



Republic v Chief Land Registrar & 2 others; Alot (Suing as the Administrator of the Estate of Samuel Alot Magaga - Deceased) (Exparte Applicant) (Environment and Land Judicial Review Case 2 of 2023) [2024] KEELC 1442 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1442 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2023
LN GACHERU, J
MARCH 14, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF LAND REGISTRAR 1ST RESPONDENT

LAND REGISTRAR, MURANG'A COUNTY 2ND RESPONDENT

ATTORNEY-GENERAL 3RD RESPONDENT

AND

MAGAGA AGOLA ALOT (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL ALOT MAGAGA - DECEASED) EXPARTE APPLICANT

JUDGMENT

1. The Exparte Applicant herein Magaga Agola Alot, filed this Judicial Review Application, dated 31st August 2023. The Judicial Review is premised under Sections 8 and 9 of the *Law Reform Act*, CAP 26, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 53 Rule 3 of the Civil Procedure Rules, wherein the Ex- parte Applicant seeks the following reliefs; -

1. That this Honourable court be pleased to grant an Order of mandamus compelling the Respondents to reconstruct within 60 days the Green card and/or file in respect of land known as Makuyu/Kariaini/Block III/20.
2. That this Honourable Court be pleased to grant an Order of mandamus compelling Respondents to rectify within 60 days the Land Title number Makuyu/Kariaini/Block III/20, by reinstating the names of the deceased Samuel Alot Magagaas the registered proprietor.



3. That the costs of the application be provided for.
2. The Judicial Review herein is based on the grounds set in the Chamber Summons, dated 28th August 2023, contained in the Application for leave to file the instant Judicial Review. These grounds are;
 - i. On 1st March 2022, this Honourable Court in ELC No.1475 of 2014 Magaga Agolo A Lot vs Lucy Wangechi Thogo & 3 Others entered Judgement in favour of the Applicant in inter alia the following terms;
 - a. A declaration that Land Title Number Makuyu/Kariaini/Block III/20 was illegally and fraudulently transferred to the 1st Defendant and illegally subsequently transferred to the 2nd Defendant.
 - b. The register for Land Title Number Makuyu/Kariaini/Block III/20 be rectified by deleting the names of the 1st and 2nd Defendants and restoring the name of the deceased Samuel Alot Magaga as the registered proprietor thereof.
 - c. A declaration that the deceased Samuel Alot Magaga is the legal owner of Land Title Number Makuyu/Kariaini/Block III/20 which ownership vests in his legal representatives.
 - d. An order of eviction against the 2nd Defendant; and
 - e. A Permanent Injunction to restrain the 1st and 2nd Defendants either through themselves or through any person whosoever from entering into, cultivating, fencing, building, selling, developing, disposing, transferring and or in any other way interfering with the Land Title Number Makuyu/Kariaini/Block III/20.
 - ii. Following delivery of the Judgement, the Applicant extracted a copy of the decree and thereafter served the same upon the 2nd Respondent in a bid to have the Land Title Number No. Makuyu/Kariaini/Block III/20 (hereinafter referred to as “the said Land”) be rectified and a restriction order placed on the title.
 - iii. The Land Registrar however declined to rectify and/or issue a restriction on the title on the premise that the green card is missing from the Land Registry.
 - iv. Unless this application is therefore, allowed, the Applicant who is an elderly person aged 74 years shall continue to be deprived off his right to enjoy the fruits of his judgement which he has waited for 9 years.
 - v. Similarly, the Applicant’s right to property as guaranteed under Article 40 of *the Constitution* of Kenya 2010 will continue to be violated upon as he cannot take possession of the said Land yet this Honourable Court has declared that the same was unlawfully transferred to other parties.
 - vi. It is therefore in the interest of justice that this Application be allowed.
3. Further, the Judicial Review, is supported by the Statutory Statement of Magaga Agola Alot sworn on 28th August 2023, wherein he averred that he is the son and among the children of Samuel Alot Magaga, the registered owner of land parcel No. Makuyu/Kariaini/ Block III/20. He further averred that the said Samuel Alot Magaga died on 22nd April 1998, and on 9th June 2014, he was granted Letters of Administration intestate for the estate of his deceased father.
4. Further that by a Judgment of the Court issued on 1st March 2022, in ELC Case No. 1475 of 2014 – Magaga Agola Alot vs Lucy Wangechi Thogo & 3 Others (Nairobi), the Court held that Samuel Alot



