



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE CONSTITUTIONAL RIGHTS

UNDER ARTICLES, 21, 22, 23 (1), 23(3) (f), 25 (c), 27, 28, 29, 47(1),

48, 49 (1) (d) & 50 (2) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012 IN THE MATTER OF THE LAND ACT

JOSEPH M NYAKWAMA.....APPLICANT

VERSUS

THE LAND REGISTRAR.....1ST RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATION

KISII SOUTH SUB COUNTY.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. This ruling is in respect of the Chamber Summons dated 19th July, 2021 filed by the Intended Interested Party in which he seeks to be made a party to the suit. Before delving into the merits of the said application, it is necessary to give a background of this matter.

INTRODUCTION AND BACKGROUND

2. By Chamber Summons dated 24th January, 2021 the Applicant sought leave to apply for Judicial Review orders of Certiorari to quash the decision of the 1st Respondent to cancel the title deed in respect of his property known as land parcel Number **WANJARE/BOGIAKUMU/8039** (hereinafter referred to as the suit property) and an order of prohibition to prohibit the 1st Respondent and its officers from cancelling the title in respect of the suit property. The Applicant also prayed that the leave so granted do operate as stay of the decision of the 1st Respondent cancelling the title deed to the suit property and any further investigations by the 2nd Respondent with a view to preferring criminal proceedings touching on the suit property.

3. In support of his application, the Applicant swore a Verifying Affidavit in which he averred that he was the registered owner of the suit property and held a title deed which was issued to him by the 1st Respondent on 10th August, 2016. He deponed that on 14th January, 2020 without any prior notification of the preceding events, he received a letter from the 1st Respondent informing him that the title deed to the suit property had been cancelled for reasons that the same had been acquired fraudulently and irregularly.

4. The Applicant contended that it was his legitimate expectation that he would be called to make representations and comments or be heard on how he acquired the title to the suit property before a decision to cancel the said title deed was made. He contended that it was his legitimate expectation that he would face the persons accusing him of fraud and ask them questions before the decision to cancel the title to the suit property as provided for by the rules of natural justice. It was his contention that the 1st Respondent did not have the power to cancel the title deed as the said power was only reserved for the court as provided for by relevant provisions of the law. He stated that immediately after receiving the letter from the 1st Respondent, he received summons from the 2nd Respondent's office requiring him to appear before the 2nd Respondent on 17th January, 2020 to answer to charges of forcible detainer and fraudulent acquisition of the title deed to the suit property.

5. He stated that the actions of the 1st and 2nd Respondents on the face of it were purely hatched by themselves and other persons known to them with a view of dispossessing him of his property where he has lived for many years and has done substantial development thereon. He deponed that upon receiving the two letters, he instructed his advocate to write a letter to the Respondents dated 16th January, 2020 seeking to know why he was not informed of the decision to unilaterally cancel his title without being granted a chance to be heard. The said letter elicited no response forcing him to file this application.

6. The Applicant expressed concerns that unless the application was heard urgently, his constitutional rights would continue to be infringed especially his right to property and his right to fair administrative action.

7. The application was opposed by the Respondents vide a Replying Affidavit sworn by the Land Registrar Kisii County, Mr. Steve Mokaya on 20th February, 2020. In his Affidavit Mr. Mokaya deponed that the suit property was originally known as **LR No. BOGIAKUMU/893** before it was illegally subdivided into two parcels, namely; **L.R BOGIAKUMU/8038** and **LR BOGIAKUMU/8039**.

8. Further, Mr. Mokaya deponed that **L.R BOGIAKUMU/893** was adjudicated in the names of Isabella Mokuu, Bosire Mokuu and Omachi Mokuu in the year 1971 and subsequently registered in their joint names on 21st September, 1974. Mr. Mokaya deponed that on 10th July, 2008 the name of Omachi Mokuu was replaced by the name of one Joseph Magati Omache purporting to be a change of names.

9. He averred that Omachi Mokuu had died without transferring his share of parcel **LR BOGIAKUMU/893** hence no transfer of his share could be done without succession being carried out. It was Mr. Mokaya's further averment that the purported transfer of the suit property to the Applicant in 2016 was therefore illegal. Mr. Mokaya contended that section 79 of the Land Registration Act, gave the Land Registrar power to cancel the title deed given that it was illegally obtained.

10. He denied the Applicant's accusation that his decision was hatched with a view of preferring criminal charges against the Applicant and argued that section 14 of the Land Registration Act did not make it mandatory for the Land Registrar to summon any

person to give information as to how he obtained his title before cancellation of the same.

11. Mr. Mokaya asserted that the constitution only protects property which has been acquired legally and that in the instant case, the title was obtained illegally hence the Applicant was not protected by the constitution.

