



**Republic v Murang’a District Land Surveyor & another; Nyaga & another (Exparte Applicants); Murang’a District Land Registrar (Interested Party) (Judicial Review 1 of 2023) [2023] KEELC 22051 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22051 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
JUDICIAL REVIEW 1 OF 2023  
LN GACHERU, J  
NOVEMBER 30, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MURANG’A DISTRICT LAND SURVEYOR ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. AG ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NELSON NJIRU NYAGA ..... EXPARTE APPLICANT**

**ELIUD NJUGUNA UNO ..... EXPARTE APPLICANT**

**AND**

**MURANG’A DISTRICT LAND REGISTRAR ..... INTERESTED PARTY**

**JUDGMENT**

1. By a Notice of Motion dated 24<sup>th</sup> April 2023, the Expert Applicants herein Nelson Njiru Nyaga and Eliud Njuguna Uno brought this Judicial Review Application and sought for the following orders:
  - i. That the Court be pleased to issue an Order of Mandamus to compel the 1<sup>st</sup> Respondent, Murang’a District Land Surveyor, to amend the survey records of the Registry Index Map ,to read Mitubiri/Thuthua Block 1/648-740, instead of Mitubiri/Thuthua Block 1/601-647.
  - ii. That costs of the Judicial Review be provided for.
2. The said Judicial Review Application is anchored on the following grounds:



1. That the Applicants are the liquidators of Kagaa Farmers' Cooperative Society Ltd and are keen on executing their mandate which involves completing distributions of the Assets that were held by the Society and ought to be placed on members hands.
  2. That the 1<sup>st</sup> Respondent has failed to regularize the Registry Index Map (R.I.M.) despite efforts by the exparte Applicants of presenting all relevant documents showing proper records held at the Survey of Kenya Offices at Nairobi.
  3. That the exparte Applicants are apprehensive that the continued delay in regularizing the Registry Index Map (R.I.M.), continues to cause unnecessary anxiety on members and persons already in occupation on the land parcels.
- 3 The Said Judicial Review Application Is Supported By The Sworn Affidavit Of Nelson Njiru Nyaga, Who Averred That He Is A Liquidator Of Kagaa Farmers' Cooperative Society Ltd, As Is Evident From Annexure Nnn1, Which Appointment Was Extended By Gazettee Notice Annexure Nn2. He Also Averred That When They Took Over As Liquidators Of Kagaa Farmers' Cooperative Society Ltd, Among The Issues Pending Was Issuing Of Title Deeds Of Undisputed Parcels Of Land To Members. That Among These Parcels Of Land Are Mitubiri/thuthua/block 1/648-740, Which Members Have Been In Quiet Possession For Over 10 Years.
- 4 Further, that while taking up their duties, it came to their attention that the Survey Map had been interfered with through misinformation that was given to the Survey Offices. That some members have misguided that land parcel Mitubiri/Thuthua/Block 1/601-646, is the same as Mitubiri/Thuthua Block 1/648-740, which is not the case. He also averred that through Court cases, the land Parcel Mitubiri/Thuthua Block 1/648-740, has been upheld and further through directions of the Chief Land Registrar and Office of the Director of Survey, the said position was also upheld.
- 5 He further deposed that the Chief Land Registrar then, Mr. J.M.E. Njue, vide a letter dated 15<sup>th</sup> May 2001, had already outlined the process that ended the alleged subdivision of Mitubiri/Thuthua Block 1/527, to the alleged Mitubiri/Thuthua Block 1/601-646, which letter was marked NNN4.
- 6 Further, that the decision of the Chief Land Registrar above was challenged by some members vide High Court in Nairobi Judicial Review Cause No. 520 of 2001, where the Court upheld the decision of the Chief Land Registrar that the subdivision of Mitubiri/Thuthua/Block 1/601-646, was improper, unprocedural and therefore was cancelled. That no appeal has been lodged so far, and therefore subdivision of Mitubiri/Thuthua Block 1/527, to Mitubiri/Thuthua Block 1/648-740 was proper and titles were issued.
- 7 It was his further allegation that land parcels No Mitubiri/Thuthua Block 1/648-740, arose on subdivision of Mitubiri/Thuthwa Block 1/527, as evidenced by annexure NNN-6, which is a copy of the Green Card, which showed that land parcel No. Block 1/527, was closed on subdivision of Mitubiri/Thuthua Block 1/648-740. That the above subdivision was done after Consent was given and Mutation done as per annexures NNN 7 (a) & (b) and NNN 8(a) & (b) respectively. He also claimed that since the Land Registry had already issued titles of Mitubiri/Thuthua Block 1/648-740, which means that the Registry Index Map was previously issued that resulted to the registration of the titles. Therefore, Murang'a District Land Surveyor should be ordered to amend the Registry Index Map as the time of Liquidators lapses on December 2023 as per Gazette Notice (NNN2), which time the Liquidators are supposed to have fully carried their mandate.
- 8 He claimed that there has been undue delay in having the Registry Index Map amended to read Mitubiri/Thuthua Block 1/648-740, due to malicious acts and lies by some members of the Society under liquidation which have resulted in misguidance to the office of the 1<sup>st</sup> Respondent. The



