



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN SIAYA

JUDICIAL REVIEW APPLICATION NUMBER 6 OF 2021

**IN THE MATTER OF AN APPLICATION BY JUMA NYATEKO, WILLIAM OYOKO
AND JAPHETH OTIENO ODERA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS AGAINST THE LAND REGISTRAR SIAYA DISTRICT**

AND

IN THE MATTER OF ARTICLES 20, 23, 40, 47, 48 AND 50 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 24, 25, 26, 79 AND 80 OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT

AND

IN THE MATTER OF THE JURISDICTION OF THE LAND REGISTRAR

SIAYA DISTRICT IN THE CANCELLATION OF TITLE DEEDS OF LAND

PARCELS SIAYA/NYAJUOK/2686, 2634, 2481, SIAYA/NYAJUOK/2685 AND SIAYA/NYAJUOK/2388

BETWEEN

JUMA NYATEKO.....1ST APPLICANT

WILLIAM OCHIENG OYOKO.....2ND APPLICANT

JAPHETH OTIENO ODERA.....3RD APPLICANT

AND

LAND REGISTRAR SIAYA DISTRICT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MAURICE ONYANGO OKECH.....INTERESTED PARTY

JUDGEMENT

Applicant's case

1. Pursuant to the provisions of **Sections 8 and 9** of the **Law Reform Act** and **Sections 3(a)** of the **Civil Procedure Act** and **Order 53 Rules**

3(1) and (3) and 4(1) of the **Civil Procedure Rules**, the *ex parte* applicants filed a motion dated 30/12/2020 against the respondents seeking the following verbatim reliefs:

a) **An order of certiorari removing to the high court for purposes of being quashed and quashing the 1st respondent's decision published at page 3774 of Kenya Gazette No.7482 of 25/09/2020 [“the impugned decision”] unilaterally and arbitrarily purporting to cancel the applicants' title deeds of pieces of land known as SIAYA/NYAJUOK/2686, 2634 and 2481; SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388.**

b) **An order of prohibition precluding the respondents and any of their respective officers, commissioners, servants, agents, and/or employees from alienating, revoking the title to, making any recommendation for the cancellation of the title or taking any step or action with regard to the applicants' title deeds of pieces of land known as SIAYA/NYAJUOK/2686, 2634 and 2481; SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388.**

c) **An order of Mandamus compelling the 1st respondent to restore the cancelled title deeds of pieces of land known as SIAYA/NYAJUOK/2686, 2634 and 2481; SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388.**

d) **That costs of and incidental to these proceedings be borne by the 1st respondents, and**

e) **Any such other, further, or incidental orders or directions as the honourable court may deem just and expedient in the circumstances.**

2. The summons is supported by a statutory statement and affidavits verifying the facts by the *ex parte* applicants both dated 10/12/2020 and annexures thereto. The summons is grounded on the following main grounds; (i) that the impugned decision infringes on the *ex parte* applicants' fundamental rights and freedoms under **Articles 40, 47, 48 and 50 (1)** of the **Constitution** and **Sections 24, 25, 26, 79 and 80** of the **Land Registration Act**, (ii) the impugned decision is ultra vires to the powers, functions and jurisdiction of the 1st respondent, (iii) the impugned decision was unilaterally issued by the 1st respondent without affording the *ex parte* applicants a hearing and in clear breach of the rules of natural justice, (iv) that the 1st respondent acted unreasonably in unilaterally concluding that the *ex parte* applicants' titles were fraudulently registered without having considered any substantive representations from the *ex parte* applicants and; (v) the 1st respondent acted in violation of **Article 10** of the Constitution by failing to uphold the national values and principles of governance including integrity, transparency and accountability in making or implementing public policy decisions.

The respondents' case

3. The Attorney General entered appearance on behalf of the 1st and 2nd Respondents on 8/01/2021 but did failed to file responses.

