



**Republic v Land Registrar, Nakuru Land Registry; Kimari & 2 others (Exparte Applicants)  
(Administrators of the Estate of the Late Kenneth Kimari Kahura) (Environment and Land  
Judicial Review Case E3 of 2021) [2023] KEELC 17298 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17298 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E3 OF 2021  
FM NJOROGE, J  
MAY 11, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND REGISTRAR, NAKURU LAND REGISTRY ..... RESPONDENT**

**AND**

**BENJAMIN GITERE KIMARI ..... EXPARTE APPLICANT**

**HANNAH NGINA ..... EXPARTE APPLICANT**

**KENNETH KIMARI ..... EXPARTE APPLICANT**

**ADMINISTRATORS OF THE ESTATE OF THE LATE KENNETH KIMARI  
KAHURA**

**RULING**

1. This judgement is in respect of the Notice of Motion application dated March 29, 2021, and it could have been delivered in the second half of the year 2021 or latest early in the year 2022 had the *ex parte* applicants faithfully complied with the court's directions of 27/4/2022 to avail a copy of the substantive judicial review notice of motion, which they eventually painfully availed on 9/11/2022 vide an attachment to an application for setting aside orders vacating the leave and dismissing the chamber summons application for leave for noncompliance with the court's directions.
2. The main judicial review notice of motion is expressed to be brought under Sections 8(2), (4), 9 of the Law Reform Act, Section 9(1) and 11 of the Fair Administrative Action Act and Order 53 Rule 3 of the Civil Procedure Rules and it seeks the following orders:



- a. There be an order of mandamus to remove and/or lift the restriction pursuant to the provision of Section 78 (1) & (2) of the [Land Registration Act, 2012](#) to all that property known as Land Reference Nakuru Municipality Block 5/294.
  - b. The costs of these proceedings be awarded to the ex parte Applicants to be borne by the Respondent.
3. The grounds in support of the application are that the *ex parte* applicants are the administrators of the estate of the late Kenneth Kimari Kahura; that land parcel Number Nakuru Municipality Block 5/294 forms part of the estate of the deceased; that the ex parte applicants are not able to fully administer the estate of the deceased because of the restrictions registered against the suit property; that the beneficiaries of the said estate cannot benefit as no further transactions can be registered unless the restriction is lifted; that the ex parte applicants have formally applied to the respondent to remove the restrictions on the property but the respondent has failed to do so and that the court has the jurisdiction to determine this matter.
4. The application is supported by the affidavit of Benjamin Gitere Kimani sworn on March 18, 2021. He reiterated that land parcel Number Nakuru Municipality Block 5/294 forms part of the estate of the late Kenneth Kimari Kahura in which estate he is an administrator; that he and his co-administrator have been dutifully administering the estate until they conducted a search on the suit property and discovered several restrictions registered against it; that a restriction by government interest was registered on 4/03/2010; another restriction was registered was by the Permanent Secretary Ministry of Housing; that he is advised by his advocates on record that they wrote the letters dated June 16, 2017 and June 21, 2017 that requested for the letters that caused the registration of the restrictions; that on October 31, 2017 the Land Registry Officials indicated that the said letters could not be traced; that a letter was written to the Ministry of Lands, Housing and Urban Development requesting for copies of the letters that led to the registration of the restrictions but there was no response; that several visits were made to the lands registry which bore no fruits so a formal application was made to the respondent to remove the said restriction; that the Land Registrar rejected the said application and directed that a representative from the Ministry of Lands and Planning appear in person before the application could be booked; that their advocate on record wrote the letter dated October 24, 2019 to the Cabinet Secretary Ministry of Lands and Planning for the name of the representative to appear before the respondent which letter did not elicit a response; that on November 4, 2019 their advocates on record wrote again to the respondent demanding for the lifting of the restriction failure to which legal proceedings would be instituted but it did not also elicit any response and that no reason has been given why the restrictions cannot be lifted.
5. In response to the application the respondent filed its grounds of opposition dated May 24, 2022 which are on the following grounds:
  - a. That the application does not meet the qualifications for the prayers sought;
  - b. That the application violates the doctrine of exhaustion of remedies;
  - c. That the application is an abuse of the court process;
  - d. That the applicants side stepped the provisions of Section 78(1) of the [Land Registration Act, 2012](#) which requires the Land Registrar to give an opportunity to all affected parties to be heard before the removal of a restriction;
  - e. That this honorable court is not the right forum to adjudicate the dispute.



