



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC JUDICIAL REVIEW NO.1 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**DISTRICT LAND REGISTRAR, NAKURU.....RESPONDENT**

**HON. LEE MAIYANI KINYANJUI.....INTERESTED PARTY**

**EX-PARTE .....LAWI KIGEN KIPLAGAT**

**R U L I N G**

1. The Exparte Applicant sought and was granted leave to institute Judicial Review proceedings against the Respondent. On 22<sup>nd</sup> June 2020 the Exparte applicant filed the substantive Notice of Motion seeking the following substantive orders:

*1. That an order of Mandamus to issue commanding and /or directing the District Land Registrar Nakuru to register the names of the exparte applicant as the proprietors to land parcel known as **Nakuru Municipality Block 16/86** measuring approximately 0.1125 Ha and forthwith issue certificate of Lease to the said Exparte applicant.*

2. The Motion was supported on the statement dated 2<sup>nd</sup> June 2020 and on the verifying affidavit of even date. The Respondent Land Registrar Nakuru, was served with the application but filed no response. The application was fixed for hearing on 17<sup>th</sup> September 2020 when on the date Ms Cheruiyot, Senior State Counsel, appeared for the Respondent and Mr. Kahiga advocate appeared for an intended interested party. Mr. Kahiga advocate for the intended interested party informed the court the interested party was the owner of the suit property as he held title to the suit land. Ms Cheruiyot affirmed that indeed Mr. Kahiga's client was registered as owner of the suit property. On the basis of the representation made the court *suo moto* and in exercise of its discretion allowed the joinder of Mr. Kahiga advocate's client to be enjoined as an interested party in the proceedings and permitted the interested party to file their pleadings in the matter.

3. The interested party, Hon. Lee Maiyani Kinyanjui filed a replying affidavit on 16<sup>th</sup> October 2020 in response to the exparte applicant's Notice of Motion. The interested party deponed that he was the registered owner of land parcel Nakuru Municipality/Block16/86 measuring approximately 0.1125Ha which is the subject matter in these proceedings. The interested party explained that the suit property was purchased by his company Translee Ltd in 2005 from Uwezo General Building Contractors Ltd and that the company assigned the property to him and he was registered as owner and issued a certificate of lease on 28<sup>th</sup> January 2009. The interested party further stated that before the land was registered in his favour there had been a complaint to the Commissioner of Lands respecting the allotment of the suit property and the Land Registrar Nakuru investigated the complaint. Both Uwezo Contractors Ltd and the exparte Applicant were invited to attend before the Land Registrar on 27<sup>th</sup> October 2005. The interested party averred he was registered as owner ostensibly after the Land Registrar resolved the dispute and the exparte applicant was aware the property was registered in his name yet he failed to make that material disclosure when he approached the court in these proceedings.

4. The interested party further averred the Exparte applicant has invoked the wrong procedure in initiating these proceedings with the intention of misleading the Court to issue an order of mandamus against the Land Registrar when such an order cannot issue since the issue of ownership requires to be determined and that would entail taking of evidence which cannot be done in judicial review proceedings. The interested party thus contended the judicial review proceedings were inappropriate and constituted an abuse of the court process.

5. The interested party simultaneously with the replying affidavit filed a Notice of Motion application dated 14<sup>th</sup> October 2020 expressed to be brought under section 3A and Section 63(e) of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules. The application prays for the following orders: -

*1. That the Honourable Court be pleased to strike out and/or dismiss the applicant's Judicial Review application and more*

particularly the Notice of Motion application dated 15th June 2020 and orders thereto.

2. That the costs of this application and the main suit by way of Judicial Review be awarded to the applicant.

6. The Notice of Motion is grounded on the reasons set out on the body of the application and the affidavit sworn in support by Hon. Lee Maiyani Kinyanjui. The applicant contends that he holds title to the suit property since the property was transferred to him in or about 2009; has been in occupation and there has been no challenge to his title; that the ex parte applicant deliberately failed to make disclosure that the interested party/applicant was the registered proprietor at time he approached the court in these proceedings; and that judicial review could not be the appropriate forum to have the dispute adjudicated. The interested party/applicant contends it is the issue of ownership and/or proprietorship that calls for determination and that judicial review cannot be a suitable forum as parties would need to adduce evidence and be cross examined which cannot be done in judicial review proceedings. The interested party further contends the order of Mandamus sought against the Land Registrar to compel him to register the ex parte applicant as proprietor cannot be available since already the interested party is registered as the proprietor of the suit property.