The interested party's case

4. The interested party filed a replying affidavit dated 13/01/2021. He contended that that he is a beneficiary of the estate of Okech Otuoma who was a tenant in common together with Ayinga Otuoma, Ayinga Omollo, Daniel Orinda and Oyoko Omolo of the original land parcel known as title number **SIAYA/NYAJUOK/153**. He averred that the original owners of title number **SIAYA/NYAJUOK/153** are all deceased and succession proceedings had not been undertaken and in any case, the 3rd *ex parte* applicant illegally and fraudulently partitioned land parcel title number **SIAYA/NYAJUOK/153** into several parcels of land including **SIAYA/NYAJUOK/2686, 2634 and 2481, SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388** and transferred it to 3rd parties who were not beneficiaries of the estates of the original five owners. He contended that the beneficiaries of the estates of the original owners of title number **SIAYA/NYAJUOK/153** lodged a complaint with the county land registrar who in exercising his powers under **Sections 14 and 79** of the **Land Registration Act** summoned the *ex parte* applicants. These chains of events led to the decision undertaken by of the Siaya land registrar.

Ex parte applicants' submissions

5. The *ex parte* applicants filed written submissions dated 16/11/2021. They contended that the role of judicial review process was to consider the decision-making process and on this, they placed reliance on the case of **Meixeur & another v Attorney General [2005] 2 KLR 189** and the Court of Appeal decision of **Municipal Council of Mombasa vs Republic and Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**. They submitted the action of the Siaya Land Registrar was illegal and in contravention with **Article 40(3)** of the **Constitution** and in any case **Section 80** of the **Land Registration Act** did not give the Land Registrar power to revoke the titles in the manner he did and on this they placed reliance on several authorities including; **Republic versus Commissioner of lands** and the **Registrar of titles ex parte Emrose Academy, JR Miscellaneous Application number 87 of 2011**. It contended the action of the Land Registrar was ultra vires, unconstitutional and against the cardinal principals of natural justice because the *ex parte* applicants were not afforded a hearing and the revocation of the titles was illegal, irrational and procedurally improper. They identified three issues for determination; (i) whether the Land Registrar Siaya followed the due process in revoking the *ex parte* applicants' titles, (ii) whether the Land Registrar acted in contravention of **Articles 40, 47, 48 and 50 (1)** of the **Constitution** and **Section 80** of the **Land Registration Act** and (iii) whether the *ex parte* applicants have met the grounds for granting a judicial review order of certiorari, prohibition and mandamus.

The Respondents' submissions

6. The 1st and 2nd Respondents did not file any submissions to the motion.

The Interested party's submissions

7. The interested party filed skeleton written submissions dated 13/01/2021. He reiterated the averments made in his replying affidavit. He contended that after investigations were carried out, a hearing was accorded to the affected parties and it was his submission that due process was followed in the cancellation of the fraudulently acquired title numbers **SIAYA/NYAJUOK/2686, 2634, 2481, SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388.**

Analysis and determination

8. Judicial Review is governed by the provisions of **Sections 3A and 5 of the Civil Procedure Act, Order 53 of the Civil Procedure Rules, and Sections 4, 7, 9 and 11 of the Fair Administrative Action Act and Sections 8 and 9 of the Law Reform Act.** By virtue of **Section 13(7)(b) of the Environment and Land Court Act**, this court has jurisdiction to hear and determine judicial review cases.

9. Having considered the *ex parte* applicants' motion, the statutory statement and verifying affidavit, interested party's replying affidavit, the annexures and parties' written submissions, these are the issues for determination; (i) whether the *ex parte* applicant has established grounds for the court to grant the orders sought.

I will proceed to analyze the legal and jurisprudential framework on the issues in a sequential manner.

10. The principles that govern judicial review proceedings are illegality, irrationality and procedural impropriety in a decision by a public body. These principles are neither exhaustive nor mutually exclusive. These principles have long been settled in a line of judicial decisions including; **Republic v Public Procurement Administrative Review Board & 2 others Exparte Rongo University [2018] eKLR, Council for Civil Services Unions –vs- Minister for Civil Service (1985) AC 374 at 401D, Fredrick Masaghwe Mukasa v Director of Public Prosecutions & 3 others [2016] eKLR and Republic vs National Water Conservation & Pipeline Corporation & 11 Others [2015] eKLR.** These principles will be juxtaposed against the circumstances of this case.

11. The 1st principle is whether the decision of the 1st respondent in cancelling titles of land belonging to the *ex parte* applicants was illegal. The court's task in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker and in this case, the power of the 1st respondent. **Section 79 and 80 of the Land Registration Act** provides the powers of a Land Registrar and the powers of the court to order a rectification of a register as thus:

“79(1) 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 mistakes 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 an interest in the rectification of the parcel.

(d) for purposes of updating the register;

(e) for purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.

80. (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”.

