



**Republic v Chief Land Registrar; Kitonga (Interested Party) (Environment and Land
Judicial Review Case 32 of 2019) [2024] KEELC 1569 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 32 OF 2019**

**AA OMOLLO, J
MARCH 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF LAND REGISTRAR RESPONDENT

AND

REV JOSEPHINE MURUGI KITONGA INTERESTED PARTY

JUDGMENT

1. The Applicant filed Notice of Motion dated 10th July 2019 seeking for the following orders;
 1. That the Court be pleased to grant the Judicial Review orders of:
 - a. Certiorari to bring into this Court for purposes of being quashed the Respondent’s said directive issued on 18th April 2019 vide a letter referenced NBI/A/26/19 relating to the Applicant’s property known as L.R No. Nairobi/Umoja/Block 107/1130.
 2. Prohibition to restrain the Respondent whether by itself, its agents or howsoever otherwise from implementing the said directive.
 3. That the costs of this Application be provided for.
2. The grounds of the motion are contained in the Chamber Summons application and the Statutory Statement as verified by the Affidavit of James Oswago all dated 1st July 2019 filed at the leave stage. The Applicant stated that the it is the registered proprietor of all that piece of land known as L.R No. Nairobi/Umoja/Block107/1130 hereinafter referred to as “the suit property” after purchasing the same from Gerald Katiuki Wabacha & Jane Wambui Gakure in the year 2015. That on 12th February 2018, the Interested party sued the Applicant and three others claiming inter alia that the Applicant



was not lawfully granted proprietorship interests in the suit property and sought for a declaration that she is the bona fide owner of the same.

3. The Applicant further stated that it undertook certain enquiries at the survey of Kenya with a view to confirm the existence of the disputed parcels of land and through a letter dated 20th March 2018, Director of Survey of Kenya confirmed that the said disputed land did not exist at all and the number that reflected on its records was for L.R. NO. Nairobi /Umoja / Block107/1130, the suit property. That there being no evidence proving that the suit property is the same as the one claimed by the interested party, they filed an application seeking to have the same suit against them struck out for disclosing no cause of action on 23rd October 2018.
4. The Applicant averred that the Interested Party surreptitiously and with a view to subvert the cause of justice, lodged a parallel complaint with the Chief Land Registrar, the Respondent and behind the Applicant's back, raising precisely the same issues. That on 18th April 2019 the Respondent vide a letter referenced NBI/A/26/19 made the following directive with regard to the suit property;

“...pursuant to section 79(2)(b) of the Land Registration Act No.3 of 2012 you are hereby ordered to surrender the Title Deed to the undersigned within 14 days from the date hereof failure to which the same will be presumed to be null and void ab initio.”
5. The Applicant stated that the said directive is illegal and void as the Respondent has no power to take over the land disputes pending before the Environment and Land Courts purporting to determine the same. That the same is sub-judice and the directive was given without affording the applicant the right to be heard thus violating articles 47,48 and 50 of the Constitution of Kenya. Further that the disputed parcel of land does not exist and the Respondent's purported powers of rectification can only be exercised over an existing disputed land.
6. The motion was opposed by the Interested Party's Replying Affidavit sworn on 13th March 2020. She contended that she was given a letter of Allotment for plot number 12 in Umoja II Extension (Block 107) on 20th August 1992 by the City Council of Nairobi and was required to pay a stand premium of Kenya Shillings Eighty Thousand (Kshs. 80, 000/=) plus annual rent of Kenya Shillings Eight Thousand (Kshs. 8, 000/=). She made the payment on 20th August 1992 and was issued with a Lease for the said plot, being land reference number Nairobi/ Umoja/ Block 107/ 1/ 1130 sometimes in the year 1998.
7. She deposed that in the year 2008, she was unable to trace her original Certificate of Lease for the said property causing her to apply for issuance with a new Certificate of Lease through Gazette Notice No. 2090 of 2009. Subsequently, she was issued with a new Certificate of Lease for land reference number Nairobi/Umoja/Block 107/ 1/1130 dated 15th May 2009.
8. The Interested party avers that in early November 2017 she was informed that the Applicant was in the process of erecting a perimeter wall around the suit plot and immediately reported the matter at Buruburu Police Station where the police called for a meeting attended by the parties in the presence of the DCIO, OCS and the Investigating Officer (10) of Buruburu Police Station. That both parties presented their ownership documents to the police for investigations to be carried out to establish their authenticity since the Applicant was also claiming ownership through a Certificate of Lease for land reference number Nairobi/Umoja/ Block 107/1130 issued on 27th May 2015
9. That the applicant was directed to stop constructing a perimeter wall to allow the police carry out investigations to establish the true owner of the suit property which it did briefly. However, in the month of January 2018, it continued with the construction necessitating the filing of Nairobi ELC



