



REPUBLIC OF KENYA



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Jepleting K'Opt Arusei & 2 others (Environment and Land Judicial Review Appeal 7 of 2021) [2022] KEELC 2954 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 7 OF 2021**

MN MWANYALE, J

JULY 29, 2022

IN THE MATTER OF

JEPLETING K'OPT ARUSEI EXPARTE

AND

LAND REGISTRAR NANDI COUNTY 1ST INTERESTED PARTY

PASCALINE JEPKEMBOI 2ND INTERESTED PARTY

JUDGMENT

1. The Exparte Applicant sought leave to commence to file Judicial Review application for orders of certiorari and Mandamus to remove into the Environment and Land Court and quash the decision of the respondent's decision to reduce the acreage of her parcel of land reference number Nandi/Kokwet/552 without prior Notice or involvement of the Applicant from 2.2 Hectare to 0.89 Hectares without any justifiable course, reason and subsequently deregistration of the Applicant of the Interested Party as the registered owner thereof.
2. The Exparte Applicant equally sought the leave so granted to operate as a stay against further implementation of the said decision and/or alienation of the subject matter Nandi/Kokwet/552 pending filing, hearing and determination of the intended Judicial Review application.
3. The application for leave was ground on grounds interalia;
 - a. The Respondent (Nandi Land Registrar) had made unfair ex-parte administrative action to deregister the Applicant and in her place substituted her name with and/or registered the Interested Party (Pascaline Jepkemboi) as the sole registered proprietor of the entire Applicant's parcel of land reference number Nandi/Kokwet/552, without prior Notice or involvement of the Applicant in the decision on 8th July 2021.



- b. The Respondent has also made an unfair ex parte decision to singlehandedly review or reduce the acreage of the Applicants parcel of land Nandi/Kokwet/552 without involvement of the Applicant from 2.2 Hectares downwards to 0.89 Hectares without any justifiable course.
 - c. The Respondent has subsequently issued a title to the Interested Party, who is moving swiftly to dispose of the subject matter to third party to the detriment of the Applicant.
4. The Ex parte Application was dated August 4, 2021 and was supported by the verifying affidavit of the Ex parte Applicant who reiterated the grounds in support of the Application. There was equally filed a statutory statement detailing and describing the parties herein.
 5. Leave was accordingly granted for commencement of the Judicial Review application.
 6. The Court noticed a similar matter between the same parties being Kapsabet ELC Court Appeal No 15 of 2021, Kapsabet.
 7. Once leave had been granted, the Ex parte Applicant filed the substantive motion on January 31, 2022, and the Interested Party filed a Replying Affidavit in opposition to the application. The Respondent through the Land Registrar, Nandi County equally filed a Replying Affidavit.

The Respondent's Case:

8. It is the respondent's case as captured by the replying affidavit of Judith Cherutich, the County Nandi Land Registrar that;
 - i. The property of Nandi/Kokwet552/ measures 0.89 hectares and is registered in the name of Rosaline Jepkemboi, the Interested Party.
 - ii. The registration was effected on 8/7/2021 as a result of a decree and Court order dated on 23/2/2021 and registered on 7/7/2021
 - iii. That the Applicant's suit to invalidate the decision of the tribunal over the suit property was dismissed as per the decree issued on 15.01.2021.
 - iv. That her offices responsibility was merely to implement the said decision which action is merely administrative in nature as such as such decisions, in absence of an appeal or stay order, are binding upon her office.
 - v. That it is therefore surprising that the Applicant even though fully aware of the decision of 23/12/2010 and even being aware of the decision of November 30, 2010, instead of appealing against the said decision, chose to file this judicial review application to challenge her decision that was purely binding and administrative in nature.
 - vi. That in entering the decision of the court the Registrar, her office was not under any obligation to inform the Applicant of the said intention, as in the event, she was aware of the said decision having been the main player in the decisions of the court.
 - vii. That therefore, it is unfathomable that her office made an unfair ex-parte administrative decision to deregister the Applicant as alleged, given that the Applicant was the main actor in the two decisions of the Court, and all my office did was to give effect to the decree of the Court.
 - viii. That in any event, I am aware that the writ under Judicial Review Application to issue by this Honorable Court, the Court must be satisfied by certain parameters factors and considerations, to wit, whether the decision maker had the jurisdiction, whether the persons



affected by the decision were heard before it was made and whether in making the decision maker took into account relevant matter or did take into account irrelevant matters.

