



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**JUDICIAL REVIEW MISC. APPLICATION NO. 108 OF 2019**

**IN THE MATTER OF: AN APPLICATION TO APPLY FOR ORDERS OF**

**JUDICIAL REVIEW IN THE NATURE OF MANDAMUS**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR, KAJIADO LAND REGISTRY.....RESPONDENT**

**JACKSON PARSEMEI OLE NTUSERO.....EX PARTE**

**JUDGEMENT**

What is before Court for determination is the Applicant's Notice of Motion Application dated the 3<sup>rd</sup> December, 2018 brought pursuant to Article 23, 27, 31, 40 and 47 of the Constitution, Order 53 Rule 1 & 3 of the Civil Procedure Rules and the Fair Administrative Actions Act. The Ex parte Applicant seeks for the following Orders:

1. An order of Mandamus directed at the Respondent to delete the name of Ntiamoye Ntusero Lengira (deceased) from the register and to register the Applicant Jackson Parsemei Ole Ntusero as the sole proprietor of Land Reference No. KJD/ KAPUTIEI NORTH/ 32975.
2. Such further and other reliefs as this Honourable Court may deem just and expedient to grant.
3. Costs of and incidentals to this application be provided for.

The application is premised on the summarized grounds that LR KJD/ KAPUTIEI NORTH/ 32975 hereinafter referred to as the 'suit land', was jointly owned by Jackson Parsemei Ole Ntusero and Ntiamoye Ntusero Lengira in undivided shares. Further, that Ntiamoye Ntusero Lengira died on 6<sup>th</sup> March, 2011 and the Applicant wants her name deleted from the Register to allow him be the sole proprietor. The Applicant claims to have written numerous letters to the Respondent to do so but they have gone unanswered and no steps have been taken to delete Ntiamoye Ntusero Lengira from the Register. He contends that the Respondent has failed and or refused to exercise his Statutory Authority granted under Section 60 of the Land Registration Act.

The application is supported by the Verifying Affidavit of JACKSON PARSEMEI OLE NTUSERO and the Statement of Facts where he avers that together with his mother Ntiamoye Ntusero Lengira they jointly owned the suit land in undivided shares. He explains that on 8<sup>th</sup> February, 2016 he wrote to the Respondent requesting him to delete his mother's name from the Register to allow him be registered as the Sole Proprietor of the suit land. Further, that he attached his mother's Death Certificate in the said letter and the title document for the suit land as per procedure. He claims the Respondent did not reply to the letter which prompted him to write another letter on 9<sup>th</sup> May, 2018 following up on whether a title deed had been prepared in his name. He contends that it has been two years since he applied to the Respondent but no action has been taken. He reiterates that the Respondent has made a grave error of law by failing to give effect to his rights under Article 23, 27 and 40(3) (a) of the Constitution. Further, that the Respondent's conduct amounts to a breach of his right to property under Article 40 of the Constitution. He insists the Respondent has deprived him of his right to equal protection and benefit of the law as guaranteed under Article 27(1) of the Constitution. Further, that the Respondent has failed the test set out at Article 47 of the Constitution and the Fair Administrative Action Act. He reiterates that no prejudice will be suffered by the Respondent if the orders sought are granted.

The Respondent though duly served and granted leave to file a replying affidavit including written submissions on 26<sup>th</sup> November, 2019 failed to do so. The Applicant filed his submissions to canvass the instant application.

**Analysis and Determination**

Upon consideration of the Notice of Motion application dated the 3<sup>rd</sup> December, 2018 including the statement of facts; verifying affidavits as well as the annexures thereon and submissions, the only issue for determination is whether the ex parte applicant is entitled to orders sought in the said application.

