



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 191 OF 2015**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF AN APPLICATION BY DANIEL PETER WANGOKURIA FOR LEAVE  
TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW**

**IN THE MATTER OF SECTION 157 OF THE LAND ACT, 2012**

**AND**

**IN THE MATTER OF SECTION 302 OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**BETWEEN**

**DANIEL PETER WANGO KURIA.....APPLICANT**

**AND**

**THE LAND REGISTRAR, KIAMBU.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JOSEPH KAMAU KURIA.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 2<sup>nd</sup> July, 2015, the applicant herein, **Daniel Peter Wango Kuria**, seeks the following orders:

1. That the court be pleased to grant an order of certiorari to bring into the court for purposes of quashing and to quash the arbitrary decision of the Land Registrar, Kiambu county to alter entries on the title deed, (green card) in respect of land parcel, No. Githunguri/Githunguri /1375 without the knowledge

2. That this honourable court be pleased to grant an order of mandamus compelling the 1<sup>st</sup> respondent to cancel the illegal entries made on the title deed/green card in respect of land parcel No. Githunguri/Githunguri 1375 and restore it to its original state.

3. That this honourable court be pleased to grant an order of prohibition prohibiting the 1<sup>st</sup> and 3<sup>rd</sup> respondents herein from causing the registration of further transfers of the subdivided portions known as:

i. Githunguri/Githunguri/2537

ii. Githunguri/Githunguri/2538

iii. Githunguri/Githunguri/4042

iv. Githunguri/Githunguri/4043

v. Githunguri/Githunguri/4044

4. That an order of prohibition do issue prohibiting the 3<sup>rd</sup> respondent from dealing in any other manner with parcels of land registered as:

i. Githunguri/Githunguri/2537

ii. Githunguri/Githunguri/2538

iii. Githunguri/Githunguri/4042

iv. Githunguri/Githunguri/4043

v. Githunguri/Githunguri/4044

5. Costs of this application be provided for.

### **Applicant's Case**

2. According to the applicant, he is the registered proprietor of Land Parcel known as Githunguri/Githunguri/1375 measuring 0.95 of an acre for which he possess the original title deed which said land was transferred to him by his father **Daniel Kuria Muchori** (now deceased) on 9<sup>th</sup> July, 1993. According to the applicant, his father who was the registered proprietor of land parcel No. Githunguri/Githunguri/270 caused the subdivision of the same into four portions and transferred them to his children, including the applicant as follows:

i. Daniel Peter Kuria- Githunguri/Githunguri/1375, 0.95 of an acre

ii. Julius NjauKuriaGithunguri/Githunguri/1376, 0.95 of an acre

iii. Joseph KamauKuriaGithunguri/Githunguri/1377, 0.95 of an acre

iv. Andrew KunguKuriaGithunguri/Githunguri/1378 11/2 acres

3. The applicant averred that his said father did not set aside any portion of his land for himself and their mother but they continued to live in their old structure which was located on the applicant's said portion of land. After the death of their mother, the applicant decided to build a decent house for his father on the applicant's portion of land known as Githunguri/Githunguri /1375 around the year 1996 next to the old structure which he later demolished.

4. It was averred that upon the death of his father, the applicant's said parcel of land known as Githunguri/Githunguri/1375 remained as an investment for the applicant's children. However, the applicant thereafter became sick and was rendered partially blind and for a long period of time did not

visit his said parcel of land until around March 2015 when he instructed his wife to make arrangements of planting napier grass for their cows but when she went there she discovered that there were some constructions going on and upon enquiry, the 3<sup>rd</sup> respondent told her to go away as the land belonged to him. This made the applicant to visit the offices of the 1<sup>st</sup> respondent herein and upon perusal of the official records discovered that there had been fraudulent transactions involving his land which was conducted without his knowledge.