- ix. That for the Ex parte Applicants to succeed, they must satisfy the Court that either, the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so, or a decision or action that has been taken is beyond the powers or body responsible for it.
 - x. That the Ex parte Applicant has not made a case that I acted without authority or jurisdiction.
 - xi. That the Ex parte Applicant has not demonstrated that I acted outside the powers that I hold.
 - xii. That the Ex parte Applicant, has not demonstrated, that while making the decision I did not follow the rules of natural justice.
9. For the above depositions, the Respondent prays that the Judicial Review Application be dismissed.

The Interested Parties Case

10. The Interested Party, Pasline Jepkemoi, filed a Replying Affidavit in that;
- i. The motion is improper irregular and abuse of the Court process, there has been no decision of the Land Registrar in respects of the size and area of the suit land Nandi/Kokwet/552, as the Register is clear that the actual size of the land is 0.89 hectare.
 - ii. That there is no decision allegedly made by the Land Registrar placed before Court touching parcel Land/Nandi/Kokwet/552 that has been 2.2. Hectare or thereabouts.
 - iii. That the Register was opened on the 4th day of September 1968 as it appears from the copy of the Register. Decision on the acreage if any was made before that said date of 4/9/1968.
 - iv. Applicant was granted leave to Review entry No. 8 and 9 on proprietorship Section of the Register, and no other and any prayer allegedly seeking a review of an entry on the registration Section, so as to raise the area and/or size will be improper irregular and illegal, decision was made on or before 1968, and is statute barred.
 - v. That the decision sought to be brought before the Court for purposes of being prohibited allegedly touches on entry No. 8 and 9 which are entries in respect of my registration and issuance of title deed. The same was not a decision by the Land Registrar as they were made pursuant to a decree in Kapsabet Lands Dispute Tribunal case No. 9 of 2020.
 - vi. That the decision of the lands Dispute Tribunal placed before the Magistrate's for adoption and the resultant execution was made more than 12 years ago. It cannot be reviewed now as the time within which it ought to have been done lapsed many years ago.
 - vii. That the implementation/execution of the Decree is not an Administrative Action as envisaged by the cited *Fair Administrative Action Act*.
 - viii. That the decision of the Land Registrar if any, has been made and cannot be prohibited, the title deed of 2.2 acres was made by the Tribunal and not the Land Registrar and Adopted by the Magistrate's Court.
 - ix. That the time that the "decision" was made to reduce the area or size of the land allegedly from 2.2. Ha to 0.89 Hectares has not been stated.



- x. That I have been shown a copy of a search dated 21/8/2014 and compared with a copy of the Register and it is clear and apparent that the search is strange and not extracted from the Register.
11. Parties were directed to file written submission on the Judicial Review application.

