



**Republic v Chief Lands Registrar; First River Side Acres (Interested Party);  
NCBA Bank Kenya PLC (Exparte) (Environment and Land Judicial Review  
Case E010 of 2022) [2023] KEELC 18058 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18058 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E010 OF 2022**  
**EK WABWOTO, J**  
**JUNE 16, 2023**  
**IN THE MATTER OF : AN APPLICATION FOR A JUDICIAL**  
**REVIEW ORDER OF MANDAMUS**  
**=AND=**  
**IN THE MATTER OF : LAND REGISTRATION ACT NO. 8 OF**  
**2012**  
**IN THE MATTER OF : RECONSTRUCTION OF THE DEED FILE**  
**RELATING TO ALL THAT PIECE OF**  
**LAND KNOWN AS LAND REFERENCE**  
**NUMBER 4275/129 (ORIGINAL**  
**NUMBER 4275/64)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHIEF LANDS REGISTRAR ..... RESPONDENT**

**AND**

**FIRST RIVER SIDE ACRES ..... INTERESTED PARTY**

**AND**

**NCBA BANK KENYA PLC ..... EXPARTE**



## JUDGMENT

1. By a chamber summons dated July 4, 2022 the *ex parte* Applicant (hereinafter referred to as the Applicant) sought leave to apply for the Judicial Review Order of Mandamus to compel the Respondent to reconstruct the deed file relating to all that piece of land known as land reference number 4275/129 (Original number 4275/64)
2. Upon leave being granted, the Applicant filed the substantive motion dated January 23, 2023 seeking the following orders:
  - i) An order of Mandamus to compel the Chief Land Registrar to reconstruct the deed file relating to all that piece of land known as land reference number 4275/129 (Original number 4275/64).
  - ii) Costs to be provided for.
3. When the matter came up for directions on February 16, 2023, it was directed that the application for judicial review be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicant filed their submissions whereas the Respondent's and Interested party's submissions were not on record by the time of preparation of the judgment.

### The Applicant's Case

4. The Application for judicial review was based upon the grounds set out in the chamber summons, the statutory statement, and the verifying affidavit accompanying the said summons. It was the Applicant's case that the Interested Party is registered as lessee from the Government of the Republic of Kenya of all that piece of land situate on Land Reference Number 4275/129 (Original Number 4275/64) Garden road, off Riverside Drive, Nairobi hereinafter called (the property). A copy of the Interested Party's Title to the property was annexed as exhibit SA 1 of Stephen Atinya's Verifying Affidavit sworn on July 4, 2022(the verifying affidavit)
5. The court was informed that on or about August 31, 2015, the *Ex-parte* applicant provided banking facilities to the Interested Party for the sum of KES 71,000,000 as security for the facility, the Interested party and the *Ex-parte* Applicant created a legal charge over the property by a Charge dated October 27, 2015, pursuant to which the *Ex-parte* Applicant has outstanding obligations.
6. It was also their case that sometime in 2020, the Interested Party sought to use the property as a multi-dwelling user and, as such, was required to procure a change of user in respect of the property from a single-dwelling user to a multi-dwelling user. Consequently, the *Ex-parte* Applicant offered further banking facilities to the Interested party for KES 83,319,000
7. On October 5, 2020, the change of user process was completed, and the Interested Party was issued with a new Certificate of Title number LR 205898. A copy of the Interested Party's new Certificate of Title LR 205898 can be found at exhibit SA 2 of the Verifying Affidavit.
8. Consequently, on October 7, 2020, the *Ex-parte* Applicant and Interested Party created a Replacement Charge for KES 70,000,000 (the Replacement charge) and a further charge for the amount of KES 83,319,000 (the further charge) both dated October 7, 2020 over the property, pursuant to which the *Ex-parte* Applicant undertook to discharge the property and register the Replacement charge and the



Further charge. Copies of the Replacement Charge and the Further charge each dated October 7, 2020 were annexed as exhibit SA 3 of the Verifying Affidavit.