5. According to the applicant, he decided to conduct a search on the property, which revealed that his title was subsequently used in the gazette of the alleged loss of his title deed and further that his said parcel of land known as Githunguri/Githunguri/1375 had been consequently subdivided into 3 portions and all registered in the name of **Daniel Kuria Muchori** as follows:

- i. Githunguri/Githunguri/2537
- ii. Githunguri/Githunguri/2538
- iii. Githunguri/Githunguri/2539

6. It was the applicant's case that land parcel number Githunguri/Githunguri/2539 had been fraudulently registered in the name of the 3<sup>rd</sup> respondent and that there were further subdivisions of land parcel No. Githunguri/Githunguri/2539 by the 3<sup>rd</sup> respondent into 3 portions all in his name as follows:-

- i. Githunguri/Githunguri/4042
- ii. Githunguri/githunguri/4043
- iii. Githunguri/Githunguri/4044

7. According to the applicant, upon discovery of the above fraudulent transactions, he visited the offices of the deputy County Commissioner, Githunguri on 21<sup>st</sup> April, 2015 who issued him with a letter addressed to the 1<sup>st</sup> respondent herein restricting further transactions on the above parcels of land. The applicant averred that the 3<sup>rd</sup> respondent was in the process of disposing the above parcel of land and had caused a letter to be sent to the applicant by the Deputy County Commissioner to appear before him on 23<sup>rd</sup> June, 2015 to show cause why the restriction placed on the said parcels of land should not be removed.

8. The applicant asserted that unless this Court intervenes as a matter of urgency, he would be deprived of his right to the suit property and the loss, and damage thereof would be irredeemable and irreparable hence it is just and fit in the circumstances to grant the prayers sought in the application

### **1<sup>st</sup> Respondent's Case**

9. In opposing the application, the 1<sup>st</sup> Respondent averred that from the records at the Kiambu land registry, the suit land LR **Githunguri/Githunguri 1375** measuring 0.95 acres was part of a subdivision of parcel 270 and which was originally registered in the name of The late **Daniel Kuria Muchori** on 5<sup>th</sup> July, 1989 and that the said LR **Githunguri/Githunguri 1375** was subsequently transferred to the Ex-parte applicant **Daniel Peter Wangokuria** on 9<sup>th</sup> July 1993 vide entry number 3 on the green card. The 1<sup>st</sup> Respondent however disclosed that the suit land LR **Githunguri/Githunguri1375** has been the subject of judicial determinations in various courts being land dispute Tribunal 16/20/126 of 1999, Kiambu SPM Court case No.22 of 2000 on 6<sup>th</sup> July 2000 in which the ex-parte applicant herein had sued his father the late **Daniel Kuria Muchori**, and subject to the decree issued therein, the same was cancelled and it's ownership restored to the late **Daniel Kuria Muchori**. The ex-parte applicant dissatisfied with the court decision sought to appeal at Nrb High court Civil Appeal No.330 of 2000 which appeal was dismissed on 29<sup>th</sup> September 2005.

10. It was averred by the 1<sup>st</sup> Respondent that pursuant to the aforesaid orders, all the entries no **4, 5 & 6** on the green card for the suit land that were made at the instigation of the ex-parte applicant were removed /cancelled vide entries no **7 & 8** on the green card and the registered proprietor remained to be the late **Daniel Kuria Muchori** who prior to his death subdivided the land into 3 parcels **2537, 2538 & 2539** each measuring 0.123 Ha. and transferred them to the 3<sup>rd</sup> respondent herein who became the registered proprietor on 19<sup>th</sup> October 2005. It was therefore averred that the current records indicate that the 3<sup>rd</sup> respondent has since caused parcel 2539 to be subdivided into parcels 4042, 4043 & 4044.

11. To the 1<sup>st</sup> Respondent, the ex-parte applicant has engaged in litigation on the suit land till 2005 and all the entries and dealings on the original suit land have been made pursuant to court orders which the ex-parte applicant has always been aware of and fully participated in hence it is not true that the land registrar acted arbitrarily in making the said entries.

12. The 1<sup>st</sup> Respondent therefore contended that the application is an attempt to clothe a judicial review court with appellate jurisdiction to look into the merits of the decision which is untenable. In the 1<sup>st</sup> Respondent's view, the orders sought are untenable and should not be granted, because if granted the functions, operations and independence of the 1<sup>st</sup> respondent pertaining to the suit land will be prejudiced.

### **Determination**

13. I have considered the application herein, the statement and the affidavit in support thereof as well as the submissions.

14. Section 33 of the **Land Registration Act** provides as follows:

***(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.***

***(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.***

***(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.***

***(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.***

***(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.***

15. It is therefore clear that under the aforesaid provision it is only the registered proprietor of a title or certificate of lease where the same is lost or destroyed that can move the Registrar for the issuance of a duplicate thereof. However before such a duplicate is issued it is required that there be a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed. However before issuing the document the Registrar must be "satisfied" of the fact of the loss or destruction. In other words in issuing the duplicate certificate there Registrar exercises a discretion.

