



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC JUDICIAL REVIEW NO. 2 OF 2021

REPUBLIC.....APPLICANT

VERSUS

NAIVASHA DISTRICT LAND REGISTRAR1ST RESPONDENT

RIFT VALLEY REGIONAL SURVEYOR.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

AND

GRACE WANJIRU NGANGA, JENNIFER WARINGA MIARAHO and

JECINTER WANGARE NYOIKE (Suing as trustees of the members

NAIVASHA UIGUANO GROUP) EX PARTE APPLICANTS

JUDGMENT

1. By chamber summons dated 16th March, 2021 the ex-parte applicants (the applicants) sought leave of court to apply for judicial review orders against the respondents. Leave was granted on 19th March 2021.

2. Subsequently, the applicants filed Notice of Motion dated 4th April 2021 seeking the following orders:

1). *An order of certiorari to remove to this Court and quash the decision of the 1st respondent herein contained in a letter dated March 2019 nullifying and cancelling title deeds for land parcel nos. Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) and reinstating their parent title parcel number Gilgil/Gilgil block 1/7413 (Kekopey).*

2). *An order of certiorari to remove to this court and quash the decisions of the 2nd respondent herein dated 21-3-2019 and 7-5-2019 cancelling land parcel numbers Gilgil/Gilgil block 1/ 9563 to 9570 (Kekopey) from registry index map number 14 and 15 Gilgil/Gilgil block 1 (kekopey) and reinstating their mother title land parcel No. Gilgil/gilgil block 1/7413 (kekopey) in the aforesaid map.*

3). *An order of mandamus directing the 1st respondent to remove entries no. 4 and 5 in the register of land reference no. Gilgil/Gilgil block 1/7413 (Kekopey) and mark the register as closed upon subdivision to parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (kekopey).*

4). *The applicants be granted leave to apply for orders of mandamus compelling the 1st respondent to open registers for land parcel nos. Gilgil/Gilgil block 1/9563 to 9570 (kekopey).*

5). *An order of mandamus compelling the 2nd respondent to remove the mutation entry reference no. MUT/NVS/9877/5/19 from registry index map number 14 and 15 Gilgil/Gilgil block 1 (kekopey) and restore land parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (kekopey) in the aforesaid map.*

6). A prohibitory order prohibiting the 1st respondent from making entries or registering any dealings in the register of land ref no Gilgil/Gilgil block 1/7413 (kekopey).

3. The application is supported by a statement dated 16th March 2021 and a verifying affidavit sworn by the first ex parte applicant Grace Wanjiru Nganga. She deposed that the ex parte applicants are the office bearers and trustees of Naivasha Uiguano Group. That she is the chairlady while the second and third ex parte applicants are the treasurer and secretary respectively. That the group was formed in 1975 with the purpose of advancing members' economic and social interests. That the group approached the former councillor of their electoral ward in Naivasha the late Nganga Kihonge (Mr Kihonge) for assistance to purchase a share of land from the former Gema Investment Company's land in Gilgil kekopey area and Mr Kihonge was to act as trustee for the group. She further deposed that the arrangement they had with Mr Kihonge was that after purchase he was to transfer the land to the members of the group but passed away before completing the transaction. That Mr Kihonge's son by the name Elias Ngugi Nganga and Grace Nduta Theuri took over as trustees of the group and completed the transaction thereby registering themselves as proprietors in trust for the group.

