



Kiore (In his Capacity as the Donee of Power of Attorney & Covenants beyond death no IP/A/64940/1) & another v Cabinet Secretary, Ministry of Lands, Housing & Urban Development & 3 others (Civil Appeal 418 of 2018) [2025] KECA 1122 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1122 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 418 OF 2018
M NGUGI, F TUIYOTT & GV ODUNGA, JJA
JUNE 20, 2025

BETWEEN

SOLOMON NJOROGE KIORE (IN HIS CAPACITY AS THE DONEE OF POWER OF ATTORNEY & COVENANTS BEYOND DEATH NO IP/A/64940/1) 1ST APPELLANT
FURNCON LIMITED 2ND APPELLANT

AND

THE CABINET SECRETARY, MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 1ST RESPONDENT
CHIEF LAND REGISTRAR 2ND RESPONDENT
THE HON ATTORNEY GENERAL 3RD RESPONDENT
JONATHAN MUNYWOKI MULI AND SHADRACK MBAI MBIU (AS THE PURPORTED ADMINISTRATOR OF THE ESTATE OF SHEILA THOMPSON) 4TH RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court- Milimani (E. Obaga, J) dated 20th September 2018) in ELC JR 12 of 2017)

JUDGMENT

1. At the centre of this dispute is a property known as LR No.1012/47/2 (IR 97708/1) located at Roysambu area in Nairobi County (suit property). The suit property, according to the Statement of Facts filed before the trial court, was registered in the names of Mary Hannah Thompson, the mother of Anthony John Thompson and Sheila Thompson. Upon the demise of Mary, the property was registered in the joint names of Anthony John Thompson and Sheila Thompson as tenants in



common. Sheila died on 23rd June 2006 and the 4th respondents were appointed as administrators of her estate on 25th May 2012. Anthony also died in France, probably between 23rd June 2009 and 6th July 2009. His estate is the subject of succession proceedings in which at least three people are claiming to be entitled to succeed him.

2. What prompted the current proceedings was a special power of attorney granted to the 1st appellant by the wife and daughter of the Anthony John Thompson in which they not only renounced their right to succeed to the estate in Succession No. Cause 1965 of 2009, but also gave power to the 1st appellant over the suit property.
3. The said power of attorney was registered as IP/A 64940/1. By Gazette Notice No. 8684 of 20th November 2015 as amended vide corrigenda published under Gazette Notice No.8901 of 4th December 2015, the donee of the power of attorney was given a 14 day notice of the recall of the said power of attorney and warned that non-compliance therewith would lead to revocation/deregistration of the same. It would seem that the 1st appellant did not comply with the said notice.
4. According to the appellants, notwithstanding numerous complaints to various state and independent agencies, it was only by a letter dated 29th December 2016 that the 1st respondent communicated the reasons behind the revocation of the power of attorney.
5. Pursuant to leave granted on 31st May 2017, the appellants filed a judicial review application by way of a Notice of Motion dated 13th June 2017 in which they sought the following reliefs:
 1. That by way of judicial review, an order of certiorari to issue, to remove to this Honourable Court for purposes of being quashed, and to quash, the 1st Respondent's Gazette Notice No.8684 of 20/11/2015 revoking Power of Attorney and Covenants beyond Death No. IP/A 64940/1 as exposted by the cabinet Secretary on 25th November 2016, for being ultra vires and unconstitutional.
 2. That by way of Judicial Review, an order of mandamus do issue, upon the issuance of the Order of Certiorari herein, compelling the 2nd Respondent or any Registrar acting at their behest to reinstate the registration of the Power of Attorney and covenants beyond death No IP/A 64940/1.
 3. That the costs be to the ex-parte applicants in any event.
6. Though served, the 1st to 3rd respondents did not participate in the proceedings before the trial court. Only the 4th respondents filed a replying affidavit.
7. The appellants, through the 1st appellant, reiterated the foregoing and contended that the 1st respondent exceeded his powers by proceeding to deregister the power of attorney when he had no mandate to do so.
8. The 4th respondents, in a replying affidavit sworn on 23rd November 2017, averred that the appellants' application was an abuse of the process of the court. According to them, the appellants obtained letters of administration in respect of the estate of Anthony John Thompson through fraud by opening parallel files to cause confusion and disinherit the other beneficiaries. They further contended that the present proceedings cannot be allowed to proceed as there are other active proceedings pending in succession causes.
9. In his judgement, the learned Judge referred to section 9(2) of the *Fair Administrative Action Act* 2015 and found: that the main contention in the matter was entitlement to take out letters of administration in respect of the Estate of the late Anthony John Thompson; that if this was sorted, the dispute would



