



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

NYERI ELC JR NO. 3 OF 2014

(Formerly NYERI HIGH COURT

JR APPLICATION NO. 7 OF 2011)

REPUBLIC OF KENYA APPLICANT

-VERSUS-

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

DISTRICT LAND REGISTRAR 2ND RESPONDENT

RICHARD JOSEPH MATHENGE 3RD RESPONDENT

EDWARD MWANGI IRUNGU INTENDED INTERESTED PARTY/APPLICANT

RULING

1. Pursuant to the leave granted to the ex-parte applicant, on 9th February, 2011 to apply for an order of prohibition, the ex-parte applicant, **Richard Joseph Mathenge**, filed the notice of motion dated **21st February, 2011** praying that the Chief Land Registrar and the District Land Registrar, Nyeri be restrained from expunging his name from the records in respect of parcel number L.R **Nyeri Municipality/Block/1/172** and from in, any other way, interfering with his occupation of L.R **Nyeri Municipality Block 1/1172** (hereinafter referred to as “the suit property”).

2. The application is premised on the grounds that *the ex-parte* applicant is the registered proprietor/owner of the suit property; that documents from the lands office prior to transfer of the suit property to the *ex parte* applicant show that all transactions were genuine and ought not to be tampered with. The *ex parte* applicant contends that the Chief Land Registrar’s Office seems to be interested in denying him his rights to the suit property. In this regard the *ex parte* applicant explains that on or about 29th December, 2010, the Chief Land Registrar wrote a letter to the District Land Registrar Nyeri and copied to him and his predecessors in title. In that letter the Chief Land Registrar required him to within 21 days show cause why the documents used to effect registration in his favour should not be expunged from the record concerning the suit property and the register in respect of the suit property rectified. The reason given by the Chief Land Registrar for the notice to show cause is that the documents used to effect transfer in favour of the ex parte applicant were forged.

3. Contending that he is an innocent purchaser for value of the suit property from the previous registered owners and being apprehensive that his right to the property may be comprised, the ex-parte applicant moved the court for the orders mentioned herein above.
4. On behalf of the 1st and the 2nd respondent, the Hon. Attorney General filed the grounds of opposition dated **21st June, 2011** challenging the application on the grounds that the application is contrary to mandatory legal provisions, untenable, an abuse of the court process, misconceived, incompetent bad in law and fatally defective.
5. When the application was pending for hearing, **Edward Mwangi Irungu** (the interested party) applied to be joined in the suit as an interested party claiming that he is the one to whom the suit property was first allocated.
6. Upon being granted leave to join the suit, the interested party filed the replying affidavit he swore on **18th March, 2013**. In that affidavit, the interested party has deposed that he is the lawful allottee of the suit property having been allocated the same in 1992; that he paid all the government dues and had been in the process of preparing a lease in respect of the suit property when he learnt that it had been unlawfully alienated to Peter Muriithi Kariuki and Johstone Mukundi Githinji and subsequently to the *ex parte* applicant.
7. The interested party complained to the 1st Respondent (Chief Land Registrar) who upon conducting investigations into the matter, established that the documents used to effect registration of the suit property were forged. The interested party further contends that the persons who transferred the suit property to the *ex parte* applicant had no good title to pass to the *ex parte* applicant.
8. In view of the foregoing, the interested party urges the court not to restrain the respondents from rectifying the records concerning the suit property.
9. The application was disposed of by way of written submissions.

Submissions for the ex parte applicant:

10. On behalf of the *ex parte* applicant, it is submitted that the 1st respondent has no power to do what he threatened to do (expunge the *ex parte* applicant's name from the register in respect of the suit property); that to expunge the applicant's name from the register of the suit property, a court order to that effect is required. Maintaining that the Chief Land Registrar has no power to cancel title to land without an order of court authorizing him to do so, the *ex parte* applicant submits that the 1st respondent's threat to expunge his name from the register of the suit property was *ultra-vires*.
11. The applicant also submits that being a purchaser for value without notice, he is blameless; that he cannot be blamed for having relied on the representation by the government that the title held by his predecessors in title was good. Further that there is no evidence to show that he was involved in fraud.
12. It is also submitted that due process of the law ought to have been used in challenging the registration of the *ex parte* applicant as the proprietor of the suit property.
13. The following cases are cited in support of the *ex parte* applicant's case:-
 - i. Malindi JR Misc. Application No. 17 of 2010; Fahim Yasin Twaha & Another v. District Land Registrar Lamu;
 - ii. Nairobi Misc Application No. 2 Of 2011; Charles Malenya & 22 Others v. The Registrar of Titles Nairobi & another;
 - iii. Eldoret JR No. 76 of 2011; Jonah Kariuki Mwaura vs. The District Land Registrar Uasin Gishu & another;
 - iv. Kakamega JR No. 20 of 2012; Kito Pharmaceutical Ltd & 2 others v. The land Registrar Kakamega District.

Submissions for the interested party:

14. On behalf of the interested party, it is submitted that the Chief Land Registrar acted within his powers in ordering that the forged documents be expunged from the record. In this regard reference is made to **Section 79(2)** of the Land Registration Act, 2012 and submitted that the Registrar is empowered to rectify or direct the rectification of register. The section provides as follows:-

“79(2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.”