Applicant therefore alleged that the undue delay in amending the Registry Index Map has caused unnecessary anxiety on persons who are in occupation and their rightful owners of Mitubiri/Thuthua Block 1/648-740. He deposed that in the interest of justice, then the 1<sup>st</sup> Respondent should amend the said Registry Index Map to properly read Mitubiri/Thuthua Block 1/648-740.

- 9 The Respondents herein did not enter appearance nor file any response to the Judicial Review though on 6<sup>th</sup> June 2023, Mr. Motari for the Attorney General had requested for 7 days to respond to the Judicial Review. The Court granted the AG leave to file a Replying Affidavit and the matter was to be heard on 4<sup>th</sup> July, 2023. Come 4<sup>th</sup> July 2023 and the AG was absent in Court and had not complied. Therefore, the Court marked the Judicial Review as unopposed and directed the exparte Applicants to file written submissions within 21 days and the same was to be determined on merit.
- 10 The exparte Applicants filed their Written Submissions on 8<sup>th</sup> August 2023, through M.M. Muriuki & Co. Advocates.
- 11 The Exparte Applicants Submitted That Mandamus Is A Prerogative Order Issued To Certain Cases To Compel The Performance Of Duty. They Relied On The Case Of Shah Vs The Ag Ea 1969 (1970) Ea 543, Where J. Gondle Held That:

“It is an Order issued to compel the Public Officers to perform duties imposed upon them by the common law or statute, and is also applicable in certain cases where duty is imposed by an Act of Parliament”

Therefore, the Respondents herein had a duty to act to amend the Registry Index Map.

- 12 Reliance was placed in the case of Kenya National Examination Council VS Republic: Exparte Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR, where the Court addressed the scope of Mandamus and referred to as Halsbury laws of England 4<sup>th</sup> Edition as follows:

“..... they mean that an Order of Mandamus will compel the performance of public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right and expect the duty to be performed:”

- 13 It was also submitted that the parcels of land affected are owned by members of the Society (on Liquidation), who have been in peaceful occupation for many years and due to that interference with the map, it has caused anxiety upon the said members.
- 14 Reliance was also placed in the case of Republic VS Principal Secretary, Ministry of Internal Security & Another. Exparte Schon Norrah & Another (2018) eKLR, where the Court held:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for Mandamus is set out in Apotex Inc VS Canada (AG) 23 stating facts which must be present for Court to issue:-

1. There must be a public legal duty to act.
2. The duty must be owed to the Applicants
3. There is a clear right to performance of that duty, meaning that:
  - (a) The applicant has satisfied all conditions precedent; and



- (b) There must have been:
  - (i) A prior demand for performance;
  - (ii) A reasonable time to comply with the demand, unless there was outright refusal; and
  - (iii) An express refusal, or an implied refusal through unreasonable delay;
- 4. No other adequate remedy is available to the Applicants;
- 5. The order sought must be of some practical value or effect
- 6. there is no equitable bar to the relief sought;
- 7. On a balance of convenience, mandamus should lie.