be settled; that there were two Succession Causes pending in the Family Division of the High Court, the first one being Nairobi HC Succession cause No.1965 of 2009 filed by the 1st appellant and the second being Nairobi HC Succession Cause No.1788 of 2009 filed by Beatrice Wairimu Kariuki; that these two cases were consolidated and a ruling delivered on 21st November 2014, after which the Petitioner in 1788 of 2009 obtained leave to appeal against the said ruling; that it was after the ruling of 21st November 2014 that the 1st appellant obtained the special power of attorney which is the subject of these proceedings; and that it was important that the pending succession causes be exhausted before the appellants can look for other remedies.

10. In the learned Judge's view, if the process of succession is exhausted, it will address the issue as to whether Anthony John Thompson was entitled to half of the suit property or the whole of the suit property, depending on whether the registration was a joint tenancy or tenancy in common. Based on the foregoing reasons, the learned Judge declined to review the decision of the first respondent to deregister the special power of attorney.
11. The learned Judge however found that the appellants were given notice of recall of the power of attorney and were warned that the power of attorney would stand deregistered if they failed to comply. Since there was no compliance, the power of attorney stood deregistered. It was the learned Judge's holding that in an application for judicial review, the concern is the process leading to the act complained of as opposed to the merits of the decision made. In his view, most of the allegations made by the appellants were unsubstantiated and the process leading to the de- registration of the power of attorney was fair; and that the appellants were given additional reasons for the decision taken. He therefore found no merit in the application and dismissed it with costs to the interested parties.
12. Dissatisfied with the said decision, the appellant appealed to this Court citing some 69 grounds of appeal which we see no need to rehash in this judgement.
13. We heard the appeal on the Court's virtual platform on 17th February 2025 when learned counsel, Mr Miller Bwire, appeared for the 1st appellant, learned counsel, Mr Mungai Kalande, appeared for the 2nd appellant, and learned counsel, Mr Nzaku, appeared for the 4th respondents. There was no appearance for the 1st to the 3rd respondent despite being served with the hearing notice.
14. The submissions by the appellants were: that the 1st respondent's decision being an administrative decision, the 1st respondent was required to heed the provisions of Article 47(1) of the *Constitution*, encompassing the rules of natural justice; that the 2nd respondent ought to have heard the appellants but that was not done, thus a null and void decision was arrived at; that in the circumstances, the learned Judge ought to have issued the writs of certiorari and mandamus sought in the Notice of Motion. In support of the submissions, the 1st appellant relied on the cases of *General Medical Council v Sparckman* [1943] 2 All ER 337, *Attorney-General v Ryan* [1980] AC 718 and *Mirugi Kariuki v the Attorney General* Nairobi Civil Application No. 70 of 1991.
15. According to the appellants, the trial court took the view that the appellants were advised to return the power of attorney and that they were given reasons, without appreciating that the 2nd respondent, who had already made an administrative decision to recall the power of attorney, only asked for the same to be furnished failure to do which would lead to revocation. This was subsequently altered to deregistration by a corrigendum published on 4th December 2015. It was submitted that there was no prior notice before the impugned deregistration which was a violation of the appellants' right to a fair administrative action. In the appellants' view, the insistence by the respondents on recalling the counterpart of the power of attorney from the appellants, yet they had their own copy, was only for



