REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC MISC. APP. NO. 23 OF 2021

JAMES NG'ANG'A NGURE & OTHERS.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE DIRECTOR OF SURVEY.....2ND RESPONDENT

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

RULING

(On compelling the Government Departments to convert land titles from one land regime to another)

1. Sometimes it is very difficult for a Court to understand what parties in a matter look for when they move it. For instance, some applications such as the instant one are nearly impossible to comprehend but somehow the Court finally find out what the parties want. That is why it requires great minds and selfless ones for that matter to be judicial officers because it requires dedication, commitment and patience to determine such matters.

THE APPLICATION

2. By a Notice of Motion dated **7/12/2021** and filed on **8/12/2021,** the Applicant sought the following specific orders:

> **1. …spent**
>
> **2. That pending *inter-partes* hearing this Honourable Court be pleased to issue orders compelling the respondents to convert titles from GLA Cap 280 (Repealed) to the Land Registration Act No. 3/2012.**
>
> **3. That at the *inter partes* hearing, orders granted in the terms of prayer 2 above be confirmed to operate till determination of this suit.**

3. The Application did not indicate the provisions under which it was brought but in their submissions Applicants indicated that it was brought under **Order 53 Rule 1** of the **Civil Procedure Rules**. The failure to indicate the provision of law is an error that **Article 159(2)** of the **2010** Constitution may be used to correct by the Court overlooking its absence. The Applicants relied on four grounds on the face of the application as well as a supporting affidavit. The affidavit sworn on **7/12/2021** by one **James Ng'anga Ngure** echoes the grounds. In summary, the applicant deponed that they were *bona fide* purchasers and the legal owners of all that parcel of land known as Nyakinywa Mugumo Tree Company Limited L.R. No. **1803/2-1461** (herein known as the ***"suit land"***) measuring approximately **2,050** acres. He annexed to the Affidavit a copy of Certificate of Postal Search and marked it as **JNN-1**. His contention was that the suit land was subdivided to **1461** portions which were approved by the Director of Survey. Thereafter, the deed plans were prepared and approved. Consequently, the Chief Land Registrar issued them with Government Lands Act (GLA) title deeds.

4. He contended that the Applicant had been enjoying quiet possession of their land from **1981** to **2015** when they made an application for conversion of land from the **GLA** regime to **Land Registration Act (LRA)** one in line with the change of the law. Further, the Chief Land Registrar and their agencies interfered their rights of quiet possession. He annexed a copy of a letter from the Ministry of Land and Physical Planning and marked it as **JNN-2** to evidence the interference. He deponed that the respondents would suffer no prejudice if the Application was allowed.

5. The Applicants filed a supplementary affidavit on **5/2/2022.** In it, the deponent repeated the contents of the Supporting Affidavit. He prayed to be granted permanent injunction orders to protect the *ex parte* applicants' right to possess their property.

THE RESPONSE

6. On **19/1/2022**, the respondent filed Grounds of Opposition dated **18/1/2022**. The **3rd** Respondent stated that the application was a non-starter, untenable, bad in Law and an abuse of the court's process as the prayers sought could not be granted. Secondly, he stated that the court lacked jurisdiction to grant the relief sought as the issue was of an administrative nature and was only a reserve to the executive arm of government. Further, the Application was an empty shell and presented in *vacuo* with no substantive legs or foundation to stand on. Finally, that the court was precluded from entertaining the application by dint of revered Constitutional principle of separation of powers.

7. They prayed that the application be dismissed with costs.

SUBMISSIONS

8. Parties were directed to dispose the application by way of written submissions. The respondents filed theirs on **21/2/2022.** The Applicants filed theirs dated **18/01/2021** on **11/02/2021**.

ISSUES, ANALYSIS AND DETERMINATION

9. While I must confess that I did not know the final terminology I would give the instant Application, it appears to me that it had many problems or hurdles to pass before it would be considered meritorious. I will explain at the beginning of the analysis of the issues herein why I hold this humble view.

10. The above notwithstanding, this Court carefully considered the application, the affidavits in support and opposition, the grounds of opposition, the Respondents' submissions as well as the law. It found the following issues for determination:

a) Whether the Court has jurisdiction to entertain the present application;

b) What orders to issue and who to bear the costs of the application?

