



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC APPLICATION (J. R) NO 48 OF 2018**

**IN THE MATTER OF AN APPLICATION BY PHILIP TUMPEINE SAIYUAH, JOSEPH KUYAN  
AND BENJAMIN LEMASEI TUMPES FOR THE JUDICIAL REVIEW (ORDER OF MANDAMUS)**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (NO 3 OF 2012) THE LAND ACT(NO 6 OF 2012)  
FAIR ADMINISTRATIVE ACT, 2015 AND ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE DECISION AND/OR REFUSAL BY THE CHIEF LAND REGISTRAR AND REGISTRAR OF  
TITLES TO REGISTER PHILIP TUMPEINE SAIYUAH, JOSEPH KUYAN AND BENJAMIN LEMASEI TUMPES AS THE  
PROPRIETORS TO THE PARCEL OF LAND KNOWN AS L.R NO 209/14069 MEASURING APPROXIMATELY 1000 HA**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF TITLES.....2<sup>nd</sup> RESPONDENT**

**ZAF HOLDINGS LIMITED.....INTERESTED PARTY**

**EX-PARTE**

**PHILIP TUMPEINI SAIYUAH**

**JOSEPH KUYAN**

**BENJAMIN LEMASEI TUMPES**

**JUDGMENT**

1. In the Chamber Summons dated 13<sup>th</sup> July, 2018, the Ex-parte Applicants sought for leave to apply for an order of mandamus to compel the Respondents to register them as the proprietors of a parcel of land known as L.R No 209/14069 and forthwith issue them with a Title Deed to the same.

2. Leave was granted on 16<sup>th</sup> July, 2018 upon which the Ex-parte Applicants filed the present Notice of Motion dated 23<sup>rd</sup> July, 2018 seeking for the following orders:

***i. That an order of mandamus to issue commanding and/or directing the Chief Land Registrar and the Registrar of Titles to register the names of the Ex-parte Applicants as the proprietors to the land parcel known as L.R No 209/14069 measuring approximately 1000 hectares Ha and forthwith issue title deed to the said Ex-parte Applicants.***

***ii. That the costs of this Application be provided for.***

3. The Application is based on the grounds set out in the Statutory Statement and the Verifying Affidavit of Philip Tumpeine Saiyua, the 1<sup>st</sup> Ex-parte Applicant, who deponed that the Ex-parte Applicants were allotted an unsurveyed industrial Plot "B" Nairobi; that the property was subsequently surveyed and a Deed Plan prepared and issued; that the stand premium of Kshs 414,020 and land rent of Kshs 1,679,750 were paid and a Rent Clearance Certificate issued on 23<sup>rd</sup> May 2019 for the period ending on 31<sup>st</sup> December, 2018 and that the property was given L. R No. 209/14069.

4. According to the Deponent, upon payment of the above fees and compliance with all the formalities, the Ex-parte Applicants were presented with a Lease requiring their signatures, ID numbers, passport and pin numbers and that the Lease was duly executed; that the Ex-parte Applicants lodged the documents for registration on 25<sup>th</sup> May, 2018, paid for the same and were given registration number 2970 and that since then, there has been a delay in registering the Lease which delay has not been explained.

#### **The Interested Party's case**

5. The Interested Party applied to be joined in these proceedings, which application was allowed vide this court's ruling of 18<sup>th</sup> February, 2021. In response to the application, the Interested Party relied on the Replying Affidavit dated 17<sup>th</sup> October, 2018 sworn by its Director, Karim Karmali.

6. The Interested Party's Director deponed that the suit property L.R No 209/14069 was initially owned by Shimba Tourist Service Limited as private property under I.R No 60458 and L.R No 209/12000; that Shimba Tourist Service Limited charged the property to Diamond Trust Bank Kenya Limited and that when they failed to pay the sums due and owing, the bank exercised its statutory power of sale and sold the property by private treaty to Bigstar Trading Company via a Sale Agreement dated 9<sup>th</sup> September, 2003 and registered on 17<sup>th</sup> September, 2003.

