



Republic v Attorney General & 5 others; Wuomuga (Exparte Applicant) (Miscellaneous Application E004 of 2022) [2023] KEELC 22628 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 22628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
MISCELLANEOUS APPLICATION E004 OF 2022**

E ASATI, J

OCTOBER 5, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE REGIONAL LAND SURVEYOR 2ND RESPONDENT

THE COUNTY LAND REGISTRAR 3RD RESPONDENT

JAMES RATENG' 4TH RESPONDENT

MARY ADHIAMBO JUMA 5TH RESPONDENT

MICHAEL OTIENO JUMA 6TH RESPONDENT

AND

JOSHUA EVANS ONYANGO WUOMUGA EXPARTE APPLICANT

JUDGMENT

Introduction

1. Vide the Notice of Motion dated 14th October 2022, the ex parte applicant initiated the Judicial Review proceedings herein under Order 53 Rule 3 of the *Civil Procedure Rules* Cap 21 Laws of Kenya, and Rule 3 of the *Constitution of Kenya (Protection of Rights and Fundamentals Freedoms) Practice and Procedure Rules 2013*. The relied sought are:-
 - a. An order of Judicial review by way of certiorari do issue to bring before this court and quash the decision of the 3rd Respondent's amendment of the Registry Index Map expressed thereon as Note No. 50 to have been undertaken on the 18th of February 2022 purporting to remove the



applicant's parcel of land known as KISUMU/KONYA/5588 from the Register and including it as constituting the 4th Respondent's parcel of land known as Kisumu/Konya/2774.

- b. An order of Judicial Review by way of certiorari, do issue to bring before this court and quash the decision of the 2nd Respondent which resulted into the second sub-division of parcel No. Kisumu/Konya/2778 into new parcels of land to wit; Kisumu/Konya/6176 and 6177 purported to have been undertaken on the 25th February 2010.
 - c. An order of Judicial Review of prohibition do issue restraining the 2nd and 3rd Respondents from sub-dividing, amending and/or undertaking a mutation in the Registry Index Map relating to Kisumu/Konya/5588 without strict compliance with the relevant provisions of all the applicable laws relating to such an exercise, if at all, it should be found necessary to sub-divide, amend and/or undertake a mutation on the same after these proceedings.
 - d. An order of Judicial Review by way of mandamus do issue directing the 2nd Respondent to annul the unlawful second sub-division of parcel of land known as Kisumu/Konya/2778 and its resultant new parcels known as Kisumu/Konya/6176 and 6177.
 - e. An order of Judicial Review by way of Mandamus, do issue directing the 3rd Respondent to amend the Registry Index Map and reinstate the status of the applicant's parcel of land known as Kisumu/Konya/5588 as earlier contained in the previous Registry Index Map before the amendments complained of herein.
 - f. Costs of these proceedings be provided for.
2. The application was based on the grounds in the Notice of Motion and the Statement of Facts, Affidavit Verifying statement of Facts and the annexures thereto filed with the chamber summons application for leave.
 3. In response to the Judicial Review application, only the 4th Respondent filed a Replying Affidavit. The rest of the Respondents filed no response to the Notice of Motion application. An affidavit of service sworn by a process server by the name of James Otieno Okudo on 2nd November 2022 and filed in court on 7th November 2022 shows that the Respondents were all served with court order and the Notice of Motion on 26th October 2022 at various hours of the day.
 4. On 27/4/2023 directions were taken that the Judicial Review application be canvassed by way of written submissions.

The application

2. The application was brought on the grounds that the ex parte applicant is the registered proprietor of land parcel known as Kisumu/Konya/5588 the suit land, which he bought from one James Juma Okoko deceased. That the suit land was part of the deceased's original parcel known as Kisumu/Konya/2778 which upon purchase was sub-divided by the deceased so as to create the suit land and land parcel No. Kisumu/Konya/5587. That the suit land was then transferred to the applicant on 30th June 2008.
3. That the 5th and 6th Respondents who are widow and son respectively of the vendor James Juma Okoko deceased, on 8/3/2010 after his death purported to sub-divide land parcel No. Kisumu/Konya/2778 which was non-existent) and created parcel Nos. Kisumu/Konya/6176 and 6177 with the result that the original land parcel No. Kisumu/Konya/2778 now has two parallel and conflicting sub-division with two (2) parcels of resultant parcels.



