



Republic v Jefwa & another; Mulya (Exparte Applicant); Karanja (Interested Party) (Environment and Land Judicial Review Case 6 of 2019) [2023] KEELC 17392 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17392 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 6 OF 2019

EK MAKORI, J

MAY 11, 2023

**IN THE MATTER OF: AN APPLICATION BY JOSPHINE SESE MULATYA
FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS.**

AND

IN THE MATTER OF: GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA.

AND

IN THE MATTER OF: LAW REFORM ACT CAP 26 LAWS OF KENYA.

AND

IN THE MATTER OF: LAND REGISTRATION, 2012

AND

IN ACCORDANCE WITH: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26

BETWEEN

REPUBLIC APPLICANT

AND

MAALIM KHAMISI JEFWA 1ST RESPONDENT

THE LAND REGISTRAR KILIFI LAND REGISTRY 2ND RESPONDENT

AND

JOSEPHINE SESE MULATYA EXPARTE APPLICANT

AND

MARGRET KARANJA INTERESTED PARTY



JUDGMENT

1. This judgment is pursuant to Judicial Review Notice of Motion application dated 29th July, 2019. The applicant seeks orders of *mandamus* to compel the Land Registrar Kilifi to revoke the existing Land Title for parcel of land known as Kilifi/Kijipwa/402 measuring approximately 0.4 hectares that exists in the name of Maalim Khamis Jefwa and to rectify it so as to reflect it as belonging to the Ex-parte applicant herein Josephine Sese Mulatya
2. The application was supported by the grounds on the face of the application and the affidavit of Josephine Sese Mulatya sworn in support of the cause. She deponed that land title No Kilifi/Kijipwa/402 belongs to her and ought to be registered under her name having been issued to her sometimes on 31st October 2001. But that unknown to her, sometimes on 7th July 2016 on conducting search, she discovered that the 1st respondents with some scrupulous Kilifi Land Registry officials, had registered it in the name of the 1st respondent who was hot in pursuit with intent of selling it to a 3rd party who was due to secure a loan from Equity Bank.
3. A criminal charge was open in the Shanzu Law Courts against the 1st respondent who was found guilty of procuring a title document and forgery in Shanzu Criminal Case No 94 of 2018 R V Maalim Khamis Jefwa.
4. Quoting the decisions in [*Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji Njoroge & others*](#) [1997] eKLR which espouses on the scope threshold and extent of *mandamus* and under what circumstances the same ought to issue, applicant is of the view that that standard has been made.
5. On whether there exists any other forum or port of call other than through Judicial Review, the applicant think that this is the best forum to obtain the reliefs sought a competent court of jurisdiction having found the title document held by the 1st respondent stands fake.
6. The applicant also thinks that the current motion is in tandem with Section 9 of the [*Fair Administrative Action Act*](#) No 4 of 2015.
7. The applicant further concludes that unlike in the case of [*Republic v Registrar of Titles Mombasa Ex-parte A.K Abdulgani Ltd*](#) [2018] eKLR , the issue here is not revocation of title but restoration of the same since the title still remains valid and ought to be in the names of the Ex –parte applicant.
8. The 1st Respondent did not file any response. The lawyer representing him Mr Okanga dropped out of the proceeding without reasons.
9. The 2nd Respondent in response filed grounds of opposition dated 8th July 2019 stating the following grounds:
 - i. That the application is an abuse of the court process.
 - ii. That the Applicant has not established any cause against the 2nd respondent.
 - iii. That the Applicant has not demonstrated the 2nd respondent's has exceeded and or neglected their lawful authority, contravened any law and that the rights of the applicant have been or are threatened with violation.



- iv. That this matter revolves around ownership and purely civil in nature and ought to have initially reckoned as such with parties involved being joined to respond on the issues raised.
 - v. That the motion has not met the threshold for issuing of judicial review orders as stated in *Kenya National Examination Council V the Republic* [1996]eKLR hence the same should be dismissed.
10. The 2nd respondents submitted that this matter revolves around title and its sanctity as envisaged under Section 26 of the *Land Registration Act* and that this is the wrong forum to bring up the current claim. It lies with the Civil Courts. The 2nd respondent has quoted several authorities to show that this matter revolves around fraud and should be tried in the civil courts see *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, *Funzi Island Development Ltd & 2 Others v County Council of Kwale & 2 Others* [2014] eKLR and *Republic v Registrar of Titles Mombasa & 4 others Ex-Parte A.K Abdulgani Ltd* [2018] eKLR.
 11. Springing from the averment of the parties and the submissions filed, the issues for determination are whether prerogative orders of Mandamus sought by the Ex- parte applicant has been achieved and who should bear costs.
 12. The parties have correctly cited the decision in *Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji Njoroge & Others* [1997] eKLR on what the court ought to consider in order to issue the prerogative writ of *mandamus* as follows:

“The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.” A similar position was adopted in *Shah vs. Attorney General* (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, inter alia, as follows:



“*mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfillment. With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. *mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...”

