



Republic v District Land Adjudication & Settlement Officer Meru Central & 2 others; Kangethe & another (Exparte Applicants); Ngai (Interested Party) (Judicial Review E005 of 2022) [2023] KEELC 22402 (KLR) (14 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW E005 OF 2022**

CK YANO, J

DECEMBER 14, 2023

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS
AGIANST THE DISTRICT LAND ADJUDICATION & SETTLEMENT
OFFICER & LAND REGISTRAR – MERU CENTRAL**

AND

**IN THE MATTER OF LAND PARCELS NO. IMENTI SOUTH MWERU III
1864 & 689**

BETWEEN

REPUBLIC APPLICANT

AND

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER MERU
CENTRAL 1ST RESPONDENT**

LAND REGISTRAR 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

LOISE NJIRU KANGETHE EXPARTE APPLICANT

NICHOLAS KIMATHI KANGETHE EXPARTE APPLICANT

AND

FRANKLINE GITONGA NGAI INTERESTED PARTY



JUDGMENT

1. Pursuant to leave granted by the court on 30th June 2022, the ex-parte applicants instituted Judicial review proceedings vide a notice of Motion dated 13th July, 2022 seeking an order of mandamus to compel the 1st respondent to rectify the adjudication records (AR) indicating the correct acreages of LR. NO. Imenti South Mweru III/1864 and to compel the 2nd respondent to cancel the erroneous title deeds, amend his records and re-issue fresh title deeds to the ex-parte applicants and interested party respectively. The application is brought under Order 53 Rule 3 of the Civil Procedure Rules, 2010 and is supported by the statement of facts dated 29th June 2022 and the verifying affidavit sworn by the 1st ex-parte applicant on 29th June 2022 in which he has annexed copies of the proceedings and decision in objection No. 153 dated 12th February, 2014, copy of the Adjudication Records for parcel No. 1864 as at 20th February, 2014, copy of the Register, copy of the Adjudication Record for parcel No. 869 as at 30th October, 2014, copies of the search certificates for the said two parcels, a copy of the ex-parte applicants title deed and copies of letters dated 28th October, 2019 and 22nd March 2022. The ex-parte applicants aver that they are the registered owners of LR. no. Imenti South Mweru III 1864 whereas the interested party is the registered owner of LR. no. Imenti South Mweru III/ 869.
2. The ex-parte applicants further aver that upon determination of objection No. 153 in respect to P/ No 689, Flora Wanja was awarded 2 acres from the said parcel and the balance was to remain with the original P/No. 689. The ex-parte applicants claim to have purchased the said 2 acres from the said Flora Wanja. That subsequently and pursuant to objection No. 1120, P/No. 1864 was transferred from the said Flora Wanja to the ex-parte applicants, but the acreage of the land parcel in the Adjudication Record (AR) had erroneously been indicated as 0.03 hectares instead of 0.78 hectares. That acting on the erroneous information in the AR, the 2nd respondent registered the acreage of P/No. 1864 as 0.03 hectares and P/No. 689 was registered as 0.78 hectares. That subsequently, the 2nd respondent issued the ex-parte applicants and the interested party herein with their respective title deeds, albeit on the alleged erroneous acreage. The ex-parte applicants contend that it is imperative to compel the 1st respondent to rectify the AR in respect of the said parcels to indicate the correct acreages and to compel the 2nd respondent to re-issue fresh title deeds indicating those correct acreages.
3. The application is opposed by both the respondents and the interested party. By an affidavit sworn on 23rd June 2023 by Frankline Gitonga, the interested party admits that he is the registered proprietor of L.R no. Imenti South Mweru III/689 measuring 0.78 hectares and was duly issued with a certificate of title on 7th July, 2017 upon the determination of demarcation, adjudication and registration process. That contrary to the allegations proffered by the ex-parte applicants, the interested party was recorded owner of the suit land during the adjudication process and that no objection had been lodged disputing his ownership or the acreage of the said land.
4. The interested party avers that parcel No. 689 was initially family land measuring approximately 6 acres that was allocated to his late grandfather, one Bernard Ndereba who distributed it to his sons, and the interested Party's uncles one Aaron Kimathi and one Bernard Kimathi Dedan in the year 2010 who were then the custodians of the family land. That the adjudication record clearly demonstrates that the acreage of land parcel No. 1864 was approximately 0.03 Ha as of the year 2011 and that the allegation that the acreage was erroneously indicated is an afterthought and a mischievous attempt to hoodwink the Honourable court.