4. That the ex parte applicant purchased a map from the land Registry on 21st March 2022 and discovered that by an amendment of the Registry Index Map expressed thereon as No. 50 to have been undertaken on 18th February 2022 the map was amended to remove the applicant's land parcel No. Kisumu/Konya/5588 from the map and the same space it previously occupied depicted on the map as being constituted as part of the 4th Respondents' parcel known as Kisumu/Konya/2774.
5. That the purported decision by the 3rd Respondent to amend the Registry Index map relating to the ex parte applicant's land parcel No. Kisumu/Konya/5588 and the purported decision of the 2nd Respondent to undertake a second subdivision on the parcel of land known as Kisumu/Konya/2778 acting under the authority of the 5th and 6th Respondents who neither had Grant of Letters of administration or the consent of the respective registered owners of the earlier subdivisions to cancel their titles constitutes a nullity in law, is and was undertaken ultra vires the power and authority vested in the 2nd and 3rd Respondents. That the entire exercise complained of is unlawful, unfair and unreasonable for reasons:
 - i. The 2nd and 3rd Respondents under the provisions of Section 14(1) and (2), 16 as read with Section 79 of the [Land Registration Act](#) are responsible for the safe custody of the record of registration of all proprietors of land ensuring that no instrument should be registered against any title of land without proper scrutiny and no such instrument should be registered when its effect would be to deprive any registered proprietor of his interests to land without the proprietor's consent or authority.
 - ii. The decision of the 3rd Respondent to amend the Registry Index map is unlawful and ultra vires as it purports to take away the applicant's parcel of land without any notice to him or his authority, consent or without due process at all with result that the applicant now holds a "paper title deed" of no value at all without any land on the ground to account for the same.
 - iii. The decision of the 2nd Respondent to undertake the 2nd sub-division on parcel of land known as Kisumu/Konya/2778 is irrational, unreasonable, irrelevant and ultra vires owing to the fact that the 2nd sub-division was authorized by the 5th and 6th Respondent who did not possess grant of Letters of Administration.
6. That unless the court grants the relief sought the ex parte applicant stands to have lost his proprietary interest in LR No. Kisumu/Konya/5588 and that the resultant parcels of the 2nd sub-division may be disposed of to innocent third parties or otherwise used to the detriment of the Ex parte Applicant with the result that the applicant is likely to suffer such loss as would not be adequately quantifiable or otherwise compensated. That this would render the Ex parte applicant's constitutional and statutory rights and safeguards in his land futile. He therefore sought intervention of the court.

The reply to the application

7. Only the 4th Respondent James Rateng' replied to the application vide his Replying affidavit sworn on 12th May 2013. It is his case that the actions of the 1st, 2nd and 3rd Respondents were lawful, did not offend any provisions of law and were done as a result of his complaint.
8. That he is the registered owner of the parcel of land known Kisumu/Konya/2774 measuring 0.6 Ha. That the parcel of land was clearly demarcated and marked out on the ground as shown by the area map for Kajulu Location Kisumu District 16th Edition Diagram Sheet No. 5 That this is the 16th Edition of the map of the area.



