



**Embakasi Industrial Project Limited v Chief Land Registrar & 2 others (Environment and Land
Judicial Review Case 21 of 2020) [2022] KEELC 14590 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 21 OF 2020
CA OCHIENG, J
OCTOBER 31, 2022**

BETWEEN

EMBAKASI INDUSTRIAL PROJECT LIMITED APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

OWINO JACOB CATTWRIGHT 2ND RESPONDENT

**EDWARD SHYLOCK OMWEGA NDEGE ALIAS EDWARD SHYZOCK OWEGA
NDEGE 3RD RESPONDENT**

JUDGMENT

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the July 14, 2020 where it seeks the following orders:
 - a. An order of Certiorari to bring to the High Court for purposes of being quashed Gazette Notice No 3115 dated April 17, 2020.
 - b. An order of certiorari to bring to the High Court for purposes of being quashed Gazette Notice No 4251 dated June 26, 2020.
 - c. An order of prohibition restraining the Respondents whether by themselves, their servants or agents from creating titles or rectification of registers or howsoever dealing in the Applicant's title under Land Reference No 12715/601 through Grant No IR 49525/1 or any other grant.
 - d. An order of mandamus directed at and compelling the 1st Respondent to rectify and remove from its registry any reference to the title No Land Reference No 12715/601 Grant No IR 49525/1 as the same is fraudulent.



- e. An order of mandamus directed at and compelling the 1st Respondent to properly secure the Applicant's title under Land Reference No 12715/601 Grant No IR 45525/1.
 - f. Cost of the proceedings.
 - g. Such other reliefs as this Honourable Court may deem just to grant.
2. The Application is supported by the Verifying Affidavit of Francis Okomo Okello and Statement of Facts. The Applicant avers that it is the registered proprietor of LR No 12715/601 by virtue of a Grant registered as IR No 45525/1 hereinafter referred to as the '*suit property*', and has been in possession of the said land from May 21, 1992. It states that there have been previous attempts by fraudsters to deal with the suit property and the matter was filed in court culminating in an order being issued in its favour on July 25, 2019 and a declaration that the existing title in respect to the suit property registered in its name declared as the sole existing title. It contends that the 1st and 2nd Respondents were actively involved in an attempt to re-create the Applicant's title in the name of the 3rd Respondent. Further, *vide* a Gazette Notice No 3115 dated April 17, 2020 issued by the 2nd Respondent, it purported to represent that the title document for the Applicant's property now purportedly owned by the 3rd Respondent was lost. It confirms that the 2nd Respondent pursuant to the aforementioned Gazette Notice and on expiry of sixty (60) days, purported to issue a Provisional Certificate of Title (PCT) in favour of the 3rd Respondent. Further, that the 2nd Respondent on June 26, 2020 in a Gazette Notice No 4251 purported to now issue notice of intention to issue a PCT at the expiry of the notice period. It explains that on the said notices, the 2nd Respondent is acting on the basis that the Grant in issue is IR No 49525/1 but referring to LR No 12715/601. Further, the initial title presented by the 3rd Respondent showed that it was in the name of Edward Shylock Owega Ndege but on June 18, 2020, the 2nd Respondent purported to register a Deed of Rectification in the name of '*Edward Shylock Omwega Ndege*'. It reiterates that the 3rd Respondent has purported to offer the Applicant's property for sale to a Company by the name, '*Silver Construction Co Ltd*' in the sum of Kshs 130,000,000. Further, the action of the 2nd Respondent to issue the Gazette Notices on the Applicant's property is therefore not only illegal and arbitrary but also against legitimate expectation.
3. The 3rd Respondent opposed the Application by filing a Replying Affidavit where he deposes that at all material times to the institution of the suit, he was the duly registered owner of the suit property from the May 21, 1992 and had vacant possession over it. He explains that sometime in December, 2019, he realized he had misplaced his original title document over the suit property and reported the matter to the Police. Further, on February 4, 2020 he made an Application to the Land Registrar for replacement of the said title document as required by Section 33(3) of the [Land Registration Act](#). He explains, that upon receiving his application, the Land Registrar ought to have published a notice under Form LRA 13 but instead made a mistake and used Form LRA 18. Further, the Gazette Notice ran its 60 days notice period and there was no objection from anyone culminating in his being issued with a PCT on June 17, 2020 by the Land Registrar, but the same had an anomaly in the names, and he applied for correction after which it was rectified on June 18, 2020. He further explains that the Land Registrar on realizing he had used the wrong form, caused a fresh Gazette Notice in Form LRA 13 on June 26, 2020 and invited members of the public who had an issue with issuance of the PCT to object. He confirms that during the pendency of the Gazette notice, he was approached by a potential purchaser Silver Construction Ltd, a company represented by the firm of Messrs Mogeni & Co Advocates. He states that the instant application seeks orders that are outside the jurisdiction of this court sitting as a Judicial Review Court. Further, that this suit is a normal suit on ownership dispute disguised as a Judicial Review. He reiterates that the orders sought have been overtaken by events as the suit property has since been transferred to Ciphei Trading Limited. He reiterates that two parties being the Applicant