12. In response to the Land Registrar's averments, the Applicant swore a Further Affidavit where he confirmed that the suit property was originally owned by three persons namely Omachi Mokua alias Joseph Omachi Magati from whom he had bought the suit the property in 1990. He averred that he had stayed on the suit property from the date he bought it up to the time of death of Omachi Mokua alias Joseph Omachi Magati which occurred on 31st May, 2015. Subsequently, Joseph Omachi Magati applied for partitioning of his original share and caused the same to be directly transferred to him. He averred that the deceased never raised any complaint over his occupancy of the property during his lifetime. He contended that thereafter, the Land Registrar issued him with a Certificate of Official Search showing the property had legally been transferred to him.

13. On 4th March, 2021 the court granted that Applicant leave to apply for Judicial Review and directed that the said application for Judicial Review be filed within 21 days. On 23rd March 2020, the Applicant filed the Judicial Review Application.

14. Before the application could proceed for hearing, one Evans Nyakwama Bosire filed an application on 19th July, 2020 seeking to be joined to the matter as an Interested Party. In support of his application, he swore an affidavit in which he averred that he was a nephew of the late Omachi Mokua alias Joseph Omachi Magati who at the time of his demise was jointly registered as the owner of land parcel No. **LR BOGIAKUMU/893** together with Bosire Mokua and Isaboke Mokua.

15. He further averred that following the cancellation of the title to land parcels **LR BOGIAKUMU/8038** and **LR BOGIAKUMU/8039**, by the 1st Respondent, the title reverted to the name of the deceased. He stated that being the only beneficiary of the deceased, he petitioned for a Grant of Letters of Administration in respect of the estate of the deceased vide **Kisii CMCC Succession Cause No. 140 of 2020**. He contended that it was after the filing of the Succession Cause that he learnt of these proceedings. He contended that the orders made in this case would have a direct bearing on his Succession case which was pending in the lower court as the suit property formed part of the estate of the deceased. He therefore prayed that his application be allowed.

16. The Applicant filed a Replying Affidavit in response to the intended Interested Party's application dated 17th November, 2021. In his Replying Affidavit, the Applicant averred that when the court allowed his application for leave to institute Judicial Review proceedings against the Respondents, the court directed that the said leave would operate as a stay of the decision of the 1st Respondent cancelling the title deed for the suit property.

17. He contended that the stay order meant that he would continue to be the registered owner of the suit property pending the hearing and determination of the Judicial Review application. To his surprise the intended Interested Party went ahead and preferred criminal charges against him over the suit property via Kisii Criminal Case No. 954 of 2020; **Republic vs. Joseph Mbaka Nyakwama** which case is still pending. He averred that at the hearing of the criminal case, the Interested party had testified that he was aware of these proceedings and therefore it was not true that he had learned about the said proceedings recently.

18. He also averred that after the delivery of the ruling on his application, the Interested Party was barred from instituting the Succession process since according to the ruling the property remained in his name pending the hearing of his Judicial Review proceedings. He also averred that the Applicant lacked *locus standi* to institute the application because he had not established the claim he had over the property.

19. On 30th November, 2021 the court directed that the application by the Interested Party be canvassed by way of written submissions. The Intended Interested Party filed his submissions while the Applicant did not file any submissions and chose to rely on his Replying Affidavit.

ISSUES FOR DETERMINATION

20. From my analysis of the application, the response thereto and submissions filed by the Interested Party, the main issue for determination is whether the Intended Interested Party should be made a party to this suit.

ANALYSIS AND DETERMINATION

21. The Intended Interested Party in this case has filed an application seeking to be joined in this suit on the grounds that he is nephew of the late Omachi Mokua alias Joseph Omachi Magati the original owner of the suit property. He contends that he has instituted Succession proceeding in the Chief Magistrate's Court at Kisii vide Kisii CMCC Succession Cause No. 140 of 2020. The application was challenged by the Applicant on the grounds that the Intended Interested Party has no *locus standi* as he has not yet obtained a Grant. Even though the Intended Interested Party only attached a Petition for Grant of Letters of Administration and its supporting documentation, I have since established from the Succession Court file that he was issued with a Grant on 13.5.2021 and what remains is confirmation of the said Grant. Having demonstrated that he has a beneficial interest in the suit property, he is a necessary party to this suit.

22. The upshot is that the application by the Intended Interested Party has merit and it is hereby granted. Accordingly, I make the following orders:

- a) **Evans Nyakwama Bosire the Intended Interested Party is hereby made a party to these proceedings as an Interested Party.**
- b) **The Interested Party shall be served with the pleadings within 14 days from the date of this ruling.**
- c) **The Interested Party shall file and serve his response to the pleadings within 14 days after service.**
- d) **The Applicant and Respondents are granted leave to file any additional documents, if need be within 21 days.**

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF MARCH, 2022.

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J.M ONYANGO

JUDGE



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