



Kibore & another v Land Registrar, Machakos & 2 others (Environment and Land Miscellaneous Application E021 of 2022) [2023] KEELC 16787 (KLR) (12 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E021 OF 2022
CA OCHIENG, J
APRIL 12, 2023**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE
JUDICIAL REVIEW ORDER IN THE NATURE OF MANDAMUS
AND CERTIORARI AND SUCH LEAVE TO OPERATE AS STAY**

BETWEEN

KARANU KIBORE 1ST EXPARTE APPLICANT

CAROLINE WANJIKU KARANU 2ND EXPARTE APPLICANT

AND

LAND REGISTRAR, MACHAKOS 1ST RESPONDENT

MAVOKO LAND DEVELOPMENT CO LTD 2ND RESPONDENT

MUSAU MUTUA 3RD RESPONDENT

RULING

1. What is before Court for determination is the Ex-parte Applicants' Chamber Summons Application dated the April 5, 2022 where they seek the following Orders:
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to grant leave to the Applicants to apply for and remove from the court judicial review orders in the nature of *Mandamus* and *Certiorari* for purposes of quashing both the 1st and 2nd Respondents' decision to register the 3rd Respondent as the proprietor of Mlolongo Phase III Plot Number 2620, to compel the 1st Respondent to effect the Transfer of Mlolongo Phase III Plot Number 2620 in favour of Applicants jointly.



4. That leave so granted does operate as stay of all dealings on the property Mlolongo Phase III Plot Number 2620 pending the hearing and determination of these Judicial Review Proceeding.
5. That the costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit including Statement of Karanu Kibore. The Applicants contend that they are purchasers for value of Mlolongo Phase III Plot No 2620 from the May 11, 2010. They aver that the Respondents jointly and severally acted in bad faith and connived to deregister them from the register and in their place replaced them with the 3rd Respondent who purportedly now holds the title to the said plot. They claim the Respondents' conduct exhibits unfairness and infidelity to the Law incompatible with its roles and duties. They reiterate that the acts commissioned by the 2nd Respondent risks them losing investment and offends the principle of legitimate expectation. They explain that on May 11, 2010, the 2nd Respondent issued them with a Certificate of Ownership for land parcel number Mlolongo Phase III Plot No 2620 after fully purchasing the said land from Mutuku Kilonzo who was a member of the 2nd Respondent. Further, after making the full payment of the purchase price of Kshs 250,000 to the Vendor, they fully executed the Transfer Instruments and paid the requisite fees to effect the transfer of the said parcel of land in their favour. They reaffirm that they have been paying land rates for Mlolongo Phase III Plot No 2620 which has secretly been transferred to Musau Mutua. Further, that they have exhausted all available avenues without success.
3. The 1st Respondent opposed the instant Application by filing Grounds of Opposition dated the April 22, 2022 where it contended that the said Application is fatally defective, incompetent, malapropism and untenable both in substance as well as form. Further, that the instant Application is hopeless, misleading and devoid of merit. He insists that the instant Application is a non-starter as the Applicants have moved the court through a wrong forum as the issues they seek to ventilate can only be addressed in a civil suit. He reiterates that the instant Application is an afterthought, non-starter and without basis as it is premised on hearsay as there is no evidence tendered to validate the Applicants' claim that they are about to lose their ownership of land known as Mlolongo Phase III Plot No 2620. He argues that the Applicants have failed to demonstrate including tender any evidence to show that the alleged decision was exercised unlawfully and that the 1st Respondent knowingly invoked the power to irregularly register the 3rd Respondent as owner of the said land.
3. The 2nd Respondent opposed the instant Application by filing a Replying Affidavit sworn by Amos Mutinda Kilonzo, its Director, where he deposes that from the history in their records for Plot No 2620 Phase III Mlolongo Ngwata, the original owner was Musau Mutua who was initially allotted the said plot. He explains that in the year 2009, Musau Mutua is said to have died and the report from his son was that they were yet to obtain succession documents. He avers that according to their records, Musau Mutua died without selling or transferring his Plot No 2620 now 632. Further, that as per their records the said plot still belongs to the Estate of Musau Mutua. He insists that as per their records, there exists no single evidence suggesting that at any time Mutuku Kilonzo (deceased) had purchased Plot No 2620 Phase III from the said Musau Mutua (deceased). He reiterates that there is no evidence of any purchase agreement, transfer fees paid or transfer effected by the said Musau Mutua to Mutuku Kilonzo. Further, that the purchase of the said plot was fraudulent through forgery of documents which are only available to the Applicants. He explains that the said Plot No 2620 Phase III was said to have been transferred by one Sammy Kisangi (deceased) who was a clerk to the Company and he cannot give evidence whether such a transaction occurred. He states that Mr. Mutuku Kilonzo died on March 16, 2011 while his wife Agnes Ndunge Mutisya also died. He reiterates that the Applicants' purchase



Certificate of Ownership in not in their records and upon cross examination including findings, the said Certificate of Ownership does not exist in their books or records.

