



Republic v Land Registrar & another; Wamae & another (Exparte Applicants) (Environment and Land Judicial Review Case E001 of 2022) [2023] KEELC 19900 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022**

JO OLOLA, J

SEPTEMBER 22, 2023

IN THE MATTER OF AN APPLICATION BY CHARLES WAMBUGU WAMAE AND PAUL MATHERI WAMAE FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS PROHIBITION AND DECLARATION AGAINST THE DECISION OF THE CHIEF LAND REGISTRAR IN RESPECT OF THE PROPERTY KNOWN AS

NYERI MUNICIPALITY BLOCK 1/1082

AND

IN THE MATTER OF ARTICLES 10(2), 35, 40, 43, 47 & 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION (GENERAL) REGULATIONS, 2017

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR 1ST RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

AND

PAUL MATHERI WAMAE EXPARTE APPLICANT



JUDGMENT

1. By the Notice of Motion dated 23rd November 2022, Paul Matheri Wamae and Charles Wambugu Wamae (the Ex-parte Applicants) prays for Judicial Review order as follows:
 - (a) A declaration be and is hereby issued that the decision of the 1st Respondent to place a restriction on the property known as Nyeri Municipality Block 1/1082 violates Articles 10, 40 & 47 of *the Constitution* of Kenya, as read together with Sections 77 of the *Land Registration Act*, and the principles of natural justice;
 - (b) An order or certiorari be and is hereby issued to remove to this Court for purposes of quashing the decision of the Land Registrar, the 1st Respondent, made on 8th February 2012, placing a restriction in favour of the 2nd Respondent, EACC, on the property known as Nyeri Municipality Block 1/1082;
 - (c) An order of mandamus be and is hereby issued to the 1st Respondent to vacate, remove and/or deregister the restriction placed on the property known as Nyeri Municipality Block 1/1082; and
 - (d) An order of Prohibition be and is hereby issued prohibiting and/or restraining the Respondents from placing and/or registering any further inhibitions, cautions and/or restrictions in any manner that violates the provisions of the *Land Registration Act*, 2012.
2. The application which is supported by an Affidavit sworn jointly by the two Ex-parte Applicants is premised inter alia on the grounds that:
 - (a) The Ex-parte Applicants are the duly registered proprietors of the parcel of land known as Nyeri Municipality Block 1/1082 measuring 0.2109 Ha. (the suit property);
 - (b) In September 2021, the Ex-parte Applicants discovered the unbeknown to them the 1st Respondent had placed a restriction on the suit property on 8th February, 2012. On the request of the 2nd Respondent on allegations that they were conducting investigations;
 - (c) The restriction was placed without following due process as no notice was issued to the Ex-parte Applicants prior to and/or subsequent to its registration in accordance with the provisions of Section 77 of the *Land Registration Act*;
 - (d) No reasonable opportunity was availed to the Ex-parte Applicants to make representations in respect of the registration of the restriction and there was an inordinate and unexplained delay by the 2nd Respondent in undertaking any investigations over any claim in respect of the suit property;
 - (e) Vide a letter dated 30th September, 2021 the Ex-parte Applicants sought to have the irregular and illegal restriction removed and for the 2nd Respondent to furnish them with particulars/ reasons for the alleged investigations;
 - (f) Vide a letter dated 4th October 2021, the 2nd Respondent informed the Applicants that the suit property allegedly constituted Government land that was irregularly, illegally and unlawfully alienated;