11. The instant application posed the challenge of calling for a complex thought process for me to understand it. First, the Application was instituted by one, **James Ng'anga Ngure** "and others". It did not disclose who the "others" were and their number. It did not purport to be a representative pleading. The Applicant did not annex a written authority from the said "others" to demonstrate that the "others" had authorized him to move the Court on their behalf. He only did so later when he filed the supplementary affidavit, annexing to it a copy of a written authority signed by **four** people. It was dated **18/01/2022**. It was filed on **31/01/2022**, forty-four **(44)** days after urging the Application. One strange this about the purported authority is that although filed that late, it was attached as annexture **JNN-1** to the Supplementary Affidavit sworn on **05/01/2022**, twenty-five (**25**) days earlier. Something failed to add up on this scenario. Someone somewhere must have been 'cooking' documents to put life into the instant hopeless Application but could not succeed. Anyway, in essence it means that by the time he brought the application, it was defective and incompetent in that respect and should be struck out for that reason. Moreover, save for the Supporting Affidavit mentioning that it was sworn "on behalf of the other applicants", it and the Supplementary Affidavit did not purport in any way by documentary support to be sworn on behalf of those "others".

12. Second, the Application was brought as a Miscellaneous one but the main prayers were of judicial review in nature. Then, by the time filing, and through, the Supplementary Affidavit, the Applicant prayed for an order of injunction against the Respondents. It appears the Application 'mutated' to one made based on a Plaint or Counterclaim but again the Applicants started to refer to themselves in the Supplementary Affidavit as "the *Ex parte*" Applicants. This imported the idea that they had in mind an Application for Judicial Review. Actually, in their submissions they stated that the Application was brought under **Order 53 Rule 1** of the **Civil Procedure Rules**. If that is what I correctly understand them to have thought to have done, then there was no leave sought to bring this Application. To complete the 'mutation' of the Application, the Applicants made what they referred to as "*ex parte* submission" and in them submitted that, "At this stage my Lord, we seeking for leave to bring to this Court and seek orders of prohibition and mandamus directing the Chief Land Registrar to issue converted titles from the now repealed **GLA Cap 280**." When the Court analysed the prayers sought, there was none for leave to issue. The Court cannot grant an order not prayed for but which surfaces only in submissions. The reason is that submissions are neither pleadings nor constitute evidence of the parties. They are simply a marketing language for the parties 'selling' their ideas to the Court. The problems summarized above are none of those that **Article 159(2) (d)** of the **2010** Constitution can cure. Nevertheless, I proceed to analyze below the issues identified step by step:-

a) Whether the court has jurisdiction to entertain the present application

13. I need not overemphasize the point that this court was established upon the promulgation of the **Constitution 2010. Article 162 (2) (b)** establishes the Environment and Land Court (ELC) being one of the two Courts of equal status to the High Court. By the provision, Parliament was obligated to enact legislation governing the establishment of the Court. **Article 162** of the Constitution provides as follows ***:***

"The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)

2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

a) employment and labour relations; and

b) The environment and the use and occupation of, and title to, land.

3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."

14. Pursuant to the above provision, Parliament enacted the **ELC Act.** The **Act** sets out in detail, the jurisdiction of the Court. **Section 13** outlines it as follows:

"13 Jurisdiction of the Court

1) ***The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) b of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

2) ***In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-***

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.

b) relating to compulsory acquisition of land;

c)relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

e) any other dispute relating to environment and land.

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court."

15. It is trite law that the jurisdiction of a court is a creature of the statute. Time and again courts have held that such jurisdiction flows from either the Constitution or an Act of Parliament or both. But, by the same law that grants it or by any other law, it may be curtailed.

16. In the present case, the Respondent challenged the jurisdiction of this Court to hear and determine the instant application. They submitted that the prayers sought herein could not be issued by this Court for the reason that conversion of titles from one regime to the other is a preserve of the executive. Further, that conversion of title deeds entails a process which is initiated by the land owner and completed by the respective government agency which ensures that the process is followed to the letter.

17. It is this court's considered humble view that conversion of titles is an administrative function that vests on the Cabinet Secretary for Lands and other designated officers. The promulgation of the **2010** Constitution heralded the introduction a number of changes in transactions relating to land through a number of statutes. Among them was the consolidation of the previous land regimes of registration to one regime to govern all. Thus, with the enactment of the Land Registration Act, **Act No. 3 of 2012**, all land regimes including Government Land Act, Registration of Titles Act, Land Titles Act and the Registered Land Act were consolidated and are now governed by the Land Registration Act.

