



**Republic v Busia County Land Registrar; Emurudu & another (Exparte);
Emomeri & another (Interested Parties) (Environment and Planning Judicial
Review E001 of 2023) [2024] KEELC 5202 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND PLANNING JUDICIAL REVIEW E001 OF 2023**

**BN OLAO, J
JULY 11, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

BUSIA COUNTY LAND REGISTRAR RESPONDENT

AND

HENDRIKA ATYANG EMURUDU EXPARTE

EMMANUEL EKAMURAN EMONGOR EXPARTE

AND

WILDAD BARASA EMOMERI INTERESTED PARTY

OKIBOKO NYAMORI & 20 OTHERS INTERESTED PARTY

JUDGMENT

1. This judgment was due on 27th February 2024. However, I was away from the station attending to my ailing step mother who later passed away on 14th March 2024 and was buried on 30th March 2024. I resumed duties in April 2024 and proceeded on a pre-scheduled leave from May up to July 2024.
2. That explains the delay in delivering this judgment. The same is regretted.
3. Hendrika Atyang Emurudu And Emmanuel Ekamuran Emongor are a mother and son and the 1st and 2nd Applicants respectively. They have approached this Court vide their Judicial Review Application dated 15th September 2023 in which they have impleaded the BUSIA COUNTY LAND REGISTRAR as the Respondents as well as the following as Interested Parties, i.e;



1. Wildad Barasa Emomeri – 1st Interested Party
2. Okiboko Nyamori – 2nd Interested Party
3. Lawrence Ikawa Ekada – 3rd Interested Party
4. Free Pentecostal Fellowship In Kenya – 4th Interested Party
5. Titus Emase Osere – 5th Interested Party
6. Valentine Osamait Acheto – 6th Interested Party
7. Andrew Omadi Okwang'anel – 7th Interested Party
8. Abisanio Epokor Okutii – 8th Interested Party
9. Vincent Pakanda Odima – 9th Interested Party
10. Ojuma Enyokoi Nyamori – 10th Interested Party
11. Anita Alukudo Etyang – 11th Interested Party
12. Stephen Imokola – 12th Interested Party
13. Patrick Imwan Ekisa – 13th Interested Party
14. Remugius Ochebo – 14th Interested Party
15. Hendrika Etyang Emurudu – 15th Interested Party
16. Ann Iserene Adhiambo – 16th Interested Party
17. Opama Noah Otwana – 17th Interested Party
18. Xlement Ekweny – 18th Interested Party
19. Margaret Amukolopa Kamla – 19th Interested Party
20. Kenneth Juma Momeri – 20th Interested Party
21. Masay Sospeter Fidelis – 21st Interested Party
22. Erick Hesbon Ajala – 22nd Interested Party

The Applicants sought the following orders:

1. An order of Certiorari be and is hereby issued removing to this Honourable Court for purposes of quashing the proceedings and decision of the Busia County Land Registrar made on 16th August 2023 and the Notice of Intention to rectify the register in respect of titles No South Teso/Asinge/1719 and South Teso/Asinge/1721 dated 23rd August 2023.
2. An order of prohibition be and is hereby issued prohibiting the Busia Land Registrar from enforcing the decision of 16th August 2023 and the Notice of Intention to rectify the register dated 23rd August 2023 in respect of titles No South Teso/Asinge/1719 and South Teso/Asinge/1721.
3. Costs be provided for.

The application is premised on the grounds set out therein, the statutory statement as well as the affidavit of the 1st Applicant sworn on her own behalf and also on behalf of the 2nd Applicant.