- Magaga (deceased), is the legal owner of land parcel number Makuyu/Kariaini/Block III/20, (the suit property) and directed the Lands Registrar to rectify the register for the suit property by deleting the names of Lucy Wangechi Thogo and Jane Waigwe Kimani and to substitute the same with the name of Samuel Alot Magaga as the registered proprietor thereof.
5. Thereafter, the Ex-parte Applicant lodged the Decree in ELC CASE NO. 1475 OF 2014 (NAIROBI), for registration, but the same was not acted upon as the relevant lands register was missing from the Lands Office, and the remarks of the Land Registrar were “documents are returned unregistered because the Register is not available”
 6. Consequently, the Ex-parte Applicant filed the Instant Judicial Review, seeking for mandatory orders as stated above.
 7. This Judicial Review is opposed by the Attorney General on behalf of all the Respondents herein. The Attorney General filed Grounds of Opposition dated 14th September 2023, and contended that the ex-parte Applicant failed to comply with the provisions of Section 33(5) of the [Land Registration Act, 2012](#) as read together with Regulation 28 of the Land Registration (General) Regulations, 2017.
 8. The Attorney General further contended that the ex-parte Applicant had not attempted or exhausted the clear procedure provided under the law thereby, making the subject Application premature, misconceived and abuse of the Court process.
 9. The Judicial Review was canvassed by way of written submissions. The Ex- parte Applicant filed written submissions on 17th November 2023, through the Law Firm of Obura Mbeche & Co Advocates. The Applicant set out three issues for determination. These are;-
 - a). Whether the Grounds of Opposition dated 14th September 2023 are merited?
 - b). What is the purpose of a mandamus Order?
 - c). Whether the Ex-Parte Applicant is entitled to the orders sought?
 10. While reproducing the provisions of Sections 33 and Regulation 28 of the [Land Registration Act, 2012](#) and Regulation 28 of the Land Registration (General) Regulations, 2017, the ex-parte Applicant submitted that the procedure set out in Section 33(5) of the [Land Registration Act, 2012](#) and Regulation 28 of the Land Registration (General) Regulations, 2017, apply only to a person claiming to be a Registered Proprietor of a parcel of land. It was his assertion that those provisions of law do not apply to the ex- parte Applicant herein as he is not named as the proprietor of the suit land.
 11. The ex-parte Applicant further submitted that he is only the administrator of the Estate of Samuel Alot Magaga, as is evidenced by the Letters of Administration marked “MA01” which were annexed to his Supporting Affidavit dated 28th August 2023.
 12. The ex- parte Applicant relied on various decided cases, among them the case of Republic Versus The County Land Registrar, Makueni Lands Registry Ex-Parte Philes Mwikali Kioko [2021],eKLR, wherein it was held that Section 33 (1), (2) and (3) of the [Land Registration Act, 2012](#), apply only to registered proprietors of the land in question.
 13. Further, the ex-parte Applicant submitted that Regulation 28 of the Land Registration (General) Regulations, 2017, does not make the procedure set out thereunder mandatory as it uses the word “may”. In support of these submissions that where the word “may” is used in a statutory provision, it does not denote a mandatory requirement. Reliance was placed in the case of Khalifa & Another Vs Principal Secretary, Ministry of Transport & 4 Others and the case of Katiba Institute & Another (Interested Parties) Constitutional Petition E032 of 2019) [2022] Kehc 368 (KLR) (13 May 2022).



