



**Nkoimo v District Land Registrar Transmara East, West & South
Districts & another (Miscellaneous Application E003 of 2022)
[2023] KEELC 20175 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20175 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

MISCELLANEOUS APPLICATION E003 OF 2022

EM WASHE, J

SEPTEMBER 21, 2023

**IN THE MATTER OF THE LAW REFORM ACT, 2012 READ
WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTION 73 OF THE LAND REGISTRATION ACT, NO.3 OF 2012

AND

**IN THE MATTER OF LAND REGISTRATION (GENERAL)
REGULATIONS, LEGAL NOTICE NO. 278 OF 2017**

AND

**IN THE MATTER OF: THE PURPORTED CAUTION HEARING
HELD ON THE 11TH APRIL 2022 AND THE DECISION THEREOF**

AND

**IN THE MATTER OF : AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI**

BETWEEN

ANGELINE N.NKOIMO APPLICANT

AND

**DISTRICT LAND REGISTRAR TRANSMARA EAST, WEST & SOUTH
DISTRICTS 1ST RESPONDENT**

INTONA INVESTMENTS COMPANY LIMITED 2ND RESPONDENT



RULING

1. The Applicant herein filed a Judicial Review Application on the 6th of June 2022 (hereinafter referred to as “the present JR”) seeking for the following orders against the 1st and 2nd Respondents;-
 - i. That an order of Certiorari to remove into this Honourable Court for the purposes of being quashed the Ruling and Order of the 1st Respondent made on the 19th of May 2022 removing the Caution lodged by the Ex-parte Applicant over the land known as L.R.No.Transmara/intona/5.
 - ii. That the costs of the Application be provided for.
2. The substantive grounds which the Applicant relies upon in seeking the above orders are spelt out in the body of the present JR and can be summarised as follows;-
 - a. The Applicant lodged a caution over the property known as L.r.no.transmara/intona/5 seeking beneficial interests thereof.
 - b. The 1st Respondent through an unauthorised person purported to undertake a Caution hearing on the 20th of April 2023 and 11th May 2022 contrary to the law.
 - c. As a result of the hearing undertaken by an authorised person, the lawful Caution placed by the Applicant was removed without following due process as provided in the relevant statute.
 - d. The Applicant further states that the purported hearing undertaken by the unauthorised person was devoid of rules of natural justice, illegality and/or procedure impropriety and should therefore be quashed by this Honourable Court.
3. These grounds adduced in the body of the present JR were expounded in the Supporting Affidavit sworn on the 6th of June 2022.
4. The present JR was duly served upon the 1st and 2nd Respondents herein as required in law.
5. The 2nd Respondent in reply to the present JR filed a Replying Affidavit on the 28th of July 2022 vehemently opposing the prayer sought by the Applicant.
6. The 2nd Respondent stated in their Replying Affidavit that the person who undertook the Caution hearing was an authorised officer in the office of the 1st Respondent.
7. Further to that, the 2nd Respondent gave a detailed account on how the Applicant was notified of the intention to remove the Caution, invited for the Caution hearing which she participated with her advocates in a language she would understand and therefore the outcome which the Applicant is seeking to quash is lawful and in compliance with the applicable law.
8. A perusal of the pleadings in the Court file indicates that the 1st Respondent did not enter appearance of file any written documents to this present JR Application.
9. The Applicant then filed their submissions on the 26th of October 2022 while the 2nd Respondents filed their submissions on 28th July 2022.



Analysis & Determination.

10. This Honourable Court upon perusing the pleadings and submissions of the parties herein, it is of the considered opinion that the main issues for determination can be outlined as follows:-

Issue No. 1- was the person who undertook the caution hearing authorised to do so?

Issue No. 2- if yes, did the authorised person follow the law in the hearing & determination of the caution hearing?

Issue No. 3- was the outcome of the caution hearing lawful & binding on the parties?

Issue No. 4- who bears the costs of the present jr?

11. Based on the above-mentioned issues, this Honourable Court will now proceed to evaluate and determine the same as provided hereinbelow.

Issue No. 1- was the person who undertook the caution hearing authorised to do so?

12. The first issue raised by the Applicant in the present JR is the legal authority and/or legitimacy of the one Mr. Job.M.Kobado as a Land Registrar envisaged under the *Land Registration Act*, No. 3 of 2012.

13. According to the Applicant, the person occupying the office of the 1st Respondent was one Mr. Stephen Githinji who unlawfully assigned his duties to the said Mr. Job.M.Kobado contrary to the law.

14. Indeed, Section 12 of the *Land Registration Act*, No 3 of 2012 provides for appointment of Land Registrars who are deemed to be public officers.

15. The qualifications of the persons to be appointed as Land Registrars are also expressly provided for under Section 13 and 13 A of the said *Land Registration Act*.

16. The allegation that Mr. Job.M.Kobado is not an authorised Land Registrar under Section 12 of the *Land Registration Act*, No. 3 of 2012 was made by the Applicant.

