



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT HOMA-BAY.**

**ELC CASE JUDICIAL REVIEW NO. 8 OF 2021**

**(FORMERLY MIGORI ELC CASE NO. 1 OF 2021 (JR))**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR, RACHUONYO SOUTH/NORTH**

**SUB-COUNTIES.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONENT**

**AND**

**ISAIAH ONYANGO ONG’UDI .....3<sup>RD</sup> RESPONDENT**

**SIPRIAN AOKO ONG’UDI .....4<sup>TH</sup> RESPONDENT**

**EX-PARTE**

**JAPHETH OGOLO OYOO**

**JUDGMENT**

1. By an application dated 12<sup>th</sup> January 2021 and duly filed in court on 15<sup>th</sup> January 2021, the Ex Parte applicant, Japhet Ogolo Oyoo through the firm of Oguttu Mboya, Ochwal and Partners Advocates sought leave of this court to commence judicial review proceedings in the nature of certiorari, mandamus and prohibition against the respondents herein. In view of the character of the application, the court granted the same 18<sup>th</sup> January 2021 and directed the Ex parte applicant’s counsel to mount a substantive application within 21 days from that date.

2. Accordingly, by a Notice of Motion dated 20<sup>th</sup> January 201 and lodged in court on 21<sup>st</sup> January 2021 (the application herein), the Ex Parte applicant is seeking the following orders;

a) The Honourable court be pleased to grant an Order/Writ of Judicial Review, in the nature of certiorari to bring unto this Honourable Court and Quash the decision of the 1<sup>st</sup> Respondent, contained vide letter Reference No. RACH/LND/ADMIN/8/VOL.IV/234, dated the 7<sup>th</sup> day of July 2020, addressed to Ex-parte Applicant, (but which was not communicated and/or forwarded, whatsoever) revoking the Ex-parte Applicants Title pertaining to and/or concerning **LR No’s KABONDO/KASEWE/1711 AND 1712**, respectively, without complying with and/or observing the principle of Fair Hearing and the Doctrine of Natural Justice, whatsoever and/or howsoever.

b) The Honourable Court be pleased to grant an Order/Writ of Judicial Review , in the nature of certiorari, to bring unto this Honourable Court and Quash the Decision of the 1<sup>st</sup> Respondent, contained vide Letter Reference No. **RACH/LND/ADMIN/8/VOL.IV/234, dated the 7<sup>th</sup> day of July 2020**, addressed to the Ex-parte Applicant, (but which was not communicated and/or (forwarded, whatsoever) rectifying the Registrar in respect of LR No. **KABONDO/KASEWE/937**,(which had hitherto been sub-divided) and restoring same to the name of one OYOO ONDIEK, now deceased, without due regard to the provisions of the Fair Administrative Actions Act, 2015 and the provisions of Section 79 of the Land Registration Act, 2016 (2012 t).

c) The Honourable Court be pleased to grant an order/Writ of Judicial Review, in the nature of certiorari, to bring unto this Honourable Court and Quash the Decision of the 1<sup>st</sup> Respondent, contained vide Letter Reference No. **RACH/LND/ADMIN/8/VOL.IV/234, dated the 7<sup>th</sup> day of July 2020**, addressed to the Ex-parte Applicant, (but which was not communicated and/or forwarded, whatsoever) cancelling the name of the EX-parte Applicant from the Register and/or Green Card in respect of LR No. KABONDO/KASEWE/937, without due regard to the doctrine of Res Judicata and in gross insubordination of the decisions of Courts of competent Jurisdictions, namely, **OYUGIS PMCC NO. 35 OF 2012** and **Kisii ELC NO'S 94 OF 2014 AND 379 OF 2016**, respectively.

d) The Honourable Court be pleased to grant an order/Writ of Judicial Review, in nature of certiorari to bring unto this Honourable Court and Quash the Restriction (sic) entered against the title in respect of the original parcel of land, namely, LR No. **KABONDO/KASEWE/937**, without any lawful cause and/or basis and which is merely intended to restrict, limit and/or hinder the Ex-parte Applicant's rights and /or interests thereto.

e) The Honourable Court be pleased to grant an order/Writ of Judicial Review, In the nature of mandamus to compel the 1<sup>st</sup> Respondent herein, to restore and/or reinstate the Register and Titles in respect of **LR NO'S KABONDO/KASEWE/1711 AND 1712**, respectively, in the names of Ex-parte Applicant and thus restore the Status Quo ante the Impugned decision made vide letter dated **7<sup>th</sup> day of July 2020**.

f) The Honourable Court be pleased to grant an Order of Judicial Review, in the nature of Prohibition, to issue prohibiting the Respondents and in particular, the 1<sup>st</sup> Respondent, from revoking, interfering with and/or otherwise altering the Register and Titles in respect of **LR NO'S KABONDO/KASEWE/1711 and 1712**, respectively, in the names of the Ex-parte Applicant, without Regard to the Due process of the Law, the constitution, 2010, the Fair Administrative Actions Act, 2015 and the Doctrine of Natural Justice.

g) Costs of this Application be borne by the Respondent and the interested parties jointly and severally.

h) Such further and/or other Orders be made as the Court may deem fit and expedient.

