



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 75 OF 2016

**IN THE MATTER OF: AN APPLICATION BY WAINAINA KIGATHI MUNGAI FOR ORDERS
OF MANDAMUS**

AND

IN THE MATTER OF: THE LAND ACT & THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF: THE REGISTERED LAND ACT (REPEALED)

AND

**IN THE MATTER OF: SECTION 1A & 1B OF THE CIVIL PROCEDURE ACT CAP 21,
ARTICLE 159(2) OF THE CONSTITUTION**

BETWEEN

WAINAINA KIGATHI MUNGAI.....APPLICANT

VERSUS

1. LAND REGISTRAR KILIFI

2. PS, MINISTRY OF LANDS.....RESPONDENTS

RULING

The Application

1. The Notice of Motion application before the court is dated 24th October, 2016 and filed here on 25th October, 2016 by the ex parte Applicant herein. The application is for a Judicial Review order of mandamus, and is filed pursuant to leave granted on 17th October, 2016 by this court. The application prays for the following orders:

1. That this Honourable Court do issue an order of mandamus compelling the Land Registrar at Kilifi to issue the Applicant with an official search and a certified copy of green card in respect to parcel of land known as Kilifi/Mtwapa/209 situated at Mtwapa in Kilifi County.

2. That the costs of this application be provided for.

2. The application is premised on the grounds that the Applicant on 17th August, 2015 applied for an official search from the 1st Respondent in respect to the parcel of land known as Mtwapa/Kilifi/209 situated in Mtwapa Kilifi County and paid the requisite fee. However, the 1st Respondent has to-date failed, refused and/or neglected to issue the Applicant with an official search in respect of the said parcel of land. The 2nd Respondent is alleged to have failed, refused and or ignored to accord any assistance to the Applicant. Due to the foregoing reasons, the Applicant's case is that the Respondents have acted ultra vires, unreasonably and failed to exercise their discretion if any, judicially. The Applicant now believes that the Respondents have illegally and unlawfully tampered with the official records as to ownership of the parcel of land known as Kilifi/Mtwapa/209 situated at Mtwapa in Kilifi County, and hence the said prayers for Judicial Review.

3. The application is supported by statement of the ex-parte Applicant filed herein on 25th October, 2016 and a Verifying Affidavit sworn on 24th October, 2016, and a Supplementary Affidavit sworn by the Applicant on 25th February, 2017.

The Response

4. The application is opposed by the Respondents vide Grounds of Opposition filed in court on 3rd February, 2017 and also vide Replying Affidavit sworn by Felix Nyakundi, the Lands Registrar, on 3rd February, 2017. The Respondents' case is that the application is an abuse of the court process and that the prayers sought exceed the scope of an order of mandamus as set out in **Civil Appeal No. 266 of 1996 (CAK 1997) Kenya National examination Council vs. Republic Ex-parte Geoffrey Gathenji**. The Respondents' case is that this court has no jurisdiction to in view of Section 79 (1) (a) of the Land Registration Act, 2012.

5. Further, the Respondent states that the register in respect of Mtwapa/Kilifi/209 has an omission in respect of the acreage of the land, and that as a consequence the Registrar of Lands cannot issue a defective certificate in respect of the said parcel of land. The Respondent's case is that the Registrar has severally advised the Applicant to engage the District Surveyor to prepare an official report on the acreage of the suit property.

Submissions

6. Parties made oral submissions in court which I have considered. The issues I raise for determination are as follows:

(i) Whether the Application is an abuse of the court process.

(ii) Whether this court has no jurisdiction pursuant to Section 79(1) of the Land Registration Act, 2012.

(iii) Whether the prayers sought exceed the scope of an order of mandamus.

The Determination

7. On the first issue, as to whether this application is an abuse of the court process, it is to be noted that the Applicant is a citizen of this country, and the proprietor of the suit property. The Applicant is entitled at any time to seek for a certificate of search, and upon payment of the requisite fees, the Applicant is entitled to be given a valid certificate of search by the 1st Respondent. This is exactly what the Applicant did. But the Respondents have failed to provide the certificate of search despite accepting the requisite fees from the Applicant. The Applicant, in order to enforce his rights, came to court to compel the Respondents to do what they are required to do in law. What else did the Respondents expect this ex –

parte Applicant to do? To take a stone and rungu and beat senseless the Registrar? God forbid that. The Applicant took the right action of coming to court and to explain to the court his predicament. The court will examine the Applicant's predicament and claim, and make a Ruling guided by the law. It is therefore preposterous for the Respondents to submit that the Application is abuse of the court process. It is not.

8. As for issue No. 2, Section 79(1)(a) of the Land Registration Act, 2012 states as follows:

“79(1)The Registrar may rectify the register or any instrument for registration in the following cases–

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor.”

9. The Respondent submitted that the above Section means that this court has no jurisdiction to direct the Registrar to issue a certificate of search as prayed. However, upon proper construction of that section, and upon proper consideration of prayers being sought, this court finds that Section 79(1)(a) of the said Act is not applicable in this matter. The application before the court is merely to compel the Registrar to issue a certificate of search to the ex-parte Applicant. The ex-parte Applicant has not asked the Registrar to correct any omissions or any errors. My understanding is that the certificate of search is simply a mirror of what is contained in the title. If the title is in anyway defective, the certificate of search will merely reveal that. It is now upon the proprietor, acting on such defects that may be revealed by the search, to seek appropriate remedies from the Registrar. These remedies may then include the need to amend or rectify errors and omissions. In performing these rectifications, Section 79(1) (a) then comes into play and determines the boundaries within which the Registrar must operate. At this stage, however, the Applicant merely wants to be issued with a certificate of search to see what is contained in the title. The Applicant has not asked that any errors or omissions be corrected. In this matter, the Registrar has admitted that the register does not give details as to acreage. Whether that omission is by mistake or whether it is fundamental, only the Registrar knows. It is upon the Registrar to issue the required certificate of search, and at the same time note deficiencies if any, thereof, and advise the Applicant what may be done to carry out any rectifications or omissions.

10. The Registrar has stated herein that he had advised the Applicant to ask the District Surveyor to carry out the survey to determine the acreage of the suit property. However, there was no evidence of any such communication from the Registrar to the ex-parte Applicant. Even then, it is the view of this court that the Registrar is the legal custodian of all titles to land and where there is a defect in a title revealed by a search, it is the Registrar to initiate the relevant process of rectification of omissions and errors, and where his powers could be curtailed under Section 79(1) of the Land Registration Act, to initiate an all-inclusive process, involving all the parties whose interests could be affected by such rectification. To merely leave the matter for the Applicant is not fair, given that the Applicant is the lawful proprietor of the suit property pursuant to a lawful transfer. If the title does not have the acreage section as alleged, it is the duty of the Registrar to put in place adequate procedure to rectify the situation. The Applicant is a lawful holder of title pursuant to a lawful transfer.

11. Having found that Section 79(1) (a) of the Land Registration Act is not applicable, it is also the finding of this court on the issue number 3 that it is within the scope of this court to issue the prayers sought.

12. Accordingly therefore, the application before the court is merited. The same is allowed in terms of prayer No. 1 but each party shall bear own cost.

Orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of

April, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Guyo for 1st and 2nd Respondents

Mr. Kaunda Court Assistant