- (g) The Ex-parte Applicants have made an application to remove the restriction which application was received at the Nyeri Lands Registry on 7th October, 2021. The 1st Respondent has neither acted on the same nor provided a response;
 - (h) It is now more than 10 year since the restriction was lodged and the Respondents actions and decisions are in violation of Article 47 of *the Constitution* and the *Fair Administrative Action Act*; and
 - (i) The alleged investigations which have now been undertaken for a period exceeding 10 years continue to dangle over the Ex-parte Applicants causing unwarranted emotional distress and anguish as they are denied of exercising their full rights as proprietors of the suit property.
3. The Ethics and Anti-Corruption Commission (the 2nd Respondent) is opposed to the grant of the orders sought. In a Replying Affidavit sworn on its behalf by investigator Simon Lei, the 2nd Respondent avers that there are ongoing investigations on a series of properties comprising Government Housing in Ring road Area of Nyeri town which were allegedly alienated to private entities among them being the suit property.
 4. The 2nd Respondent avers that sometime in 2012 in discharge of its statutory mandate under inter alia Section 11(1) of the Ethic's and Anti-Corruption Commission Act, 2011, it did request the 1st Respondent to register a restriction in the register of the suit property pending conclusion of its investigations regarding the circumstances upon which the suit property was registered in the names of the Ex-parte Applicants.
 5. The 2nd Respondent further avers that the said restriction was placed pending conclusion of investigations and filing of a substantive suit, to forestall dealings which would complicate the recovery process.
 6. The 2nd Respondent asserts that its preliminary investigations have revealed that the suit property was hived off the compound of Government House No. HG-19 situated in Ring Road, Nyeri town and that those facts are contained in the Ndung'u Report and in documents obtained from the Ministry of Housing.
 7. The 2nd Respondent avers further that the said preliminary investigations have established that the subject property was allocated by the Commissioner of Lands to one Gervas O. Oketch on or about 29th May, 1995 and the 2nd Respondent has filed claims and counterclaims for the recovery of all the parcels of land that were hived off the compound of the said HG-19.
 8. The 2nd Respondent denies that it has violated any constitutional and legal rights of the Ex-parte Applicants asserting that its investigations are on course and that it is in the public interest that the orders sought herein be denied.
 9. I have carefully perused and considered the application by the Ex-parte Applicants as well as the response thereto by the 2nd Respondent. I have similarly perused and considered the written submissions and authorities to which I was referred by the Learned Advocates representing the said Parties. The Land Registrar Nyeri, sued as the 1st Respondent neither entered appearance nor opposed the application.
 10. The Ex-parte Applicants are the registered proprietors of the parcel of land known as Nyeri Municipality Block 1/1082 (the suit property). It is their case that sometime in September 2021, they discovered that unbeknown to them, the 1st Respondent had way back on 8th February, 2012 placed a



restriction on the suit property on the request of the 2nd Respondent. It is further their case that the said restriction was irregularly and illegally placed on the suit property and that the same is a violation of their rights as the proprietors of the said property.

11. Accordingly the Applicants have urged the Court to declare that the decision of the 1st Respondent to place the restriction on the suit property violates Articles 10, 40 and 47 of *the Constitution* of Kenya as read together with Sections 77 of the *Land Registration Act*, and the principles of natural justice. The Applicants have also urged the Court to grant an order of certiorari to remove to this Court for purposes of quashing, the decision made by the 1st Respondent on 8th February, 2012.
12. In addition, the Ex-parte Applicants crave an order of mandamus to issue against the 1st Respondent requiring him to vacate, remove and/or deregister the restriction as well as an order of prohibition restraining the Respondents from placing and/or registering any further inhibitions, cautions and/or restrictions in any manner that violates the law.
13. The Ethics and Anti-Corruption Commission (the 2nd Respondent) is however opposed to the grant of the said orders. It is the 2nd Respondent's case that there are on-going investigations on a series of properties comprising Government housing in Ring Road area of Nyeri town which properties were allegedly alienated to private entities among them being the suit property.
14. The 2nd Respondent asserts that sometime in the year 2012, in the discharge of its statutory mandate under inter alia Section 11(1) of the *Ethics and Anti-Corruption Commission Act*, 2011, it did request the 1st Respondent to register a restriction in the register of the suit property pending the conclusion of its investigations regarding the circumstances under which the suit property came to be registered in the names of the Ex-parte Applicants.
15. It is the 2nd Respondent's case that the said restriction was placed to forestall dealings with the suit property in a manner that would complicate the recovery process. They aver that preliminary investigations have since revealed that the suit property was hived off the compound of Government House No. HG-19 situated at Ring Road in Nyeri town and that the same was initially allocated by the Commissioner of Lands to one Gervas O. Okech on or about 29th May, 1995.
16. The 2nd Respondent further avers that it has filed a number of claims and counterclaims for the recovery of all the parcels of land that were hived off the compound of the said House No. HG-19. It denies that it has violated any constitutional or other legal rights of the Ex-parte Applicants through its actions and asserts that its investigations are on course and that it is in the public interest that the orders sought herein be denied.
17. As was stated by the Court of Appeal in *Municipal Council of Mombasa -vs- Republic & Umoja Consultants Limited (Civil Appeal No. 185 of 2001)(2002) eKLR*;

“Judicial review is concerned with the decision making process, not with the merits of the decisions 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 no sufficient evidence to support the decision touching on violation of fundamental rights.”



18. More recently in Republic -vs- Kenya Revenue Authority Ex-parte Stanley Mombo Amuti (2018) eKLR, it was held that:

“ 37. The entrenchment of the power of judicial review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of Court to in such cases be guided by the purposes, values and principles of *the constitution* and the constitutional dictate to develop the law on that front. First, Parties who were once denied judicial review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the Court ...

