



**Afro Mark Solutions Limited v Land Registrar Kwale (Environment & Land
Petition 15 of 2021) [2022] KEELC 14776 (KLR) (11 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 15 OF 2021**

AE DENA, J

NOVEMBER 11, 2022

BETWEEN

AFRO MARK SOLUTIONS LIMITED PETITIONER

AND

THE LAND REGISTRAR KWALE RESPONDENT

JUDGMENT

1. This petition has been filed pursuant to the provisions of articles 2,10,19,20,21,22,23,165[1][3]b,258 and 259 of the [Constitution of Kenya 2010](#). It is the petitioner's case that the respondent in purported exercise of its statutory mandate under the [Land Registration Act](#) wrote a letter dated December 17, 2018 informing the petitioner that it had placed a restriction on its title and calling for the surrender of the said title Kinango/Maji Chumvi/2 for what it called unconfirmed allegations. The letter was received on January 14, 2019.
2. The petitioner states that before the restriction and call for the surrender, it had not been notified of any defect in its title nor given a hearing. That the land being in an adjudication area, there was no dispute arising from the adjudication process. The petitioner avers that the restriction on its land violates the petitioner's rights to information, right to property and fair administrative action. In view of this, the petitioner seeks for the following reliefs before court;
 - a. A declaration be made that the petitioner's rights under 35,40,47 and 50 of the [Constitution](#) have been violated by the respondent.
 - b. A declaration be made that the decision to place a restriction on land title number Kinango/Maji Ya Chumvi/2 and call for its surrender is procedurally unfair hence null and void ab initio.
 - c. An order of certiorari quashing the respondent's letter dated December 17, 2018 and removing any restriction placed on plot number Kinango/Maji Ya Chumvi/2 that is the subject of the said letter.



- d. An order of *mandamus* compelling the respondent to give the petitioner all information that has made it put a restriction on the parcel of land number Kinango/Maji Ya Chumvi/2 and call for its surrender.
3. The petition is supported by the affidavit of Abdullahi Billow Mohamed a director of the petitioner. It is the petitioners case that before placing the restrictions on its land and being ordered to surrender its title it was not given audience by the respondent. That no reasons have ever been given for the said drastic actions. It is deponed that the petitioner has through its directors and advocates visited the land registrar and written various letters seeking information on the respondent's actions without success necessitating this suit. That the principles of good governance transparency and openness have not been adhered by the registrar in dealing with its title.
4. It is also averred that the key documents revealing the identity of persons that have filed complaints over the petitioner's title as alleged by the respondent have not been availed or disclosed despite the respondent being the sole custodian of all the title deed documents in Kwale. That in the event the restrictions are not removed and the title released, the petitioner's constitutional rights and freedoms will be continually violated by the respondent. The petitioner lists its constitutional rights and fundamental freedoms that have been infringed and injury caused. It is pleaded that every person has the right to property of any description in Kenya a right to information under articles 40 and 35 of the *Constitution* respectively.
5. According to the petitioner it has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair under article 47 of the *Constitution* and the same has been infringed upon. That the decision to place a restriction on the petitioner's title and call for its surrender was procedurally wrong and unfair to the petitioners.

RESPONSE

6. In response to the petition, the respondent through the office of the attorney general filed a replying affidavit sworn by Kennedy Githunguri Njenga. He avers that he is seized of the issues surrounding the adjudication herein which he confirms was conducted properly and in accordance with sections 23,24 and 25 of the *Land Adjudication Act*, including public participation and appointment of land committee members for the adjudication section. That vide a letter dated July 26, 2018 the adjudication officer for Kinango reported that that the land adjudication register for maji ya chumvi adjudication section was complete. It is stated the petitioner featured as a beneficiary and was issued with the title deed herein which was collected from the Kwale lands office. That after printing and issuance of titles it was discovered that the dates on which the titles were issued had an error and the titles were recalled for rectification of the date indicated. That this was not an invalidation of the adjudication process that had been done following the due process. He states that he is not aware of any instance of corruption or illegality that arose during the adjudication process.

SUBMISSIONS

7. The petitioner's submissions are filed before court on February 16, 2021. It is submitted that the constitution is to be interpreted in a manner that *interalia* promotes its purposes values and principles and advances the rule of law and human fundamental rights and freedoms. The court is referred to the holding in *AOO & 6 others v attorney general & another* [2017] eKLR. Relying on the discussion on right to property from the case of *Isaiyah Otiato & 6 others v County Government of Vibiga* [2018] eKLR it is contended that the petitioners right to property under article 40 of the *Constitution* have been violated.



