



Republic v Naivasha District Land Registrar & 3 others; Mbugua (Exparte Applicant) (Environment and Land Judicial Review Case 1 of 2023) [2024] KEELC 467 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2023**

A OMBWAYO, J

FEBRUARY 1, 2024

**IN THE MATTER OF: TIMOTHY NGANGA MACHARIA
AND**

**IN THE MATTER OF: ARTICLES 40 AND 47 OF THE
CONSTITUTION OF KENYA, 2010, THE LAND ACT, 2007,
LAND REGISTRATION AT, 2012 AND THE FAIR
ADMINISTRATIVE ACTION ACT 2015**

-AND-

**IN THE MATTER OF: UNLAWFUL AND IRREGULAR
CANCELLATION OF NAIVASHA MUNICIPALITY BLOCK LR
8/164.**

BETWEEN

REPUBLIC APPLICANT

AND

NAIVASHA DISTRICT LAND REGISTRAR 1ST RESPONDENT

**DIRECTOR OF LAND ADMINISTRATION MINISTRY OF LAND AND
PHYSICAL PLANNING 2ND RESPONDENT**

**DIRECTOR OF SURVEYS MINISTRY OF LAND AND PHYSICAL
PLANNING 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

AND



JUDGMENT

1. This is a judicial Review application brought under the provisions of section 8 and 9 of the Law Reform Act Cap 26 Laws of Kenya and Order 53 of the Civil Procedure Rules 2010. Leave to commence the Judicial Review proceedings was obtained on 29th September 2023. The Notice of motion was filed on 16th October 2023. The exparte applicant seeks an order of Certiorari to remove to this Court and quash the decision of the 1st and 2nd Respondents herein contained in a letter dated 21/05/2020 nullifying and cancelling the Registry Index Map for land parcel Nos. Naivasha Municipality Block 8/160. She further seeks an order of Mandamus directing the 1st Respondent to reinstate the Registry Index Map for land parcel nos. Naivasha Municipality Block 8/160 and open register for land parcel nos. Naivasha Municipality Block 8/160
2. Lastly, she seeks a Perpetual Prohibition against the 1st, 2nd and 3rd Respondents prohibiting them from in any way altering, interfering and/or imposing conditions ultra vires to the Registry Map Index for land parcel nos. Naivasha Municipality Block 8/160.
3. The exparte application is based on grounds that the applicant herein has at all times relevant to this application been the rightful proprietor of all that parcel of land known as Naivasha Municipality Block 8/160.
4. It is stated that on or around 21/05/2020, the 2nd Respondent issued directives to the 3rd Respondent instructing him to amend the Registry Index Map, effectively cancelling out Naivasha Municipality Block 8/160
5. It is trite that where either the National and/or County Governments intend to resurvey boundaries and/or amend or survey plans for any land under leasehold tenure, then said Governments are obligated to give reasonable notice to the holders of interest and/or cautions on the parcels to be affected. Despite the Applicant herein being a party of Interest, he was never included in the proceedings and/or the deliberations leading to the decision. The Registry Index Map was consequently amended on 12/6/2020.
6. The Respondents further failed to notify the applicant herein of the effected amendments and he would have been left unawares had he not conducted a search, therefore discovering the misdeed.
7. The actions of the Respondents herein have adversely affected the proprietary rights of the Applicant herein as he is unable to enjoy and/or utilize the suit parcel of land as he can neither hold, use manage and/or dispose of the same for his benefit.
8. The applicant laments that the said decision and the contents therein are thus in contravention of the provisions of the Land Act, The Land Registration Act and Article 40 of the Constitution for the same is illegal, unreasonable, unfair-, improper, irregular nun and void.
9. According to the applicant, the administrative decision by the 1st & 2nd Respondents was rendered outside the scope of their authority, without heading and/or considering the Applicant's interests, input and/or views on the matter, as such the said decision ought to be quashed by this Honorable court and thereafter the 1st, 2 and 3rd Respondents be prohibited from interfering with the Registry Index Map for land parcel nos. Naivasha Municipality Block 8/160



