



**REPUBLIC OF KENYA**

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

**ELC NO.136 OF 2017**

**(FORMERLY NAIROBI MISC. CIVIL APPL.105 OF 2015)**

**IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: SECTION 65 OF THE LAND REGISTRATION ACT (NO.3 OF 2012)**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT(CAP.26) AND ORDER 53 RULE 1(1) & (2) OF THE CIVIL PROCEDURE RULES (2010)**

**AND**

**IN THE MATTER OF: THE DECISION OF KIAMBU LANDS REGISTRAR REFUSING AND/ OR DECLINING TO REGISTER R.L 19 AND R.L 7 TRANSFERS IN RESPECT OF L.R NOS. KAMITI/ANMER BLCK 2/964; KAMITI ANMER BLOCK 2/965; KAMITI/ANME BLOCK 2/966; KAMITI ANMER BLOCK 2/967 AND KAMITI/ANMER BLOCK 2/968**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, KIAMBU.....2<sup>ND</sup> RESPONDENT**

**EXPARTE APPLICANT, JOYCE MUTHONI MICHUKI**

**JUDGMENT**

By a **Notice of Motion** dated **13<sup>th</sup> May 2015** the Ex parte Applicant herein filed Judicial Review proceedings seeking for the following orders as against the Respondents that;

**1. That an order of Mandamus be issued compelling the Respondents to register, in favour of the Ex parte Applicant herein R.L19 and R.L 7 transfers in respect of the parcels of land known as Nos. Kamiti/Anmer Block 2/964; Kamiti/Anmer Block 2/965; Kamiti/Anmer Block 2/966; Kamiti/Anmer Block 2/967 and Kamiti/Anmer Block 2/968.**

**2. That costs of and incidental to this Application be provided for.**

The Application is based on the grounds that the Respondents acted arbitrarily and in total disregard of the doctrine of Natural Justice and provisions of **Section 65 of the Land Registration Act (No. 3 of 2012)** in their refusal to effect Registration of **R.L 7 and R.L 19** transfer instruments as mandated by the said **Section 65 of the Land Registration Act**, and hence the need for an order of **Mandamus** to compel them to comply with the provisions of the said law.

In her **Supporting Affidavit**, the Exparte Applicant averred that she is the Administrator of the **Estate of Zachary Michuki Kamondo** vide letters of Administration issued by the Nairobi High Court in cause **No. 2424 of 2008**. It was her contention that the late **Zachary Michuki Kamondo** was the registered owner of **Title No.Kamiti/Anmer Block 2/964, 2/965, 2/966, 2/967 and 2/968** as evidenced by annexure **JMM 2 (a)-(e)**.

She further contended that she challenges the 2<sup>nd</sup> Respondent's decision not to register **R.L 19 and R.L 7** transfers in respect of the said parcels of

lands in her favour. She further averred that on **25<sup>th</sup> June 2014**, through her Advocates she applied to the **Land Registrar, Kiambu** to register in her favour **R.L 19 and R.L 7** transfers in respect of the properties. However her Advocates were informed that the said transfers in respect of the properties would not be registered since the said parcels have been listed adversely in the **unofficial Ndungu Land commission** report. She averred that the **Land Registrar, Kiambu** acted in contravention of **Rules of Natural Justice** as she was not given a chance to be heard before the decision not to register the transfers was made.

Further that the decision not to register the said transfers is prejudicial to and inconsistent with her constitutional right to property and fair and just administrative action pursuant to **Articles 40 and 50** of the Constitution of Kenya. She further contended that the **Land Registrar, Kiambu** has a statutory duty conferred upon him by **Section 65 of the Land Registration Act, No.3 of 2012** to register the said transfers which duty the 2<sup>nd</sup> Respondent illegally failed to perform. She alleged that the Land Registrar's decision was based on irrelevant considerations as the refusal to effect the said transfer was based on the **unofficial Ndung'u Land Commission Report** as opposed to the mandatory statutory provisions.

She further alleged that having become entitled by an Order of Court to the right, title and interest in the aforesaid parcels of land she had a

legitimate expectation that the 2<sup>nd</sup> Respondent would abide by his statutory obligations and effect registration of the **R.L 7 and R.L 19 transfers** registering her as proprietor of the said properties. She averred that her only remedy as against the Land Registrar to compel the registration of the transfer is through the orders of Mandamus. It was her contention that her Advocates issued a statutory notice to the Attorney General which was responded to.

