



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**JR.NO.24 OF 2010**

**GEORGE STEVEN OPIYO.....APPLICANT**

**VERSUS**

**NYANDO DISTRICT LAND REGISTRAR.....RESPONDENT**

**JOSEPH ISMAEL OMONDI MARENYA.....INTERESTED PARTY**

**J U D G M E N T**

1. The Exparte Applicant herein – **GEORGE STEPHEN OPIYO** – desires that this Court grant him a Judicial review order in the nature of Mandamus compelling the Nyando District Land Registrar to register him as proprietor of **KISUMU/KORU/579** and **KISUMU/KORU/398** upon payment of the requisite stamp duty and registration fee. He wishes also to be paid costs.

2. To achieve that, he filed a Notice of Motion here on 10/6/2010. The motion is dated 9/6/2010.

3. In an earlier application for leave to file the Notice of motion various reasons had been advanced to justify an order for **MANDAMUS**. Among the reasons are that the respondent – **NYANDO DISTRICT LAND REGISTRAR** – has unlawfully refused to register the applicant's transfer forms to effect transfer of Land Parcels **KISUMU/KORU/579** and **KISUMU/KORU/398** in his favour yet the applicant purchased the same for value and all his completion documents are in order. The respondent was said to have no power to refuse registration where no encumbrances exist. The respondent therefore was said to be abusing the powers of his office.

4. The Exparte – Applicant (simply the applicant hereafter) is said to have bought the two parcels of land (suit parcels hereafter) from one Joseph Ismael Omondi, the interested party. The consideration was Kshs.1,116,250. The matter even went to Land Control Board and the necessary consents were given. What followed was execution of the necessary documents so that the respondent can duly effect registration. But the Respondent refused to effect registration and failed to give reasons for his refusal. That necessitated the filing of this application.

5. But the respondent filed a replying affidavit here saying, inter alia, that one **GEORGE BENARD ODHIAMBO** presented two power of Attorney instruments said to be executed by the person from whom the applicant purports to have bought the suit parcels. But complaints later came from children of the purported seller alleging the purported seller was infact sick and bedridden and had not executed the

alleged power of attorney.

6. That was explained to the applicant when he presented documents for transfer and registration. The matter was also referred to C.I.D for further investigations. At around that time too, the District Commissioner, Nyando, who had chaired the Land Control Board that had given the consent was recalling the consent documents upon receiving similar complaints.

7. The Respondent said the action taken by his office was justified and was in accordance with Section 8(a)(b) and (c) and Section 136(1) of the Registered Land Act (Cap 300).

The interested party, who is the purported seller, also filed a replying affidavit through **ROSEBELLA OMONDI**, his guardian ad Litem. The affidavit was filed on 5/6/2013 and is dated 31/5/2013. The replying affidavit is generally a denial that the interested party ever executed the power of attorney alleged. It also emerged that the whole alleged process of sale to the applicant is being challenged in **KISUMU HCC NO.174/2011**.

8. This matter never went for hearing. Submissions were filed instead. The submissions of the applicant generally reiterate what the grounds advanced, the statement of fact and the verifying affidavit filed earlier on with the application for leave contain.

9. The respondent's submissions were filed on 19/8/2011 and are dated 16/8/2011. Just like the applicant's submissions, the Respondent generally reiterates what is contained in the replying affidavit filed.

10. The interested party, who is the alleged seller, filed submissions on 19/6/2013. In brief, the submissions deny that the suit parcels were ever sold by the interested party. The alleged execution of the power of Attorney by the interested party is denied.

11. I have carefully considered what was laid before me. There is no doubt that the Respondent refused to register the applicant as the proprietor of the suit parcels. The applicant would have the court believe that this happened without reason.

12. But the Respondent explained that complaints were brought by children of the interested party. The complaints made him invoke provisions of Sections 8c and 136(1) of Registered Land Act which are as follows:

**Section 8: The Registrar may exercise the following powers in addition to any other powers conferred on him by this Act, that is to say:**

(a).....

(b).....

**c. He may refuse to proceed with registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this act is not performed.**

**Section 136(1) For the prevention of fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the Land, Lease or charge, after directing such enquiries to be made and notices to be served and hearing**

**such persons as he thinks fit, make an order (hereinafter referred to as restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

The import of these provisions is that the Registrar has the discretion to refuse to act as any party may require if he detects something improper or fishy.

13. Given the explanation availed by the respondent in the replying affidavit and the submissions, there was justification in invoking the provisions afore stated. It is clear that a complaint had been made. The Respondent could not ignore the complaint. The proper thing to do was to refuse registration, as was done, until the complaints were resolved. There is lack of truth in the applicant's assertion that registration was refused without reason.

14. This suit cannot be seen in isolation from **KISUMU HCC NO.174/2011**. To allow the application herein is tantamount to pre -determining that other suit. It is clear that the other suit is challenging the very process leading to the alleged sale of the suit parcels to the applicant. Prudence and common sense would require that parties await the outcome of the other suit.

15. The applicant had a choice to have this matter deferred until the other suit is concluded. But he chose to proceed with this suit knowing well that the process of sale of the suit parcels to him is challenged. That is lack of tact. The inevitable dismissal of this suit therefore must go with the attendant costs.

16. The upshot then is that the application herein is dismissed with costs.

**A.K. KANIARU – JUDGE**

**10/12/2013**

**10/12/2013**

A.K. Kaniaru – Judge

Diang'a George – C/C

Plaintiff – Present

Defendant – absent

Odeny for Exparte Applicant

Tarus (absent) for interested party

**COURT:** Judgment read and delivered in open **COURT**. Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**10/12/2013**

**AKK/vaa**



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