



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA AT NYAHURURU**

**JUDICIAL REVIEW No 1 OF 2019**

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL ORDERS OF MANDAMUS AND PROHIBITION AGAINST THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR AND THE DISTRICT LAND REGISTRAR, NYAHURURU**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTIONS 107 AND 108, ARTICLES 10, 73 AND 159 OF THE CONSTITUTION**

**IN THE MATTER OF LAND REFERENCE No. NYANDARUA/OLJORO OROK SALIENT/2205 AND NYANDARUA/OLJORO OROK SALIENT/200**

**ALLAN NJUKI MURAGE & WILLIAM MWEMA**

**MURAGE (Suing as Administrator of the Estate of**

**JOHN MURAGE NATHAN G'THERU.....APPLICANTS**

**VERSUS**

**THE HON ATTORNEY GENERAL.....1<sup>st</sup> RESPONDENT**

**THE MINISTRY OF LANDS.....2<sup>nd</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR NYAHURURU.....3<sup>rd</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....4<sup>th</sup> RESPONDENT**

**RULING**

1. The Applicants vide his Chamber summons dated the 22<sup>nd</sup> March 2019 herein substantially seeks for leave to apply for an order of *Mandamus* against the Respondents herein to compel them to rectify the current erroneous Green Cards of land parcel No. Nyandarua/Oljoro Orok Salient/2205 and Nyandarua/Oljoro Orok Salient/200 to read their original values (sic) of 2.2 Ha and 9.2 Ha respectively, as per the certified copy included. That the Respondents to then work with the rectified green cards, in their office to calculate the new values of acreage of all the subdivisions of both parcels of land to date which will be reflecting the true value of the said parcels of land namely Nyandarua/Oljoro Orok Salient/2205 reflecting 2.2 Ha and Nyandarua/Oljoro Orok Salient/200 reflecting 9.2 Ha. The same to reflect the 13 acres deducted fraudulently and/or erroneously therefrom and the same be reconsolidated to the title Nyandarua/Oljoro Orok Salient/200.

2. The Applicants also sought for leave to apply for an order of prohibition to stop and restrain the Respondents from dealing with the suit property ref No. Nyandarua/Oljoro Orok Salient/2205 in any way to the detriment of the Applicants, and from receiving, registering and/or accepting and challenges or contests to the Applicant's title.

3. That the report prepared by Mr. Birundu the land Registrar be adopted and implemented wholesomely. They also sought for costs for the Application.

4. The said application is supported by the grounds on the face of it and on the verifying affidavit of William Mwema Murage dated the 22<sup>nd</sup> March 2019.

5. A date for hearing of the same inter-parties was fixed for the 22<sup>nd</sup> July 2019 and service was effected. There was neither a response by the Respondents nor an appearance on the day scheduled for hearing. Counsel for the Applicant then sought for their application to be allowed as prayed.

6. I have considered the Applicant's unopposed application herein. *Order 53 Rule 1* of the Civil Procedure Rules, is the applicable law on leave to commence Judicial Review proceedings. The said proviso provides as follows:

*(1)No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.*

*(2)An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.*

7. As seen from the above, no application for Judicial Review orders should be made unless leave of the court was sought and granted.

8. In the case of the **Republic v County Council of Kwale & Another ex parte Kondo & 57 others (1998) 1 KLR (E&L)** the court held as follows:

*“The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial Review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for Judicial Review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.*

9. In the present application, the substantive issue that requires to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence Judicial Review proceedings. The Applicant is seeking an order of *Mandamus* against the Respondents herein to compel them to rectify the current erroneous Green Cards of land parcel No. **Nyandarua/Oljoro Orok Salient/2205 and Nyandarua/Oljoro Orok Salient/200 to read their original values of 2.2 Ha and 9.2 Ha respectively.**

10. **The Applicants also sought for leave to apply for an order of prohibition to stop and restrain the Respondents from dealing with the suit property ref No. Nyandarua/Oljoro Orok Salient/2205 in any way, to the detriment of the Applicants.**