7. The Ex parte applicant filed a replying affidavit in response to the interested party's application. The position taken by the ex parte applicant was that the certificate of Lease exhibited by the interested party did not originate from the Chief Land Registrar who ordinarily issues leases on behalf of the government. The Ex parte applicant in this regard places reliance on a letter from the Chief Land Registrar dated 14<sup>th</sup> January 2021 exhibited as "LKKI" which was in response to the, ex parte Applicant's counsel's letter to the Chief Land Registrar dated 30<sup>th</sup> November 2020 exhibited as "LKK2". The said advocate's letter sought the Chief Land Registrar to confirm if they were aware of the certificate of lease dated 28<sup>th</sup> January 2009 held by the interested party. The Chief Land Registrar inter alia vide the letter of 14<sup>th</sup> January, 2021 responded thus:-

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*As from our correspondence file records, the above purported lease dated 28<sup>th</sup> January, 2009 is not traceable from our records.*

*However a lease dated 14<sup>th</sup> June, 2018, forwarded to Nakuru Land Registry in favour of LAWI KIGEN KIPLAGAT was generated processed and sent for registration"*

8. The ex parte applicant further averred the Land Registrar though served with the Motion never responded notwithstanding he declined to register the lease in favour of the ex parte applicant. The Ex parte applicant contended that there was failure on the part of the Land Registrar to perform a public duty entrusted on him and an order of mandamus to compel him to act was an appropriate remedy.

9. The application by the interested party was canvassed by way of written submissions. The singular issue for determination is whether judicial review was an appropriate forum or avenue for the ex parte applicant to approach the court. The ex parte applicant insists it was, while the interested party was of the view that judicial review in the circumstances of the present matter could not be an available remedy. It is indeed settled law that where generally evidence would be required in order to make a determination and that evidence cannot be deduced from the affidavit filed in support and/or opposition, then judicial review would not be a suitable forum for such a matter.

10. In the present matter the evidence adduced establishes that indeed the interested party holds a certificate of lease over title **LR No. Nakuru Municipality Block 16/86** issued to him on 28<sup>th</sup> January, 2009. The interested party exhibited a copy of the certificate of Lease, a copy of the abstract of title (greencard) issued on 24<sup>th</sup> July 2020 and a copy of certificate of official search dated 19<sup>th</sup> June 2020. All these documents affirm that Lee Maiyani Kinyanjui is the registered proprietor of the suit property. The Ex parte Applicant exhibited via his verifying affidavit in support the application for leave a letter dated 10<sup>th</sup> May 2019 ("LKK5") from the Chief Land Registrar addressed to the Land Registrar, Nakuru where the Chief Land Registrar acknowledged that the Land Registrar Nakuru had returned the lease dated 14 June, 2018 unregistered because there was already an existing lease over the same property to a different party. The evidence was that it was the interested party who held the lease. **How was the Land Registrar Nakuru to register the Lease issued in favour of the Ex parte Applicant, if already there was a registered party?** The only way that could have happened is if the title of the registered proprietor was successfully challenged and declared to be a nullity for whatever reason. If already there was a lease registered over the property, the Land Registrar could not register another lease over the same property.

11. The ex parte application in his response and submission stated the lease in favour of the interested party did not originate from the Chief Land Registrar and argued that the lease could not have been genuine.

12. The gist of the submission by the ex parte applicant was that the certificate of lease issued in favour of the interested party was null and void and the Land Registrar ought to have cancelled the same and proceeded to register the lease in favour of the ex parte applicant. The issue that however arises was whether the Land Registrar should have proceeded to annul and cancel the lease in favour of the interested party without affording the interested party a hearing. I do not think so as the rules of natural justice demand that every party likely to be affected by any decision and/or act must be given an opportunity of being heard before the decision is made or act undertaken.

13. The interested party having been registered as the proprietor of land parcel **Nakuru Municipality Block 16/86** he was conferred with rights of proprietorship in terms of sections 24 and 25 of the Land Registration Act, 2012. The rights conferred are absolute and indefeasible and the title of such person can only be challenged on the grounds of fraud or misrepresentation and/or if it is shown the title was acquired illegally, unprocedurally or through a corrupt scheme as provided under section 26 (1) (a) & (b) of the Land Registration Act, 2012.

14. Section 24, 25(1) and 26(1) (b) of the Act which relevant in these proceedings provide as follows: -

24. Interest conferred by registration  
Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and  
 (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor  
 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—  
 (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and  
 (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

26. Certificate of title to be held as conclusive evidence of proprietorship  
 (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—  
 (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or  
 (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

15. Having regard to the foregoing legal provisions, it is abundantly clear that the title held by the interested party could not be challenged otherwise than as provided under section 26 (1) (a) or (b) under either the ground of fraud and/or misrepresentation to which the interested party was proved to have been a party and/or in the alternative the interested party had to be shown to have acquired the title illegally, unprocedurally or through a corrupt scheme. Fraud can only be proved by evidence and the standard of proof is at a higher pedestal than proof on a balance of probabilities. Equally, to establish or prove illegality or corruption proof must be by way of evidence.

