



Republic v Land Registrar – Busia County & another; Mbingi (Interested Party); Egesa (Exparte Applicant) (Environment and Land Judicial Review Case E002 of 2022) [2023] KEELC 20078 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2022
BN OLAO, J
SEPTEMBER 28, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE LAND REGISTRAR – BUSIA COUNTY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

STELLA ANDESU MBINGI INTERESTED PARTY

AND

LEONARD WANDERA EGESA EXPARTE APPLICANT

JUDGMENT

1. Leonard Wandera Egesa (the Applicant) has approached this Court vide his Notice of motion dated 4th August 2022 in which he seeks the following orders:
 1. An order of Certiorari do and is hereby issued to call into the High Court and quash the decision by the County Land Registrar which unlawfully purportedly and/or is intended to cancel the Applicant’s title for the land parcel No Bukhayo/Bugengi/1205.
 2. An order of prohibition do issue against the County Land Registrar Busia stopping him and/or her from cancelling the Applicant’s title to the land parcel No Bukhayo/Bugengi/1205 or altering the title to land parcel No Bukhayo/Bugengi/1205.
 3. An order of Mandamus do issue against the Land Registrar Busia compelling him to restore the registration of land parcel No Bukhayo/Bugengi/1205 into the names of the Applicant.



4. Costs of the application be borne by the Respondents.
2. The application is based on the Applicant's affidavit, statement of facts and verifying affidavit as well as other documents.
3. The gravamen of the application is that the Applicant's father purchased the land parcel No Bukhayo/Bugengi/1205 (the suit land) from one Mr Elisha Mbingi Oswaga vide an agreement dated 30th March 1999. That the necessary consent of the Land Control Board was obtained and the suit land was registered in the Applicant's names and a title deed was issued accordingly and he has been in occupation of the same. However, the Land Registrar Busia has purported to cancel the Applicant's title to the suit land without any jurisdiction and in the absence of a Court order. The action is unconstitutional hence this application.
4. The following documents have been annexed to the application:
 - 1: Proceedings held on 5th April 2022 by Wilfred –v- Nyaberi the Land Registrar Busia over the ownership of the suit land.
 - 2: Copy of land sale agreement between Elisha Mbingi Oswaga and Boaz Egesa Lukoba dated 30th March 1999 in respect of the suit land.
 - 3: Application for consent to transfer land by Elisha Mbingi Oswaga.
 - 4: Letter of consent.
 - 5: Transfer of land form.
 - 6: Copy of title deed for the land parcel No Bukhayo/Bugengi/1205.
 - 7: Statement of the Applicant's witness Michael Olengo Ouma confirming that the Applicant's father purchased the suit land.
5. The Land Registrar Busia Mr Winfred Nyaberi filed a replying affidavit dated 28th September 2022 on behalf of the 1st and 2nd Respondents. He deposed, inter alia, that sometime in 2022, he received an application for certificate of official search from the Applicant herein in respect to the suit land. However, when he examined the copy of title deed to the suit land which was annexed to the application, it did not appear to be genuine. He therefore requested for the original title deed and after checking it, he confirmed that it was a forgery. He noticed the following:
 - a. The title deed was on paper which is different from the paper used by the Ministry of Lands.
 - b. It did not have a serial number which is mandatory on title deeds.
 - c. The typing was not consistent with the Ministry's approved standards.
 - d. It had a stamp of "Land Registrar Busia" yet no such stamps are issued by the Ministry. The only stamp on a title deed is that of Land Registrar and his/her number. And even that was only introduced in 2001 and not 1999 when this title was issued.