Exparte Applicants Submission: -

12. It is the exparte applicant submission that the decree which was been executed by the respondent was specific, it required that;
- “ i) that the award as filed herein by Kosirai Land Disputes Tribunal dated January 21, 2010 be and is hereby adopted as a judgment of this Hon. Court.
- ii) That Bascaline Jepkemboi (claimant) be given 2.2. acres she bought from Jane Jepleting Kobot Arusei
- iii) That the Government Surveyor Kapsabet to take necessary action by subdividing Nandi/kokwet/552 and also request Lands Registrar Kapsabet to issue a title deed for 2.22 acres. Right of Appeal 30 days.”
13. It is the Exparte Applicants submissions that the Respondent without following any Court order reduced the acreage of Nandi/kokwet/552 to 0.89 Ha from 2.2 Hectares which was the actual size on the ground and proceed to give the same to the interested party on 8/7/2021.
14. The Exparte Applicant places reliance on annexure number 3B (Search dated 21/08/2014), which shows that the actually acreage of Nandi/kokwet/522 as 2.2. Hectares while annexures 3c search dated 15/7/2021 shows that the Land reduced on 8/7/2021 to 0.89 Hectares.
15. That thus the reduction from 2.2 Ha to 0.89 Hectares is the administrative action of the Respondent that was illegal and hence been challenged.
16. The illegality being that whereas the decree stated that the land was to subdivided and 2.2 acres to be given to the Interested Party, the Respondent did not cause any subdivision as per the decree; and that was instead done was to approximate area of the suit parcel on the register to 0.89 Ha.
17. In support of these submissions, the Exparte Applicant relies on Annexure 2 A being the search dated 21/08/2015, which showed that the property was 2.2 Hectares while annexure marked 2B shows that the acreage is 0.89 Hectares. Annexure JKA – 2, a certified copy of the register is also the document that the Exparte Applicant places reliance. The Court while writing the ruling found annexure JKA 2 to be missing certain details as it only showed entries No. 5 to No. 9 made in 2021 2021, and not the previous entries, and on 25th July 2022, granted leave to both the Exparte Applicant and the Respondent for either party to file the complete copy of the Register by way of a Supplementary Affidavit. The Exparte Applicant filed the Supplementary Affidavit dated 25th July 2022, and exhibited the complete copy of the green card showing all the entries from entry number 1 to 9; the annexure is marked as JKA in the affidavit dated July 25, 2022.
18. The Exparte Applicant thus submits that the decision of the Respondent herein, renders her homeless and she is now a squatter own her own property.



The Respondent's Submissions:

19. The Respondent submits that she acted upon a Court decision, which decision was binding upon her office.
20. It is the Respondents further submission that the Applicant has not met the threshold to warrant issuance of the order's sought. The Respondents submits that for the Exparte Applicant to succeed, she must prove that the decision or action complained of was tainted with illegality, irrationality and procedural impropriety.
21. In support of this submission, the Respondent places reliance on the decision in the case of *Patroli vs Kabale District Local Government Council and others* (2008) 2. E. A. 300.
22. It is the Respondent's further submission that she had a duty to obey the Court orders as was stated in the case of *Econet Wireless Ltd. Vs Minister for Information and Communication of Kenya and Another* (2005) KLR 228 and that her duty the decision she made was in compliance with a Court order and she should not be faulted.
23. Lastly the Respondent submits that the Court sitting on a Judicial Review is only concerned with the process leading to the making of the decision and Court should not go into the merits of the decision itself. In support of this the Respondent relies on the decision in *Municipal Council of Mombasa vs Republic... Umoja Consultants* Nairobi, Civil Appeal No. 185 of 2007 (2002) eKLR where the Court of Appeal held;

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e. jurisdiction to make it. Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did they take..... merits of decision itself.....such as whether this was or there was no sufficient evidence to support the decision and that as we have said, it is not the province of Judicial Review...”

24. For the above reasons the Respondent prays that the Application be dismissed.

The Interested Parties Submission:

25. It is the Respondents submission in a nutshell that the Land Registrar's decision being challenged by way of Judicial Review was made more than 6 months ago; and is time barred.
26. The Interested Parties further submits that the failure to attach the decision challenged is fatal to the application as it contravenes order 53 Rule 7 (1) of the *Civil Procedure Rules*. In support of the above submission the Interested Party has cited the decision in the case of *Samson Kirerea M'ruchu vs minister for Lands and Settlement* CA 21 of 1999, which decision was quoted with approval in the case of *Musa Kingori Gaita vs Kenya Wildlife Service* (2006) eKLR The court observed “compliance with the above provision is a precondition to seeking an order of certiorari, An Applicant who fails to comply with the requirements of that provision disentitles himself to a hearing of this motion under rule 3 of the *Civil Procedure Rules*. It would appear to us that the failure to comply with rule 7 (1) above, does not render the application incompetent ab into but renders proceedings continued in violation thereof a nullity. We say so advisedly as a copy of the decision sought to be quashed may be lodged before the hearing of the motion for an order of certiorari...”



27. The Interested Party submits that the decision of the Land Registrar of 8th day of July 2021, to register the Interested Party was not the Land Registrar decision but implementation of a Court decree.
28. On the strength of the above decisions, and submission the Interested Party prays that the Application be dismissed with costs.

