



REPUBLIC OF KENYA

High Court at Kerugoya

Judicial Review 5 of 2012

JOSEPH NGURE GATHUMBIAPPLICANT

VERSUS

MWEA DIVISION LAND DISPUTES TRIBUNAL1ST RESPONDENT

WANG'URU SRM'S COURT2ND RESPONDENT

KIRINYAGA DISTRICT LAND SURVEYOR3RD RESPONDENT

AND

JANE WAMBUI GATHUMBI1ST INTERESTED PARTY

GRACE WANGECI GATHUMBI2ND INTERESTED PARTY

JUDGMENT

On 17th January 2013, this Court delivered a ruling on a preliminary objection raised by the interested parties herein whereby I ruled that the remedy of certiorari was not available to the applicant but I allowed the hearing of the substantive application on the remedy of prohibition to be canvassed. It was further agreed that the application be canvassed by way of written submissions which were to be filed on or before 23/4/2013. However, by that time, Mr. Kimani for the applicant had not filed his submissions and asked for more time to do so and notwithstanding the complaint from Ms Chimau for the respondents that Mr. Kimani was delaying the matter, the court nonetheless gave Mr. Kimani upto 3/5/2013 to put in his submissions and fixed a judgment date for 30/5/2013. However, as at the time of drafting this judgment on 16/5/2013, Mr. Kimani had still not filed any submissions and I have therefore drafted this ruling without the benefit of his in-put.

As stated earlier in this judgment, the issue that concerns me is the remedy of prohibition as sought in the applicant's Notice of Motion dated 10/12/2007 in which the following order was sought in prayer No. 2.

“That an order of prohibition do issue preventing the 3rd respondent from ever accepting and/or registering any dealings or transactions by or at the behest of the interested parties relating to Title numbers MWERUA/KAGIO/3582 and 3584 resulting from the decisions of the 1st and 2nd respondents”.

I have considered the submissions by the advocates for the respondents and the interested parties.

I have also considered the pleadings herein.

From the applicant's own affidavit in support of the Notice of Motion dated 10/12/2007, it is clear from paragraph 9 that the original parcel of land known as MWERUA/KAGIO/2907 had already been sub-divided into the following three portions:-

1. ***Title No. MWERUA/KAGIO/3582 is registered in the names of Jane Wambui Gathumbi the 1st interested party.***
2. ***Title No. MWERUA/KAGIO/3583 is registered in the names of the applicant.***
3. ***Title No. MWERUA/KAGIO/3584 is registered in the names of the 2nd interested party i.e. Grace Wangeci Gathumbi.***

The above registrations were effected as far back as 9th September, 2007 by the 3rd respondent and therefore, by the time the applicant came to court on 10/12/2007, the mischief that he sought to prohibit had already been done. In the circumstances, the remedy of prohibition is, regrettably, not available to the applicant because the act that he seeks to prohibit has already been done. According to the ***BLACK'S LAW DICTIONARY 9th Edition***, the remedy of prohibition "***arrests the proceedings of any tribunal, board or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion***". Going by that definition, what the applicant seeks to "***arrest***" is already gone.

In **COMMISSIONER OF LANDS & ANOTHER VS COSTAL AQUACULTURE LTD K.L.R (E & L) 1 at Page 271**, the Court stated as follows as per Tunoi J A (as he then was) quoting from Halsbury's Law of England:

It is, I think, settled law that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings."

The Judge went on to state as follows:-

"Prohibition lies where there is a lack of jurisdiction and the proceedings in question are incomplete".

And in the case of **KENYA NATIONAL EXAMINATION COUNCIL VS REPUBLIC EX-PARTE GEOFFREY NJOROGE, C.A. CIVIL APPEAL NO. 266 OF 1996 NBI** and which counsel for the respondents referred to in her submissions, the Court of Appeal stated that prohibition looks to the future and where a decision has already been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. The Court went further and observed as follows:-

"Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision".

From the above, it is not contraverted that parcels number MWERUA/KAGIO/2907 has already been sub-divided into three portions and three titles issued by the 3rd respondent one to the applicant and the other two to the two interested parties. This sub-division and registration had been done way back in September 2007 some three months before the applicant filed his Notice of Motion in December 2007 and some two months before he obtained leave in November 2007. Clearly therefore, the remedy of prohibition is not available to him and would not be efficacious as the decision sought to be prohibited has already been made.

Ultimately therefore the Notice of Motion dated 10th December 2007 is dismissed with no order as to costs.

B.N. OLAO

JUDGE

30/5/2013