5. The interested party avers that he has been utilizing the whole suit land since his childhood in the lifetime of his father by planting maize, beans and peas crops. That their exclusive possession was only threatened around the year 2018 when one Geoffrey Muriuki Manene started trespassing on the land and threatened to occasion harm upon the interested party and his family if they dared continue utilizing the land. The interested party further avers that the ex-parte applicants are strangers to him and denied that they are innocent purchasers of parcel No. 1864. The interested party states that he is astonished that the ex-parte applicants would purchase land without conducting due diligence and or visiting the locus in quo or involving the office of the District Surveyor to ascertain the true acreage of what they were purchasing.
6. The interested party avers that he has never been involved in the objection proceedings adduced to by the ex-parte applicants. It is the interested party's contention that if the issues raised are justified, the same ought to have been raised during the adjudication process and not upon the registration of the title deeds under a new legal regime. He pointed out that the ex-parte applicants were issued with their title deed in the year 2017 and they never raised any issues on the acreage of the suit land, adding that no justification whatsoever has been tendered why the issues are being raised after about 5 years. The interested party avers that he acquired an indefeasible title of the subject parcel of land after following due process and accused the ex-parte applicants of approaching the court with unclean hands and of making vague and baseless allegations in a bid to muscle the interested party to relinquish ownership of the land.
7. Relying on advice, the interested party states that the court lacks jurisdiction to hear and determine the application as the titles being challenged were issued in 2017 which is more than 5 years after the challenged decision and that the delay is inordinate. That the application is littered with falsehoods and falsified documents motivated by greed to grab the interested party's share through the backdoor and prayed for it to be dismissed with costs. In the affidavit, the interested party has annexed copies of a search, a letter from the adjudication officer showing his ownership during the adjudication process receipts, the adjudication record and police abstract.
8. The respondents opposed the application and filed grounds of opposition on the following grounds-;
 1. That the orders sought in the application require the court to investigate the issue of ownership and acreage of the suit land, to wit the merit review exercise is beyond the remit of the court as a Judicial review court.
 2. That the 1st respondent is no longer seized of jurisdiction over the suit land since the same is now registered under the [Land Registration Act 2012](#).
 3. That the 1st and 2nd respondents complied with the requisite requirements in the adjudication process and in the registration of the certificates of title over the suit land.
 4. That the application offends the doctrine of exhaustion of statutory and administrative remedies by failing to seek administrative remedies provided for in law before seeking judicial intervention.
 5. That the applicant did not exhaust the remedies set out in Section 29 of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
 6. That this Honourable court lacks jurisdiction to determine the matter by dint of Section 29 of the [Land Adjudication Act](#) and Section 9 of the Fair Administrative Actions Act 2015.



7. That the application herein is an afterthought, the ex-parte applicant having been issued with the certificate of title in 2017 and hence indolent in prosecuting their alleged interest over the suit land.
8. That this application is an abuse of court process and should be struck out and/or dismissed with costs to the respondents.
9. The application was canvassed by way of written submissions. The ex-parte applicants filed their submissions dated 26th September, 2023 through the firm of Kaumbi & co. Advocates while the respondents filed theirs dated 12th October 2023 through the Honourable Attorney General and the interested party filed his submissions dated 13th October, 2023 through the firm of Okubasu Munene & Kazungu LLP Advocates.
10. In their submissions, the ex-parte applicants gave a background of the matter and identified the sole issue for determination to be whether the decision of the adjudication officer pursuant to objection No. 153 was implemented in its entirety, and if not, whether this court has the power to compel such implementation. Learned counsel for the ex-parte applicants relied on the case of R. Vs Magistrate's Court – Mombasa Absin Synergy Ltd ([2022] KEHC where Mativo J. held as follows-;