13. The purpose of Judicial Review is set out in the case of [Municipal Council of Mombasa v Republic, Umoja Consultants Ltd](#), Nairobi Civil Appeal No.185 of 2007[2002] eKLR, where the Court of Appeal held that:

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e. the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

14. Circumstances under which orders of Judicial Review can be issued were well expounded in the Ugandan case of [Pastoli v Kabale District Local Government Canal & Others](#) [2008] 2EA 300 at pages 300-304 where Kasule J. held as follows:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without



jurisdiction or *ultra vires* or contrary to the provision of a law or its principles are instances of illegality----

Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi v Secretary of State for the Housing Department [1990] AC 876”.

15. In this matter, the *ex parte* applicant complains that unscrupulous land officials at the Kilifi land office illegally transferred her valid and indefeasible title and had it registered in the name of the 1st respondent who was tried and found to have perpetrated the fraud. This was the findings in Shanzu Criminal Case No 94 of 2018 R V Maalim Khamis Jefwa. These findings did not direct the Kilifi Land Office or Registry to cancel the title document fraudulently acquired by the 1st respondent and revert it back to its rightful own the Ex parte applicant. The criminal proceedings were meant to punish than restore. Restoration is the province of our civil law. To have a title cancelled and or challenged, the provisions of Section 26(1) of the Land Registration Act has to be invoked:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. In Republic v Registrar of Titles Mombasa & 4 Others Ex-Parte A.K Abdulgani Ltd [2018] eKLR the court held as follows:

“The interested parties and the respondents allege that the titles were acquired fraudulently. What was the right procedure to follow in asserting the respondent’s and interested parties’ interest in the suit land? Surely, not by ultra vires action of revocation of grant of title but by suitable judicial proceedings in that behalf. In a recent decision, Franns Investments Limited v The Registrar of Titles, Mombasa & 2 Others., Mombasa Petition No. 63 of 2012 this Court has ruled on the issue as follows:

18. “It is clear that it is now settled that Registrar of Tiles or the Land Registrar as the case may be does not have power to revoke title to land. In the



case of Republic v. Land Registrar Taita Taveta District & another [2015] eKLR, I made this observation and gave the way forward in the event that the Government through its agencies wished to challenge the title to land considered to have been unlawfully obtained, as follows:

34. “The Court must therefore uphold the Rule of Law with regard to the applicant’s rights, as a registered proprietor, under sections 27 and 28 of the Registered *Land Act* as then applicable to the suit property (now section 25 of the *Land Registration Act, 2012*), until fraud shall have been established in accordance with section 26 (1) of the *Land Registration Act 2012* which provides as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. Before any order may be made in terms of Article 40 (6) of *the Constitution* of Kenya 2010 and section 26 (1) (a) of the *Land Registration Act 2012* that the title to land was acquired by fraud, misrepresentation and or illegally and it is therefore not protected by *the Constitution*, the fraud, misrepresentation and illegality in the acquisition of property must be proved to the required standard. The case of fraud and illegality in the acquisition of the suit property herein must, therefore, be proved in proceedings brought by the Government in that behalf under the civil procedure relating to filing of actions before the Court. The Government may, of course, in accordance with the law, as it may be advised,



acquire the suit property for the purposes of use by the public school, the Interested Party herein.”

19. Such proceedings for the determination of the title to the suit property in this case already exist and are pending determination before the Environment and Land Court. The revocation of the titles while these suits were pending, apart from being done without jurisdiction would be a usurpation of the mandate of the Court and a contempt of court if it were shown that the Registrar was aware of the proceedings before the Court. This aspect of the matter was, however, not fully canvassed before the Court although counsel for the petitioner submitted that the Registrar was by revoking the tiles to the suit properties stealing a march on the petition.”

17. In the current matter whereas the *ex parte* applicant has a right and has been deprived of her title due to fraud, following the holdings in the authorities cited above, the 1st port of call available for the *ex parte* applicant is by filing a civil suit for the revocation of title obtained by the 1st respondent claiming fraud. This plainly a wrong forum. Consequently, motion dated July 29, 2019 is hereby dismissed. Looking at the nature of the claim, each party will bear own costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 11TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Muinde for the Applicant

Court Clerk: Happy

In the Absence of: -

Mr. Okanga for the 1st Respondent

AG for the 2nd Respondent

