



Republic v Chief Land Registrar; Kamau (Exparte Applicant); Guyo & 4 others (Interested Parties) (Judicial Review 2 of 2022) [2023] KEELC 21242 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21242 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
JUDICIAL REVIEW 2 OF 2022
EK MAKORI, J
NOVEMBER 2, 2023
IN THE MATTER OF: AN APPLICATION FOR JUDICIAL
REVIEW
AND
IN THE MATTER OF: AN APPLICATION BY DR. WANJIRU
KAMAU FOR ORDERS OF MANDAMUS
AGAINST THE CHIEF LAND
REGISTRAR
AND
IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012
AND
N THE MATTER OF: THE LAND ACT, 2012
AND
IN THE MATTER OF: THE NATIONAL LAND COMMISSION
ACT NO. 5 OF 2012**

BETWEEN

REPUBLIC APPLICANT

AND

THE CHIEF LAND REGISTRAR RESPONDENT

AND

DR JOSEPHINE WANJIRU KAMAU EXPARTE APPLICANT

AND



HAJILA BAJILA GUYO INTERESTED PARTY
MAISHA BORA LIMITED INTERESTED PARTY
WESTERN SUNSHINE COMPANY LIMITED INTERESTED PARTY
THE HON ATTORNEY GENERAL INTERESTED PARTY
NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGMENT

1. This is yet another matter from the Chembe/Kibabamshe Adjudication Section! The ex parte Applicant herein Dr. Josiphine Wanjiru Kamau has brought this Judicial Review application dated 20th December 2021, pursuant to leave granted by this Court – Odeny J. on 15th June 2022 seeking the following orders:
 - i. That an order of mandamus does issue to compel the Chief Land Registrar, either by himself, subordinates, agents, or whosoever compelling him to revoke the illegal and fraudulently acquired grants in respect of Grant Number L.R Chembe Kibabamshe/397 held by Hajila Guyo and to issue the applicant with a title over L.R Chembe Kibabamshe/397 upon compliance with the set legal requirements.
 - ii. That the suit property Grant Number L.R Chembe Kibabamshe/397 be solely vested and registered in the applicant’s name.
2. The ex-parte applicant asserts that she was allotted Land Parcel No. LR Chembe/Kibabamshe/397 through an adjudication process and accordingly issued with the title. However, the ex-parte Applicant claims that she discovered that the 1st, 2nd, and 3rd Interested Parties were issued title deeds over the parcel contrary to her already adjudicated rights over the suit property.
3. She complained to the 5th Interested Party. Hearings were conducted after all parties had been invited. The 5th Interested Party determined that the suit property belonged to the ex-parte applicant.
4. Subsequently, the decision of the 5th Interested Party was communicated to the Respondent who willfully neglected and refused to implement the directive of the 5th Interested Party.
5. Through the affidavit of Stella Kinyua, the Land Registrar Kilifi, the Respondent deposed that the parcel land had been transferred to several parties after the initial allocation to the ex-parte applicant was cancelled.
6. According to the Respondent, the parcel of land is registered in the favour of the 2nd Interested Party and the cancellation of the title has been restrained vide orders issued by this court in ELC Petition no. 9 of 2015.
7. The 1st Interested Party has deposed a Replying Affidavit in opposition to the current motion. It is averred that the acquisition of the suit land was regular and lawful.
8. As a settlor in that land since 20th November 1998, she was offered to be allocated the land which was then unalienated Government land. She accepted the offer and paid the requisite statutory fees. Upon payment of the loan with the Settlement Fund Trustee, a discharge of charge was issued to her. It took a while for the title to be released to her. She filed Malindi High Court Misc. Judicial Review No. 31 of 2008 for orders of mandamus to compel the Land Registrar to register her as the legal owner of the



suit property. An order of mandamus was to later be issued by consent. It came to pass that there was interference with the title the 2nd and 3rd Interested Parties were fraudulently registered as proprietors of the suit property which necessitated the filing of the Malindi ELC Case No. 149 of 2018. This Court – Olola J. granted an injunction on 20th September 2019 in that matter. The suit is still pending litigation.

9. The issues that fall for the determination of this court are whether an order of mandamus can be issued under the circumstances we have in this matter and whether this Court's jurisdiction has been properly invoked. Those twin issues can be discussed together.
10. The ex parte applicant is of the view that this is the right forum and that pursuant to the 5th Interested Party's inquiries over the legality and regularity of the title – the subject of this suit, claimed by several parties a determination was reached that the rightful person to own the property is the ex parte applicant. This was reached through a rigorous inquiry and all parties were invited to clarify and support their ownership of the suit property and the 5th Interested Party fully and finally settled the matter and gazette its verdict which is binding.
11. The Respondent and the 1st Interested Party are of the contrary view that this is not the right forum to address the grievances raised by the ex-parte applicant. There are pending matters before this court significant being Malindi ELC Case No. 149 of 2018. Besides, this matter requires evidence to be taken in a normal civil suit pitting the parties herein for the court to probe the claims by the parties and for the court to make an informed determination thereafter.
12. The Respondent and the 1st Interested Party have quoted several authorities to show that this court as moved is not the right forum and cannot issue the orders sought – Republic v Attorney General & Another Ex parte Joyce Muthoni Michuki [2019] eKLR, Republic v Kenya Revenue Authority Ex parte Style Industries Ltd [2019] eKLR, Republic v Cabinet Secretary for Interior & Co-Ordination of National Government & Another Ex parte Peter Adiele Mmegwe & Another [2020] eKLR, Cyril J. Haroo & Another v Uchumi Services Ltd & 3 Others [2014] eKLR, Republic v District Land Registrar Nakuru Ex parte Lawi Kigen Kiplangat, Lee Kinyanjui [2021] Eklr. Republic v National Land Commission & Another, Kibirgen Kimaiyo & 6 Others 2020 eKLR, Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR, Republic V National Transport and Safety Authority & 10 others ex parte James Maina Mugo [2015] eKLR.
13. The Judicial Review jurisdiction of this Court is said to be neither criminal nor civil. It is sui generis so to say. When a party seeks judicial review orders as stated in the case of Republic v Attorney General & Another Ex parte Joyce Muthoni Michuki [2019] eKLR quoting the leading authority of Pastoli v Kabale District Local Government Canal & Others [2008] 2 EA 300:

“The scope of Judicial Review was aptly elucidated in the case of Pastoli vs. Kabale District Local Government Council and others (2008) 2 EA 300 where at pages 303 and 304 the court stated;

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).



Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a 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, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is 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. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

14. In the Kenya National Examinations Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR the Court held:

“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 and 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.”

15. The ex-parte applicant has sought the order of mandamus for failure by the respondent to comply with section 14(5) of the *National Land Commission Act* requiring the Land Registrar to revoke the title for parcel No. Chembe/Kibabamshe/397. Section 14 (5) of the Land *National Land Commission Act* provides as follows:

“Where the commission finds that the title was acquired unlawfully, the commission shall direct the Registrar to revoke the title.”

16. In a letter dated May 19, 2016, the chairperson of the 5th interested party directed the respondent to revoke the title registered in favour of the other parties. However, the Respondent has yet to comply with the directive.
17. On the part of the respondent - the Land Registrar Kilifi has adduced evidence which demonstrates at entry number 8 that there is restraint by way of injunctive orders of this court - Olola J. from revoking the title of the current registered owner, Maisha Bora Limited.
18. The ex-parte applicant seeks to compel the respondent to revoke the title for parcel Chembe/Kibabamshe/397 held by the 1st interested party but there are existing orders against revocation of the title held by the 2nd interested party. The 2nd interested party was registered on 12th February, 2009



which was 7 years before the determination made by the 5th interested party. It follows therefore that the court cannot revoke ownership of a non-registered proprietor.

19. The writ of mandamus must only command what the party against whom the application is made is legally obligated to do. A mandamus cannot require immediate performance of a general duty. A mandamus cannot command the duty in question to be carried out in a specific manner where a statute imposes a duty and leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid.
20. In the case of Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR, the Court stated as follows:

“Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether a public duty has crystallized, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out.”
21. We have a dispute (s) at hand between different parties as to the ownership of the suit property significant - Malindi ELC Case No. 149 of 2018. Moreover, the public duty of the respondent will only crystallize upon the conclusion of the matter(s) and/or setting aside the orders issued by this Court. I have not been addressed at what stage of the trial the other action(s) lies. Further orders from this court will tend to the proliferation and convolution of suits. The recipe is chaos where different parties have different orders from different courts of equal status.
22. It follows therefore that the order of mandamus sought cannot be issued until the orders issued by this Court which is superior to the 5th interested party are set aside or the dispute between the parties is fully and finally resolved.
23. Whether judicial review is the proper mode for seeking redress for the issue herein. I think not. The issues raised and disputations made against the decision of the 5th respondent are contentious matters which can only be redressed by way of a civil suit. It is trite law that Judicial Review is designed to resolve uncontested matters of fact through affidavit evidence. There are a plethora of facts posed by the evidence tendered by the parties herein, particularly on the root of the title in this matter which seems to have passed many hands and can only be resolved through an ordinary suit by calling witnesses, and oral evidence to determine ownership of the suit property.
24. In the case of Republic V National Transport and Safety Authority & 10 others ex - parte James Maina Mugo [2015]eKLR Court held :

“...judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that when an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the disputes in the ordinary civil suits.”
25. First, both the 2nd Interested Party and the ex-parte applicant all lay claim to the property which is the subject matter herein which led to the review of the dispositions by the 5th interested party. It will be necessary to interrogate the validity of the said claims by oral evidence.



26. The dealings in the Chembe /Kibabamshe Adjudication Section leave a bitter taste in the mouths of the landowners and are so convoluted that the titles issued do not reflect the true spirit and principles of the Torrens System:

- a. Mirror principle – the register reflects (mirrors) accurately and completely the current facts about the title of each registered lot. This means that each dealing affecting a lot (such as a transfer of title, a mortgage or discharge of same, a lease, an easement, or a covenant) must be entered on the register and so be viewable by anyone.
- b. Curtain principle – one does not need to go behind the Certificate of Title as it contains all the information about the title. This means that ownership need not be proved by long complicated documents that are kept by the owner, as in the Private Conveyancing system. All of the necessary information regarding ownership is on the Certificate of Title.
- c. Indemnity principle – provides for compensation of loss caused by private fraud or by errors made by the Registrar of Titles.

The titles issued are no longer indefeasible, the Land registers do not mirror the true disposition and ownership the officials at the adjudication and allocation missed it. Perhaps they will need to account for (indemnify) in future. There is this current slang going around in social media that for you to buy land in Kenya you will need a good lawyer, a surveyor, and a drunkard from that local area to tell you whether you will be purchasing “air”. The latter person will likely mirror the title better than the Land Registries! The titles arising from the Chembe/Kibabamshe Adjudication Section are worse! This will be a discussion in another forum.

27. The upshot is that the motion dated 20th December 2021 is defeated and dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 2ND DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of: -

Mr. Munga for the Respondent and 4th Interested Party

Mr. Mwaniki holding brief for Mr. Makabo for the 1st Interested Party

Mr. Murunga for the Respondent

