



REPUBLIC OF KENYA



KENYA LAW

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Marigi v National Land Commission (Environment and Land Judicial Review Miscellaneous Application 64 of 2019) [2023] KEELC 22344 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22344 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

**ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 64 OF 2019**

MN GICHERU, J

DECEMBER 19, 2023

**IN THE MATTER OF AN APPLICATION BY GABRIEL GACHIGO
MARIGO FOR LEAVE TO FILE JUDICIAL REVIEW PROCEEDINGS
FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT, NO. 5 OF

2012

AND IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS

OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACTION RULES

BETWEEN

GABRIEL GACHIGO MARIGI APPLICANT

AND

NATIONAL LAND COMMISSION RESPONDENT



JUDGMENT

1. The applicant vide the notice of motion dated 8/12/2021 seeks the following reliefs against the respondent:
 - i. That an order of certiorari do and is hereby issued to bring into this honourable court for the purposes of being quashed.
 - a. The decision purportedly issued through a letter dated 12/6/2019 (herein after referred to as “the letter) by the respondent that the applicant’s property known as plot No. 10 (New Number A430) Emali Trading Centre, suit land, by resolving that it belongs to Joseph Leyepa C/O Joshua Moshira.
 - b. The Direction and/or order purportedly issued in the letter requiring the chief officer lands to implement the decision therein by effecting the changes to reflect Joseph Leyepa C/O Joshua Moshira as the owner of the suit land.
 - ii. That an order of prohibition be and is hereby issued retraining the respondent or chief officer lands or its agents, servants and/or its employees or any other person at its behest from effecting the changes in the official Government records to reflect Joseph Leyepa C/O Joshua Moshira as the owner of the suit land.
 - iii. That the costs of this application be provided for.
2. The motion is supported by a verifying affidavit dated 9/7/2019 filed while seeking leave to commence judicial review proceedings and annexures. In brief the applicant states as follows:
3. Firstly, the applicant is the registered owner of the suit land which he bought from Koisan Ole Pemba on 18/10/1987. Ole Pemba had been allocated the land on 11/1/1983 through letter of allotment No. Occ.LND.16/Emali/TM/Res/LTS/ Allot/1/1/10.
4. Ole Pemba satisfied all his obligations required of him by paying rates to the local authority after which he was issued with a rates clearance certificate number 2358.
5. The applicant after the transfer of the suit land to himself continued with his obligation of payment of rates as per the receipts, which are all exhibited.
6. Fourthly, the applicant commenced development of the suit land by digging a pit latrine and depositing ballast for construction purposes. He also constructed a semi-permanent structure, which was demolished by some unknown people.
7. Fifthly, the suit land is separated from plot numbers 14 and 15 by a metre road according to the official map of Emali Trading Centre.
8. Sixthly, the respondent carried out a validation exercise in the absence of the applicant and reached a decision that the suit land belongs to Joshua Ole Moshira.
9. Seventhly, the applicant complained to the respondent about this decision but instead of repeating the validation exercise, the respondent illegally, unlawfully and unprocedurally set up a committee that merely declared the suit land to belong to Joseph Leyepa C/O Joshua Moshira. The letter making this declaration directed the chief officer lands to effect those changes in the official records.



10. This suit is aimed at quashing the decision of the respondent for condemning the applicant unheard and failing to observe the Constitutional tenets of affording parties to a dispute a fair hearing.
11. The motion is opposed by the respondent and its director of legal affairs, Brian Ikol, has sworn a replying affidavit dated 15/2/2023 in which he replies as follows:
12. Firstly, it is the County Government that established a joint committee to hear and resolve Land disputes in the County so the decision is not solely attributable to the respondent.
13. Secondly, the letter that the applicant complains of falls short of Order 53 Rule 7 Civil Procedure Rules which requires the filing of an order, warrant, commitment, conviction or record to be quashed.
14. Thirdly, the suit as filed is not in the proper form of a judicial review application for failure to put the state as the applicant and the current applicant, as the *ex parte* applicant. For the above reasons the suit ought to be struck out.
15. Counsel for the parties filed written submissions on 17/11/2022 and 16/5/2023 respectively. The issues identified by counsel are as follows:
 - a. Whether the prerogatory orders of certiorari and prohibition should issue.
 - b. Whether the letter dated 12/6/2019 is a decision capable of attracting the orders sought.
 - c. Whether the application is properly before the court.
 - d. Whether costs should be awarded in this case.
16. I have carefully considered the motion in its entirety including the grounds, the verifying affidavit, the annexures, the replying affidavit, the submissions, the issues and the law cited in the submissions and I make the following findings on the issues raised.
17. Regarding whether the suit is properly before the court, I find that it is. This is a case where the applicant is saying that land which he occupied from 1987 and for which he has been paying rates was found to belong to another in proceedings where he was not invited. This deposition by the applicant is not disputed by the respondent. What the respondent says is that the suit does not conform to be usual form where the state must be named by applicant. I find that the decisions referred to by the respondent predate the Constitution which provides in Article 159(2) (d) as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(d) Justice shall be administered without undue regard to procedural technicalities”
18. In my finding, the absence of the state as the applicant does not invalidate the suit. This failure is curable under Article 159 (2) (d) of the Constitution. After all the necessary parties have joined in the suit.
18. The letter dated 12/6/2019 is the one, which took away the applicant’s land. Without it, the land would still be the applicants. Once it is quashed, the suit land will revert to the applicant. It is therefore the one that needs to be quashed. It takes the place of the order envisaged by Order 53 Rule 7. It is already on record and it is signed by an officer of the respondent.



19. I find that the Order of Certiorari should issue because the applicant was not granted a fair hearing by the joint committee that heard the dispute. This was contravention of Article 50(1) of the Constitution which provides as follows:

“ Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”

By hearing the dispute in the absence of the applicant and by failing to invite him for the exercise, the joint committee acted contrary to the Constitution.

20. Finally, on costs, I find that they should be awarded to the successful party as required by Section 27 of the Civil Procedure Act. There exists no reason to deviate from the requirements of this provision of Law.

21. For the above stated reasons I find merit in the notice of motion dated 8/12/2021 and I allow it in terms of prayers (i), (ii) and (iii). It is so ordered.

DELIVERED, SIGNED AND DATED ON THE 19TH DAY OF DECEMBER, 2023 AT KAJIADO

M. N. GICHERU

JUDGE