7. It was deponed by the Interested Party's Director that on 24<sup>th</sup> December, 2009, Bigstar Trading Company Limited transferred the subject property to the Interested Party; that since taking vacant possession of the suit property, the Interested Party has remained in possession thereto and that the Interested Party has not transferred the suit property to any person or agency and neither has it been acquired by the Government or any other body.

8. According to the Deponent, sometime in February, 2008, the Commissioner of Lands requested that the suit property and the adjoining properties be re-surveyed following which the property was re-numbered as L.R No 209/14069 under Deed Plan Number 232643; that consequent to the re-survey, the Interested Party was to relinquish the old Title Deed to be issued with a new Title Deed and Deed Plan.

9. It was deponed by the Interested Party's Director that in the process of the surrender aforesaid, the Interested Party realized that one Patrick Ngetich tried to illegally have a title extracted in the names of Usi Flowers Limited by alleging that Usi Flowers Limited was the legal proprietor of the suit property; that the Interested Party instructed their advocates to follow up on the attempted fraud and that they wrote a letter to the National Land Commission informing it of the attempted fraud and asked the NLC to intervene.

10. It was deponed that in response, the National Land Commission wrote to the Chief Lands Registrar and the Director of Survey notifying them of the fraud and asking them to preclude any officials of Usi Flowers Limited from attempting to register the suit property in its name; that despite the foregoing, the Interested Party was unable to lodge its old title deed as the Deed file was missing and that a visit to the lands registry in August, 2018 revealed that the Ex-parte Applicants herein were attempting to have the title to the suit property registered in their names.

11. The Interested Party's Director deponed that the *mandamus* orders sought by the Ex-parte Applicants cannot lie for the reasons that the Interested Party holds the title to the suit property, which title has not been revoked or converted; that the Registrar cannot be compelled to issue a second title in respect of the same land and that there is a dispute as to ownership of the suit property.

12. The Interested Party's Director filed a Supplementary Affidavit in which he deponed that in view of the threat posed by the loss of the Deed file as earlier stated, the Interested Party made an application for reconstruction of the Land Register pursuant to Section 33 of the Land Registration Act, which application was allowed and gazetted on 2<sup>nd</sup> August, 2019; that there was no challenge to the application during the 60 days notice period as set out in the law and that the application was allowed on the 3<sup>rd</sup> December, 2019.

13. According to the Interested Party, the search conducted on the new title shows that the Interested Party is still the registered proprietor of the suit property pursuant to which they have continued paying land rent and rates.

14. The 1<sup>st</sup> Ex-parte Applicant filed a Supplementary Affidavit in which he deponed that the Interested Party's assertions are with respect to the property known as L.R 209/12000, Nairobi as evidenced from the Transfer dated 24<sup>th</sup> December, 2009; that the aforesaid property and the suit property herein L.R 209/14069 are different parcels of land and that the Interested Party now purports to have acquired a recent title to the suit property being L.R 209/14069(Original Number-NIL).

15. It was deponed by the 1<sup>st</sup> Ex-parte Applicant that together with the new title, the Interested Party is advancing a new narrative being that they were allotted the suit property contrary to their earlier assertion that the property that they purchased was L.R No. 209/12000 and that

the Lease period is described as being for a term of 99 years from 1985 whereas in the adduced Certificate of Title for L.R No. 209/14069, the period is for a term of 99 years from 1<sup>st</sup> July, 1993.

16. It was deponed that if indeed the land register was lost, the resulting title would have been a provisional title for L.R 209/12000 and not a Certificate of Title for L.R 209/14069; that there is no evidence with respect to the alleged mutation of L.R No 209/12000 to L.R 209/14069 and that the Interested Party has no case.

### Submissions

17. The Ex-parte Applicants' counsel submitted that the scope of the judicial review remedy of *mandamus* was set out by the Court of Appeal in the case of *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR* as well as the cases of *Shah vs Attorney General(No.3) Kampala HMC No 31 of 1969[1970]EA 543* and *Mureithi & 2 Others vs Attorney General & 4 Others[2006]1 KLR(E&L)707*.