The Application is opposed and the Respondent through the Land Registrar filed a Replying Affidavit and averred that the refusal to register was not arbitrary as it was premised on the fact that there are restrictions lodged on the respective parcels of land by the Chief Land Registrar as evidenced by **annexture WN1**. It was her contention that there is a procedure in law for removal of a restriction which includes through the Court process or removal by the restricter and the procedure under **Section 78** of the Land Registration Act. She averred that the exparte Applicant has not served them with any Court Order for the removal of the said restriction and thus she was unable to register the transfers. She alleged that the parcels of land were restricted based on the findings on the Report of the Commission of inquiry into the illegal/irregular allocation of public land as having been hived off Kiambu Forest without being degazetted. She therefore averred that the Ex parte Applicant does not deserve the orders sought.

The Exparte Applicant filed a **Supplementary Affidavit** and averred that she has been advised by her Advocates that for a restriction to be valid the procedure set out under **section 76(1) of the Land Registration Act** must be followed as such the Registrar was required to conduct an inquiry upon service of the required notice upon all interested parties.. It was her contention that as per the reading of the Registrar's **Replying Affidavit**, no inquiry was conducted before registration of a restriction on the titles in question and no notices were issued to any interested party before a decision to impose a restriction was made. It was her contention that the Registrar was under a duty to follow the procedure set out in law before registering the restriction and such the Registrar transgressed upon all rules of natural justice and acted ultra vires and it would be proper for the Court to make orders for the removal of the restriction.

The Application was canvassed by way of written submissions to which the Court has now carefully read and considered. The Court has also carefully considered the pleadings in general, the annexures thereto, the cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The Court finds that the issues for determination are:-

- a) ***Whether the applicant has met the threshold for grant of Judicial Review Order of Mandamus.***
- b) ***Who is entitled to costs of these proceedings.***

a) **Whether the applicant has met the threshold for grant of judicial review order of Mandamus:**

In order to determine whether or not the Exparte Applicant has met the threshold for granting of the Judicial Review order of Mandamus, it is important for this Court to set out the purpose of judicial review. See the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, where the Court of Appeal held that:-

***“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of judicial review”.***

Further the circumstances under which orders of judicial review can be issued were elaborated by Justice Kasule in the Uganda case of Pastoli ...Vs..Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.

**“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.**

**Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.**

**Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.**

**Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidwi... Vs...Secretary of State for the Housing Department (1990) AC 876”.**

There is no doubt that the Exparte Applicant is the beneficial owner of the suit properties having acquired interest of the same vide **Succession Cause No.2424 of 2008**. She alleged that she then through her Advocates sought to have the said suit properties transferred to her and it was then that the **Land Registrar, Kiambu** refused to register the transfers by using an **unofficial report** from the **Ndungu Commission**. While the Exparte Applicant in her supporting Affidavit had alleged that was the only reason that the Registrar had refused to register the transfer, in her supplementary Affidavit, she acknowledged that there was a restriction that was registered against the suit property, though it was her contention that one could not tell when the said restriction was registered. In her **Replying Affidavit**, the **Land Registrar, Kiambu** averred that the only reason as to why she could not register the transfers was because the **Chief Land Registrar** had registered a **restriction** as against the suit properties and therefore the transfer could not be effected.

This Court must therefore interrogate the averments by the parties as against the circumstances under which a judicial review order is to be issued. The first question then that this Court asks itself is whether the **Land Registrar, Kiambu** had the powers and jurisdiction to effect the transfer and in this regard the Court will answer to the affirmative. To which then this Court will interrogate whether the decision made by the Land Registrar Kiambu not to effect the transfer was **tainted with illegality, irrationality and procedural impropriety**. **The Land Registrar Kiambu had averred that when the transfer was presented before her, there was a restriction registered against it. This Court will then inquire as to whether the Land Registrar was in a position to register the transfer with a restriction in place and whether the Chief Land Registrar was within his powers to order/register the said restriction. Section 76 of the Land Registration Act, 2012 provides that;**

**“(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.**

**(2) A restriction may be expressed to endure—**

**(a) for a particular period;**

**(b) until the occurrence of a particular event; or**

**(c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.**

**(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions”.**

From the above provisions of the Law it is very clear that the Registrar was within his powers to order the registration of the restriction as against the suit properties. It does not escape the Court’s mind that the Ex parte Applicant had alleged that the restriction was improperly placed as she had had no notice of the same.

