

IN THE MATTER OF THE SUB-DIVISION OF THE LR. NUMBER MBEERE/KIRIMA/2976

CONTRARY TO THE ORDER OF CERTIORARI DATED 26TH OCTOBER, 2010

BETWEEN

ZAKAYO NJERU NJAGI.....APPLICANT

VERSUS

DAUDI NGARI NJIRU.....RESPONDENT

RULING

1. By a notice of motion dated and filed on 23rd October 2014, the Applicant, Zakayo Njeru Njagi, sought the following orders against the Respondent, Daudi Ngari Njiru;

a. That the Honourable court do order the rectification of the register by directing that the subdivision and registration of the original LR NO. Mbeere/Kirima/2976 into LR Nos. Mbeere/Kirima/3882 (0.60 Ha), 3891 (0.60 Ha), 3888 (0.60 Ha), 3879 (0.60 Ha), 3877 (0.60 Ha), 3912 (0.30 Ha), 3913 (0.30 Ha), 3914 (0.30 Ha), 3915 (0.30 Ha), 3916 (0.30 Ha), 3917 (0.60 Ha), 3918 (0.60 Ha), 3919 (1.50 Ha), 3922 (0.60 Ha), 3921 (0.60 Ha), 3924 (0.80 Ha), 3907 (0.60 Ha), 3910 (0.60 Ha), 3887 (0.60 Ha), 3884 (0.60 Ha), 3902 (0.60 Ha), 3901 (1.60 Ha), 3899 (1.80 Ha), 3898 (0.90 Ha), 3903 (0.60 Ha), 3904 (0.60 Ha), 3905 (0.60 Ha), 3908 (0.60 Ha), 3909 (0.60 Ha), 3911 (0.60 Ha), 3894 (0.90 Ha), 3893 (0.60 Ha), 3886 (0.60 Ha), 3885 (2.43 Ha), 3883 (0.60 Ha), 3890 (0.60 Ha), 3889 (0.60 Ha), 3892 (0.90 Ha), 3878 (0.60 Ha), 3876 (0.90 Ha), 3900 (15.00 Ha), 3880 (0.60 Ha), 3881 (0.60 Ha), 3920 (1.50 Ha), 3923 (0.60 Ha), 3925 (1.50 Ha), 3936 (1.50 Ha), 3985 (3.00 Ha), 3896 (0.60 Ha), 3906 (0.60 Ha), 3897 (4077, 4079 and 4048) be cancelled.

b. That the above stated portions of land be consolidated and registered in the original state number (ie LR No. Mbeere/Kirima/2976) as it was prior to the decree/verdict of the Principal Magistrate Court, Siakago issued on 28.05.10 in case No. 379/2009 and 12/2010.

c. That the cost of this application be paid by the Respondent, Daudi Ngari Njiru.

d. Any further relief deemed fit and just to grant.

2. The basis of the said miscellaneous application was that the Respondent had caused *Title No. Mbeere/Kirima/2976* to be subdivided into 53 parcels and transferred to third parties in violation of a stay order granted in Embu J.R. No 34 of 2010. It is also apparent that the substantive judicial review order of *certiorari* was subsequently granted which quashed the award of the Tribunal upon which the Respondent's actions were based. The order of *certiorari* was granted on 26.10.2011 whereas the transfer of the 53 parcels was affected in April 2011.

3. The Respondent filed a replying affidavit in opposition to the said application. He stated that the application seeks cancellation of registered titles whose owners were not joined as parties herein. He denied disobeying any court orders and stated that cancellation of property titles could not be effected via a miscellaneous application. He therefore asked the court to dismiss the said application as lacking merit.

4. In my opinion, the Applicant is aggrieved because of his inability to obtain execution or implementation of the order of *certiorari* obtained on 26th October 2011 which quashed the award of the Land Disputes Tribunal (LDT) and the resultant decree of Siakago PM's Civil Case No. 379 of 2009. The implementation of the award in alleged violation of the temporary stay granted at the leave stage is not the real question in controversy. It is being introduced as a red herring just to muddy the waters and obscure the real issue in controversy. Why do I say so? It is because the order of *certiorari* quashed both the award of the LDT and the decree of Siakago PM's court and all that was required for the Applicant to obtain the desired result was implementation of the order of *certiorari*. It is clear from the annexures to the application that all efforts by the Applicant to have the Land Registrar comply with the order were not successful. He even implored the office of the Attorney General to intervene and have the order implemented without much success.

5. The court has considered the application, the replying affidavit in opposition thereto and the parties' written submissions. The court is not satisfied that the prayers sought should be granted for the following reasons. First, the Land Registrar who is in position to implement the main orders sought was not joined in the proceedings. The Respondent, who is a civilian is not in a position to implement the orders sought for cancellation of the 53 titles and consolidation thereof into a single title. Second, the proprietors of the 53 titles whose cancellation is sought were not joined in the proceedings. The court would violate the cardinal principles of natural justice if they were to be deprived of their properties unheard. Third, if the Land Registrar has failed to comply with an order of *certiorari*, appropriate proceedings for enforcement should be undertaken. I do not think that filing a new application against a civilian would secure enforcement of the order of *certiorari*.

6. Finally, the cited provisions of the law do not empower the court to undertake rectification of titles in the circumstances of this case. **Section 63(e) of the Civil Procedure Act (Cap. 21)** only empowers the court to issue an interlocutory order if it is so prescribed. I do not consider cancellation of titles to be an interlocutory order. The provisions of **section 80 of the Land Registration Act** only empowers the court to order rectification if the registered proprietors had knowledge of the fraud, omission or mistake complained of. There is no evidence on record to the effect that the proprietors of the 53 parcels had such knowledge.

7. The court agrees with the principles of law articulated in the case of **Hadkinson Vs Hadkinson [1952] 2ALL ER 567** cited by the Applicant's counsel that court orders ought to be obeyed unless and until they are discharged. However, the appropriate mode of dealing with alleged contemnors must be followed. There is no application or prayer before me for the alleged contemnor to be punished.

8. In view of the foregoing, the court finds no merit in the notice of motion dated 23rd October 2014 and the same is hereby dismissed with costs.

9. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of

SEPTEMBER, 2017

In the presence of Ms Anne Thungu holding brief for Mr. Eddie Njiru for the Applicant and Mr. Mogusu holding brief for Mr. Momanyi for the Respondent.

Court clerk Njue.

Y.M. ANGIMA

JUDGE

21.09.17