



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**  
**MISC. APPLICATION NO. 388 OF 2014**

**IN THE MATTER OF: THE LAND REGISTRATION ACT NO.3 OF 2012 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF: THE LAND ACT NO.6 OF 2012 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR ORDERS OF CERTIORARI, PROHIBITION  
AND MANDAMUS**

**BETWEEN**

**REPUBLIC.....APPELLANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL OF KENYA...1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR,**

**KAJIADO NORTH DISTRICT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. I presume from the application seeking leave to institute these proceedings that the *ex parte* applicant is one **Amos Godfrey Onyango Nyaoro**. The reason why I use the term “presume” is because in the Motion dated 24<sup>th</sup> October, 2014, it is not indicated who the *ex parte* applicant is.
2. By a Motion on Notice dated 24<sup>th</sup> October, 2014, the following orders were sought.
  - a. That an order of certiorari do issue quashing the decision by the second respondent to cancel, nullify and/or rectify the register in respect of title number KJD/OLEKASASI/1067 with the intention of deleting the Applicants name as the

registered proprietor from the register of the aforementioned title pursuant to a notice dated 12<sup>th</sup> June 2014.

b. That an order of prohibition do issue prohibition the second Respondent from cancelling, nullifying and/or rectifying the register in respect of title number KJD/OLEKASASI/1067 with the intention of deleting the applicants name as registered proprietor from the register of the aforementioned title pursuant to a notice dated 12<sup>th</sup> June 2014.

c. That an order of mandamus do issue to compel the second Respondent to lift the notice dated 12<sup>th</sup> June 2014.

d. That an order of mandamus do issue to compel the second Respondent to re-instate the name of the applicant in the register as the duly registered proprietor of the property known as title number KJD/OLEKASASI/1067.

e. That costs be provided for.

### Applicant's Case

3. The application was supported by affidavits sworn by the said **Amos Godfrey Onyango Nyaoro** on 14<sup>th</sup> October, 2014 and 18<sup>th</sup> June, 2015.
4. According to the deponent, the second respondent in this matter did send a notice dated 12<sup>th</sup> June 2014 to him intimating an intention to cancel his title deed over title number KJD/OLEKASASI/1067 (hereinafter referred to as the "suit property") of which he is the registered proprietor.
5. According to the deponent, on or about the 21<sup>st</sup> day of May 2014 he duly entered into a sale agreement with one **James Kamau Kimani** for the purchase by the deponent of the suit property for a consideration of Kshs. 3,200,000/= and he was accordingly issued with the title thereof by the second Respondent in his favour on the 27<sup>th</sup> day of May 2014. However, on or about the 18<sup>th</sup> of July 2014 he received vide postal mail a letter addressed to him by the second Respondent dated 12<sup>th</sup> June 2014 summoning me to appear before the district lands registry, Kajiado North and explain the manner in which he acquired the suit property.
6. Pursuant thereto, the deponent made numerous attempts to see the second Respondent at his office situated at the Kajiado North district land registry but unfortunately all his attempts to do so proved futile as the second respondent was always unavailable at the office. Similarly, his advocates on record concurrently made attempts to contact the said district lands registry, Kajiado North to obtain further particulars relating to the said notice dated 12<sup>th</sup> June 2014 they were unsuccessful.
7. As a result of the foregoing, the deponent's said advocates responded to the mentioned notice vide their letter dated 18<sup>th</sup> July 2014 and served upon the respondents herein on the 22<sup>nd</sup> of July 2014 which said letter contained full particulars and disclosure as to the manner in which the deponent acquired ownership of the suit property and furnished the Respondents with supporting documents after which the Respondents went quiet and did not bother to offer a response to the same despite various explanations and demands through the deponent's lawyers.
8. Based on legal advice, the deponent averred that by the second Respondent invoking the provisions of section 79 (2) of the **Land Registration Act** (hereinafter referred to as "the Act") within his said letter of 12<sup>th</sup> June 2014, he had expressed every intention to rectify the register of the suit property to cancel and/or revoke the title issued in the deponent's favour by his office yet the validity and legality of the title to the suit property held by him can only be determined through a court of law and not by the second Respondent *suo moto*. To him, his right to the suit property is protected and guaranteed by the provisions of Articles 40 and 47 of the constitution.
9. He therefore asserted that the said notice was an afterthought as the proper mechanism set in place to acquire title was strictly adhered to and the second Respondent lacked basis to act in an

