



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

JUDICIAL REVIEW APPLICATION NO. 11 OF 2019

(FORMERLY KIAMBU JUDICIAL REVIEW NO. 31 OF 2017)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMENCE

PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLE 40 OF

THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF SECTIONS 14,24(a),

25(1),26(1) &79 OF THE LAND REGISTRATION ACT(NO.3 OF 2012)

AND

IN THE MATTER OF IRREGULAR CANCELLATION/REVOCATION

OF TITLE DEED TO RUIRU/RUIRU EAST BLOCK 3/308

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR THIKA.....RESPONDENT

EX PARTE MARIA WAIRIMU MICHAEL

WANJIKU MWAURA.....INTERESTED PARTY

JUDGMENT

By an ***Amended Notice of Motion*** Application dated **26th March 2018**, the Ex-parte Applicant sought for the following orders against the Respondent :-

- 1. That an order of Certiorari to remove into this Court and quash the decision of the Respondent, cancelling/revoking the title deed for parcel No. RUIRU/RUIRU EAST BLOCK 3/308 issued to the Applicant.***
- 2. An Order of Mandamus compelling the Respondent to restore in the Land Register and all other relevant documents held at Thika Land Registry, the Applicant as the registered absolute proprietor of the title to parcel No. RUIRU/RUIRU EAST BLOCK 3/308 and removing the restriction placed on the subject property on the 20th March 2017 and 23rd May 2017.***

3. That costs of and incidental to the application be provided for.

4. That such further and other reliefs that this Honorable Court may deem just and expedient to grant.

The Application is premised on grounds stated in the Statutory Statement and the Verifying Affidavit of **Maria Wairimu Michael**, dated **11th October 2017**, in which the Applicant averred that she purchased land parcel No. **Ruiru/Ruiru East Block 3/308**, and a title deed was issued on **13th February 2017**. That on around the **22nd July 2017**, the Respondent purported to cancel/revoke the said title claiming that the registered owner had reported that she did not sign the transfer forms in favor of the Applicant.

That the Respondent action was without jurisdiction, ultra vires, unreasonably, irrationally and unprocedurally when it purported to cancel/revoke the title deed issued to the Applicant. The Ex-parte Applicant averred that on **23rd February 2017**, she conducted an official search of parcel No. **Ruiru/Ruiru East Block 3/308**, and the search confirmed that she was the registered owner and as she was about to commence subdivision, she perused the documents at the lands office Thika and learned that a restriction had been placed on the subject property restraining any dealings on the said parcel of land due to the fact that her title had been issued on the strength of fake documents.

That on **22nd June 2017**, her title had been revoked/canceled by the

Respondent and one **Wanjiku Mwaura** restored as the registered proprietor. That she has been advised by her Advocates on record which information she believes to be true that the Respondent canceled/ revoked her title to the subject property without giving her a chance to be heard and such actions are against rules and principles of natural justice and thus ought to be quashed. That no illegality nor procedural impropriety was committed in the acquisition of the suit property.

The Application is opposed and the Respondent filed **Grounds of Opposition** dated **19th March 2018**, and averred that the Ex parte Applicant's Application is tainted with discrepancies and is questionable. Further, that the Ex parte Applicant has approached this Honorable Court with unclean hands as the attached copy of **green card** annexure MW 3 No. 8 and 9 of the title deed is indicated to belong to one **Martha Wairimu Macharia**, and not the Ex parte Applicant. That the National Identification Numbers of **Martha Wairimu Macharia** and the Ex Parte Applicant is shown to be the same being No. **11035923**, yet their names are for two individuals. It was its contention that the name of the Ex Parte Applicant and the title deed that was cancelled was for **Martha Wairimu Macharia** and hers. It was averred that the title deed purportedly belonging to the ex parte applicant was issued on the same day as that one of **Martha Wairimu Macharia**, to whom title has been cancelled.

The Application was canvassed by way of written submissions and the Ex parte applicant through the **Law Firm of Mohammed & Kinyanjui Advocates** filed her submissions dated **20th November 2020**, and submitted that the Land Registrar acted in excess of and without jurisdiction in purporting to cancel the Ex parte Applicant's title and restoring one **Wanjiku Mwaura**, as the registered proprietor of the said parcel of land. It was further submitted that on the issue of discrepancy, in the names as they appear on the title document and on the green card, was an oversight on the part of the Registrar. The Ex parte Applicant relied on various decided cases including the case of **Republic ...v... Land Registrar, Taita Taveta District & others (2005) eKLR**, amongst other precedents.

The Interested Party though duly served by way of substituted service through the Newspaper advertisement never entered appearance. The Respondent did not file written submissions either.

The Court has carefully considered the Ex parte Applicant's Judicial Review and the annexures thereto. The Court has also considered the **Grounds of Opposition** by the Respondent, the written submissions, cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The issues for determination are;

- a) Whether the Ex Parte Applicants has met the grounds for granting of Judicial Review Order of Certiorari and Mandamus.**
- b) If so, whether the Amended Notice of Motion application dated 26th March 2018 is merited.**
- c) Who is entitled to costs of these proceedings.**

The purpose of Judicial Review was set out in the case of **Municipal Council of Mombasa...Vs...Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, where the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons 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”.

Further circumstances under which orders of Judicial Review can be issued were elaborated by **Justice Kasule in the Uganda case of Pastoli ...Vs...Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.**

“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.

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 provision 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.

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 to act 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 legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi... Vs...Secretary of State for the Housing Department (1990) AC 876”.