12. It is clear that the grounds upon which the said Land Registrar purported to revoke the *ex parte* applicants' titles were not the ones envisaged within the provisions of **Section 79 of the Land Registration Act** and it is only the court under the provisions of **Section 80 of the Land Registration Act** that can rectify the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained made or omitted by fraud, mistake, omission, or substantially contributed to it by any act, neglect or default of a proprietor. This position of law was upheld in the following cases **Republic v the District Land Registrar Uasin Gishu & 2 others[2013] eKLR and Sabina Nyambura Githina & another v Land Registrar, Thika Land Registry & 3 others; Real Capital Ltd (Interested Party) [2021] eKLR.** The motion succeeds on this limb.

13. Within the provisions of **Article 47 of the Constitution and Sections 4 of the Fair Administrative Action Act** the *ex parte* applicants' title to land could not be arbitrarily cancelled without the proprietors being afforded an opportunity of being heard failure to do so would go against the tenets of natural justice. These provisions of law grant every person a right to fair administrative action. Save for filing a memorandum of appearance, the respondents for reasons best known to them absconded from participating in this case. Their involvement in the suit would have assisted the court in determining whether or not the *ex parte* applicants were issued with a notice of the complaint, a fair hearing was accorded and a reason for arriving at its decision was made before arriving at its far-reaching decision of cancelling the *ex parte* applicants' titles to land. As it stands, there is no shred of evidence that the *ex parte* applicants were afforded a fair hearing. The motion succeeds on this limb.

14. The principle of rationality as a ground for judicial review of an administrative action is dealt with in **Section 7(2) (i) of the Fair Administrative Action Act.** The case of **Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR** held thus on the test of rationality.

“In applying the test of rationality, the reviewing Court will ask: is there a rational objective basis justifying the connection made

by the administrative decision-maker between the material made available and the conclusion arrived at... Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others”.

15. The interested party has annexed the green card for land parcel title number **SIAYA/NYAJUOK/153** and it is evident that the manner in which the original parcel of land was partitioned and transferred to third parties is questionable. Having carefully examined the decision of the Land Registrar *vis a vis* the history of land parcel title number **SIAYA/NYAJUOK/153**, there is nothing to show that a reasonable Land Registrar, faced with the same set of facts would have arrived at a different conclusion however, as has been found, land registrars do not have jurisdiction to cancel titles to land by way of gazette notices. In other words, even if the facts and evidence before the Land Registrar were overwhelming against the manner in which the *ex parte* applicants acquired titles to the parcels of land, he acted unreasonably and irrationally by applying the facts on non-existent provisions of law. The motion succeeds on this principle.

16. It has been held in several court decisions including (**Commissioner of Lands v Kunste Hotel Ltd [1997] eKLR (Nairobi Court of Appeal)**; **Municipal Council of Mombasa v Republic & another [2002] eKLR (Nairobi Court of Appeal)**; **Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR (Nairobi Court of Appeal)**) that judicial review is concerned with the decision-making process and not with the private rights or the merits of the decision being challenged. This court would be acting outside the purview of judicial review applications if it determined ownership of a disputed property and this court will leave the parties to ventilate the merits of the dispute in ordinary civil suits. In other words, the parties are at liberty to move the court in an appropriate manner in seeking a determination of whether the *ex parte* applicants' titles were title deeds that were genuinely obtained or not and who are the rightful owners of the suit properties are.

17. It is my net finding that the decision of the Siaya Land Registrar was tainted illegality, procedural impropriety and irrationality.

18. Ultimately, I make the following disposal orders;

a. That an order of certiorari is hereby issued calling into this Court the decision of the 1st Respondent Gazetted on 25/09/2020 cancelling the *ex parte* applicants' title deeds numbers **Siaya/Nyajuok/2686, 2634, 2481, Siaya/Nyajuok/2685** and **Siaya/Nyajuok/2388** for the purposes of being quashed and the same are hereby quashed.

b. **An order of Mandamus compelling the 1st respondent to restore the cancelled title deeds of parcels of land known as SIAYA/NYAJUOK/2686, 2634 and 2481; SIAYA/NYAJUOK/2685 and SIAYA/NYAJUOK/2388**

c. Costs are awarded to the *ex parte* applicants.

JUDGMENT DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

In the Presence of:

Mr. Awiti for the applicants

Mr. Obombo for 1st and 2nd respondent

N/A for interested party

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

20/1/2022