16. In the present matter apart from the exparte applicant averring that the interested party's lease did not originate from the Chief Land Registrar, there is no evidence to prove that the interested party was registered fraudulently or that he was party to any alleged fraud. The issues for determination in this matter touch on the ownership of the disputed property. For instance from the abstract of title exhibited, it shows one E. Kaptuya was registered as owner on 1<sup>st</sup> July 2005 while on 8<sup>th</sup> July 2005 Uwezo General Building Contractors Ltd was registered as owner before transferring the property to the interested party on 28<sup>th</sup> January 2009. Evidence of how these transactions were effectuated would be necessary to determine whether they were fraudulent. Likewise, the exparte applicant has exhibited a letter of allotment for unsurveyed plot No.27 Nakuru Municipality issued in 1984 yet the lease was not issued until June 2018. **What is the explanation for the delay of over 30 years in processing the lease?** These are matters that would require evidence to be resolved.

17. The exparte applicant by the Notice of Motion prays for order mandamus to compel the Land Registrar to register him as the proprietor of land parcel **Nakuru Municipality Block 16/86**. On the basis of what I have discussed above, it is evident that the ownership of the subject property is disputed as between the exparte applicant and the interested party. The dispute cannot be determined otherwise than by taking evidence where the contesting parties will be required to prove their respective claims of ownership to the property. The interested party is as per the register held by the Land Registry presently the registered proprietor. The Land Registrar cannot annul or cancel the registration of the interested party unless he is ordered to do so by the court. Section 79 of the Land Registration Act, 2012 allows the Land Registrar to effect rectification of the register in case of errors, mistakes or omissions not materially affecting the interests of any proprietor. The section does not give power to the Land Registrar to annul and or cancel the title of a registered proprietor. It is the Court under section 80 of the Land Registration Act, 2012 that has power to order rectification of the register by ordering any registration to be cancelled or amended if it is satisfied that the registration was obtained, made or omitted by fraud or mistake.

18. Section 80 of the Act provides:-

80. Rectification by order of Court  
 (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.  
 (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

19. I have stated earlier in this ruling that this is a matter where the ownership of the suit property is contested and that evidence ought to be *viva voce*, so that either party can cross - examine the other, must be adduced. The scope of Judicial Review does not include conducting a trial that would entail taking evidence to resolve contested matters. The scope of Judicial Review was well articulated in the case of **Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd. Civil Appeal No.185 of 2001** where the Court of Appeal stated:-

“ Judicial review is concerned with the decision making process, not with the merits of the decision: the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters.... The court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself. Such as whether there was or there was not sufficient evidence to support the decision”.

20. In the instant matter there is irrefutable evidence that the interested party is registered proprietor of the leasehold property the subject matter of the suit. The Land Registrar affirmed as much to the Chief Land Registrar when he declined to register the lease issued to the exparte applicant. The exparte applicant did not make disclosure at the time of commencing the judicial review proceedings that the property the subject matter was already registered in the interested party's name and all indications are that he was aware and/or ought to have been aware. After the Land Registrar indicated the property was registered in the name of some other party, a simple search would have revealed

who the registered proprietor was. The failure to make disclosure could have been intended to hoodwink the Court to grant the order of mandamus without knowing the true status of the register. Upon the interested party being enjoined to the proceedings and filing his pleadings, it became evident that the ownership of the property was the primary issue. The Court of Appeal in the case of **Sanghami Investment Ltd -vs- Officer in Charge Nairobi Remand and Allocation Prison (2007) I EA 354** held that where a dispute concerns ownership there is need for *viva voce* evidence and that ousts the jurisdiction of the court in judicial review proceedings. The Court in the matter *inter alia* stated thus: -

*“—Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights, to occupy land namely occupation, and disposition there would be need to allow viva voce evidence and cross examination of the witnesses which is not available in Judicial Review proceedings. —“*

21. In the instant matter the *ex parte* applicant and the interested party claim ownership of the suit property. The dispute will require evidence to be taken *viva voce* in order to adjudicate and make a determination. Judicial Review proceedings as instituted by the *ex parte* applicant cannot be the appropriate forum to have the disputed issues ventilated and adjudicated. I agree with the observation by Odunga, J in the case of **Seventh Day Adventist Church (East Africa) Ltd -vs- PS Ministry of Nairobi Metropolitan Development & Another (2014) eKLR** where he stated as follows: -

*Where an application brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceedings to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary Civil suits”.*

22. I am in the result satisfied that the interested party’s application dated 14<sup>th</sup> October 2020 has merit . The *ex parte* applicant chose the wrong forum to have the issues relating to the ownership of land parcel **Nakuru Municipality Block 16/86** adjudicated and determined. The Court lacks jurisdiction to deal with the matter while exercising its judicial review jurisdiction. In the premises the interested party’s application is allowed and the *ex parte* applicant’s Notice of Motion dated 15<sup>th</sup> June 2020 is hereby ordered struck out.

23. The costs of the instant application and the costs of the Judicial Review application are awarded to the interested party.

24. Orders according.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF MARCH 2021.**

**J M MUTUNGI**

**JUDGE**