



**Republic v Kilifi County Land Registrar; Settlement Fund Trustees
(Interested Party); Ali (Exparte) (Environment and Land Judicial Review
Case E002 of 2023) [2024] KEELC 56 (KLR) (22 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 56 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023
FM NJOROGE, J
JANUARY 22, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KILIFI COUNTY LAND REGISTRAR RESPONDENT

AND

SETTLEMENT FUND TRUSTEES INTERESTED PARTY

AND

OMAR ALI EXPARTE

JUDGMENT

1. In a notice of motion application dated 27th January 2023, the Applicant is seeking for the following Judicial Review Orders: -
 - a. That the honourable court be pleased to issue a judicial review order of *mandamus* to compel the Respondent to release the original title deed in respect to land parcel known as Kilifi/Tezo Roka/73 to the *ex-parte* applicant who is the registered owner.
 - b. That the honourable court be pleased to issue a judicial review order of prohibition to prohibit the Respondent from holding the *ex-parte* applicant’s original title deed in respect to land parcel known as Kilifi/Tezo Roka/73.
 - c. That costs to the application be provided for.
2. The application is based upon the grounds listed on the face of it and the affidavit sworn by the Applicant on the even date. The Applicant’s case is that upon payment of the requisite fees to the



interested party, he was issued with a discharge of charge of the land parcel Kilifi/Tezo Roka/73 (the suit property) which was subsequently registered in his name. However, the Respondent has since declined to release to him the original title deed for no good reason.

3. The Respondent and Interested Party opposed the application. They filed a Replying Affidavit sworn by J.B Oketch, the Kilifi District Land Registrar, on 13th March 2023. Mr. Oketch deposed that according to the green card, the suit property was first allocated to Omar Ali who processed a discharge of charge from the interested party on 23rd April 2015 and a title issued to him. On 2nd December 2015, the suit property was transferred on transmission to one Omar Ali Omar, and later on 8th December 2015 transferred on sale to one Jayesh Karsan Mepani who is the current registered owner. Mr. Oketch deposed that the title deed was no longer in the possession of the Respondent but the registered owner.
4. In rebuttal, the Applicant filed a supplementary affidavit on 13th June 2023 stating that the said Omar Ali Omar, now deceased, was his neighbor on plot number 72 and that he (the applicant) was in possession and occupation of number 73. He denied being issued with the original title deed by the Respondent.
5. Parties agreed to file written submissions.

Applicant's Submissions

6. The Applicant's counsel submitted that the Respondent failed to adduce evidence of any transfer documents and or copies of grant which would form the basis of the transfer by transmission or otherwise; that the Respondent has also failed to explain the contradiction between the green card and copy of official search which shows that as at 7th November 2019, the suit property was still registered in the name of the Applicant.
7. To counsel, the onus of proof was on the Respondent, the official custodian of the relevant documents, who failed to discharge that burden. Counsel urged the court to allow the Application.

Respondent's and Interested Party's Submissions

8. Counsel identified two issues namely whether the applicant is entitled to the orders of *mandamus* and prohibition, and whether judicial review is the proper mode of instituting this suit.
9. Regarding the first issue, counsel submitted that as per the definition of *mandamus* stated in the case of [*Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others*](#) [1997] eKLR, that order can not be granted herein for reasons that the order must command no more than the party against whom the application is made is legally bound to perform; that 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 to be performed in a specific way.
10. He added that in the present case the public duty of the Respondent will only crystallize upon conclusion of the issue of ownership, as such the order of *mandamus* cannot issue. Counsel relied on the case of [*Republic v JKUAT, Ex-Parte Elijah Kamau Mwangi*](#) [2021] eKLR to buttress this point. Similarly, so counsel submitted, the order of prohibition could only be issued once the issue of ownership is determined. He relied on the case of [*Fredrick Masaghwe Mukasa v DPP & 3 others*](#) [2016] eKLR.
11. In relation to the second issue, counsel argued that the issues raised in this suit are contentious and can only be determined by way of an ordinary civil suit. He quoted the case of [*Republic v NTSA & 10 others Ex-Parte James Maina Mugo*](#) [2015] eKLR where the jurisdiction of judicial review was stated to be limited to uncontested matters of facts.



12. Counsel urged the court to dismiss the notice of motion with costs.

Analysis and Determination

13. The Applicant is asking for an order of *mandamus* directed at the Respondent to release to him the title deed for the entire plot number Kilifi/Tezo Roka/73 and a prohibition prohibiting the Respondent from holding the said title.
14. As aptly submitted to me by the Respondent, the efficacy and scope of an order of *mandamus* and prohibition was set out by the Court of Appeal in the case *Kenya National Examination Council – v- Geoffrey Gathenji Njoroge & 9 others* [supra]. The court quoted with approval *Halsbury’s Laws of England*, 4th edition, volume 1 at page 111 from paragraph 89 as follows:

“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 office and is in the nature of a public duty..... 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. If the complaint is that the duty has been wrongly performed, i.e that the duty has not been performed according to law, then *mandamus* is a wrong remedy to apply because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...”
15. It is clear from the above decision that an order of prohibition or *mandamus* cannot quash what has already been done. It is only the writ of *certiorari* that deals with the quashing of decisions of bodies and persons and not the writ of *mandamus* or prohibition.
16. The Respondent in this case is the custodian of all land documents and particularly the suit property herein. The Respondent exhibited a copy of an excerpt of the green card relating to the suit property. A perusal of the said excerpt reveals that title deed for Kilifi/Roka/73 was first issued to one Omar Ali on 23rd April 2015. The same was then transferred to one Omar Ali Omar on 2nd December 2015, and finally to one Jayesh Karsan Mepani on 8th December 2015 and a title deed issued on the same date.
17. On the other hand, the Applicant’s evidence is contrary to this information. He exhibited a copy of discharge of charge dated 28th May 2018 and copy of a title deed issued on 4th November 2019. The Applicant also annexed a copy of certificate of official search dated 7th November 2019.
18. From the foregoing, it is evident that the title deed to the suit property has been issued to someone else. The Respondent averred that he was not in possession of any title deed related to the suit property. For this reason, an order of *mandamus* and prohibition as prayed cannot be issued against the Respondent. It will be in vain. Perchance issued and complied with, it may lead to double title. It is also clear to me that there is an eminent issue as to ownership of the suit property. On the one part, the Applicant claims that he is the legal owner and even produced a copy of a title allegedly given to him at the Land Registry; on the other part, the Land Registry records show that the suit property has changed ownership twice and is currently in the name of a third party, not party to this suit.
19. In my view, before the Respondent can be compelled by this court to act in favour of the Applicant herein, it is paramount that the issue of ownership is first settled. On this issue, I agree with the



Respondent's counsel that it can only be determined in a normal civil suit and by way of oral evidence and production of documents with cross-examination to establish the veracity of averments by the parties to determine the validity of the title issued and the rights of the various parties in relation to the suit land.

20. In the circumstances, I find that the Applicant's notice of motion application dated 27th January 2023 is unmeritorious and I dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE,

ENVIRONMENT AND LAND COURT, MALINDI.

