



**Republic v District Land Registrar Narok & another; Koini  
 (Exparte Applicant) (Environment and Land Judicial Review Case  
 E001 of 2024) [2024] KEELC 6544 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6544 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT NAROK  
 ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2024**

**CG MBOGO, J**

**OCTOBER 8, 2024**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
 IN THE FORM OF CERTIORARI, PROHIBITION & MANDAMUS**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT, CAP 300**

**AND**

**IN THE MATTER OF ARTICLES 25 (C), 27 (1) & (2),47  
 (1) & 50 (1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DISTRICT LAND REGISTRAR NAROK ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KINGASUNYE KIPAS KOINI ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to leave granted on 7<sup>th</sup> February, 2024 the ex parte applicant filed the notice of motion dated 4<sup>th</sup> March, 2024 expressed to be brought under Section 3A of the Civil Procedure Act, Order 51, Order 53 Rules (3) and (4) of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act, Cap 26 seeking the following orders: -



- a. An order of *certiorari* to remove into this honourable court and quash the decision of the 1<sup>st</sup> respondent to remove a lawful caveat entered by the applicant on 4<sup>th</sup> January, 2024 by the applicant in respect of property known as Land Reference Number Cis-Mara/ Ololulunga/ 101.
  - b. An order of *mandamus* to compel the 1<sup>st</sup> respondent to rescind the decision to remove a lawful caveat entered by the applicant on 4<sup>th</sup> January, 2024 by the applicant in respect of property known as Land Reference Number Cis-Mara/ Ololulunga/ 101.
  - c. An order of prohibition to forbid the 1<sup>st</sup> respondent from implementing the decision to remove the caveat entered by the applicant on 4<sup>th</sup> January, 2024 and or dealing in any way whatsoever with the property known as Land Reference Number Cis-Mara/ Ololulunga/ 101.
2. The application is premised on the grounds inter alia that the *ex parte* applicant is the first wife of Samson Kipas Koni who is the registered proprietor of parcel known as Cis-Mara/ Ololulunga/ 101.
  3. Further grounds upon which the orders are sought is that the 1<sup>st</sup> respondent acted ultra vires with no regard to the rules of fair hearing as enshrined under Articles 25 (c), 27 (1), and (2), 47(1) and 50 (1) of the *Constitution*. Further, that there was abuse of power in contravention of the procedure for removal of a caution provided under Section 73 (2) of the *Land Registration Act*, Cap 300, irrelevant consideration and illegality, unreasonableness, bad faith, and procedural impropriety.
  4. The application is supported by the verifying affidavit of the *ex parte* applicant sworn on even date. The *ex parte* applicant deposed that on 4<sup>th</sup> January, 2024, and having the knowledge that her husband intended to cause subdivision of the suit property without her knowledge, she placed a caution over the entire land to protect her beneficial interest and the interests of her children. She deposed that vide the letter dated 19<sup>th</sup> January, 2023(sic), she was summoned by the 1<sup>st</sup> respondent to appear on 31<sup>st</sup> January, 2024 for hearing and determination of the caution she had lodged.
  5. The ex-parte applicant deposed that at the time the summons was served, she was unwell and she would not have been able to attend the hearing. Further, that her advocate wrote to the 1<sup>st</sup> respondent informing them of her predicament vide the letter dated 29<sup>th</sup> January, 2024, and the hearing was deferred to 16<sup>th</sup> February, 2024. She deposed that the 1<sup>st</sup> respondent despite the full knowledge of her illness, and despite deferring the date to 16<sup>th</sup> February, 2024, went ahead and unprocedurally caused the removal of the caution without giving her an opportunity to be heard.
  6. The *ex parte* applicant deposed that the actions by the 1<sup>st</sup> respondent to remove a lawful caution entered on 4<sup>th</sup> January, 2024 was unlawful and unprocedural. Further, that it is in the best of justice that the orders sought are granted.
  7. The substantive motion was canvassed by way of written submissions. The *ex parte* applicant filed her written submissions dated 2<sup>nd</sup> July, 2024 where she raised two issues for determination as listed below: -
    - a. Whether the 1<sup>st</sup> respondent illegally and unprocedurally caused the removal of a caution lodged by the ex parte applicant on the parcel of land reference number Cis-Mara/Ololulunga/101.
    - b. Who shall bear costs of the application.
  8. On the first issue, the *ex parte* applicant submitted that the action by the 1<sup>st</sup> respondent to remove the caution was unlawful and unprocedural with no regard to the rules of fair hearing and in total contravention of the law. The *ex parte* applicant submitted that the 1<sup>st</sup> respondent acted ultra vires and in abuse of power in blatant disregard of the rule of law. She submitted that the 1<sup>st</sup> respondent was



unreasonable, and without giving her a fair hearing proceeded to cause the removal of the caution. She cited bad faith, irrelevant consideration and illegality, procedural impropriety and loss of legitimate expectation as among the grounds which the 1<sup>st</sup> respondent permitted itself to remove the caution.