“The jurisdiction of judicial review is supervisory jurisdiction. It reflects the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. The role of the court in Judicial review is supervisory.”
11. In answering the question whether the 1st and 2nd respondents exercised their mandate and implemented it as per the law, learned counsel for the ex-parte applicants discussed the process of adjudication as provided under the [Land Adjudication Act](#) Cap 284 Laws of Kenya. They submitted that the procedure of ascertaining the interest of individuals in land is contained in part III of the [Land Adjudication Act](#) and cited Section 13 of the said Act which provides that any person with an interest in land in an adjudication section shall make a claim to the recording officer and any or all conflicting interests are heard and determined by a committee in accordance with the recognized customary land.
12. Learned counsel for the ex-parte applicants also cited Section 23 of the said Act which provides that upon determination of rights, an adjudication record is prepared. That the record shall comprise of the number of parcels as shown on the demarcation map and its approximate areas and the name and description of the owner. That the demarcation map and the adjudication record together form the adjudication register. That upon the publication of the register, any aggrieved person may file an objection and the adjudication officer will then determine the objection and thereafter alter the adjudication register to conform with any determination of the objections.
13. They also cited Section 29 which provides that any person who is aggrieved by the decision of the Adjudication Officer may appeal to the Minister. If no appeal is preferred within the prescribed period, the Director of Land Adjudication shall alter the duplicate register to conform with his decision and sent a certified copy to the Chief Land Registrar who shall alter the adjudication register accordingly.
14. The ex-parte applicants counsel submitted that from the above process of ascertaining individual interests in land, adjudication and finally registration is what ought to have been strictly followed in the subject matter herein. That it is not in dispute that the decision of the adjudication officer was that P/ No. 1864 was 2 acres and the register therefore should have been altered in conformity to the decision of the Adjudication Officer and forwarded to the Chief Land Registrar for registration. Learned counsel



for the ex-parte applicants relied on the case of *Munyua Maina Vs Hiram Githiha Maina*, CoA Civil appeal No. 239 of 2009 in which it was held that-;

“... When a registered proprietor’s roots of title is under challenge, it is not sufficient to dangle the instrument of title that it is in challenge, the registered proprietor must go beyond the instruction and prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances,” and submitted that the interested party ought to demonstrate how his P/No. 689 indicates 2 acres yet the adjudication officer’s decision was that P/No. 1864 is 2 acres. That the interested party also tires to evade the aspect of occupation since he does not occupy 2 acres but only a small portion that remained after the 2 acres were decreed to P/No. 1864.

15. The ex-parte applicants urged the court to find that their prayer for an order of mandamus to compel the 1st and 2nd respondents herein to rectify their records is well grounded and valid. That what the 1st and 2nd respondents do not wish to admit is that the updating and registration of their records were made hurriedly due to political pressure and therefore they ultimately messed up with the registration of people’s interests as evidenced in this suit.
16. The respondents identified two issues for determination, that is whether the Honourable court has jurisdiction to determine the matter and whether the ex-parte applicants are entitled to the orders sought.
17. Regarding the first issue, the respondents submitted that Judicial review order proceedings are anchored under Article 47 of *the Constitution* and the *Fair Administrative Action Act* 2015. That Section 7 of the Fair Administrative Act 2015 provides that any person aggrieved by an Administrative Action or decision may apply for review of the Administrative Action or decision and the court may review the said action if the person who made the decision was biased, failed to take into account relevant considerations or did not comply with a mandatory procedure.
18. The respondents submitted that it is trite law that judicial review is concerned with the decision-making process and not the decision itself and relied on the case of *Republic Vs Anti counterfeit Agency exparte Caroline Mangala t/a Hair Works Saloon (2019) eKRL* and *Republic vs Public Procurement Administrative Review Board & 3 others ex-parte Saracen Media Limited (2018) eKRL*.
19. The respondents further submitted that the process followed by the 1st respondent herein was proper and within the confines of the *Land Adjudication Act* Cap 284 laws of Kenya. That the adjudication record and register for Mweru III was prepared and the same was available for inspection by members of the public.
20. The respondent cited Section 26 of the *Land Adjudication Act* which provides that any person affected by the adjudication register should object to the adjudication officer within sixty days and stated that the duty was on the applicants to object to the register within 60 days and the failure on their part to enforce their alleged claim within the stipulated timelines cannot be equated to an illegality or unreasonableness on the part of the 1st respondent. The respondents submitted that these proceedings are an attempt to circumvent the procedure and limitation of time set out under Section 26 of CAP 284 Laws of Kenya.
21. The respondents submitted that the assertion that the 1st respondent erred in recording the applicant’s acreage is rebuttable. That the interested party alleged that the acreage as noted down is correct and that the suit is an attempt to get his land. The respondents submitted that it would require the court to investigate issues of ownership and acreage of the suit land which they submit, involves a merit



review exercise which is beyond the remit of the court as a judicial review court. That an investigation as to whether the acreage as recorded in the title issued to the applicants and the interested party was erroneous is a fact finding and fact resolution exercise not suitable for judicial review proceedings. The respondents submit that this calls for a full hearing and proof before the trial court. The respondents relied on the case of Republic Vs National Transport & Safety Authority & 10 others ex-parte James Maina Mugo (2015) eKLR and submitted that the application is an attempt to have contested issues as to the proper acreage of the suit properties determined via judicial review proceedings rather than approaching the court through the proper forum. To this end the respondents submitted that the court lacked jurisdiction to determine the suit herein.