3. The application is premised on the statement of facts and the verifying affidavit both of even date together with the annexed documents marked as "JOO 1" to "JOO 8" which include; judgment delivered on 23<sup>rd</sup> June 2016 in Kisii ELC Civil Appeal No. 94 of 2014 (JOO-5a), a ruling delivered on 23<sup>rd</sup> June 2017 in Kisii ELCC No. 379 of 2016 (JOO-5b), a ruling delivered on 24<sup>th</sup> January 2020 in Kisii ELCC No. 379 of 2016 (JOO-6), judgment delivered on 24<sup>th</sup> December 2018 in Oyugis PMCC No. 35 of 2012 (JOO-7) and the 1<sup>st</sup> respondent's letter Ref.No. RACH/LND/ADMIN/8/VOL.IV/234 dated 7<sup>th</sup> July 2020 (JOO-8). The application is also based on grounds (a) to (oo) set out on it's face.

4. Briefly, the Ex parte applicant's lamentation is that he is the registered proprietor of the original land, LR No. Kabondo/Kasewe/937 which was originally registered in the name of Oyoo Ondieki (Deceased-1). That upon the death of Deceased-1, he obtained letters of administration over the estate thereof and the original land was then transferred to his name and registered accordingly. That the Ex parte applicant proceeded and caused the sub division of the original land culminating to twin sub divisions namely LR Nos. Kabondo/Kasewe/1711 and 1712 and caused them to be registered in his name. That the dispute has been determined as shown in the documents marked as JOO-5a, JOO-5b, JOO-6 and JOO-7 thus, the 1st respondent, an agent of the 2<sup>nd</sup> respondent, was devoid of jurisdiction over the matter. That the 1<sup>st</sup> respondent's decision (JOO-8) did not conform with Articles 47 and 50 (1) of the Constitution of Kenya, 2010, sections 5, 6, 7, 9, 10 and 11 of the Fair Administrative Actions Act, 2015 and section 79 of the Land Registration Act, 2016 (2012). Thus, it precipitated the present application.

5. The respondents were duly served as revealed in an affidavits of service sworn on 5<sup>th</sup> February 2021 and filed herein on 7<sup>th</sup> June 2021. The 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to file any response to the application.

6. In a 16-paragraphed replying affidavit sworn on 26<sup>th</sup> April 2021 by the 2<sup>nd</sup> interested party, Siprina Aoko Ong'udi for and behalf of the 1<sup>st</sup> interested party and herself, the application is opposed. The interested parties deposed, inter alia, that the Ex parte applicant did not obtain letters of administration and confirmation of grant from a court of law hence resulting to fraud as disclosed in the 1<sup>st</sup> respondent's letter dated 7<sup>th</sup> July 2020 marked as "SAO-4" and annexed to the said affidavit. The interested parties termed the application a waste of judicial time and resources as this court cannot condone fraud.

7. In their assertion, the interested parties also relied on a copy of the citation in Oyugis SPM's Court Succession Cause No. E2B of 2020 alongside Oyugis SPMCC No. 35 of 2012 (SAO-1) as well as a green card (SAO-2) and a certificate of official search dated 10<sup>th</sup> September 2020 (SAO-3) annexed to the affidavit. They then urged the court to dismiss the application with costs.

8. On 7<sup>th</sup> August 2021, this court ordered and directed that the application be heard by way of written submissions; see **Order 51 Rule 16 of Civil Procedure Rules, 2010 and Practice Direction number 33 of the Environment and Land Court Practice Directions, 2014**.

9. On 25<sup>th</sup> February 2022, the Ex-parte applicant's counsel filed submissions dated 18<sup>th</sup> February 2022 giving the background of the matter, framed five issues for determination including whether the 1<sup>st</sup> respondent was seized of the jurisdiction to the titles over the twins sub divisions of the original land and whether the 1<sup>st</sup> respondent's decision (JOO-2/SAO-4) was constitutional. Counsel discussed the issues in the negative and relied on **Article 47 and section 79** (both supra) and the decision in the case of **Republic-vs-Non Governmental Organisations Cordination Board Ex-Parte Evans Kidero Foundation (2017) eKLR**, to fortify the submissions.