18. It was submitted by counsel that although the powers of the Chief Lands Registrar in registering the lease is a discretionary exercise subject to the provisions of **Section 14(c)** of the **Land Registration Act**, the discretion should be exercised judicially and fairly and that where a public entity fails to exercise its jurisdiction judicially and fairly, the court can intervene as affirmed in the case of *Republic vs Public Procurement Oversight Authority Ex Parte Getrio Insurance Brokers Limited [2011] eKLR* and *Republic vs Chief Land Registrar Ex-parte-Stephen Karanja Kungu[2014]eKLR*.

19. Counsel submitted that the Chief Land Registrar is mandated to effect registration of the suit property in the Applicants names pursuant to **Section 30(1)** of the **Land Registration Act,2012**

20. The Interested Party's advocate filed submissions in which it submitted that there is incontrovertible evidence that the Interested Party is the lawful proprietor of the suit property with title thereto and that the said title is protected by **Sections 24, 25 and 26** of the **Land Registration Act**. Counsel referred the court to the case of *Charles Karaithe Kiarie & 2 others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR*.

21. Counsel submitted that the Interested Party's title aforesaid has not been revoked by either the court or the National Land Commission in exercise of its powers under **Section 14** of the **National Land Commission Act**; that the Land Registrar's office is a creature of statute whose mandate is set out under **Section 14** of the Land Registration Act and that the Land Registrar's powers does not include the powers to revoke title, which powers are vested in this court and the National Land Commission.

22. It was submitted by the Interested Party's advocate that no evidence has been adduced showing that the Interested Party's title has been revoked by the court; that the Judicial Review court is in any event not the appropriate court to revoke a title as held by the court in *Republic vs Commissioner of Lands & another Ex-parte Jimmy Mutinda[2014]eKLR* and that the court in *Republic vs Principle secretary, Ministry of Internal Security & another Ex-parte Schon Noorani & another (2018) eKLR* and *Republic vs County Land Registrar, Kisumu County Land Registry & 2 others Ex parte United Millers Limited; Agriculture and Food Authority (Interested Party) [2020] eKLR* held that for the order of *mandamus* to issue, there must be among others a public legal duty to act.

23. Counsel submitted that Judicial Review applications cannot review contested matters as held in the case of *Supa Nova Properties (supra)*; that the remedy of *mandamus* looks to the future and cannot be used to quash that which has already been done as observed in the case of *Republic vs Commissioner of Lands & another Ex-parte Jimmy Mutinda[2014]eKLR* and *Jotham Mulati Welamondi vs Chairman, Electoral Commission of Kenya[2002] eKLR* and that the order of *mandamus* cannot issue because a title for the suit property already exists in the name of the Interested Party and the Land Registrar does not have a legal duty to register a title where one already exists.

24. The Ex-parte Applicants' counsel filed supplementary submissions in which he submitted that the scope of Judicial Review has advanced beyond the traditional areas and that as such, there is no exhaustive list setting up the grounds upon which the court can exercise its judicial review jurisdiction. Reliance in this regard was placed on the cases of *R vs Panel on Takeover and mergers Ex-parte Datafin[1978]QB 815*, *Commissioner of Lands Ex-parte Lake Flowers Limited Nairobi HCMISC Application No 1235 of 1998* and *Kuria & 3 Others vs Attorney General[2002]2 KLR 69*.

25. According to counsel, the Ex-parte Applicants having been duly allotted the suit property and met all the requisite conditions are entitled to be registered as proprietors of the same; that this court is duly vested with jurisdiction to grant the Judicial Review orders sought pursuant to **Section 13(7)** of the **Environment and Land Court Act** and that the Interested Party's land known as L.R 209/12000 and the suit property herein known as L.R 209/14069 are different parcels of land.

