



REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW APPLICATION NO.E009 OF 2020**

IN THE MATTER OF: ARTICLES 27, 40, 47, AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS, PROHIBITION &
CERTIORALI**

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: LAND ACT

AND

IN THE MATTER OF: LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF: LAND REGISTRATION (GENERAL) REGULATIONS, 2017

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

REGISTRAR OF TITLES, NAIROBI.....RESPONDENT

EX PARTE

RUTH MAYOYO.....EX PARTE APPLICANT

BEN OMENGE.....EX PARTE APPLICANT

TOM NYABOGA.....EX PARTE APPLICANT

AND

NEW KAREN VENTURES LIMITED.....INTERESTED PARTY

JUDGEMENT

1. This is the Notice of Motion dated 14th October 2020 filed Pursuant to leave granted by this Honourable Court on 28th September 2020.
2. It is brought under Sections 8 and 9 of the Law Reform Act, Order 53, and Rule 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.
3. The Ex-parte Applicants seeks;
 - i. That an order of certiorari do issue to remove to this Honourable court for purposes of being quashed, any decision and /or order of the Respondent reconstructing the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi Area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020, for being an affront to the rules of natural justice and more specifically, for being an affront to the Ex parte Applicants' right to fair hearing.*
 - ii. That for the avoidance of doubt, the order of certiorari in 1(i) above do also issue to bring into this Honourable Court for the purposes of being quashed, any decision and/or order of the Respondent that interfered with the registers of the Applicants' parcels of land namely L.R Nos.6967/3, 6867/5, and 6967/6-being the subdivisions arising from land L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi area.*
- 2. That an order of prohibition do issue directed towards the Respondent restricting and/or prohibiting the Respondent, his/her agents, officers, employees and/or any person acting under the instructions of the Respondent, from carrying out the proposed reconstruction of the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi Area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020, before hearing and determining the Exparte Applicants' objection dated August 2020.*
- 3. That an order of mandamus do issue compelling the Registrar of titles - Nairobi County (the Respondent) to hear and determine the Exparte Applicants' objection dated 10th August 2020, objecting to the proposed reconstruction of the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020.*
- 4. Any other order/relief that this Honourable court may deem fit and just to grant, in the circumstances to enhance the course of justice.*
- 5. That the costs of this application be provided for.*

4. The application is premised on the grounds set out in the statement of facts accompanying the application for leave dated 25th September 2020 and on the verifying affidavit sworn by Tom Nyaboga on 25th September 2020.

5. He deponed that upon learning of an application by New Karen Ventures Limited to have the land register for L.R.No.6967 (**orig.No.5830/1/2**) reconstructed vide Gazette Notice.No.3670 dated 22nd May 2020, the Ex-parte Applicants' advocates wrote to the land registrar through the letter dated 17th July, 2020.

6. He further deponed that L.R.No.6967 (**orig.No.5830/1/2**) was previously owned by Mr.Bindon Blood and it was transferred to Mr. Ignatius I. Nderi in the mid 1980's who applied to Nairobi County Council for approval of proposed subdivisions to the suit land. He deponed that the suit land was surveyed and subdivided into 9 plots of various sizes vide survey plan folio No. 200 of register No.27 and the subdivisions changed hands and eventually the 1st,2nd and 3rd Ex-parte Applicants purchased the subdivisions; **L.R No.6967/3,6967/5,6976/6** respectively which are now registered in their respective names.

7. He added that when the suit land was subdivided, the original register was closed long before the Interested Party was incorporated and that new registers were opened corresponding to all the subdivisions arising from the suit land.

8. He deponed that the original register having been closed and the title to L.R.No.6967 having been surrendered to the Government of Kenya, it is illegal to reopen the already closed register through a gazette notice. He questioned the rationale of the gazette notice stating that if the Interested Party is the registered owner and the register is either lost or destroyed, then which register was used by the land registrar to ascertain the ownership of land L.R.No.6967, if the said register is what the Interested Party seeks to have reconstructed?

9. He deponed that the reason the Ex parte Applicants did not object to Gazette Notice.No.3670 dated 22nd May 2020 within 60 days was because the advertisement was not posted on any of the local dailies with nationwide circulation as required by the Land Registration Act and the attendant rules and the fact that the Notice advertised the original mother title and not the subdivisions therefore they did not know that their parcels would be adversely affected by the proposed reconstruction.

