



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW NO. 509 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO**

**APPLY FOR ORDERS OF MANDAMUS BY**

**CHARLES MUCHAI MWANGI & 2 OTHERS**

**AND**

**IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 3, 4, 7, 8 & 9 OF THE FAIR**

**ADMINISTRATIVE ACTIONS ACT, 2015**

**AND**

**IN THE MATTER OF PART V & VI OF THE LAW**

**OF SUCCESSION ACT OF 2012**

**AND**

**IN THE MATTER OF ORDER 53 RULE 1 OF THE**

**CIVIL PROCEDURE ACT**

**AND**

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

**BETWEEN**

**CHARLES MUCHAI MWANGI.....PLAINTIFF/APPLICANT**

**HELLEN WANJIKU MWANGI.....PLAINTIFF/APPLICANT**

**ESTHER WACERA KIRUNGI.....PLAINTIFF/APPLICANT**

**VERSUS**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 19<sup>th</sup> October, 2016, the applicants herein, wrongly described as plaintiffs and who ideally ought to have been ex parte applicants instead of the substantive applicants, seek the following orders:

- 1. That the instant application be certified as urgent and fit to be heard ex parte in the instance.**
- 2. That a Mandamus do issue compelling Jane W. Ndiba the Acting Chief Registrar, Nairobi to personally attend court during the hearing until discharged by the court.**
- 3. That a Mandamus do issue compelling the Acting Chief Registrar of Lands, the Respondent herein, to remove or cause to be removed the prohibitory order entered as I.R 25110 (LR 209/7626) together with all the encumbrances thereon howsoever put on the suit property.**
- 4. That any other and further relief that this honourable court may deem fit and just to grant in the circumstances.**
- 5. That the costs of this application be provided for.**

2. According to the applicants, they are administrators of the estate of **Daniel Mwangi Muchai** who died intestate on 26<sup>th</sup> May, 2007 and a certificate of confirmation dated 19<sup>th</sup> January, 2009 was issued.

3. According to the applicants among the properties listed for succession was IR 25110 (LR 209/7626) (hereinafter referred to as “the suit property”) which was to be shared equally among the beneficiaries. It was averred that after the grant was issued, a search was carried on the properties and it was discovered that there was a prohibition on the suit property which was registered on 10<sup>th</sup> February, 1987 based on Civil Suit No. 80 of 1982. It was however contended that the said order did not specify which Court or jurisdiction the matter presided.

4. The applicants therefore contended that as administrators, they were unable to administer the suit property due to the said order despite the fact that the suit property was still vacant as no one had contested its ownership. Ants were surprised that since the registration of the said prohibitory order, no pleadings were served upon them regarding the same. Similarly, the circumstances under which the said order was placed were unknown to them.

5. The applicants disclosed that their attempts to trace in local registries the file number proved futile hence their search had not borne any fruit. It was therefore their case that the failure by the Respondent to disclose the particulars of the said case was unreasonable, unfair and in violation of the applicants’ legitimate expectation.

6. The applicants suspected that there was no suit in existence hence the said order was an illegality, impropriety, an abuse of the Court process and smacked of mischief and/or bad faith on the part of the Respondent.

7. The application was not opposed despite service on the Respondent.

8. I have considered the application, the affidavit in support thereof and the submissions filed.

9. Article 47 thereof 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.***

10. In this case, although the Respondent was served with the pleadings no response has been filed. The Respondent has therefore not shed any light on the circumstances that led to the registration of the offending order assuming there was any such order in the first place.

11. In the absence of such explanation, this Court can only find that the said entry on the register is unlawful and such unlawful action cannot be allowed to stand. In the absence of the particulars of the said order, the applicants have no remedy in law by which the said action can be challenged. In **Republic vs. Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996**, the Court of Appeal cited, with approval, Halsbury's *Law of England*, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 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."***

12. This in my view is a case which calls for a remedy of the defects of justice since the applicants' rights to property have been curtailed and they have no specific legal remedy for enforcing the said right under the unique circumstances of this case.

13. In the premises, I find merit in the Motion dated 19<sup>th</sup> October, 2016 and issue the an order of *mandamus* compelling the Chief Registrar of Lands, the Respondent herein, to remove or cause to be removed the prohibitory order entered on I.R 25110 (LR 209/7626) together with all the encumbrances thereon howsoever put on the suit property.

14. The application was however not properly intituled. Instead of the same being brought in the name of the Republic as is the norm in judicial review proceedings, the same was expressed to be brought in the names of the ex parte applicants. Accordingly, there will be no order as to costs.

15. It is so ordered.

**Dated at Nairobi this 24<sup>th</sup> day of January, 2017**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Velo for Mr Kokul for the Applicant**

**CA Mwangi**