15 It was also submitted that the ex parte Applicants have demonstrated that they have issued several demands to have the 1<sup>st</sup> Respondent to amend the Registry Index Map to no avail. That the action of 1<sup>st</sup> Respondent implies refusal and thus the delay is unreasonable. Further that the ex parte Applicants work within specific time and are known to distribute assets of the Society to its members and the actions of the 1<sup>st</sup> Respondent have frustrated the said ex parte Applicants. It was further submitted that the 1<sup>st</sup> Respondent has failed to give any response and reasons to the unreasonable delay in amending the Registry Index Map.

16 Reliance was also placed in the case of *Zakayo Michubu Kibwange VS Lydia Kagina Japheth & 2 Others* (2014) eKLR where the Court held:

“.....Further, that a person seeking Mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the Mandamus orders is sought .....”

17 Therefore, it is clear that the ex parte Applicants legal right has been suppressed when the 1<sup>st</sup> Respondent failed to perform their duty to amend the Registry Index Map: Reliance was placed on Article 47(1) of the Constitution of Kenya 2010 which states:

- i. “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- ii. 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....”

18 Further, it was submitted that the actions of the 1<sup>st</sup> Respondent to refuse to amend the Registry Index Map, is infringing on the right of persons who legally are in occupation of the parcels of land.

19 This Court has considered the pleadings in general and the decided cases cited, especially the holdings of the Court of Appeal on the nature of remedy of Mandamus in its decision in the case of *Republic VS National Examination Council; Ex parte Gathenji & 9 others* (supra), where it held:

“The Order of Mandamus is of a most extensive remedial nature and is in form a command issued from the High Court directed to any member, corporation or inferior tribunals requiring him or them to do some particular thing therein specified which appertains to his or their office or is in the nature of public duty-----



20 What do these principles mean –

“They mean that an order of Mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

21 Being guided as above, the Court finds the issue for determination is whether the 1<sup>st</sup> Respondent (Murang’a District Land Surveyor) has a public duty or obligation to perform or satisfy, so that the Court can be duty bound to issue orders in favour of the exparte Applicants herein. If such duty exist, are the exparte Applicants entitled to the orders sought?

22 Under the Survey Act, the Director of Survey or the person delegated by him is supposed to issue a Registry Index Map for any area that has been subdivided. See Section 30(1) of the Survey Act, which states;

“Every surveyor who executes any survey in accordance with the provisions of this Act and of any regulations made thereunder shall send to the Director all plans, field notes and computation relating thereto, and all such plans, field notes and computations shall be deposited in the Survey Office and shall become the property of the Government”

23 The 1<sup>st</sup> Respondent was supposed to carry the above duty but, has failed to do so. It is evident from the provisions of section 32 of the said Survey Act without having the Registry Index Map amended and send to the Director, the suit properties will not be deemed to have been surveyed, and that failure will thus hinder the exparte applicants from concluding their mandate as liquidators. The said section 32 reads as follows;

“No land shall be deemed to have been surveyed or resurveyed until the plan thereto has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by affixing of the seal of the Survey of Kenya”

24 The Registry Index Map (RIM) is a map that covers a large geographic area in which the land to be subdivided lies and the said R. I.M is prepared once the plan is send to the Director. After getting the map, the Surveyor visits the land where he/she might take some ground measurements indicated on the Maps and the exact measurements on the ground.

