



**Republic v Machakos Land Registry & another; Dwiko (Exparte) (As an administrator of the Estate of the Late Peter Ndolo Ndwiko) (Environment and Land Judicial Review Miscellaneous Application E003 of 2022) [2022] KEELC 14578 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14578 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION E003 OF 2022**

**CA OCHIENG, J**

**NOVEMBER 2, 2022**

**IN THE MATTER OF AN APPLICATION BY MUANZA DWIKO  
FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLES 23, 27, 40, 47 &  
68(C) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 & 3 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**MACHAKOS LAND REGISTRY ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**MUANZA DWIKO ..... EXPARTE**

**AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE PETER NDOLO  
NDWIKO**



## JUDGMENT

1. By a Notice of Motion Application dated the March 18, 2022 brought pursuant to Order 53 Rule 1 and 3 of the *Civil Procedure Rules*, Section 61 of the *Land Registration Act*, Sections 1A, 1B, and 3A of the *Civil Procedure Act*, the Ex parte Applicant seeks the following orders:
  1. That the court be pleased to issue an Order of Mandamus directed at the Machakos Land Registrar to delete Peter Ndolo Ndwicko (deceased) from the register and to register the Applicant Muanza Dwiko as the administrator and proprietor of Land Reference No Mavoko Town Block 3/2840 and issue a Certificate of title pursuant reflecting the same.
  2. That the costs of this Application be borne by the Respondents.
2. The Application is premised on the Statutory Statement and supported by the Verifying Affidavit of Muanza Dwiko. He avers that on December 10, 2003, Peter Ndolo Ndwicko passed away in the State of California and left behind a Will where he bequeathed various properties to his beneficiaries. He contends that the deceased who was his father, bequeathed him, his share in Lukenya Ranching and Farming Cooperative Society Ltd being Member No 633 and Plot No 636 which is titled Mavoko Town Block 3/2840. He explains that the Will was presented to the Superior Court of California, County San Bernadino, San Bernadino District whereof the said Court issued Grant of Letters of Administration on April 1, 2004, vide Case Number, SPRSS 05732. Further, the Applicant was appointed the Administrator of the deceased Estate and he applied for re seal of the Grant in Kenya, which was done on May 10, 2012. He explains that, in a bid to distribute the deceased Estate, he discovered that the Certificate of Title for Mavoko Block 3/2840 was missing wherein he lodged the requisite application for replacement. Further, he has for over two years sought to be registered as the proprietor of Mavoko Town Block 3/2840 through transmission but the Machakos Land Registry has frustrated his efforts. He avers that he was forced to lodge a fresh application to be registered as proprietor by transmission and the same was lodged in July, 2021 but it was rejected under the pretext that the Registrar required his physical appearance as the Administrator despite proof he is based in the USA. He reiterates that the actions of the Land Registrar is detrimental to him as it leaves Mavoko Town Block 3/2840 belonging to the deceased Estate open to land grabbers and the creation of third party rights. Further, he has lodged complaints to the Hon Cabinet Secretary Ministry of Lands and the Commission of Administrative Justice but no substantive help has been forthcoming.
3. The Land Registrar, DM Mwangangi in opposition to the instant Application filed a Replying Affidavit where he deposes that the instant Application is frivolous, scandalous and devoid of substance in law or at all while the Verifying Affidavit is full of falsehoods and misrepresentations. He confirms that his office received from the Ex parte Applicant an Application to be registered as the proprietor of land parcel known as Mavoko Town Block 3/2840 with the attached Will, executed on December 10, 1984 and resealed in Kenya on May 10, 2012. He explains that before his office could register the said changes, they noticed that the parcels identified in the Will, namely Plot No 636 in Lukenya Ranching and Farming Cooperative Society Ltd was different from the parcel indicated on the application form namely Mavoko Town Block 3/2840. Further, they were unable to interpret that the Plot No 636 in Lukenya Ranching and Farming Cooperative Society Ltd was one and the same as land parcel Mavoko Town Block 3/2840 in their register thus could not confirm from the Will whether the Ex parte Applicant had been bequeathed Parcel No Mavoko Town Block 3/2840. Further, he requested for the Ex parte Applicant to avail himself to clarify the issues and more specifically to avail documentary evidence that the suit parcel identified in the Will and the application were one and the same. He insists



that to date the Ex parte Applicant has failed to avail himself and thus they were unable to effect the transmission of ownership as applied for. He reiterates that if there had been no issue over the identified parcels of land in the resealed Will then his office would have effected the changes in the register and issued new titles in the Ex parte Applicant's names.