- arbitrary manner by issuing the mentioned notice and that should the second respondent be allowed to proceed and act on the said notice he stood to lose the sum of Kshs. 3,200,000/= paid out as purchase price yet he was a *bona fide* purchaser for value.
10. He further averred that the notice was issued without hearing him as he did not participate in any fraudulent act towards acquiring title over the suit property.
  11. It was submitted on behalf of the applicant that from a reading of the notice dated 12<sup>th</sup> June, 2014, the 2<sup>nd</sup> Respondent took it upon himself to rectify the register of the suit property in default of appearance by the applicant hence the 2<sup>nd</sup> Respondent had already made a decision as to the action he was proceeding to take which was to cancel the title to the suit property, an action which was in excess of the authority granted to him and in breach of the applicant's legitimate expectation to be treated fairly after he due process had been followed. According to the applicant, the validity of a title document can only be pronounced by a court of law and for a property to fall outside the protection of Article 40 of the Constitution a Court or a tribunal must have made a finding that the property was illegally or improperly acquired.
  12. Accordingly it was the applicant's case that not only did the Respondents fail to follow the due process but their actions violated the applicant's right to air administrative action under Article 47 of the Constitution. It was further submitted that the Respondent's action violated the applicant's legitimate expectation. In support of his submissions the applicant apart from Articles 40 and 47 of the Constitution relied on sections 79(2) and 80 of the Act as well as **Republic vs. Registrar of Titles & 4 Others [2012] eKLR; John Mukora Wachihhi vs. Minister for Lands & 6 Others [2013] eKLR; and Power Technics Limited vs. The Hon. Attorney General & 2 Others [2012] eKLR.**

### **Respondents' Case**

13. The application was opposed vide a replying affidavit sworn by **R K Kalama**, the 2<sup>nd</sup> Respondent herein on 6<sup>th</sup> January, 2015.
14. According to him, the application is premature and baseless and otherwise intended to obstruct the investigations with respect to the suit parcel of land being conducted by the district land registry. In his view, prayers (a), (c) and (d) sought cannot issue as there is no decision made by the district lands registrar either verbal or express, to cancel, nullify and/or rectify the register, in respect of the suit property as alleged by the Applicant.
15. He clarified that the purported notice dated 12<sup>th</sup> June 2014 was actually a letter summoning the applicant to appear before him as provided under section 14 of the ***Land Registration Act* 2012** with relevant documents supporting a purported transfer of the suit property which summons were necessitated after he received a complaint from the DCIO Ongata Rongai that there was a fraudulent transfer of the said parcel of land from one **James Kamau Kimani** into the names of the Applicant without knowledge nor consent of the registered owner. Upon investigations of the records, the 2<sup>nd</sup> Respondent found that the parcel of land in question was registered in the names **James Kamau Kimani** on 5<sup>th</sup> August 2008 and title deed issued for the same. However a transfer of land was presented for registration on 27<sup>th</sup> May 2014 signed by **James Kamau Kimani** as the transferor and attested by the firm of M/s Ray Aboge Advocate of Post Office Box 53013-00200 Nairobi and that the transfer of land was registered and title deed issued to the Applicant. The alleged registered owner **James Kamau Kimani** presented his original title deed and his original ID on 6<sup>th</sup> June 2014 and the 2<sup>nd</sup> Respondent proceeded to report the matter to the criminal investigations department and following the discovery of the discrepancies, a restriction was entered on 9<sup>th</sup> June 2014 prohibiting dealings with the said parcel of land until completion of investigations by the DCIO Ongata Rongai.
16. According to him, instead of appearing before him, the applicant instructed his advocate to write a letter informing him that he is the "bona fide purchaser" for value. Accordingly, no decision was made either verbal or express, cancelling, nullifying and/or rectifying the register in respect the suit property with the intention of deleting the Applicants name as the registered proprietor as he so alleged.
17. He reiterated that the letter of 12<sup>th</sup> June 2014 was purely in exercise of powers conferred on him

- by Section 14 of the **Land Registration Act** and was not a notice to the Applicant revoking title.
18. According to the Respondents since the actions by the 2<sup>nd</sup> Respondent were undertaken in its official capacity the application ought to fail. It was contended that since the Applicant was only summoned pursuant to section 14 of the Act, the threshold for the grant of the orders of certiorari had not been met. The power to summon the applicant, it was submitted being grounded on the general powers of the Land Registrars, the issue of ultra vires did not exist.
19. It was submitted that apart from general allegations the applicant had not attempted to prove that the respondent's actions were ultra vires. Mandamus, it was submitted ought not to issue in the manner sought as it would amount to compelling the Respondents to act in a particular way. To grant the orders of certiorari sought, it was contended would amount to curtailing the statutory duty and function of the 2<sup>nd</sup> Respondent.