15. It is pointed out that the guidelines that the Registrar is supposed to follow are provided for under **sub-section 4 of Section 79**. The Registrar is said to have followed the said guidelines- he gave notice to the affected parties who failed to respond or ignored it.

16. In view of the foregoing, it is submitted that the Registrar did not act *ultra vires* or breach the rules of natural justice.

17. It is contended that prohibition cannot issue in favour of the *ex parte* applicant because the decision sought to be prohibited had already been made before the application for prohibition was made. In this regard reference is made to the case **of Kenya Examination Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 others**, [Nairobi C.A.C.A NO. 266 of 1996] and submitted that prohibition cannot quash a decision which has already been made.

Analysis and determination

18. The remedy of judicial review is concerned not with private rights or merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (see **Republic V. Secretary of State for Education and Science ex parte Avon County Council** (1991) 1 ALL ER 282 at 285). It lies for excess of jurisdiction or absence of it or for departure from the rules of natural justice. see **Kenya National Examination Council V. Republic** (*supra*).

19. In the instant case, it appears that based on investigations conducted by the 1st respondent, upon receipt of a complaint from the interested party, the 1st respondent formed the opinion that the title that the *ex parte* applicant had was obtained fraudulently or unprocedurally. As a result, the 1st respondent issued a notice to the *ex parte* applicant to show cause why his name should not be expunged from the record in respect of the suit property. After the *ex parte* applicant failed to respond to the notice within the time stipulated in the 1st respondent's letter dated 29th December, 2010 by a letter dated 28th June, 2011 the 1st respondent instructed the 2nd respondent to expunge the documents used to effect the transfer of the suit property and entries in respect thereof from the register and accordingly rectify the register.

20. From the evidence before me, it appears that the intended rectification was not effected as the *ex parte* applicant moved to court and obtained an order to prohibit the respondents from effecting the intended rectification of the title.

21. As judicial review is not concerned with the merits of the impugned decision but the lawfulness of the decision, I will not venture into the merits of the decision by the impugned decision of the 1st respondent. Instead I will limit myself to the lawfulness or otherwise of the said decision.

22. In regard to the decision of the 1st respondent to order expunging of records held in respect of the suit property and rectification of the same by removing the name of the *ex parte* applicant, it is submitted on behalf of the *ex parte* applicant that the 1st respondent had no power to do so under the Registered Land Act, Cap 300 Laws (repealed).

23. Counsel for the interested party in his submissions, cited **Section 79(2)** of the Land Registration Act,

2012 and asserted that the 1st respondent has power to make the impugned decision.

24. Regarding reference to **Section 79(2)** of the Registered Act, 2012 I wish to point out that since the title which is the subject matter of these proceedings was obtained under Cap 300, it is the provisions of that Act that applies to the title. See **Section 107** of Land Registration Act, 2012 which provides as follows:-

“107. (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act...”

25. The relevant section of Cap 300 concerning the issue raised in this application is **Section 142** which provides as follows:-

“142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases

(a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) In any case and at any time with the consent of all persons interested;

(c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify. (2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.”

26. The circumstances upon which the Registrar may effect rectification of title to registered land are those contemplated herein above. Clearly, those circumstances do not include instances where fraud is alleged like in this case.

27. It would appear that where fraud is alleged, then rectification can only issue under **Section 143** which provides as follows:-

“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default...”

28. In view of the foregoing, the only lawful way of challenging the *ex parte* applicant's title is to challenge it in a court of law as contemplated in **Section 143** of Cap 300. In this respect I 100% agree with the decision in the case of **Malindi JR Misc. Application No. 17 of 2010; Fahim Yasin Twaha & Another v. District Land Registrar Lamu** (*supra*) that:-

“If respondent wishes to challenge the applicant's titles then the proper legal process must be adopted.”

In that case, the trial judge, **Omondi J.**, directed that the respondent shall retain the records of the applicants in the land registry as owners of the properties in contention until such time that a proper legal process is used to adversely affect them.

29. In the circumstances of this case, despite being of the view that the interested party has an arguable case against the *ex parte* applicant and/or the applicant's predecessors in title, since judicial review simply deals with the lawfulness or otherwise of a decision and not the merits behind the decision, the interested party's claim that the *ex parte* applicant did not obtain good title to the suit property cannot be determined in the current proceeding.

30. With regard to the interested party's submission that an order of prohibition cannot issue because the impugned decision has already been made, the evidence presented in court shows that the impugned decision was not acted upon. It is therefore, possible to restrain the respondents from acting on the decision that was made in excess of the 1st respondent's power.

31. In view of the foregoing, until and unless the *ex parte* applicant's registration is through the due process of the law found to have been effected wrongfully, the respondents are restrained from interfering with the *ex parte* applicant's registration as the proprietor of the suit property and his occupation thereof.

32. The upshot of the foregoing is that the *ex parte* applicant's application succeeds to the extent contemplated in this ruling.

Dated, signed and delivered at Nyeri this 5th day of October, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Gathega Mwangi h/b for H. K. Ndirangu for *ex parte* applicant

Mr. Ng'ang'a h/b for Ms Mwai for interested party

N/A for the respondent

Court assistant - Lydia