



REPUBLIC OF KENYA



**Mwanthi v Malundu & 3 others (Environment & Land Case
006 of 2020) [2025] KEMC 32 (KLR) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEMC 32 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
ENVIRONMENT & LAND CASE 006 OF 2020
YA SHIKANDA, SPM
MARCH 10, 2025**

BETWEEN

BENJAMIN MUTUA MWANTHI PLAINTIFF

AND

REHEMA MUMTAZ SAID MALUNDU 1ST DEFENDANT

DIRECTOR OF LAND & SETTLEMENT, NAIROBI 2ND DEFENDANT

**SUB-COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER,
KIBWEZI 3RD DEFENDANT**

ATTORNEY GENERAL 4TH DEFENDANT

RULING

The Application

1. The Plaintiff herein moved the court by way of a Notice of motion pursuant to the provisions of sections 1A, 1B and 3A of the [Civil Procedure Act](#), sections 26, 29, 30 and 31 of the [Land Registration Act](#) and Order 40 rules 1, 2, 3, 4 and 10 of the Civil Procedure Rules. The application is dated 19/7/2024 and was filed on the same day. The application seeks the following main orders:
 1. That the Honourable court be pleased to issue a mandatory order compelling the Makueni Land Registrar to release the original title deed for Plot No. 277 Kiboko B Settlement Scheme to the applicant;
 2. That leave be granted to the 1st defendant/applicant to file an additional list of documents limited to the copy of the title herein.
2. The prayer for costs is not clear. The application is supported by the affidavit of the 1st defendant/applicant and is premised on the following general grounds:



- a. The applicant has superior proprietary rights over the suit land having been duly allocated the same by the 2nd respondent;
 - b. The 2nd, 3rd and 4th respondents have in due process caused the title deed generated by the Registrar Makueni County who has refused to issue the same to the applicant;
 - c. When the plaintiff testified on 27/5/2024 it was disclosed that the due procedure to generate a title deed was underway, which is now done;
 - d. The dispute herein has changed in nature upon existence of the title which can only be challenged substantively under Land Registration Act laws, unlike under the Land Adjudication and Settlement Act;
 - e. It is just and in good faith that the same be disclosed for proper consideration at the determination of the issues herein;
 - f. The Land Registrar does not have any valid, legal or justification to continue holding the title herein.
3. In the affidavit in support of the application, the applicant reiterated the grounds on the face of the application and attached documents in support thereof. The applicant deposed that on 10/6/2024 a title deed was issued in her favour and when she went to collect it, the Land Registrar declined to give it to her on the strength of a letter by the Plaintiff.

The Response

4. The Plaintiff opposed the application by filing a Replying affidavit sworn by himself. The plaintiff deposed that the application was incompetent and a waste of precious judicial time. That ownership of the land is contested herein and that granting of the orders sought shall render the suit nugatory. The plaintiff further deposed that the 1st defendant seeks to bypass the due process of hearing and determination of the suit by attempting to dispose of the application by way of an interlocutory application. That the plaintiff's case has already taken off and it is prudent and in the best interest of justice that the case be heard and determined on merit. The plaintiff deposed that the Land Registrar made it clear that he could not issue the certificate of title because of existence of a court case. That the applicant has failed to advance any reasons as to why the orders should be granted and that if granted, the plaintiff will suffer irreparably

Main Issues for Determination

5. Having considered the application and the response by the plaintiff, I find that the main issues for determination are as follows:
- i. Whether there are sufficient grounds for the court to order the Land Registrar to release the title document to the applicant;
 - ii. Whether the applicant should be granted leave to file a further list of documents;
 - iii. Who should bear the costs of the application?

The 1st Defendant/applicant's Submissions

6. The applicant filed written submissions. She submitted that it was important for the court to note that the title deed has already been issued after a due process by the 2nd to 4th defendants as is required in law. That by the existence of the title deed, the issues for parties to litigate on have changed and unless the



same is disclosed to the court, the parties shall be on an academic expedition and that there is need for full disclosure on the existence of the same for the real issues to be determined. The applicant further submitted that the title was issued in her favour but the same has been detained by the Makueni Land registrar without reasonable cause and has not explained the legal reasons for its detention.

7. It was submitted on behalf of the applicant that there exists a title on the suit land and that the Applicant/1st Defendant has a duty to disclose all material facts within her knowledge for just determination of the suit on merit. That by the existence of these facts it is thus imperative that the court also sees and questions are asked on the same if need be or to the extreme the title deed legality if any. The applicant submitted that by the existence of the title deed, the nature of issues to be determined has changed from those under the Land Adjudication Act to those under Land Registration Act which shall be for consideration at the appropriate time. That special circumstances have come forth that prevail upon the court to have the evidence on the existence of the title deed as stated by the Applicant. The applicant relied on authorities whose copies were not provided.

