



Mwareri v Land Registrar (Naivasha) & 3 others (Environment and Land Judicial Review Case E3 of 2022) [2023] KEELC 20162 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20162 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E3 OF 2022
A OMBWAYO, J
SEPTEMBER 22, 2023
IN THE MATTER OF A JUDICIAL REVIEW APPLICATION
IN THE MATTER OF THE CONSTITUTION OF KENYA 2010
IN THE SECTION 8 & 9 OF THE LAW REFORM ACT CAP 23 OF THE LAWS OF KENYA
IN THE MATTER OF THE SECTION 6,7,8,9,10&
11 OF THE FAIR ADMINISTRATION ACT 2015
IN THE MATTER OF SECTION 79 OF THE LAND REGISTRATION ACT
IN THE MATTER OF AN APPLICATION BY MARGARET NJOKI MWARERI
FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

MARGARET NJOKI MWARERI APPLICANT

AND

LAND REGISTRAR (NAIVASHA) 1ST RESPONDENT

MINISTRY OF LANDS AND PHYSICAL PLANNING 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION (REGIONAL DIRECTOR RIFT VALLEY) 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. On the November 9, 2022, this court granted Margaret Njoki Mwareri leave to commence judicial review proceedings for an order of *certiorari* to remove to this court and quash the decision and directions of the 1st respondent in letter dated October 18, 2022 directing the applicant to surrender her title deed in parcel No Miti Mingi/Mbaruk/Block S /932 Kianjoya which was in her possession.



The applicant was further granted leave to apply for prohibition prohibiting the respondent from implementing and or putting in place an any act , action or move cancelling the applicants title and redirect the register for land parcel No Miti/Mingi/Mingi/ Block S/932 (Kianjoya) in the applicant’s possession.

2. The *ex parte* applicant subsequently filed a notice of motion seeking an order of certiorari to remove to the Environment and Land Court and quash the decision and directive/order of the 1st respondent Land Registrar-Naivasha in the letter dated October 18, 2022 directing the applicant to surrender her title deed for land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya) in her possession. Moreover, he seeks an order of certiorari to remove to the Environment and Land Court and quash the decision and Notice of Intention to Rectify Register by the 1st respondent in respect of her title deed for land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya) to rectify the Land Register. Further he seeks an order of prohibition against the 1st respondent from recalling for surrender title and rectifying the register on title number Miti Mingi/Mbaruk Block 5/932 (Kianjoya). He prays for costs of the application.
3. The application is based on grounds that the decision of the 1st respondent violated right to natural justice and fair hearing as she was not heard before the decision was made and therefore the decision was unfair irregular and unlawful. Moreover the decision infringes on her right to own property.
4. The facts of this case are that the applicant is the rightful and legal owner of land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya) measuring 0.0377 hectares. Prior to purchasing the parcel of land, the applicant exercised due diligence and carried out an official search and established that one Stephenson Njau Kiarie was the registered owner and that the parcel of land was free from any encumbrances. On the October 12, 2019, the applicant entered into a sale agreement with Stephenson Njau Kiarie for the purchase of the parcel of land at Kshs 3,000,00/= and upon completion of payment of the purchase price, the applicant obtained consent to transfer the parcel of land and it was eventually transferred to the applicant. Consequently, a title deed was issued to the applicant on October 24, 2019 and she proceeded to take possession of the land, constructed a perimeter wall, installed a gate and refurbished the land parcel into an entertainment playground. The applicant continued to enjoy quiet possession of the land till March 2020 when one Patrick Wanjihia Gakio filed an application before court in Naivasha CMCC ELC No 110 of 2019. Thereafter he filed a suit in Nakuru CM ELC No 51 of 2020 alleging to be the lawful registered owner of the parcel of land measuring 0.0977 hectares having bought it from one Stehenson Njoroge Gichua in 2006 and further, that Stehenson Njau Kiarie had fraudulently caused the ownership of the parcel of land to be transferred to himself and subsequently to the applicant herein. That PaTrick Wanjihia Gakio equally lodged a complainant at Nakuru Police Station OB 103/18/10/2019 and at the same instance of Cpl Christopher Mosop charges were preferred against the applicant in Nakuru MCCR E1364 of 2022 with the offence of:
 - a. Conspiracy to commit a felony contrary to section 393 of the [Penal Code](#)
 - b. Conspiracy to defraud contrary to section 317 of the [Penal Code](#)
 - c. Forceful detainer contrary to section 91 of the [Penal Code](#)
 - d. Obtaining registration by false pretence contrary to section 320 of the [Penal Code](#)
 - e. Making a false statement contrary to section 339 of the [Penal Code](#)
 - f. Forgery of official documents contrary to section 351 of the [Penal Code](#)
5. The applicant alleged that civil suit CM ELC No 51 of 2020 and the criminal case MCCrCNo E1362 of 2022 are related to the parcel of land and the issue of ownership are pending before courts of competent jurisdiction for determination and that *vide* a letter dated October 18, 2022, the 1st



respondent made a directive/order recalling the applicant's title deed requiring her to surrender it within fourteen (14) days based under the provisions of section 79 of the [Land Registration Act](#), 2012 on the alleged establishment of fraud that are yet to be heard and determined in the civil and the criminal cases. The applicant laments that the 1st respondent on November 9, 2022 issued a notice of intention to rectify register to the applicant to appear before her at 10.00am on November 23, 2022 for purpose of rectifying the register in title Number Miti Mingi/Mbaruk Block 5/932 (Kianjoya)

