



**Republic v Land Registrar, Narok County; Okello (Interested Party);  
Leparakuo (Exparte Applicant) (Environment and Land Judicial Review Case  
E022 of 2022) [2023] KEELC 20563 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20563 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E022 OF 2022  
CG MBOGO, J  
OCTOBER 12, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND REGISTRAR, NAROK COUNTY ..... RESPONDENT**

**AND**

**WILLIAM OMONDI OKELLO ..... INTERESTED PARTY**

**AND**

**MUSANA OLE LEPARAKUO ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to leave granted on 16<sup>th</sup> November, 2022, the *Ex-Parte* Applicant filed the Notice of Motion Application dated 2<sup>nd</sup> December, 2022, expressed to be brought under Section 8 & 9 of the *Law Reform Act*, Section 16 (3) and (4), Section 4(1), 7(1)(a), (b), 7 (2) and 9 of the *Fair Administrative Action Act* No. 4 of 2015, Section 71,72,73 & 74 of the *Land Registration Act* No. 3 of 2012, Order 53 Rules 1 & 2 of the *Civil Procedure Rules* seeking the following orders: -

1. An order of *Certiorari* to remove into the honourable court and quash the proceedings, ruling and consequential orders of the 1<sup>st</sup> respondent, the Land Registrar, Narok Land Registry authorizing the conditional removal of the caution registered on LR. No.Cis Mara/Oleleshwa/19699 upon execution of instruments of transfer of seven (7) acres of land by the exparte applicant in favour of the interested party dated 13<sup>th</sup> May 2022 but received on 24<sup>th</sup> May 2022.



2. An order of *Certiorari* to remove into the honourable court and quash the caution registered by the interested party against LR.No. Cis Mara/Oleleshwa/19699.
  3. An order of *Certiorari* to remove into the honourable court and quash the title deed for LR.No.Cis Mara/Oleleshwa/19698.
  4. An order of *mandamus* compelling the respondent to:
    - a. Remove and or lift the caution registered by the interested party against LR. No. Cis Mara/Oleleshwa/19699.
    - b. Issue a title deed for LR. No. Cis Mara/Oleleshwa/19699 to the exparte applicant.
  5. That costs be provided for.
2. The application is supported by the grounds in the statutory statement dated 14<sup>th</sup> November, 2022 which stated that the respondent has acted irrationally by registering cautions against the *Ex-Parte* Applicant's land without any supporting documentation, failing to ensure that the Interested Party presents supporting documents before registration of the cautions and or during the hearing and that the respondent's decision was made arbitrarily capriciously and in bad faith.
  3. The application was supported by the verifying affidavit of the *Ex-Parte* Applicant deposed that he was the registered owner of LR. No. CisMara/Oleleshwa/16853 which was later subdivided and parts thereof sold to third parties and that the suit property is his matrimonial home where his family resides. Further, that the Land Registrar has refused to issue him with a title deed for the suit property after the original title deed was surrendered for excision, registration and transfer of other parcels to other purchasers.
  4. The *Ex-Parte* Applicant further deposed that the Interested Party registered a caution on LR. No. Cis Mara/Oleleshwa/11801 on 16<sup>th</sup> August, 2021 alleging purchaser's interest without his knowledge which caution was later mysteriously removed without notice to himself and or without a hearing. That later, when he surrendered his title to the land registry for registration and transfer of part thereof to a third party, the Respondent working in cahoots with the interested party caused the excision of five acres of land from LR.No. CisMara/Oleleshwa/19698 on 25<sup>th</sup> January, 2021 and had it registered in the name of the Interested Party. Further, that he lodged a criminal complaint with the police and instituted a suit which was later withdrawn upon the Respondent's cancellation of the said title deed.
  5. He further deposed that later, a fresh caution was registered by the Interested Party on LR.No. CisMara/Oleleshwa/19699 without his knowledge and upon making an enquiry, the Respondent issued a notice to the Interested Party to make representations vide a letter dated 9<sup>th</sup> March, 2022. Further, that the Interested Party made written representations vide a letter dated 11<sup>th</sup> April, 2022 with no evidence of purchase of land save for unsupported allegations.
  6. The *Ex-Parte* Applicant further deposed that he requested for further particulars from the Respondent before the hearing which particulars were never rendered. Further, that he attended a hearing together with his second wife who made representations on behalf of her co-wife to the effect that their consent as spouses was never sought and granted if at all and thus were opposed to any subdivisions.
  7. It was further deposed that a ruling was issued to them on 24<sup>th</sup> May, 2022 dated 13<sup>th</sup> May, 2022 which ruling attempted to rewrite the contract as the Respondent ordered for a surrender of seven acres of his land before the caution is lifted. The *Ex-Parte* Applicant contended the manner in which the Respondent has been registering and lifting cautions on his land without justifiable cause and process