So what does the Judicial Review orders entails? This was elaborated in the case of Kenya National Examination Council...Vs...Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996, where the Court held that:-

“That now bring us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice. It does not. However, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Law of England, 4th Edition vol.1 at Pg.37 paragraph 128.”

From the foregoing cases, the applicable law in cases of Judicial Review have already been established and this Court will now consider the above applicable law and then juxtapose it with the available facts to determine whether the **Exparte Applicant** is deserving of the orders sought.

a)Whether the Ex Parte Applicants has met the grounds for granting of Judicial Review Order of Certiorari and Mandamus

In the case the Kenya National Examination Council... Vs... Republic (Exparte Geoffrey Gathenji & Another (Supra), the Court clearly stated that the Order of *Certiorari* can quash a decision already made as an Order of *Certiorari* will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with. So have the **Exparte Applicant** established existence of the above condition to warrant this Court quash the decision of Respondent and compel it to do what is required of it?

It is the Ex Parte Applicant’s contention that the Respondent acted in excess of its Jurisdiction, first when it purported to cancel her title deed without giving her a chance to be heard and further acting **ultra vires** in cancelling her title which powers it did not have. In the case of Republic...Vs...The Honourable The Chief Justice of Kenya & Others ...Vs...exparte Mojjo Mataiya Ole Keiuwa, Nairobi HCM CA No.1298 of 2004, the Court held that:-

“The rules of Natural justice are minimum standard of fair decision making imposed by the common law on persons, or bodies that are under a duty to act judicially”.

The Respondent has not denied cancelling and revoking the title held by the Ex Parte Applicant. The contention by the Ex Parte Applicant that she was never notified before the revocation have not been rebutted as the burden shifted to the Respondent to prove that rules of natural justice were followed. Though the Respondent has averred that the green card and the title deed bear different names, the Court notes that this goes to the merit of the case which a Judicial Review Court does not have powers to deal with the same. In the case of Republic ...Vs... Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR, the Court held that:-

“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. 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.....”

The Respondent having not given the Ex Parte Applicant a chance to be heard also acted **ultra vires** in revoking the Applicant’s title. The Court has seen the green card in which the Respondent allegedly cancelled and revoked the title held by the Applicant. In the case of RepublicVs... Land Registrar Taita Taveta District & another [2015] eKLR the Court held that;

“It is now accepted that the Registrar had no jurisdiction to revoke titles to land under the Registered Land Act or the Registration of Titles Act. In this regard, I reiterate my holding in Republic v. The Registrar of Titles, Mombasa & 2 Ors ex Parte Emfill Ltd., [2012] eKLR which, as shown below, the Court of Appeal approved-

“For these reasons, I find that the government cannot revoke title to land even “for public need or interest” or for alleged illegality. The Government is obliged to move the Court for appropriate orders to revoke, cancel or rectify title in such circumstances. A unilateral decision published in the Gazette will not do. The considerations of public interest such as presented

by the Respondent in this proceedings may only be used by the Court in an appropriate case in making an order for cancellation of title or in authorizing, subject to due compensation, the compulsory acquisition or take-over of the private property.”

In the circumstances of this case, I find that the Government should have moved the Court, which has jurisdiction to invalidate titles that are obtained by fraud, for orders for the revocation of the Applicant’s titles on the ground that they were fraudulent and illegal as alleged in the Gazette Notice No 17714 of 2010. Having chosen to revoke the titles without jurisdiction under the law, the decision of Registrar is subject to quashing by an order of Certiorari for being ultra vires the Registered Land Act cap. 300 under which the parcels of land were registered.

It is thus not in doubt that the Respondent did not have jurisdiction to cancel and or revoke the Applicant’s title. This Court therefore finds and holds that the Respondent acted *ultra vires* **and therefore had no jurisdiction.**

Having found that the *Exparte Applicant* was not accorded an opportunity to be heard and was condemned unheard, as envisaged in the doctrine of Natural justice, this Court also having made a finding that the Respondent acted *ultra vires*, the Court further finds that the *Exparte Applicant* has established the **threshold for granting of Judicial Review Orders** of Certiorari and Mandamus.

b) If so, whether the Amended Notice of Motion application dated 26th March 2018 is merited.

The Exparte Applicant is seeking an Order of Judicial Review of **Certiorari** and **Mandamus** to quash the decision of the Respondent and an Order of Mandamus to have the register restored.

The Court has held that the Respondent acted without jurisdiction and did not give the *Exparte Applicant* an opportunity to be heard, thus it is only fair that the said decision is quashed. Having now carefully considered the facts of this case and the available provisions of law, the **Court finds that the Exparte Applicant is deserving of the orders sought and therefore the Amended Notice of Motion Application is merited**

c) Who is to bear costs of these proceedings?

Ordinarily, costs do follow the event. **Section 27** of the **Civil Procedure Act** provides that ‘*costs are granted at the discretion of the Court.* Therefore **the Exparte Applicant is entitled to the costs of these proceedings.**

The upshot of the foregoing is that the Court finds and holds that the **Exparte Applicant is deserving of the orders sought in the Amended Notice of Motion** dated **26th March 2018** and **allows the said Amended Notice of Motion application entirely in terms of prayers no. 1 and 2 with costs.**

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 27TH DAY OF MAY 2021.

L. GACHERU

JUDGE

27/5/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ochwa for the exparte Applicant

No appearance for the Respondent

L. GACHERU

JUDGE

27/5/2021