38. Third an order of Judicial Review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3)(f). Fourth, Section 7 of the *Fair Administrative Action Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a Court in accordance with Section 8 or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7(2) of the Act provides for grounds for applying for Judicial Review. Fifth, Article 159 commands Courts to administer justice without undue regard to procedural technicalities.”

19. In the matter before me, it was not in dispute that the ex-parte Applicants were registered as proprietors of the suit property on 27th April, 2011. According to the 2nd Respondent, sometime in the year 2012, in the discharge of its statutory mandate, it did request the 1st Respondent to register a restriction in the register of the suit property pending conclusion of investigations it had launched as regards the circumstances under which the ex-parte Applicants came to be registered as proprietors of the suit property.

20. It was again not in dispute that the Land Registrar had the power to register a restriction on a parcel of land. In that respect, Section 76(1) of the *Land Registration Act* provides as follows:

“(1) For the purposes of compulsory acquisition, the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

21. Arising from the foregoing, it was apparent that the law places a duty on the Registrar to issue notices and to conduct some preliminary inquiries prior to the registration of the restriction. While the wording of the said Section 76(1) of the *Land Registration Act* does not place a mandatory duty on the Registrar to give notice to the persons the Registrar may consider fit to receive them, the Registrar does



not have such discretion when it comes to the proprietors that are to be affected by the restriction. In this respect, Section 77 of the Act provides as follows:

“77. Notice and effect of restriction.

- (1) The Registrar shall give notice, in writing, of a restriction to the proprietor affected by the restriction.
- (2) An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.”

22. That being the case, it was clear to me that in registering a restriction, the law required the Land Registrar concerned to inform the person who was to be affected by the restriction. Given the effects of a restriction on how a proprietor would thereafter deal with his/her property, it was also clear to me that the principles enunciated under Article 47 of *the Constitution* should apply at the point in time of the registration of the restriction. The said Article provides as follows:

“47. Fair administrative action:

- (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.
- (3) ...”

23. In the matter before me, the Ex-parte Applicants have asserted that they have to-date, more than 10 years after the restriction was registered on their land, not been given any notice of the registration of that restriction on the suit property. That assertion has not been contested by either of the Respondents herein and the only inference one can make is that no notice was issued as stated by the Ex-parte Applicants.

24. According to the 2nd Respondent it had placed the restrictions on the suit property in the discharge of its mandate as provided under Section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*. The said Section simply provides as follows:

“In addition to the functions of the Commission under Article 252 and Chapter six of *the Constitution*, the Commission shall:

- (i) institute and conduct proceedings in Court for purposes of recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payments of compensation or other punitive and disciplinary measures.”

25. As it were, that provision neither ousted the mandatory provisions of Section 77 of the *Land Registration Act* nor did it limit the requirements of due process. As was stated in Accounting Officer



Kenya Ports Authority -vs- Public Procurement Administrative Review Board & 3 Others (2019) eKLR:

“...It is irrelevant whether the Tribunal would have arrived at the same decision even if it had afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a Party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said Party’s contribution is unlikely to affect the decision. See Onyango Oloo -vs- Attorney General (1986 – 1989) EA 456:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted

fairly without giving an opportunity to be heard... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice ... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ... Denial of the right to be heard renders any decision made null and void ab initio.”

26. It was also apparent that when the Ex-parte Applicants came to learn of the restriction, they wrote a letter to the Respondents herein dated 30th September, 2021 seeking for the removal of the restriction. It is the Applicants case that the 1st Respondent has to-date failed to act upon and/or to respond to the said request. It is to be noted that the removal of a restriction is provided for under Section 78(1) of the [Land Registration Act](#) as follows:

“78. Removal and variation of restrictions.

(1) The Registrar may, at any time 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.”

27. That being the case, it was again clear to me that upon receipt of the letter, it was incumbent upon the Land Registrar to conduct a hearing to give all the Parties affected by the restriction an opportunity of being heard and thereafter order the removal or variation or retention of the restriction. By failing to notify the Applicants of the imposition of the restriction and again failing to hear them when they applied for its removal, the 1st Respondent acted illegally and failed to comply with mandatory provisions prescribed by the empowering statute law to the detriment of the Applicants.

28. It follows that I am persuaded that there is merit in the Motion dated 23rd November, 2022. I allow the same in terms of Prayers 3(a), (b), (c) and (d) with costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 22ND DAY OF SEPTEMBER, 2023.

In the presence of:

Mr. Otieno for the Ex-parte Applicants

No appearance for the 1st Respondent

Ms Omweri for the 2nd Respondent



Court assistant - Kendi

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J. O. Olola

JUDGE

