



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JUDICIAL REVIEW APPLICATION NO. 64 OF 2011

THE REPUBLIC.....
 APPLICANT

-VERSUS-

THE LAND REGISTRAR, KILIFI
RESPONDENT

AND

GOOD SAMARITAN VISION INTERESTED
 PARTY

EX-PARTE: CECILIA GATHONI

WANGARE

JUDGMENT

INTRODUCTION

1. Upon leave granted on the 2nd June 2011, the ex parte applicant by Notice of Motion dated 20th June 2011, expressed to be brought under Order 53 Rule 3 of the Civil Procedure rules 2010, sections 1A, 1B and 3A of the Civil Procedure Act, sections 8 and 9 of the Law Reform Act and Articles 40, 47 and 48 of the Constitution of Kenya, sought judicial review orders as follows:
 1. *That the ex parte applicant be granted judicial review orders of:*
 - a. **Certiorari** removing to this court and quashing the decision of the respondent to register and to issue Interested Party a title deed in respect of all that piece of land known as Kilifi/Mtondia/941.
 - b. **Mandamus** compelling the respondent to cancel the Interested Party’s title deed in respect of all that parcel of land known as Kilifi/Mtondia/941.
 - c. **Mandamus** compelling the respondent to register and to issue the Interested Party with a title deed that does not cover the land known as Kilifi/Mtondia/945.
 - d. **Mandamus** compelling the respondent to restore the registration of the ex parte applicant as the sole registered proprietor of all that parcel of land known as Kilifi/Mtondia/945.
 2. *That the costs be to the ex parte applicant.*

The Ex Parte Applicant’s Case

2. The ex applicant's case is set out in the Grounds Upon Which the Relief is Sought in the Statement dated 30th May 2011, as follows:

GROUND UPON WHICH THE RELIEF IS SOUGHT

- a. *The ex-parte applicant is the registered proprietor of all that parcel of land known as Kilifi/Mtondia/945 (hereinafter "plot 945") pursuant to a title deed issued on 04.04.2001.*
- b. *The ex-parte applicant purchased plot 945 from one Francis Washiali Tsalwa sometime in March 2001 after which the title deed was issued to the ex-parte applicant.*
- c. *The property was a subdivision of Plot No. Kilifi/Mtondia/941 (hereinafter "plot 941").*
- d. *Upon being issued with a title deed the ex-parte applicant charged plot 945 to Barclays Bank on 07.06.2001 and registered a further charge to the same bank on 12/07/2002. The title deed is still with the said bank.*
- e. *Having acquired plot 945 and a title deed having been duly issued to her, the ex-parte applicant acquired proprietary rights over the land which cannot be defeated in an unlawful manner.*
- f. *To enable her charge plot 945 to the bank the ex-parte applicant duly appeared before the Bahari Land Control Board and applied for a consent. She was duly granted the consent.*
- g. *All the foregoing show that plot 945 was duly in existence and duly registered in favour of the ex-parte applicant as the absolute owner.*
- h. *Plot 941 having been subdivided to create plot 945 among others, plot 941 ceased to exist and no title deed for plot 941 could be issued to anyone after the said subdivision.*
- i. *To the ex-parte applicant's shock she has recently discovered that the respondent purported to issue a title deed in respect of plot 941 to the 1st Interested Party.*
- j. *The aforesaid title deed purports to show that it was issued on 10.04.2002 but the ex-parte applicant believes that it was issued only recently then backdated to 10.04.2002.*
- k. *In any case the respondent could not lawfully and procedurally issue a title deed for plot 941 on 10/04/2002 when the said plot had been subdivided into plot 945 among others way back on 04/04/2001.*
- l. *The respondent's actions aforesaid are unfair, irregular, unprocedural, unlawful and unjust.*
- m. *The ex-parte applicant was not given any notice of the respondent's intention to carry out the aforesaid acts.*
- n. *The ex-parte applicant was neither heard nor given an opportunity to be heard prior to the said acts.*
- o. *The respondent's acts purport to deprive the ex-parte applicant of her property and hence the said acts infringe on her constitutionally guaranteed rights.*
- p. *The respondent's said acts are ultra vires the powers and statutory functions of the respondent.*
- q. *The respondent's acts complained of are an abuse of power, unfair and perverse within the Wednesbury principle.*
- r. *The respondent's acts complained of are unreasonable, irrational and a breach of the rules of natural justice.*
- s. *The respondent's acts are in bad faith and constitute errors of facts and law.*
- t. *The respondent's acts complained of are unfair and unjust in all the circumstances of the case.*