4. Ms Nganga further deposed that some members of the group who reside in Gilgil area wanted to replace the trustees but the trustees and majority of the members opposed the change and in the months of February and March 2009 the trustees informed the group that the Nakuru land registrar had rejected the change of trustees because the members had not agreed on the matter. That subsequently the group requested the trustees to transfer the group's land to the office bearers of the group but the trustees gave the group a title deed for land parcel number Gilgil/Gilgil block 1/ 9565 (kekopey) which bore their names as proprietors in trust instead of the office bearers. That the trustees refused to transfer the title to the office bearers and the first respondent also refused to register the group's resolution to change the trustees. Consequently, the group filed Nakuru ELC Case Number 407 of 2017 seeking change of trustees. On 3rd March 2020 the court revoked the appointment of the trustees and appointed the ex parte applicants in their place in regard to land parcel number Gilgil/Gilgil Block 1/9565. Subsequently, the previous trustees handed to the ex parte applicants a title deed for land parcel number Gilgil/Gilgil Block 1/ 9563 (Kekopey). That all, along the previous trustees had led the ex parte applicants to believe that the group's land was Gilgil/Gilgil Block 1/ 9565 (Kekopey) only for the ex parte applicants to realize that it was one of eight subdivisions of Gilgil/Gilgil Block 1/7413 (kekopey) which are all registered in the names of the previous trustees as proprietors in trust for the group, a fact that they say is confirmed by the details in the two title deeds in their possession and by the first respondent in a replying affidavit that she filed in Judicial Review Application No 3 of 2020.

5. Ms Nganga went on to state that the ex parte applicants also learnt that the subdivision of land parcel Gilgil/Gilgil Block 1 7413 (kekopey) into parcels numbers Gilgil/Gilgil Block I/ 9563 to 9570 (Kekopey) was carried out in July 2009 and new title deeds issued in the names of the trustees as absolute proprietors. That the ex parte applicants tried to have the first respondent comply with the court order on change of trustees in vain then during a meeting in December 2020, the first respondent showed them Gazette Notice Number 341 dated 16th January 2009 which the first respondent said had cancelled the registration of the trustees as proprietors of the parent land parcel and that therefore the subsequent subdivisions were null and void.

6. That the ex parte applicants filed Judicial Review No 3 of 2020 to compel the first respondent to furnish them with records on the cancellation and on they were served with a replying affidavit in which the first respondent herein explained the process followed to cancel the titles. That the first respondent deposed therein that in March 2019, elected trustees of the group furnished her with the aforesaid gazette notice and that instead of cancelling the parent title, the land registrar allowed subdivision of the land into 8 parcels being parcels numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) and title deeds issued in the names of the trustees as proprietors. That in further pursuit of information regarding the cancellation of the titles, the ex parte applicants approached the second respondent for information and the second respondent furnished them with a letter from the first respondent dated March 2019 in which the first respondent requested the second respondent to delete parcels numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) from the RIM on the ground that when the proprietors subdivided Gilgil/Gilgil Block 1 7413 (kekopey), the gazette notice had already cancelled the title of the parent parcel number Gilgil/Gilgil block 1 7413 (Kekopey) and the proprietors therefore lacked capacity to subdivide it and that the titles were therefore null and void.

7. Ms Nganga also deposed that acting on the aforementioned request, the second respondent cancelled land parcels Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) from registry index map sheet number 14 and 15 Gilgil/Gilgil Block 1 (kekopey) on 7th May 2019 by making reversal entries numbers 29 and 72 in the map without involving the registered proprietors in the process and while relying solely on people who claim to be trustees of the group but are not the registered proprietors. Further, that the second respondent relied on a mutation plan which was not made by the registered proprietors. That the titles were cancelled when one of the proprietors was dead and the respondents were aware of active litigation over land parcel no Gilgil/Gilgil block 1/ 9565 (Kekopey) in ELC Case Number 407 of 2017 on behalf of the members of the group.

8. The respondents opted not to counter the ex parte applicants' allegations through any replying affidavit. Instead, they filed grounds of opposition in which they took the position that the rectification of the titles for parcel number Gilgil/Gilgil Block 1/9563 to 9570 was conducted in accordance with the provisions of **Section 79 of the Land Registration Act**, that the restriction that was placed on the suit property was removed and the register is open for subdivision, that the application is scandalous, frivolous, vexatious and an abuse of the court process and that it does not meet the requirements of the prayers sought.