4. The Application was canvassed by way of written submissions which were only filed by the Respondents.

Analysis and Determination

5. Upon consideration of the instant Chamber Summons Application including the Statement of Karanu Kibore, Grounds of Opposition, parties Affidavits and rivalling submissions, the only issue for determination is whether the Applicants are entitled to leave to institute Judicial Review proceedings of mandamus as well as certiorari and if the said leave should operate as a stay of all dealings on land parcel number Mlolongo Phase III Plot No 2620.
6. The 1st Respondent in his submissions contends that the Applicants' Application does not meet the threshold set for leave to be granted. He argues that no documentation has been annexed to warrant the allegations that the 1st Respondent is guilty of conniving to deregister the Applicants from the register. He reiterates that the cause of action falls outside the tenets of Judicial Review. He insists that the instant Application is unmerited due to the fact that the issue in contention is a land ownership dispute. To support its arguments, it relied on the following decisions: *Republic v County Council of Kwale & Another Ex parte Kondo & 57 Others* Mombasa HCMA No 384 of 1996; *Council of Civil Servants Union v Minister for Civil Service* [1985] AC 2; *Republic v Director Land Administration Ministry of Lands and Physical Planning & 2 Others Ex parte: Roysa Community Development Society Ltd* [2021] eKLR; *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal No 185 of 2001; *Republic v National Transport & Safety Authority & 10 Others Ex parte James Maina Mugo* (2015) eKLR and *Republic v District Land Registrar, Nakuru Ex parte Lawi Kigen Kiplagat: Lee Maiyani Kinyanjui (Interested Party)* [2021] eKLR.
7. The 2nd Respondent in its submissions reiterated the averments in its Replying Affidavit and insists that the Applicants have failed to demonstrate a *prima facie* case warranting the grant of leave and as such stay should not be granted to them. It argues that the Applicants have not met the threshold for leave to file Judicial Review proceedings on averments as stated in the 2nd Respondent's Replying Affidavit. Further, that the alleged piece of land that the Applicants are claiming to have been sold to them belongs to the 3rd Respondent who was allotted the same by the 2nd Respondent and which to date has not been transferred to a third party as per records. It reiterates that the Applicants have failed to explain how they were able to secure the alleged plot from Mutuku Kilonzo. To support its arguments, it has relied on the following decisions: *Republic v County Council of Kwale & Another Ex parte Kondo & 57 Others*, Mombasa HCMA No 384 of 1996 and *Sharma v Brown Antoine* [2007] 1 WLR 780.
8. The Applicants claim to be owners of land reference number Mlolongo Phase III Plot No 2620 and contend that the Respondents have connived and had the 3rd Respondent registered as owner of the said plot. They explained that they sought for the resolution of the dispute but were not successful. They hence sought leave to apply for and remove from the court, Judicial Review orders in the nature of *Mandamus* and *Certiorari* for purposes of quashing both the 1st and 2nd Respondents' decision to register the 3rd Respondent as the proprietor of Mlolongo Phase III Plot No 2620, to compel the 1st Respondent to effect the Transfer of the said plot in their favour. Further, for the leave to operate as stay of any dealings with the aforesaid land. The 1st and 2nd Respondents opposed the instant Application and insist that the Applicants are not entitled to leave as sought.



9. On leave to institute Judicial Review proceedings, Order 53 Rule 1 stipulates thus:

“(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

10. The Court in the case of *Kingdom Kenya 01 Limited v District Land Registrar, Narok & Fifteen (15) others* [2018] eKLR described Judicial Review as follows:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands v Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers v Republic – Civil Appeal No 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange – versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.”

11. It is trite that Judicial Review is not concerned about the merits of the decisions but the process, which was adhered to. It further challenges the administrative action of a person in position of authority. In this instance, I note the Ex-parte Applicants seek to challenge how the 3rd Respondent was registered as proprietor of land reference number Mlolongo Phase III Plot No 2620. It insists it legally bought the said plot from one Mutuku Kilonzo and has been paying rates. The 2nd Respondent that is the allotting authority of the land explains that from the history in their records, the original owner of Plot No 2620 Phase III Mlolongo Ngwata, was Musau Mutua. Further, that he was initially allotted the said plot but died in the year 2009 and as per the report from his son, they were yet to undertake succession proceedings in respect to his estate. It insisted that according to their records, Musau Mutua



died without selling or transferring his plot No 2620 now 632 and the same still belongs to his estate. Further, as per their records, there exists no single evidence suggesting that at any time Mutuku Kilonzo (deceased) had purchased Plot No 2620 Phase III from the said Musau Mutua (deceased). It was emphatic that there is no evidence of any purchase agreement, transfer fees paid or transfer effected by the said Musau Mutua to Mutuku Kilonzo.

12. However, at this juncture, as a Court I will not analyze the merits or demerits of the registration of the 3rd Respondent as owner of aforementioned parcel of land but whether the Applicants are entitled to leave. From the documents they have presented, I note there is no Certificate of Title to prove the 1st Respondent indeed registered the 3rd Respondent as owner of the disputed land. Further, the 2nd Respondent that is the allotting Company has insisted that the said documents do not exist as per their records and the disputed plot is still in the name of the Estate of the 3rd Respondent who died in 2009 before the Applicants purchased the plot.
13. In the case of the *Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo* [2015] eKLR, it was held that:

“It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”
14. Based on the facts as presented including associating myself with the decisions cited above, it is my considered view that the issues the Applicants have raised do not fall within the ambit of Judicial Review as the two other Respondents are not public entities nor persons. Further, I find that the Applicants ought to have filed a civil suit to enable the parties ventilate their case through viva voce evidence and produce documents to prove their claim. I find that the Ex-parte Applicants are hence not entitled to leave. I opine that the issue raised touch on ownership of a parcel of land whose current owner as per the 2nd Respondent’s records is deceased and there will hence be need for *viva voce* evidence before any decision is made.
15. In the circumstances, I find the instant Chamber Summons Application unmerited and will dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF APRIL, 2023

CHRISTINE OCHIENG
JUDGE