8. The petitioner states that its right to fair administrative action under article 47 herein have been infringed since for procedural fairness the petitioner ought to have been heard and the reasons behind the decision for the respondent's actions supplied. That the provisions of section 76 of the Land Registration Act No 3 of 2012 were overlooked as no notice was given and neither was the petitioner heard before the restriction was placed. The petitioner relies on the court's decision in R v National Police Service Commission exparte Daniel Chacha.
9. Pointing to the failure by the respondent to supply the actual complaint that precipitated the recall and its particulars including failure to honor a consent that was filed in court to supply the same, the respondent had through these actions breached the Petitioner's right to access to information. Reliance is placed on the holding in Katiba Institute v President Delivery Unit and 3 others [2017] eKLR.
10. On violation of the right to fair hearing under article 50 of the Constitution it is submitted the provisions of section 76 of the Land Registration Act No 3 of 2012 was not applied since the petitioner ought to have been heard before the restriction was effected as was held in Commission for Implementation of the Constitution v Speaker of the National Assembly [2016] eKLR.

DISCUSSION AND DETERMINATION

11. After carefully considering the pleadings and submissions made by the parties herein the issue that commend determination is whether the petition is merited. It is not disputed that the issues arising are as a result of the restriction and recalling of the petitioner's title deed for the suit parcel Kinango/Maji Ya Chumvi/2. Further that the said actions were taken without hearing the petitioners and that no communication was availed as to why the title deed was recalled and which has never been issued back.
12. This being a constitutional petition it is now a well settled principle that the petitioner ought to demonstrate with some degree of precision the right it alleges has been violated, the manner it has been violated, and the relief it seeks for that violation – see Anarita Karimi Njeru v Republic (1976- 80) 1 KLR 1272. The petitioner states that its rights to fair administrative action, fair hearing and the right to information have been infringed upon by the respondent's actions. This court has gone through the instant petition and is satisfied that the petitioner has set out the articles of the Constitution that it alleges have been infringed and further set out in what manner the said rights were infringed and therefore meeting the constitutional threshold of a Constitution as petition.
13. Article 47 of the Constitution provides that;

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

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.

Parliament shall enact legislation to give effect to the right 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.
14. In the case of Judicial Service Commission v. Mbalu Mutava & another, the Court of Appeal held that: -

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and



other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

15. The placement of a restriction against the suit property is the genesis of this petition. This then calls for interrogation of the procedure provided in law and whether it was adhered to. The title Kinango/Maji Ya Chumvi/2 is issued under the registered Land Act (now repealed) and by dint of the provisions of section 107 the Land Registration Act, 2012 applies to the suit land. Under the Act a restriction is defined as an interest registered under section 76 and includes the registrars caveat. My reading of section 76 (1) of the Act reveals that the registrar may make an order for restriction suo motto or on the application of any person interested in the land for the purposes of compulsory acquisition, prevention of any fraud or improper dealing or for any other sufficient cause. However, this can only be done after he has directed inquiries to be made and notices to be served and hearing such persons as the registrar considers fit. It is only after these have been fulfilled that the registrar shall under the provisions of section 77 of the Act give notice, in writing, of a restriction to the proprietor affected by the restriction.
16. I find it necessary to reproduce verbatim the Land registrars letter dated December 17, 2018 which is addressed to the petitioner

RE: Notification Of Restriction And Surrender Of Title Deed Parcel No. Kwale/maji Ya Chumvi/2

The above refers

The office is in receipt of unconfirmed allegations that there exists other certificate of titles deed plans under RTA on the above-mentioned parcel of land.

In view of the above we are kindly requesting you to surrender the title deed issued to you until this matter is investigated and a determination made. In the meantime, we have placed restriction on this and all other parcels in Maji ya Chumvi area.

The adjudication officer Kinango is requested to liaise with the director of adjudication to confirm if indeed there was a setting apart and if there are other titles in existence.

.....

The letter is signed by Dick Safari Land Registrar Kwale. It is copied to the Chief Land Registrar Nairobi and D.L.A.S.O (District Land Adjudication Settlement Office) Kinango.