- the malicious purpose of destroying it and wiping it off its record completely, given that the donor had not complained about it.
16. The appellants further submitted: that since a power of attorney is an authorization by a donor to a donee, the respondents had no authority whatsoever to revoke it and by purporting to do so, they acted ultra vires their authority; that the pendency of the probate cases in the High Court does not constitute alternative remedies as contemplated under section 9(2) of the Fair Administrative Actions Act since the question of the legal verity of the actions of the respondents to recall, revoke and or deregister power of attorney No. IP/A 64940/1 of 20th November 2015 was never an issue for determination in High Court Succession Causes; that the 1st, 2nd and 3rd respondents were never parties to the High Court Succession Causes which were filed in 2009 while the events leading to the judicial review suit before the trial court took place 6 years later, in 2015; and that since the appellants filed their submissions on 13th September 2018 before delivery of judgment on 20th September 2018, the submissions were part of the hearing, thus the failure to consider them contravened the appellants' right to fair trial.
 17. The 1st and 2nd respondents, through the 3rd respondent, the Attorney General, submitted: that the appellants do not have a bona fide claim on the purported irrevocable power of attorney since it is not stated on its face whether it is irrevocable; that a valid power of attorney must be registered under the *Registration of Documents Act* and *Stamp Duty Act*; that despite their disclosing a valuable consideration of 90,000 pounds, it did not meet the criteria for registration since an irrevocable power of attorney must state that it is irrevocable and that it is given for valuable consideration; that the Registrar of Lands' actions were legally justified since the appellants had been given adequate notice through the Kenya Gazette and the appellants failed to prove the allegations.
 18. The 4th respondents submitted that, pursuant to section 6 of the *Civil Procedure Act*, the matter was sub judice since the two succession causes in the Family Division of the High Court namely HC Succession Cause No. 1965 of 2009 filed by the appellants and Nairobi HC Succession Cause No. 1788 of 2009 filed by Beatrice Wairimu Kariuki were still pending. According to the 4th respondents, the matters directly and substantially in issue set out in the Memorandum of Appeal are substantially in issue and are being heard and determined in the Family Division in the High Court. The 4th respondents asserted that the revocation of the power of attorney was fair and urged this Court to find no merit in the appeal and dismiss it with costs.
 19. We have considered the submissions made before us. From the outset, it ought to be clarified that the matter before us is not a succession cause, nor is it an appeal from a succession cause. The issues in contention, in our view, are: Whether there was an alternative remedy available to the appellants under the pending succession proceedings hence the judicial review application fell afoul of section 9(2) of the *Fair Administrative Actions Act*; whether the appellants were heard before the decision sought to be quashed was made; and whether the said decision was ultra vires the powers of the 1st respondent. Our determination of this appeal does not, in any way, determine how the succession matters ought to be handled. We are simply called upon to determine whether the process of the revocation or deregistration of the power of attorney was lawful. Once that is done, the respondents are at liberty to proceed in the manner they deem fit. The grant of an order of certiorari neither prohibits the taking of an action nor compels the taking of an action. It simply quashes the impugned decision and leaves it to the decision maker to decide on what step to take next.
 20. On the other hand, the grant of an order of mandamus does not compel the doing of an act in a particular manner unless the manner of doing the act is prescribed by the law. This was the position in *Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji & 9 Others* [1997] eKLR



where this Court, citing *Halsbury's Law of England*, 4th edition volume 1 at page 111 from paragraph 90 held that:

“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.”

21. As regards the first issue, the appellants approached the court complaining that the power of attorney was unprocedurally revoked since they were not afforded an opportunity of being heard before the said action was taken. Secondly, it was averred that the 1st respondent had no power to revoke the said power of attorney. The cause of action was the revocation of the power of attorney. While the power of attorney had a connection with the property in dispute in the succession cause, the subject of the dispute was not a succession dispute and its revocation could not have been resolved in the succession cause. The Supreme Court in *National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (The Abidha Nicholus Case)* interrogated the circumstances in which the availability of an alternative remedy acts as a bar to litigation by stating that:

“The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law.”

22. However, in order for a legal provision relied upon to support the doctrine of exhaustion and constitutional avoidance to pass muster, it ought to meet certain tests, namely that the reliefs available in the alternative forums must be available, effective and sufficient. As was observed in the decision of the African Commission of Human and People's Rights in the case of *Dawda K. Jawara v Gambia* ACmHPR 147/95-149/96:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ... a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

23. The Supreme Court in *The Abidha Nicholus Case* similarly explained that:

“(107) Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of



the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others* (Pet.No.15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment).”

