



**Republic v Land Registrar Busia County; Wabidonge (Exparte Applicant);
Wanjala & 4 others (Interested Parties) (Environment and Land Judicial Review
Case E001 of 2023) [2023] KEELC 17441 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023**

BN OLAO, J

MAY 11, 2023

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR BUSIA COUNTY RESPONDENT

AND

DOUGLAS WABWIRE WABIDONGE EXPARTE APPLICANT

AND

JOHN OCHIENO WANJALA INTERESTED PARTY

GEOFREY OTIENO ODUOR INTERESTED PARTY

PETER JOSEPH MAKOKHA INTERESTED PARTY

GEORGE OJIAMBO WANYAMA INTERESTED PARTY

COUNTY GOVERNMENT OF BUSIA INTERESTED PARTY

JUDGMENT

1. By his Notice of Motion dated 12th January 2023 and filed herein on 17th January 2023, Douglas Wabwire Wabidonge (the Applicant herein) citing the provisions of Section 9 of the Law Reforms Act and Sections 7(1), (2) (c, d, e and f), 10(1) and 11 of the *Fair Administrative Action Act* as well as Order 53 Rule 1(1) and 2 of the Civil Procedure Rules sought the following substantive orders:

1. An order of Certiorari to move into this Honourable Court and quash the findings by the Land Registrar Busia on 21st July 2022 in as far as he lacked powers under Section 79 of the



Land Registration Act to revoke title deeds issued improperly and sub-dividing land parcel No Bokhayo/Mundika/2932.

2. An order of mandamus to be directed to the Land Registrar Busia to revoke title deeds for land parcels No Bokhayo/Mundika/7565, 7566 and 7567 or any other sub-division superimposed on land parcel No Bokhayo/Mundika/2932.
 3. That costs of this application be provided for.
2. The application is based on the grounds set out therein, the affidavit of the Applicant and the statement of facts.
 3. The basis of the application is that the Applicant is the registered proprietor of the land parcel No Bokhayo/Mundika/2932 which was created following a sub-division of the land parcel No Bokhayo/Mundika/755. The other parcel of land also created as a result of the said sub-division was land parcel No Bokhayo/Mundika/2931.
 4. That following the demise of the proprietor of the land parcel No Bokhayo/Mundika/2931, his children carried out this succession of his Estate and sub-divided the said land creating land parcels No Bokhayo/Mundika/7565, 7566 and 7567. That parcel No Bokhayo/Mundika/7565 was further sub-divided to create land parcels No Bokhayo/Mundika/10235 – 10241 which completely subsumed his land parcel No Bokhayo/Mundika/2931. He therefore moved to the office of the Land Registrar vide a letter dated 11th April 2022 seeking his assistance to rectify the muddled register. Before that, he had moved to the Court vide his Originating Summons in Busia ELC Case No 6 of 2018 which was however dismissed for being res judicata. Upon hearing all the parties, the Land Registrar made his findings in which he improperly declined to revoke the offending title deeds thus necessitating this application.
 5. Annexed to the application are the following documents:
 1. Green Cards for the land parcels No Bukhayo/Mundika/755, 2932, 10235, 10236, 10237, 10238, 10239, 10240, 10241.
 2. Judgment in Busia ELC Case No 6 of 2018 (OS).
 3. Letter by Balongo and Company Advocates dated 12th April 2022 and addressed to the Land Registrar complaining about the illegal sub-divisions and obliteration of the title to L.R NO Bokhayo/Mundika/2931 and 2932 and subsequent subdivisions.
 6. On behalf of the Interested Parties herein, John Ochieno Wanjala the 1st Interested Party filed a replying affidavit dated 3rd February 2023 in which he deponed, inter alia, that this application is incompetent, lacks merit and is also res-judicata since the Applicant's case and the Respondent's counter-claim were heard and determined in Busia ELC Case No 6 of 2018 (OS). That the Applicant was misguided and instituted proceedings before the County Land Registrar seeking to cancel the title deeds of the 1st Respondent as well as those of other persons who were not served to attend the hearing. That the Land Registrar declined to cancel the said titles as that would be beyond his jurisdiction. That such a remedy could only be obtained through a substantive suit. That Judicial Review proceedings only examine the process of arriving at a decision and not the merit of the decision. The orders sought cannot be granted since the Applicant was inviting the Land Registrar to exceed his powers.
 7. Annexed to the replying affidavit are two letters from Balongo and Company Advocates being:
 1. Letter dated 3rd February 2023 addressed to the Land Registrar.



2. Letter dated 26th July 2022 addressed to Wanyama and Company Advocates.
8. The application has been canvassed by way of written submissions filed by Mr Jumba instructed by the firm of Balongo and Company Advocates for the Applicant and by Mr Wanyama instructed by the firm of Wanyama and Company Advocates for the Interested Parties.
9. I have considered the application, the replying affidavit, the documents annexed thereto and the submissions by counsel.
10. The Applicant seeks two substantive orders being an order to remove into this Court for quashing the findings of the Land Registrar Busia dated 21st July 2022 (the report is infact dated 20th January 2022) on the grounds that he lacked the powers to revoke titles improperly issued and an order of mandamus to direct the Land Registrar to revoke title deeds in respect to the land parcels No Bokhayo/Mundika/7565, 7566 and 7567 of any other sub-division imposed on parcel No Bokhayo/Mundika/2932.
11. The parameters of a Judicial Review application were set out by the Court of Appeal in Municipal Council Of Mombasa -v- R & Umoja Consultants Ltd Civil Appeal No 185 of 2001 in which it was held that:

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision”.