4. The gist of the application is that the Applicants are the registered proprietors of the land parcels No South Teso/Asinge/1719 and 1721 (the suit land) which are resultant sub-divisions of the land parcel No South Teso/Asinge/29 which belonged to one NYAMORI ILUKOL the deceased father-in-law to the 1st Applicant. It was transmitted to the 1st Applicant's brother in law OKIBOKO NYAMORI who sub-divided it to create the land parcels No South Teso/Asinge/1699 to 1728 and the same were shared among the beneficiaries to the Estate of the deceased as well as purchasers and registered in the names of the 2nd to 22nd Interested Parties. That the 1st Interested Party although not a member of the family of the deceased nor a purchaser started laying claim to the land parcel No South Teso/Asinge/1719 belonging to the 1st Applicant.
5. The Applicants therefore filed at the BUSIA CHIEF MAGISTRATE'S COURT CIVIL CASE NO E53 of 2020 against the 1st Interested Party who filed a counter-claim. The Applicants claim was upheld and the 1st Interested Party's counter-claim was dismissed vide a decree issued on 6th December 2022. The 1st Interested Party has since appealed the said judgment vide BUSIA ELC APPEAL NO E107 of 2022 which is pending before this Court but meanwhile, the 1st Interested Party has obtained a stay of execution of that judgement.
6. Meanwhile, the Respondent served the 1st Applicant with a letter addressed to all the Interested Parties being the owners of the former land parcel No South Teso/Asinge/29 inviting them to a meeting which was solely over the dispute relating to the land parcel No South Teso/Asinge/1719 belonging to the 1st Applicant. The Respondent wanted the 1st Applicant to transfer the land parcel No South Teso/Asinge/1719 to the 1st Interested Party. During the meeting, only the 1st Applicant, the 1st Interested Party and OKIBOKO NYAMORI were allowed to speak. After hearing them, the Respondent verbally directed the 1st Applicant to surrender to him for cancellation the title to the land parcel No South Teso/Asinge/1719 so that a fresh title could be issued to the 1st Interested Part. The 1st Applicant through his counsel protested that verbal decision and brought to the attention of the Respondent the pending appeal before this Court.
7. On 30th August 2023 the 1st Applicant received the proceedings and decisions of the Respondent dated 16th August 2023 together with a notice dated 23rd August 2023 of his intention to rectify the register. It is the Applicant's case from the proceedings and the decision of the Respondent that:
 - a. The dispute heard by the Land Registrar was over the ownership of the land parcel No South Teso/Asinge between the 1st Interested Party and the 1st Applicant.
 - b. That same dispute was before the subordinate Court and an appeal is pending before this Court.
 - c. The other persons in attendance were never heard.
 - d. The Respondent's decision did not emanate from the hearing which he purported to conduct.
 - e. The Interested Party is not a member of the Applicant's family and therefore not a beneficiary. It is further deposed in the affidavit that:
 - a. The proceedings and decision of the Land Registrar dated 16th August were sub-judice the proceedings before this Court and were therefore geared towards subverting the course of justice.
 - b. The proceedings and decisions were also made without jurisdiction as the issues raised before the Respondent were beyond the scope of his statutory mandate.



- c. The notice of intention to rectify the register is also issued in excess of jurisdiction as the power to cancel titles rests with the Court and not the Respondent.
- d. The Respondent acted on a complaint from a person without the requisite locus standi and the decision is therefore unreasonable.
- e. The proceedings and decisions by the Respondent were an abuse of power.
- f. The proceedings and decision by the Respondent are nullities in law as matters relating to succession are outside the scope of his powers.

The Applicants add further that the said Land Registrar WILFRED N. NYABERI who issued the notice to rectify the register has already been transferred and left Busia on 23rd August 2023.