Issues for Determination:

29. The parties herein have not framed the issues for determination, the Court considers the following as the issues for determination and frames the same as follows;
 - i. a) Whether the Court's jurisdiction in this Judicial Review Application is limited to the decision making process only?
 - b) Whether the decision by the Land Registrar to issue title to the Interested Party was in strict compliance of the decree of the Court.
 - c) If answer to 1 (b) above is in the affirmative, is the Exparte Applicant entitled to seek Judicial Review Orders.
 - d) If answer to 1 (b) above is in the negative is the Exparte Applicant entitled to the relief's sought.
 - d. Who bears the costs of the proceedings?

Analysis And Determination:

30. In their submissions, Mr. Letting for the Respondent and Mr. Choge for the Interested Party submits that the Court jurisdiction in a judicial Review application is limited to the decision making process, and not the merits of the decisions.
31. In support of the above submissions both the Interested Parties and the Respondent have cited the Court of Appeal decision in *Municipal Council of Mombasa vs Republic, Exp Umoja Consultants Ltd.* Nairobi Civil Appeal No. 185/2007 (2002) eKLR.
32. The jurisprudence has since grown from delivery of the Municipal Council of Mombasa decision cited by the Interested Parties and the Respondent with the enactment of *the Constitution* 2010, article 47 of *the Constitution* provides for Issuance of Judicial Review Orders.
33. Accordingly the jurisdiction of the Court in Judicial Review matters has greatly expanded especially when considering a Judicial Review application brought under article 47 of *the Constitution* and the provisions of *Fair Administrative Action Act*.
34. In Civil Appeal No. 46/2021, *Suchan Investment Limited vs Ministry of National Heritage and 2 others*. The Court of Appeal observed at paragraph 56, the Court observed that a merit review was possible in Judicial Review Applications.
35. In Civil Appeal No. 486 of 2019, *JSC vs Lucy Muthoni Njora* the Court of Appeal observed ".....to my mind even faulty to be traditional process only approach to judicial review must involve a measure of merit analysis.... Judicial Review as an area of law is not static and its parameters have never been cast in stone..."
36. It follows from the above decisions that where an Exparte Applicant invokes article 47 of *the Constitution* as a basis for the Judicial Review and the Fair Administrative Action and further post the Lucy Njora decision above that there can be a merit analysis of a decision in Judicial Review.



37. Having found that the Court can go into the merits of a decision, the Court finds in answer to issue No. 1 above that it has jurisdiction to look into merits of the decision in this matter, as the application was expressed to have been brought under article 47 of the Constitution and the Fair Administrative Action Act.
38. On issue No. 1 (b) as whether the decision by the Respondent to issue to title to Interested Party was in the decree of the Court.
39. From the proceedings herein the Respondent did not cause a subdivision of the property but transferred wholly the same. That decision is exhibited by the search showing that the parcel number Nandi/kowet/552 was wholly transferred to the Interested Party.
40. The decree as reproduced in paragraph 12 above required the Government Surveyor to take necessary action by subdividing Nandi/kokwet/552 and the land Registrar to issue a title deed for 2.2 acres to the Interested Party.
41. It follows therefrom that the Respondent was commanded by the decree the liaise with the County Surveyor and cause a subdivision of the Nandi/kokwet/552, so that 2.2 acres would be hived off in favour of the Interested Party.
42. In implementing the decision, the respondent was therefore required together with the surveyor to ascertain the acreage of Nandi/kokwet/552 and subdivided 2.2 acres thereof and Register the same; to the Interested Party.
43. It appears from the record that this was not done, hence the genesis of the complaint before Court it follows therefrom in implementing the Court decision, the Respondent omitted to look into part of the decree that required the Government Surveyor to ascertain and subdivided Nandi/kokwet/552.
44. The parties' submission on this aspect are all silent. But from the analysis above, the Court finds that the decision to issue the title to Interested Party was not in strict compliance of the decree as there was omission to include the Surveyor to ascertain the acreage.
45. The said omission falls under the Fair Administrative Act category of issues capable of being subject of Judicial Review under section 2 and 7 of the Fair Administration Act which the Exparte Applicant cites in support of Application. Consequently having found that there was an error of omission on the part of the Respondent, it follows that the Exparte Applicant is entitled to have sought the intention of Court through Judicial Review application.
46. Would the decision have been different if the Surveyor had ascertained the acreage before the title was issued by the Respondent to the Interested Party?
47. It is the Exparte Applicants submissions on the basis of the search dated 21/8/2014 (annexure JK 2 (a) that the acreage was 2.2 Ha. The Respondent and the Interested Party both submit that the acreage of Nandi/kokwet/552 is 0.89 Ha.
48. Annexure JK 2 (b) the certificate of search dated 15/07/2021 provided the approximate area of Nandi/kokwet/552 at 0.89 Ha.
49. As explained earlier in the judgment, the Court granted leave to the Exparte Applicant to file a Supplementary Affidavit so as to annex a complete record of the Register of Nandi/kokwet/552 as the copy filed earlier omitted entries No. 1 to 4 hence it was incomplete. By the Supplementary Affidavit dated 25/7/2022 a complete record if the register was annexed as J.K A1. In the said annexure the



