



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**MISC APPLI 826 OF 2001**

**NDUNGU NGETHE & OTHERS.....APPLICANTS**

**Versus**

**THE CHIEF LAND REGISTRAR & OTHERS.....RESPONDENTS**

**JUDGMENT**

The ten Applicants namely, Ndungu Ngethe, Kamau Macharia Dounglas Kairu, Muiruri Wainaina, Flora Wanjiku Maina, Jimson Mwangi Wanyoike Kamwati, Kennedy Gathogo Kariuki, Johnson Kanyi Maina, Julius Gitonga Gakuo and 36 others have brought the amended Notice of Motion dated 12<sup>th</sup> February 2002 seeking Judicial Review orders against the Hon. The Attorney General, and Kagaa Farmers Co-operative Society Ltd. They seek the following orders:

1. That this court do grant an order of certiorari to remove to the High Court and quash the decision of the 1<sup>st</sup> Respondent to cancel the Applicants' title deeds for the land parcels Mitumbiri/Thuthua Block 1/601-646 vide letters dated 15<sup>th</sup> May 2001;
2. An order of mandamus do issue directed at the Chief Land Registrar Nairobi requiring him to validate, ratify or confirm the Applicant's title deeds to their respective parcels of land comprised in land parcel Nos Mitumbiri/Thuthua Block 1/601-646;
3. The Respondent be restrained by order of this court from trespassing, subdividing surveying, alienating or allocating the registered titles in favour of any other persons other than the Applicants herein until the hearing and determination of the suit.

The application is premised on the affidavits of Ndungu Ngethe sworn on 26<sup>th</sup> July 2001 and 16<sup>th</sup> May 2003 and a statement dated 23<sup>rd</sup> July 2001.

Briefly, the Applicants contend that they are members of the 2<sup>nd</sup> Respondent Co-operative Society. They were allocated parcels of land in the suit land, Mitumbiri/Thuthua Block 1/601-646. The Society passed a resolution in the meeting of 30<sup>th</sup> December 1998, (annexed to Ndungu Ngethe's supplementary affidavit dated 16<sup>th</sup> May 2003) at Minute 4, that the land be subdivided and allocated to members. That the PC Thika gave consent to subdivide and surveyors were appointed to do the subdivision and titles were issued in the names of the Applicants. Thereafter, the 1<sup>st</sup> Respondent raised issue with the subdivision and ordered cancellation of the title deeds and cautions were placed against the plots. Though they were assured that the titles were bona fide, they were caveated. The Applicants claim to be bona fide

members of the 2<sup>nd</sup> Respondent and entitled to the property allocated to each of them and they are in occupation to date. That the 1<sup>st</sup> Respondent acted outside his powers of the society having resolved to subdivide the land. That unless the orders sought are granted they stand to be evicted from the land that they have been in possession since 1999.

Mr. Kirori, Counsel for the 1<sup>st</sup> Respondent filed grounds of opposition dated 17<sup>th</sup> April 2002 in opposing the motion and a replying affidavit of Junius Njue dated 11<sup>th</sup> October 2001. Mr. Njue is the Acting Deputy Chief Land Registrar. He deponed that he received a complaint from one Joe Karanja, the Chairman of Kagaa Co-operative Society that some people purported to have titles for Mitumbiri/Thuthua 1/527 but upon investigation, he established that the land had never been subdivided, the register was still intact and no fees were paid for subdivision and a restriction was then placed on the land. That the Applicants have not disclosed how they came to acquire their titles. That their application is misconceived and lacks merit.

Mr. Muriuki, Counsel for the 3<sup>rd</sup> Respondent submitted that no leave was obtained for the Applicant to seek an order of mandamus in the Chamber Summons and that the prayer for Judicial Review orders was not specific. That the statement is at variance with the Chamber Summons in that in the statement, the Applicant sought to quash the decision of Thika District Registrar whereas in the Chamber summons, it was generally against the Registrar. Counsel also submitted that it was not clear whether the Applicant sought leave of the court to amend the Notice of Motion. Counsel relied on the affidavit of the Chief Land Registrar and that of Joe Karanja dated 8<sup>th</sup> October 2001. That the Applicants have failed to controvert the Registrars deponement that the transfers had not been recorded in the Lands Register and no payment had been made to effect the transfers.