- Case No. 59 of 2018 in which the Interested Party sought the nullification of their (Applicant's) Certificate of Lease for land reference number Nairobi/Umoja/ Block 107/1130.
10. The Interested Party contended that the Applicant could not have lawfully purchased the subject property from Gerald Kariuki Wabacha and Jane Wambui Gakure and issued with a lease on 1st April 1978. This is because by that time Gerald was yet to be born and Jane Wambui Gakure was a minor. Further, that Gerald Kariuki Wabacha and 2 others suing on behalf of Umoja II Zone 9 Self Help Group in Nairobi ELC Case No. 347 of 2013 expressly claimed to have been allotted Land Reference number Nairobi / Block 107 Umoja II Zone 9 by the City Council of Nairobi on 26th November 2008 in which the Interested Party is sued as the 16th Defendant, they sought orders nullifying among others title for Nairobi/ Block 107/ 1130 and the case is pending in court. Therefore, it is difficult to understand how Gerald Kariuki Wabacha and Jane Wambui Gakure got issued with a title for her property while the case they had filed in court is yet to be determined.
 11. Also, that the alleged 1978 Lease issued to Gerald Kariuki Wabacha and Jane Wambui Gakure by the City Council of Nairobi has not been produced and there is no document produced that corroborates the certificate of lease for Nairobi/Umoja/Block 107/1130. The Interested party contended that it is contrary to the law for two title documents to be issued to two different persons for the same property noting that Gerald Kariuki Wabacha and Jane Wambui Gakure were issued with a certificate of lease for Nairobi/Umoja/ Block 107/ 1130 on 7th April 2014 while she was issued with a certificate of lease in the year 1998.
 12. That the Survey of Kenya through their letter dated 20th March 2018 stated that the land reference number reflected in its records is L.R. No. Nairobi Block 107/ 1130 which does not have the name "Umoja" in it and the City Council of Nairobi which is the Lessor through its letter dated 28th March 2018 indicated that the Interested Party was issued with a certificate of lease for L.R. No. Nairobi/ Umoja/Block 107/1/ 1130 though the correct land reference number is Nairobi Block 107/1130. The Interested party stated that through their letter dated 27th March 2018 they wrote to the County of Nairobi notifying it that the Applicant was laying claim on her plot and the County of Nairobi vide its letter dated 28th March 2018 confirmed that it issued her with a lease dated 15th January 1998 which has never changed hands and the same was served on the Ministry of Land. That upon her advocates writing to the Ministry of land through their letter dated 30th April 2018 complaining that the court order issued on 5th March 2018 had not been registered despite it having been duly presented for registration. The Ministry of Lands wrote to the County of Nairobi through its letter dated 14th May 2018 seeking details and particulars on the status of L.R. No. Nairobi/Umoja/Block 107/ 1130 to enable it put its records in order.
 13. Further, that the County of Nairobi replied through its letter dated 10th August 2018 in which it reiterated that it issued the interested party with a lease dated 15th January 1998 and the Ministry of Land then wrote to the Applicant herein through its letter dated 16th October 2018 in which it summoned them to appear before the Chief Land Registrar on 1st November 2018 and produce its document in support of its claim to ownership of the property. That all the other concerned parties were also invited to attend the said meeting with the Applicants being served through its advocates on record on 18th October 2018 but failed to honour the summons by the Chief Land Registrar.
 14. The Interested Party stated the failure of the Applicant to honour the Respondent's summons prompted them to issue the letter dated 18th April 2019 in which the Chief Land Registrar exercised his powers granted by Section 79 (2) (b) of the [Land Registration Act](#) to nullify title documents relating to L.R. NO. Nairobi Umoja Block 107/1130. She contended that the directive by the Chief Land Registrar is lawful because it is empowered by Section 14 (a) and (b) of the [Land Registration Act](#) to



summon any person to appear before him and produce documents a directive which the Applicant declined to honour. That Section 30 (2) (a) of *Land Registration Act* requires the Land Registrar to issue only one certificate of title/ lease in respect to each parcel of land and the issuance of two certificates of leases in respect of the same parcel of land was an error of the Land Registry for which the Land Registry was entitled to rectify noting that Section 79 (3A) allows any person aggrieved by the decision of the Registrar to apply to the court for any necessary orders.