approximate area of Nandi/kokwet/552 is typewritten as 2.2 Acres which is canceled and handwritten as 0.89 Ha.

50. The Court has converted the 2.2 Acres into Hectares and found it to be 0.89 Ha.
51. Accordingly the search dated 21/08/2014 which suggests the acreage to be 2.2 Ha seems to have no backing from the Register, as the Register provided the acreage to be 2.2 Ha which is 0.89 Hectares.
52. The Court finds that according to the Register that the original acreage of Nandi/kokwet/552 to have been approximately 2.2 acres or 0.89 Ha.
53. The Exparte Applicant has annexed a survey report by Topoland General Agencies annexure to the substantive motion which shows that the actual acreage on the ground was 3.048 Acres or 1.598 Ha.
54. There is therefore a discrepancy as to acreage on the Register which is 0.89 Ha and the actual acreage on the survey report which 3.948 acres.
55. The Court finds that the decision of the Land Respondent to issue the title to the interested Party without involving the County Land Registrar would have been different had there been no omissions on the part of Land Registrar to involve the Government Surveyor.
56. The Exparte Applicant is therefore justified to invoke the *Fair Administrative Action Act*, and seek the Judicial Review Orders as the Omission on the part of the Respondent, has greatly affected her interests in Nandi/kokwet/552.
57. Accordingly the Exparte Applicant has laid sufficient basis to justify the issuance of Judicial Review Orders in this matter as her application succeeds.
58. The notice of motion application dated is hereby allowed not in terms as prayed but in terms that;
 - i. The decision of the Respondent made on 8/7/2021 issuing a title for Nandi/kokwet/552 to Pascaline Jepkemboi the Interested Party is called into this Court and an order of certiorari is hereby issued quashing that decision. Hence the title Nandi/kokwet/552 issued on 8/7/2021 to Pascaline Jepkemboi is hereby cancelled.
 - ii. An order of Mandamus is hereby issued to the Respondent to strictly comply with the decree of Kapsabet LDT NO. 9 of 2010 issued on 25th January 2011 by;
 - a. Involving the County Surveyor in the presence of Exparte/Applicant and the Interested Party to ascertain the acreage of Nandi/kokwet/552.
 - b. If the acreage on the ground is more than the acreage on the Register the County Surveyor to subdivide the same and the Registrar (Respondent) to Register 2.2 acres in favour of the Interested Party and the residual acreage in favour of the Exparte Applicant.
 - c. In the subdivisions in (b) above regard is to be given to the current abode of the Exparte Applicant so that it be constituted in her title. Or
 - iii. Should the acreage be confirmed to be 2.2 acres on the ground as corresponding to the Register, the whole portion to be transferred to the Interested Party Pascaline Jepkemboi, as per the decree in Kapsabet LTD NO 9/2010 and a new title be issued to her.
 - iv. There shall be no orders as to costs.

DATED AT KAPSABET THIS 29TH DAY OF JULY 2022.



HON. M. N. MWANYALE,

JUDGE.

Delivered in the presence of;

Mr. Choge for Interested Party

Mr. Rotich for Exparte Applicant

No appearance for Mr. Letting for the Respondent