22. Regarding the issue as to whether the ex-parte applicants are entitled to the orders sought, the respondents relied on the case of Republic Vs District Land Adjudication and Settlement Officer Maara Sub County & 3 others – ex-parte applicant – M’Nyiri Ragwa; Njeru Kiririka (2021) eKLR where the court observed thus-;

“According to Halsbury law of England 4th Edn. Vo. 1(1) para 12 page 270 the remedies of quashing orders (formerly known as certiorari) prohibiting orders formerly known as orders of prohibition, mandatory orders (formerly known as orders of mandamus)... are all discretionary. The court has a wide discretion whether to grant relief at all and if so what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.”

23. The respondents pointed out that according to the adjudication record produced by the applicants and marked “LNK 3A” the approximate area has been recorded as 0.03 ha in 2011. That the applicants were further issued with a title deed for P/No. 1864 denoting that the parcel was approximately 0.03 ha in 2017. It is the respondent’s submission that the applicants slept on their alleged rights for more than 11 years since their cause of action arose and that in light of the inordinate delay and the principle of equity that aids the vigilant not the indolent, they prayed that the court finds it fit to decline granting the reliefs as sought.
24. With respect to the orders of mandamus sought the respondents relied on the court’s holding in Republic Vs Jomo Kenyatta University of Agriculture and Technology ex-parte Elijah Kamau Mwangi (2021) eKLR and submitted that the principles that apply for an order of mandamus to issue has not been met in this case and cited Section 79 of the [Land Registration Act](#) as read with Regulation 91 of the Land Registration (General) Regulations 2017 which provides the applicants with a legal remedy to submit an application for rectification of an error made on the register to the registrar. The respondents urged that the applicants have not demonstrated that they have initiated the process of rectification and as such the duty to rectify the error has not crystallized. The respondents further submitted that the nature of this dispute requires that both the applicants and the interested party are afforded an opportunity to prosecute their claims to the suit land. The respondents urged the court to find that the applicants have not met the requirements for the grant of an order of mandamus and are therefore not entitled to the orders sought.
25. It is the respondents submission that the application herein seeks to determine issues of ownership and acreage of the suit properties via a judicial review proceedings and submitted that an investigations of those issues falls beyond the purview of the court sitting as a judicial review court. The respondents