15. The Respondent also filed grounds of opposition dated 31st day January 2022 stating the following grounds;
 - i. That the Respondent's actions were justified and in accordance with the provisions of section 79 of LRA No. 3 of 2012
 - ii. That the right to own property provided for under article 40 of *the Constitution* is not absolute and the title may be revoked if it is found to have been acquired illegally or through fraudulent means
 - iii. That the judicial review application as filed offends the mandatory provisions of order 53 as well as the provisions of the *Law Reform Act*

Submissions

16. The Applicant and the interested party filed submissions dated 11th October 2023 and 8th November 2023 respectively. The Applicant framed their issues for determination in this matter to be; whether the Respondent had jurisdiction to entertain the dispute; whether the Respondent's actions were ultra vires for want of Jurisdiction under Section 79 of the *Land Registration Act* No. 3 of 2012; and whether the Respondent violated the Applicant's Constitutional rights under Article 47, 48 and 50.
17. The Applicant submitted that it is only the court that has power to direct the cancellation of a registration thus a dispute over ownership and/or control of suit property cannot be determined by the Respondent through its directive such as that issued to the Applicant on the 18th April, 2019 vide letter referenced NBI/A/26/19. In support cited the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and James Kiraau v David Ndunau Waweru [2015]1 eKLR.
18. They submitted that section 8 of the Land Disputes Tribunal Act No. 303 (repealed) provided that all appeals from the Land Disputes Tribunal lay in the Appeals Committee then in the High Court but now to the Environment and Land Court. The matters that were pending before the Tribunals were to be concluded by the Magistrates' Courts and matters pending in the Appeals Committee were to be concluded by the Environment and Land Court.
19. The Applicant stated that by the time the Respondent authored the letter dated 18th April 2019, the matter of ownership of the disputed parcel of land was already in court. As such it was subjected to the sub judice rule. In support they cited the cases Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties).
20. Further, the Applicant relied in the case of R vs Chief Land Registrar & Another ex parte Yosabi Kerubo Manyura (2018) eKLR and Republic v Bishop Patrick Li awa N a udi & 4 others' Ex- parte: Archbishop Nahtal Yongo Okuon & 3 others [2021] eKLR to submit that the Respondent's actions were ultra vires for want of jurisdiction under section 79 of the *Land Registration Act* No. 3 of 2012 . That the Land Registrar does not have power to make determinations on disputed ownership of title.



21. The Applicant submitted that the Respondent and the Interested Party have gone to great lengths in an attempt to try and demonstrate that its title is not a good title, an exercise they can undertake by filing an appropriate action in court for the cancellation of that title as was determined in the case of Republic v Bishop Patrick Ligawa Nyagudi & 4 others- Ex- parte: Archbishop Naphtaly Yongo Okuon & 3 others [2021 eKLR. They contend that the Respondent having acted ultra vires, this court should grant the order of certiorari as prayed. It relies on the decision of Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & others Civil Appeal No 266 of 1996 eKLR where the Court stated the circumstances under which an order of certiorari can be granted, that is if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.
22. Further, they urged the court to quash the decision of the Respondent, for infringing on their right to own property under Article 40 of *the Constitution* of Kenya. They added that the Interested Party instituted a suit ELC No. 59 of 2018 on 12th February, 2018 claiming ownership of the suit property and having fully participated in the claim, it is an illegality to circumvent the said suit and engage the Respondent to decide in her favour.
23. They relied on the case of Judicial Service Commission V Mbalu Mutava & Another [2015] eKLR, Director of Public Prosecutions v Tom Ojienda t/a Prof Tom Ojienda & Associates Advocates & 3 others [2019] eKLR and Kenya Human Rights Commission v Non- Governmental Organisations CoOrdination Board (2016) eKLR which emphasize that any acts that touch on the rights or interests of a person will be regarded as administrative actions thus be subjected to the tests under Article 47 of *the Constitution*, the *Fair Administrative Action Act* and more so on the right to be heard before any adverse action is taken against them, the Applicant submitted that Respondent violated the Applicant's Constitutional rights under Article 47 and 50. They stated that in the present case, the Respondent made a unilateral decision which adversely affected them and by failing to afford him an opportunity to be heard, the respondent denied him an opportunity to ventilate his grievances in a manner consistent with Article 47 of *the constitution* and section 4 of the *Fair Administrative Action Act*.
24. The Interested party listed the following issues for determination; whether the Applicant was afforded an opportunity to be heard by the Chief Lands Registrar before seeking to cancel its certificate of title; whether the Lands Registrar have powers to rectify the register; and if the application is merited.
25. She submitted that the Applicant was summoned to appear affording them an opportunity to be heard but it chose not to attend or avail its document proving that it was entitled to the land. Further, that when she learnt of the intrusion into her property, she rushed to court to stop it. That the property being a leasehold, she sought an explanation from Nairobi City County who were categorical that the same was allotted to her and had not been transferred to someone else. Her next stop was at the Ministry of Lands which clarified she was the bonafide owner. It was expected that the Ministry of Lands would rectify its records to align it with the instructions of the Lessor. However, the same was rectified in favour of the applicant with the certificate of title reading Land Title No. Nairobi/Umoja/Block107/1130 instead of L.R. No. Nairobi BLK 107/1/1130.
26. The Interested party relied on the decision by Hon. Justice Oguttu Mboya in Nairobi ELC Case No. 1382 of 2016: Murang'a Road Motor Mart Ltd Vs Rockville Junior Academy Ltd & 6 Others as Consolidated with ELC No. 174 of 2017 and ELC No.706 of 2011 which dealt with a similar scenario in the same area where parties were using different titles to claim ownership over the same parcel of land and established that the series of titles bearing Nairobi Block 107/1/XXXX as being the genuine