6. The 1st respondent's filed a replying affidavit through Roussan Ritho Mwangi, the County Land Registrar stating that on the June 20, 2022, the land register received a letter addressed to the land registrar, department of lands Naivasha Ref: DCI/Sec/Nku/2/3/1 Vol XI/67 from the Directorate of Criminal Investigations-Nakuru and signed by the County DCI Officer, Anthoni Sunguti. The said letter referred to investigations carried out in relation to the dispute involving ownership of parcel of land No Miti Mingi/Mbaruk Block 5/932 (Kianjoya) contested by two persons claiming to be registered owners of the land namely Patrick Wanjihia Gakio and Stephenson Njau Kiarie. The letter further outlined facts that the DCIO were able to establish based on the investigations carried out including the fact that the said Stephenson Njau Kiarie had been issued with a title to the land in the year 2019 and had immediately proceeded to dispose of the land to the applicant herein.
7. He states that the letter concluded with the findings from the DCIO stating that the said Stephenson Njau Kiarie had falsified documents and acquired the contested parcel of land illegally and thus fraudulently. The DCIO recommended that the Land Registrar do revoke the title issued to Stephenson Njau Kiarie and any subsequent title deed issued thereof by invoking section 79(1) (2) of the [Land Registration Act](#) and revert the parcel of land to the rightful Owner Patrick Wanjihia Gakio
8. He stated section 79(1) (2) of the [Land Registration Act](#) gives the registrar the mandate and or entitlement to rectify the register in various cases including where there fraudulent dealings with the land have been established and that pursuant to the letter detailing the fraudulent dealings with the contested land, the recommendation by the Directorate of Criminal Investigation-Nakuru and a review of the register the Land Registrar made the informed decision to issue a notice of intention to revoke the title and rectify the register invoking section 79 of the [Land Registration Act](#) and that vide a letter dated October 18, 2022 the Land Registrar proceeded to issue a notice of intention to rectify the register and directed the applicant to surrender the title deed for land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya. Thereafter the land registry at Naivasha received summons to attend court dated November 18, 2022 from the firm of Obura Mbeche & Co Advocates. The said summons were in relation to the application filed herein against the land registrar Naivasha and others.
9. The land registrar was not aware and was neither informed that there were any court proceedings or matters pending before court in relation to the contested parcel of land. In this regard the land registrar did not act out of contempt but acted in accordance with the recommendations of the Directorate of Criminal Investigations, in accordance with the law and based on the information at hand. The land registrar is willing to abide by the decision of this court in relation to the contested parcel of land. In the supplementary affidavit the *exparte* applicant states that her grievance has not been responded to moreover that the respondent has not given reasons to his .actions that are unlawful.
10. I have considered the application for judicial review, the replying affidavit and submissions on record and find that the grounds for judicial review are usually three, namely illegality, irrationality and procedural impropriety. In this matter the application is principally based on illegality, irrationality and procedural impropriety. Section 79 (2) and (4) of the [Land Registration Act](#) No3 of 2012 provides for rectification of the register thus:-

“79 Rectification by Registrar



- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
informal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor;
 - a) in any case and at any time with the consent of all affected parties; or
 - b) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel;
 - c) for purposes of updating the register;
 - d) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.
- (2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (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. “

11. It is trite law that allegations of fraud or acquisition of titles through other irregular means can be ascertained through the legal forums such as a court of law, wherein evidence would be adduced and tested in the usual legal manner. See the case of *R.G Patel v Laiji Makanji*(1957)EA 314, where the court held that:-

“Allegation of fraud must be strictly proved. It was incumbent upon the plaintiff therefore to demonstrate to this court that the transfer of the titles to the defendants names was fraudulent and specifically explain the actions which constituted the fraud”.

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Though the land register has the powers to rectify the register the same is in respect of informal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor and that there is a process to be followed. To begin with, the registrar has no power to rectify the register and affect the proprietorship of a registered owner. In this matter the land registrar was attempting to do exactly what the law forbids



him to do that is revoking the title issued to Stephenson Njau Kiarie and the subsequent title issued to the *ex parte* applicant and reverting the property to Patrick Wanjihia Gakio. This court finds that the letter dated October 18, 2022 directing the applicant to surrender the title deed for parcel of land Miti Mingi/mbaruk Block 5/932 (Kianjoya C) was tainted with illegality as the land registrar had no such powers to recall the title with the intention of cancelling or revoking the same.