- submitted that the applicants have not met the requirements for the grant of the order sought and prayed for the application to be dismissed with costs to the respondents.
26. Learned counsel for the interested party identified three issues for determination, namely whether the order sought are capable of being issued, whether the Honourable court has jurisdiction to delve into merits of the ex-parte applicant's case and whether the interested party lawfully acquired ownership of LR No. Imenti South Mweru III/689 measuring 0.78 hectares.
 27. On whether the orders sought are capable of being issued, the interested party counsel contended that it is not in dispute that adjudication process was completed in compliance with Section 28 of the [Land Adjudication Act](#), and that the Chief Registrar caused the registration to be effected of the suit parcels in accordance with the adjudication register. That the Chief Land Registrar acted in accordance with the letter dated 15th February, 2016 produced by the interested party as annexure No. "FGN – 1" from the District Land Adjudication & Settlement Officer that indicated that adjudication process had been completed in accordance with Cap 284 and issued the title deed to the interested party and the ex-parte applicants as per the records as no appeal was pending. The interested party submitted that the adjudication sections was closed in 2015 and L.R No. Imenti South Mweru III/689 registered to the interested party on 24th May 2017 and title deed issued to the interested party on 7th July, 2017 as evidenced by the official search and copy of the title deed annexed to the interested party's affidavit.
 28. The interested party submitted that Section 9 (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules restrict the filing of Judicial review suit within 6 months from the time a decision being challenged was made. That the applicants herein are seeking to challenge the decision made in 2016 – 2017 for issuing title deed to the ex-parte applicants for a portion measuring 0.78 hectares. The interested party argued that no plausible reason has been tendered to justify the excessive delay in approaching the court over 5 years since the issuance of title deeds. It is thus interested party's submissions that the suit is overtaken by events as the adjudication process was closed and the land registered under the [Land Registration Act](#) and title deed issued. The interested party argued that the suit is time barred as it was filed over 5 years after the decision was made. The interested party's counsel relied on the case of Republic Vs District Land Adjudication & Settlement Igembe District: Exparte Evangeline Nkirote Kaibi, M'Mukaria M'Mucheke & 2 others (interested parties) (2021) eKLR.
 29. On the issue as to whether the Honourable court has jurisdiction to delve into merits of the applicant's case, the interested party submitted that judicial review proceedings are only concerned with reviewing the decision making process and not the merits of the decision and the court as such sitting as a judicial review court is thus restricted from acting as a Court of Appeal over the decider which would involve going into the merits of the decision. The interested party contended that the applicants herein are asking the court to sit as an appellate court and decide the merits of the land registrar to issue the title deed measuring 0.78 hectares to the interested party. The interested party's advocate placed reliance in the case of SGS Kenya Limited Vs Energy Regulatory Commission & 2 others SC Petition No. 2 of 2019 (2020) eKLR.
 30. The interested party pointed out that the ex-parte applicants are seeking the court to interrogate facts and determine whether an erroneous indication of parcel No. 1864 as 0.03 hectares and parcel No. 689 as 0.78 hectares like an ordinary ELC claim. The interested party submitted that such a determination can only be raised in an ordinary Environment and Land Court and not a judicial review application.
 31. The interested party's advocate submitted that the Supreme Court recently authoritatively offered clarification on the two emerging school of thoughts in the decision in Praxidis Namoni Saisi & 7 others Vs Director of Public Prosecution & 2 others, Sc Petitions 39 Consolidated with SC Petition 4 of 2019. It is the interested party's submissions the court should not delve into the merits of the case



as that shall result in its evaluating the sufficiency of evidence and delving into the merits and demerits of the decision of the Land Registrar in issuance of title deeds.

32. On whether the interested party lawfully acquired ownership of LR. No. Imenti South Mweru III/689 measuring 0.78 hectares, the interested party submitted that should the court be inclined to delve into the merits of the decision, it is their submissions that the ex-parte applicants were issued with title deed in the year 2017 and that if indeed they are innocent purchasers for value the interested party questioned why they did not visit the locus in quo to ascertain their interests on the ground and questioned why they did not lodge a claim since 2017 to date.
33. The interested party submitted that the ex-parte applicants have not proved by way of affidavit evidence that the interested party acquired the registration of acreage of the suit parcel by way of fraud and or misrepresentation of facts to warrant the rectification of his acreage. The interested party's counsel relied on the decision in Hassan Mohammed Haji Vs Mohamed Keynan & another (2019) eKLR.
34. The interested party submitted that the order of mandamus sought is incapable of being granted as the adjudication process was completed and the land registered under the Land Registration Act and further that the suit is time barred as orders of judicial review can only be issued if the decision was sought to be set aside is made within the stipulated time frame of six months.
35. It is the interested party's submission that he acquired ownership of the parcel no. 689 legally and the acreage indicated therein is the lawful acreage and argued that there is no scintilla of evidence produced to controvert the interested party's averment.
36. I have considered the pleadings, the submissions filed and the authorities relied on. The issues I find for determination are whether the court has jurisdiction to determine the matter and whether the orders sought should be granted or not.
37. The respondents submitted that this court lacks the jurisdiction to determine the suit herein since the proceedings are an attempt to circumvent the procedure and limitation of time set out under Section 26 of the Land Adjudication Act. The respondents and the interested party further submitted that the matter involves a merit review exercise which is beyond the scope of this court as a judicial review court.
38. In the case of Owners of Motor Vessel "Lilian S" V Caltex Oil (Kenya) Ltd (1989) 1 KLR 1 Nyaranga JA held as follows:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."
39. In the case of Samuel Kamau & another Vs Kenya Commercial Bank & 2 others Sup. Court Civil Application No. 2 of 2011, the Supreme Court of Kenya stated-;

"A court's jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submissions that the issue as to whether a court of law had jurisdiction to entertain a matter before it, it is not one of procedural technicality, it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings."