24. In our view, the pending succession proceedings were not adequate and effective avenues in addressing the appellants’ grievances. A succession cause is not an avenue for quashing an administrative decision. Had the appellants waited for the determination of the succession proceedings they would have run the risk of the prescribed time for quashing the decision running out.
25. That leads us to the issue whether the appellants were heard before the decision sought to be quashed was made. What provoked the proceedings before the trial court was the Gazette Notice No. 8684 of 20th November 2015. That Gazette Notice, at the material part stated that:

“Whereas Powers of Attorney dated 17th June, 2015 was presented in the registry of documents in Nairobi as day book No. 1178 of 12th October, 2015 between (1) Clara Amy Thompson alias Clara Amy Cox, (2) Tina Louse Belchar alias Tina Cox (donors) and (3) Solomon Njoroge Kiore (donnee) in respect of all that piece of land known as LR No. 1012/47/2 registered as IR 97708/1 and whereas the Power of Attorney was registered as IP/A 64940/1, the registrar of title recalls the said Power of Attorney within 14 days failure to which the power will stand revoked.”

26. It is true that corrigenda was published in Gazette Notice No.8901 of 4th December 2015 in which it was stated that:

In Gazette Notice No. 8684 of 2015 amend the word “Revocation” in the heading to read “Deregistration” and the word “Revoked” to read “Deregistered”.

27. There is no evidence that prior to the publication of the Gazette Notice No.8901 of 4th December 2015, the 1st appellant, who was the donee of the said Power of Attorney was notified of the intention to either revoke the same or deregister it. No reasons were given for recalling of the power of attorney. One would have expected that, before the gazette notice was published, the appellants be informed of the intention to recall the power of attorney, setting out the reasons therefor. The first time the reasons for the action was given was vide a letter dated 29th December 2016 in which the 1st respondent alluded to lack of evidence of locus standi on the part of the donors to give the power of attorney. The manner in which the Gazette Notice was drawn did not indicate that the 1st appellant was being called upon to show cause why the power of attorney should not be recalled, deregistered or revoked. In the words of the Gazette Notice, “the registrar of title recalls the said Power of Attorney within 14 days failure to which the power will stand revoked.” Our understanding is that by the time of the publication of the gazette notice, a decision had already been made recalling the power of attorney and if the appellants did not comply with the decision within 14 days it would be revoked. It really matters not whether what was intended by the Gazette Notice was revocation or deregistration. Article 47(1) of the Constitution provides that:

Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

28. Section 4(3)(a) and (b) of the *Fair Administrative Action Act* provides that:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-



- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard.
29. That failure to afford a person likely to be affected by an administrative action renders the decision void, notwithstanding the fact that the result would have been the same if such opportunity had been afforded, was emphasised by Lord Wright in *General Medical Council v Spackman* [1943] 2 All ER 337 that:
- “If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”
- See also *Onyango Oloo v Attorney General* [1986-1989] EA 456.
30. We find that the appellants were not afforded an opportunity to be heard before the decision to recall the power of attorney for the purposes of revocation or deregistration, and its subsequent deregistration or revocation, was made.
31. In light of our finding above, we find it unnecessary to deal with the issue of whether the decision to revoke or deregister the power of attorney was ultra vires the powers of the 1st respondent.
32. In the premises, we find this appeal merited. We allow it and set aside the judgement in Nairobi ELC JR 12 of 2017 of 20th September 2018. We substitute therefor an order allowing the Notice of Motion dated 13th June 2017 and direct that an order of certiorari do issue, removing into the Court for purposes of being quashed, and quashing, the 1st respondent’s Gazette Notice No.8684 of 20th November 2015 revoking Power of Attorney and Covenants beyond Death No. IP/A 64940/1. We issue an order of mandamus compelling the 2nd respondent by himself or through the relevant registrar acting at the behest of the 2nd respondent to reinstate the registration of the Power of Attorney and Covenants beyond Death No. IP/A 64940/1.
33. As the substantive dispute revolves around the estate of a deceased person, which is yet to be resolved, we make no order as to costs.
34. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

F. V. ODUNGA

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JUDGE OF APPEAL



I certify that this is the true copy of the original
signed

DEPUTY REGISTRAR