- without his knowledge and consent of his spouses. Also, that it was wrong for the Respondent to fail to record his wives representation or consider the centrality of spousal consent in land transactions.
8. The application was opposed by the replying affidavit of the Interested Party sworn on 6<sup>th</sup> January, 2023. The interested party deposed that vide a written sale agreement, he purchased 10 acres of land from the *Ex-Parte* applicant as then comprised in parcel no. Cis-Mara/Oleleshwa/18653 a fact which has not been denied by the *Ex-Parte* Applicant in paragraph 4 of his supporting affidavit dated 9<sup>th</sup> September, 2022 filed in Narok CMCC Misc no. 2 of 2021 which was withdrawn. Further, that the only point of contention is the *Ex-Parte* Applicant alleges to have sold to him Cis-Mara/Oleleshwa/981 which he has not provided proof nor take any steps to apportion him his acreage bought from the parcel despite his plea to do so.
  9. The Interested Party further deposed that with the intervention of the Narok North Assistant County Commissioner, the *Ex-Parte* Applicant was arrested and he agreed to take seven acres as the *Ex-Parte* Applicant's wife pestered him to consider their children. Also, that despite having purchased 10 acres, the *Ex-Parte* Applicant continued subdividing Cis-Mara/Oleleshwa/18653 without considering his interest which he later came to realise that he only had five acres and upon deliberation, the *Ex-Parte* Applicant pledged to have it amended to read 10 acres. That it was upon an out of court settlement between the *Ex-Parte* Applicant and one Betty Koikai that the mutation for new numbers was registered and the Respondent signed the transfer and consent documents which necessitated the registration of title deed Cis-Mara/Oleleshwa/19698 which is 5 acres.
  10. The Interested Party further deposed that upon realizing that the land transferred was five acres, he went forth to place a caution on Cis-Mara/Oleleshwa/19699 which upon enquiry on subdivision, the *Ex-Parte* Applicant informed him that he has two acres which if he transfers will add up to 7 acres which the Interested Party did not object to. Further, that the *Ex-Parte* Applicant showed him land which he later learnt that he had sold portions thereof to other parties and that is when he placed a caution and filed Misc. No. 2 of 2021. Further, that the *Ex-Parte* Applicant somehow abandoned Misc No. 3 of 2021 and requested the Respondent to remove the caution in Cis-Mara/Oleleshwa/19699 which he was then issued with a notice and which he responded.
  11. It was further deposed by the Interested Party that he came to realise that the title deed already issued to him (which he still holds the original title) had since been cancelled and subdivided resulting into new numbers Cis-Mara/Oleleshwa/ 21184-21188. That the *Ex-Parte* Applicant is acting fraudulently noting the subsisting entries of caution placed on Cis-Mara/Oleleshwa/11801. That indeed, the *Ex-Parte* Applicant applied for a removal of the caution and upon notification, he objected and the Respondent gave them a date for hearing. Further, that a ruling was delivered on 13<sup>th</sup> May, 2022 and the aggrieved party was given 14 days to appeal which the *Ex-Parte* Applicant never did.
  12. The Interested Party deposed that the procedure by the Respondent was as outlined in law as a matter of administrative justice and for an administrative cause.
  13. Mercy Kakenya Parakuo filed a supporting affidavit sworn on 22<sup>nd</sup> February, 2023 in response to the Interested Party's replying affidavit. In her supporting affidavit, Mercy Kakenya Parakuo deposed that she is the second wife of the *Ex-Parte* Applicant and a co-wife of Margaret Ene Leparakuo and affirmed that Cis Mara/Oleleshwa/16853 is their matrimonial home. She went on ahead to narrate the circumstances surrounding the case and deposed that any document purporting to have been signed by them is a forgery and is strange to them.



