



**O.LIII r.1, 2 &3 of CPR; ss 8&9 of Law Reform Act
Application for J.R. Order of mandamus to effect an earlier order of Certiorari.**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

H.C.C.C. NO. 15 OF 2010 (J. R.)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
MANDAMUS**

AND

IN THE MATTER OF LAND PARCEL NUMBER KIRINDINE 'A'/3711

BETWEEN

LAND REGISTRAR IGEMBE SOUTH

DISTRICT.....RESPONDENT

JOSEPH MUTWIRI IRUGURA.....INTERESTD

PARTY

ANDREW MEME MWIRERIA.....EX-PARTE

APPLICANT

LESIIT J.

RULING

The application is Notice of Motion dated 7th July 2010. It has been brought under Order OLIII r1,2, and 3 of CPR and ss.8 & 9 of the Law Reform Act. The application seeks an order of Mandamus directed at the Respondent the Land Registrar, Igembe South District to compel the Respondent to cancel the name of Joseph Mutwiri M'Irugura from the register of Parcel No. Kirindine A/3711 and enter the names of Andrew Meme M'Mwereria as owner.

The application is supported by a statement of facts wherein the following facts are set out;

2. The applicant was at the time of adjudication the owner of parcel No. 3711 KIRINDINE 'A'

adjudication section.

3. The interested party filed an objection over the same parcel of land but it was dismissed.
4. The interested party and the Land Adjudication Officer Igembe South colluded and purported to have the objection reheard and land awarded to the Interested Party herein.
5. I challenged the said decision in Meru High Court Misc. Application No. 1 of 1999 and the same decision was nullified and the land ordered to be mine.
6. I went to the Land Adjudication Office to get the land registered in my names but I was referred to the respondent herein.
7. The respondent herein advised me to get an order to substitute the interested party's name with mine and title issued to me.

The application is supported by a verifying affidavit sworn by ex-parte applicant dated 16th February 2010. The evidence set out in the affidavit is briefly that the suit land No. 3711, was entered in the Land Adjudication Kirindine "A" register under the deponents name. That in July & August 1998 the interested party filed an objection over the parcel of land and that he lost. The applicant states that the interested party colluded with the Land Adjudication Officer who reheard the objection and awarded the suit property to the interested party. He deposes that he challenged the decision of the Land Adjudication Officer and that the same was nullified and the court declared the land belongs to the ex-parte applicant. That when he took the decision to the Land Adjudication Officer he advised him that the land had already been registered in the name of the interested party and title had been issued. The Land Registrar advised him to obtain an order directing that the name of the interested party be substituted with him and thus this application.

The application is opposed. The interested party has filed a replying affidavit. In that affidavit the interested party outlines reasons why the order sought should not be granted. He deposes that the land belonged to his forefathers before Adjudication and that graves of family members dating 400 years had been buried on that land. He deposes that he has developed the land and that it was his main source of livelihood and he outlines the developments at paragraph 5 of his affidavit. The deponent states that during Land Adjudication the ex-parte applicant raised an objection through fraud and succeeded to have the suit land taken from him. That he filed an objection to the Land Adjudication Officer who called the ex-parte applicant and since he had no defence the land reverted back to him. The interested party deposes that he has also filed a Civil Suit No. 39 of 2010 over the suit property in order to enable the court to do justice to the parties.

The application was heard inter parties. Mr. B. G. Kariuki urged the application on behalf of the ex-parte applicant. In brief Mr. Kariuki urged that the basis of the instant application was a Judicial Review ruling by Hon. Emukule J in Meru HC Judicial Review No. 1 of 1999. It is annexed as AM 2(a). Learned counsel relied on the finding of the Hon. Judge at page 7 of the ruling. In fact I would want to quote from pg 6-7 where he found thus:

13. **"In the circumstances therefore the proceedings of the Land Adjudication Officer held on 11th & 16th November 1998, and the decision made on 16th November 1998 are null and void, or simply a nullity.**
14. **In the result therefore the Applicant's Notice of Motion dated and filed on 22nd January 1999 succeeds and there shall therefore issue in terms of Order LIII Rule 7 of the Civil Procedure Rules an order of certiorari that the**

proceedings of the Land Adjudication Officer held on 9th and 16th December 1998 and the decision therein shall be removed to and forthwith quashed by this court.