9. That in the year 2018, he noticed several activities going on on his land parcel No. Kisumu/Konya/2774, that he made a complaint at the lands office and a letter dated 10th September 2018 was issued. That he discovered that a portion of his land had been hived off to expand a parcel of land known as Kisumu/Konya/2778 from which the ex parte applicant claims to have bought a portion. That perusal of the area map issued on 5th July 2010 which is the 16th edition shows that vide MUT/124/859/12/09 land parcel No. Kisumu/Konya/2778 was sub-divided to create Kisumu/Konya/5587 and 5588. That the two do not exist. That if the ex parte applicant bought any land from parcel no. 2778 then the same could be a sub-division of parcel No. 6176 or 6177.
10. That page 2 of the mutation is misleading as it shows that the mutation was done on land parcel No. KISUMU/KONYA/2774 yet he has never sold any portion of his land. That as a result of the illegal mutation the size of his land had shrunk as part of it had been hived off.
11. As a result of his complaint to the lands office, his parcel of land was re-established and that the actions of the lands office were meant to rectify an error that had been occasioned on his land.
12. That the report he made to the land office was genuine and in the belief that he will be assisted to re-establish the boundaries of his land.
13. That the remedy of the ex parte applicant is to seek the estate of the owner of parcel Nos. Kisumu/Konya/6176 and 6177. That if the orders sought are allowed, the court will have been used to further an illegality. That entry No. 50 in the 50th Edition of the area map was to rectify the error occasioned by the actions of the ex parte applicant and the owner of land parcel No. Kisumu/Konya/2778 which affected his (4th Respondents') land parcel No. 2774. The 4th Respondent prayed that the Judicial Review application be dismissed with costs.

Submissions

14. Only the ex parte applicant filed submission in the matter. The 5th and 6th Respondents elected not to file any submissions but associated themselves with the submissions by the ex parte applicant.
15. Written submissions dated 19th July, 2023 were filed on behalf of the ex parte applicant by the firm of Owiti, Otieno & Ragot Advocates. Counsel submitted that the 4th Defendant admits that he is the one who lodged the complaint that triggered the actions of the 2nd and 3rd Defendants.
16. That the administrative decision of the 2nd and 3rd Respondents to sub-divide land parcel No. Kisumu/Konya/2778 twice and amend the Registry Index map accordingly is what triggered these proceedings because the 2nd and 3rd Respondents are the persons holding custody and exclusive control of the Register of all titles to land, and the register of all such instruments of registration and amendment of the Land Registry map on behalf of the public and without whose authority of registration, such registration would not arise.
17. That the effect of the manner in which the sub-divisions were undertaken and maps amended is such that the ex parte applicant has literally found himself holding onto a worthless paper title deed in his name, yet on the ground as defined by the Registry Index Maps which is the only source of determination of existence of any land on the ground, he has no such land even by its description by number and the new parcels thereby created held in the names of other persons with difference sizes which constitute re-parcellation and rectification without consent of the Applicant as the registered owner of the affected land. That no notice of actions or opportunity to show cause was given to the applicant.



18. That the actions by the 2nd and 3rd Defendants were ultra vires and exceeded the authority granted to the 2nd and 3rd Defendants by law.

That under the provisions of Section 14(1) and (2) of the *Land Registration Act*, the 2nd and 3rd Respondents are vested with the authority and responsibility for the safe and secure custody of the records of registration of all proprietors to ensure that no instruments are registered against any title when its effects are to deprive any registered proprietor any interest in land without the proprietor's consent or authority.

19. That the decision of the 2nd and 3rd Respondents having adversely affected the rights of the applicant, the 2nd and 3rd Respondents were under a duty to give the applicant a chance to be heard before the condemnation in accordance with the provisions of Section 4(3) of the Fair Administrative Actions Act, 2015.

That the 3rd Respondent in amending the Register Index Map without instructions or authorization and agreement of the exparte applicant as the affected person was in contravention of all laid out legal provisions including Article 47(2) and 50(1) of the *Constitution* of Kenya 2010.

20. Counsel relied on the case of *Patriotic Guards Ltd v James Kipbirchir Sambu* (2018) eKLR at page 6 where the Court of Appeal held that there is no need to restate the importance of fair trial as guaranteed by the *Constitution*. The court stated:

“the right to a fair trial remains at the heart of any judicial determination and courts should endeavor to protect and uphold the same. it is a cardinal rule and it emanates from the principle of natural justice”.