17. Despite the fact that the 1st Respondent did not file any response to the present JR, Section 107(1) and (2) of the *Evidence Act*, Cap 21 provides as follows:-

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

(2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies with that person.”

18. Referring to present JR, the Applicant did not attach any collaborative evidence by way of a witness statement or documentary evidence to prove that indeed Mr. Job.M.Kobado was not a Land Registrar as envisaged in the *Land Registration Act*, No. 3 of 2012.

19. In the Honourable Court’s considered view, this issue was very pertinent to the validity of the entire Caution hearing process and the Applicant should have taken serious steps to prove the same.

20. A simple letter of inquiry to either the Chief Land Registrar, the Deputy Chief Land Registrar or even the County Land Registrar would have provided the much needed evidence as to whether Mr. Job.M.Kobado is a duly appointed Land Registrar or not.



21. The failure to provide any such evidence would work in favour of Mr. Job.M.Kobado and against the Applicant's allegations as the same would be deemed to be mere allegations.
22. Further to that, the Applicant in the present JR confirms that two letters dated 13.04.2022 and 20.04.2022 were duly served on her by the said Mr. Job.M.Kobado.
23. Similarly, the Applicant further confirms that she attended the Caution hearing on the 20.04.2022 which was undertaken by the same Mr. Job.M.Kobado.
24. The question that begs to be answered in the mind of this Honourable Court is why did the applicant accept to receive and attend the Caution hearing if indeed Mr.Job.M.Kobado was not a duly appointed Land Registrar?
25. Why has the Applicant filed a Judicial Review Application against the 1st Respondent office if indeed Mr. Job.M.Kobado was not a Land Registrar and by extension a Public Servant under Section 12 of the *Land Registration Act*, No. 3 of 2012?
26. This Honourable Court is of the considered opinion that the Applicant's allegation that Mr. Job.M.Kobado was not a Land Registrar as envisaged in Section 12 of the *Land Registration Act*, No. 3 of 2012 is purely an after thought that was created after the determination of the Caution went against her wishes.
27. In essence therefore, this Honourable Court hereby makes a finding that Mr. Job.M.Kobado was duly authorised and/or lawfully permitted as a Land Registrar to summon, conduct and make pronouncement of the issue of the caution lodged by the Applicant.

Issue No. 2- if yes, did the authorised person follow the law in the hearing & determination of the caution hearing?

28. The Honourable Court having decided that the person undertaking the Caution hearing was duly authorised and competent to do so, the next issue for determination is whether the right procedure and rules were indeed followed.
29. The process and/or procedure of withdrawing and/or removing a caution has been specifically provided for under Section 73 of the *Land Registration Act*, No. 3 of 2012 which provides as follows;-
 - “(1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.
 - (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
 - (3) If a cautioner has not raised any objection at the expiry of the time stated, the registrar may remove the caution.
 - (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the registrar shall, after giving parties an opportunity of being heard, make such order as the registrar considers fit, and may in the order provide for the payment of costs.
30. Turning to the present JR, it is stated on Oath in paragraph D (iii) in the grounds upon which the relief is being sought contained in the Statutory Statement that the Applicant received a letter dated



- 13.04.2022 notifying her of the intention to remove the Caution as provided under Section 73 (2) of the *Land Registration Act*, No. 3 of 2012.
31. In the same Statutory Statement under paragraph D (x), the Applicant states on Oath that the Land Registrar directed her to file any objection within 14 days from the said date as is required by Regulation 80 (7) of the Land Registration Regulations.
 32. In paragraph D (xi) the Applicant again states on Oath that she received a letter dated 20th April 2022 inviting her to attend a Caution hearing to be held on the 11th of May 2022 at 10.00 am at the Land Registrar's office as provided for under Regulation 80 (8) of the Land Registration Regulations.
 33. In paragraph D (xii) the Applicant confirms to have attended the said Caution hearing on the 11th of May 2022 in the presence of the 2nd Respondent.
 34. Clearly therefore and on admission of the Applicant herein, the provisions of Section 73 of the *Land Registration Act*, No. 3 of 2012 relating to removal of a caution were indeed followed by the Land Registrar to their logical conclusion.
 35. The other aspect that the Applicant has raised an issue is the failure to serve the appropriate notices in the prescribed manner as provided in the Land Registration (General) Regulations 2017.
 36. Indeed, the Honourable Court has perused the Land Registration (General) Regulations 2017 and confirms the provision of various Forms including a prescribed Form for an application to remove a caution and a Notice For a Hearing on Application to remove a caution.
 37. However, these prescribed forms are geared towards providing sufficient information to anyone that may be affected and/or interested in the said proceedings.
 38. The notice to remove the caution served on the Applicant contained all the relevant information to bring to the attention of the Cautioner that a request to remove the caution has been made.
 39. Similarly, the Notice of a Caution hearing served on the 20.04.2021 provided the necessary information as to when the said hearing would occur, the time when it would be conducted and the place there it would take place.
 40. In fact, the Applicant who was the Cautioner even attended at the right place at the right time and to the right Land Registrar as provided in the hearing notice.
 41. In other words, although the Notices issued by the Land Registrar were not in the prescribed form, the same had the correct and adequate information and the variance was only in the form not substance.
 42. In essence therefore, this Honourable Court is of the considered view that despite the variance in form between the notices issued by the Land Registrar and the ones prescribed in the form, the Applicant was not prejudiced in any way in the process.
 43. The last issue that the Applicant has raised is the fact that the Land Registrar conducted the hearing in a manner that was contrary to the law.
 44. The Applicant pleaded and submitted that the Land Registrar denied her the chance to defend her caution by denying her a right to representation by a Counsel, undertook the proceedings in a language she did not understand and further acted on bias by stating that he was on instructions from above.
 45. First and foremost, it is important to look back at what action the Applicant took upon the service of the Notice to Withdraw the Caution served on her on 13.04.2022.



