



**Republic v Land Registrar – Murang’a & another; Mwangi & another (Exparte) (Environment and Land Judicial Review Case E001 of 2022) [2024] KEELC 1055 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1055 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022  
LN GACHERU & LN GACHERU, JJ  
FEBRUARY 29, 2024**

**IN THE MATTER OF THE AN APPLICATION BY SIMON NJOROGE MWANGI AND LUCY FRANCES GATHONI MWITURA FOR ORDERS OF CERTIOTARI & MANDAMUS**

**AND**

**IN THE MATTER OF ARTICLE 47 CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE DECISION BY LAND REGISTRAR MURANG’A TO REJECT THE APPLICATION TO ACQUIRE A TITLE DEED FOR LAND PARCEL LR NO. MAKUYU/KARIAINI BLOCK 111/3**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE LAND REGISTRAR – MURANG’A.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE SIMON NJOROGE MWANGI & LUCY FRANCES GATHONI MWITURIA**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE LAND REGISTRAR – MURANG’A ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**SIMON NJOROGE MWANGI ..... EXPARTE**



JUDGMENT

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1. Vide leave of the court granted on 16<sup>th</sup> February 2022, the Exparte Applicants herein Simon Noroge Mwangi and Lucy Frances Gathoni Mwituria, filed this Judicial Review Application dated 28<sup>th</sup> February 2022, and sought for the following orders;
  - i. An order of Certiorari quashing the decision of the 1<sup>st</sup> Respondent to deny the ex-parte acquisition of title deed for land parcel LR No. Makuyu/Kariaini Block 111/3.
  - ii. An order of Mandamus does and is hereby issued compelling the 1<sup>st</sup> Respondent to issue the applicants with title deed for land Parcel No. Makuyu/Kariaini Block 111/3.
  - iii. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners are the rightful proprietors of the suit property on LR No. Makuyu/Kariaini Block 111/3.
  - iv. A declaration that the Petitioners' right to fair administrative action under Art 47 and right to property under Article 40 of *the Constitution* as read together with fair administration Act 2015 have been violated.
  - v. Costs of the petition be borne by the Respondents and interested party jointly.
2. This Judicial Review is premised on the grounds stated on the face of the application and on the supporting Affidavit of the Ex Parte Applicants herein.
3. These grounds are;
  - i. That the suit property referred to as L.R.Makuyu/Kiriaini Block 111/3 belonged to one Mwangi Mwituria(deceased).
  - ii. That the estate of the deceased was subjected to Succession Cause No. 202 of 1990 Thika and the suit property distributed to the Applicants herein.
  - iii. That upon conducting a search on the suit property at the 1<sup>st</sup> Respondent, it was discovered to be erroneously allocated to the Government of Kenya.
  - iv. That the Applicants have since followed up the matter with the Respondents to no avail despite the same being marked as solved.
  - v. That the actions of the Respondents have inhibited the Applicants right to their own property contrary to *the constitution* of Kenya *Land Registration Act* and for fair Administrative Act.
  - vi. That the actions of the Respondents are bias, ultra vires, illegal, unreasonable, unfair, procedurally flawed, made in bad faith, not proportionate to the interests/rights affected and materially influenced by an error of law.
  - vii. That it is in the interest of justice that the application be allowed as prayed.
4. In his supporting Affidavit dated 28<sup>th</sup> February 2022, Simon Njoroge Mwangi, averred that the suit property is registered in the name of Mwangi Mwituria(deceased), as is evident from the copy of allotment letter attached thereto.