herein and another company called Diploy Plastic Industries Limited took each other to court *vide* ELC 36 of 2014 over the suit property, which none had possession of, and came up with a consent order declaring the Applicant's title as the sole existing certificate of title over the said property.

4. The Applicant further filed a Notice of Motion Application dated the August 27, 2021, seeking to commit the 2nd and 3rd Respondents to civil jail or imposition of a fine, for being in contempt of orders of the court issued on July 7, 2020. The said Application is premised on the ground that the 2nd and 3rd Respondents have violated the orders of the court issued on July 7, 2020, despite express orders of leave to operate as a stay, and proceeded to register the 3rd Respondent as owner of the suit property. The said Application is supported by the Affidavit of Francis Okomo Okello.
5. The Application was opposed by the 3rd Respondent *vide* his Replying Affidavit wherein he denied service of the impugned court order. He explained that the advocate served, was not acting for him.
6. The two Applications were canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the Notice of Motion Applications dated the July 14, 2020 and the August 27, 2021 including the respective Affidavits, annexures and rivalling submissions, the following are the issues for determination: Whether the Applicant is entitled to orders of Mandamus, Certiorari and Prohibition as sought. Whether the 2nd and 3rd Respondents are in contempt of the orders of the court issued on July 7, 2020.
8. The Applicant in its submissions reiterated its averments as per the two applications and to buttress its arguments, relied on the following decisions: *Judicial Service Commission & another v Njora (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021)*; *African Management Communication International Limited v Joseph Mathenge Mugo & Another (2013) eKLR*; *Hadkinson v Hadkinson (1952) P 235 at 288* and *Gubabchance Popatlal Shah & Another (1990) eKLR*.
9. The 3rd Respondent in his submissions also reiterated his averments as per the Replying Affidavits and insisted that he was not personally served with the Court Order and hence could not be cited for contempt of court. Further, that the Applicant failed to register the Court Order issued on July 7, 2020 as dictated by Section 68(3) of the *Land Registration Act*. He reiterates that the conduct of the Respondents was not deliberate. To support his arguments, he relied on the following decisions: *Samuel M N Mweru & Others v National Land Commission & 2 others (2020) eKLR*; *Mutitika v Baharini Farm Limited (1985)*; Supreme of Court Canada in *Carey v Laiken 2015 SCC 17 (April 16, 2015)*; *Republic v Principal Secretary Ministry of Defence Ex parte George Kariuki Waitihaka (2019) eKLR*; *Peter Mbugua Ngugi & 2 Others v Chief Land Registrar & 6 others (2020) eKLR*; *Cherotich Kiprono Ruto v Reuben Kipngetich & 4 Others (2020) eKLR* and *Sheila Cassart Issenberg & Another v Anthony Machatha Kinyanjui (2021) eKLR*.
10. The Applicant has sought for orders of Certiorari, Mandamus and Prohibition to quash the aforementioned Gazette notices as enumerated above and for rectification of the Land Register in respect to the suit property to reflect it as its owner.
11. Lord Diplock in the case of *Council for Civil Service Unions v Minister for Civil Service [1985] AC 374, at 401D* clearly set the standards of Judicial Review when he stated thus: -

Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the



third ‘procedural impropriety’ ...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness’...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

12. While the Canadian Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)* 2 SCR 817 6 held that: -

The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

13. See also the decision of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd Civil Appeal No 185 of 2001*.

14. Article 47 of the *Constitution* provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.”

15. While Section 7 of the *Fair Administrative Actions Act* provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to — (a) a court in accordance with Section 8; or (b) a Tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said Section.

16. From perusal of the proceedings herein including the impugned Gazette Notices, I note the two notices were issued in respect to the suit property. Both the Applicant and 3rd Respondent claim ownership of the suit property and all indicate they were registered as owners on May 21, 1992 as evident in the Certificates of Title each has produced. It has emerged that the Applicant herein and another company called Diploy Plastic Industries Limited was involved in a lawsuit being ELC 36 of 2014 where the fulcrum of the dispute was the suit property and recorded a consent order declaring the Applicant’s title as the sole existing Certificate of Title over the said property. It has also emerged that the suit property is now registered in the name of Ciphei Trading Limited which is not a party to these proceedings. From the two Gazette Notices in respect to the suit property, I note the 2nd Respondent who was a Land Registrar signed them and called upon the public to lodge any objection before a new PCT could be issued to the 3rd Respondent. The Applicant insists this process was fraudulent and flagged out how the 3rd Respondent was registered as owner of suit property. The 3rd Respondent in



his Affidavit explained the reason for the two Gazette Notices as well as change of name as there was an error. The Applicant has not indicated if it lodged any objection to the Gazette Notices as required by law, but I note the 3rd Respondent was later issued with a PCT. The Applicant being aggrieved with this process and contending that it is the owner of the suit property has sought for quashing of the Gazette notices as well as rectification of the register. On rectification of register, I will make reference to Section 80 of the [Land Registration Act](#), and from a reading of the said provisions, I opine that this requires the tendering of viva voce evidence before a Court can make a determination on whether a title can be cancelled or not.

17. From the explanations in the respective Affidavits, I note the 3rd Respondent has explained the process he adhered to before getting a PCT. He confirmed engaging the 2nd Respondent, after losing his title and this culminated in the issuance of the Gazette notices first before the PCT. From a reading of the [Land Registration Act](#), I note the Land Registrar is legally mandated to issue a fresh title where an owner reports that one is missing, so long as it adheres to the process outlined in the Act. It is my considered view that since there was no restriction on the Land Register, the Land Registrar indeed adhered to the regulations within the [Land Registration Act](#) before issuing the PCT. The Applicant has sued the 3rd Respondent, who is not a public officer, and I am unable to decipher what administrative action he had committed so as to be subjected to the Judicial Review process. The Applicant heavily relied on the Court of Appeal decision of *JSC v Njoka* (supra) and insists the Court needs to look at the merit of the decision. I wish to appreciate the direction given in the said decision but clarify that in this instance, prior to the issuance of the Gazette Notices, the 3rd Respondent was already registered as a proprietor of the suit property, and he only sought for a PCT to replace the missing one. Whether the title was fake or not is not clear at this juncture. The Applicant seeks for cancellation of the 3rd Respondent's title which I opine is in the realm of a civil dispute as viva voce evidence is required before this can be done. I believe this is not the direction the Court of Appeal provided in the *JSC v Njoka* decision (supra). In this instance while associating myself with the decisions I have cited including the quoted legal provisions, since there are two competing titles, I find that this is a case that requires the Applicant to file a civil suit where viva voce evidence can be adduced unlike in the current circumstances where the court cannot take oral testimonies. Further, except for claiming the 1st and 2nd Respondents were served with the Court order, the Applicant did not register the said order in the Land Register as required by Section 68(3) of the [Land Registration Act](#) and further, he never lodged an objection to the issuance of a PCT. In the foregoing, I do not see any elements of procedural impropriety, unfairness or bias as claimed. Further, I do not find that the 2nd Respondent acted illegally, unreasonably or in breach of rules of natural justice as claimed. I opine that even if the two Gazette Notices were quashed, the 3rd Respondent has introduced a Third Party, who is not in the instant proceedings. It is my considered view that since there are two competing titles, this is not the right forum for parties to tender evidence to prove how each one acquired its title. It is interesting to note that the Applicant's advocates prior to filing this suit had even represented a client Silver Construction Company Ltd who sought to purchase the suit property from the 3rd Respondent.
18. In the foregoing, I find this Judicial Review Application incompetent and hold that the prayers for Prohibition, Mandamus and Certiorari cannot issue at this juncture.
19. On the issue of contempt of court, it is not in dispute that the Court made its Order dated the July 7, 2020 staying the decision of the 1st and 2nd Respondents as contained in the impugned Gazette notices and issuance of a PCT.