RESPONSES BY THE PARTIES

3. The Attorney General appeared for the Respondent and filed an affidavit sworn on 23rd August 2012 by Anthony Tune Karani, a district Land Registrar, Kilifi who stated as follows:
 1. *THAT I am the district land registrar KILIFI District well conversant with the matters herein hence competent to swear this affidavit.*
 2. *THAT the parcel of land number **KILIFI/MTONDIA/162** was registered to the Settlement Fund Trustees on the **8th September, 1980.***
 3. *THAT on the 13th March 2001, the parcel was transferred to **NDIMA WANJE TUNJE** through Settlement Fund Trustees Transfers and discharged according (See the encumbrance section), but the land register gives no indication title deed as having been issued to the proprietor. (Annexed hereto and marked ATK I is a copy of the discharge).*

4. THAT a subdivision of the parcel number **KILIFI/MTONDIA/162** is purported to have been carried out on the **14th March, 2001**, with the resultant subdivisions being parcel numbers **KILIFI/MTONDIA/940** and **941**. Interestingly no entry was made in the green card to show that a mutation was registered on the said date, neither is there any entry to indicate that the transaction was captured in the presentation book.
5. THAT the parcel was purportedly carved out of the parcel number KILIFI/MTONDIA/162 in the name of NDIMA WANJE TUNJE, on the 14th March, 2011, but no title deed was issued.
6. THAT on the 14th March, 2001, the parcel of land was allegedly transferred to FRANCIS WASHIALI TSWALA (ID No. 480968) and a title deed issued. However, this transaction never featured in the Presentation Book).
7. THAT on the 10th April, 2002, a subsequent transfer was registered to GOOD SAMARITAN VISION, P.O. Box 510, KILIFI, and a Title Deed issued, and again no information in the Presentation Book. (Annexed hereto and marked ATK II).
8. THAT on 23rd March, 2009 a restriction was placed against the Title Deed prohibiting further transactions.
9. THAT it is further noted that the records for parcels numbers KILIFI/MTONDIA/940 and 945 cannot be traced in the registry at all, but according to a photograph of a title deed in our possession the following details were noted. (Annexed and marked ATK III).
 - i. The document (Copy of the Title Deed) shows **CECELIA GATHONIWANGARE (ID. No. 6250465)** as the alleged registered proprietors on the 4th April, 2001 as a result of a transfer, however, no documentation is available in the registry. Infact, there is no evidence to show that the transfer documents were officially received at the registry for registration purposes.
 - ii. The copy of the Title Deed also shows the parcel as having been charged to Barclays Bank of Kenya Limited for Kshs.400,000/- and 200,000/-, on 7th June 2001 and 12th July, 2002 respectively.
10. THAT we have also observed that FRANCIS WASHIALA TSWALA (ID No. 4180968), allegedly transferred the parcel number KILIFI/MTONDIA/941, to GOOD SAMARITAN VISION, P.O. Box 510 KILIFI on the 10th April 2002, while it is also claimed that he subdivide the same parcel on the resultant sub-divisions, which the documents are non-existent and were never entered in the Presentation Book, to indicate official registration."