4. The Ex parte Applicant filed a Further Affidavit where he reiterated his averments and contended that there has never been an official communication by way of a letter explaining exactly what is required and which action offends the requirements espoused under the Fair Administrative Actions Act. Further, that the only responses to his numerous queries have been information passed through the registry counters. He reaffirms that there are fundamental aspects of his complaint that the Registrar is glossing over. Further, that whereas the Land Registrar claims that LR No Mavoko Town Block 3/2840 is not in the Will of his late father, the said property is still in the deceased name and therefore such an excuse does not hold. He explains that the Title Deed was issued in 2008 long after the deceased had passed on in 2003. Further, that the Land Registrar is the custodian of all land records and should be aware that when the property was allotted by Lukenya Ranching and Farming Cooperative Society Ltd, it was unsurveyed and bore the Plot No 636. He further contends that the Land Registrar has failed to address the fact that the application pending before him in respect of this property seeks several undertakings; Issuance of new Title Deed since the original one is lost; Transmission of the title from the deceased's name to the Administrator's name; Transmission of the title from the Administrator to the Beneficiary entitled to the land as per the Will of the deceased.
5. The Judicial Review Application was canvassed by way of written submissions.

## **Submissions**

### **The Ex parte Applicant's Submissions**

6. The ex parte Applicant provided a background of the dispute herein and submitted that they had demonstrated that the Land Registrar's conduct has been unfair, oppressive, and has made onerous demands against the Estate of the Late Peter Ndolo Ndwiko. He proceeded to explain that on July 9, 2021 when the Application for Replacement of a Title Deed was made, the Registrar advised that the said Application be paid for and this was after he had fulfilled the requirements including Advertising the Loss of the Title Deed in the Daily Nation Newspaper, executing an indemnity in favour of the Government and producing a Police Abstract. Further, on the strength of the Land Registrar's authorization, he paid stamp duty in respect to the application for transfer of the property to the beneficiaries. He further submitted that the Land Registrar instead of dealing with all the shortcomings of the applications has been dealing with the application piecemeal. He outlined how the Land Registrar kept giving him different instructions.

### **Respondents' Submissions**

7. The Respondents in their submissions contend that the Ex parte Applicant ought to have demonstrated that the process that led to the impugned decision was illegal, outrageous and improper. They aver that the Ex parte Applicant herein miserably failed this test as he has not demonstrated that the decision is tainted with illegality, irrationality or procedural impropriety. They argue that the Ex parte applicant seeks to challenge the merit of 1<sup>st</sup> Respondent's decision which is outside the ambit of Judicial Review. They reiterate that Judicial Review is a wrong forum to determine the dispute herein, as the Ex parte Applicant's claim for proprietorship stems from the Will which gave him his deceased father's share in Lukenya Ranching and Farming Cooperative Society Ltd Plot No 636. Further, that at no point has the Ex parte Applicant demonstrated that the parcel of land in the Will is one and the same with the suit land herein. They insist that the aspect of transmission of title is a non-issue, the



same having to comply with statute law and the fact that the parcels indicated in the Grant is different from the one purported to be transferred. Further, that the process of transmission of title is an exercise of discretion vested to the 1<sup>st</sup> Respondent.