5. He also averred that the estate of the deceased is subject to the Succession Cause No. 202 Of 1990, in Thika, and the property was distributed to the applicants herein as is evident from annexures SNM 2.
6. It was his contention that upon conducting a search of the suit property, at the 1<sup>st</sup> Respondent, it was discovered to be erroneously allocated to the government of Kenya, as is evidenced by annexure SNM2.
7. He contended that he has personally followed up the matter, with the Respondents to no avail, despite the same being marked as resolved. He annexed SNM3, which are succession proceedings.
8. He averred that he has been informed by his counsel on record that the action of the Respondents has inhibited the Exparte Applicants' right to their own property, contrary to *the Constitution* of Kenya, *Land Registration Act*, and Fair Administration Act.
9. Further, that the actions of the Respondents are illegal, unreasonable, unfair and procedurally flawed. That in the interest of justice, the Application should be allowed.
10. The Judicial Review is also supported by the Statutory statement of the Exparte Applicants herein dated 10<sup>th</sup> January 2022, which reiterated the grounds in support of the Application.
11. The Attorney General for 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Memorandum Of Appearance on 15<sup>th</sup> February 2022, but did not file any response to the substantive Judicial Review, even after having been granted several opportunities to do so.
12. The Judicial Review proceeded exparte through written submissions. The Exparte Applicants filed their submissions on 1<sup>st</sup> October 2023, through Kaburu Miriti & Co Advocates.
13. The exparte Applicants submitted that this Judicial Review is founded on section 79 of the *Land Registration Act*, which provides inter alia that the Registrar may rectify the register or instrument presented for registration in formal matters and in the case of error or mistakes and for purposes of updating the register.
14. The Exparte Applicants submitted that the Respondents have the necessary authority to rectify the error in the register for the land parcel no, Makuyu/Kariani Block 111/3, on the proprietorship section.
15. Reliance was placed on the case of Homabay ELC JR 7/2012: Michael Otieno Oloo Vs Homabay Land Registrar & 2 others (2022) eKLR, where the court held;

“Black’s Law Dictionary 10<sup>th</sup> Edition at page 1467 defines the term “Rectification of register” as;

“A process by which a person whose name was wrongly entered in or omitted from the record can compel the recorder to correct the error.”

22. It is to be noted that the protection of right to property is enshrined under Article 40 of *the Constitution* which reads in part;

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property---“

16. It was also submitted that the application is presented in the nature of Judicial Review against the decision of the 1<sup>st</sup> Respondent in the rectification of the land register for LR No. Makuyu/ kariani Block111/3, more specifically the error at the properties section. This is grounded on the right to fair administrative action, guaranteed by Article 47 of *the Constitution*, and the Fair Administrative Action.



17. Reliance was placed on the case of Nakuru ELC JR 2/2021 Republic v Naivasha District Land Registrar & 2 Others Ex parte Grace Wanjiru Nganga & 2 Others (2022) eKLR, where the court held;
- “Are the ex parte applicants entitled to the reliefs of certiorari, mandamus and prohibition which they have sought? An order of certiorari will issue if a decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. An order of prohibition ordinarily issues to forbid a tribunal or body from continuing proceedings in excess of its jurisdiction or in absence of jurisdiction. On its part, an order of mandamus compels the performance of a public duty which is imposed by statute. See Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR and Joseph Malakwen Lelei & another v Rift Valley Land Disputes Appeals Committee & 2 others [2014] eKLR.”
18. The ex parte Applicants urged the court to allow their Judicial Review Application as prayed. It is evident that Judicial review refers to the authority of the court to examine the actions of various administrative bodies of government, and to determine whether such actions are consistent with *the constitution*. See the case of Republic v Public Procurement Administrative Review Board & 2 others.
19. Traditionally, Judicial Review, was not concerned with the merits of the decision, but rather the propriety of the process and the procedure in arriving at the said decision. However, this approached has now substantially changed.
20. In the case of such an Investment Ltd vs Ministry of National Heritage & culture & 3 Others (2016) eKLR, the Court of Appeal held;
- “traditionally judicial reviews is not concerned with the merits of the case. However, section 7 (2)(1) of the Fair Administrative Act provides proportionality as a ground for statutory judicial review.... This test of proportionality leads to a greater intensity of review than the traditional grounds. What this means in practice is the consideration of substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision”
21. Further, the Supreme Court in the case of Dande & 3 others vs inspector General, National Police Service & 5 Others & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment), set out the scope of judicial review and the circumstances under which the scope may be expanded to include inquiry into the merits of Administrative actions.
22. What is clear is that Judicial Review is invoked when there is a decision made by an administrative unit. A Judicial Review is a challenge to the way in which a decision has been made rather than the rights and wrongs of the conclusion reached.
23. The parameters for Judicial Review were set out in the case of Pastoli vs Kabale District Local Government Council & another (2008) 2EA 300, where it held;
- “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 acts 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.