21. Counsel submitted further that the administrative decision of the 2nd and 3rd Respondents should be declared a nullity and set aside by having it quashed by an order of certiorari as sought by the ex parte Applicant.

22. That the decision of the 2nd and 3rd Respondents to register a 2nd sub-division on a land that no longer existed namely; parcel number 2778 as at 8th March, 2010 when the 2nd sub-division was done was equally a nullity. That according to the provisions of Section 16(2) of the *Land Registration Act* upon such sub-division whose effects was to alter the boundaries of the original land, the Land Registrar was under a duty to allocate the new parcel of land new number and had a duty to cancel parcel number 2778. The 2nd Respondent did so on the first sub-division which resulted into the suit land parcel No.KISUMU/KOGONY/5588 and parcel No.5587. But later the Land Registrar and Land Surveyor purported to re-introduce the original parcel No.2778 which now remains along with the impugned new title No.6176 and 6177 in the impugned amendment No.50 of the Registry Index Map. That the old number should not have been allowed to remain along with the two resultant numbers 6176 and 6177.

23. That the 2nd sub-division was initiated by the 5th and 6th Respondents who had no Letters of Administration to the estate of the original registered owner hence the entire transaction was a nullity by having been done by persons who had no authority to do so.

Counsel prayed that the Judicial Review application be allowed and costs be borne by the 4th Respondent who initiated the illegal process and benefited therefrom.



Issues for Determination

24. From the pleadings filed and submissions made, the following emerge as the issues for this court's determination: -
- a. Whether or not the land parcel No.KISUMU/KONYA/2778 was sub-divided at the instance of the original registered owner so as to create resultant parcel Numbers KISUMU/KONYA/5588 and KISUMU/KONYA/5587.
 - b. Whether or not sub-division of land parcel No.KISUMU/KONYA/2778 as to create parcel number KISUMU/KONYA/6176 and 6177 was lawful.
 - c. Whether the decision to sub-divide land parcel No.2778 to create No.6176 and 6177 thereby obliterating the suit land parcel Number 5587 and amending the Registry Index map was ultra vires, unlawful and in breach of the principles of nature justice.
 - d. Whether the ex parte applicant is entitled to the relief sought.
 - e. Who pays the costs?

Analysis and Determination

24. The first issue is whether or not land parcel number KISUMU/KONYA/2778 was sub-divided at the instance of the original registered owner so as to create land parcel numbers KISUMU/KONYA/5588 and 5587.

It was the applicant's case that he bought a portion of land parcel No KISUMU/KONYA/2778 from one James Juma Okoko who was the registered owner. That James Juma Okoko subdivided his land parcel number Kisumu/Konya/2778 to create No. 5588 registered in the ex parte applicant's name and No 5587. To demonstrate this, the applicant exhibited to the court a mutation form marked JE-6 23-7-2010 and attached to the Affidavit Verifying Statements of Facts. The mutation shows that land parcel KISUMU/KONYA/2778 measuring 0.5 Hectares was sub-divided into parcel A, meaning 0.36 Ha. And assigned number 5587, parcel B measuring 0.10 Ha and assigned number 5588 and an allowance of 0.04 for road. The mutation form was signed by James Juma Okoko, Identity card number 254**** of P.O. Box 523, KISUMU. The copy of the mutation form in court is certified as a true copy of the original by the 2nd Respondent on 19th May, 2022. The 2nd and 3rd Respondents did not respond to the issue of the sub-divisions; to admit or deny the same. The 4th Respondent response was that the said subdivision did not exist.

25. In addition to the mutation, the ex parte applicant exhibited a title deed for one of the resultant parcels of the sub-division namely the suit land, registered in the name of the ex parte applicant. The parcel number of the suit land is one of the two parcel numbers shown in the mutation. The title deed is annexure J.E 1 to the Affidavit Verifying Statements of Facts. From the title deed, it is clear that the suit land was registered in the name of ex parte applicant and title deed issued to him in July the year 2008.

The 5th and 6th Respondents agreed with the contention of the ex parte applicant.