9. The respondents did not file a response to the application, and as it is, the motion is unopposed. Be that as it may, it is the duty of this court to check whether there is merit or otherwise in the said application before granting any orders. I have considered the application, the evidence tendered, and the written submissions filed by the *exparte* applicant. I am of view that the issue for determination is whether the *exparte* applicant is entitled to the orders of judicial review.
10. In the case of *Pastoli v Kabale District & others* (2008) 2 E.A. 300 the court set out the duty of a court in Judicial Review applications as follows: -

“In order to succeed in an application for judicial review, the applicant has to show that the decision or the act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles are instances of illegality.....irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority would have made such a decision is usually in defiance of logic and acceptable moral standards.....Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non -observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

11. In the case of *Municipal Council of Mombasa v Republic Umoja Consultants Ltd* Civil Appeal No 185 of 2007 (2002) eKLR the Court of Appeal held that: -

“The court would only be concerned with the process leading to the making of the decision and how was the decision arrived at. Did those who made the decision have power i.e. jurisdiction to make it. Were the provisions affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant 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 this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review.”

12. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury's Laws of England* 4<sup>th</sup> Edition Vol (1)(1) Para 60.
13. Section 71 of the *Land Registration Act* provides that:

1. A person who—



- a. claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
  - b. is entitled to a licence; or
  - c. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.
2. A caution may either—
    - a. forbid the registration of dispositions and the making of entries; or
    - b. forbid the registration of dispositions and the making of entries to the extent expressed in the caution.
  3. A caution shall be in the prescribed form, and the registrar may require the cautioner to support the caution by a statutory declaration.
  4. The registrar may reject a caution that is unnecessary or whose purpose can be effected by the registration of an instrument under this Act.
  5. Subject to this section, the caution shall be registered in the appropriate register.”

14. While Section 72 of the [Land Registration Act](#) stipulates that:

1. The registrar shall give notice, in writing, of a caution to the proprietor whose land, lease or charge is affected by the caution. (2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”

15. Further, Section 73 of the [Land Registration Act](#) states thus: -

1. A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the registrar.
2. The registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
3. If a cautioner has not raised any objection at the expiry of the time stated, the registrar may remove the caution. (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the registrar, in writing, of the objection within the time specified in the notice, and the registrar shall, after giving the parties an opportunity of being heard, make such order as the registrar considers fit, and may in the order provide for the payment of costs.”



16. The *ex parte* applicant herein contended that she placed a caution on the suit property owned by her husband for her benefit and that of her children. She further contended that she was summoned to attend hearing on the removal of caution but she was unable to as a result of sickness wherein she sought for a deferral of the hearing. That the 1<sup>st</sup> respondent agreed to the deferral of the hearing and the matter was slated for hearing on 16<sup>th</sup> February, 2024. However, she was surprised to learn that the 1<sup>st</sup> respondent went ahead and unlawfully removed the said caution, thereby denying her the right to a fair hearing. I have perused the documents relied on in this matter. Indeed, the *ex parte* applicant registered a caution on 4<sup>th</sup> January, 2024 as evidenced by a copy of the certificate of official search dated 29<sup>th</sup> January, 2024. Due to a medical report dated 25<sup>th</sup> January, 2024, the *ex parte* applicant was advised to be on bed rest and she could not attend the hearing. The same appears to have been communicated to the 1<sup>st</sup> respondent vide the letter dated 29<sup>th</sup> January, 2024 which bears an illegible stamp acknowledging receipt. However, the caution whether removed or otherwise, appears to have been ‘overtaken by events as registrar already pronounced her decision above.’

17. In the case of *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & others* Civil Appeal No 266 of 1996 [1997] eKLR the Court of Appeal held inter alia as follows:

The order of *mandamus* is of 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 or 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. The order must command no more than the party against whom the application 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... These principles mean that an order of *mandamus* 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done... 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.

18. From the material supplied before this court, there is enough evidence to show that the 1<sup>st</sup> respondent indeed acted without jurisdiction, by abusing its powers to deny the *ex parte* applicant the right to a fair hearing as anticipated by the provisions of Section 73 of the *Land Registration Act*. It is my finding that the *ex parte* applicant has proved her case and the substantive notice of motion dated 4<sup>th</sup> March, 2024 is hereby allowed in the following terms;



- i. An order of *certiorari* is hereby issued to remove and quash the decision of the 1<sup>st</sup> respondent to remove a lawful caveat entered by the applicant on 4<sup>th</sup> January, 2024 by the applicant in respect of property known as Land Reference Number Cis-Mara/Ololulunga/101.
- ii. An order of prohibition to forbid the 1<sup>st</sup> respondent from implementing the decision to remove the caveat entered by the applicant on 4<sup>th</sup> January, 2024 and or dealing in any way whatsoever with the property known as Land Reference Number Cis-Mara/ Ololulunga/ 101.
- iii. The *ex parte* applicant is hereby awarded costs to be borne by the respondents.

It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**08/10/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C.A