15.

16. For avoidance of doubt, any act done or step taken by any authority under the said quashed proceedings and decision is equally null and void and therefore of no effect in Law. In other words, the land in issue belongs to the ex parte applicant”.

Mr. Kariuki urged that the learned court’s decision was extracted as per annexure 2(b) and served upon the Land Registrar to effect the change and that he declined. Mr. Kariuki urged that the decision of the Judge has not been appealed against and that therefore the order of mandamus ought to be issued.

Mr. Kariuki cited **Misc J. R. Case No. 15 of 2008** where an order of mandamus was issued by this court directed at the Land Registrar to effect the decision of the court in a Succession Cause.

Mr. Maroro, learned State counsel representing the Respondent submitted in that **Misc Cause No. 1/99** the Respondent was the Land Adjudication Officer and that in the current application the Respondent is the Land Registrar. Counsel observed that since the two offices were distinct it was necessary to have orders directed to offices targeted for action to be taken.

Mr. Rimita (Rtd Judge) represented the interested party. In his submissions the learned counsel urged that the order of mandamus does not as counsel but that it is discretionary and that before it issues it, the court must consider whether it will do justice to the parties. Learned counsel urged court to consider the replying affidavit and find that the issues raised in it have not been challenged. Counsel urged that the Land Registrar was not a party to the Judicial Review proceedings before Hon. Emukule J and that the issue before the Judge was an order of Certiorari to quash the decision of the Respondent in the said Proceedings. Mr. Rimita urged that there were no prayers for the cancellation of registration of the suit land and that therefore the decision of the learned judge did not touch on the registrations. Mr. Rimita urged court to disallow the application so as to allow the parties ventilate their case in the pending suit. Counsel relied on the case of **MATALINGA & OTHERS VS AG 1972 EA 518** and the **REPUBLIC V DIRECTOR GENERAL OF EAST AFRICAN RAILWAYS CORPORATION [1974]KLR 194** learned counsel urged that the **MISC. J. R. CASE NO. 15/08** cited by Mr. Kariuki was distinguishable because the application was not opposed and because there was an order in a Succession Cause.

I have carefully considered the application before the court. Mandamus is discussed in Halbury’s Laws of England 4 Edition Vol. 1 pg III paragraph 89 thus:

“the order of mandamus is of a most extensive remedial nature, and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defect of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal remedy for enforcing that right; and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less comment beneficial and effectual.

The question to ask oneself is whether by issuing the order of mandamus sought here, justice will be done or whether it will remedy the defect of justice.

The relevant consideration is that the applicant obtained an order of certiorari directed against the respondent in Misc. App. No. 1 of 1999. At the time the order was made, the respondent in this case was not a party to the application. Considering submissions by counsel for the applicant, it is also true that by the time the order of certiorari was issued by Hon. Emukule, J on 19th December 2008, what the applicant had sought to quash in the said order had already taken effect and the matter had been executed by the Land Registrar, a different officer from the one whose decision was sought to be quashed. It is clear that the order of certiorari did not take effect.

In the current application the order of mandamus sought here seeks to compel an officer, who was not a party to the earlier proceedings, to take an action that will effect the belated order of certiorari. I do not think that it will be a proper exercise of discretion to allow the order sought. Not only was the earlier

order made belatedly, the current application is seeking to enforce it against an officer who was not a party to the earlier proceedings. In the circumstances I decline to grant the order brought as it will only go to complicate the matter further.

The application is therefore dismissed with costs.

Dated Signed and delivered at Meru this 26th day of November 2010

LESIT, J

JUDGE

In the presence of the parties
Kirimi/Mwonjaru – Court Clerk.
C. Kariuki for Applicant
Mr. Maroro for the Respondent
Mr. Rimita for Interested Parties.

LESIT, J

JUDGE