



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

JUDICIAL REVIEW CAUSE NO. 7 OF 2017

IN THE MATTER OF AN APPLICATION TO APPLY FOR JUDICIAL REVIEW BY FRANCIS NDUNGU GITAU AND JOHN NDUNG’U GITAU FOR AN ORDER OF MANADAMUS

AND IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 2012

AND

IN THE MATTER OF RECONSTRUCTION OF GREEN CARD AND RESTORATION OF THE BOUNDARIES OF LAND PARCEL NUMBER NDARUGU/GACHARAGE/794 TO ITS ORIGINAL STATE PRIOR TO THE COMBINATION OF LAND PARCEL NUMBER NDARUGU/ GACHARAGE/794 AND NDARUGU/GACHARAGE/205 GIVING RISE TO LAND PARCEL NUMBER NDARUGU/GACHARAGE/796

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY LAND REGISTRAR, THIKA LAND REGISTRY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

THE DISTRICT LAND SURVEYOR, THIKA.....3RD RESPONDENT

AND

EX PARTE FRANCIS NDUNG’U GITAU AND JOHN NDUNG’U GITAU

(FORMERLY KERUGOYA JR. MISCELLANEOUS NO.3 OF 2016)

JUDGMENT

The matter for determination is the Exparte Applicant’s Application dated 23rd October 2017, brought under **Sections 8 & 9** of the **Law Reform Act (Cap 26 Laws of Kenya)** and **Order 53 Rules 3(1) &(3)** of the **Civil Procedure Rules** wherein the Applicants have sought for the

following orders;

- 1. An order of Mandamus to compel the County Land Registrar, Thika Land Registry to reconstruct the file and/or Green Card of Land Parcel No.Ndarugu/ Gacharage/794.**
- 2. An order of Mandamus to compel the County Land Registrar, Thika Land Registry to restore the boundaries of land parcel No.Ndarugu/ Gacharage/794 to its original state prior to the combination of the said land parcel No.Ndarugu/ Gacharage/794 and No.Ndarugu/ Gacharage/205 giving rise to land parcel No.Ndarugu/ Gacharage/796.**
- 3. An order compelling the District Land surveyor, Thika District to restore the mutation of No.Ndarugu/ Gacharage/794 as it existed prior to the unlawful and fraudulent combination with land parcel No.Ndarugu/ Gacharage/205 giving rise to land parcel No.Ndarugu/ Gacharage/796.**

4. Costs and incidental to this Application.

5. Such further and other reliefs that this Honourable Court may deem just and expedient to grant.

The Application is premised on the grounds that the **County Land Registrar from Thika Land Registry**, testified in court on **1st October 2015** that the land documents evidencing combination of land parcels **No.Ndarugu/Gacharage/794 & Ndarugu/Gacharage/205**, giving rise to land parcel number **Ndarugu/Gacharage/796**, could not be traced and that the Lands office has had issues and such the documents could not be traced and the only documents on record are the green cards. That the land Registrar further acknowledged that they did not have documents evidencing combination of land parcels **No.Ndarugu/Gacharage/794 & Ndarugu/Gacharage/205**, giving rise to land parcel number **Ndarugu/ Gacharage/796**.

In their statements the Ex parte Applicants averred that they are Administrators of the Estate of the late **Gitau Kamau** who was the original registered owner of parcel number **Ndarugu/Gacharage/794**, having been registered on **24th March 1958**, which land was later transferred to **Gakuu Kibuthu** on **29th June 1960**, in unclear circumstances. They also averred that there had been illegal dealings by **Gakuu Kibuthu** who transferred their land **Ndarugu/Gacharage/794**, and combined it with his parcel **Ndarugu/Gacharage/205** giving rise to **LR.Ndarugu/Gacharage/796**. They further alleged that being certain that their father had never transferred the suit property to the late **Gakuu Kibuthu**, they moved to court to obtain transfer documents and documents utilized in the transfer and combination from the **County Land Registrar, Thika Land Registry**, in order to move the court to cancel the illegal transfer but their efforts bore no fruits. They however commenced the process of reclaiming their father's land as evidenced by various correspondences attached to the Application. They have also endeavoured to challenge the transaction in court and have severally applied to the **County Land Registrar, Thika** to issue them with all documents used on the transaction to no avail. They further averred that they then filed an Application in Court seeking to have

the **District Land Registrar** release to them the certified copies of the transfer documents registered at the Land Registry for transfer of **LR.Ndarugu/Gacharage/794**, from **Gitau Kamau** to **Gakuu Kibuthu** and all documents evidencing combination of **Ndarugu/Gacharage/794** and **Ndarugu/Gacharage/205**, giving rise to **Ndarugu/ Gacharage/796**, and the same was allowed via a Ruling dated **15th May 2013**, and though it has been served upon the **County Land registrar Thika, District Land Registry**, the Registrar has failed to comply with the order.

The Applicants further averred that after numerous attempts to proceed with the Application to have the Registrar committed to Civil jail, the Registrar came to Court and acknowledged that the documents in question were missing and could not be traced.

In his **Verifying Affidavit** the Ex-parte Applicant reiterated the averments made in the statement and further averred that he has obtained the surveyors map showing the area in dispute in **Kiambu District Ndarugu** location in **1958**, prior to the transfer and combination of the suit properties and he has further obtained a copy of the Surveyor's map as the area **Ndarugu Location, Gacharage Sub-location** as is currently constituted as evidenced by **annexture JNG-7** and if the matter is not resolved forthright then his family will stand to lose their land.

