



**Republic v County Land Registrar Kakamega & 3 others; Saleh
(Ex parte Applicant) (Environment and Land Judicial Review Case
E002 of 2023) [2024] KEELC 1084 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2023
DO OHUNGO, J
FEBRUARY 29, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR KAKAMEGA 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

GEORGE MZEE MARAMBA 3RD RESPONDENT

RUDOZE SHITANDI MARAMBA 4TH RESPONDENT

AND

YUSUF AMIN SALEH EX PARTE APPLICANT

RULING

1. By Chamber Summons dated 15th August 2023, the Ex Parte Applicant is seeking the following orders:
 1. [Spent]
 2. [Spent]
 3. That this court does grant leave for the applicant to apply for an order of certiorari to remove into this court and to quash the Entry No. 5 on Land parcel Butso/So/Shikoti/14130.
 4. That this court does grant leave for the applicant to apply for an order of Mandamus compelling the Land registrar to enter the name of the applicant as one of the proprietors with interest in common in 0.11 Ha of Butso/So/Shikoti/14130.



5. That leave granted in 2, 3 and or 3 above to operate as stay of any transfer, subdivision, sale and or any interference/further interference whatsoever of Butsotso/Shikoti/14130.
6. That costs of this Application be provided for.
2. The application is grounded on Statutory Statement dated 15th August 2023 and is supported by a verifying affidavit and supporting affidavit, both sworn by the Ex Parte Applicant. He contended that pursuant to a grant issued in *Kakamega HC Succession Cause No 34 of 2014*, he was one of the registered proprietors of the parcel of land known as Butsotso/Shikoti/14130 (suit property) and that the Respondents mysteriously and fraudulently removed his name from the register of the suit property. He pleaded particulars of fraud in his Statutory Statement.
3. Although evidence of service was availed, the First and Second Respondents neither responded to the application nor participated in its hearing.
4. On their part, the Third and Fourth Respondents filed Grounds of Opposition in which they took the position inter alia that this Court lacks jurisdiction to supervise the High Court and that fraud is an issue of private law which cannot be addressed through Judicial Review.
5. The application was canvassed through written submissions which both the Ex Parte Applicant and the Third and Fourth Respondents duly filed. I have considered the application, the Statutory Statement, the affidavits, Grounds of Opposition, and the submissions. The issue that arises for determination is whether leave to apply for judicial review orders of certiorari and mandamus should be granted.
6. Pursuant to Order 53 rule 1 (1) of the *Civil Procedure Rules*, no application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted. Further, the proviso to Order 53 rule 1 states that that where the circumstances so require, the Judge may direct that the application be served for hearing inter partes before grant of leave. That is the course that was taken when Chamber Summons dated 15th August 2023 went before the recess duty Judge on 17th August 2023.
7. As Waki, J. (as he then was) held in *Republic v County Council of Kwale & another ex parte Kondo & 57 others* (1998) 1 KLR (E&L):

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.

8. Pursuant to the prayers in the Chamber Summons, the ex parte applicant intends to apply for an order of certiorari to remove into this court and to quash the entry number 5 in the register of the suit property and an order of mandamus compelling the land registrar to enter the name of the ex parte



applicant as one of the proprietors of the suit property. From the material on record, entry number 5 conferred proprietorship of the suit property to, among others, the Third and Fourth Respondents herein. Cancellation of the said entry is therefore cancellation of title to land. Similarly, issuance of an order of mandamus compelling the land registrar to enter the name of the ex parte applicant as one of the proprietors of the suit property is an order conferring title to land. The ex parte applicant's basis for seeking the orders is that the Respondents mysteriously and fraudulently removed his name from the register of the suit property.

9. As was stated by the Court of Appeal in *Municipal Council of Mombasa v Republic & another* [2002] eKLR, judicial review is concerned with the decision making process, not with the merits of the decision itself. The judicial review court does not delve into the merits of the decision or whether there was sufficient evidence to support the decision. Simply put, judicial review is not concerned with private rights. See *Commissioner of Lands v Hotel Kunste* [1997] eKLR.
10. Fraud is a serious allegation and a party like the ex parte applicant who raises such an allegation must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR.
11. A registered proprietor of land is entitled to the rights, privileges, and benefits under Section 24 of the *Land Registration Act*. Pursuant to Section 26 (1) (a) or (b) of the *Act*, a certificate of title can only be nullified on grounds of fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. It thus becomes manifest that cancellation of title on grounds of fraud cannot be attained through judicial review since such an allegation must be tested rigorously through viva voce evidence at trial. The ex parte applicant does not have a case that can be argued through judicial review. He should explore other avenues of seeking relief.
12. I find no merit in Chamber Summons dated 15th August 2023 and I therefore dismiss it with costs to the Third and Fourth Respondents.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Obiero for the Ex Parte Applicant

No appearance for the Respondents

Court Assistant: E. Juma