14. In the course of the proceedings, the Interested Party filed on 11<sup>th</sup> May, 2023 a Notice of Motion Application dated 8<sup>th</sup> May, 2023 expressed to be brought under Order 51 Rule 14 (3) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders:-
  1. Spent.
  2. That this honourable court be pleased to strike out and expunge from records the supporting affidavit dated 22<sup>nd</sup> February 2023 sworn by one Mercy Kakenya Parakuo.
  3. That the cost of this application be provided.
15. The application was premised on the grounds inter alia that the in its substantive stage, the *Ex-Parte* Applicant filed a Notice of Motion Application dated 2<sup>nd</sup> December, which is supported by the verifying affidavit of the *Ex-Parte* Applicant sworn on 14<sup>th</sup> November, 2022 and that the supporting affidavit dated 22<sup>nd</sup> February, 2023 is misplaced and against the rules of procedure.
16. The application was supported by the affidavit of the Interested Party sworn on even date. The Interested Party deposed that the said Mercy Kakenya Parakuo who deposed to the affidavit sworn on 22<sup>nd</sup> February, 2023 is not a party to these proceedings and her affidavit should be expunged from the records as it is not clear what exactly the affidavit is supporting since the *Ex-Parte* Applicant had already sworn an affidavit.
17. On 22<sup>nd</sup> June, 2023, the Respondent filed grounds of opposition dated 6<sup>th</sup> June, 2023 opposing the application dated 2<sup>nd</sup> December, 2022 on the following grounds: -
  1. That in registering the impugned cautions on land parcels no. CisMara/Oleleshwa/19699 and CisMara/19698 the respondent acted within his mandate as provided under Section 71 of the Land Registration Act, No. 3 of 2012.
  2. That the respondent conducted the hearing and rendered his decision in compliance with the provisions of Section 74 (4) of the Land Registration Act, No. 3 of 2012 which gives the Land Registrar the powers to make such orders as the registrar considers fit.
  3. That there is a dispute as to the ownership of the suit parcels which requires that oral and/or documentary evidence be adduced and as such this is an issue that cannot be determined in a judicial review application.
  4. That cancellation of the title to CisMara/Oleleshwa/19698 is an issue that requires investigation as to the manner in which the title was issued and as such this is not an issue that can be determined in judicial review proceedings.
  5. That this application does not meet the threshold for granting the judicial review orders being sought.
  6. That this application is misconceived, mischievous, an afterthought and an abuse of the court process hence subject for dismissal.
18. On 29<sup>th</sup> August, 2023, the Interested Party filed a further replying affidavit sworn on 28<sup>th</sup> August, 2023. The Interested Party in his further replying affidavit, reiterated the contents of his replying affidavit that there is no need to reproduce the same.
19. The substantive Motion and the Notice of Motion Application dated 8<sup>th</sup> May, 2023 were both canvassed by way of written submissions. On the 16<sup>th</sup> August, 2023 the Interested Party filed written submissions dated 7<sup>th</sup> September, 2023. The said submissions dealt with the Notice of Motion