17. From the contents of the above letter, it is clear this letter was informing the petitioners who is the registered proprietor that a restriction had already been placed on this parcel among other parcels. The letter is not inviting the petitioner to give their input or attend to be heard but it is communicating a decision that has already been reached. To me it suffices to have been issued under the provisions of section 77. Infact to me the entire provision as to restrictions including their removal and variation envisages that a party interested in the property is heard before any action is taken.
18. The import of fair administrative action as a constitutional right was discussed in the South African case of President of the Republic of South Africa and Others v. South African Rugby Football Union and



others[62] where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African *Constitution*:-

a. “Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

19. Further the court, in *Pinnacle Projects Limited v. Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR, had the following to say on article 50 with respect to fair trial principles in civil cases:

“While the wording of article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.”

The above principles apply in full force to the decision of the registrar to place the restriction without first hearing the petitioner or even finalize the investigations.

20. The petitioner avers that the right to access to information was also violated. The right to access to information is provided under article 35 of the *Constitution* as follows:

“Every citizen has the right of access to -

- a. information held by the state
- b. information held by another person and required for the exercise of the protection of any right and fundamental freedom”

Mumbi Ngugi J. in *Nairobi Law Monthly Company Limited v Kenya Electricity Generating Company & 2 others* [2013] eKLR held that

“.....what is required is for the person seeking information to make a request for such information. A violation of the right to information cannot be alleged before a request for information has been made.”

21. In the present petition, it is stated that the Petitioner has made several efforts trying to access information as to why the title deed was recalled and information on the basis relied upon by the Respondent. From the record it is confirmed that the Petitioner made several requests to the respondent to be availed with the identity of the person who had made an adverse report against it, the nature of the said allegations and a copy of the same. The letters dated February 2, 2019, January 16, 2019 and May 23, 2019 were exhibited. It is clear that this was in a bid to have an idea of the issues



raised in order for the Petitioner to defend itself. The letters were not responded to. It is this court's finding that indeed the petitioners rights to information were infringed upon.

22. I'm also guided by the dictum in Sceneries Limited v National Land Commission (2017) eKLR where the court held that a decision arrived at in total breach of the rules of natural justice is ultra vires null and void and cannot be allowed to stand.

23. But what about the petitioners claims that their right to property under article 40 of the Constitution have been violated through the placement of a restriction on the Petitioner's title and calling for its surrender when even the respondent in the replying affidavit had acknowledged that the petitioner holds a valid title deed. Article 40 is to the effect that; -

Subject to article 65, every person has the right, either individually or in association with others, to acquire and own property--

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the state or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this article on the basis of any of the grounds specified or contemplated in article 27 (4).

(3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation--

24. I have keenly perused the affidavit in response to the petition herein. At paragraph 13 it is deponed that

'After titles had been issued and or printed, it was discovered that the dates on which the titles were issues (sic) had an error. As a result, the land registrar recalled them for rectification of the date indicated. This was not an invalidation of the adjudication process that had been done following due process'

25. It is noteworthy that the letter recalling the title gives the reason for the surrender being the presence of unconfirmed allegations that there existed other certificate of titles deed plans under the Registration of Tiles Act in respect of the suit property and not to rectify an error. Assuming there were errors and the tittle was recalled for rectification, the procedure to be followed is provided under section 79 of the Land Registration Act which envisages the consent of the proprietor unless the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission. There are no allegations of fraud made against the petitioner and in any event the matter was to be investigated first. Notice is also envisaged. Though no evidence has been placed before this court that the title has been revoked or that a determination has been made whose import is to deprive the petitioner of his property, in my view the holding of the title for this long including the restriction militates against the petitioners use of his property though Mr. Kennedy Githunguri Njenga has stated under oath that the recall or request to surrender was not an invalidation of the adjudication.

26. In view of everything I have e said above, I hereby make the following orders;

a. A declaration be and is hereby made that the petitioner's rights under article 35,47,40 and 50 of the Constitution have been violated by the Respondent.



- b. A declaration be made and is hereby made that the decision to place a restriction on land title number Kinango/Maji Ya Chumvi/2 and call for its surrender was procedurally unfair hence null and void ab initio.
- c. An order of certiorari is hereby issued quashing the respondent's letter dated December 17, 2018 and removing any restriction placed on plot number Kinango/Maji Ya Chumvi/2 that is the subject of the said letter.
- d. An order of mandamus is hereby issued compelling the respondent to give the petitioner the title deed over the parcel of land number Kinango/Maji Ya Chumvi/2.
- e. Costs of the suit are awarded to the Petitioner.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 11TH DAY OF NOVEMBER, 2022

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms Ajulu HB for Mr. Jengo for the Plaintiffs/Applicants

Ms. Waswa for the Respondent

Mr. Denis Mwakina- Court Assistant.