8. The following documents are annexed to the application:

- 1. An order issued by CHERONO J on 6th September 2023 granting the Applicants leave to file this application.
- 2. Statutory statement by the Applicants.
- 3. Affidavit by the 1st Applicant.
- 4. Copy of title deed to the land parcel No South Teso/Asinge/1719 in the name of the 1st Applicant.
- 5. Certificate of Official Search for the land parcel No South Teso/Asinge/1721 in the name of the 1st Applicant.
- 6. Certificate of Official Search for the land parcel No South Teso/Asinge/29 in the name of OKIBOKO NYAMORI.
- 7. Mutation Form for the sub-division of the land parcel No South Teso/Asinge/29.
- 8. Plaint in Busia Chief Magistrate's Court ELC Case NO E53 of 2020 between the Applicants as the plaintiffs and the 1st Interested Party as the defendant.
- 9. 1st Interested Party's defence in Busia Chief Magistrates Court ELC case NO E53 of 2020.
- 10. Decree issued in Busia Chief Magistrate's Court ELC case NO E53 of 2020.
- 11. Memorandum of appeal filed in BUSIA ELC APPEAL NO E17 of 2022 by the 1st Interested Party as the Appellant against the Applicants as the Respondent.
- 12. Ruling delivered by E.A. NYALOTI Chief Magistrate in Busia Chief Magistrate's Court ELC Case NO E53 of 2020.
- 13. Notice dated 31st July 2023 by the County Land Registrar WILFRED NYABERI addressed to the 1st Applicant and others to attend a meeting on 16th August 2023 over the ownership of the land parcel No South Teso/Asinge/29.
- 14. Letter by OMONDI & COMPANY ADVOCATES dated 16th August 2023 and addressed to the Land Registrar Busia.
- 15. Notice of Intention to rectify dated 23rd August 2023 and addressed to the 1st Applicant and others.



16. Proceedings held on 16th August 2023 by the County Land Registrar with respect to the land parcel No South Teso/Asinge/29.
9. The Respondent did not file any response to the application.
10. The 1st and 2nd Interested Parties filed grounds of opposition dated 31st October 2023 in which they raised the following:
 1. That the Land Registrar is vested with the powers to rectify the register by dint of Section 79 of the [Land Registration Act](#) hence the process that led to the cancellation of title cannot be said to have been done in excess of jurisdiction.
 2. That the requisite notices were issued as required by law and the Applicants duly participated in the process that led to the cancellation of title hence due process of law was followed.
 3. That the proceedings before the Land Registrar Busia related to cancellation and restoration of title to L.R No South Teso/Asinge/29 while the proceedings in Busia ELC Civil Appeal NO 17 of 2022 relates to the occupation and use of L.R No South Teso/Asinge/1719 and 1721 hence the two actions cannot be said to be sub-judice.
 4. That the Land Registrar's decision was rational and reasonable given that it was demonstrated and indeed conceded by the Applicants that the subdivision of L.R No South Teso/Asinge/29 was unlawful and fraudulent.
 5. That the Land Registrar's decision did not therefore constitute an abuse of power and a subversion of the due process of Court.
 6. That the application is therefore scandalous, vexatious and otherwise an abuse of Court process and the same should be dismissed with costs.
11. The 1st Interested Party on behalf of herself and the 2nd Interested Party swore a replying affidavit dated 31st October 2023 in which it was deposed, inter alia, that the land parcel No South Teso/Asinge/1719 is a sub-division of the land parcel No South Teso/Asinge/29 which had been fraudulently sub-divided to create 29 title deeds registered in the names of different persons including the Applicants herein who were registered as proprietors of the land parcel No South Teso/Asinge/1719. That sometimes on 31st July 2023, the Land Registrar Busia issued a notice to all affected persons to appear before him for a hearing on the circumstances leading to the subdivision of the parent title which hearing was conducted on 16th August 2023 in the presence of all affected persons.
12. That during the hearing, it was discovered that the sub-division of L.R No South Teso/Asinge/29 was fraudulent as the same was done through correction of names instead of a full succession process as required by law. The Land Registrar therefore recommended that all the titles be cancelled and the same to revert back to L.R No South Teso/Asinge/29 and on 23rd August 2023, he issued a notice of intention to rectify the register to all the effected parties following the findings of the hearing. The titles emerging from the parent title were all cancelled on 24th August 2023 and reverted back to the title No South Teso/Asinge/29 in the name of ILUKOL NYAMORI (deceased). That the proceedings before the Land Registrar Busia were in no way related to the matter pending before Busia ELC APPEAL NO 19 of 2022 as alleged since the claim in Busia Chief Magistrate's Court ELC Case NO 53 of 2020 related to the occupation and use of the land parcel No South Teso/Asinge/1719 while the proceedings before the Land Registrar Busia and which are the subject of this application related to the acquisition and eventual sub-division of the land parcel No South Teso/Asinge/29. That the issue of cancellation of title, use and occupation of the suit land cannot be said to be sub-judice BUSIA CIVIL APPEAL