24. The Ex parte applicants have alleged that they are the rightful owners of land parcel No Loc Makuyu/Kariani block 111/3, which was erroneously allocated to the government, but despite numerous applications, the Respondents have refused to cause the said land parcels be registered in their names.
25. The Applicants have therefore urged the court to issue prerogative orders to quash the decisions of the Respondents of denying the Ex parte/Applicants acquisition of the title deed for the suit land, mandamus order to compel the 1<sup>st</sup> Respondent to issue the Ex parte Applicant with the title deed, and a declaration that the applicants are the rightful owners of the suit property.
26. However, the Applicants have not attached any decision of the 1<sup>st</sup> Respondent denying them acquisition of the title deed for the suit property. Therefore, there is no decision to be quashed by this court. See the case of Republic V Commissioner of Lands Municipal Council of Mombasa & 3 Others Exparte New Nyalı Community Group;

“It was incumbent upon the Applicant to account for his failure to show a copy of the decision sought to be quashed before the hearing of the motion to the satisfaction of this court. There is no affidavit evidence to explain the reasons why copies of the decisions complained of have not been supplied. In the end I find this preliminary point as well founded hence it is upheld. This renders the entire motion fatally defective.”

27. Further, the Applicants have urged the Court to compel the 1<sup>st</sup> Respondent to issue the Exparte Applicants with the title deed of the suit property. The Applicants attached some proceedings from the succession court to show that the suit property was subject of succession proceedings for the estate of Mwangi Mwituria. However, no confirmed grant was attached and this Court cannot hold that the same was distributed to the Ex parte Applicants.
28. Further, the Applicants attached the search certificates which shows that the suit land is registered in the name of the Government of Kenya. The search certificate does not show when the said land was registered in the name of the Government. If it was before the Succession cause, then the suit property was not available for distribution, through succession proceedings as it was not registered in favour of Mwangi Mwituria(deceased).
29. The issue of ownership of this suit property cannot be settled in a Judicial Review, but in a normal civil suit, where the Court would need to determine whether the Applicants are the rightful owners of the suit property. Therefore, this court cannot issue an order to compel the 1<sup>st</sup> Respondent to issue them with the title deed.



30. On a declaration that the applicants are the rightful owners of the suit property, this can only be issued after evidence has been available by the applicants on how they acquired the suit property, so that the court can order a rectification of the certificate of title Section 26 of the *Land Registration Act*, is very clear on the rights of a registered owner, and section 80 of the said Act gives instances when land register can be rectified.
31. This Court finds that it cannot confer ownership of the suit property to the Exparte Applicants through a Judicial Review, such as this one. They should file a substantive civil suit, wherein they will call evidence, which evidence will be subjected to the usual test.
32. On the right to fair administrative action, there is no evidence that the Exparte Applicants rights have been violated, and the Court has found that the Exparte Applicants can state their rights through a substantive civil suit.
33. Though this Judicial Review is not contested, the court finds that the Exparte Applicants have not met the conditions for grant of the prerogative orders sought herein.
34. For the above reasons, the court finds and holds that this Judicial Review Applicant is not merited and the said application is dismissed entirely with no orders to costs since the Respondents did not oppose the suit.
35. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of; -

Mr Murimi for the Exparte Applicants

1<sup>st</sup> Respondent

Absent

2<sup>nd</sup> Respondent

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

**29/2/2024**