12. In the case of Pastoli -v- Kabale District Local Government Council & Others 2008 2 E.A. 300, the Court cited with approval the cases of Council Of Civil Unions -v- Minister For The Civil Service 1985 AC 2 and also the case of An Application By Bukoba Gymkhana Club 1963 E.A 478 and held:

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or act complaint 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 or making the act the subject of complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or it’s 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 a 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 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 legislative instrument by which such authority exercise jurisdiction to make a decision”.



13. I have looked at the proceedings which were presided over by the Principal Land Registrar Mr Wilfred N. Nyaberi And The Land Registrar Mr Nicholas A. Obiero on 20th July 2022 with respect to the rectification of the register to the land parcels No Bokhayo/Mundika/2931 and 2932 as well as subsequent sub-divisions. The proceedings were held at the request of the Applicant through his counsel’s letter dated 12th April 2022. In the last paragraph of that letter, counsel addressed the County Land Registrar Busia as follows in the last paragraph:

“In this particular instance, your office failed and we are praying that you move with the haste and cancel all title deeds and mutation which subjugated our clients parcel of land.”
Emphasis mine.

14. That letter clearly set out what the Applicant required the Land Registrar to do.
15. Both the Applicant and the Interested Parties were represented at the hearing by counsel now appearing before this Court. After hearing oral submissions by both counsel, the Land Registrar prepared a report and made the following recommendations which I will reproduce in extenso as they form the substratum of this application:

“Recommendations

The sub-division dated 12th February 2002 which resulted in parcels Bokhayo/Mundika/7565, 7566 and 7567 was irregular and disenfranchised the Applicant of his land parcel No Bokhayo/Mundika/2932.

To rectify this irregularity, this sub-division dated 12th February 2002 and any other sub-divisions resulting from the same need to be cancelled.

Whereas Section 79 of the *Land Registration Act* gives the Land Registrar the powers to rectify entries on registers, this case requires cancellation of several titles that were irregularly acquired which is beyond the jurisdiction of this office. As such, I advise the Applicant to move to Court to have these titles cancelled in the strength of this report”. Emphasis added.

16. The above is the recommendation or decision of the Land Registrar which has provoked this application for orders of Certiorari and Mandamus. An order of Certiorari will issue to quash a decision made without or in excess of jurisdiction or where the rules of natural justice are not complied with. An order of Mandamus on the other hand will be directed to any person, corporation or inferior tribunal requiring it to do some particular act which pertains to any public duty – see Kenya National Examination Council -v- R & Geoffrey Gathenji Njoroge & Others 1997 eKLR. It is clear both from the tone of the Applicant’s letter to the Land Registrar dated 12th April 2022 as well as the proceedings, that the Applicant approached the two Land Registrars to cancel various titles the creation of which was irregular and ended up disenfranchising the Applicant of his land parcel No Bokhayo/Mundika/2932. The Applicant and the Interested Parties were heard through their counsel who addressed the two Land Registrars. In that respect therefore, there was no flouting of the rules of natural justice. However, and rightly so, the Land Registrar declined the invitation by the Applicant to cancel those titles because he would have been acting beyond his jurisdiction. While Section 79 of the *Land Registration Act* empowers a Land Registrar to rectify any register, or instrument, that authority does not extend to cancellation of a title to land unless with the authority of a Court order. Only the Court can cancel a title to land as provided under Section 80 of the *Land Registration Act*. The Land Registrar rightly acknowledged that he had no powers to cancel the titles although he appreciated that they were created irregularly. By declining to do so as requested by the Applicant, the Land Registrar



infact acted properly by not exceeding his jurisdiction. There is therefore nothing for this Court to quash by an order of Certiorari.

17. With regard to the prayer for an order of Mandamus, the Applicant is beseeching this Court to direct the “Land Registrar Busia County to revoke title deeds Bokhayo/Mundika/7565, 7566 & 7567 or any other sub-divisions super imposed on L.R Bokhayo/Mundika/2932.” As already stated above, the Land Registrar has no powers to revoke any title to land unless directed to do so by a Court following a civil suit in which evidence is heard and the Court finds the title deed to have been obtained illegally, unprocedurally through fraud, misrepresentation or a corrupt scheme as provided under Section 26(1) of the [Land Registration Act](#). That is not within the province of a Judicial Review application such as this one whose parameters I have already set out above. To issue an order of Mandamus as sought would be improperly directing the Land Registrar to act contrary to the law.
18. The up-shot of all the above is that the Application dated 12th January 2023 and filed herein on 17th January 2023 is devoid of merits. It is accordingly dismissed with costs to the interested parties.

BOAZ N. OLAO

JUDGE

11TH MAY 2023

Judgment dated, signed and delivered at Busia ELC on this 11th day of May 2023 by way of electronic mail.

