



**REPUBLIC OF KENYA**

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

**KAJIADO MISC. 21 OF 2017**

**JUDICIAL REVIEW NO. 1 OF 2017**

**IN THE MATTER OF AN APPLICATION TO INSTITUTE JUDICIAL REVIEW ORDERS**

**OF CERTIORARI A & MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 23 OF THE CONSTITUTION 2010**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN ACCORDANCE WITH THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015**

**IN THE MATTER OF AN APPLICATION**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**AND**

**LAND REGISTRAR KAJIADO NORTH DISTRICT.....RESPONDENT**

**EX PARTE.....PETER NKANAI NDUMBE**

**JUDGMENT**

The application before Court is a Notice of Motion application dated 10th April, 2017 brought pursuant to Articles 10, 23 of the Constitution, Sections 103 (1) (c), 104 of the Land Act, Sections 14, 24, 56 of the Land Registration Act and Order 53 Rule 1 (2) of the Civil Procedure Rules, The Fair Administrative Act No. 4 of 2015 and all the other enabling provisions of the law.

The application is based on the grounds which in summary are that the Respondent failed to look at the Charge to satisfy itself that the same had many errors made in haste in rendering the Charge not capable of registration but instead went ahead to register a defective Charge over the ex parte applicant's land identified as KAJIADO/LOODARIAK/1848 (suit land). The Respondent failed to notice that the purported affidavit in lieu of spousal consent was not sworn by the Chargor and/or did not meet the threshold of an affidavit as the same is neither dated nor drawn by an authorized person. The defective Charge was registered without the mandatory spousal consent or a proper affidavit on the Chargor's marital status. The alleged affidavit in lieu of marriage is not dated, was not signed by the Ex parte Applicant and does not show who drew it hence it is defective in law. The defective Charge is not dated and the signatures therein are not attested to as required rendering the whole Charge defective and illegal. Further that the defective illegal Charge was registered without the properly obtained Land Control Board consent and the Respondent misdirected itself in buying the lie that the Land Control Board Consent can be obtained on the same day the 27th November, 2015 the same day of registering the Charge and without involving the ex parte Applicant. The defective Charge has not been certified and the certification areas of the Charge document have been left blank and undated clearly showing malicious exclusion of the ex parte Applicant and the Respondent did not satisfy itself that the Charge had met the statutory requirements before registering it. Further that the spousal interest is an overriding interest and the Respondent owed it to the ex parte Applicant to satisfy itself that the same had been granted before registration of the Charge. The registered defective Charge was done without consultations and without the ex parte applicant's family approval and specifically from his two wives and the said family property is at the risk of being auctioned.

The application is supported by the affidavit of PETER NKANAI NDUMBE the ex parte Applicant herein where he deposes that he is the registered owner of land identified as KAJIADO/LOODARIAK/1848. He avers that sometime in 2015 a friend of his called EDWARD NJOROGÉ approached him for a business partnership and he suggested using his title to obtain a loan facility of Kshs. 2 million which he gave him but with instructions that he had to consult family first as it is the only family land. He states that his family was against this and he informed his friend EDWARD NJOROGÉ of the same. He claims he later learnt that a Charge had been registered over the suit land without consulting him and neither did they obtain spousal consent from his wives.

### **Analysis and Determination**

I have considered the issues raised, the affidavit in support of the application, the annexures thereon, the submissions and authorities relied upon and the only issue for determination is whether the decision of Respondent to register a Charge over the suit land on 27th January, 2015 was a mistake amounting to an injustice against the ex parte applicant.

The ex parte applicant contends that the Respondent failed to conduct due diligence and registered a Charge against the suit land without spousal consent. I note the ex parte Applicant admits that the Chargor was his friend and that in 2015 he approached him for a business partnership and suggested using the ex-parte Applicants title to the suit land to obtain a loan facility of 2 million. The ex parte Applicant admits to giving his title deed to the Chargor and told him he needed to consult his wives before he signs the Charge. From the averment of the ex parte Applicant, I note they had a history with the Chargor which he cannot deny at this juncture. What is curious is that the ex parte Applicant left his title deed with the Chargor and does not tell the Court on whether he sought to get it or not. He avers that he only came to learn of the Charge when there was a purported auction scheduled on 24th January, 2017 on account of the Charge which he deems defective. The ex parte Applicant hence seeks orders of certiorari and mandamus as against the Respondent to deregister the Charge over the suit land. He claims the Charge contains so many defects which included lack of spousal consent and should not have been registered. A cursory look at the the Charge document which is annexure 'PNN 2' and the ex parte Applicant affidavit annexure 'PNN4' , I note they were duly signed by him. Further in the affidavit at paragraph 3 it indicated he was single, living as a bachelor and never been married. I find that the question of spousal consent should hence not have arisen as envisaged by section 79(3) of the Land Act which provides that:

***A charge of a matrimonial home, shall be valid only if any document or form used in applying***

***for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.***

The issues he is raising concern providing a security to guarantee a loan which is a private affair and the Land Registrar cannot stop a party from doing so. I note that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process.

**In the case of Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001, it was held:**

**“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision... It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute.”**

In relying on the case above, I will not go to the merits of the decision of the Land Registrar to Register the Charge dated 27th January, 2015 but proceed to highlight what the process entails in providing the security to secure a loan with a financier. This include but not limited to giving the security itself, negotiating with the financier, signing of the Charge documents, obtaining consent of the Land Control Board to Charge property and finally presenting the Charge for Registration by the relevant Land Registrar. From this process, it is evident that the said Land Registrar comes at the tail end to register it and is not concerned with the private process mentioned above. In this instant matter it is clear the negotiation by the parties which culminated in Charging the suit land was a private matter and the Land Registrar cannot be blamed for registering the said Charge when presented for registration. In so far as the ex parte Applicant claims his rights were violated, he does not seem to have clean hands as he indeed surrendered the title deed to the suit land to his friend Edward Njoroge who charged it. He is claiming the Charge is defective and should not have been registered. However, I note that the Charge document bears his signature as the Chargor and no where in his supporting affidavit does he allude to the fact the said signature is a forgery. He even swore an affidavit claiming he is single. He is poking holes on the Charge after the Chargee commenced the process of realizing security and he even admits the auction was scheduled in January, 2017.

Section 56 (4) of the **Land Registration Act** provides that : ***'The Registrar shall not register a Charge, unless a land rent clearance Certificate and the Consent to Charge, certifying that no rent is owing to the Commission in respect of the land, or that the land is freehold, is produced to him or her.***

**In the case of Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that: **“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”**

In relying on the said case, I note that the ex parte Applicant has failed to demonstrate to the Court the illegalities the Land Registrar committed in registering a Charge that he deems defective. The issues the ex parte applicant is raising in relation to the defects in the Charge are issues he can ventilate upon in a substantive suit. If indeed he claims a forgery on the part of his friend then he can also lodge a complaint with the Police and if a crime is found to have been committed, then his friend can be charged.

In the circumstances the Notice of Motion dated 10th April, 2017 fails and the same is hereby dismissed I will make no order as to costs.

**Dated signed and delivered in open court at Kajiado this 1<sup>st</sup> day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**