40. Under Article 162(2) (b) of *the Constitution* and Section 4 and 13 of the *Environment and Land court Act*, this court has the mandate to hear any matter related to the Environment and Land. Section 13 (7) (b) provides that in exercise of its jurisdiction under the Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including prerogative orders. Prerogative orders include any order of mandamus which is sought by the ex-parte applicants herein. In light of the above, it is my finding that this court has jurisdiction to determine the application herein.
41. The next issue to consider is whether the orders sought should be granted or not. The scope and efficacy of an order of mandamus is well defined in Halsbury's Laws of England, 4th Edition volume 1 at page 111 from Paragraph 89 as follows-;
- “The order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right, and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”
- “The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”
42. An order of Mandamus is therefore meant to compel the performance of a public duty which is imposed on a person or body of persons by a statute and when that 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 (see Kenya National Examination Council Vs R: ex-parte Geoffrey GAtinji & others – Civil appeal No. 266 of 1996).
43. It was further held in Republic Vs the Commissioner of Lands & another Ex-parte Kithinji Murugu M'agere, Nairobi High Court Misc. Application No. 395 of 2012 that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms.
44. In Republic Vs Town Clerk, Kisumu Municipality, ex-parte East African Engineering consultants [2007] 2 EA 441, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.
45. Further, the court will only compel the satisfaction of a public duty if it has become due, and if or whether there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallised, the court will not issue an order of mandamus to compel the respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the court may compel



the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.

46. In Republic V Jomo Kenya University of Agriculture and Technology ex-parte Elijah Kamau Mwangi [2021] eKLR, it was held inter alia, that

“The main principles that apply therefore for an order of mandamus to issue are firstly that the court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.”

47. In this case, the ex-parte applicants are seeking an order to compel the 1st respondent to rectify the adjudication records indicating the correct acreages of L.R No. Imenti South Mweru III/1864 and to compel the 2nd respondent to cancel the title deeds amend his records and re-issue fresh title deeds to the ex-parte applicants and the interested party. From the material on record, it is clear to me that the adjudication process was concluded and titles issued to the ex-parte applicants and the interested party in respect of their respective parcels of land. The ex-parte applicants’ complaint suggest that they were issued with a title deed indicting lesser acreage than that which they were entitled to while the interested party got more acreage.

48. Section 79 of the [Land Registration Act](#) provides as follows-;

“79 The Registrar may rectify the register or any instrument presented 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,
- (b) In any case and at any time with the consent of all affected parties, or
- (c) If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the registrar shall first give notice in writing to all persons with any interest in the rectification of the parcel.

(2) Notwithstanding subsection (1), the registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.’

49. Section 80 of the same Act provides for rectification by order of court and states as follows-;

“(1) Subject to subsection (2) the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to by any act, neglect or default.”



50. The above provisions of law clearly provide a legal remedy for rectification of an error made on the register either to the registrar or to the court. In this case, the ex-parte applicants have not demonstrated that they have initiated the process of rectification as provided for under the Land Registration Act. I have perused the application herein. I note that the same is solely made pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act. Even though the applicants have generally referred to the Land Registration Act, a reading of the application confirms that the applicants have not approached the court pursuant to the provisions of Section 80 of the Land Registration Act. In addition, Section 26 of the Land Registration Act provides inter alia, that the certificate of title issued by the registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, and the title of that proprietor shall not be subject to challenge except on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title was acquired illegally, unprocedurally, or through a corrupt scheme. In my view, and as correctly submitted by the respondents and the interested party, the matters raised by the ex-parte applicants requires the court to interrogate disputed facts. Such issues are for determination before the court in an ordinary suit and not by way of a judicial review application. The nature of evidence in judicial review proceedings is based on affidavit evidence and may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. As was held by the Supreme Court in *Praxidis Namoni Saisi & 7 others Vs Director of Public Prosecutions & 2 others (supra)*” the merits of a case are best analyzed in a trial or an appeal after hearing testimony, cross -examination of witnesses and examining evidence adduced.
51. From the material on record, it is clear to me that the ex-parte applicants require the court to investigate issues of ownership and especially the acreage of the suit land. I am afraid, those are issues that can best be dealt by the court in an ordinary suit rather than through Judicial review proceedings.
52. Therefore, it is my findings that the notice of motion dated 30th June 2022 is devoid of merits and I am not persuaded that the ex-parte applicants are entitled to the orders sought. Consequently, the application is hereby dismissed with costs to the respondents and the interested party.
53. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu/Lena M

Ouma holding brief for Kaumbi for ex-parte applicants

Ms Maina holding brief for Ms Mbaikyatta for respondents

No appearance for Mwirigi for interested party

C.K YANO

JUDGE