However the Applicant in her Application sought orders for Judicial Review as against the Land Registrar Kiambu for refusing to register the transfers. There were no orders sought as against the restriction. This Court therefore finds that it is not in a position to interrogate the illegality or not of the restriction that had been placed.

The purpose of **Judicial Review Orders** is not to look at the merit of

the decision that has been made by the public officer, but to interrogate whether the right process had been followed before that particular officer made the decision. The Exparte Applicant has not provided any evidence before this Court that seem to suggest that she tried to have the restriction removed but the public officer failed in her duty. This Court therefore holds and finds that the Restriction registered by the Chief Land Registrar subject to any other finding was valid.

Having held and found that there was a valid restriction in place. The next question that this Court must then answer is whether the Land Registrar Kiambu acted within her powers and jurisdiction to decline to register the two transfers. **Section 76(2A)** of the Land Registration Act provides that;

**(2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions”.**

From the above provision, it is clear that once a Restriction has been registered in the register any dealings in the land are prohibited. The registration of the transfers in this regard is a dealing in land. This Court having held and found that there was a valid restriction that remains unchallenged therefore finds that the decision by the Land Registrar not to register the transfers was not in any way irrational nor was it impromptu. There is a purpose for which a Restriction is registered and that is to guard against fraud or any improper dealings of a particular piece of land. See the case of **Matoya Vs Standard Chartered Bank (K) LTD & Others (2003) I EA 140**, where it was held that;

**“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented”.**

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, 4<sup>th</sup> Ed. 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.”**

The Exparte Applicant has asked the Court to grant her an Order of Mandamus to compel the **Land Registrar Kiambu** to register the transfer **R.L 19 and R.L 7**, though the registering of the transfer instruments appertain to the duties of the Land Registrar’s duties, this Court must also be satisfied that the rules of Natural justice were not followed and therefore the decision by the Land Registrar not to register the transfers were improper and irrational.

This Court having carefully considered the Application, the Affidavits and the annexures presented before it is not satisfied that the decision by the Land Registrar was ultra vires. The allegations by the Exparte Applicant of not having been heard before the restriction was placed are not part of these proceedings and there being a **restriction**, the Court cannot in any way compel the Land Registrar to register the said transfers while **restriction** is still in place. See the case of **Republic ...Vs...Kenya Revenue Authority Exparte Yaya Towers Ltd (2008) eKLR**, the Court held that:-

**“The remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected.....”**

This Court finds and holds that there is no instant where the Ex parte Applicant was treated unfairly as she was allowed to present her papers and was given a reason as to why the transfers could not be registered and if she felt aggrieved by the restriction that was in place, she ought to have sought a way of removing the restrictions before seeking Judicial Review Orders to have the transfer instruments registered. The right to own property under **Article 40** of the **Constitution** is not absolute.

Having now carefully read and considered the pleadings of the parties, the available evidence, cited authorities and provision of the law and the written submissions, the Court finds that the Ex parte Applicant has failed to discharge the burden of proving her claim on a balance of probabilities and therefore her claim for Judicial Review Order of Mandamus is not merited and it is therefore disallowed.

#### **b) Who is entitled to the costs of these proceedings?**

Though costs normally follow events, the Court has discretion on whether or not to grant costs. **Section 27** of the **Civil procedure Act** gives the Court discretion on grant of costs. Looking at the circumstances of the suit, this Court therefore orders each party to bear its own costs.

The Upshot of the foregoing is that the **Notice of Motion** application dated **13<sup>th</sup> May 2015**, is not merited and the same is dismissed entirely with an order that each Party to bear her and/or its own costs.

It is so ordered.

**Dated, Signed and Delivered at Thika this 4<sup>th</sup> day of October 2019.**

**L. GACHERU**

**JUDGE**

**4/10/2019**

In the presence of

Mr. Gichuhi holding brief for Mr. Mbugua for Exparte Applicant

No appearance for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

Lucy - Court Assistant

**Court** – Judgment read in open court.

**L. GACHERU**

**JUDGE**

**4/10/2019**