6. The application was canvassed by way of written submissions. The ex parte applicants filed their submissions dated August 10, 2021 on August 12, 2021 while the respondent filed its submissions dated June 17, 2021 on June 18, 2021.
7. The ex parte applicants in their submissions submitted on whether they are entitled to the orders sought in the substantive application. They relied on the case of *Republic vs Kenya National Examinations Council ex parte Gathenji & 8 others* Civil Appeal Number 234 of 1996, Sections 76, 77 and 78 of the *Land Registration Act* and submitted that despite numerous correspondences to the respondent, no reasons for the restrictions have been given. The ex parte applicants further submitted that the respondent has rejected a formal application that had been filed to remove the restrictions pursuant to Section 78 of the *Land Registration Act*. They then reiterated the contents of their affidavit, relied on Article 47 of the *Constitution*, the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* Civil Appeal Number 185 of 2001 and submitted that the respondent failed to accord them a hearing before registering the restriction on their land as well as failing to remove the said restriction which goes against the rules of natural justice.
8. They also relied on the cases of *Jane Wanjiru Nyota & 2 others vs Land Registrar, Kajiado County, & another* [2020] eKLR, *Daniel Piranto Ole Nchani v Deputy County Commissioner Kajiado & 3 Others Ex parte Daniel Piranto Ole Nchani* [2019] eKLR and sought that the court issues an order of mandamus compelling the respondent to remove the restriction pursuant to Section 78(1) and (2) of the *Land Registration Act* with respect to the suit property.
9. The respondent submitted that it is not disputed that a restriction was registered under LR Nakuru Municipality Block 5/294 and that it is mandated to remove the said restriction in accordance with Section 78(1) and (2) of the *Land Registration Act*. The respondent further submitted that it would have been prejudicial if it would have made a decision concerning the restriction without giving the party who may have placed the restriction the opportunity to be heard. The respondent relied on the cases of *Mwangi Rukwaro & another v Land Registrar, Nyeri* [2019] eKLR and *David Oloo Onyango v Attorney General* [1989] eKLR in support of its arguments.

### **Analysis and determination**

10. After considering the application, the affidavit in support, the grounds of opposition and the submissions the only issue that arises for determination is whether the court should issue orders of mandamus to remove the restriction placed on LR Number Nakuru Municipality Block 5/294 pursuant to Section 78(1) & (2) of the *Land Registration Act*.
11. The ex parte applicants' case is that they are the administrators of the estate of the late Kenneth Kimari Kahura who in the course of administering the estate discovered that restrictions had been placed on the register of the suit property. It is also their case that they wrote numerous letters to both the respondent and to the Ministry of Lands, Public Works, Housing and Urban Development seeking for the letters that led to the registration of the restrictions but they did not get a response which led them to file the present application.
12. The respondent on the other hand argues that the ex parte applicants did not follow the procedure provided for under Section 78 of the *Land Registration Act* as it could not remove the restriction without the input of the parties who caused the restriction to be registered in the first place.



13. The court in the case of *Municipal Council of Mombasa vs Republic, Umoja Consultants Ltd*, Nairobi Civil Appeal Number 185 of 2007(2002) eKLR held as follows on the purpose of judicial review proceedings:

“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 made 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 he 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 there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review.”

14. Section 78 of the *Land Registration Act* provides as follows:

“(1) The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

15. It is not disputed that there are restrictions registered as against the suit property; the certificate of official search dated 8/6/2017 annexed to the affidavit in support of the application under consideration, shows there are three restrictions registered against the title: one on 4/3/2020, another one on 30/4/2010 and yet another one on 3/2/2016. The first two restrictions seem to have been registered with government input as the first one reads “restriction by Government interest” and the second one “restriction by Permanent Secretary Ministry of Lands.” The third entry on restriction reads “restriction: no dealings by Mugambi Nguthari & Co. Advocates P.O. Box .... on behalf of owner.”