10. He added that the Applicants' letter dated 17th July 2020 remains unanswered hence necessitating filing their subsequent objection dated 10th August, 2020. He added that the Respondent and its agents continuously and consistently refused to accept service of the objection until 24th September, 2020 and it has not been heard.

11. He deponed that the Applicants are apprehensive that unless their objection dated 10th August 2020 is heard and determined, and unless the court intervenes, their parcels of land will be illegally and irregularly disposed of by the Interested party, hence exposing them to irreparable losses.

The Respondent's response

12. The application is opposed by Respondent vide the affidavit sworn on 11th June 2021 by Nyambaso David Nyandoro who described himself as the senior assistant Chief Land Registrar working as such with the Ministry of Lands and Physical planning.

13. He deponed that the parcel of land known as **L.R.No.6967 (orig.No.5830/1/2)** in fee simple interest and measuring approximately 29 acres was first registered in the name of Ronald Bruce Smith on 26th March 1930. He added that Ronald Bruce Smith transferred the property to Coralie Stanford Boulderson vide a deed of conveyance dated 28th February 1942 who in turn conveyed the property to Wilma Blood by an indenture of conveyance dated 2nd June 1944.

14. He further deponed that the property was conveyed by the Standard Bank of South Africa Limited 'the personal representative of Wilma Blood', to his beneficiary Bindon Blood on 11th day of October 1961 by way of Assent. William blood then sold the property to Ignatius Iriga Nderi at a consideration of kshs.240, 000/= and the conveyance was registered on 13th May 1976.

15. He deponed that the property was sold by Ignatius Iriga Nderi to Stephen Kositany and Ashok Kumar Manohar who then sold to Kenya Commercial bank by an indenture of conveyance dated 25th September 1991.He added that by an indenture of conveyance dated 4th February 2008, Kenya Commercial bank transferred the property to New Karen Ventures Limited, which is the current proprietor and the deed of conveyance was registered on 4th February 2009.

16. He deponed that the register /folio for the property contained in volumeN83 Folio 233 file 7660 had been tampered with and removed from the volume and that the registered proprietor applied for reconstruction of the register vide deed of indemnity dated 13th May 2020 pursuant to Section 33(5) of the Land Registration Act No.3 of 2012 and the regulations thereof and that it was duly registered and advertised through Gazette Notice.No.3670 dated 22nd May 2020 as required by law.

17. He further deponed that the record/folio was reconstructed after the lapse of the statutory 60 days period excluding entries numbers 21, 22 and 23 as their records were missing.

18. He deponed that on 30th July 2020, they received an objection to the notice to reconstruct the register vide a letter dated 17th July 2020 but the statutory period for reconstruction of the register had lapsed by the time the office received the objection since the register had been reconstructed on 22nd July 2020.He also deponed that no subdivisions had been registered against the title whatsoever.

The Interested Party's response

19. The application was also opposed by the Interested Party through the affidavits sworn on 14th December 2020 and on 35th March 2021 by its director one Stephen Njogu Mburu. He deponed that the Interested Party is the registered owner of **L.R.No.6967** though an indenture of conveyance from Kenya Commercial Bank for Kshs.65,000,000/= and that its title is deposited at Kenya Commercial Bank for safe keeping.

20. He further deponed that together with his colleagues, they intended to purchase the suit property in common and paid a 10% deposit on 10th August 2006 but they decided to register the Interested Party in 2007 and agreed that Kenya Commercial Bank would transfer the suit property in the name of the Interested Party vide the indenture of conveyance dated 4th February 2009.

21. He deponed that prior to purchase, the Interested Party's Advocates conducted due diligence and established that the suit property has never been government land and that it changed hands from Mr. Bindon Blood to Mr.Ignatius Iriga Nderi then to Stephen Kositany and Ashok Kumar Manohar who sold to Kenya Commercial Bank which in turn sold to the Interested Party.

22. He deponed that before the suit property was transferred to the Interested Party, its title got lost in the hands of Kenya Commercial Bank and its then legal officer Gladys Biama prepared, registered and gave the Interested Party a deed of indemnity dated 10th October 2008.

23. He deponed that the Interested Party has enjoyed quiet peaceful possession and occupation until in the recent past when rumors of a dispute over the land emerged. He added that through a letter dated 26th September 2012, the Interested Party through one of its director Dr. Gladys Mwendu Musuva wrote to the Registrar, Ministry of land requesting for a caveat to be registered on the suit property and to keep the file under safe custody to protect their interests therein. He further deponed that the Interested Party carried out several searches overtime to ascertain t if there has been any interference of ownership of the suit property.