- Application dated 8<sup>th</sup> May, 2023. In these submissions, the Interested Party raised one issue for determination which is whether the supporting affidavit dated 22<sup>nd</sup> February 2023 sworn by one Mercy Kakenya Parakuo should be expunged from the records.
20. On this issue, the Interested Party submitted that no leave of the court was sought by the said deponent to be enjoined to these proceedings as a party hence the import of the affidavit is unknown. The Interested Party relied on the cases of *Joseph Baker Kiamba Mwaniki v Abdi Godana Dida (Chairman) & 4 Others* [2022] eKLR and *P.M.M Private Safaris v Kevin Ijatia* [2006] eKLR.
  21. On 11<sup>th</sup> September, 2023, the Interested Party filed written submissions with regard to the substantive Motion dated 7<sup>th</sup> September, 2023 and raised two issues for determination as listed below: -
    1. Whether the interested party bought land from the ex parte applicant and had an interest in the cautioned parcel.
    2. Whether the registrar followed the due process of the law while delivering his ruling dated 13<sup>th</sup> May 2022.
  22. On the first issue, the Interested Party submitted that the *Ex-Parte* Applicant entered into a contract with the Interested Party and frustrated and/or neglected to perform his part of the contract and instead of making good the harm and frustrations, he has caused the Interested Party to come to this court seeking relief when on his end, he has no clean hands. The Interested Party relied on the case of *Nugari Gachomo v Equity Bank Limited* [2019] eKLR.
  23. On the second issue, the Interested Party submitted that the Respondent gave each party a chance to be heard together with their witnesses and upon considering all the circumstances surrounding the case, rendered a ruling dated 13<sup>th</sup> May, 2022 and any aggrieved party was given 14 days to appeal. The Interested Party submitted that the Respondent acted in the interest of both parties and as such, the ruling dated 13<sup>th</sup> May, 2022 ought to be upheld.
  24. By the time of writing this Judgement, the *Ex-Parte* Applicant and the Respondents had not filed their submissions.
  25. I have considered the substantive Notice of Motion dated 2<sup>nd</sup> December, 2022 and the Notice of Motion Application dated 8<sup>th</sup> May, 2023 and the issues for determination are as follows: -
    1. Whether the supporting affidavit of Mercy Kakenya Parakuo ought to be expunged from the records.
    2. Whether the ex parte applicant is entitled to the orders of *Certiorari* and *mandamus*.
  26. I will begin with the Notice of Motion Application dated 8<sup>th</sup> May, 2023 which deals with the first issue. The *Ex-Parte* Applicant herein filed Chamber Summons dated 14<sup>th</sup> November, 2022 seeking leave to file judicial review proceedings against the respondent. The application was accompanied by the *Ex-Parte*'s statutory statement dated 14<sup>th</sup> November, 2022 and a verifying affidavit sworn on 14<sup>th</sup> November, 2022. The *Ex-Parte* Applicant was granted leave on 16<sup>th</sup> November, 2022 to commence judicial review proceedings. The Interested Party filed a replying affidavit sworn on 6<sup>th</sup> January, 2023 in response to the Notice of Motion and in response, one Mercy Kakenya Parakuo filed a supporting affidavit sworn on 22<sup>nd</sup> February, 2023. In this affidavit, the said Mercy in paragraph 2 deponed that, "...and the advocate has outlined the import and tenor of the Interested Party's replying affidavit which we wish to respond to."