14. On the issue of what is the purpose of mandamus Order, the ex-parte Applicant submitted that the said order is employed to enforce the performance of a public duty which is imperative, not optional or directory, with authority concerned. For this submissions, the ex-parte Applicant relied on HALSBURY'S LAWS OF ENGLAND, 4TH Edition, Volume 1 at of page 111 at paragraphs 89 and 90 and the decision of the Court in the cases of Kenya National Examinations Council Vs Republic Ex Parte Geoffrey Gathenji Njoroge [1997]E KLR and Republic Vs The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere, Nairobi HC Misc. Appl. No. 395 Of 2012.
15. On whether the ex-part Applicant is entitled to the Orders sought, in the instant Judicial Review, it was submitted that the Applicant will be deprived of his right to enjoy the fruits of a successful Judgment unless the prayers in the instant Judicial Review Application are allowed by the Court.
16. Reliance was placed in the cases of Republic vs Director of Land Adjudication & Settlement & 2 Others Ex-parte Stephen Kanyaru M'impwi [2018]e KLR and Republic vs Chief Land Registrar & 2 Others Ex-parte Tojan Nominees Ltd [2020]e KLR., as there is a judgement of the court in favour of Ex-parte Applicant, which Judgement has not been appealed against or set aside.
17. The Attorney General on his part filed the written submissions 27th October 2023, and set out two issues for determination as follows;
 - I. Whether the Applicant has exhausted the procedure set down for reconstruction of the register?
 - II. Whether the Applicant is entitled to the orders sought?
18. It was the Respondents submissions that this Judicial Review Application is premature and ought to be dismissed by the Court as the Ex-parte Applicant has disregarded the provisions of Section 33(5) of the Land Registration Act, 2012 and Regulation 28 of the Land Registration (General) Regulations, 2017.
19. Further, it was submitted that the Applicant being the holder of Letters of Administration in respect of the estate of SAMUEL ALOT MAGAGA (deceased), is possessed of the requisite legal capacity to lodge an application for reconstruction of the register for the suit property pursuant to Regulation 28 of the Land Registration (General) Regulations, 2017, but has never initiated the same process.
20. It was also submitted that where there exists a clear procedure prescribed by the Constitution of Kenya or by a Statute, that procedure needs to be strictly followed. Reliance was place on the cases of Speaker Of The National Assembly v James Njenga Karume [1992]e KLR ,and Mutanga Tea & Coffee Company Ltd V Shikara Ltd & Another [2015]e KLR, wherein the court held ;

“ where there was a clear procedure for the redress of any particular grievance prescribed by the constitution, or Act of Parliament, that procedure should be strictly followed.”
21. It was their submissions that the import of the word “May” appearing on a Statute, whether the meaning of a statute is mandatory or not depends on what Parliament intended and must be ascertained by reading the Statute as a whole. For this submissions the Respondents cited the decision of the Court in the case of Republic Vs Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another [2018]e KLR, where the court held;-

“ it is the duty of courts of justice to try to get the real intention of the legislature by carefully attending to the whole scope of the Statute to be considered...”



22. The above are the Parties pleadings, the annexures thereto and their rival written submissions, which this court has carefully considered. The court has considered the relevant provisions of law, and finds as follows;
23. This is a Judicial Review Application filed by the Ex-parte Applicant herein seeking for prerogative orders. It is not in doubt that prerogative orders are issued by the superior courts, in exercise of their supervisory jurisdiction over inferior tribunals, and public bodies. These orders include mandatory prohibitory and quashing orders. The ex-parte Applicant herein has sought for Mandamus, which is a mandatory order.
24. It is not in doubt that the ex-parte Applicant herein filed ELC CASE NO. 1475 of 2014, at Milimani ELC, wherein a judgement was issued in his favour on 1st March 2022. Among the Orders issued in his favour were that; the register for land parcel no. Makuyu/ Kariani/ Block III/20, be rectified by deleting the names of Lucy Wangechi Thogo and Jane Waigwe Kimani, as 1st & 2nd Defendants and restoring the name of the deceased, Samuel Alot Magaga, as the registered proprietor.
25. There is also no doubt that the ex-parte Applicant is the legal Representatives of the estate of Samuel Alot Magaga(deceased), and the holder of the above decree. It is evident that he presented the court decree at the Lands office, but the Land Registrar could not act on the court order, on allegations that the land register was missing.
26. Further, from the cited authority, it is evident that the order of Mandamus as sought herein is supposed to compel the performance of a public duty or any act contrary to or evasive of the law. See the case of R vs Jomo Kenyatta University of Agriculture & Technology Ex-parte Elijah Kamau Mwangi (2021) eklr, wherein the court held that for such order to be issued, it must be shown that the public officer has failed to perform his duty.
27. Since the Ex-parte Applicant is the one who has filed the instant Judicial Review Application, the onus is upon him to avail evidence that the public body herein has failed to act as provided by the law.
28. The Respondents have opposed the instant Judicial Review on grounds that the laid down procedure for rectification of the Land Register pertaining to the suit land was not been attempted, followed or exhausted by the ex parte Applicant herein.
29. However, as earlier noted by the Court, there is a court order vide a decree issued on 10th May 2023, and it is evident that the ex-parte Applicant submitted the said Decree issued in ELC Case No. 1475 of 2014 (Nairobi), to the Land Registrar for removal of the names of Lucy Wangechi Thogo and Jane Waigwe Kimani, from the title deed of the suit land and substitution of the same with the name of Samuel Alot Magaga.
30. Further, it is evident that the Lands Registrar did not comply with the aforesaid Decree, on allegations that the Land Register was not available. Who was to avail the said land register? Is it the ex-parte Applicant or the Land Registrar?
31. The principles to be considered in determining whether to grant or not to grant the orders of mandamus were set out in the case of Republic vs Kenya National Examination Council exparte Gathenji & 9 others(1997) eklr, where the court held;