11. The application is premised on the grounds that the Applicants are administrators of the Estate of John Murae Gatheru who was at all material times the registered proprietor of land registration **No.Nyandarua/Oljoro Orok Salient/200 measuring 9.2 Ha since the year 1978.** That Mr. Ayub Rimui Muchina, who was the deceased's neighbor was the proprietor of parcel No **Nyandarua/Oljoro Orok Salient/2205. That these parcels of land were separated by an access road.** That subsequently, the deceased, John Murae Gatheru had sub divided his land into two parcels of land resulting into parcel No. 9502 and 9503 measuring 3.21 Ha and 0.81 Ha respectively. Mr. Ayub Rimui Muchina, **also sub divided his parcel of land into several parcels of land which subdivision caused the deceased's acreage of land to be reduced by about 13 acres while** Mr. Ayub Rimui Muchina gained acreage on his land thereby causing a discrepancy between the acreage on the ground and on the RIM.

12. It was therefore the Applicants' contention that there having been the discovery of the aforesaid discrepancy, they had raised their complaint with the Respondents who have declined, refused and/or neglected to cancel all the title deeds arising from the illegal subdivision of **Nyandarua/Oljoro Orok Salient/2205.**

13. Upon analyzing the facts presented by the parties as well as the submissions by Counsel, I find the issue for determination as being:-

i. *Whether the ex parte applicant has established grounds for the court to grant the leave sought.*

14. In the case of **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR** the court held that orders of *Mandamus* could only issue against a person, corporation or inferior tribunal as follows:

*“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, 4<sup>th</sup> 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.”

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..... .”

15. The Applicants have deponed that whereas the 1<sup>st</sup> Respondent is the Principal Legal advisor to the Government, the 2<sup>nd</sup> Respondent is the Ministry of lands. Section 79(4) of the Land Registration Act provides as follows;

*The Cabinet Secretary may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under this Section and without prejudice to the generality of the foregoing, the regulations may provide for –*

- a. *The process of investigation including notification of affected parties.*
- b. *Hearing of the matters raised; and*
- c. *The criteria to be followed in coming up with the decision.*

16. The 3<sup>rd</sup> Respondent is the office of a Land Registrar which office is established under Section 12 of the Land Registration Act and hence a public office. The qualification for appointment into that office are set out in Section 13 of the said Act, while the powers of the Land Registrars are set out in Section 14 of the said Act which powers include, but are not limited to, requiring persons to produce documents, summoning any person to appear and give information or explanation and causing oath or declarations to be administered. These are powers of a quasi-judicial entity and the decision taken in the exercise of such powers are amenable to this Court’s Judicial Review jurisdiction.

17. The 4<sup>th</sup> Respondents is a culpable officer with the Ministry of lands against whom complaints are made in case of failure to perform duties in accordance with the law.

18. Section 79 of the Land Registration Act, No. 3 of 2012 makes provisions for instances where the Land Registrar can effect rectification of the register. The provision is as follows:

*The Registrar may rectify the register or instrument presented for registration in the following cases –*

- a. *in formal matters and in the case of errors, mistakes or omissions not materially affecting the interests of any proprietor.*
- b. *In any case and at any time with the consent of all affected parties; or*
- c. *If upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.*
- d. *For purposes of updating the register;*
- e. *For purposes of correcting the name, address or other particulars of the proprietor upon the written application by the proprietor in a prescribed form.*

19. In **Re Bivac International SA (Bureau Veritas)** (2005) EA. 43 the High Court expounded on the issue of discretion and stated that:-

“... whereas Judicial Review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors that led to the exercise of the court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waxing a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the Judicial Review sought, the grounds and possible principles of administrative law involved.”

20. I have considered the application before the court. The institutions intended to be sued are public bodies that is subject to Judicial Review orders. The documents placed before the court do establish an arguable case for the Applicant against the Respondents. The application is thereby merited.

21. In the foregoing, leave to file an application for orders of Mandamus and prohibition against the Respondents is herein granted as prayed. The same shall be filed within 21 days upon delivery of this ruling.

**Dated and delivered at Nyahururu this 29<sup>th</sup> day of October 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**