



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JR MISCELLANEOUS CIVIL APPLICATION NO. 83 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF**

**CERTIORARI BY WAY OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT THIKA CIVIL CASE  
NUMBER 381 OF 1996**

**AGNES NJERI KABATHA ..... PLAINTIFF**

**VERSUS**

**PAULINE WANJIRU NDICHU ..... DEFENDANT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI BY WAY OF  
JUDICIAL REVIEW**

**BETWEEN**

**REPUBLIC.....APPLICANT**

AND

CHIEF MAGISTRATE, THIKA LAW COURTS.....1<sup>ST</sup> RESPONDENT  
AGNES NJERI KABATHA .....2<sup>ND</sup> RESPONDENT

EX PARTE: JOSEPH NJUGUNA KABUGUA

**RULING**

The ex parte applicant's application dated 11<sup>th</sup> November 2010 seeks an order of certiorari to remove into this court and quash the judgment/decree of the Chief Magistrate's Court in **Thika Chief Magistrate's Civil Case No. 381 of 1996, Agnes Njeri Vs Pauline Wanjiru**. In his affidavit in support of the application the ex part applicant stated that he is the absolute proprietor of a parcel of land known as LR No. **Loc 1/THUITA/1078** hereinafter referred to as "**the suit land**", situate within Gatanga District, Muranga county. He purchased the suit land from Pauline Wanjiru, the defendant in the aforesaid case. The consideration was Kshs.70,000/=. The suit land was excised from a parcel of land known as LR NO. LOC 1/THUITA/576 which was owned by Pauline Wanjiru. The parent title was closed on 22<sup>nd</sup> September 1997 upon the subdivision and creation of two new titles numbers LOC 1/THUITA/1077 and 1078.

In the Chief Magistrate's Civil Case at Thika the court delivered a judgment in favour of the plaintiff, Agnes Njeri, ordering the defendant, Pauline Wanjiru, to transfer to the plaintiff 1.3 acres from Land Parcel No. LOC 1/THUITA/576. The applicant's parcel of land measures 1 acre and Pauline Wanjiru was left with a parcel measuring 0.3 acres only. The entire parcel of land before subdivision measured 1.3 acres.

The applicant stated that by ordering Pauline Wanjiru to transfer 1.3 acres from the original parcel of land the court inferred that the suit land be transferred to the defendant in the said case. The applicant contended that the subordinate court did not have jurisdiction to deal with issues of ownership of registered land of make a declaration of trust over such land as it purported to do in the said case.

The 2<sup>nd</sup> respondent filed a replying affidavit and stated that one Pauline Wanjiku Ndichu was her step mother and was registered as proprietor of LAND PARCEL LOC 1/THUITA/576 and LOC 1/THUITA/180 during the land demarcation and consolidation. There were two cases before the Chief Magistrate's Court at Thika, CMCC No. 1284 of 1985 and CMCC No. 386 of 1996 which were consolidated by consent. she further stated that on 14<sup>th</sup> June, 1998 prior to the said consolidation the court in CMCC No. 1284 of 1995 ordered that the dispositions effected on land parcels LOC 1/THUITA/180 and LOC 1/THUITA/576 be nullified and the subdivisions were canceled. The ex parte applicant had sought to be joined in the suit and leave was granted but the orders sought for review of the aforementioned orders were denied and he did not appeal against that decision.

The 2<sup>nd</sup> respondent further contended that the ex parte applicant did not institute his application for the orders of certiorari within a period of six months from the date of the impugned decision. She further stated that the Chief Magistrate's Court had jurisdiction to issue the orders now being questioned by the ex parte applicant.

The ex parte applicant filed a further affidavit and stated that as at 14<sup>th</sup> June, 1998 when the Chief Magistrate's Court at Thika made the orders complained of he had already acquired a good title over the suit land. At that time he had not been enjoined as a party to the suit. He reiterated that the learned Magistrate had no jurisdiction to order cancellation of his title deed.

The ex parte applicant and the 2<sup>nd</sup> respondent filed their respective submissions which I have carefully considered.

The major ground upon which the ex parte applicant sought the order of certiorari is that the Chief Magistrate's Court had no jurisdiction to deal with the issue of ownership of a registered parcel of land or a declaration of trust over such land. He cited the provisions of **Section 159** of the **Registered Land Act, Cap 300** as well as the decision of Makhandia, J. in **JOB MURIITHI WAWERU vs PATRICK MBATIA, Civil Appeal No. 42 of 2007 at Nyeri (unreported)**.

The 2<sup>nd</sup> respondent submitted that the court had jurisdiction to grant the orders which it made, in view of the monetary value of the suit land.

**Section 159** of the **Registered Land Act** states as follows:

**“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunals Act in accordance with that Act”.**

It is clear from the said section that a Resident Magistrate's Court can deal with any civil dispute relating to title of a registered land as long as the value of the subject land does not exceed twenty five thousand pounds or Kenya shillings five hundred thousand (Kshs.500,000/=).

The suit land had been purchased by the applicant at a consideration of Kshs.70,000/=. I do not therefore agree that the Chief Magistrate's Court did not have jurisdiction to deal with the matter.

**Section 2** of the **Registered Land Act** defines “the court” as follows:

**“the court”, except as otherwise expressly provided, means the court having jurisdiction in the matter in question by virtue of section 159”.**

**Section 143(1)** of the **Act** grants the court power to order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that the registration (other than a first registration) had been obtained by fraud or mistake. The applicant's title is not a first registration.

In **MUTHUITA vs WANOE [1982] KLR 166**, the Court of Appeal held that The Resident Magistrate's Court has jurisdiction to declare the existence of a trust. Such jurisdiction is derived from **Section 159** of the **Registered Land Act** and the jurisdiction is as wide as that of the High Court where the value of the

land in dispute falls within the pecuniary jurisdiction established under **Section 159** thereof. The authority of **JOB MURIITHI WAWERU vs PATRICK MBATIA (Supra)** cannot assist the applicant. Makhanida, J. held that the subordinate court had pecuniary jurisdiction because the purchase price of the land in dispute was Kshs.495,000/=. The fact that the learned Magistrate made orders in respect of a parcel of land whose title did not exist at the time does not necessarily mean that the decision was made irrationally and in abuse of power or discretion. Although it was submitted by the applicant that the orders made by the trial court had the effect of canceling his title, it had been demonstrated that the court had jurisdiction to make such an order. Whether such order was right in law, based on the facts of the case, it is not for this court to determine. It is trite law that in judicial review proceedings the court is not concerned with the merits of a decision but the decision making process itself. See **REPUBLIC VS JUDICIAL SERVICE COMMISSION ex parte PARENO [2004] 1 KLR 203**.

If the applicant was aggrieved by the judgment made by the trial court he ought to have preferred an appeal against the same instead of filing judicial review proceedings.

The **Supreme Court Practice**, 1997 Volume 53/1-141/16 states that:

**“The court will not however, on a judicial review application act as a “court of appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power”.**

In view of the foregoing, the application for an order of certiorari to quash the judgment/decree of the Thika Chief Magistrate’s Court in Thika CMCC No. 381 of 1996 is dismissed with costs to the 2<sup>nd</sup> respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF JUNE, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – Court Clerk**

**Mr. Mwangi for the Ex Parte Applicant**

**Mr. Kiragu Kimani for Miss Waithera for the 2<sup>nd</sup> Respondent**

**Mr. Mwendwa for the 1<sup>st</sup> Respondent**