The Respondents failed to respond to the Application despite service and being given various opportunities by the Court to file their responses.

The Application was canvassed by way of written submissions and the Ex parte Applicants through the **Law Firm of Patrick Law & Associates Advocates**, filed their submissions on the **11th May 2018**. They relied on various provisions of the Law and case law amongst them the case of **Samuel Kamau Macharia...Vs...Ali Khan Ali Muses & 2 Others (2014 eKLR)**, where the Court held that;

“The green card could not have been plucked out for any other reason but to facilitate fraud. This was to conceal the chronological order of the entries on the same and to avoid detection of previous entries. The Kwale Land Registrar shall reinstate the plaintiff as the registered owner of Galu/ Kinondo/50, and delete the names of the 1st defendant from the same.”

Further they relied on the case of **Kenya National Examinations Council Vs...Republic Ex parte Geoffrey Gathenji Njoroge (1997) eKLR**, where the Court held that:

“An order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

It was therefore submitted that it is only the court that can order for rectification of the register by cancellation or amendment, where it is satisfied that any registration has been obtained by fraud.

The Court has now carefully read and considered the pleadings and

submissions and it is my opinion that the issue for determination is **whether or not the Ex parte Applicants are entitled to the reliefs sought.**

The Ex parte Applicants are seeking for the Judicial Review Orders of Mandamus, 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 cited, with approval, **Halsbury's Law of England, 4th Edn. Vol.7 p.111 para 89** held that:-

“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."

Further in the case of *Shah...Vs...Attorney General (No. 3) Kampala HCMC No.31 of 1969 [1970] EA 543*, the Court expressed itself *inter alia*, as follows:

"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy."

The question that then arises is whether the Applicants are entitled to the orders that they have sought.

The Applicants have sought for an order to reconstruct the file and green card of Land parcel Number Ndarugu/Gacharage/794. It is clear by the evidence that has been provided in Court that the Land Registrar indeed acknowledged that the file relating to the said suit property cannot be traced. It will therefore be in order to have the said file reconstructed as there would be no any other available remedy to the Applicant to enable them to get copies of the same. It is this court opinion that it is the duty of the Land Registrar to keep the said records and therefore it is the Land Registrar that can reconstruct the same. This Court therefore finds that the said prayer is merited and the Applicants are entitled to the same.

The Applicants have also sought for an order of mandamus to compel the *Land Registrar* to restore the boundaries prior to the combination of the same and an order compelling the *District Land Surveyor Thika District*, to restore the mutation prior to the unlawful and fraudulent combination. Granting these orders would be akin to the Court acknowledging that the said combinations were illegal and fraudulent. These are not questions that are before this court and therefore the Court is unable to adjudicate on the same. Even so these are also not Judicial Review questions. The Applicants have rightly so averred that they have not been able to prove that the combination of the suit properties were done fraudulently and unless the same have been proved in a court of competent jurisdiction, this Court ordering or granting the Applicants the said prayers as currently framed will be tantamount to issuing orders against a party that is not a party to the case and the same will affect the said *Gakuu Kibuthu*. It will be akin to condemning the said *Gakuu Kibuthu* unheard which is against the cardinal rule of Natural Justice. In the case of *Republic...Vs...Kenyatta University Ex parte Ochieng Orwa Domnick & 7 Others [2018] eKLR* the court held that;

"The Director of Public Prosecutions is not a party in this case, yet the order sought seeks to stay or quash criminal proceedings. This is a serious omission. Even though it is an omission that could have been cured by way of amendment, the ex parte applicants counsel did not address it at all. The DPP was a necessary party in these proceedings."

"A court of law cannot issue orders which will affect persons who are not parties to the case. Such a scenario amounts to granting orders affecting other persons without giving them the benefit of a hearing. It is an established principle that a person becomes a necessary party if he is entitled in law to defend the orders sought. The term "entitled to defend" confers an inherent right to a person if he or she is affected or is likely to be affected by an order to be passed by any legal forum, for there would be violation of natural justice. A person or an authority affected by a Court order must have a legal right or right in law to defend or assail."

As the Court has already noted, *Gakuu Kibuthu* is not a party to these proceedings and therefore he has not had any chance to defend his acquisition of the said parcel of land that led to the questioned combination. If this Court was to order that the *Land Registrar Thika*, to restore the boundaries or that the *District Land Surveyor* to restore the mutation as they existed it would be making orders that are adverse to his rights without giving him a chance to defend himself.

Having now carefully considered the instant Judicial Review Application dated 23rd October 2017, the Court finds that the only *prayer no.1* is merited and an Order of Mandamus is hereby issued compelling the *County Land Registrar, Thika Land Registry* to reconstruct the file and on the Green Card of land parcel *No.Ndarugu/Gacharage/794*.

However, the Court finds that *prayers no.2 & 3* are not merited as they cannot be issued in a Judicial Review application but after calling of evidence and granting each affected party an opportunity to be heard. The Ex-parte Applicants are entitled to costs only in regard to the prayer that has succeeded. The said costs to be borne by the Respondents.

It is so ordered.

Dated, Signed and Delivered at Thika this 31st day of May 2019.

L. GACHERU

JUDGE

31/5/2019

In the presence of

Mr. Muchiri for the Exparte Applicants

No appearance for 1st Respondent

No appearance for 2nd Respondent

No appearance for 3rd Respondent

Lucy - Court Assistant

Court – Judgment read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

31/5/2019