### **Determination**

20. I have considered the issues raised in its application.
21. These proceedings were triggered by the letter dated 12<sup>th</sup> June, 2014 from the 2<sup>nd</sup> Respondent to the Applicant. Therefore the determination of this application will depend largely on the impact and the import of the said letter. In the said letter the 2<sup>nd</sup> Respondent pursuant to section 14 of the Act summoned the applicant to appear before the 2<sup>nd</sup> Respondent together with the relevant documents in respect of the transaction in respect of the suit property following a complaint that the applicant fraudulently caused the transfer of the suit property into his names without the knowledge nor the consent of the Registered owner. In the same letter the 2<sup>nd</sup> Respondent warned the applicant that in default of compliance within 14 days the 2<sup>nd</sup> Respondent would invoke section 79(2) of the Act.
22. Sections 14 and 79(2) aforesaid provide:

***14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—***

***(a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;***

***(b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;***

***(c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;***

***(d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and***

***(e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.***

***79(2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.***

23. Section 79(4) of the Act however empowers the National Land Commission (hereinafter referred to as "the Commission) to make regulations prescribing the guidelines that the Registrar is to follow before rectifying or directing rectification under subsection (2). Notwithstanding any such

regulations Article 47 of the 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. Therefore any Regulation made pursuant to section 79(4) of the Act must pass the constitutional muster in Article 47 of the Constitution.
25. Whereas Article 40 of the Constitution protects the right to property, however that protection pursuant Article 40(6) of the Constitution, does not extend to any property that has been found to have been unlawfully acquired. Section 79(4), subject to the Regulations made by the Commission and of course the Constitution, the supreme law of the land, empowers the 2<sup>nd</sup> Respondent to rectify register or document where the document in question has been obtained by fraud.
26. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** in which the said Court held *inter alia* as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents**

**did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

27. It is clear from the provisions of section 14(a) and (b) of the Act that the 2<sup>nd</sup> Respondent was properly within his powers to issue a notice in the manner he did vide his letter dated 12<sup>th</sup> June, 2014. It is also clear that he was empowered to take actions under section 79(4) as long as he complied with the law and the Constitution. He in fact alluded to the fact that he would invoke his powers thereunder if the applicant failed to comply with the letter under reference. He did not say as the applicant would like this Court to hold that he would proceed to nullify the applicant's title to the suit property.
28. The 2<sup>nd</sup> respondent's powers under section 7(4) of the Act was clearly subject to the law and the mere fact that he indicated that he would put the machinery under the aforesaid provision into motion cannot in my view be construed to mean that he had made up his mind to revoke the applicant's title.
29. However the applicant did make representations as asked by the 2<sup>nd</sup> Respondent. There is no indication that the 2<sup>nd</sup> Respondent had made a decision in respect thereof. One cannot also speculate on the nature of decision the 2<sup>nd</sup> Respondent intended to make. In order for an order of certiorari to issue, a decision must have been made inter alia without or in excess of jurisdiction, or in breach of the rules of natural justice or on such like grounds. Without a decision there is nothing capable of being quashed.
30. With respect to prohibition the applicant must show that the respondent proposes to proceed in excess of its jurisdiction or in contravention of the laws of the land. In this case there is no evidence apart from the consideration of the representations made by the applicant which way the 2<sup>nd</sup> Respondent intend to proceed. To grant the order of prohibition as sought by the applicant would amount to impeding the 2<sup>nd</sup> Respondent from exercising its otherwise lawful discretion and considering the representations made before it. In other words an order of prohibition though look to the future ought not to be speculative but ought only to issue where there is evidence that an illegal action is in the offing.
31. With respect to *mandamus*, the Court can only compel the respondent to perform of a public duty which is imposed on a person or body of persons by a statute where the person or body fails to perform the same. In this case the applicant seeks an order compelling the 2<sup>nd</sup> Respondent to lift the notice dated 12<sup>th</sup> June 2014 and to re-instate the name of the applicant in the register as the duly registered proprietor of the suit property. *Mandamus*, it is my view cannot be issued to compel an illegal act. Similarly the Court cannot by an order of mandamus compel the exercise of discretionary powers in a particular way. The 2<sup>nd</sup> Respondent after considering the representations made by the parties is empowered to make one determination or the other including the lifting of the questioned notice. This Court cannot order the lifting of the same until the same is quashed. As this Court has found that certiorari is not available to the applicant in these proceedings, *mandamus* cannot issue if its effect would be to quash the decision in issue. For the same reasons the order compelling the 2<sup>nd</sup> Respondent to re-instate the name of the applicant in the register as the duly registered proprietor of the suit property cannot be granted moreso as there is no evidence that the 2<sup>nd</sup> Respondent has removed the applicant's name from the register.
32. Having considered the material placed before me in this application, I agree with the Respondents that the instant application is premature.

### **Order**

33. In the result the Notice of Motion dated 24<sup>th</sup> October, 2014 is unmerited. The same fails and is hereby dismissed with costs.

**Dated at Nairobi this 29<sup>th</sup> day of July, 2015**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Sifuma for Mr Aboge for the Applicant***

***MR Munene for the Respondent***

***Cc Patricia***