20. *Black's Law Dictionary (Ninth Edition)* defines contempt of court as: -
Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”*
20. Section 29 of the *Environment and Land Court Act*, on contempt of court stipulates thus:
Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”
21. While Section 4(1) (a) of the *Contempt of Court Act* defines civil contempt as:
Willful disobedience of any judgement, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court.”
22. In the case of *North Tetu Farmers Co Ltd v Joseph Nderitu Wanjohi (2016) eKLR* where Justice Mativo stated that:
Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand* have authoritatively stated as follows: -
‘there are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases - (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant; (b) the defendant had knowledge of or proper notice of the terms of the order; (c) the defendant has acted in breach of the terms of the order; and (d) the defendant’s conduct was deliberate.”
24. I wish to make reference to the affidavit of service of Samuel Maithya Muthoka, (the process server) sworn on August 20, 2020 at paragraphs 2, 3 and 5, where he states as follows:
2. That I received Chamber Summons dated July 1, 2020 Notice of Motion dated July 14, 2020 and the order dated July 9, 2020 from M/s Mogeni & Co Advocates with instructions to serve them upon the Attorney General, Anyango Opiyo & Co Advocates and Chief Land Registrar, Nairobi.
 3. That on the July 15, 2020 I served the said documents upon the Attorney General’s office Machakos which were received at the office of Public Trustee. Returned herewith duly served and acknowledged.
 5. That I proceeded to Anyango Opiyo & Co Advocates offices at Uniafric House 4th Floor, Koinange Street, Nairobi where I served the said documents upon the advocate who accepted service but declined to acknowledge service arguing that she had no instructions to act in this matter. My copies are returned herewith duly served but not acknowledged.”
25. In this instance, the burden of proof was upon the Applicant to prove how it served the Court Order including the Penal Notice upon the alleged contemnors and how they defied it and proceeded to issue a PCT in the name of the 3rd Respondent. However, from the averments in the process server’s Affidavit which I have quoted, it is clear, there was no Penal Notice. Further, that the 3rd Respondent was not personally served as claimed by the Applicant since the Advocate declined to acknowledge service insisting she was not on record for him. Further, there is no indication if the 2nd Respondent was personally served.



26. Based on the facts as presented while associating myself with the decision quoted as well as the legal provisions cited above, I find that in the current circumstances, the Applicant has not proved its allegations of contempt as against the Contemnors and will hence decline to allow this prayer.
27. In the circumstances, I find the two applications dated July 14, 2020 and August 27, 2021 unmerited. I will disallow the Notice of Motion application dated the August 27, 2021 but strike out the Notice of Motion dated the July 14, 2020.

I make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF OCTOBER, 2022.

CHRISTINE OCHIENG

JUDGE

