



**REPUBLIC OF KENYA**

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

**ELC. MISCELLANEOUS APPLICATION NO. 2 OF 2020 - JR**

**IN THE MATTER OF LAND REFERENCE NUMBERS: KJD/ KAPUTIEI NORTH/ 59209, 59216, 59362, 59227, 59228, 59229, 59230, 59248, 59256, 59261, 59264, 59270, 59277, 59284, 59287, 59290, 59291, 59253, 59299, 59303, 59312, 59315, 59321, 59376, 59323, 59324, 59338, 59339, 59301, 59341, 59255, 59365, 59357, 59364, 59372, 59414, 59393, 59395, 59397, 59403, 59415, 59417, 59423, 59426, 59257, 59325, 59326, 59327, 59328 AND 59219**

**ASILI HOUSING COOPERATIVE SOCIETY LTD.....APPLICANT**

**VERSUS**

**THE DISTRICT LAND REGISTRAR, KAJIADO SOUTH**

**AND CENTRAL.....RESPONDENT**

**JUDGEMENT**

What is before Court for determination is the Applicant's Chamber Summons application dated the 23<sup>rd</sup> November, 2020, brought pursuant to Order 53 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:

1. That an Order of this Honourable Court do issue calling before court for the purposes of having it quashed the decision of the Land Registrar, Kajiado South and Central for declining to open Green Cards for Parcels of Land Reference numbers KJD/ KAPUTIEI NORTH/59209, 59216, 59362, 59227, 59228, 59229, 59230, 59248, 59256, 59261, 59264, 59270, 59277, 59284, 59287, 59290, 59291, 59253, 59299, 59303, 59312, 59315, 59321, 59376, 59323, 59324, 59338, 59339, 59301, 59341, 59255, 59365, 59357, 59364, 59372, 59414, 59393, 59395, 59397, 59403, 59415, 59417, 59423, 59426, 59257, 59325, 59326, 59327, 59328 and 59219.
2. That an Order of Mandamus do issue compelling the Respondent to open Green Cards of ALL the Titles issued by him to the Applicant.

The application is premised on the summarized grounds that the Applicant is the registered owner of the mother title KJD/KAPUTIEI NORTH/26142 which was subdivided to several titles. The Applicant through its surveyor, subdivided the said parcel and registered mutations. Further, upon the subdivisions of several titles, the Respondent issued the said titles in the names of the Applicant's members. The Applicant contends that some of its members who were issued with titles made applications to the Land's Office for official search but the Respondent said the titles had no Green Cards. Further, the officials of the Applicant Society visited the Land's Office with a view of establishing the missing Green Cards and the registry advised them to bring the Original Titles which they did but the Respondent declined to open the Green Cards. He avers that failure by the Respondent to open the Green Cards for the titles has resulted in institution of suits by the Applicant's members seeking orders to compel the Applicant to complete the process. Further, the Applicant has no role to play for the alleged lose of the Green Cards in the Land's office. The Applicant reiterates that the Respondent had acted ultra vires as the law required him to open the Green Cards for all the titles he issued and his action is unlawful, illegal and requires court's intervention.

The application is supported by the Statutory Statement, Applicant's Statement and Affidavit of GRACE ALINYO its Chief Executive Officer, verifying the facts relied on.

The Respondent though duly served on 26<sup>th</sup> January, 2021 as evident in the affidavit of service of THOMAS OTIENO AKACH failed to enter an appearance and file a response to controvert the Applicant's averments. Further, on 24<sup>th</sup> February, 2021, the Respondent was again served with a Mention Notice for 8<sup>th</sup> April, 2021 while the Hon. Attorney General was served with the said Notice on 12<sup>th</sup> March, 2021, but they still failed to enter an appearance and oppose this suit. Hence, in essence, this matter is undefended.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Applicant's Chamber Summons application dated the 23<sup>rd</sup> November, 2020 including the Statutory Statement, Applicant's Statement and Verifying Affidavit as well as the annexures thereon, the only issue for determination is whether the applicant is entitled to the orders sought in the said application.

The Applicant in its submissions reiterated its claim and insisted it had met the threshold set for judicial review order of mandamus. It further relied on various provisions of the Constitution including Articles 40, 47(2) and 73(1) respectively. To buttress its averments, it relied on the following decisions: **Suchan Investment Limited V Ministry of National Heritage & Culture & 3 Others**; **R V Chairman Business Premises Rent Tribunal & 2 others Ex parte Nakuru Stores Co. Ltd (2016) eKLR**; **Republic V The County Secretary, County Government of Kirinyaga & Another (2020) eKLR**; **Muriithi & 2 Others V Attorney General & 4 others ( 2006) ICLR and Apotex Inc V Canada ( Attorney General) (193) Can L11 3004 (FCA).**

It is not in dispute that the Applicant which is a Cooperative Society is the registered owner of the mother title KJD/KAPUTIEI NORTH/26142 which was subdivided to several titles. The Applicant claims that through its surveyor, it subdivided the said parcel and registered mutations after which the Respondent issued several titles in the name of its members. The Applicant explains that the fulcrum of the dispute herein is that some of its members who were issued with titles made applications to the Land's Office for official search but the Respondent said the titles had no Green Cards. The Applicant confirms that some of its officials visited the Land's Office with a view of establishing the missing Green Cards and the registry advised them to bring the Original Titles which they did but the Respondent still declined to open the Green Cards.