4. For the Interested Party an affidavit sworn by its Director **MWASAHA MWAGAMBO MWASAHA** on 29th November 2011 set out its case, principally, as follows:

1. THAT I am the director and founder of Good Samaritan Vision entity which is registered with the Department of Social Services Ministry of Gender Children and Social Development. That we ran a children home, orphanage and Nature Park which we have developed from a quarry within the Bofa Area.
2. THAT while searching for a site for the Orphanage and Park, I realised that the neighbouring Land belonged to one Francis Tsalwa. I started looking for him. This was around the year 2001. That on 20th March 2001, I entered into an agreement with the said Francis Tsalwa wherein I agreed to purchase the 6¼ acres including the quarry for Kshs.1,300,000/- inclusive of charges for processing of the title. That we visited Mulongo & Company Advocates who reduced the agreement in writing. That at the time I had paid Mr. Tsalwa a deposit of Kshs.300,000/-. Mr. Mulongo charged us Kshs.20,000/- for the agreement.
3. THAT Tsalwa processed the title and after about 3 months he gave me the title. That I had done a search to confirm that the property was in our name. That we have built a perimeter wall, to date school structures and an incomplete Conference Hall put up a farm and dug a well.
4. THAT I am now shocked that the ex-parte Applicant is suing me and claiming that my title is not proper yet I have been on the land for all this while.
5. THAT I have read the Statement and all documents on record and consulted with my Advocate now on record and state that:-

- a) *A Judicial Review Order of Certiorari shall not issue as the act sought to be removed herein and quashed occurred on 10/4/2002 which is more than six months before this suit commenced. I am informed that by dint of law Certiorari shall not issue for acts done outside the six months period from the day of commission as shown by the Green Card Copy annexed by the Ex-parte Applicant at page 15 thereof as G.W.6.*
6. *THAT the search at page 16 is also an authentic one as issued on 26/3/2009. That the ex-parte Applicant has been aware of this position from 2009 to date.*”
5. The ex parte applicant filed a supplementary affidavit sworn on 23rd July 2013 in response to the replying affidavits attached Certificates of searches on her parcel NO. 945 indicating as registered owner as early as 8th June 2001 of the parcel being as subdivision of plot No.941 over one year before the Interested Party obtained title to Parcel No. 941 on 10th April 2002. She urged that the Registrar as the custodian of register and records he could not be heard to say that the documents on parcels of land could not be traced. She further averred that she had instructed a Surveyor to review the matter who had issued a report dated 15th May 2013 which set out his findings as follows:
1. *Plot number Kilifi/Mtondia/941 was subdivided on March year two thousands and one (3/2001) or there about. The survey mutation forms were submitted to the District Surveyor Kilifi on 21/3/2001. The District Surveyor issued the resulting new numbers as Kilifi/Mtondia/944, Kilifi/Mtondia/945 and Kilifi/Mtondia/946. The mutation forms were collected from the District Surveyor by the owner of plot Kilifi/Mtondia/941 so that he could register the new numbers and obtain the new title deeds (Kilifi/Mtondia/944 and Kilifi/Mtondia/945). Plot number Kilifi/Mtondia/946 is a road.*
 2. *The title deed Kilifi/Mtondia/941 was surrendered back to the Government before the new titles (Kilifi/Mtondia/944&945) were issued. The title deed Kilifi/Mtondia/941 stopped existing when the new ones were issued.*
 3. *Title deed Kilifi/Mtondia/945 was issued on 4/4/2001 by the District Land Registrar, Kilifi District as indicated on the copy of the title deed issued to Cecilia Gathoni Wangare of ID No. 6250465.*
 4. *The Registry Index Map sheet 198/2/13 as referenced on the title deed was not amended after the new Title deeds were issued and still reflects Plot Kilifi/Mtondia/941 instead of Kilifi/Mtondia/944, 945 & 946. The District Surveyor should be requested to present the Mutation forms to the amending office in Mombasa so that the registry index Map can be amended to reflect the new numbers. From the current registry map it is noted that surveys carried out much later have been amended reflecting the resultant new numbers.*
 5. *The correspondence file for plot Kilifi/Mtondia/945 has been opened at District Land registrar’s office as two official searches were carried out on 11th May 2002 and 15th July 2002. The searches confirmed proprietor as Cecilia Gathoni Wangare.*

SUBMISSIONS BY THE PARTIES

6. Counsel for the parties – M/S Omondi Waweru & Co. Advocates for the ex parte applicant M/S Akanga Alera & Associates for the Interested Party and Mr. Oscar Eredi, Principal Litigation Counsel for the Attorney General, for the Respondent - filed written submissions, respectively dated 4th October 2013, 20th March 2012 and 20th February 2014, and ruling was reserved for the 4th June 2014. On account of heavy workload in the Constitutional and Judicial Review Division of the Court at Mombasa where I have served single-handedly, it has not been possible to earlier deliver this ruling, and the delay is greatly regretted