NO 17 of 2022. That the Land Registrar has, by dint of Section 79 of the [Land Registration Act](#), powers to rectify the register upon satisfaction that the same was obtained by among other things, fraud. The Land Registrar, upon confirming that the sub-division of land parcel No South Teso/Asinge/29 was obtained by fraud proceeded to cancel the sub-divisions thereof and restored the parent title as required by law. That the Applicants fully participated in the hearing and conceded that they did not carry out a proper succession process in subdividing the land parcel No South Teso/Asinge/29 but instead, conducted a rectification of names hence the decision of the Land Registrar was rational and was not actuated by any ulterior motives. There is therefore no basis for granting the orders sought and the application lacks any basis in law.

13. The 1st and 2nd Interested Parties annexed the following documents to the replying affidavits:
 1. Proceedings before the Land Registrar dated 31st July 2023.
 2. Notice for the rectification of the register dated 23rd August 2023.
 3. Hearing of the application to rectify register held on 16th August 2023.
 4. Plaint in Busia Chief Magistrate's Court ELC case NO E53 of 2020.
 5. Green Card for the land parcel No South Teso/Asinge/29.

14. The 3rd, 6th, 10th, 13th, 16th and 17th Interested Parties also opposed the application. They filed separate replying affidavits all dated 15th November 2023. The replying affidavit of the 3rd, 6th, 13th and 17th Interested parties were similar in contents. Basically their case is that they had purchased various parcels of land out of the land parcel No South Teso/Asinge/29 being part of the Estate of ILUKOL NYAMORI. That the said land had been fraudulently sub-divided into 29 titles and were registered to different parties and the Applicant was registered as the proprietors of the land parcel No South Teso/Asinge/1719. So on 31st July 2023, the Land Registrar Busia issued notices to all the affected parties to appear before him for hearing as to the circumstances leading to the sub-division of the parent title. The hearing was conducted on 16th August 2023 in the presence of all the affected parties during which it was discovered that the sub-division of the land parcel No South Teso/Asinge/29 was done fraudulently through a process of correction of names instead of a full succession as required by law. The Land Registrar recommended that all the titles be cancelled and to revert back to the land parcel No South Teso/Asinge/29 and so on 23rd August, the Land Registrar issued notices of intention to rectify the register. On 24th August 2023, all the titles emanating from the parent title were cancelled. The proceedings before the Land Registrar were in no way related to the matter pending in CIVIL APPEAL NO 17 of 2022 as alleged. That the claim in Busia Chief Magistrate's Court ELC Case NO E53 of 2020 related to the occupation and use of the land parcel No South Teso/Asinge/1719 while the proceedings before the Land Registrar Busia and which are the subject of this application relate to the acquisition and eventual sub-division of the land parcel No South Teso/Asinge/29. Therefore, the issue of cancellation of title, use and occupation of land parcel No South Teso/Asinge/1719 cannot be sub-judice the proceedings in Busia ELC CIVIL APPEAL NO 17 of 2022. That the Land Registrar had powers to rectify the register upon confirming that the sub-division of the land parcel No South Teso/Asinge/29 was obtained by fraud. That the Applicants were notified and fully participated in the proceedings which led to the cancellation of the titles and they even conceded that there was no proper succession process conducted. The Land Registrar's decision was therefore rational and was not actuated by ulterior motives as complained. There is therefore no basis for granting the orders sought in this application by quashing the Land Registrar's decision. This application lacks any basis.