ones as being the ones recognized by the Lessor which were generated after a part development plan had been carried out by the Nairobi City Council.

27. It is her submission that the applicant's Land Title No. Nairobi / Umoja / Block107/1130 was superimposed on the land already allotted to her, Nairobi/Umoja/Block 107/1/1130 and which was supposed to be corrected to read Nairobi Block 107/1130. She averred that the applicant whose title is Land Title No. Nairobi /Umoja/Block107/1130 has not explained how its title was updated to Nairobi Block 107/1130. The Interested Party submitted that even if the Chief Land Registrar has no power to cancel a title, he clearly has powers to rectify a register. That she has no problem if the applicant's Land Title No. Nairobi/Umoja/Block107/1130 is not cancelled so long as the same is not superimposed on her land Nairobi/Umoja/Block 107/1/1130.

Determination:

28. The Respondent issued a directive dated 18th April 2019 against the Applicant by dint of Section 79(2)(b) of the *Land Registration Act* No.3 of 2012 ordering it to surrender its Title Deed to the suit property within 14 days failure to which the same will be presumed to be null and void ab initio. The Applicant has brought forth this suit seeking for the orders of Certiorari to bring into this Court for purposes of being quashed the said directive and prohibit the Respondent from implementing it. This is on the grounds that the Respondent lacked jurisdiction to revoke the Applicant's title, that the Respondent acted ultra vires, that the matter was sub judice and that the Respondent issued the said directive without involving the Applicant.
29. The Interested party explained that the suit property had been allotted to her in the year 1992 by City Council of Nairobi, who issued her with a certificate of lease in the year 1998. That in the year 2008 she applied for a new title after failing to trace the original one and the same was issued for Nairobi/Umoja/Block 107/1/1130 as confirmed by Nairobi County but in the record at Surveys Kenya, the land reference was Nairobi /Block 107/1130. The Interested Party had also filed a suit Nairobi ELC Case No. 59 of 2018 seeking nullification of the title held by the Applicant.

Issues for determination

- 30.
- a. Whether the Respondent acted in excess of its jurisdiction in issuing the directive?
 - b. Whether the matter before the Respondent was sub judice
 - c. Whether the Respondent complied with Article 47 and 50 of *the Constitution*?
 - d. Whether to grant the reliefs sought
31. The Interested Party argued that the Respondent issued the directive premised on the mandate given to it under Section 79(2)(b) of the *Land Registration Act* No.3 of 2012. The provision on rectification is outlined in Section 79 (1) and (2) of the Act as follows;

“79.

- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
 - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;



- (b) in any case and at any time with the consent of all affected parties; or
 - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
- (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.”