25 The exparte Applicants have alleged that the land in dispute was initially Mitubiri/Thuthua Block 1/527, which was later subdivided but through some confusion it was given registration numbers as Mitubiri/Thuthua Block 1/601-646, whereas it was supposed to be Mitubiri/Thuthua Block 1/648-740.

26 The Court has seen a letter from the Chief Land Registrar J.M.E. Njue, which indicated that subdivision of Mitubiri/Thuthua Block 1/527, to Mitubiri/Thuthua Block 1/601-646 was not properly done.

27 The Court too has seen the letter dated 25<sup>th</sup> August 2022, from J.W. Kamuyu, Land Registrar Thika, confirming that they have cancelled land parcels No. Mitubiri/Thuthua Block 1/1120-1393, which were a subdivision of Mitubiri/Thuthua Block 1/647, and have reinstated title numbers Mitubiri/Thuthua Block 1/648-740, which were resultant subdivisions of block 1/527. There is evidence that land parcel No. Mitubiri/Thuthua Block 1/527, was subdivided into various plots and title deeds were issued. The Court too has seen various correspondences on the cancellation of R.I.M. in respect of land parcels No Mitubiri/Thuthua Block 1/601-646.



- 28 In the letter dated 28<sup>th</sup> October 2015, the Ag. Chief Land Registrar had requested the Director of Survey to cancel the R.I.M. for Mitubiri/Thuthua Block 1/601-646, and replace the same with R.I.M. for Mitubiri/Thuthua Block 1/648-740.
- 29 Further, there was a confirmation letter dated 2<sup>nd</sup> December 2015 confirming that R.I.M. for Mitubiri/Thuthua Block 1/601-646, was cancelled and was replaced by parcels No. Mitubiri/Thuthua Block 1/648-740. Indeed, land parcels No Mitubiri/Thuthua Block 1/601-646, were cancelled. Therefore, it was obvious that with the above development, then the R.I.M. was to be amended to reflect the new land parcels being Mitubiri/Thuthua Block 1/648-740.
- 30 The exparte Applicants have averred that the 1<sup>st</sup> Respondent has failed to amend the R.I.M. and therefore, they cannot fully carry out their mandate effectively of being the Liquidators of Kagaa Farmers' Cooperative Society. Preparing the R.I.M. is the mandate of the District Land Surveyor, and his duty is a public legal duty and the said duty is owed to the exparte Applicants and members of Kagaa Farmers' Cooperative Society. The District Land Surveyor has a legal duty to perform and failure to perform the same will suppress the rights of the members of Kagaa Farmers' Co-operative Society, whom the exparte Applicants are representing herein.
- 31 The 1<sup>st</sup> Respondent has had time to comply, but has failed to do so. For amendment of R.I.M. there is no other remedy as the 1<sup>st</sup> Respondent has to do what is required of by law and R.I.M. cannot be replaced with anything else.
- 32 The 1<sup>st</sup> Respondent has a duty to amend the referred R.I.M. to reflect the new titles being Mitubiri/Thuthua Block 1/648-740. There is no doubt that the other Public Officers have authorized the cancellation of the old R.I.M. and amendment of the same to reflect the new land parcels. The 1<sup>st</sup> Respondent has not done its duty and this is an implied refusal, to perform what is required to be done legally.
- 33 It is paramount that the 1<sup>st</sup> Respondent should comply and allow the exparte Applicants to carry out their duties of being Liquidators before their terms comes to an end in December 2023. Accordingly, the Court finds and holds that the Notice of Motion Application dated 24<sup>th</sup> April 2023, as brought by the exparte Applicants is merited and the same is allowed entirely in terms of prayer No.2, of the said Notice of Motion Application with costs to the exparte Applicants.
- 34 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**L. GACHERU**

**JUDGE**

Delivered virtually in the presence of:

M/s Mwirichia – for Exparte Applicants

No appearance by 1<sup>st</sup> Respondent

No appearance by 2<sup>nd</sup> Respondent

No appearance by Interested Party

Joel Njonjo - Court Assistant.