27. From the above, it appears that the deponent, Mercy Kakenya Parakuo, assumed the role of the *Ex-Parte* Applicant in this case and opted to respond to the replying affidavit instead. However, this deponent is unknown to this court, and in filing the substantive Notice of Motion Application, the *Ex-Parte* was clear that the said application was accompanied by a statutory statement dated 14<sup>th</sup> November, 2022 and a verifying affidavit sworn on 14<sup>th</sup> November, 2022.
28. Order 53 Rule 4 (1) of the [Civil Procedure Rules](#) provides as follows: -
- “Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement”(emphasis)
29. From the above provision of the law, the approach by the said Mercy who sought to respond to the replying affidavit of the Interested Party was wrong. As far as the court is concerned and more so at the substantive stage, she is a stranger to these proceedings. The situation would have only been different if her “supporting affidavit” was detailed as one of the documents supporting the Notice of Motion.
30. On the second issue, the *Ex-Parte* Applicant has asked this court to grant the orders of *Certiorari* and *mandamus* to remove into this honourable court and quash the decision of the Respondent rendered via a ruling dated 13<sup>th</sup> May, 2023. Before I delve further, I realise that both the *Ex-Parte* Applicant and the Interested Party went into the merits of the case detailing the process based on either side of the story as to what culminated into the arrival of the decision by the Respondent. Indeed, the Respondent was right that issues of ownership being at the centre of the dispute came out clearly and which the Respondent in its grounds of opposition stated that it would require full trial to determine the issue.
31. I agree that judicial review cannot give answers as to ownership of the suit land but will only be limited to check whether the Respondent in its powers correctly applied the law. In addition, judicial review proceedings do not deal with the merits of the decision but by the decision-making process.
32. In [Municipal Council of Mombasa v Republic & Umoja Consultants Ltd](#) Civil Appeal No. 185 of 2001 the Court of Appeal held:
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision.”
33. 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 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.](#)



34. 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.

35. In this case, the Respondent issued a notice of withdrawal of caution on property known as Cis Mara/Oleleshwa/19699 upon the interested party dated 9<sup>th</sup> March, 2022. The Interested Party responded vide a letter dated 11<sup>th</sup> April, 2022 and objected to the removal of the caution and protested the cancellation of the title no. Cis-Mara/Oleleshwa/19698. The *Ex-Parte* Applicant through its advocate, respondent vide a letter dated 12<sup>th</sup> April, 2022 which prompted a hearing that took place on 19<sup>th</sup> April, 2022 before the Land Registrar in Narok.

36. I have taken time to look at the ruling dated 13<sup>th</sup> May, 2022 and both the *Ex-Parte* Applicant and the Interested Party gave their testimonies and Mr. Ombati testified as a witness for both parties. The Respondent in its ruling noted that the contractual relationship with regard to the parcel of land was not in dispute and the dispute was in relation to which parcel of land was sold to the Interested Party. In exercising its powers under Section 73 (4) of the *Land Registration Act*, the Respondent made the finding as follows: -

“Therefore, keeping the above in mind, and upon hearing both parties and their agents and witnesses therein, I hereby made determination as follows: that the caution is herein be withdrawn on condition that the proprietor execute the necessary documents to effect



transfer of 7 acres of that parcel of land known as Cis Mara/Oleleshwa/16853 to the cautioner herein.”

37. The question then is, was the Respondent irrational in arriving at its decision? Was there procedural fairness? And did the Respondent abuse its statutory powers?

38. Section 73 of the [Land Registration Act](#) provides as follows: -

- “(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 orders as the Registrar considers fit, and may in the order provide for the payment of costs...”

39. In my view, the Respondent followed to the letter the provisions of Section 73 of the [Land Registration Act](#) and the *Ex-Parte* Applicant may not have been satisfied with the decision of the Respondent prompting the filing of the instant suit.

40. I see no reason as to why this court should interfere with the decision of the Respondent. As such, the Notice of Motion Application dated 8<sup>th</sup> May, 2023 is allowed in terms of prayer 2 to the effect that the supporting affidavit sworn on 22<sup>nd</sup> February, 2023 by Mercy Kakenya Parakuo is hereby expunged from the records. That leaves the said Notice of Motion Application with no supporting affidavit to stand on as is required under Order 53 Rule 4 (1) of the [Civil Procedure Rules](#). The Notice of Motion Application dated 2<sup>nd</sup> December, 2022 is hereby dismissed. Each party to bear its own costs.

It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 12TH day of OCTOBER, 2023.**

**HON. MBOGO C.G.**

**JUDGE**

**12/10/2023.**

**In the presence of:**

**CA:Pere Meyoki**