ISSUES FOR DETERMINATION

7. The issues for determination are as follows -
- a. Whether the remedies of judicial review orders of certiorari and mandamus *are available*

- in this case; and, if so,
- b. Whether the ex parte applicant *has demonstrated a case for the grant of the judicial review orders sought.*

DETERMINATION

Whether the remedies of judicial review orders are available in this case

Application time barred?

8. Objection was taken by the Respondent and the Interested Party that the decision challenged in the judicial review proceedings was made on 10th April 2002 and the proceedings commenced outside the 6 Months period provided in Order 53 rule of the Civil Procedure Rules. For the applicant, it was contended that the provisions of Order 53 rule 2 are subsidiary legislation which is trumped by the substantial justice principle of article 159 of the Constitution as a procedural technicality and the authority of ***Ogendo & Anor. v. Nzioka & Anor.*** [1993] LLR 332 (CAK) was relied on for the proposition that formal technical procedural requirements such as in that case for leave before commencement of judicial review application should not affect the exercise of the court's jurisdiction to hear the matter on the merits.
9. I however, do not consider that the jurisdiction of the court is affected in this case by the filing of the challenge on the decision of the Respondent outside the provision of six months because the rule applies only to decision of judicial or quasi judicial nature not administrative decisions such as those taken by the respondent in this case. Order 53 rule 2 of the Civil Procedure Rules is based on section 9 (3) of the Law Reform Act which provides that –

“9. (3) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceedings from the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, Decree, conviction or other proceedings or such shorter period as may be prescribed under any written law...”

Construed ***ejusdem generis***, the provisions of section 9 (3) of the Law Reform Act apply only to judgments, rulings, decrees, orders or other determinations or directions in proceedings of judicial nature.

Special jurisdiction of the Court

10. The ex parte applicant sought to place reliance on the provisions of the Constitution of Kenya in his judicial review application to justify the grant of the orders on the grounds of deprivation of property under Article 40 of the Constitution and reliance placed on ***Beatrice Wairimu Kiiru v. Director of Surveys & 2 Ors.*** [2011] eKLR where Ouko, J. as he then was relied on Article 40 as further justification for the grant of order of certiorari against a decision of the Director of Surveys holding that “[b]y arbitrarily amending the register to remove the applicant’s title, the 1st respondent was in breach of article 40 of the Constitution which prohibits the State from depriving a person of private property.”
11. However, in a decision which binds this Court, ***Makupa Transit Shade Ltd v. KPA***, supra, the Court of Appeal held that it is improper to combine the judicial review application and the constitutional jurisdiction of the court in seeking orders based on both processes, in view of the special jurisdiction of the judicial review, as follows:

“Finally, we would observe that Judicial Review Jurisdiction is a special Jurisdiction that it is neither criminal nor civil. It operates within narrow confines of the Law Reform Act and order 53 of the Civil Procedure Rules. As it is narrow, it should never be mixed or combined with other Jurisdictions. In this appeal we note that though the appellants came to Court specifically seeking Judicial Review orders, they also wittingly or unwittingly roped in Constitutional Jurisdiction. We

do not think that this was proper or appropriate. The two are different jurisdictions that should not be mixed. We appreciate that under **Article 23** of the Constitution that deals with authority of courts to uphold and enforce the bill of rights, the Court may grant many reliefs including an order of Judicial Review. However, this can only happen where a party has properly invoked the Constitutional Jurisdiction of the Court. **One cannot come to Court vide Judicial Review proceedings and expect to be granted Judicial Review orders on the basis of an infringement of a constitutional right. A party should make an election.**”

Accordingly, the applicant ought to urge the breaches of the constitution in suitable proceedings filed in that behalf in as an ordinary suit or constitutional petition rather than a judicial review court.

Private law interests?

