Republic v The National Land Commission & 2 others; Mgei (Exparte); Karienye (Interested Party) (Environment and Land Judicial Review Case 13 of 2019) [2022] KEELC 3996 (KLR) (18 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3996 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 13 OF 2019

SO OKONG'O, J

JULY 18, 2022

BETWEEN

REPUBLIC .... APPLICANT

AND

THE NATIONAL LAND COMMISSION .... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR .... 2ND RESPONDENT

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

AND

NANCY USIDE MGEI .... EXPARTE

AND

CHARLES MURIUKI KARIENYE .... INTERESTED PARTY

JUDGMENT

The applicant's case.

1. The ex-parte applicant, Nancy Uside Mgei (hereinafter referred to only as "the applicant") brought this judicial review application by way of Notice of Motion dated July 1, 2019seeking the following orders;

    1. That this Honourable Court be pleased to grant an order of Mandamus directed at the Respondents compelling them to grant and issue to the Applicant the title documents in respect of all that piece and/or parcel of land known as L.R No. 15065/61-Karen Nairobi (hereinafter referred to only as "the suit property").

    2. That the costs of the application be provided for.

2. The application was brought on the grounds set out on the statutory statement and verifying affidavit of the applicant both dated January 21, 2019and a supplementary affidavit also by the applicant dated May 28, 2021. The applicant has contended that the Government of Kenya allocated to her the suit property through a letter of allotment dated 15th November 1995 after she applied for the same. The applicant has averred that she complied with the terms of the said letter of allotment by making payments of the required fees and others charges totalling Kshs 181,050.00. The applicant has averred that a Deed Plan No 157535 was thereafter prepared in respect of the property together with a lease in her favour.

3. The applicant has averred that while pursuing the issuance of the said lease, she learnt that the interested party, Charles Muriuki Karienye purported to have been issued with a lease by the Nairobi City Council in respect of the suit property but with a different land reference number namely, LR No 78610 on April 26, 1996. The applicant has averred that she paid all the requisite charges including land rent and rates up to 2017 to facilitate the issuance of the said lease. The applicant has averred that the lease that was purportedly issued to the interested party was fraudulent and illegal. The applicant has contended that she lodged a complaint regarding that lease with the 1st respondent which found her complaint to be merited.

4. The applicant has averred that the 1st respondent's director of legal services and enforcement wrote to the 2nd respondent on May 10, 2018 directing him to issue the applicant with a certificate of lease in respect of the suit property but the 2nd respondent refused to do so. The applicant has averred that there is no reasonable justification for the respondents' refusal to issue her with a title for the suit property. The applicant has averred that the respondents' failure and neglect to issue her with the said title amounts to abdication of statutory duty and a breach of the applicant's legitimate expectation and a right to fair administrative action. The applicant annexed to her verifying affidavit copies of a letter of allotment dated November 15, 1995(last page missing), a receipt issued by the Commissioner of Lands for Kshs 181,050/-, Rent Clearance Certificate dated October 16, 2017 and a letter dated May 10, 2018 by the 1st respondent's Director of Legal Services and Enforcement.

5. In her supplementary affidavit, the applicant has averred that she is the bona fide owner of the suit property. The applicant has averred that the interested party who claims to have acquired the suit property from a third party did not carry out any due diligence before acquiring the property. The applicant has averred that when the interested party purported to purchase the suit property from Joseph Kihara Mureithi, she was the owner of the suit property and she was not approached or consulted during the purported transaction.

6. The applicant has averred that the said Joseph Kihara Mureithi has never been registered as the owner of the suit property and as such his purported proprietorship of the property was as a result of an illegal and fraudulent undertaking or a corrupt scheme. The applicant has averred that since the said Joseph Kihara Mureithi held a fraudulent title, the interested party could not get a good title from him.

The respondents' case.

7. The applicant's application was opposed by the 1st respondent. The 2nd and 3rd respondents did not respond to the application despite service. The 1st respondent opposed the application through a replying affidavit of Brian Ikol sworn on May 7, 2019. This affidavit was filed in opposition to the Chamber Summons application for leave. The 1st respondent denied that the applicant had lodged a complaint with it in relation to the suit property. The 1st respondent contended that the letter dated May 10, 2018 alleged to have been written by the 1st respondent's Director of Legal Services and Enforcement was a forgery as the letter did not emanate from the 1st respondent's office. The

1st respondent has stated that the purported writer of the letter, PM Njoka is not known to the 1st respondent. The 1st respondent has stated that it is not responsible for preparing title documents, registering the same and issuing certificates of title. The 1st respondent has stated that that is the responsibility of the 2nd respondent. The 1st respondent has contended that the orders sought cannot be enforced against the 1st respondent.