The Plaintiff's/Respondent's Submissions

8. The Plaintiff also filed written submissions. The plaintiff submitted that if the application is allowed, the suit would be determined. The plaintiff argued that the application seeks to circumvent the due process. That the applicant has not adduced evidence to show that a title deed has been processed in her favour, yet ownership of the land is in dispute. The plaintiff further argued that there are two competing claims and that no prejudice will be suffered by the applicant is the suit is heard to conclusion and the court determines who the owner of the suit land is. That this was not a clear case where a mandatory injunction would be granted unless and until the parties are heard and a determination made.
9. The plaintiff submitted that the court did not have jurisdiction to issue a writ of mandamus as that was a preserve of the High Court. The argument was based on the fact that the office of the Land Registrar is an administrative body. That the applicant ought to join the Land Registrar to this suit so that he explains why he has not issued the title. The plaintiff also relied on an authority whose copy was not provided and urged the court to dismiss the application with costs.

Analysis and Determination

10. I will begin by addressing the issue of jurisdiction as raised by the plaintiff/respondent in his submissions. The plaintiff argues that the order sought is in the nature of mandamus, which writ can only be granted by the High Court as per Article 165(6) of the Constitution of Kenya.
11. In the writings of John Beecroft Saunders in a treatise entitled "Words and Phrases Legally defined" – Volume 3: I – N at page 113, quoted in the case of Seven Seas Technologies Limited v Eric Chege [2014] eKLR, the following was said about jurisdiction:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into



the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

12. In the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, Justice Nyarangi (as he then was) of the Court of Appeal held as follows:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

13. In Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 others [2012] eKLR, the Supreme Court of Kenya pronounced itself on jurisdiction and stated:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

14. The Constitutional and statutory foundation for the jurisdiction of the Magistrates courts is Articles 23 (2) and 169(1)(a) of the Constitution as read with the Magistrates Court Act No. 26 of 2015. Section 4(1) of the Magistrates Court Act stipulates as follows:

The objective of this Act is to enable magistrate courts to facilitate just, expeditious, proportionate and accessible judicial services in exercise of the criminal and civil jurisdiction in this Act or any other written law."

15. From the above provision, it can be inferred that in order to ascertain whether a Magistrate's court has jurisdiction to try a matter before it, the court does not have to restrict itself to the provisions of the Magistrates Court Act. Jurisdiction may be conferred by other written law. According to section 5 of the Civil Procedure Act, any court shall, subject to the provisions contained in the Act, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

16. Before delving further into the issue of jurisdiction, it is important for this court to determine whether the instant application is one for a mandatory injunction or mandamus. The common denominator in an application for mandamus and for a mandatory injunction is that both seek orders compelling a party to act or do something. The Land Registrar Makueni is not a party to this suit. In my view, a mandatory injunction cannot be granted against a person who is not party to a suit or the proceedings in which the mandatory injunction is being sought.

17. In Kenya, a writ of mandamus is a court order compelling a public body or official to perform a specific, lawful duty they are legally obligated to fulfill, used to remedy a failure to act when a legal right exists and no other specific remedy is available. I am guided by the holding of the Court of Appeal on



the nature of the remedy of mandamus in its decision in Republic vs Kenya National Examinations Council *ex parte* Gathenji and 9 Others [1997] e KLR. The said Court held as follows in this regard:

The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

The order of mandamus is of a 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."

18. At paragraph 90 headed "the mandate" it is stated:

The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel 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...."

19. The applicant invoked the provisions of Order 40 of the Civil Procedure Rules but looking at the gist of the application, Order 40 does not apply herein. The prayer by the applicant is for the court to compel the Land Registrar (a public authority) to issue her with certificate of title. Although the applicant amended the application to read "release" instead of "issue", I find that to be a game of semantics since the two mean the same thing given the context. The applicant attempts to argue that the title deed has already been issued and what remains is its release to her. When a certificate of title is prepared and released to the proprietor of land, it is said to have been issued to such proprietor.

20. In my view, the form of the application cannot be said to be a petition for a writ of mandamus but the substance can be said to be that for a petition for a writ of mandamus. I say so because the applicant alleges that she went to obtain the certificate of title and the Land Registrar declined to issue or release it to her stating that there was a court case involving a dispute over ownership of the land. The applicant further argues that the Land Registrar has no legal grounds to decline to issue the title deed to her yet she has superior proprietary rights over the land. The conduct of the Land Registrar, if true, is a matter for Judicial Review. I agree with the plaintiff/respondent that applications for judicial review are a preserve of the High Court, in the first instance. In the circumstances, I hold that this court is devoid of jurisdiction to grant the orders sought. Sections 1A, 1B and 3A cannot remedy a situation where the court has no jurisdiction.

21. On the sole ground that the court has no jurisdiction to grant the orders sought, the application must of necessity fail. I am also of the view that it is not the duty of the court to assist a party in obtaining evidence in support of their case. If the applicant believes that there is evidence at the Lands Registry



that would support her position in this matter, it is her duty to find that evidence. In the circumstances of this case, the applicant has the option of applying to the Land Registrar for a certified copy of the Register in respect of the suit land or applying for summons to the Land Registrar to attend and produce the records in respect of the suit land at the time of hearing.

Disposition

22. In view of the foregoing, I find that the application is devoid of merit. I proceed to dismiss it with costs to the plaintiff.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 10TH DAY OF MARCH, 2025.

Y.A SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