15. The above Interested Parties annexed to their replying affidavits some of the same documents already filed herein by the 1st and 2nd Interested Parties.



16. On his part, the 10th Interested Party also made the same averments as the 3rd, 6th, 13th and 17th Interested Parties. The only difference is that he is the son of ILUKOL NYAMORI the then registered proprietor of the land parcel No South Teso/Asinge/29.
17. There is also a replying affidavit by one ANN ISERENE ADHIAMBO who also swore a replying affidavit dated 15th November 2023 in which she describes herself as the wife to the late son of ILUKOL NYAMORI, the registered proprietor of the land parcel No South Teso/Asinge/29. The contents of her replying affidavit are similar to those of the other Interested Parties above.
18. On 15th November 2023 and again on 12th December 2023, MR OMONDI counsel for the Applicants asked the Court to expunge from the record the 5th, 7th, 8th, 9th, 11th, 14th, 15th and 21st as Interested Parties. Indeed the 15th Interested Party is infact the 1st Applicant herein and her inclusion in the list of Interested Parties could only have been by error. For purposes of this judgment, therefore, the Interested Parties exclude the 5th, 7th, 8th, 9th, 11th, 14th, 15th and 21st Interested Parties.
19. The application has been canvassed by way of written submissions. The same have been filed by MR OMONDI instructed by the firm of OMONDI & COMPANY ADVOCATES for the Applicants and by MR OKEYO instructed by the firm OKEYO OCHIEL & COMPANY ADVOCATES for the 1st and 2nd Interested Parties. The Respondent did not file any response to the application and therefore did not participate in the application, the 3rd, 6th, 10th, 13th, 16th and 17th Interested Parties who filed replying affidavits did not file any submissions.
20. I have considered the applications, the rival affidavits and annexures thereto as well as the submissions by MR OMONDI and MR OKEYO.
21. This being a judicial review application, this Court will be guided by the words of LORD DIPLOCK in the case of COUNCIL OF CIVIL SERVICE UNIONS -V- MINISTER FOR CIVIL SERVICE 1984 3 ALL ER 935 [1985 A.C 374] where he said:

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, 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. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the Judges, by whom the judicial power of state is exercisable.

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. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. 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. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down



in legislative instrument by which it's jurisdiction is conferred, even where such failure does not involve any denial of natural justice.” Emphasis mine

That is the scope of judicial review applications which the Courts in this country have continued to be guided by. See for instance the cases of CORTEC MINING KENYA LTD -V- CABINET SECRETARY MINISTRY OF MINING & 9 OTHERS 2017 eKLR and also the case of REPUBLIC -V- THE CHAIRMAN AMAGORO LAND DISPUTES TRIBUNAL 2014 eKLR which has been cited by counsel for the Applicant.

22. As regards the role of a Court considering such an application, the Court of Appeal in the case of *MUNICIPAL COUNCIL OF MOMBASA -V- R & UMOJA CONSULTANTS LTD C.A. CIVIL APPEAL NO 185 of 2001* [2002 eKLR] put it thus:

“... judicial review is concerned with the decision -making process, not with the merits of the decision itself ... The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters? These are the kind of questions a Court hearing a matter by way of judicial review is concerned with, and such Court is not entitled to act as a Court of appeal over the decider; acting as an appeal Court over the decider 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 – and that, as we have said, is not the province of judicial review.” Emphasis mine

I have emphasised the issues of illegality and jurisdiction from the above precedents because as will soon become clear, this case largely revolves around whether or not the Land Registrar Busia was clothed with the jurisdiction to make the decisions complained of herein.