10. The respondents filed no submissions in this application.

11. 19<sup>th</sup> October 2021, learned counsel for the interested parties filed submissions dated 8<sup>th</sup> October 2021 giving background information and brief facts of the matter and identified twin issues for determination namely whether the application falls within the purview of a civil dispute as opposed to “Judicial Review application” and whether the application should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. Counsel analyzed the issues in the affirmative and cited **section 26 (1) of the Land Registration Act, 2016 (2012), Municipal Council of Mombasa-vs-Republic and Umoja Consultants Limited (2002) eKLR, the Black’s Law Dictionary 6<sup>th</sup> Edition on the definition of the term “abuse” and the Kenya National Examinations Council-vs-Republic Ex-Parte Geoffrey Njoroge and 9 others (1997) KLR**, among others, to reinforce the submissions. Counsel urged this court to dismiss the application as the same is misconceived, an afterthought, a waste of judicial time and resources hence, find judgment in favour of the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.

12. I have thoroughly considered the entire application, the 1<sup>st</sup> and 2<sup>nd</sup> the application, the interested parties’ replying affidavit and their submissions. On that score, the issues for determination are condensed to whether;

(a) The defendant’s decision as contained in his letter (JOO 8/SAO-4) is reasonable, procedurally fair and lawful.

(b) The Ex-Parte applicant is entitled to the orders of judicial review sought in the instant application.

13. The Constitutional and statutory provisions under which the application was commenced, are all borne in mind. Indeed, an order of judicial review is an appropriate relief that a court may grant as provided for under **Article 23 (3) (f) of the Constitution of Kenya, 2010**.

14. The Ex Parte applicant stated that he is entitled to protection of the right by dint of **section 26 (1) of the Land Registration Act, 2016 (2012)**. The protection of right to property is anchored under **Article 40 of the Constitution of Kenya, 2010**.

15. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> interested parties’ contention is that the application is devoid of merits. That the Ex-parte applicant ought to have sought relief by way of an ordinary civil suit and not through the instant application.

16. Article 47 (1) (supra) which is operationalized by sections 5,6,7,9, 10 and 11 of the Fair Administrative Actions Act, 2015 (supra), stipulates;

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

17. Additionally, Article 50 (1) (supra) reads;

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

18. The 1<sup>st</sup> respondent has the jurisdiction in respect of nullification of title to land under section 79 (supra). Besides, in making the decision thereof, the 1<sup>st</sup> respondent was to ensure that the persons to be affected by his decision were given adequate notice of what is proposed in the decision and give reasons thereof as stated in **Article 47, section 79 and Republic-vs-Non Governmental Organisations Cordination case (all supra)**, among other authorities.

19. In the present application, the procedure followed in the arriving at the impugned decision (JOO-8/SAO-4) is not shown therein. The decision strikes at the root of the applicant’s rights enshrined under **Articles 47 (1) and 50 (1) (supra)** and offends the res judicata principle as captured in **section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

20. In the case of **Re Hebtullah Properties Limited (1976-1980) 1 KLR 1195 at 1209**, it was observed;

*“The tribunal had a duty to hear the landlord on the objection. It did not hear the landlord. There was.....a violation of the audi al teram partem rule (right to be heard)...”*

21. Clearly, the contested issues between the parties herein were determined on merits as disclosed in the determinations marked as JOO-5a, JOO-5B, JOO-6 and JOO-7 and annexed to the application. It was the duty of the 1<sup>st</sup> respondent to comply accordingly as noted in **Kenya National Examination Council case (supra)**.

22. It follows that the 1<sup>st</sup> respondent’s decision contained in the letter dated 7<sup>th</sup> July 2020 (JOO-8/SAO-4) regarding the nullification of title in respect of the twin sub divisions of the original land and subsequent restriction thereon, was unreasonable and procedurally unfair. No adequate notice was issued to the Ex-Parte applicant thereof. The decision was unreasonable, procedurally unfair and unlawful in the circumstances as the dispute had been determined as pointed out in paragraphs 3 and 19 hereinabove. Therefore, the Ex parte applicant is entitled to the orders sought in the application..

23. In the end, I find the Ex-Parte Applicant’s application dated 20<sup>th</sup> January 2021 and lodged in court on 21<sup>st</sup> January 2021, meritorious. I proceed to allow the same in terms of orders of judicial review of certiorari, mandamus and prohibition sought therein and as stated in paragraph 2 (a) to (g) hereinabove.

24. It is so ordered.

**DELIVERED, DATED and SIGNED at Homa Bay this 28<sup>th</sup> day of February 2022.**

**G.M.A ONG'ONDO**

**JUDGE**

**PRESENT:**

- a) W.Ochwal, learned counsel for the Ex-Parte Applicant
- b) Ms Odera, learned counsel holding brief for Mr H. Obach, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties.
- c) Okello, Court Assistant