32. It is not in dispute that both the Applicant and the Interested Party have interest on the same suit property by virtue of either holding a certificate of lease. The directive issued by the Respondent amounted to revocation of the title held by the Applicant in stating that the same was now rendered null and void. The provisions of section 79 above allowed the Respondent to rectify title in so far as it did not materially affect the interest held. The option for cancellation was where there was proof of fraud. It is established in law that fraud must be pleaded and strictly proved. See the case *Koinange and 13 Others (1986) eKLR* where it was observed:

“Allegation of fraud must strictly be proved, and though the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than a balance of probabilities. The onus of discharging this burden is on the party alleging the fraud.”

33. Given that there is a burden to prove fraud means that the forum for doing so would be in a court of law either through criminal proceedings against a party accused of committing the fraud or in civil case between parties. It is my considered opinion and I so hold that the failure of Applicant to attend before the Respondent cannot be inferred as proof of fraud since fraud cannot be inferred. The Respondent filed grounds of opposition which did not provide any justification for exercising the power under section 79 (2) of the Act. Thus, I agree with the Applicant that the Respondent acted ultra vires its mandate provided in the [Land Registration Act](#) by declaring that the Applicant’s title became null and void ab initio.

(b) Whether the matter before the Respondent was sub judice

34. The Applicant contended that the Interested party having filed a suit Nairobi ELC Case No. 59 of 2018 against them concerning the subject matter of nullification of Certificate of Lease for L.R. no Nairobi/Umoja/ Block 107/1130, investigation of the said title by the Respondent amounted to sub judice. The concept of sub judice means “under Judgement.” It states that a matter is being considered by a court thus any other court is barred from trying that matter so long as the first suit goes on.

35. The doctrine of sub judice is provided for in Section 6 of the [Civil Procedure Act](#) as follows: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”



36. The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020]eKLR pronounced that,

“A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

37. A strict interpretation of Section 6 of the *Civil Procedure Act* and the determination in the case cited above, it is my view that the concept of sub judice applies where the same issue is presented before courts of competent jurisdiction for determination. Thus, the Respondent not being a court, a complaint lodged with it which is an issue similar with that presented before a court of competent jurisdiction does not amount to sub judice. Despite the fact that the action was not sub-judice, the Interested Party’s action amounted to stealing a march.

c. Whether the Respondent complied with article 47 & 50 of *the Constitution*?

38. The Applicant argued that the Respondent issued the directive in subject without giving it a chance to be heard which averment was opposed by the Interested party while stating that the Respondent issued summons dated 16th October 2018 to the parties affected, to appear before them on 1st November 2018 and present their documents of title. The said service of summons from the Respondent was not controverted by the Applicant who none the less failed to appear it prompting the issuance of the directive on 18th April 2019.

39. Article 47 of *the Constitution* provides on fair administrative action stating that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and if a right or fundamental freedom of a person has been or is *Constitution of Kenya, 2010* likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Article 50 provides for fair hearing with the Applicant contending that it was not given an opportunity to be heard by the Respondent. The Applicant explained that due to the failure of the Respondent to conduct fair administrative action, their right to own property under Article 40 of *the Constitution* of Kenya was infringed.

40. On the same hand, the Applicant did not contest the averment that the Respondent issued summons to them to appear and present the document of title to the suit property. This amounted to invitation to present their case which they failed to attend and be heard. Thus, it is my opinion that they can not on the same track state that they were not given an opportunity to be heard.

b. Whether to issue the reliefs sought

41. The Applicant has sought for the orders of certiorari to bring into this Court for purposes of being quashed the Respondent’s directive issued on 18th April 2019 and Prohibition to restrain the Respondent from implementing the said directive. The Purpose of Judicial Review was set out in 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”.

42. In the case of Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR the court stated;

“29. In a nutshell Judicial Review is the means by which High Court judges scrutinize public law functions intervening as a matter of discretion to quash, prevent, require and/or classify not because they disagree with the judgment but so as to right a recognizable public law wrong. This public law wrong could be unlawfulness, Wednesbury unreasonableness or irrationality, unfair hearing, ultra vires bad faith, unfairness, made or arrived at out of excess powers (ultra vires) biasness, capriciousness or un Judicially.”

43. Having established that the directive issued by the Respondent is ultra vires for lack of jurisdiction to issue the same, the order of certiorari is granted. This court shall also grant the order of prohibition which is intended to forbid or prevent an action in the future without following due process and is ordinarily granted alongside the orders of Certiorari. Thus, the application is allowed with costs to the ex parte Applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024

A. OMOLLO

JUDGE