9. The application was canvassed through written submissions. Both sides duly filed their submissions.

10. The ex parte applicants argued that the first respondent had no jurisdiction to nullify and cancel the titles and further that the registered proprietors were not given a notice of the intended cancellation or even a hearing. That their property rights were violated. They relied *inter alia* on the cases of **Lawrence Muriithi Mbabu v District Land Registrar, Nyeri & another; John Githui Kinyua (interested party) [2019] eKLR** and **Republic v Nakuru District Land Registrar & another ex-parte Szumbah Mwanaongoro & 7 others [2016] eKLR**. They further invoked **Section 7(2) (d) (f) and (k) of the Fair Administrative Action Act, 2015**. That the second respondent equally failed to give the registered proprietors any notice or hearing prior to removing the parcels from the registry index map, in violation of **Section 33 of the Survey Act**. Reliance was placed on the case of **Beatrice Wairimu Kiiru v Director of Surveys & 2 others [2011] eKLR**.

11. In response, the respondents submitted that their actions that led to the cancellation of title for parcel numbers Gilgil/Gilgil Block 1/9563

to 9570 were in accordance with **Section 79 (1) (b)** of the **Land Registration Act**. That it was the ex parte applicants who brought the matter to the first respondent who then in good faith proceeded to request the regional surveyor to effect the reversal of the mutation of the land from the 8 subdivisions on the map back to the original number. They urged the court to dismiss the application with costs.

12. The ex parte applicants filed further submissions in which they argued that owing to the respondents' failure to file a replying affidavit, the facts presented by the ex parte applicants be considered proven. That the respondents did not satisfy the conditions set by **Section 79** of the **Land Registration Act** and the **Land Registration (General) Regulations of 2017**. They cited the case of **Republic v Public Procurement Administrative Review Board & 2 others ex-parte Numerical Machining Complex Limited [2016] eKLR** and prayed that the application be allowed.

13. I have considered the parties' respective pleadings, evidence and submissions. The issues that emerge for determination are whether the ex parte applicants were given notice and a hearing prior to the actions now being challenged, whether the respondents had jurisdiction to nullify and cancel the titles and map entries and finally whether the reliefs sought should issue.

14. As already noted, the respondents did not file any replying affidavit. In the circumstances, the facts surrounding the dispute which have been presented by the ex parte applicants remain wholly uncontested.

15. From the uncontested material on record, I am satisfied that the ex parte applicants are office bearers and trustees of Naivasha Uiguano Group (the group), that the group owned the parcel of land known as Gilgil/Gilgil Block 1/7413 which was subdivided in July 2009 into parcels numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) and new title deeds issued in the names of the trustees of the group.

16. As confirmed by the first respondent's letter dated March 2019, the first respondent declared the titles in respect of parcel numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) null and void and requested the second respondent to delete the said parcel numbers from the registry index map which the second respondent duly did on 7th May 2019.

17. The respondents contend that their actions were in accordance with **Section 79 (1) (b)** of the **Land Registration Act**. The section provides as follows:

79. Rectification by Registrar.

(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.

(2) No alteration affecting the title of the proprietor may be made pursuant to sub-section (1) without the proprietor's consent unless –

(a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or

(b) it would for any other reason be unjust for the alteration not to be made.

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.

(3) ...

(3A) ...

(4)

18. **Article 47** of the **Constitution** provides the right to a fair administrative action in the following terms; -

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

(2) If a right of 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.

19. There is no doubt that the ex parte applicants stood to be adversely affected by the respondents' actions of cancelling their acquired rights and interests in the suit property. In terms of **Article 47 (1) and (2) of the Constitution**, the respondents had a duty and obligation to ensure the ex-parte applicants were notified and given an opportunity to be heard before any action that was adverse to their rights and interest being taken. Indeed, **Section 79 (2) of the Land Registration Act** expressly provides that no alteration affecting the title of a proprietor may be made pursuant to the section without the proprietor's consent unless the conditions specified under the section are fulfilled and that a written notice of ninety days must be given to the proprietor of the intention to make the alteration. The ex parte applicants have stated that they were not notified and given an opportunity to be heard before the actions complained of were taken. The respondents have not disputed that contention as I therefore accept it as the factual position.