12. Approving and following its earlier decision in **Commissioner of Lands v. Kunste Hotel Limited (1997) eKLR**, the Court of Appeal, (Okwengu, Makhandia and Sichale, JJA.) in **Makupa Transit Shade Ltd & Anor. v Kenya Ports Authority [2015] eKLR of 12th March 2015** on an application by the applicant for mandamus directing the respondent to grant it a lease on a property observed that:

“In **Commissioner of Lands v. Kunste Hotel Limited (1997) eKLR** this court held that:

“But it must be remembered that judicial review is concerned not with private rights or merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he is subjected.”

See also **Meixner v. AG.**, (2005) 2 KLR 189.

13. It was contended that the dispute before the court involved the private law issue of ownership of the suit property between the applicant and the Interested Party which could only properly be resolved ‘in a civil suit where evidence is adduced witnesses cross-examined and a determination made.’ The applicant’s claim to the judicial review orders was based, however, alleged breach of the provisions of the Registered Land Act, as follows:

“The ex parte applicant’s and the Interested Party’s titles are both registered under the registered Land act cap. 300 laws of Kenya (hereinafter the Act). Under section 10 of the Registrar is required to maintain a separate register in respect each parcel of land and further under section 16 of the Act, registrar is required to omit from the register entries that have ceased to have effect. These sections of the Act required the respondent to create a new register for the remainder of the parcel that was previously known as Kilifi/Mtondia/941. Contrary to the law, thje respondent purported to issue a fresh title deed to the Interested Party on 10.04.2002 in respect of plot Kilifi/Mtondia/941.”

14. This court would agree that if plot no. 941 had been subdivided into parcels of land including no. 945 which was transferred and registered in the applicant’s name, and the registrar subsequently purported to create a title to original title which had already been extinguished by the subdivision, the Registrar would be acting outside his statutory obligation under sections 10 and 16 of the Registered Land Act. The allegations of the various parties in the suit however, raise questions as to the existence of the parcel of land no.945 and therefore its registration in the name of the applicant. The applicant has the burden of proof under section 107 of the evidence Act to prove the existence of the plot 945 and her registration as proprietor thereto.

Whether the ex parte applicant has demonstrated a case for the grant of the judicial review orders

Dispute as to existence of plot no. 945

15. The ex parte applicant submits that the court should infer the existence of the plot and its registration infer name because the respondent as the custodian of land registration documents had withheld the documents, which must be adverse to his case.

“The Respondent is the custodian of eh register. He cannot just tell the court that the records are missing. He cannot remain mum when clear and tangible evidence has been put before this court. He has to offer convincing explanations. His failure to do so can only be construed as a deliberate attempt at withholding information that would otherwise be adverse to his case. We urge the court to infer and hold so.”

With respect, on the principle of proof by balance of probabilities, it would require cogent evidence than mere inference to determine the fact of ownership and tile to land and the apparent fraudulent disposition of it and registration in the name of another party. Moreover, in making the adverse inference, it was not shown what interest the respondent has in maintaining or not maintaining the register in a particular way.

16. The court did not understand the Registrar to admit the existence of the plot no. 945 but rather to be surprised and to suggest *mala fides* in the applicant case at the non-existence of documents supporting of her cases. That must the meaning to be given to the contents of paragraph 4 of the registrar’s replying affidavit:

*“THAT a subdivision of the parcel number **KILIFI/MTONDIA/162** is purported to have been carried out on the **14th March, 2001**, with the resultant subdivisions being parcel numbers **KILIFI/MTONDIA/940** and **941**. Interestingly no entry was made in the green card to show that a mutation was registered on the said date, neither is there any entry to indicate that the transaction was captured in the presentation book. ”*

17. It is disputed that the applicant’s title and parcel of land ever existed. The Respondent’s submissions cast doubt as to the existence of plot 945 as follows:

“3. In the instant case we, submit that the applicant was unknown to the registrar when the impugned decision was made. Furthermore, relevant documents to support the fact that the applicant purchased the suit property have not been annexed. For instance there was no official search at the time we filed our replying affidavit. No transfer form was duly filled executed and presented. No proof of payment of stamp duty and no consen to subdivide and transfer.