8. To support their averments, they relied on the following decisions: /*Council of Civil Service Unions -versus- Minister for the Civil Service [1985] AC 374*; *Seventh Day Adventist Church (East Africa) Limited -versus- Permanent Secretary, Ministry Of Nairobi Metropolitan Development & another (2014) eKLR*; [Republic Vs Public Procurement Administrative Review Board & 2 others Ex Parte - Sanitam Services \(EA\) Limited \[2013\]eKLR](#); *Sanghani Investment Limited Vs Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*; *HTV Ltd Vs Price Commissions (1976) ICR 170*; *Western Fish Products Ltd Vs Penwith District Council & anor (1981) 2ALLER 204*; [Peter Bogonko Vs National Environmental Management Authority \(2006\) eKLR](#); *Maritime Electric Co Ltd -versus- General Dairies Ltd QB 227*; *Republic Vs Marsbland and Fen District Commissioners (1910) 1 KB 155*; [Kenya National Examinations Council Vs Republic Ex Parte Geoffrey Gathenji Njoroge](#); and [Republic v Land Registrar Laikipia East District Ex parte Joshua Marete M'Kiambati & 7 others \[2021\] eKLR](#).

### Analysis and Determination

9. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Ex parte Applicant is entitled to orders of mandamus as sought.
10. Lord Diplock in the case of [Council for Civil Service Unions vs Minister for Civil Service \[1985\] AC 374](#), at 401D set the standards of judicial review when he stated thus:-

Judicial review has I think developed to a stage today when one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness', it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'

11. While in the case of Republic vs Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal highlighted circumstances under which a party can seek an order of mandamus, and cited with approval, [Halsbury's Law of England, 4<sup>th</sup> Edn Vol 7 p 111 para 89](#) and stated thus:

'The order of mandamus is of 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 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.'

12. Further, in the case of [\*Judicial Service Commission & another v Njora \(Civil Appeal 486 of 2019\) \[2021\] KECA 366 \(KLR\) \(7 May 2021\)\*](#), the Court of Appeal held that:
13. To my mind, even fealty to the traditional 'process-only' approach to judicial review must involve a measure of merit analysis. How would a court determine whether an employer acted reasonably and fairly 'in the circumstances of the case', without examining those circumstances and measuring them against what is reasonable or fair, and arriving at the conclusion that the action taken was within or outside the bond or range of reasonable responses? I think that it would be unrealistic for a court to engage in a dry and formalistic approach, steeped in process alone, while eschewing a measure of merit examination. Such merit review is a sine qua non of meaningful engagement with the question of reasonableness and fairness as the antidote to the arbitrary, capricious or illegal conduct of authorities, that invite judicial review in the first place. 45. Judicial review as an area of law is not static and its parameters have never been cast in stone. Thus, in the common law jurisdictions, there have been major developments in the field, especially in the last four decades or so. In the United States, for instance, there has been a decisive shift, with the Supreme Court there seeming to impose a heightened standard of judicial review that involves more judicial scrutiny of administrative action through 'a searching and careful' engagement. This has been recognized as the 'hard look doctrine'. It is much less deferential to the decision-maker as formerly encapsulated in the process-only approach.
14. See also the decision in *Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR*.
15. In line with the standards set in the aforementioned decisions, I will proceed to decipher whether the Respondents' actions in failing to delete Peter Ndolo Ndwiko (deceased) from the register and to register the Applicant Muanza Dwiko as the administrator and proprietor of Land Reference No Mavoko Town Block 3/2840 including issuance of a Certificate of title to that effect, is contrary to the provisions in the [\*Fair Administrative Action Act\*](#) as well as Article 47 of the [\*Constitution\*](#). The Ex parte Applicant contends that he made three applications to the Land Registrar in respect to Land Parcel No Mavoko Town Block 3/2840, which included replacement of the Title Deed; registration of an Administrator through transmission; and registration of the Administrator as beneficiary under the Will. The 1<sup>st</sup> Respondent despite receiving the three applications and acknowledging the deceased indeed left behind a Will, bequeathing the property to the Ex parte Applicant has declined to register the said documents. The 1<sup>st</sup> Respondent in his Replying Affidavit insists registration of the said documents is discretionary and this is not the right forum to compel him to register the said documents. Further, that the Ex parte Applicant failed to explain the relationship between the Share No 636 and LR No Mavoko Town Block 3/2840. I note under the [\*Land Registration Act\*](#), it is only the 1<sup>st</sup> Respondent mandated under the law to register the documents, the Ex parte Applicant seeks to be registered. Further, I note the Ex parte Applicant even produced a copy of a search confirming that the deceased was registered as owner of Mavoko Town Block 3/2840 on June 10, 2008 which fact has not been controverted by the 1<sup>st</sup> Respondent. It is worth noting that the 1<sup>st</sup> Respondent did not deny that on the July 9, 2021 when the Application for Replacement of a Title Deed was made, he advised the Ex parte Applicant to pay for it and this was after the Ex parte Applicant had fulfilled the requirements including Advertising the Loss of the Title Deed in the Daily Nation Newspaper, executing an indemnity in favour of the Government and producing a Police Abstract. Further, that the Ex parte Applicant even paid Stamp Duty in respect to the application for transfer of the property to the beneficiaries. Even if the Respondent did not want to register the Ex parte Applicant as owner of Mavoko Town Block 3/2840, he however has not explained why he has failed to replace the lost title