23. It must also be remembered, although the Applicants did not premise their application on any constitutional provision, that following the promulgation of the 2010 Constitution, judicial review now enjoys a constitutional underpinning. Article 47 of *the Constitution* provides that:

47: “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” Emphasis mine

Having said all the above, and notwithstanding the lengthy affidavits by the parties and the submissions by counsel, the determination of this application basically revolves on whether or not the Land Registrar Busia had the jurisdiction to make the decision which he did with respect to the suit land. Most of the issues in this matter are not really in dispute. Indeed the complaint by the Applicants that the Land Registrar cancelled the title to the suit land is conceded by the Interested Parties. In paragraphs 9, 10 and 11 of her replying affidavit, the 1st Interested Party has deposed as follows:

9: “That it was the Land Registrar’s recommendation that all the titles be cancelled and the same to revert back to L.R No South Teso/Asinge/29”.

10: “That on 23rd August 2023, the Land Registrar Busia issued a Notice of Intention to rectify register to all affected parties following the finding from the hearing conducted on 16th August 2023. Attached and marked W.B. 1-3 is a copy of the Notice of Intention to rectify register.”

11: “That all titles emerging from the parent title were on 24th August 2023 cancelled and the title reverted back to L.R No South Teso/Asinge/29 in the name of ILUKOL NYAMORI (deceased). Attached and marked W.B.1-3 is a copy of register for L.R No South Teso/Asinge/29”.



The 3rd, 6th, 10th, 13th, 16th and 17th Interested Parties made similar averments in their respective submissions. But most importantly, having summoned and heard the Applicants and the Interested Parties herein, the County Land Registrar Busia MR WILFRED NYABERI made the following decision on 16th August 2023 vide his report filed herein;

“But all said and done the titles were obtained fraudulently and succession of the Estate of the late NYAMORI ILIKORI was not done as required by law, instead his son OKIBOKO NYAMORI did a correction of names instead of succession. Succession of the estate of the late is a legal process which cannot be substituted by way of correction of names. In view of the above, I direct all the parties that have titles originating from the irregularity that occurred should surrender them and rectification of registers done to reinstate the original title to enable succession to be carried out.”

With that decision, the Respondent as represented by MR WILDRED NYABERI had effectively cancelled all the titles that had emanated from the parent title being NO SOUTH TESO ASINGE/29 and which include the Applicants’ titles No South Teso/Asinge/1719 and 1721 the suit land herein.

24. Counsel for the 1st and 2nd Interested Parties has submitted in paragraph 1 } his submissions that what the Respondent did was mere rectification of the register and therefore within his jurisdiction as provided under Section 79 of the *Land Registration Act*. This is how counsel has put it:

“From the record before Court, the Busia County Land Registrar, upon receipt of a complaint concerning acquisition of title emanating from L.R NO. South Teso/Asinge/29 issued the relevant notices inviting all the Interested Parties for a hearing before the decision was made. Upon hearing the affected parties including the Ex-parte Applicant, it was discovered that indeed the sub-division and subsequent transfer of L.R NO. South Teso/Asinge/29 was done without following due process and the Registrar proceeded to cancel the same. On the issue of jurisdiction, Section 79 of the *Land Registration Act* vests power in the Land Registrar to rectify the register in the following terms: ...”

Counsel then cites the said provision and adds:

“The Land Registrar is specifically given powers under sub-Section 2 of the said provision to rectify the register where the document in question has been obtained by fraud. The procedure and scope for such rectification, we submit, is provided for under Section 79 (4) of the *Land Registration Act* in the following terms ...” Emphasis mine.

Counsel for the Applicants is of the view that the Land Registrar acted in excess of his jurisdiction. In paragraph 19 of his submissions, he states that:

“It has been held times without number by this Court and the Court of Appeal that a Land Registrar (like the Respondent) lacks power to cancel a title. The Courts have held that under Section 80 of the *Land Registration Act* (supra), only a Court of law can cancel a title on the basis of fraud or illegality. The Courts have further stated that the registrar is only mandated under Section 79 (2) to rectify a register but that mandate is limited to errors, mistakes or omissions that do not materially affect the rights of the registered proprietor.”