12. In the case of *Republic v Chief Land Registrar & another Ex-parte Yosabia Kerubo Manyura* [2018] eKLR, it was held as follows:

“It is evident from the provisions of section 79 that the land registrar’s powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the interests of any proprietor. Cancellation of a title quite clearly would materially affect the interest of the registered proprietor. In my view, it is only the court that under section 80(1) of the *Land Registration Act*, 2012 that has the power to direct the cancellation of a registration.I therefore hold that the land registrar lacked the jurisdiction to cancel the applicant’s title and in doing so he acted ultra vires and his actions are amenable to an order of certiorari. Having held that the land registrar did not have jurisdiction to cancel the applicant’s title it follows that no due process was followed in effecting the cancellation of the title as the land registrar could only cancel the title if he was ordered to do so by the court. The land registrar in the circumstances of the case only had jurisdiction to place a restriction against the land pending determination of the issue whether or not the applicant was validly registered as the owner of the land by the court.”

13. This court finds that the *ex parte* applicant has demonstrated that the 1st respondent acted illegally where he had no powers.
14. On whether the decision of the land registrar administrative decision was tainted with unreasonableness and irrationality, the relevant provisions are found within section 7(2) (i) of *Fair Administrative Action*[27] which provides that:-

“A court or tribunal under subsection (1) may review an administrative action or decision, if-

- i. the administrative action or decision is not rationally connected to-
 - a) the purpose for which it was taken;
 - b) the purpose of the empowering provision;
 - c) the information before the administrator; or
 - d) the reasons given for it by the administrator.”

15. The test for rationality was stated as follows by Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and another: In re Ex parte President of the Republic of South Africa and others:-*

“The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle.”



16. In *Trinity Broadcasting (Ciskei) v ICA* of,[29] Howie P stated the rationality test as follows:-

“In the application of that test, the reviewing court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the materials made available and the conclusion arrived at.”

17. This court finds that the 1st respondent action of relying on the recommendations of the Divisional Criminal Investigations Officer who had no such powers to recommend for the revocation of title was tainted with un-reasonableness and irrationality. He did not conduct an independent investigation to establish any fraud in respect of the transactions in the green card of the property but relied on the decision of the Divisional Criminal Investigations Officer. The reasons given by the land registrar for revoking title are not reasonable and rationale.

18. On procedural impropriety, by failing to notify the applicant of the impending rectification the 1st respondent's action was tainted with procedural impropriety and in breach of the rules of natural justice. The 1st respondent has a duty to hear the applicant before making an independent decision but not to rely on the decision of the 3rd respondent. The provisions of article 47(1) and (2) of the *Constitution* stipulate that :

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action”.

19. The aforementioned provisions of the *Constitution* resonate well with the provisions of section 4(1), (2) and (3) of the *Fair Administrative Action Act*, where it is stated that:

“(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or



- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

20. In [Geothermal Development Company Limited v Attorney General & 3 others](#) [2013] eKLR, it was held that;

“Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including (c) responsive, prompt, effective, impartial and equitable provision of services” and (f) transparency and provision to the public of timely, accurate information.

.....

As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well”. (Emphasize added).

21. In the Supreme Court of India case of [Sangram Singh v Election Tribunal Kotech](#) AIR 1955 SC 664 at 711, the court stated that;

“There must be ever present in the mind that our laws of procedure are grounded on the principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them”.

22. The 1st respondents action was clearly in breach of article 47 of the [Constitution](#) of Kenya 2010 and sections section 4(1), (2) and (3) of the [Fair Administrative Action Act](#), .

23. On the remedies of certiorari and prohibition sought by the applicant, the parameters of judicial review remedy of prohibition were set out by the Court of Appeal in [Republic v Kenya National Examinations Council ex parte Gathenji & others](#) civil appeal No 266 of 1996 as follows:

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...Prohibition 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, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings..... 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. In the present appeal the



respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.” [Emphasis added]. –

24. In this case, I do find that the applicant has satisfied this court for grant of the judicial review orders sought on the basis of illegality, irrationality and procedural impropriety.
25. Ultimately, I do grant an order of certiorari to remove to the Environment and Land Court and quash the decision and directive/order of the 1st respondent in the letter dated October 18, 2022 directing the applicant to surrender her title deed for land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya) in her possession. Moreover, I grant an order of certiorari to remove to the Environment and Land Court and quash the decision and notice of intention to rectify register by the 1st respondent in respect of her title deed for land parcel Miti Mingi/Mbaruk Block 5/932 (Kianjoya) to rectify the Land Register. Lastly, I do grant an order of prohibition against the 1st respondent from recalling for surrender title and rectifying the register on title number Miti Mingi/Mbaruk Block 5/932 (Kianjoya). Costs of the suit to the exparte applicant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND, DAY OF SEPTEMBER 2023.

A O OMBWAYO

JUDGE

