



**Republic v District Land Registrar, Siaya; Okong’o (Exparte) (Environment and Land
Judicial Review Case E002 of 2021) [2023] KEELC 404 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2021
AY KOROSS, J
FEBRUARY 2, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

THE DISTRICT LAND REGISTRAR, SIAYA RESPONDENT

AND

SIMON PETER OTIENO OKONG’O EXPARTE

JUDGMENT

1. By chamber summons dated September 20, 2021 which this court was moved pursuant to the provisions of Section 8(2) of the *Law Reform Act* and Order 53 Rule 1 of the *Civil Procedure Rules*, this court on January 20, 2022 granted leave to the ex parte applicant to institute judicial review proceedings against the respondent on the following orders;
 - a. The ex parte applicant is granted leave to commence judicial review proceedings to apply for orders of certiorari to quash the gazette notice no 5399 dated July 30, 2020 reference Mr/0783530, a decision of the respondent to revoke the ex parte applicant’s registration as the proprietor of all that piece of land containing 0.17 HA known as East Gem/anyiko/1769.
2. As ordered by the court, the ex parte applicant on February 4, 2022 filed his substantive notice of motion. It was filed within the provisions of Order 53 Rules 3 & 4 of the Civil Procedure Rules, Sections 1(A), (B) and 3A of the *Civil Procedure Act* and he sought the following reliefs;
 - a. An order of certiorari do issue to remove into this Honourable Court for purposes of quashing the decision of the respondent made on the July 30, 2020 vide gazette notice no. 5399 referenced MR/0783520, a decision of the respondent to revoke the ex parte applicant’s



registration as the proprietor of all that piece of land containing 0.17 Ha known as East Gem/Anyiko/1769 and direct the same to vest with the ex parte applicant;

- b. An order of certiorari do issue to remove into this Honourable Court for purposes of quashing the decision of the respondent made on the July 30, 2020 vide gazette notice no 5399 referenced MR/0783520, a decision of the respondent to revoke the ex parte applicant's registration as the proprietor of all that piece of land containing 0.17 Ha known as East Gem/Anyiko/1769 and direct the respondent to issue a title deed over East Gem/Anyiko/1769 to the ex parte applicant;
 - c. An order of certiorari do issue to remove into this Honourable Court for purposes of quashing the decision of the respondent made on the July 30, 2020 vide gazette notice no 5399 referenced MR/0783520, a decision of the respondent to revoke the ex parte applicant's registration as the proprietor of all that piece of land containing 0.17 Ha known as East Gem/Anyiko/1769 and direct the respondent to compensate the ex parte applicant for East Gem/Anyiko/1769 at the current prevailing market rates;
 - d. An order of prohibition do issue prohibiting the respondent from implementing the impugned decision made on July 30, 2020;
 - e. An order of mandamus do issue compelling the respondent to compensate the ex parte applicant for the loss of East Gem/Anyiko/1769 at the current prevailing market rates resulting from the impugned decision made on July 30, 2020 vide gazette notice no 5399 referenced MR/0783520, a decision of the respondent to revoke the ex parte applicant's registration as the proprietor of East Gem/Anyiko/1769;
 - f. Such other orders and reliefs as the Honourable Court may deem appropriate in the circumstances; and
 - g. Costs of the proceedings be provided for. Emphasis added.
3. The motion dated September 20, 2021 was supported on the grounds set out on the statutory statement and verifying affidavit of the ex parte applicant in support of the chamber summons application for grant of leave.
 4. Briefly, it was the ex parte applicant's case inter alia, he was lawfully registered as the proprietor of East Gem/Anyiko/1769 ('suit property') on April 10, 2018; he had been in quiet use and possession of it; he had by an agreement of sale dated February 5, 2018 purchased the suit property from Leonadus Ochieng Oleng; without authority, the respondent by a gazette notice issued on July 30, 2022 illegally revoked the ex parte applicant's proprietorship over the suit property and reverted it back to Leonadus Oleng Ochieng; the actions of the respondent contravened Articles 10, 27, 40 and 47 of the Constitution and criminal proceedings against him over the suit property in Siaya SPM 58 of 2021 were withdrawn.
 5. The ex parte applicant contended the respondent's actions were illegal and unprocedurally unfair, irrational, contravened the provisions of law, unreasonable, ultra vires and, interfered with his right of legitimate expectation.
 6. Despite service, the respondent did not file any documents in opposition to the motion. Notwithstanding the motion was unopposed, it is the duty of the court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles.
 7. As directed by the court, Mr Oduol disposed of the motion by way of written submissions dated February 5, 2022. He recapped the averments made in the ex parte applicant's pleadings and this court