18. Section 6 of **Land Registration Act** *provides as follows:*

"(1) for the purposes of this Act, the Cabinet Secretary in consultation with the Commission and the county governments shall, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units.

(2)....

(3).....

(4) The office or authority responsible for land survey may, at any time, cause registration sections or blocks to be combined or divided, or cause their boundaries to be varied, and immediately inform the Registrar of the changes.

(5) Any order by the Cabinet Secretary under this section shall be published in the gazette and in at least two daily newspapers of nationwide circulation.

19. From the above provision, it is clear that the Cabinet Secretary for the time being in charge of the Ministry of Land and Physical Planning is vested with the power and authority to carry out any conversion of land from one regime to another. Concisely, the Cabinet Secretary identifies land suitable to be registered as registration units, then, directs the Office of Survey to carry out survey and prepare cadastral maps on it in preparation for conversion, thereafter, gazettes the registration unit and causes it to be published in two daily newspapers of nationwide circulation, if there are objections to any details given, they are attended to by the Registrar before converting the titles and issuing new ones to the registered proprietors as provided for by the **Land Registration Units Order of 2017.**

20. In essence, the Cabinet Secretary also receives any complaints resulting from the conversion and resolves them accordingly. In the instant case, other than mentioning, without any supporting evidence that the applicants applied for conversion of the titles their titles from **GLA** to **LRA** in **2015**, the Applicants did not demonstrate that they had initiated any of the processes to have their land converted. Moreover, they did not show to the Court that the Respondents had refused to carry out the exercise they prayed orders for or that the Respondents had failed to act within any specific timelines. The Applicants only moved the Court, requesting it to compel the Chief Land Registrar to convert their land parcels from the GLA regime to LRA regime. As it is now clear, from the summary above, there is a procedure to be followed when converting titles from one regime to another. In the **Order 2017** there is no specific timeline given for the process to start and be completed. Ordinarily, the process should be exhausted before a party moves the Court for appropriate orders. This is what this Court could refer to as the doctrine of exhaustion. What that means is that all the internal mechanisms in place for the process to end must be exhausted before the Court is moved, if at all the law provides for a party to move the Court. It bears to add that not a single step should be skipped.

21. In the circumstances, even in the instance where the Applicants could have demonstrated that the procedure had been followed and they had a complaint on the manner the conversion was conducted, they should have applied to this Court by way of Judicial Review.

22. Lastly, the Applicants appear not to have known the remedies they wanted the Court to give. In the Application they asked for an order to the effect of directing the Respondents to covert the titles from one land regime to another. In the Supplementary Affidavit they asked for orders of injunction against the Respondents for reason of what they (Applicants) referred to as interference with their lawful and quiet possession. In support of their assertion they annexed a letter, **JNN 2** dated **15/11/2021** from the Ministry of Lands and Physical Planning. The letter referred to some fraudulent subdivision of the parcels of land the Nyakinyua Mugumo Tree Company Society holds. A number of titles were referred to in the letter.

23. The upshot is that this Court cannot engage in the determination of the instant application for lack of the power to do so. It lacks jurisdiction to do so since the mandate of conversion of titles from one regime to another and all transactions relating to conversion vests in the relevant administrative body and thus is an administrative obligation which ought to be fulfilled in accordance with the law.

24. While addressing the issue of jurisdiction, the Court in the case of ***George Kamau Macharia -v- Dexka Limited (2019) eKLR*** held that

> ***"....it is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations....."***

25. I am convinced that this Court does not have the jurisdiction to adjudicate the matter or direct the administrative body on how or how fast to conduct the exercise. Without it I cannot make any further step herein. I down my tools. In so doing, I am guided by the case of **Owners Of Motor Vessel lilians versus Caltex Oil (Kenya) Ltd (1989)1KLR** which was cited with approval in the case of **Onesmus Kamau Mungai –v- Phares Mwangi Kamau & 2 others (2019) eKLR.** In the case the Court held that

> ***"....Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without Jurisdiction and ought to down its tool at this stage."***

b) What orders to issue and who to bear the costs of the application

26. The result is that the Application dated **17/12/2021** is premature, devoid of any merits and must be struck out. I do so. The costs shall be to the Respondents.

It is so ordered.

Dated, signed and **delivered** at **Kitale via electronic mail** on this **23rd** day of **March**, **2022.**

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE