



Republic v The Land Registrar, Busia & 2 others; Ochieng (Interested Party); Tebino (Exparte) (Suing as the administrator of the Estate of Joseph Martin Wandera Dindi) (Environment and Land Judicial Review Case E004 of 2020) [2022] KEELC 3700 (KLR) (4 August 2022) (Judgment)

Neutral citation: [2022] KEELC 3700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2020**

**AA OMOLLO, J
AUGUST 4, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

THE LAND REGISTRAR, BUSIA 1ST RESPONDENT

BUSIA COUNTY SURVEYOR 2ND RESPONDENT

THE CHIEF NAMBALE SUB-COUNTY 3RD RESPONDENT

AND

LUCIA MAKIO OCHIENG INTERESTED PARTY

AND

MARY CONNIE TEBINO EXPARTE

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH MARTIN
WANDERA DINDI**

JUDGMENT

1. For determination is the notice of motion dated November 18, 2020 brought under the provisions of sections 9 of the [Law Reform Act](#) cap 26 of the laws of Kenya, section 7(1)(2) (c, d, e, f), 10(1) and 11 of the [Fair Administrative Action Act](#) No 4 of 2015 and order 53 rule 1(1)(2) and 2 of the [Civil Procedure Rules](#). The orders sought in the application are;
 - a) An order of *certiorari* to remove into this honourable court and quash in its entirety Gazette Notice No 6470, dated September 4, 2020 and purported subsequent new title deed for all that land known as title No Bukhayo/Kisoko/307.



- b) Costs and other incidentals be borne by the respondents and interested party herein.
 - c) Any such order or relief as the honourable court may deem just, fit and appropriate in the circumstances of this matter.
2. The application is supported by the grounds on its face and the supporting and supplementary/further affidavits sworn by the applicant on January 23, 2020 and December 6, 2021 respectively. The grounds stated include;
 - (i) That the actions of the respondent in publishing Gazette Notice No 6470 dated September 4, 2020, knowing or ought to have known that the said property was subject to a succession cause, is not only grossly unfair, unreasonable in the circumstances but clearly illustrates that the Respondent failed to take into account relevant considerations.
 - (ii) The action of the respondent publishing the said Gazette Notice and callously failing to appreciate that there was no way he could issue a new title deed solely in the names of the interested party herein as registered proprietor, was a decision that was materially influenced by an error of law.
3. The applicant deposed that vide a confirmed grant dated June 3, 2019 and issued in Busia High Court Succession Cause No 192 of 2010, she is a co-administrator of the estate of her late father Joseph Martin Wandera Dindi. Before she could proceed, she established that the Interested Party who is her co-administrator, had during the pendency of the Busia High Court Succession Cause No 192 of 2010, unilaterally filed an application to be granted a new title deed for all that land parcel known as Bukhayo/Kisoko/307 exclusively in her own name and to the total exclusion of all other beneficiaries of the late Joseph Martin Wandera Dindi. Consequently, on the September 4, 2020 at the instigation of the interested party, the respondent caused to be published Gazette Notice No 6470 purporting to issue a new title for all that land parcel known as LR Bukhayo/Kisoko/307 solely in the names of the interested party.
4. The Respondent put in grounds of opposition on February 22, 2021 in opposition of the application. The grounds state as follows;
 - a) That the notice of motion lacks cause of action, it's premature and unmerited and fatally defective.
 - b) That the notice of motion does not meet the laid down threshold for judicial review proceedings and it is largely ill advised.
 - c) That as clearly indicated in exhibit attached to the notice of motion and as obtained from Lands Office Registry entry 6 dated July 11, 2020 the suit properly is as confirmed grant filed at the Registry.
5. The interested party swore a replying affidavit dated November 9, 2021 in contestation of the application. He deposed *inter alia* that he is one of administrators of the estate of their father. He deposed that application is frivolous, vexatious, and devoid of any merit. The interested party denied that at any particular point he presented himself as the only the estate of Joseph Martin Wandera Dindi (deceased). the interested party also denied any particular time visiting the Land's Registry Busia to lodge any application to transfer, lease and or subdivide any or all of the land belonging to administrator of the Estate of Joseph Martin Wandera Dindi-deceased. The interested party also denied any particular time visiting the Land's Registry Busia to lodge any application to transfer, lease and or subdivide any or all of the Land belonging to the Estate of Joseph Martin Wandera Dindi (deceased).



6. The interested party deposed further that official land searches conducted at the Lands Registry Busia clearly show that of all the land that Joseph Martin Wandera Dindi (deceased) is still the registered proprietor of all the land that belonged to him. The interested party instead accused the *ex parte* applicant of running away with the original title thus slowing down the completion of the succession process, and which action forced him to report loss of the said title. He urged the court to have the matter quickly concluded and the restriction on the title to be lifted.
7. In the further affidavit dated December 6, 2021, the applicant deposed that the substantive notice of motion dated November 18, 2020 having been allowed on the April 15, 2021, it reasonably follows that this honourable court is now *functus officio* and is therefore unable to consider both the respondent's ground of opposition allegedly filed on the February 22, 2021 nor the interested party's replying affidavit dated November 9, 2021 respectively. She deposes that the respondent failed to appreciate that even though the confirmed grant dated June 3, 2019 was filed by the interested party at the Land Registry under entry dated July 11, 2020, the same could not be implemented at the time as the same had been challenged and sought to be revoked by one Eugene Okemo and which application was later dismissed on October 6, 2020.
8. The applicant argues that by the time the court was dismissing the application for revocation on October 6, 2020, the Interested Party had shamelessly and covertly engaged the respondent who on his part had hurriedly caused to be published Gazette Notice 6470 on the September 4, 2020. She further deposed that the respondent views his actions as legally sound and for the alleged "benefit of all beneficiaries" when the interested party seeks to sell portions of the suit property under the guise that she is the sole registered proprietor, is not only highly unfortunate but illegal and cannot be couched, by any stretch of imagination to be for the benefit of the beneficiaries of the estate of Joseph Martin Wandera Dindi. According to the applicant, the respondent's wanton actions are not only flagrantly illegal but *ultra vires* as there is no known statutory provision that bestows upon the respondent the mandate to issue the suit property's title deed in the sole and exclusive names of the interested party. She denied that the title deed was in her possession but said it was in the possession of one Eugene Okemo who is not only a close confidant of the interested party but also a confidant of the respondent to whom the said Eugene Okemo hastily surrendered the original title deed upon realizing the instant suit has been filed. Annexed to the affidavit was a copy of the ruling dated October 6, 2020, copy of order dated December 3, 2020, copy of the gazette notice, copy of application for revocation/annulment of grant filed in Busia HC Succession Cause No 192 of 2010.
9. The parties' directions for filing of written submissions. The interested party put in their written submissions on February 16, 2022 stating that the *ex parte* applicant and himself are the legal administrators of the estate of the late Joseph Martin Wandera Dindi. He submitted that they were issued with the certificate of confirmation of grant on June 3, 2019 and no subdivision had taken place since the *ex parte* applicant was in possession of the original title deed of the said property and the two houses of the deceased were not in talking terms. He avers that while the *ex parte* applicant held on to the said title deed, only her and members of their house got to farm, harvest and enjoy the benefit of the said property to the exclusion of the other houses. It is his submission that *ex parte* applicant refused to surrender the original title deed at the Busia Land Registry for the subdivision processes to be completed and she did so with the main aim of stifling the subdivision processes causing unimaginable pain and anguish to the other houses. The interested party stated that he proceeded to the Lands Registry to report that the main original title is lost and/or missing as per the information given to her by the *ex parte* applicant.
10. The *ex parte* applicant filed her submissions on February 11, 2022 and submitted inter alia, that the substantive notice of motion dated November 18, 2020 having been allowed the court is now



functus officio and is therefore unable to consider both the respondent's grounds of opposition nor the interested party's replying affidavit. On the scope of judicial review, the applicant submitted that article 165(6) of the Constitution of Kenya gives this honourable court the power of judicial review over subordinate courts and any person, body or authority exercising a judicial or quasi-judicial functions. She submitted that the Gazette Notice No 6470 which sought to issue a new title deed exclusively and solely in the name of the interested party, was unlawful and unprocedural for portraying the interested party as the sole registered proprietor of the land parcel LR No Bukhayo/Kisoko/307 and in clear contravention of the confirmed grant issued by the court on 03/06/2019 in Busia HC Succession Cause No 192 of 2010.

11. It was her further submissions that the respondent through either malicious design or sheer incompetence was complicit in the scheme to disinherit the beneficiaries of the estate of the late Joseph Martin Wandera Dindi and therefore deliberately failed to take into consideration all relevant factors prior to publishing Gazette Notice No 6470. She relied on the decision in Republic v Public Procurement Administrative Review Board Ex-Parte Kotaa East African Limited; Kenya Ports Authority & 2 others (Interested Parties) [2021] eKLR, where Ogola J, quoted the Court of Appeal decision in Republic v Public Procurement Administrative Review Board & 3 others, Ex Parte Olive Telecommunication PVT Limited eKLR, which court stated as follows:-

“...In our view, to justify interference the decision in question must be so grossly unreasonable that no authority, addressing itself to the facts and the law would have arrived at such a decision. In other words, such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it.”