46. Section 73 (4) of the *Land Registration Act*, No.3 of 2012 provides that a cautioner objects to the withdrawal of the caution, then the cautioner shall write such an objection to the Land Registrar within the time specified in the Notice to Withdraw.
47. In the present JR, there is no letter or form that the Applicant as the Cautioner prepared and served on the Land Registrar objecting to the removal of the said Caution by the 2nd Respondent.
48. In essence therefore, even though the Land Registrar invited the Applicant for a Caution Hearing, the application to withdraw the said Caution had not been objected to in writing by the Applicant as required under Section 73(4) of the *Land Registration Act*, No. 3 of 2012.
49. Secondly, the Applicant has alleged being denied the right to legal representation.
50. The Honourable Court takes notice that in the very first letter served on the Applicant by the Land Registrar, the Advocate acting for the Applicant in this JR was also copied in the same letter.
51. In addition to the above, according to the proceedings and determination of the Land Registrar touching on the Caution hearing undertaken on 11th of May 2022 produced in this Honourable Court by the 2nd Respondent, the Applicant herein was actually represented by two Advocates namely Ms. Pion and Mr. Tuya who is the Counsel on record in the present JR.
52. In the said proceedings before the Land Registrar on the 11th of May 2022, the Applicant through the two Counsels mentioned hereinabove participated in the proceedings by claiming that their client had a claim of adverse possession and therefore the caution was properly on record.
53. It therefore goes without saying that the allegation advanced by the Applicant to the effect that the language used by the Land Registrar was not understood by her is misplaced and meant to mislead this Honourable Court.
54. Lastly is the issue that the Land Registrar was biased and acted on instructions from above.
55. Unfortunately, the proceedings and determination by the Land Registrar have clearly indicated the grounds of how the decision was arrived upon.
56. It is worthy noting that the Land Registrar wrote a detailed determination at the end of the hearing and gave reasons as to why the caution was being removed.
57. This Honourable Court under the present JR can not alter and/or debate the Land Registrar's determination if the necessary procedure and/or processes were adhered to.
58. In essence therefore, this Honourable Court does not find any form of biases by the Land Registrar as alleged by the Applicant herein.

Issue No. 3- was the outcome of the caution hearing lawful & binding on the parties?

59. In making a finding on whether or not the decision of the Land Registrar issued on 11.05.2022 was lawful and binding, the Honourable Court is guided by the authority of *Council Service Unions-versus-Minister for the Civil Service* (1894) ALL ER 935 where the Court stated as follows;-

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."



By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

60. Looking at the three broad principles which should guide Courts in making determination regarding Judicial Review Applications, this Honourable Court is satisfied that the Land Registrar exercise of his jurisdiction under Section 73 (1) of the *Land Registration Act*, No. 3 of 2012 as read with Section 73(4) of the *Land Registration Act*, No. 3 of 2012 and can not be said to have acted illegally, irrationally or with procedural impropriety to warrant a quashing of the said decision pronounced on the 11.05.2022.

Issue No. 4- who bears the costs of the present jr?

61. The last issue for determination is the who bears the costs of the present JR.
62. Costs usually follow the event and/or the party that has not been successful unless otherwise.
63. In this particular JR, the costs will be borne by the Applicant herein.

Conclusion

64. In conclusion, the Honourable Court hereby makes the following Orders as regards the Notice of Motion Application dated 6th of June 2022;-
 - A. The Notice of Motion dated 6th June 2022 be and is hereby dismissed.
 - B. The orders issued under prayer no. 2,3 & 4 of the Notice of Motion Application dated 6th June 2022 be and are hereby lifted, discharged and/or set-aside forthwith.
 - C. Costs of the Notice of Motion Application dated 6th June 2022 be borne by the applicant herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21ST OF SEPTEMBER 2023.

EMMANUEL.M.WASHE

JUDGE



In the presence of :

Advocates for the applicants: N/A

Advocates for the respondent: N/A