I find that parcel No 2778 was subdivided by the original registered owner to create parcel No. 5587 and the suit land registered in the name of the ex parte applicant.

26. The next issue is whether the sub-division of land parcel KISUMU/KONYA/2778 so as to create No.6176 and 6177 was lawful. It is not disputed that there was another sub-division of land No.2778 so as to produce parcel Number 6176 and 6177. The ex parte applicant exhibited to the court a



mutation form marked JEP-7 and dated 25-2-2010. It shows that land parcel known as KISUMU/KONYA/2778 measuring 0.5 Hectare was sub-divided to create parcel “A” measuring 0.37Ha assigned parcel number 6176 and parcel “B” measuring 0.09 Hectares assigned number 6177 and an allowance of 0.04 hectares Road.

The mutation was signed by Mary Adhiambo Juma and Michael Otieno Juma the 5th and 6th Respondents herein. By this time, the the first mutation subdivision and transfer had taken place. The original parcel number 2778 ought to have ceased to exist and register closed upon the sub-division. No evidence was tendered that the first subdivision, transfer and registration was ever nullified. It is not fathomable then how the 2nd and 3rd Respondents managed to retrieve parcel No.2778, sub-divided it and transferred the resultant parcels. This was not lawfully possible.

In the absence of evidence that the first sub-division was nullified and the title issued to the ex parte applicant canceled in accordance with the law, I find that the 2nd sub-division which was admittedly initiated by the 4th Respondent for his benefit was unlawful.

27. The third issue is whether or not the decision to sub-divide land parcel No.2778 to create 6176 and 6177 thereby obliterating the suit property parcel No.5588 and land parcel No.5587 and the decision to amend the Registry Index Map was ultra vires, unlawful and in breach of the principles of natural justice.

The decision and action of the 2nd and 3rd Respondents of sub-dividing the parcel number 2778 for the second time and amending the Registry Index Map to the detriment of the ex parte applicant is not denied.

The evidence available shows that as a result of the decision and action of the 2nd and 3rd Respondent the suit property which is registered in the name of the ex parte applicant no long exists on the ground and instead, new numbers were created which belong third parties. That the ex parte applicant remained only with the title deed document with no corresponding piece of land on the ground.

28. The 4th Respondent claimed that he is the one who initiated the process by making a complaint to the Lands Office when he noticed several activities on land parcel No.KISUMU/KONYA/2774 which belong to him. That during the course of his investigation, he discovered that a portion of his land had been hived off to expand a parcel of land known as KISUMU/KONYA/2778 from which the ex parte applicant claims to have bought a portion which constitutes the suit land herein.

That after several trips to the lands office, his land was re-established as it ought to have been done and the boundaries made. That therefore, the actions of Land Officers were not unlawful and were in line to rectify an error that had been occasion on his land to restore the land to its original position.

29. There is no evidence that the ex parte applicant or the registered owner of the subject land was notified of the 4th Respondent’s complaint to the lands office or of the decision and actions of the 2nd and 3rd Respondents thereon.

The ex parte applicant relied on the provision of Article 47(2) and 50(4) of the *Constitution* of Kenya 2010 and Section 4(3) of the *Fair Administrative Actions Act* 2015.

Article 47(1) grants the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness entails notice of the decision to take the proposed action and an opportunity to be heard being granted to the person to be affected by the administrative action. In this case, there is no evidence of notice or opportunity to be heard given to the ex parte applicant. Article 47(2) provides that 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. In the present case, there was not only no notice of the action but also no reasons given to the ex parte applicant for the action by the Respondents and more particularly the 2nd and 3rd Respondents who had the constitutional and statutory obligation and duty to do so.

30. Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. There is no evidence that the dispute initiated by the 4th Respondent that involved land belonging to the ex parte applicant was heard and/or handled in the manner provided for in Article 50 of the *Constitution*. Section 4 of the *Fair Administrative Actions Act*, 2015 provides that where an administrative action is likely to adversely affect the rights or fundamental freedom of any person, the administrator shall give the person affected by the decision;
- a. Prior adequate notice of the nature and reason for the proposed administrative action;
 - b. An opportunity to be heard and to make representation in that regard;
 - c. Notice of a right to or internal appeal against an administrative decision where applicable;
 - d. A statement of reason pursuant to section 6;
 - e. Notice of the right to legal representation, where applicable
 - f. Notice of the right to cross-examination or where application
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

31. There is no evidence at all that these provisions of the law were complied with. It is clear that the actions of the 2nd and 3rd Respondents were unilateral, arbitrary and contrary to the principles of natural justice. The principles of natural justice demand inter alia, that no one should be condemned unheard and that a party is entitled to know the results for and the decision taken by an authority against the party. In *Clunky Limited v Director of Criminal Investigations* (Petition E004 of 2022 (2022) KEHC 297 (KLR)(27 April 2022)(Judgement the High Court & Justice Mativo J as he then was) held that;

“I have severally stated in previous decisions that the notion of the principles of Natural Justice and its application in justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, “an essential inbuilt component” of the mechanism through which decision-making process passes in the matter touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensure a strong safeguard against any judicial or administrative order of action, adversely affecting the essential rights of the individuals”

I find that the decision and action of the 2nd and 3rd Respondents to re-subdivide land parcel 2778 and amend the Registry Index Map with the effect of obliterating the ex parte applicant’s land title No.5588 was unlawful, ultra vires, and against the principles of natural justice.

32. The 4th Respondent claimed that the actions of the 2nd and 3rd Respondents were to rectify an encroachment that had been occasioned in his land. If this is true, the question that arises is whether sub-division and re-parcellation was the remedy provided by law to rectify encroachment. The evidence available is that the 4th Respondent’s title No.2774 was distinct and separate from the original parcel from which the suit land was curved namely; parcel No.2778. The decision administrative actions of the 2nd and 3rd Respondents were excessive, uncalled for and unlawful.



33. For the foregoing reasons, I find that the ex parte applicant is entitled to the prayers sought. He has demonstrated sufficient grounds for the grant of the same. The purpose of Judicial Review remedy is to check administrative action. I allow the Judicial Review application and make the following orders;
- a. An order of Judicial review by way of certiorari is issued to bring before this court and quash the decision of the 3rd Respondent of amendment of the Registry Index Map expressed thereon as Note No. 50 to have been undertaken on the 18th of February 2022 purporting to remove the applicants parcel of land known as KISUMU/KONYA/5588 from the Register and including it as constituting the 4th Respondent's parcel of land known as Kisumu/Konya/2774.
 - b. An order of Judicial Review by way of certiorari, is issued to bring before this court and quash the decision of the 2nd Respondent which resulted into the second sub-division of parcel No. Kisumu/Konya/2778 into new parcels of land to wit; Kisumu/Konya/6176 and 6177 purported to have been undertaken on the 25th February 2010.
 - c. An order of Judicial Review of prohibition is issued restraining the 2nd and 3rd Respondents from sub-dividing, amending and/or undertaking a mutation in the Registry Index Map relating to Kisumu/Konya/5588 without strict compliance with the relevant provisions of all the applicable laws relating to such an exercise, if at all, it should be found necessary to sub-divide, amend and/or undertake a mutation on the same after these proceedings.
 - d. An order of Judicial Review by way of mandamus is issued directing the 2nd Respondent to annul the unlawful second sub-division of parcel of land known as Kisumu/Konya/2778 and its resultant new parcels known as Kisumu/Konya/6176 and 6177.
 - e. An order of Judicial Review by way of Mandamus, is issued directing the 3rd Respondent to amend the Registry Index Map and reinstate the status of the applicant's parcel of land known as Kisumu/Konya/5588 as earlier contained in the previous Registry Index Map before the amendments complained of herein.
 - f. Costs are awarded to the ex parte applicant.
- Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 5TH DAY OF OCTOBER 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Kevin - Court Assistant.

Ragot for the Applicant.

Ariho for the 4th Respondent.