16. It is now clear that even in the exercise of what may appear to be *prima facie* absolute discretion conferred on the executive the Court may interfere. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of Nyamu, J (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

17. It is therefore clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade in his Book *Administrative Law*:**

**“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”**

18. To hold that the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window and when whittle away the Constitutional safeguards provided under Article 47 of the Constitution. Accordingly the Courts are empowered to investigate allegations of abuse of power and improper exercise of discretion.

19. What then does the term “satisfaction” mean in the exercise of discretion?

20. In **Employment Secretary vs. ASLEF [1972] 2 QB 455 at 492-3**, Lord Denning expressed himself as follows:

**“If it appears to the Secretary of State? This, in my opinion, does not mean that the Minister’s decision is put beyond challenge. The scope available to the challenger depends very much on the subject-matter with which the Minister is dealing. In this case I would think that, if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law, it may well be that a court would interfere; but when he honestly takes a view of the facts or the law which could reasonably be entertained, then his decision is not to be set aside simply because thereafter someone thinks that his view was wrong.”**

21. In my view, for an authority exercising discretion to be said to have been satisfied, it must have consider all the relevant factors. To do so it must have some relevant material before it on the basis of which it can form an opinion on the matter. The word “consider” has been the subject of judicial

determination in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** where it was held as follows:

**“To consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion...“Consider” implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided.”**

22. In my view a proper consideration of a matter requires that the Tribunal takes into account all aspects of the case and all aspects of the case cannot be said to have been considered when the person(s) against whom the complaint is preferred or who reasonably stands to be adversely prejudiced has not been called upon to give his or her version of the issue(s) in contention.

23. Article 47 of the same Constitution provides:

***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) 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.***

24. Pursuant to Article 47(3) Parliament has enacted the ***Fair Administrative Action Act***. Section 4(1), (2) and (3) thereof provides:

***4. (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***

***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***

***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***

***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where***

***applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

25. Under section 2 of the said Act “administrative action” is expressed to include:

**(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or**

**(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.**

26. It is therefore my view that before the Registrar issue a duplicate title or certificate of lease, he is duty bound to make all the necessary inquiries to satisfy himself that the document is actually lost or destroyed and where the exercise of discretion is challenged, he is under obligation to disclose all steps taken by him in order to have been satisfied of the fact.

27. In this case however, it is contended that the cancellation of the entries no **4, 5 & 6** on the green card for the suit land that were made at the instigation of the ex-parte applicant were removed /cancelled vide entries no **7 & 8** pursuant Court orders and that thereafter the registered proprietor remained to be the late **Daniel Kuria Muchori** who prior to his death subdivided the land into 3 parcels **2537, 2538 & 2539** each measuring 0.123 Ha. and transferred them to the 3<sup>rd</sup> respondent herein who became the registered proprietor on 19<sup>th</sup> October 2005. It was disclosed that the current records indicate that the 3<sup>rd</sup> respondent has since caused parcel 2539 to be subdivided into parcels 4042, 4043 & 4044. To the 1<sup>st</sup> Respondent, the ex-parte applicant has engaged in litigation on the suit land till 2005 and all the entries and dealings on the original suit land have been made pursuant to court orders which the ex-parte applicant has always been aware of and fully participated in hence it is not true that the land registrar acted arbitrarily in making the said entries.

28. I have considered the issues raised in these proceedings. From the documents exhibited by the parties herein it seems that there were certain orders which led to the making of certain entries on the register. The proceedings that gave rise to the said orders are not before this Court. To grant the orders sought herein without the full benefit of the proceedings referred to in my view may place this Court and its orders in a situation in which as the 1<sup>st</sup> Respondent contends this Court may well have overturned the alleged decisions.

29. As is stated in *Halsbury's Laws of England* 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270:

**“The remedies of quashing orders (formerly known as orders of 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 to 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. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”** [Emphasis added].

30. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

**“... it must always be remembered that judicial review orders being discretionary are not**

**guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”**

31. In this case, the issues raised in my view cry loud for a fully-fledged hearing before a civil court in which parties would be at liberty to give viva voce evidence and be subjected to the process of cross-examination.

32. In the result I find no merit in the Notice of Motion dated 2<sup>nd</sup> July, 2015 which I hereby dismiss but with no order as to costs.

**Dated at Nairobi this 17<sup>th</sup> day of November, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Mr Kamau for the 3<sup>rd</sup> Respondent**

**Mr Kiarie for Mr Mitiambo for the Applicant**

**CA Mwangi**