24. He deponed that in March 2020, the Interested Party established that folio/page IR N 83 233/26 7660 containing the details of the suit property was missing in the Lands registry at Ardhi house and on 15th March 2020, he executed a deed of indemnity together with his co-director one Mr. Henry Tanui in respect of the suit property to the Registrar of Lands, Nairobi Central registry requesting for reconstruction of the missing folio.

25. He deponed that the mode of notifying the public of a lost/destroyed register is by way of a Gazette Notice and the Respondent issued a gazette notice thus the Ex-parte Applicants' allegations that they were unable to lodge the objection in time are flimsy and unfounded.

26. He also deponed that the Interested Party filed a report with the Director of public prosecutions to investigate ownership of the suit property and it has opened a file to carry out investigations.

27. He deponed that he is informed that the suit property had been fraudulently subdivided into 10 parcels by a surveyor known as Dr. Nyika without the Interested Party's authority and he collected the deed plans from survey of Kenya and issued them to people without the Interested Party's authority but the said Nyika returned the deed plans to the Interested Party and they were subsequently cancelled by the Director of Survey upon request by the Interested party.

28. He faulted the Ex-parte Applicants for failing to indicate their root ownership of the alleged portions they claim to own and failure to demonstrate how Prince Thorpe Apartment Limited whom they claim from became the owner.

The Ex parte Applicants' submissions

29. They are dated 18th November 2021. Counsel for the Ex parte Applicants framed the issues for determination as follows:-

i. Whether the Applicants have met the grounds or threshold for granting of the judicial review orders of certiorari, prohibition and mandamus.

ii. Who should be awarded costs?

30. Counsel put forward the Ugandan case of **Patoli v Kabole District Local Government Canal & Others [2008]2 EA 300** to submit that in order for an Applicant to succeed in a Judicial review application, he /she must establish that the act /decision complained of is marred with illegality, irrationality and/or procedural impropriety.

31. He submitted that the register to **L.R No.6967** was closed in 1988/89 when the suit land was subdivided into 9 plots thus in the absence of evidence of amalgamation, reconstruction of the register of the original mother title of the suit property before amalgamation was impossible since it had already been closed.

32. He added that the Ex-parte Applicants' attempt to serve the Respondent with their objections were met with hostility, ignorance and arrogance since the Respondent refused service. He added that the Ex-Parte Applicants' evidence of the Respondent's refusal of service is uncontroverted and even after the Ex-parte Applicants finally served the Respondent, it refused to hear their objections.

33. He submitted that while the Respondent admits that it reconstructed the register on 22nd July 2020, only 58 days had expired contrary to the 60 days it specified in the Gazette Notice dated 22nd May 2020 arrived at after excluding 1st June 2020 which was Madaraka day and 24th and 25th May 2020 which were Eid ul fitr holidays.

34. He pleaded with the court to take judicial notice that the Respondent's Gazette Notice No.3670 dated 22nd May 2020 was issued during a time when the world was under various restrictions and lockdowns imposed by governments across the world because of the raging global pandemic and that in Kenya, the government had downscaled service delivery in its state offices including the Respondent's registry. He urged the court to find that it was difficult for the Ex-parte Applicants who reside in USA to lodge their objections given the circumstances at the time.

35. It was his submission that the Respondent did not advance reasons why it did not hear the Respondent's objections before reconstructing the file. He added that by failing/completely refusing to hear and determine the Ex-parte Applicants' objection, the Respondent acted in total disregard of the law and the rules of natural justice and as such, the decision made by the Respondent to reconstruct the register to the suit property is tainted with illegality, irrationality and procedural impropriety.

36. He further submitted that the Respondent's decision is an affront to the Ex-parte Applicant's constitutional right to own property, right to fair administrative action and that it contravenes provisions of the Land Registration Act, 2012 which requires the Respondent to hear and determine all objections before proceeding to reconstruct the land register for any given parcel of land. He added that the decision also contravenes Section 33(5) of the Land Registration Act, 2012 and is an affront to the rules of natural justice. He urged the court to allow to the motion and award costs to the Ex-parte Applicants.

The Interested Party's Submissions

37. They are dated 18th June 2021. Counsel for the Interested Party framed issues for determination as follows:-

a) Whether the application for orders of judicial review has met the required legal threshold.

b) Whether the Applicants are entitled to the orders sought.

c) Who should bear the costs?