4. The claims that the suit property was charged to a bank is no proof that there is a valid title. The extract of the green card we have annexed to our affidavit does not show that the suit property exists./ Such records as pertains to Kilifi Mtondia 940 and 953 be traced in the land registry at Kilifi at all.”

18. The ex parte applicant in response filed the documents indicating the charge of the property to a bank and a surveyor’s report detailing the creation of the parcel of land no.945 among others out of plot no. 941. The Surveyor’s Report which purports to vouch for the prior creation of subdivisions 944, 945 and 946 out of the original parcel no.941 was attached to the applicant’s supplementary affidavit filed in response to the replying affidavits of the respondent and the Interested Party and these parties had no opportunity to contradict it by evidence.

Whether the court will deal with the merits of the decision

19. Judicial review procedure must not be used in cases where the facts of the case are so much disputed that the determination of the matter will require elaborate hearing with cross-examination of witnesses to discover the truth behind the various positions taken by the parties. In this case the truth could be any of three positions advanced by the parties as follows:
- a. That the original parcel of land 941 was subdivided into 944, 945 and 946 and plot 945 transferred to the applicant as presented by the ex parte applicant. However, the ex parte applicant did not produce, the consent of the land Board to the subdivision, the agreement for sale to her and subsequent transfer of plot 945 and payment of stamp duty to authenticate the transaction.
 - b. That the creation, transfer and registration of plot no. 945 was subsequent to the registration of the Interested Party's title on 10th April 2002 as alleged by the Interested Party.
 - c. That the plot no 945 did not exist, irrespective of the charge thereof on paper to the Bank, as alleged by the respondent.
20. The court cannot be certain, on the evidence presented before it, that the ex parte applicant was the registered proprietor of a parcel of land no. 945 and that the registration of the Interested Party as proprietor of plot no. 941 was an illegality in view of the ex parte applicant's title to plot no. 945. It was for the ex parte applicant to prove that she had acquired a prior title to a parcel of land plot 945 created out of original plot no. 941 and that therefore any subsequent disposition and registration of title on the whole original plot no. 941 was a nullity and without or in excess of jurisdiction on the part of the respondent Land Registrar. This the ex parte applicant has on a balance of probabilities failed to do in these proceedings. In such circumstances, the judicial review remedies of certiorari and mandamus cannot issue.

CONCLUSION

21. Clearly, the dispute as to the existence of the two parcels of land the subject of these judicial review proceedings calls for determination of the merits of the decision to issue a title to the Interested Party, not merely the process of the exercise by the Registrar of his powers or mandate under then applicable Registered Land Act, cap 300 Laws of Kenya. For the Court to determine that a parcel of land no. 945 was created by subdivision of original plot no. 941 and transferred to the applicant prior to a purported transfer and registration of the said original parcel of land no. 941 to the Interested Party, the Court will have to take evidence from the Department of Surveys responsible for subdivisions of land, the private surveyor who made the report attached to the applicant's supplementary affidavit, the owner of the land who purportedly transferred the land to the two disputant parties – the ex parte applicant and the Interested Party – the Land Registrar and the parties themselves with possible witnesses of the respective sale agreements and transfers.
22. The need for full trial of the question of existence and ownership of plot no. 945 and its prior registration in the name of the ex parte applicant before the subsequent registration of plot no. 941 in the name of the Interested Party, which was the basis of these judicial review proceedings, requires direct evidence to be adduced *viva voce* with cross-examination for veracity of witnesses and therefore calls for a procedure amenable to full hearing on the merits such as a suit by plaint or originating summons or by constitutional petition before the Environment and Land Court or the Constitutional Division of the Court. The judicial review court is wholly unsuited for this type of inquiry/hearing.

ORDERS

23. Accordingly, for the reasons set out above, the ex parte applicant's Notice of Motion herein is declined with costs to the Respondent and the Interested Party.

DATED SIGNED AND DELIVERED THIS 30TH DAY OF JUNE 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Applicant

No appearance for the Respondent

Mr. Mwasaha Mwangabo for the Interested Party

Linda - Court Assistant.