The interested party's response:

8. The interested party opposed the application through a replying affidavit sworn on December 20, 2020. The interested party has averred that the suit property was previously owned by Joseph Kihara Mureithi from whom he purchased the same through an agreement of sale dated May 27, 2009. The interested party has averred that Joseph Kihara Mureithi acquired the suit property on December 4, 1998. The interested party has averred that after paying the full purchase price to the said Joseph Kihara Mureithi, the suit property was transferred and registered in his name on February 9, 2012. The interested party has averred that he acquired the suit property for valuable consideration after conducting due diligence.

9. The interested party has contended further that the applicant did not accept and pay for the allotment of the suit property within 30 days as was prescribed in her letter of allotment. The interested party has averred that the interested party having failed to comply with the terms of the letter of allotment nothing would have stopped the Government from allocating the same land to another person. The interested party has averred that he is the bona fide purchaser of the suit property and not the first registered owner thereof. The interested party has averred that since the applicant has not challenged the validity of the title of the first registered owner of the suit property, her claim against the interested party has no legal basis.

The submissions:

10. The application was argued by way of written submissions. The applicant filed submissions dated July 7, 2021. In her submissions, the applicant has framed two issues for determination namely; whether the applicant is the bona fide proprietor of the suit property and whether the title held by the interested party in respect of the suit property should be revoked and the 2nd respondent compelled to issue a new title to the applicant.

11. The applicant has submitted that she is the bona fide proprietor of the suit property in that upon being issued with an allotment letter she complied with the terms thereof by paying all the requisite fees and charges. The applicant has submitted that the suit property was not available for allocation to any other person. The applicant has submitted further that the interested party's title should be revoked on the ground that it was acquired illegally after which the 2nd respondent should be compelled to issue a new title in favour of the applicant. In conclusion, the applicant has submitted that she has made out a case for the grant of the order sought in the application before the court.

12. The interested party filed submissions dated August 9, 2021. The interested party has framed three issues for determination by the court namely; whether the interested party is the legal owner of the suit property, whether the applicant has interests in the said parcel of land capable of legal protection and what are the remedies available for the applicant. The interested party has submitted that he acquired the suit property legally and not fraudulently as claimed by the applicant. The interested party has submitted that his title is indefeasible and deserves protection by the court. The interested party has reiterated that the applicant has no right over the suit property capable of protection. The interested party has submitted that the interested party did not comply with the terms of the letter of allotment in that she did not accept the allotment and make payment of the requisite charges within 30 days as was

provided for in the letter of allotment. The interested party has submitted that since the applicant did not accept the allotment and did not pay the requisite charges as prescribed, there is a likelihood that the property was allocated to another person. The interested party has submitted that the applicant's remedy if any is against the Government and not the interested party.

Determination:

13. I have considered the application together with the supporting affidavits, the affidavits filed in response thereto by the 1st respondent and the interested party and the submissions by counsels. In my view there is only one issue arising for determination in this application namely, whether the applicant has made out a case for the grant of an order of judicial review in the nature of mandamus against the respondents. In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR, the Court of Appeal stated as follows:

> "The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect;
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> That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters".

14. The applicant is seeking an order of mandamus to compel the respondents to issue her with a title in respect of the suit property. In *Halsbury's Laws of England*, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature and mandate of an order of mandamus as follows:

> "The order of mandamus is of most extensive remedial nature and is in the form a command issuing from the High Court of justice, directed to any person, cooperation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is 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 leave discretion as to the mode of performing the duty in the hand 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."

15. In the book; Public Law in East Africa published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

> " Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues *ex debito* justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully."