### Analysis & determination

26. Having considered the pleadings and submissions made by the parties, the sole issue that arises for determination is;

*i. Whether the Ex-parte Applicants have made out a case for the grant of the Judicial Review orders of mandamus.*

27. The nature and scope of the judicial review order of *mandamus* was discussed by the Court of Appeal in *Commission on Administrative Justice vs Kenya Vision 2030 Delivery Board & 2 others [2019] eKLR* where it cited the case of *Kenya National Examination Council vs Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR* where it was held thus:

*“The order of mandamus is of most extensive remedial nature and is in the form of 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 of 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, and it may issue in cases where although there is an alternative remedy, yet the mode of redress is not convenient, beneficial and effectual.*

*..... the party against whom the application is made must be 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.”*

28. This position was reiterated in the English case of *R vs Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741* where it was stated as follows:

*“It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”*

29. From the foregoing, it is apparent that a person seeking an order of *mandamus* must satisfy the Court that the action he seeks to compel the Respondent to perform is a duty which the Respondent is under a public duty to perform, either under common law or under a statute, and further that no other appropriate remedy is available to the Applicant.

30. The Respondents are a creature of Sections 12 and 13 of the Land Registration Act. Section 14 thereof sets out their general powers as follows:

*“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.”*

31. From the foregoing, it is apparent that whereas indeed the decision of whether or not to register any instrument, certificate, document, plan, information or explanation is an exercise of discretion, the discretion is not unfettered. Pursuant to the aforesaid provision, the discretion to register an instrument by the Registrar may be refused where 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 the Act is not performed.

32. The *Ex-parte* Applicants opine that they were duly allotted the suit property, paid all the requisite fees and completed the formalities; that they lodged and paid for the registration the requisite documents and were issued with a registration number; that the above notwithstanding, the registration of their documents not been completed and that despite making inquiries, no answers have been forthcoming from the Land Registry with respect to the non-registration of their documents and that their rights to a fair administrative action has been impeded.

33. Indeed, it is trite that where a statute gives a statutory or public body discretion, that discretion ought to be properly exercised and where it is not, the court is entitled to interfere with the discretion. The court in *Republic vs Minister for Home Affairs and Others Ex Parte Sitamze [2008] eKLR* persuasively set out the circumstances where the court is entitled to interfere with the exercise of discretion:

*“(i) where there is an abuse of discretion;*

*(ii) where the decision-maker exercises discretion for an improper purpose;*

*(iii) where the decision-maker is in breach of the duty to act fairly;*

*(iv) where the decision-maker has failed to exercise statutory discretion reasonably;*

*(v) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*

*(vi) where the decision-maker fetters the discretion given;*

*(vii) where the decision-maker fails to exercise discretion;*

*(viii) where the decision-maker is irrational and unreasonable.”*

34. Is the court entitled to intervene given the circumstances of this case? On 18<sup>th</sup> of February 2021, the Interested Party herein was granted leave to join these proceedings. The Interested Party is claiming ownership of the suit property. According to the Interested Party, the suit property, L.R No 209/14069, was initially owned by Shimba Tourist Service Limited under I.R No 60458 and L.R No 209/12000 which they charged to Diamond Trust Bank Kenya Limited; that Shimba Tourist Services Limited failed to pay the sums due and that the bank in exercise of its statutory power of sale, sold the property by way of private treaty to Bigstar Trading Company who in turn sold the subject property to the Interested Party.

35. According to the Interested Party, sometime in February, 2008, the Commissioner of Lands requested that the suit property and the adjoining properties be re-surveyed following which the property was re-numbered and given L.R No 209/14069 under Deed Plan Number 232643 and that consequent to the re-survey, the Interested Party was to relinquish the old Title Deed to be issued with a new Title Deed.

36. According to the Interested Party, in the process of surrendering the old title document as directed, there was an attempt by a third Party to fraudulently register the property in his name; that in view of the threat posed by the loss of the Deed file, they made an application for reconstruction of the Land Register pursuant to Section 33 of the Land Registration Act, which application was allowed and gazetted on the 2<sup>nd</sup> August, 2019 and that there was no challenge to the application during the 60 days notice period as set out in the law.