need not rehash them. It was counsel's submissions the revocation of the ex parte applicant's title to the suit property was ultra vires, contravened the ex parte applicant's right to fair administrative action and violated constitutional and statutory provisions of law. Counsel placed reliance on Article 47 (1) and (2) of the Constitution which provides as follows;

‘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.’

8. It was counsel's submissions that this constitutional provision was breathed into life by Section 4 (1) (2) and (3) of the Fair Administrative Action Act which states as follows;

‘4. \ Administrative action to be taken expeditiously, efficiently, lawfully etc

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where An administrative action is likely to adversely affect the rights or fundamental freedoms of Any person, the AdmInistrAtor shAll give the person Affected by the decision–
 - (a) Prior and adequate Notice of the nature and reasons for the proposed administrative action;
 - (b) An opportunity to be heard and to make representations in that regard;
 - (c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) A statement of reasons pursuant to section 6;
 - (e) Notice of the right to legal representation, where applicable;
 - (f) Notice of the right to cross-examine or where applicable; or
 - (g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

9. Counsel argued that Section 79(2) of the Land Registration Act did not confer upon the land registrar with the authority to cancel title documents because this authority was by virtue of Section 80 of the same Act exclusively vested with the ELC and he placed reliance on the case of Republic v Chief Land & Another ex-parte Yosabia Kerubo Manyura (2018) eKLR where Mutungi J in his dicta expressed himself thus;

‘It is evident from the provisions of Section 79 (above) that the Land Registrar's powers of rectification are limited to rectifying errors, mistakes or omissions that do not materially affect the interests of any proprietor. Cancellation of a title quite clearly would materially affect the interest of the registered proprietor. In my view, it is only the court that under



Section 80(1) of the *Land Registration Act*, 2012 that has the power to direct the cancellation of a registration.’

10. Counsel argued the motion was merited and it be allowed.

Analysis and determination

11. After reviewing the pleadings, annexures thereto and submissions filed by the ex parte applicant’s counsel, the main issue for determination is whether the ex parte applicant is entitled to the reliefs sought.

12. Pertinent issues emerged which may dispose of the motion. Order 53 Rule (1) of the Civil Procedure Rules provides that:

‘(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.’

Whereas Rule 3(1) thereof stipulates;

‘3. Application to be by notice of motion [Order 53, rule 3.]

(1) When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.’

13. As earlier highlighted in this judgment, the ex parte applicant sought leave on a singular judicial review order leave to commence judicial review proceedings to apply for orders of certiorari to quash the gazette notice no 5399 dated July 30, 2020 reference MR/0783530, a decision of the respondent to revoke the ex parte applicant’s registration as the proprietor of all that piece of land containing 0.17 HA known as EAST GEM/ANYIKO/1769. This leave was granted by the court.

14. Paragraph 2 of this judgment has underlined certain portions of the motion which introduced new orders that were not the subject of such leave. The ex parte applicant went on a frolic of his own and introduced several new prayers inter alia, orders of certiorari to vest the suit property on the ex parte applicant, issuance of a title deed to him, compensation, prohibition and mandamus.

15. Having brought himself within the provisions of Order 53 of the Civil Procedure Rules, the ex parte applicant was bound to abide by the procedures set out therein.