16. The ex parte applicants have also annexed to their affidavit an application to remove a restriction dated August 28, 2019 where on the face of it, it is signed that that someone should appear in person before the Land Registrar. I note that the designation of the person who is to appear in person before the Land Registrar is not legible. A letter from the applicants’ advocates dated October 24, 2019 is also annexed to the affidavit in support of the motion. It is addressed to the Cabinet Secretary, Ministry of Lands and Physical Planning requesting for the name of its representative who must appear before the Land Registrar before the application to remove the restriction is booked for registration and another letter dated November 4, 2019 is annexed that is addressed to the respondent. It is not clear whether that letter was ever received by the addressee as there is no attempt to establish the fact. Also, the application to remove a caution lacks date of receipt, presentation book number and endorsement of official fees paid. It also lacks a stamp of the land registrar and this court can not tell whether, given the respondent’s ground no 4 in the grounds of opposition, it was ever lodged with the Land Registrar. In that ground and in his submissions the respondent argued that the ex parte applicants did not comply with the provisions of Section 78 of the *Land Registration Act*.



17. The Court of Appeal in the case of *Kenya National Examination Council v Republic Ex Parte Geoffrey Gatbenji Njoroge & 9 others* [1997] eKLR held as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury’s Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says: -

“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 and 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.”

... What do these principles mean? They mean that an order of mandamus will 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.”

18. It must be remembered that restriction have apparently been, for reasons unknown, in place for quite a long time without any disturbance by the applicants, but the main ground of the applicants in their application (ground (e)) is to the effect that the applicants have formally applied to the respondent to lift and/or remove a restriction on the property but the respondent has failed to do so.
19. This issue must be taken with the seriousness it deserves since it involves the right of a registered title holder but it is noted that the claim involves the alleged conduct of a public officer. Failure to book an application to remove a restriction as intimated by the applicants, if it occurred, would have afforded the applicants a cause of action against the Land Registrar, for he is indeed duty bound to receive it, consider it and render a determination thereof. However, the issue in the current judicial review Notice of Motion is not whether the respondent refused to accept the application to remove a restriction or not. The issue is whether or not this court ought through an order of mandamus to compel the respondent, who is said to have declined or neglected to remove the restriction, to remove the restriction. Notably, no particular restriction is targeted by the application dated 29/3/2021 and I find this a fatal flaw for this court is not inclined to rewrite the application to lean towards any of the restrictions on the land register for the applicant’s benefit.
20. The applicants are not only duty bound to establish that they indeed applied to the Land Registrar, but also that he declined to remove the restrictions. I do not find the respondent’s objection as to exhaustion of remedies raised by the respondent to be idle. The matter has been made even more difficult to determine as no particular Land Registrar is mentioned by name and a whole office may be condemned wholesale with resultant demoralization of hard working staff.
21. It is the onus of an applicant who wishes to obtain the court’s relief, where there is another procedure provided for by statute, to first exploit and exhaust that statutory mechanism before approaching the court. Upon failure to do so the court is most likely to find that its jurisdiction has not been properly



invoked. The Court of Appeal in the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR spoke to this proposition and stated as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

22. The Court of Appeal further in the case of *Mutanga Tea & Coffee Company Ltd v Shikara Limited & another* [2015] eKLR held as follows:

“It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the *Constitution* or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.”

23. Section 107 of the *Evidence Act* is to the effect that he who alleges proves. In the absence of proof that the application for removal of caution was lodged and rejected by the Land Registrar, and in the absence of proof that the letter dated October 24, 2019 was ever delivered to the Cabinet Secretary Ministry of Lands and Physical Planning or that he replied to the same, it is doubtful that the applicants have laid before this court a factual matrix sufficient to support a case of issuance of orders of mandamus against the Land Registrar, Nakuru Land Registry.

24. In conclusion therefore, it is my view that the ex parte applicants have failed to make out a case for the issuance of the orders of mandamus to compel the respondent to remove the restrictions placed on land reference Number Nakuru Municipality Block5/294 and I therefore issue the following final orders:

- a. The substantive Judicial Review notice of motion dated March 29, 2021 is hereby dismissed;
- b. There shall be no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 11<sup>TH</sup> DAY OF MAY 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