10. The Respondents herein are public officers, state officers, whose decision is subject to this Honorable Court's supervision under the writs of judicial review. It is in the Interests of justice and fairness that the application allowed, as the same will not be prejudicial as against the Respondents herein.
11. The supporting affidavit of Catherine Wanjiru Mbugua reiterates the grounds and facts of the statement filed with the application seeking leave. The respondent did not file a replying affidavit as required by Law.
12. The applicant submits that the court has jurisdiction to extend time to file an application for Judicial Review Order of certiorari. He cites the provisions of Article 139 (2) of the Constitution of Kenya read with section 1A, 1B and 3A of the Civil Procedure Act. The ex parte applicant argues that the court having granted leave it must have considered the issue of limitation of time.
13. Moreover, the applicant argues that on or around 27/05/2020, the 2nd Respondent issued directives to the Respondent instructing him to amend the Registry Index Map, effectively cancelling out Naivasha Municipality Block 8/160. It is the procedure that where either the National and/or County Governments intend to resurvey boundaries and/or amend of survey plans for any land under leasehold tenure, then said Governments are obligated to give reasonable notices to the holders of interest and/or cautions on the parcels to be affected, informing them of the intended process and inviting their objections.
14. The Petitioner herein being at all times relevant to this Petition been the rightful proprietor of all that parcel of land known as Naivasha Municipality Block 8/160, was by all accounts a party of interest. Yet, despite this he was never included in the proceedings and/or the deliberations leading to the impugned decision that was the amendment of the Registry Index Map on 12th June 2020.
15. She cites Article 47 of the Constitution of Kenya 2010 which entitled every person who had been or was likely to be affected by administrative action to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. As such, by all accounts your Honor, the applicant should have been informed of the intention to amend, the effect the amendment would have on his title, and allowed an opportunity to make his reservations about the same.
16. She refers to Section 19(1) of the Registered Land Act specifically provides that:

“Where the Registrar is maintaining the registry map he may, Of in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form and the mutation form shall be filed.”
17. According to the applicant, it is evident that for the Respondent to make any adjustment there must be instructions by the 1st Respondent in the form of mutation forms. Secondly, the alterations envisaged must relate to correction of the line or position of any boundary shown on the registry map. Thirdly, any correction that is likely to affect any person's interest shown by the register can be affected only with the agreement of that person.
18. In Communications Commission of Ken a & 5 Others v Ro al Media Services & 5 Others the court described Legitimate expectation as:

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to



be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation."

19. The Ex-parte Applicant was the registered proprietor of the suit land, and his interest in the land is clearly shown in the register. As such, he had a legitimate expectation that that in performance of their statutory duties, the Respondents would comply with the procedures laid down, that he would be heard before any steps are taken to effect those interest, and that subsequent communication would be issued by the Respondents upon implementation of their decision, within the stipulated timelines,
20. The applicant argues that the Respondents further failed to notify the Petitioner herein of the effected amendments and as such he would have been left unawares had he not conducted a search, therefore discovering the misdeed and/or procedural impropriety.
21. The Respondents' failure to notify the Petitioner of their intentions, or their actions thereafter amounts to a gross breach of the Petitioner's rights to; fair administrative action, fair hearing; public participation; access to information; as well as his right to Property as enshrined under the Constitution of Kenya, 2010. Equally, the impugned decision and the contents therein lie contravention of the provisions of the Land Act and the Land Registration Act, rendering the same illegal, unreasonable, unfair, improper, irregular, void, and consequently- unenforceable.
22. The actions of the Respondents herein have adversely affected the proprietary rights of the Applicant herein, as the altering of the boundary of a cadastral map, results in the original parcel number being cancelled and a new number being subsequently issued rendering the former title number and its register null and void. This effectively barred the Petitioner from enjoying and/or utilizing the suit parcel of land as he could neither hold, use manage and/or dispose of the same for his benefit. By arbitrarily amending the register to remove the applicants title, the Respondents are in breach of Article 40 (3) of the Constitution, which prohibits the State from depriving a person of private property arbitrarily.
23. That the Respondents herein are public officers, state officers, a constitutional ministry whose decision being in contravention of the laws of the land and founded upon a complete failure comply with the rules of natural justice when making the decision to amend the index map, is subject to this Honorable Court's supervision under the writs of judicial review. As such, this honorable court has the jurisdiction and mandate to rectify this injustice by not only quashing the impugned decision, mandate the reinstatement of the Registry Index Map for land parcel nos. Naivasha Municipality Block 8/169 and reopening of its register, but equally prohibit the 1st, 2nd and 3rd Respondents from interfering with the Registry Index Map for land parcel nos. Naivasha Municipality Block 8/160.
24. In this regard she relies on the case of *Betrice Wairimu Kiiru Vrs Director of Surveys & 2 Others*(2011) eKLR where the honorable court rendered itself thus:

"It is now se e that an order of certiorari will issue if the impugned decision is found to have been made without or in excess of jurisdiction or where the rules of natural justice are not complied with. Similarly, an order of prohibition will issue to stop a tribunal or a public body from continuing with proceedings in excess of its jurisdiction or in contravention of the laws of the land. It lies also where the tribunal or public body in arriving at its decision departs from the rules of natural justice. . . "
25. In Conclusion, the applicant submits that the rule of law principle requires that all government action must comply with the law, including the Constitution, whose standards demands and/or requires that the exercise of public power should not be arbitrary, capricious, Of unjust, and that the decision



- taken must be rationally related to the purpose for which the power was given. Equally, that where administrator's actions created a reasonable expectation in the mind of the aggrieved party, the court will hold the administrator to the representation, and enforce the legitimate expectation.
26. As such, there having been a reasonable expectation on part of the Respondent's as to the due process to be followed, and this procedure having not been followed resulting in a capricious and/or irrational decision, then this Honorable court must hold them to the representation and enforce the legitimate expectation by granting the remedies as sought. On costs the applicant submits that the effect of section 27 of the Civil Procedure Act is that the Judge or Court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; as such the costs of this application should be awarded to the applicant
27. The 1st – 4th respondents argue that the court lacks jurisdiction to hear and determine this application as the same is statute barred. The respondents rely on section 8 and 9 of the Land Registration Act Cap 26 Laws of Kenya read with Order 53 rule 2 of the Civil Procedure Rules 2010.
28. I have considered the application and do find that the 1st issue to be determined is whether the court has jurisdiction to hear this application for Judicial Review due to the fact that it was filed more than 6 months after the decision by the respondents as submitted by the respondents.
29. Section 9 (3) of the Law Reform Act provides: -
9. Rules of court
- (3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
30. Order 53 rule 2 of the Civil Procedure Rules 2010 provides: -
2. Time for applying for certiorari in certain cases [Order 53, rule 2.]
- Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
31. It is the courts view that section 9(3) of the law Reform Act applies only to judgment, order, decree, conviction or other proceedings of a court or quasi-judicial proceedings but not administrative actions such as the ones made by the respondents. Turning to the merits of the application, Section 19 (1) of the Land Registration Act provides:-
19. Fixed boundaries
- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested



person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

32. I do find that the section envisages a fair administration action however, in this case the respondent did not afford the Exparte Applicant a fair hearing.
33. Article 47 of the constitution of Kenya provides: -
47. Fair administrative action
- (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.
34. The respondents breached the provisions of Article 47 of the Constitution by depriving the exparte applicant of her property without affording her a hearing.
35. It is settled law that an order of certiorari is issued to quash a decision that is tainted with an illegality, Irrationality and procedural impropriety. It is issued if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons whereas an order of mandamus is issued to compel an administrative authority to perform a duty that is bestowed upon it by law where it has been demanded that it performs the duty but it has declined.
36. In the locus classicus case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR the court of Appeal of Kenya determined the efficacy and scope of mandamus, prohibition of certiorari. The court held that these remedies are only available against public bodies such as the Council in this case. That an Order of Prohibition do and will it issue directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings and that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision.
37. The court went on to find that an Order Of Mandamus 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 which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no 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 convenient, beneficial and effectual.



38. The court held that the order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.
39. These principles mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed
40. I do find that the respondents have a duty to reinstate the Registry Index Map for land parcel No.Naivasha/Municipality Block 8/160 and to re-open the Register for Land parcel No Naivasha/Municipality Block 8/160.
41. An order of prohibition is normally issued to prohibit the respondent from acting against the law. The court can't issue a perpetual prohibition because it cannot be contemplated that the respondent will in future Act against the law. No evidence has been placed before this court that the respondents will in future act against the law. Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision
42. Due to the breach of the applicants right to be heard enshrined in Articles 50 and 47 Of The Constitution Of Kenya 2010, I do issue an order of Certiorari to remove to this Court and quash the decision of the 1st and 2nd Respondents herein contained in a letter dated 21/05/2020 nullifying and cancelling the Registry Index Map for land parcel Nos. Naivasha Municipality Block 8/160.
43. The applicant is entitled to and I do issue an order of Mandamus directing the 1st Respondent to reinstate the Registry Index Map for land parcel nos. Naivasha Municipality Block 8/160 and open register for land parcel nos. Naivasha Municipality Block 8/160. I decline to grant an order of perpetual prohibition. Costs to the exparte applicant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 1ST DAY OF FEBRUARY 2024.

A O OMBWAYO

JUDGE