16. I am not satisfied that the applicant has made out a case for the grant of the order sought in her application. As stated in the extract of Halsbury's Laws of England cited above, an order of mandamus would require the person it is directed at to do something that appertains to his office and is in the nature of a public duty. The order would command no more than the person is legally bound to perform. In the circumstances, the applicant had a duty to satisfy the court that the respondents are legally bound to issue her with a title but they have refused to do so without any reasonable cause. Has the applicant discharged this burden? I am not convinced that she has. The applicant has not demonstrated that she complied with the terms of the letter of allotment of the suit property. The letter of allotment in favour of the applicant was dated November 15, 1995, the applicant was supposed to accept the allotment and make payment of Kshs 181,050/- within 30 days. The applicant has not placed any evidence before the court as to when she accepted the allotment. The evidence before the court which is indicative of when she may have accepted the allotment is a receipt by the Commissioner of Lands dated December 15, 1996 for Kshs 181,050/-. This receipt shows that the applicant accepted the allotment one year after the offer was made which was a breach of the terms of the allotment.

17. There is also inconsistent information as to who allocated the suit property to the applicant. As I mentioned earlier in the judgment, the letter of allotment that was produced by the applicant in court is incomplete. The last page is missing. Whether the omission which is glaring was intentional or not is not clear. The indication on the face of the letter of allotment is however that it was issued by the Commissioner of Lands on November 15, 1995. The letter that was produced by the applicant as exhibit 4.5 in the verifying affidavit states that applicant was allocated the suit property by the Nairobi City Council in 1996. It is not clear therefore whether the allotment was by the Commissioner of Lands or the City Council of Nairobi.

18. Assuming that the allotment was by the Commissioner of Lands, I am of the view that the Commissioner of Lands whose successor in title is the 1st and 2nd respondents was not legally bound to issue a lease or a Grant in favour of the applicant who did not comply with the terms of the letter of allotment. From the Certificate of Title for the suit property that was produced by the interested party, it appears that the suit property was allocated to another person who thereafter transferred the same to one, Joseph Kihara Mureithi who subsequently sold and transferred the same to the interested party.

19. Joseph Kihara Mureithi was registered as the owner of the suit property on December 11, 1998. He transferred the suit property to the interested party for valuable consideration on February 9, 2012. The interested party is now the registered owner of the suit property and a holder of a title in respect thereof. The law does not authorise the respondents to issue two titles for the same parcel of land to different people. I am of the view that once the applicant learnt that the interested party had been issued with a title in respect of the suit property, her recourse should have been to challenge that title through a normal civil suit. Until that title is cancelled, the respondents have no legal duty to issue another title to the applicant for the suit property.

20. From the submissions made by the parties, there is no doubt that the dispute before me is over ownership of land. The applicant has claimed that the interested party acquired the suit property fraudulently and as such his title should be cancelled and a new title issued in favour of the applicant. The interested party on the other hand has defended his title which he claims to have acquired legally for valuable consideration after undertaking due diligence. One thing that the applicant has forgotten is that there is no prayer in her application for the cancellation of the interested party's title. Even if there was such prayer, I doubt if I would have granted the order. It has been stated by this court on numerous occasions that judicial review is not the appropriate procedure for determining disputes over ownership of land. There is no way I can determine the legality of the title held by the interested party on the affidavit evidence before me. The allegations of fraud made against the interested party can only be proved at a hearing where evidence is tendered and tested through cross examination.

21. I am of the view that the applicant chose a wrong forum for the complaint that she has against the respondents and the interested party. In *Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others* [2018] eKLR) the court stated as follows:

> "In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.
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> The upshot is that I dismiss this Judicial Review application with costs to the Interested Parties. I award no costs to the Respondent since it did not participate in the proceedings."
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> In Republic v Cabinet Secretary, Ministry of Interior & Co-ordination of National Government & 2 others Ex-Parte Kisimani Holdings Ltd [2015] eKLR, the court dealing with a similar issue stated as follows:
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> > " 26. As was held in *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*:
> >
> > "Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application..........Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title.

The original documents would need to be produced at a full hearing where oral evidence would be adduced..........It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts."

27. To grant the orders sought herein will leave the serious conflicting issues of fact raised in these proceedings unresolved hence will be a source of future conflicts since as already stated judicial review applications do not deal with the merits of the case but only with the process. In other words, in judicial review applications the Court's jurisdiction is to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits."

22. Due to the foregoing, I find no merit in the applicant's Notice of Motion application dated July 1, 2019. The same is dismissed with costs to the 1st respondent and the interested party.

DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mongare h/b for Mr. Kofuna for the Applicant

N/A for the Respondents

N/A for the Interested Party

Ms. C.Nyokabi-Court Assistant