To settle the question of whether or not the amended Notice of Motion is properly on record, I have perused the record and seen that on 12<sup>th</sup> October 2001, Justice Rawal allowed for amendment of the motion and allowed Kaaga Farmers Co-operative Society Ltd. to be enjoined as an Interested Party. It was by consent. I believe the amendment of the Notice of Motion was done in terms of the amended Notice of Motion dated 13<sup>th</sup> August 2001 which brought in Kaaga Farmers Cooperative Society as the 3<sup>rd</sup> Respondent and had already been filed on 14<sup>th</sup> January 2001 and was immediately set down for hearing. The question then is whether another amendment was allowed by the court to enable the Applicant file the amended Notice of Motion dated 12<sup>th</sup> February 2002.

Order 53 Rule 4(2) requires that an amendment of the statement or filing of further affidavit be with leave of court. There is no provision for amendment of the Notice of Motion but the courts have severally exercised their discretion and allowed amendment of Notice of Motion upon leave being granted by the court. After an amendment was ordered on 12<sup>th</sup> October 2001 the matter came up again on 22<sup>nd</sup> October 2001 and the only order made was that the matter was not urgent. When it came up again on 8<sup>th</sup> November 2001 the parties agreed to adjourn the matter to allow for negotiations. There was no further order of amendment. On 21<sup>st</sup> January 2002, the matter was stood over generally. Suddenly on 20<sup>th</sup> February 2002, the registry fixed for hearing an amended notice of motion dated 12<sup>th</sup> February 2002 and filed in court on 13<sup>th</sup> February 2002. The Applicant was not able to tell the court when the amendment was done and I find no such order of amendment on record. The amended notice of motion dated 12<sup>th</sup> July 2002 is irregularly on record as it was filed without leave of the court and is hereby struck out. What this court should consider is the motion dated 13<sup>th</sup> August 2001 and filed in court on 14<sup>th</sup> August 2001.

On the face of it, the application dated 13<sup>th</sup> August 2001 is defective because it is not brought in the name of the Republic. It is trite law since 1959, that Judicial Review applications (motion) are brought in the name of the Republic (or Crown). The Republic brings the application on behalf of the ex parte Applicant. The Applicants had no capacity to bring the motion as they purported to do. See the case of **FARMERS BUS SERVICE V TRANSPORT LICENSING APPEALS TRIBUNAL 1959 EACA 779** and **JOTHAM MULATI WELAMONDI V CHAIRMAN ECK (2002) KLR 486** where

the Court of Appeal of East Africa and High Court reiterated that failure to bring a Judicial Review application in the name of the Republic renders the motion fatally incompetent and should be struck out.

The Applicants claim to be the owners of the plots in contention. If the order of certiorari were to be granted the effect would be that this court is declaring the suit land to belong to the Applicants. From the evidence contained in the affidavits of the Chief Land Registrar, that of Mr. Karanja the chairman of the 3<sup>rd</sup> Respondent and that sworn in support of the application, there is obviously a dispute as to whether the Applicants own the suit land. Whereas the Applicants claim to have been registered, they have not demonstrated so and the Applicant would need to do so by way of adducing evidence. This is not a matter that would be resolved by way of affidavit evidence in a Judicial Review application. Orders of Judicial Review would not lie in any event.

I have seen that at prayer 3, the Applicant was seeking an order of injunction. Under S. 8 (1) of the Law Reform Act which donates power to the High Court to issue Judicial Review orders, the only remedies available in Judicial Review are certiorari, mandamus and prohibition. Orders of injunction or declarations are not available in Judicial Review in Kenya. It is in England that the 1977 Act introduced and widened the scope of Judicial Review remedies.

In sum, apart from the application being fatally incompetent, it also lacks merit. The Applicants not being before the correct forum for articulation of their rights, the motion is hereby dismissed with the Applicants bearing the costs.

Dated and delivered this 4<sup>th</sup> day of November 2008.

R.P.V. WENDOH

JUDGE

**Present:**

Ms Chelagat for the Applicant holding brief

No appearance for Mr. Mutinda for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent

Muriuki present for the 3<sup>rd</sup> Respondent Kagaa Farmers

Court judgment delivered and countersigned.

G.A. DULU

JUDGE