12. The respondents filed their submissions on March 18, 2022 and submitted that there was a slip and/or error in the granting of the orders of April 15, 2021 as, the respondent had already on February 22, 2021 filed and served their response to the application. That going by the conduct of the parties herein, they are desirous of being heard on merit and they were alive to the provisions of article 159(2) (d) of the Constitution and the well settled principle of law that equity will not suffer a wrong to be without remedy and the respondents seek a remedy from this honourable court. On the issue of whether due procedure was followed in issuance of a new title deed for LR No Bukhayo/Kisoko/307, they submitted that section 33 of the Land Registration Act deals with the procedure for replacement of lost or destroyed certificates of title and registers of land.
13. Where the Land Registrar is satisfied with the evidence of such loss or destruction, he shall issue a replacement thereof after expiry of 60 days of publication of the application in the Gazette. They reiterated their submission that the 1st respondent considered this procedure and to avoid costs and acted perfectly within the law to have the suit property registered in the name of the administrators for purposes of administration and distribution of the estate. The respondents denied that the gazette notice sought to disinherit the beneficiaries of the estate of Joseph Martin Wandera Dindi. They urged the court to dismiss the application herein with costs to the respondents.
14. On the question of whether this court is *functus officio*, the position taken by the applicant may be correct but since the order was made in error, the court can suo moto set it aside. There was an error on two fronts, first, the orders were made on the presumption that the application was an-opposed. This was in error since by the time the order was made, the Respondents had filed grounds in opposition to the application. Secondly, in my order on the face of the record i made reference to wrong date in terms of the application that was granted. In the circumstances of the case, the orders of April 15, 2021



- ought to be set aside *ex debito justitiae* which I hereby do guided by the Court of Appeal decision in the case of *Patrick Omondi Opiyo t/a Dallas Pub v Shaban Keah & another* [2018] eKLR.
15. Proceeding now on the merits of the application, the ex-parte applicant is seeking relief in the nature of *certiorari* which is normally issued where a public authority has acted in excess of its jurisdiction or without authority. The High Court is suited with supervisory jurisdictions over tribunals and subordinate courts and will not hesitate to exercise such powers should it find that an authority reached a decision contrary to the law, illegally, irrationally or in breach of rules of natural justice.
 16. In *Republic v Public Procurement Administrative Review Board; Shenzhen Instrument Co Limited & another (Interested Party) Ex parte Kenya Power and Lighting Company Limited* [2019] eKLR Mativo J while relying on the decision in *Paul Kiplagat Birgen & 25 others v Interim Independent Electoral Commission & 2 others* [2011] eKLR held as follows;

“A judicial review court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the body. Where a body is granted wide decision-making powers with a number of options or variables, a judicial review court may not interfere unless it is clear that the choice preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, a judicial review court may not interfere only because it favours a different option within the range...”
 17. The Gazette Notice Number 6470 sought to be quashed is worded thus,

“whereas Lucia Makio Ochieng is registered as proprietor in absolute ownership interest in all that piece of land containing 8.2ha situate in Busia under title No Bukhayo/Kisoko/307 and whereas sufficient evidence has been adduced to show that the title deed issued thereof has been lost, notice is given that at the expiration of sixty days from the date hereof, I shall issue a new land title deed provided that no objection has been received within the period.”
 18. At the time the notice was published, the records held by the 1st respondent indicated that the suit title was registered in the name of Joseph Martin Wandera Ndindi-deceased. It is submitted that the 1st respondent was acting within the provisions of section 33 of the *Land Registration Act* and on evidence of loss received from the interested party. While the title may have been lost and misplaced and the law allows the 1st respondent to facilitate steps of such replacement, the question is whether it was lawful for the 1st respondent to publish information that was contrary to what was in his custody. If the administrator was applying for title as the administrator of the deceased estate, the gazette notice ought to have specified in the same manner. Further, section 33(2) provides that the Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed
 19. It follows that the Gazette Notice No 6470 referring to the interested party as the absolute registered owner of LR No Bukhayo/Kisoko/307 was unprocedural and *ultra vires* the power given to the Registrar by statute. The 1st respondent also acted irregularly by acting without the statutory declaration being deposed to by both the administrators as well as excluding the name of the applicant from the gazette notice.
 20. In light of the foregoing, I find merit in the motion dated November 18, 2020 and enter judgement in favour of the *ex parte* applicant thus;



- a. An order of *certiorari* and is hereby issued calling into this honourable court and quashing in its entirety the Gazette Notice No 6470, dated September 4, 2020 and the purported subsequent new title deed for all that land known as title No Bukhayo/Kisoko/307
- b. The *ex parte* applicant is awarded half costs of the suit to be paid jointly and severally by the respondents and the interested party.

JUDGMENT DATED, SIGNED & DELIVERED VIA EMAIL ON 4TH AUGUST 2022

A OMOLLO

JUDGE