I note the Applicant annexed copies of the various certificates of title belonging to its members, which were issued by the Respondent and do not have Green Cards to explain the anomaly. The Applicant further annexed a copy of a letter dated the 3<sup>rd</sup> July, 2020 from its lawyers messrs Bwoigara Getange & Company Advocates addressed to the Respondent which excerpt I wish to highlight hereunder: *' We act for Asili Investment Cooperative Society Ltd which held the mother title for the attached titles. We are advised that the mother title being KJD/ KAPUTIEI NORTH/ 26142 was subdivided into several sub titles among them is the attached titles. Out of the said subdivisions of the subject land and issuance of the resultant titles, we are unable to do a search of all the above titles as we are always told to bring the original titles and upon production of the same, your office has not been of much assistance to resolve the problem and provide us with a search as we are always told there is no green cards in the Registry. To enable you delve into this matter further, we forward you the following documents: a) 54 copies of titles with no Green Cards in the Lands Office; b) Copy of the mother title being KJD/ KAPUTIEI NORTH/ 26142; Copy of the Mutation Form; Copy of the Subdivision of KJD/ KAPUTIEI NORTH/ 26142. We shall be most grateful if you would regularize the position in your registry to enable members of our client be able to conduct searches at your offices.'*

It is the Applicant's contention that despite writing the aforementioned letter seeking the opening of the Green Cards, the Respondent has failed to act. I note the Applicant has further annexed the Mutation Form for KJD/KAPUTIEI NORTH/26142 including the Area List to show the subdivisions. Further, the Applicant has annexed copies of some of the pleadings wherein its members have sued it, in respect to anomalies over the registration of their lands which were resultant subdivisions of KJD/KAPUTIEI NORTH/26142. The Respondent though duly served failed to file any replying affidavit to controvert the Applicant's averments.

In the case of **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR**, the Court described judicial review as follows: *' 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.'*

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 while highlighting the circumstances under which a party can seek an order of mandamus, 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."*

Section 7(1) and (2) of the Land Registration Act provides that: *' (1) There shall be maintained, in each registration unit, a land registry in which there shall be kept— (a) a land register, in the form to be determined by the Commission; (b) the cadastral map; (c) parcel files containing the instruments and documents that support subsisting entries in the land register; (d) any plans which shall, after a date appointed by the Commission, be geo-referenced; (e) the presentation book, in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry; (f) an index, in alphabetical order, of the names of the proprietors; and (g) a register and a file of powers of attorney. (2) The Registrar shall, upon payment of the prescribed fee, make information in the land registry accessible to any person.'*

From the legal provisions cited above, it is clear that the Respondent had an administrative role to play in availing the Green Cards in respect to the aforementioned parcels of land. Further, this role had to be in tandem with the provisions of the Land Registration Act, Fair Administrative Action Act as well as Article 47 of the Constitution. From the excerpt, I have cited above, I note the Applicant was very clear in what it sought from the Respondent, which letter there is no indication whether the same elicited a response. From the pleadings herein, it is evident that the Applicant's members were yet to be furnished with Green Cards in respect to the aforementioned parcels of land. To my mind, I opine that the Respondent abdicated his responsibility to furnish the Green Cards since there was no reason offered for his failure to do so as he had already issued titles. Further, I find that he failed to act appropriately as required by the Land Registration Act, the Fair Administrative Action Act and the Constitution. Article 47 of the Constitution is very clear that every person has a right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair with reasons given for the said action.

In relying on the facts as presented including the quoted legal provisions while associating myself with the two cited judicial authorities, I find that failure by the Respondent to furnish the Green Cards to the proprietors of the suit lands is against the rules of Natural Justice and violated their Constitutional right to property. I opine that since the Respondent did not controvert the averments herein, it amounts to an admission on his part. Further, his actions are contrary to his legal mandate and contravene the Constitutional principles of reasonability and procedural fairness as the basic rules of natural justice were not observed in the process herein. It is my considered view that since the Applicant furnished the Respondent with all the relevant documents, there is no reason why he should not produce the Green Cards in respect to the aforementioned parcels of land, which titles he had issued.

It is against the foregoing that I find the Chamber Summons application dated the 23<sup>rd</sup> November, 2020 merited and proceed to allow it in the following terms:

1. That the decision of the Land Registrar, Kajiado South and Central for declining to open Green Cards for Parcels of Land Reference numbers KJD/KAPUTIEI NORTH/ 59209, 59216, 59362, 59227, 59228, 59229, 59230, 59248, 59256, 59261, 59264, 59270, 59277, 59284, 59287, 59290, 59291, 59253, 59299, 59303, 59312, 59315, 59321, 59376, 59323, 59324, 59338, 59339, 59301, 59341, 59255, 59365, 59357, 59364, 59372, 59414, 59393, 59395, 59397, 59403, 59415, 59417, 59423, 59426, 59257, 59325, 59326, 59327, 59328 and 59219 respectively be and is hereby quashed.

2. That an Order of Mandamus do issue compelling the Respondent to open Green Cards of ALL the Titles issued by him to the Applicant to wit: open Green Cards for Parcels of Land Reference numbers KJD/KAPUTIEI NORTH/59209, 59216, 59362, 59227, 59228, 59229, 59230, 59248, 59256, 59261, 59264, 59270, 59277, 59284, 59287, 59290, 59291, 59253, 59299, 59303, 59312, 59315, 59321, 59376, 59323, 59324, 59338, 59339, 59301, 59341, 59255, 59365, 59357, 59364, 59372, 59414, 59393, 59395, 59397, 59403, 59415, 59417, 59423, 59426, 59257, 59325, 59326, 59327, 59328 and 59219.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**