“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 or their office and is in the nature of a public duty. Its purpose is to remedy



the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

Further the Court held:

“What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

32. It is the allegations of the Exparte Applicant that the Land of Registrar have failed to comply with the court order issued by the Court in its decree of 1st March 2022, on allegations that the land register is not available. The exparte Applicant has alleged that this refusal has deprived him and his siblings their right to property as provided by Article 40 of *the Constitution*.
33. The Respondents did not dispute failure to adhere to the Judgement and/or decree of the court, but contended that the Exparte Applicant did not follow the right procedure or exhaust all the available mechanism to resolve the issue, but rushed to court prematurely.
34. However, it is clear that the exparte Applicant submitted a court decree, issued in respect to ELC NO 1475 OF 2014, wherein, the court directed cancellation of title in respect of 1st and 2nd Defendants, and restoration of the title in the original owner, Samuel Alot Magaga.
35. The above judgement of the court has not been reviewed or set Aside. It is therefore a valid court order which should be obeyed or complied with. The Respondents cannot hide behind the provisions of Section 33 of *Land Registration Act*, and the General Regulations 2017 as submitted by them. The above provisions of law would come into effect, where there is no court order.
36. It is trite that court order must be complied with, whether one is happy with them or not. See the case of Hadkinson vs Hadkinson(1952) 2All E.R 567,where the court held that;- it is plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction, to obey it , unless that order is discharged.
37. There is no evidence that the decree of the court issued in favour of the Ex parte Applicant herein has been discharged and/ or reviewed. Therefore, the Respondents cannot fail to comply with the said court decree/ order by relying on the provisions of law. That is tantamount to challenging the said court order, but not through the proper channel, of filing an Appeal. By holding that the land register is not available, the Land Registrar was in disobedience of the court order, which disobedience is ordinarily frowned by courts.
38. It is trite that court orders are not issued in vain. See the case of Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County (Ex Parte David Mugo Mwangi) [2018] eKLR, the Court made the following observations;

“It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying therewith, the honorable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set



aside on review or on appeal. In *Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another* [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

“It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

39. Though the Respondents had submitted that the decision in the case of *Republic vs the County Land Registrar Makueni Lands Registry Ex-parte Philes Mwikali Kioko & 2 Others* (2021)eKLR, is not relevant herein, this court will be persuaded by the holding thereon since the circumstances are the same. The court held as follows;

“the Applicant herein is the administrator of the Estate of the deceased and he still holds an original title deed that was upheld by the court and further has a valid court order to the same effect.”

40. It is also evident that as provided by Section 33(5), of *Land Registration Act*, the Land Registrar, is the one with the duty to reconstruct any lost or destroyed land register. In the instant case, there is a Court decree/Order and all that the Land Registrar needs is to obey the said Court order. Section 33(5) of *Land Registration Act* reads as follows;

“(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.”

41. From the above analysis, it is clear that the Land Registrar, ought to adhere to the directives of the court in its decree of 1st March 2022, and he should not insist that the exparte applicant ought to follow the procedure provided by Section 33 of the *Land Registration Act*, and Regulation 28 of General Regulations 2017, of *Land Registration Act*. The Exparte Applicant is not the registered proprietor of the suit land, but a legal representative of the estate of Samuel Alot Magaga, and a Decree holder.

42. For the above reasons, the court finds that the Land Registrar as a holder of a Public Office has failed to perform a public duty and has also failed to comply with a clear decree of the court, and the Exparte Applicant has satisfied the court that he deserves the orders sought in the instant Judicial Review Application dated 31st August 2023.

43. Consequently, the court allows the instant Judicial Review Application in terms of prayers No. 1 & 2. The exparte Applicant is also entitled to costs of this suit.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF MARCH 2024.

L. GACHERU

JUDGE



Delivered online in the presence of:

Applicant

1st Respondent

Absent 2nd Respondent

3rd Respondent

Mr. Otieno for the Ex Parte Applicant

Joel Njonjo – Court Assistant

L. Gacheru

Judge

14/3/2024