38. Counsel relied on the Supreme Court case of **Independent Electoral and Boundaries Commission (IEBC) & 2 Others [2015]**, cited in **Super Nova Properties Limited v The National Land Commission [2019] e KLR** to submit that judicial review proceedings are concerned with the decision making process and not the decision itself.

39. He added that in considering an application for judicial review, courts have previously held that an applicant must show that the decision being challenged was either reached illegally, unprocedurally or unreasonably. He put forward the case of **Council for Civil Service Unions v Minister for Civil Service [1985] AC 274 at 401D**.

40. He submitted that the Applicants have not specifically outlined how their right to a fair hearing has been infringed by the Respondent since by the time the proceedings herein were being commenced, no decision had been made by the Respondent. He added that the Respondent complied with Section 33 of the Land Registration Act, 2012 and Rule 28 of the Land Registration (general) Regulations, 2017 which provides for the procedure the registrar is to follow before reconstructing the register.

41. He further submitted that the process of reconstruction had not been completed therefore the Respondent cannot be faulted for a process which it had not concluded and on that basis, the judicial review proceedings by the Applicants were premature.

42. On the issue whether the Ex -parte Applicants are entitled to the orders sought, he submitted that an order of certiorari can only issue to quash a decision which has already been made and which has been made illegally but in this case, no decision to construct the register for the suit property has been made thus such an order cannot issue as no decision exists.

43. He further submitted that an order of mandamus can only issue to compel performance of an act which a public body/individual carrying out a public function has illegally declined to perform. He added that the Respondent has not declined to perform or in any way intimated his refusal to perform his public duty of considering the objections and making a decision to that effect therefore an order of mandamus cannot issue against it.

44. He also submitted that an order of prohibition can only issue to prohibit the performance of a legally sanctioned act in a certain way not envisaged yet the Applicants have not demonstrated with evidence how/why they think the Respondent is likely to act illegally, irrationally or without regard to due laid down procedure. He put forward the case of **Kenya National Examination Council v. Republic Ex-parte Geoffrey Githinji Njoroge & 9 others [1997] e KLR**.

45. On grant of the orders of certiorari, he submitted that the court cannot compel the performance of a duty which the Respondent has not declined to perform. He implored the court to dismiss the motion and award costs to the Interested Party.

46. It appears that Respondent did not file any submissions

Analysis and Determination

47. The Ex parte Applicants' case is that the Respondent issued gazette notice No 3670 dated 22nd May 2020, wherein it indicated that it intended to reconstruct the Register of LR NO 6967 (the suit property) within sixty (60) days.

48. It is their case that the Register to the said parcel had been closed sometimes in 1988/89 when the suit property was subdivided into 9 plots of various sizes vide survey plan Folio NO 200 of Register 27. The Ex parte Applicants own LR Nos 6967/3, 6967/5 and 6967/7 respectively.

49. Upon hearing of the intended reconstruction of the register the Ex parte Applicants raised their objection through a letter dated 17th July 2020. When they did not get any response they filed another objection dated 24th September 2020. When the second letter did not elicit any response they (Ex parte Applicants) filed these proceedings.

50. The issue for determination is whether the Ex parte Applicants have made out a case for grant of the judicial review orders.

51. In the case of **Market Plaza Ltd vs Commissioner of Lands & 3 others [2019] eKLR** the Court of Appeal stated thus:-

“...The function of the High Court sitting in Judicial Review proceedings is not to determine an appeal or otherwise consider the merits of the decision by a public body but rather undertake a consideration of the manner in which the decision was made (see Republic vs Kenya Revenue Authority Ex parte Yaya Towers Ltd [2008] eKLR.

In **Ransa Company Limited vs Manca Francesco & 2 Others [2015] eKLR** this court expressed itself thus:-

“As we all appreciate, a court sitting on Judicial Review exercises a sui generis jurisdiction which is very restrictive. Indeed, in the sense that it principally challenges the process, and other technical issues like excessive jurisdiction, rather than the merits of the case. It is also very restrictive in the nature of the remedies or reliefs available to the parties”.

The Interested Party correctly submitted that judicial review concerns itself with the decision making process. The process stems from the reconstruction of the register by the Respondent which the Ex parte Applicants raised objection thereto.

52. Section 33 of the Land Registration Act, 2012 and Rules 28 of the Land Registration (General) Regulations, 2017 provides for the procedure the Registrar has to follow before reconstruction of the Register.