20. Under **Article 10 of the Constitution** which embodies the national values and principles of governance all state organs, state officers, public officers and all persons are bound to apply the rule of law whenever they apply or interpret any law. Applying the rule of law would have entailed the ex parte applicants and the group being given a chance to be heard before the group's titles were cancelled. The cardinal rule of natural justice is that no person should be condemned unheard. There is no evidence the ex parte applicants were accorded a chance of being heard before their titles were cancelled. Merely acting in good faith, if any, as the respondents contend they did, is not enough. Above all, good faith can only be manifested if in the first place there is compliance with the rule of law.

21. It is now settled law that a land registrar has no power to cancel a title and that cancellation only be done by a competent court of law. See **Sabina Nyambura Githina & another v Land Registrar, Thika Land Registry & 3 others; Real Capital Ltd (Interested Party) [2021] eKLR** and **Kuria Greens Limited v Registrar of Titles & another [2011] eKLR**. Clearly therefore, the first respondent acted without jurisdiction when she purported to nullify the titles in respect of parcel numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey). Equally, the second respondent's action in deleting the said parcel numbers from the registry index map is a nullity and without jurisdiction since it founded on another nullity. See **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169**.

22. Are the ex parte applicants entitled to the reliefs of certiorari, mandamus and prohibition which they have sought? An order of certiorari will issue if a decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. An order of prohibition ordinarily issues to forbid a tribunal or body from continuing proceedings in excess of its jurisdiction or in absence of jurisdiction. On its part, an order of mandamus compels the performance of a public duty which is imposed by statute. See **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** and **Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR**.

23. From the foregoing, it is manifest that the respondents acted without jurisdiction and that there is a duty to correct their actions by way of certiorari and mandamus so as to revert the *status quo ante*.

24. The ex parte applicants have sought an order of prohibition to stop the first respondent from making entries or registering any dealings in the register of land ref no Gilgil/Gilgil Block 1/7413 (kekopey). If I were to grant such an order, I would in a blanket manner inhibit the first respondent from discharging her statutory mandate. Such an order would even stop the first respondent from making any lawful entries duly sought by the registered proprietor. Nothing has been offered to show that the respondents are intent on acting in excess of its jurisdiction or in absence of jurisdiction in the future. I will therefore not grant an order of prohibition.

25. In the result, I make the following orders:

a) **An order of certiorari is hereby issued removing to this court and quashing the decision of the first respondent herein contained in a letter dated March 2019 nullifying and cancelling title deeds for land parcel numbers Gilgil/Gilgil Block 1/9563 to 9570 (Kekopey) and reinstating their parent title parcel number Gilgil/Gilgil Block 1/7413 (Kekopey).**

b) **An order of certiorari is hereby issued removing to this court and quashing the decisions of the second respondent herein dated 21st March 2019 and 7th May 2019 cancelling land parcel numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey) from registry index map number 14 and 15 Gilgil/Gilgil Block 1 (Kekopey) and reinstating their mother title land parcel number Gilgil/Gilgil Block 1/7413 (Kekopey) in the aforesaid map.**

c) **An order of mandamus is hereby issued directing the first respondent to remove entries numbers 4 and 5 in the register of land reference number Gilgil/Gilgil Block 1/7413 (Kekopey) and mark the register as closed upon subdivision to parcel numbers Gilgil/Gilgil Block 1/9563 to 9570 (Kekopey).**

d) **An order of mandamus compelling the second respondent to remove the mutation entry reference number MUT/NVS/9877/5/19 from registry index map number 14 and 15 Gilgil/Gilgil Block 1 (Kekopey) and restore land parcel numbers Gilgil/Gilgil block 1/9563 to 9570 (Kekopey) in the aforesaid map.**

e) **Since the ex parte applicants did not seek any costs in the Notice of Motion, I make no order as to costs.**

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2022.

D. O. OHUNGO

JUDGE

DELIVERED THROUGH ELECTRONIC MAIL IN THE PRESENCE OF:

COURT ASSISTANT: E. JUMA