- despite directing the Ex parte Applicant to adhere to the relevant legal processes before he was able to do so. Further, he has not explained why he directed the Ex parte Applicant to pay stamp duty for transfer if he knew he did not intend to register the said land in his name.
16. Article 47 of *the Constitution* provides that:
- (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. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall— (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.'
17. While Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to — (a) a court in accordance with Section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said Section.
18. From the facts as presented including my analysis above while associating myself with the aforementioned decisions as well as the cited legal provisions, I find that failure by the 1<sup>st</sup> Respondent to efficiently as well as expeditiously replace the lost Title Deed to land parcel number Mavoko Town Block 3/2840, after the Ex parte Applicant who is an Administrator of the deceased Estate, had adhered to the proper legal process as he had been directed amounted to 'procedural impropriety'. I further find that the 1<sup>st</sup> Respondent's refusal to heed to several requests from the Ex parte Applicant seeking for the registration of the title in his name as the Administrator and beneficiary of the deceased Estate, without communicating the said reasons, contravened the Rules of Natural Justice as well as the provisions of the Section 7 of the *Fair Administrative Action Act* including Articles 40, 47 and 50 of the *Constitution*. I find that the Ex parte Applicant actually had a legal right to expect the performance of a legal duty by the 1<sup>st</sup> Respondent even if he was not present in the country and the 1<sup>st</sup> Respondent demanding his personal presence is unreasonable. Further, it was imperative upon the 1<sup>st</sup> Respondent as the Land Registrar to implement the terms of the Will since the Ex parte Applicant had already been appointed Administrator by the Court and there was a Grant to that effect.
19. To my mind, I find that the 1<sup>st</sup> Respondent's actions of blatantly declining to undertake his duties is irrational and infringed on the Ex parte Applicant's rights. It seems to me the Ex parte Applicant was not accorded fair treatment as required by the law. It is trite that remedy of Judicial Review is only available to a party against actions of a public official and I opine that the Ex parte Applicant had a right to seek to be served by the 1<sup>st</sup> Respondent. Further, that the 1<sup>st</sup> Respondent's averments that the Ex parte Applicant sought to undertake a merit review of his actions, is contrary to the directions given in the case of *JSC & Anor Vs Njora (supra)*.
20. Based on my analysis above, I find the Notice of Motion Application dated the March 18, 2022 merited and will proceed to allow it in the following terms:
- a. An Order of Mandamus be and is hereby issued directed at the Machakos Land Registrar to delete Peter Ndolo Ndwiko (deceased) from the register and to register the Applicant Muanza Dwiko as the administrator and proprietor of Land Reference No Mavoko Town Block 3/2840 and issue a Certificate of Title to that effect within thirty (30) days from the date hereof.



b. That each party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 2<sup>ND</sup> DAY OF  
NOVEMBER, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**