I notice that in his submissions, counsel for the 1st and 2nd Interested Parties has quoted Section 79 (1) and (2) of the *Land Registration Act* to read:



- (1) “The Registrar may rectify the register or any instrument presented for registration in the following cases -
 - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - (b) in any case and at any time with the consent of all affected parties; or
 - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
- (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.”

However, the above provision has been amended vide legal notice NO 28 of 2016. It now reads:

- (2) “No alteration affecting the title of the proprietor may be made pursuant to sub section (1) without the proprietor’s consent unless –
 - (a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
 - (b) it would for any other reason be unjust for the alteration not to be made.

Provided that a written notice of ninety days shall be given to the proprietor of such intention to make the alteration.” Emphasis mine.

I do not think that Section 79 (1) and (2) of the [Land Registration Act](#) empowers the Land Registrar to cancel a title to land even if he takes the view, as happened in this case, that there was evidence of fraud in the manner in which it was acquired. A reading of the above provision makes it clear that the powers of the Land Registrar are confined to rectifying mistakes errors or omissions. It could not have been the intention of the legislature to give the Land Registrar power to cancel a title to land otherwise, nothing would have been easier to say so in clear terms. That is why Section 80 (1) and (2) of the [Land Registration Act](#) whose marginal notes read “Rectification by order of Court” goes on to provide in subsection (1) thereof that:

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- (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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.”

If it had been intended that Land Registrars can also cancel title deeds to land if satisfied that the same were obtained by way of fraud, then the word “cancel” would have been inserted in Section 79 of the Land Registration. However, that provision only uses the word “rectify”. It does not use the word



cancel as is used in Section 80 of the [Land Registration Act](#). The term rectification of register is defined in BLACK'S LAW DICTIONARY 10TH EDITION as follows:

“A process by which a person whose name was wrongly entered in or omitted from a record can compel the recorder to correct the error.” Emphasis mine.

I would state, therefore, that where for instance a title holder's name has been mis-spelt or the Identity Number or address wrongly captured, those are matters within the purview of the Land Registrar under Section 79 of the [Land Registration Act](#). However, cancellation of a title to land is the sole prerogative of the Court. And the Land Registrar can only do so pursuant to a Court order. And in exercising those powers, the Court will be guided by the provision of Section 26 (1) of the Land Registration. There is ample jurisprudence that the Land Registrar has no jurisdiction to cancel a title to land. See, for example [EMFIL LTD -V- THE REGISTRAR OF TITLES MOMBASA & OTHERS C.A. CIVIL APPEAL NO 312 of 2012](#) [2014 eKLR], [KURIA GREENS LTD -V- REGISTRAR OF TITLES & ANOTHER](#) 2011 eKLR among other cases.

25. Having arrived at the decision to cancel the title to the suit land, the Land Registrar Busia went further and on 24th August 2023 he made an entry NO 5 on the Green Card by cancelling, among others, the title to the suit land and reverting the same back to the parent title No South Teso/Asinge/29. He clearly went beyond his jurisdiction. The 1st Interested Party has deposed in paragraph 17 of her replying affidavit that the Applicants were present “and fully participated in the process that led to the cancellation of title as can be seen in the attached proceedings.” The fact that the Applicants were present during the proceedings (infact the record shows that only the 1st Applicant was invited and present during the hearing on 16th August 2023) could not cloth the Land Registrar with the jurisdiction to cancel the titles to the suit land as he purported to do. And even if the Land Registrar believed that Section 79 of the [Land Registration Act](#) empowered him to do so, he was required under Section 79 (2) (b) of the Act to issue a written notice of ninety (90) days to the Applicants as the proprietors of the suit land. Instead, he issued his notice on 31st July 2023 and the hearing was held on 16th August 2023 some sixteen (16) days later. The cancellation of the Applicants title was then communicated on 23rd August 2023 also contrary to the law. The notice and the hearing proceedings suggest that they were for purposes of “rectification of register” but as is now clear, the Land Registrar went well beyond what the notice suggested. It is instructive to note, finally that the Land Registrar, as the Respondent did not deem it fit to file any response in response to these serious allegations levelled against him. The bottom line is that the allegations against the Respondent have largely not been rebutted.
26. The Respondent clearly acted without jurisdiction and contrary to the law. He may have been persuaded that fraud was perpetrated. However, the most he could have done was to refer the parties to the Court for any appropriate remedy.
27. The Applicants have sought the twin orders of Certiorari and Prohibition.
28. With regard to the order of Certiorari, the Applicants seek that the decision of the Busia Land Registrar made on 16th August 2023 and the notice of intention to rectify the register in respect of titles No South Teso/Asinge/1719 and 1721 dated 23rd August 2023 be quashed. And with regard to the remedy of prohibition, the Applicants seek an order prohibiting the Busia County Land Registrar from enforcing the decision of 16th August 2023 and the Notice of Intention to rectify the register dated 23rd August 2023.