14. The clear provisions of Order 53 Rules 1 and 3(1) of the Civil Procedure Rules limits the prayers sought in a substantive motion to that which leave was obtained. Any other prayer that was outside this purview was incompetent and a nullity. Consequently, I hereby strike out the words ‘and direct the same to vest with the ex parte applicant’ that was sought in prayer (a) of the motion. In addition, I also strike out in entirety paragraphs (b), (c), (d) and (e) of the prayers sought in the said motion. In this, I am guided by the persuasive decision of Aburili J in *Republic v Chief Magistrate’s Court Nairobi Exparte Jeff Koinange & 11 others [2017] eKLR* where the court stated;

‘In this case, prayers Nos 2 and 4 of the amended notice of motion being for certiorari and mandamus are not grounded on any leave of court sought and therefore those prayers cannot stand in these proceedings. Accordingly, the two prayers are hereby struck out.’

15. Having struck out the offending prayers, I will proceed to determine whether the main prayer that was sought is merited.



16. The submissions of counsel indeed capture the legal position. In light of Section 80 of the [Land Registration Act](#), the ELC is vested with mandate to amend or cancel the registers of parcels of land if they were obtained or omitted by fraud or mistake. Courts have pronounced themselves in several decisions on this and I need not reinvent the wheel.
17. The role of the registrar on rectification of titles is well spelt out in Section 79 of the same Act. A close reading of Section 79 does not demonstrate the Land Registrar had the mandate to cancel the title document of a registered proprietor. I am without a shadow of doubt the land registrar acted ultra vires when by a gazette notice cancelled the title deed for land parcel no. East/Anyiko/1769 that was allegedly registered in the ex parte applicant's name. However, from the pleadings, this court cannot rest there.
18. A review of the averments in the ex parte applicant's pleadings and title documents show the suit property is East Gem/Anyiko/1769 whilst that in the gazette notice referenced East/Anyiko/1769. Whether there was an error or not is not the subject for this court's determination but what has caught this court's attention is that these are two distinct parcels of land. The net effect is that the impugned gazette notice did not cancel East Gem /Anyiko/1769 which is the ex parte applicant's parcel of land.
19. Two distinct parcels numbers cannot exist over the same parcel of land. See the decision of this court in [National Bank of Kenya v Mary Awino Abiero \(suing as the Legal Representative of the Estate of Everest Abiero Ameny & another; Colinet Auctioneers \(Interested Party\) \[2022\] eKLR](#) where this court held as follows;

'These registration sections are identified by distinctive names and may further be divided into blocks which have distinctive numbers or combinations of numbers and letters. The name of the registration section, the number and the letter of the block is deemed sufficient reference to a particular parcel of land. This provision of law echoes the provision of Section 18(3) and (4) of the repealed Registered [Land Act](#). What these provisions of law imply is that each parcel of land has a unique reference that is distinct from any other parcel of land'
20. The gazette notice that was at the center of the ex parte applicant's pleadings did not make any reference whatsoever to the suit property and on that basis, it is my finding that this court cannot grant the orders sought.
21. The gazette notice was issued on July 30, 2020 and the chamber summons for leave to file judicial review proceedings was filed on September 21, 2021. Apparently, it was filed outside the statutory period of 6 months; it was statutory barred. See Section 9 (3) of the [Law Reform Act](#) and Order 53 Rule 2 of the Civil Procedure Rules.
22. Though not fatal, by the provisions of Order 53 Rules 6 of the Civil Procedure Rules this court has discretion to add a proper party who would have been affected by the outcome of the decision of this court. It was paramount for the ex parte applicant to join any party who would have been affected by the outcome of the court decision as an interested party; which he did not.
23. For the reasons stated above, it is my finding that the judicial review proceedings were not merited and I hereby dismiss it. Because the attorney general did not enter appearance or file pleadings in these proceedings, the ex parte applicant shall bear his own cost.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF FEBRUARY 2023.

HON. A. Y. KOROSS

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:



In the Presence of:

Mr. Oduol for the exparte applicant.

Mr. Kobimbo for the respondent.

Court assistant: Ishmael Orwa