9. The *Ex-parte* Applicant, through its then advocates – M/s Kimondo Gachoka and Company Advocates proceeded to lodge the Replacement Charge and the Further Charge at the Land Titles Registry in Nairobi. The *Ex-parte* Applicant was however informed that the deed file relating to the property was missing and therefore the registration of the Replacement Charge and the Further charge could not be processed. A copy of the Booking form dated October 22, 2020 demonstrating lodging of the Replacement and Further charges at the Land Titles Registry was annexed exhibit SA 4 of the Verifying Affidavit.
10. The court was also informed that the *Ex-parte* Applicant made several follow-ups at the Land Titles Registry to try and trace the missing deed file. On April 20, 2021, through M/s Kimondo Gachoka and Company Advocates, the *Ex-parte* Applicant wrote a letter addressed to the Principal Secretary, Ministry of Lands and Physical Planning in efforts to obtain assistance in relation to the missing deed file. However, the *Ex-parte* Applicant was informed by officials at the Land Titles Registry that the deed file could not be traced and that it would need to be reconstructed for the Replacement charge and the Further Charge to be registered. A copy of Kimondo Gachoka and Company Advocate’s letter dated April 20, 2021 addressed to the Principal Secretary, Ministry of Lands and Physical Planning was annexed as exhibit SA 5 of the Verifying Affidavit.
11. The Interested Party applied for reconstruction of the deed file as well as issued a Deed of indemnity dated July 27, 2021. A copy of the Deed of indemnity dated July 27, 2021 was annexed as exhibit SA 6 of the Verifying Affidavit.
12. Due to inaction from officials at the Land Titles Registry, the *Ex-parte* Applicant instructed the firm of Kimondo Gachoka Advocates to escalate the matter to the Cabinet Secretary, Ministry of Lands and Physical Planning. By way of a letter dated January 31, 2022 the firm wrote to the Cabinet secretary, Ministry of Lands and Physical Planning for intervention in relation to the missing Deed File relating to the property. The letter did not elicit any response from the Cabinet Secretary. A copy of Kimondo Gachoka Advocate’s letter dated January 31, 2022 addressed to the Cabinet Secretary, Ministry of Lands and Physical Planning can was annexed as exhibit SA 7 in the Verifying Affidavit.
13. It is against this backdrop that the *Ex-parte* Applicant approached this Honourable Court for grant of an order of mandamus compelling the Respondent to reconstruct the deed file relating to the property.
14. The Applicant in its written submissions dated April 24, 2023 also referred to Section 33 (5) of the [Land Registration Act](#), 2012 and the following cases in support of its case; [Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 Others](#) [2019] eKLR and [Republic vs County Land Registrar, Makuani Lands Registry Ex-Parte Philes Mwikali Kioko & 2 Others](#) [2021] and urged the Court to grant the prayers sought.

### **The Respondent’s and Interested Party’s Case**

15. The Respondent and Interested party despite being served and failed to file any response or submissions in respect to the Application.



## Analysis and Determination

16. The Court has considered the application for judicial review and the submissions filed by the Applicant. The court is of the opinion that the following key issues arise for determination herein:
- i. Whether the *Exparte* Applicant have made out a case for the grant of the judicial review order sought.
  - ii. Who shall bear the costs of the application?

## Issue No I

### Whether the Applicant has made out a case for the grant of the judicial review order sought.

17. The principles that guide the Court when dealing with an application for judicial review remedy of mandamus was stated in the Court of Appeal case of *Commission on Administrative Justice v Kenya Vision 2030 Delivery Board & 2 others* [2019] eKLR. Wherein the court stated as follows:
- “As observed by the Judge and correctly so in our view, the principle that guides the High Court when dealing with the scope and efficacy of an order of mandamus was crystalized by the Court in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others* (supra) namely:
- “The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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 it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.”
18. This position was reiterated in the English case of *R v Dudsbeath, ex parte, Meredith* [1950] 2 ALL ER 741 where it was stated as follows:
- “It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”
19. Section 33 (5) of the *Land Registration Act*, 2012 provides that; “the Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquires as may be necessary and after giving due notice of sixty days in the gazette”.
20. It was also submitted that the Respondent has failed to fulfil its obligation despite several reminders in reconstructing the missing file which amounts to defeat of justice.
21. From the foregoing it is apparent that the writ of mandamus will issue where there is a public duty to be performed by the Respondent and where no other appropriate remedy is available to the *Exparte* Applicant.



22. In the circumstances and as aptly submitted by the *Exparte* Applicant, the Court is satisfied that the *Exparte* Applicant has made out a case for grant of the judicial review orders sought and the appropriate order that comments itself for granting at this stage is an order of mandamus.

## Issue No 2

### Who shall bear the costs of the application?

23. Although costs of an action or proceedings are at the discretion of the Court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise. In the instant case, the Respondent did not resist the Application, no response and submissions were filed and, in the circumstances, I direct that each party will bear own costs of these proceedings.

24. Accordingly, for the reasons set out above, this Court finds that the *Exparte* Applicant's Motion dated January 23, 2023 is merited, and is allowed as follows:

- i) An order of order of Mandamus compelling the Chief Lands Registrar to reconstruct the deed file relating to all that piece of land known as land reference number 4275/129 (Original number 4275/64).
- ii) Each party to bear its own costs of the application.

25. It is so ordered.

**Dated, Signed and Delivered at Nairobi this 16th day of June 2023.**

**E. K. WABWOTO**

**JUDGE**

**In the Virtual Presence of: -**

**Ms. Wameyo h/b for Mr. Kuyo for the Applicant.**

**N/A for the Respondent.**

**N/A for the Interested party.**

**Court Assistant: Caroline Nafuna**

**E. K. WABWOTO**

**JUDGE**