29. As was held in the case of *KENYA NATIONAL EXAMINATION COUNCIL -V- REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & OTHERS C.A. CIVIL APPEAL NO 266 of 1996.*

“Only an order of certiorari can quash a decision already made and an order of Certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons

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. Prohibition is an order from the High Court 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 is clear from all the above that the remedy of Certiorari is well merited. The Respondent issued an order cancelling the titles to the suit land and in so doing, he acted beyond his jurisdiction.

30. And in the last paragraph 3 of his notice dated 23rd August 2023, the Respondent addressed the 1st Applicant and others in the following terms:

3: “You are hereby notified to surrender the title in your possession to this office within 14 days from the date of this letter as the registers have been rectified as per the ruling after hearing delivered on the 16th August 2023 in the presence of all the parties.”

That order still hangs over the heads of the Applicants and unless an order of prohibition is issued, it has to be complied with. The remedy of prohibition is also merited.

31. On costs, they follow the event unless the Court for good reason decides otherwise. Counsel for the Applicants has urged me to order that they be borne by the 1st Interested Party for reasons that “he is the one who knowing that he had no appeal before this Court, initiated a parallel process with the Respondent.” I do not think it will be fair to make such an order penalising the 1st Interested Party only with regard to payment of costs on that ground. The 1st Interested Party, just like any other party, was entitled to approach the Respondent as any other body seeking the orders which she did. *The Constitution* guarantees her that right and it would be discriminatory to only penalise the 1st Respondent for exercising that right. If anything, I would have been more inclined, like other Courts have done, to penalise the Land Registrar personally for not declining jurisdiction in the matter before him. However, I will not take that route to-day. The Respondent, the 1st, 2nd, 3rd, 6th, 10th, 13th, 16th and 17th Respondents shall bear the Applicants’ costs of this application.

32. Ultimately therefore and having considered all the evidence in this application, this Court makes the following disposal orders:

1. An order of Certiorari be and is hereby issued removing to this Honourable Court for purposes of quashing the proceedings and decision of the Busia County Land Registrar made on 16th August 2023 and the Notice of Intention to rectify the register in respect to titles No South Teso/Asinge/1719 and South Teso/Asinge/1721 dated 23rd August 2023.
2. An order of Prohibition be and is hereby issued prohibiting the Busia County Land Registrar from enforcing the decision of 16th August 2023 in respect of titles No South Teso/Asinge/1719 and South Teso/Asinge/1721.



3. The Respondent and the 1st, 2nd, 3rd, 6th, 10th, 13th, 16th and 17th Interested Parties shall meet the Applicants costs.

BOAZ N. OLAO

JUDGE

11TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL AT BUSIA ON THIS 11TH DAY OF JULY 2024.

Right of Appeal.

BOAZ N. OLAO

JUDGE

11TH JULY 2024

Further Order:

For those parties who are acting in person, they be notified to collect copies of the Judgment from the Deputy Registrar on 11th July 2024 or any other convenient date and sign for them.

BOAZ N. OLAO

JUDGE

11TH JULY 2024