It is not in dispute that the Applicant jointly with his late mother Ntiamoye Ntusero Lengira are the joint registered proprietors of the suit land as evident in the Certificate of Title which was annexed to the verifying affidavit. It is further not in dispute that the Applicant severally sought for the Respondent to cancel the late mother's name from the register and issue a new Certificate of title but he has failed to do so. The Applicant has hence sought for an order of mandamus to compel the Respondent to delete the name of the deceased mother and issue a new Certificate of Title. The Applicant in his submissions reiterated his claim and relied on section 60 of the Land Registration Act as well as the following cases: **Republic Vs Attorney General & Another Ex parte Ongata Rongai Works Limited (2016) eKLR where it referred to the case of Republic Vs Kenya National Examinations Council Ex parte Gathengi & 8 Others Civil Appeal No. 234 of 1996 and Shah Vs Attorney General (No. 3) Kampala HCMC No. 31 of 1969 (1970) EA 543** to buttress their arguments.

Section 60 of the Land Registration Act governs transmission on death of a joint proprietor and states thus: ***If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate.***

In the current scenario, the Respondent failed to file a replying affidavit to controvert the Applicant's averment. From a perusal of the two affidavits, the Applicant annexed the late mother's Death Certificate; copy of Certificate of title to KJD/ KAPUTIEI NORTH/ 32975; two letters dated the 9<sup>th</sup> May, 2018 and 26<sup>th</sup> July, 2019 respectively from messrs Mogeni & Company Advocates written on behalf of the Applicant, to the Respondent seeking to find out if he had prepared a new Certificate of Title. It is the Applicant's contention that the Respondent despite receipt of the said letters, failed to respond nor act on the same. From a reading of section 60 of the Land Registration Act, it is clear that the Respondent had an administrative role to play in respect to the deletion of the Applicant's late mother's name from the Certificate of Title and issuance of a new one in the sole name of the Applicant. Further, this action had to be in tandem with the provisions of the Fair Administrative Action Act as well as the Constitution. From the Respondent's actions, it is evident that he failed to adhere to the provisions of the Land Registration Act as well as the Fair Administrative Action Act to implement a duty imposed on him by statute for the benefit of the Respondent.

Article 47 of the Constitution provides that every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair as well as to be given reasons for the said action. Further, the provisions of section 4 of the Fair Administrative Actions Act are anchored in the principles enshrined in Article 47 of the Constitution and reaffirms that a person who can be affected by an administrative action has to be granted an opportunity to be heard and to make representations. **In the case of Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR the Court of Appeal held that:** ***“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.***

Further in the case of **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal while highlighting the circumstances under which judicial review of mandamus are issued, 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.”...These principles mean that an order of mandamus compels 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.***

In the current case, the Applicant sought for an order of mandamus against the Land Registrar Kajiado Land Registry to compel him to delete the name of Ntiamoye Ntusero Lengira (deceased) from the register and to register him as the sole proprietor of Land Reference No. KJD/ KAPUTIEI NORTH/ 32975.

Based on the facts as presented including the analysis above and in associating myself with the two cited judicial authorities, I find that failure by the Respondent to respond to the Applicant's request to be issued with a new Certificate of Title in his sole name is against the rules of Natural Justice and violated the Applicant's Constitutional rights as enshrined in Article 27, 40 & 47 of the Constitution. To my mind, I find that by failing to implement what he is legally mandated to do, the Respondent, failed to observe the Constitutional principles of reasonability and procedural fairness. I opine that since the Respondent did not controvert the averments, it amounts to an admission on his part and this hence amounts to 'procedural impropriety'.

It is against the foregoing that I find the instant application merited and will proceed to make the following order:

i) An order of mandamus be and is hereby issued directing the Land Registrar Kajiado Land Registry to delete the name of Ntiomoye Ntusero Lengira (deceased) from the register and to register the Applicant Jackson Parsemei Ole Ntusero as the sole proprietor of Land Reference No. KJD/ KAPUTIEI NORTH/ 32975 within ninety (90) days from the date hereof.

ii) The Applicant is awarded the costs of the suit.

**Dated, Signed and Delivered via email this 5<sup>th</sup> Day of May, 2020**

**CHRISTINE OCHIENG**

**JUDGE**