37. It is the Interested Party's case that a new title for the suit property was issued in its names and that a search conducted on the new title shows that the Interested Party is the registered proprietor of the suit property pursuant to which they have continued paying land rent and rates.

38. In rebuttal, the *Ex-parte* Applicants maintain that the Interested Party's property being L.R No. 209/12000 and the suit property herein being L.R No. 209/14069 are two different parcels of land; that the Interested Party is advancing a new narrative being that they were allotted the suit property contrary to their earlier assertion that their property was 209/12000 and that the same was a transfer from Bigstar Trading Company.

39. It is evident from the above narration that there is a dispute as regards the ownership of the suit property. The court has keenly analyzed the documents adduced by the parties. In support of their claim for the suit property, the *Ex-parte* Applicants have annexed copies of the letter of allotment dated 6<sup>th</sup> January, 1995 for Industrial Plot "B" Nairobi, the receipt for payment of stand premium and other charges totaling Kshs 414,020 and Land Rent for Kshs 1,679,750, the Rent Clearance Certificate for and up to 31<sup>st</sup> December, 2018, the Deed Plan, the R.I.M, and a duly executed Lease dated 18<sup>th</sup> April 2018. These documents are in respect of land known as L.R No. 209/14069.

40. The Interested Party on the other hand has annexed, *inter-alia*, copies of the Certificate of Incorporation, the Certificate of Title for L.R No 209/12000, the Transfer of Lease Agreement dated 9<sup>th</sup> September, 2003 from Diamond Trust Kenya to Bigstar Trading Company Limited and the Transfer from Bigstar to the Interested Party dated 24<sup>th</sup> December 2009, several property rates requests and land rates/rents payments for the years 1995-2018 and the letter from the National Land Commission to the Chief Land Registrar indicating that L.R 209/14069, originally 209/12000, belongs to the Interested Party.

41. Indeed, the records from the Ministry of Lands shows that the Interested Party is the current proprietor of the suit property to which it holds a Certificate of Title issued on 30<sup>th</sup> September, 2020. Having been so registered, the Interested Party was conferred with the rights of proprietorship in terms of **sections 24 and 25 of the Land Registration Act, 2012. Section 24** of the Act provides as follows:

***“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

***(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”***

42. **Section 25** of the Act provides as follows:

***“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”***

43. The rights conferred to the Interested Party are absolute and indefeasible. Its title can only be challenged on the grounds of fraud or misrepresentation and/or if it is shown that the title was acquired illegally, unprocedurally or through a corrupt scheme as provided for under **section 26 (1) (a) & (b) of the Land Registration Act, 2012.**

44. Having regard to the foregoing legal provisions, it is abundantly clear that the title held by the Interested Party can only be challenged by way of an ordinary suit on the basis that either the same does not refer to the suit property or that it was obtained fraudulently or by misrepresentation or was acquired illegally, unprocedurally or through a corrupt scheme.

45. There being a dispute between the *Ex-parte* Applicants and the Interested Party over ownership of the suit property, a determination thereof will require evidence to be taken *viva voce*. That being so, it is the finding of this court that this matter falls outside the mandate of Judicial Review. This court cannot direct the Respondent by way of an order of *mandamus* to register the *Ex parte* Applicants as proprietors of the suit property under the circumstances enumerated above.

46. The upshot of the foregoing is that the Notice of Motion Application dated 23<sup>rd</sup> July, 2018 fails and the same is dismissed with costs.

**Dated, signed and delivered virtually in Nairobi this 10<sup>th</sup> day of March, 2022.**

**O. A. Angote**

**Judge**

**In the presence of:**

Ms Martin Jelegat for Mr. Arusei for the Applicant

No appearance for the Respondent

Mr. Achoki for Interested Party

Court Assistant - Okumu