That although the Applicants title is fake, he insists that the suit land belongs to him yet there is an entry in the register against it to the effect that it is fraudulent. The Land Registrar therefore informed the Applicant that he could not issue him with a certificate of official search.
6. The Applicant continues to insist that even the family of the previous owner of the suit land were aware that he is the owner. So the Land Registrar summoned the families of the previous owner of the suit land for a hearing. It transpired that the previous owner of the suit land Elisha Mbingi Oswaga died on



8th November 1983 and could therefore not have sold the suit land to the Applicant in 1999. Further, Sela Andesu Mbingi the Interested Party herein and widow to Elisha Mbingi Oswaga confirmed that the original title to the suit land is infact with the Public trustee under file NO 76 of 1984 Kisumu. It was also confirmed that the Applicant is a stranger to the said family and has never utilised the suit land. After hearing all the parties, the Land Registrar made the conclusion that the Applicant could not have purchased the suit land and all the documents produced by him were forgeries. He therefore notified the Applicant that he would rectify the register after 90 days unless contrary orders are issued by the Court. That this suit is devoid of merit and is an abuse of the Court process.

7. Annexed to that affidavit are the following documents:
 1. Copy of title deed for the land parcel No Bukhayo/Bugengi/1205.
 2. Copy of register to the land parcel No Bukhayo/Bugengi/1205.
 3. Copy of summons by the Land Registrar for the hearing of the dispute in respect of the land parcel No Bukhayo/Bugengi/1205.
 4. Land sale agreement dated 30th March 1999.
 5. Death certificate of Elisha Mbingi Oswaga.
 6. Proceedings of the hearing held on 5th April 2022 by the Land Registrar in respect of the land parcel No Bukhayo/Bugengi/1205.
8. Stella Andesu Mbingi the Interested Party is the widow to Elisha Mbingi Oswaga. She swore a replying affidavit dated 31st September 2022 in which she deposed, inter alia, that her late husband died on 8th November 1983 and had not sold the suit land to the Applicant. That she lives on the suit land and it was only when she was summoned by the Land Registrar to the hearing on 5th April 2022 that she learnt that the Applicant had a title to the suit land acquired in 1999. It was then that she also discovered that the Applicant had filed Busia Chief Magistrate's Court Succession Cause No E313 Of 2022 in respect to the Estate of Elisha Mbingi citing her to take out Letters of Administration in respect of her late husband's Estate on the ground that she had refused to give him the title deed to the suit land after he had purchased it. She therefore wonders why the Applicant who claims to have obtained the title deed to the suit land in 1999 would be filing a citation against her in 2022. She adds that this application is vexatious, frivolous, unmerited and an abuse of the Court process. It should be dismissed with costs.
9. The following documents are annexed to her replying affidavit:
 1. Summon by the Land Registrar dated 17th March 2022.
 2. Death Certificate of Elisha Mbingi Oswaga.
 3. Land sale agreement dated 30th March 1999.
 4. Copy of title deed to the land parcel No Bukhayo/Bugengi/1205.
 5. Application in Buisa Cm's Court Succession Cause No E313 of 2022.
 6. Letter (un-dated) from Chief Nangoma Location addressed to the Registrar High Court Busia.
 7. Certificate of official search for the land parcel No Bukhayo/Bugengi/1205.
10. The application has been canvassed by way of written submissions. These have been filed both by Mr Ashioya instructed by the firm of Ashioya & Company Advocates for the Applicant, Mr Juma Collins



Senior State Counsel for the Respondents and by MR OUMA instructed by the firm of B. M. Ouma & Company Advocates for the Interested party.

11. At the commencement of this judgment, I set out the specific orders of Certiorari, prohibition and Mandamus which the Applicant herein beseeches this Court to grant him. I shall revert to them later on.
12. For now, it is necessary for this Court to remind itself on its role while determining Judicial Review applications. In the case of Municipal Council Of Mombasa –v- Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001, the parameters of Judicial Review jurisdiction were set out as follows:

“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 persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took 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 not sufficient evidence to support the decision.”

13. In the case of Pastoli -v- Kabare District Local Government Council & Others 2008 2 E.A 300, the Court cited with approval the cases of Council Of Civil Unions -v- 1985 Ac 2 and also An Application By Bukoba Gymkhana Club 1963 E.A. 478 and held thus:

“In order to succeed in an application for judicial review, the Applicant has to show that the decision or the 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 or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions 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 where there is a failure to act fairly on the part of the decision making authority 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 legislation instrument by which such authority exercises jurisdiction to make a decision.”

14. This Court has the discretion whether or not to grant any orders in judicial review applications. In doing so, the Court must consider whether or not the remedy sought is the most efficacious. And as was held in the case of Speaker Of National Assembly -v- Njenga Karume 2008 1 KLR 425, where there is a clear procedure for addressing any particular grievance as prescribed by *the Constitution* or any Act of Parliament, that procedure should be followed.
15. The first prayer sought by the Applicant is an order to quash the decision of the County Land Registrar Busia “which unlawfully purported and or is intended to cancel the ex-parte Applicant’s title for L.r No Bukhayo/Bugengi/1205.” Having heard the Applicant and family of the late Elisha Mbingi



Oswaga including his wife Stella Andesu Mbingi and the neighbours, the Land Registrar Busia made the following findings as per his report dated 5th April 2022:

“Registrar’s Ruling Leonard Wandera Egesa does not and has never owned land parcel No Bukhayo/Bugengi/1205. The title deed in Leonard’s possession is a fake and does not confer any ownership/right of the above land. The register to be rectified by reverting the title back to Elisha Mbingi Oswaga

Wilfred N. Nyaberi

County Land Registrar

Busia County.”

16. In paragraphs 15, 16, 17 and 18 of his replying affidavit dated 28th September 2022, the above Land Registrar has deposed as follows:

15:

That I came to the conclusion that the ex-parte Applicant could have never bought parcel Bukhayo/Bugengi/1205. Any document that alludes to such a transaction must be a forgery or fraudulently obtained.”

16:

That it is well within my knowledge that with a fake title deed, a fraudulent entry on the register, and alleged transaction with a person who was dead 15 years before the said transaction, I had no option but to invoke Section 79(2) of the [Land Registration Act](#).”

17:

That I notified the ex-parte Applicant of the intention to rectify the register in the respect. I have also issued an additional notice using L.R.A Form 91. So far, an entry for rectification has been made on the register pending the signing, which will be done after the expiry of statutory period of 90 days unless contrary order are given by court.”

18:

That it is well within my knowledge that we are yet to rectify the register, the same will be rectified after the expiry of 90 days and we have not cancelled the Applicant’s title, as he has never owned any title deed. What he has is a forgery which is nothing more than a worthless piece of paper. One can only cancel what exists.” Emphasis mine.

17. Section 79 of the [Land Registration Act](#) donates to the Land Registrar power to rectify the register. Section 79(2) of the same reads:

79 (2):

No alteration affecting the title of the proprietor may be made pursuant to subsection (1) without the proprietor’s consent unless –



- a. The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
- b. It would for any other reason be unjust for the alteration not to be made.

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.” Emphasis mine.

Section 80(1) of the same Act on the other hand reads as follows:

“Subject to Section (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.” Emphasis mine.

18. It is clear from the above that the Land Registrar cannot cancel any title to land. The powers of the Land Registrar are however limited to rectification of errors, mistakes or omissions where “fraud” or “lack of proper care” are established. The Land Registrar has made it clear in paragraph 18 of his replying affidavit that he has “not cancelled the Applicant’s title”. In *Kenya National Examination Council -v- R. Exparte Geoffrey Gathenji Njoroge & Others* Court Of Appeal Civil Appeal No 266 of 1996 [1997 eKLR] it was held that:

“Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

I have not heard the Applicant complain that the rules of natural justice were not complied with. He was summoned by the Land Registrar and attended the proceedings of 5th April 2022 where he gave his side of the story as to how he obtained the title to the suit land. The Land Registrar was satisfied after hearing all the parties that the Applicant obtained his title fraudulently. He therefore made the decision to rectify the register and it is clear from the provisions of Section 79(2) of the *Land Registration Act* that the Land Registrar had powers to rectify the register. He also made it clear that he did not cancel any title. Obviously, he is aware that as a Land Registrar, he has no mandate to cancel any title deed. In the circumstances, there is nothing to warrant an order of Certiorari.

19. The prayer for an order of Certiorari is devoid of merit. It is dismissed.
20. With regard to the order of prohibition, it was described in the case of *Kenya National Examination Council -v- Republic Ex-parte Geoffrey Gathenji Njoroge* (supra) as follows:

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practise or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – see *Halsbury’s Law Of England*, 4th Edition, Vol. 1 of page 37 paragraph 128.”

21. The proceedings before the Land Registrar Busia with respect to the land parcel No Bukhayo/ Bugengi/1205 were conducted and terminated with a report dated 5th April 2022. The Land Registrar has already made a decision to rectify the title to the said land in exercise of the powers conferred upon



him by Section 79(2) of the *Land Registration Act*. There is nothing else remaining to be done by him. Again, in the case of Kenya National Examination Council -v- R. Exparte Geoffrey Gathenji Njoroge (supra), the judges said of prohibition:

“That is why it is said prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice, the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.” Emphasis mine.

22. The order of prohibition as sought by the Applicant in paragraph 2 of his Notice of Motion is for this Court to issue an order of prohibition “against the County Land Registrar Busia stopping him and/or her from cancelling the Ex-parte Applicant’s title to L.r No Bukhayo/Bugengi/and / or altering the title to L.R No Bukhayo/Bugengi/1205.” From paragraph 18 of the Land Registrar’s replying affidavit, it is clear that the view he has taken of this dispute is that the Applicant’s title is a forgery and a worthless piece of paper which cannot be cancelled. He adds that “one can only cancel what exists.” The Land Registrar is therefore not contemplating cancelling the said title as it does not exist. He intends to rectify the register a power which he can exercise under Section 79(2). There is also nothing to justify the grant of an order of prohibition.

23. The prayer for an order of prohibition is devoid of merit. It is declined.

24. Finally, the Applicant seek an order of Mandamus which he has crafted in paragraph 3 of his Notice of Motion as follows:

“That an order of Mandamus do issue against the Land Registrar Busia compelling him to restore the registration of L.r No Bukhayo/Bugengi/1205 into the names of the Ex-parte Applicant.”

25. Again citing Halsbury’s Law Of England 4th Edition the Court of Appeal described the order of Mandamus as follows in the case of Kenya National Examination Council -v- R. Ex-parte Geoffrey Gathenji Njoroge & Others (supra):

“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. It’s 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.”

26. From the documentary evidence placed before this Court, the title to the land parcel No Bukhayo/Bugengi/1205 is still in the names of the Applicant. The Land Registrar has not cancelled it. He



only intends to rectify the register, the term “registration” is defined in the Concise Oxford English Dictionary 12th Edition as:

“The action or process of registering or of being registered.”

27. With regard to land, the certificate of title or lease is the best evidence that the person whose name appears therein is the person registered as the proprietor subject to any encumbrances or overriding interests. Since no other title deed has been exhibited in these proceedings, it is not clear what registration the Applicants wants the Land Registrar to be ordered to “restore”. That prayer for an order of Mandamus is clearly speculative.
28. The claim for an order of Mandamus is equally without merit. It is for dismissal.
29. Most significantly, however, in paragraph 12 (d) his replying affidavit, the Land Registrar Mr Winfred Nyaberi disposed as follows:

“The Interested Party also stated that the original title deed is with the Public Trustee under file NO 76 of 1984 Kisumu. She intends to pick it after completing the succession of her late husband.”

And although the Interested Party did not specifically confirm the above averment, she deposed in paragraph 14 of her replying affidavit that this application has now helped her to raise the red flag on fraudulent dealings by the Applicant with respect to the suit land. That being the case, the Applicant really has no title to the suit land which the Land Registrar has cancelled or intends to cancel. The Applicant does not hold anything known to the law for which this Court ought to intervene and protect in respect to the suit land. The Land Registrar having confirmed that the original title to the suit land is with the Public Trustee, this matter rests.

30. The up-shot of the all the above is that the Notice of Motion is devoid of any merit. It is accordingly dismissed with costs to the Respondents and Interested party.

**JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 28TH DAY OF SEPTEMBER 2023
BY WAY OF ELECTRONIC MAIL. RIGHT OF APPEAL.**

BOAZ N. OLAO

JUDGE