53. The Registrar issued the gazette Notice dated 22nd May 2020 which was a 60 days' notice of intention to reconstruct the register to **L.R.No.6967**. The Ex -parte Applicants allege that they hold titles which arose from subdivision of the suit land, therefore they raised their objection as required under the Act, vide their letter dated 17th July which was received by the Respondent on 10th August 2020 and an objection dated 10th August 2020. The Ex-parte Applicants' deponed that the Respondent largely frustrated service. Those allegations were uncontroverted. Further, the Ex parte Applicant's letter has never been responded to.

54. While the Interested Party argued that the Respondent is yet to make a decision and that it has not refused to consider the Ex-Parte

Applicants' objection, the Respondent conceded that it reconstructed the register on 22nd July 2020 after lapse of 60 days. The Ex-parte Applicants filed an application for leave to bring these proceedings into this court in September 2020. Even by the time they filed this substantive motion dated 14th October 2020, it appears that they were not aware that the register to the suit property had already been reconstructed.

55. The Respondent therefore made a decision to reconstruct the register to the suit property without hearing objections raised by the Ex-parte Applicants. Had it not refused service, the letter dated 17th July 2020 would have reached it before it made a decision to reconstruct the register. Further, its decision was premature as it did not demonstrate compliance with other requirements listed in Section 33 of the Land Registration Act, 2012. Even after it was made aware of the Ex-parte Applicants' objections, it did not communicate to them that it had already made a decision.

56. While Section 33 of the Land Registration Act does not direct the Respondent to inform objectors/Applicants that a decision to reconstruct has been reached, it would have been reasonable for the Respondent to inform the Ex-parte Applicants of its decision and reasons therefore in line with Article 47 of the constitution.

57. The Respondent flouted the procedure in Section 33 of the Land Registration Act, 2012 and Rule 28 of the Land Registration (general) Regulations, 2017 by refusing to hear the Ex-parte Applicants' objection and acting unreasonably.

58. The Ex-parte Applicants also persuaded the court to consider that at the time the Gazette Notice was issued, the world was literally under the corona virus emergency and as such, the Ex-parte Applicant's objections who reside in United States of America were unable to travel and the Respondent had scaled down services at its registry. The Respondent would have made consideration to these factors before hurriedly and unreasonably reconstructing the register while objections had been filed.

59. I find that the Respondent was under an obligation to hear objections by the Ex parte Applicants before proceeding to reconstruct the register. The rules of natural justice make it mandatory for a party to be heard before any decision that is likely to affect and to vary/determine their rights is made. In the case of **KNEC vs Republic Ex parte Geoffrey Gathenji & 9 Others [1997] e KLR** the Court held that:-

“That now brings us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an order of prohibition do and when will it issue? It 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 wrong decision or the merit of the proceedings, See Hulsbury Laws of England 4th Edition Vol 1 at page 37 paragraph 128”.

60. The court went further to state: *“only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction where the rules of natural justice are not complied with or for such like reasons”.*

61. I find that the Ex parte Applicants have made out a good case for the grant of the orders sought.

62. I grant the following prayers in the Notice of Motion:-

(i) That an order of certiorari is hereby issued to remove to this Honourable court for purposes of being quashed and is hereby quashed any decision and /or order of the Respondent reconstructing the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi Area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020.

(ii) That an order of certiorari in (i) above do also issue to bring into this Honourable Court for the purposes of being quashed and is hereby quashed, any decision and/or order of the Respondent that interfered with the registers of the Applicants' parcels of land namely L.R Nos.6967/3, 6867/5, and 6967/6-being the subdivisions arising from land L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi area.

(iii) That an order of prohibition is hereby issued restricting and/or prohibiting the Respondent, his/her agents, officers, employees and/or any person acting under the instructions of the Respondent, from carrying out the proposed reconstruction of the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi Area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020, before hearing and determining the Exparte Applicants' objection dated August 2020.

(iv) That an order of mandamus is issued compelling the Registrar of titles - Nairobi County (the Respondent) to hear and determine the Exparte Applicants' objection dated 10th August 2020, objecting to the proposed reconstruction of the land register for L.R.No.6967 (orig.No.5830/1/2) situated in the city of Nairobi in the Nairobi area, pursuant to Gazette Notice.No.3670 dated 22nd May 2020.

(v) Each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 10TH DAY OF MARCH 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Morara Omoke for the Applicants

Ms Kubai for the Respondent

Ms Kimani for Mr. Nzaku for Interested party

Steve - Court Assistant