Republic v County Land Registrar Trans Nzoia County & another; Tumweti (Exparte Applicant) (Environment and Land Judicial Review Case 1 of 2023) [2024] KEELC 1312 (KLR) (13 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1312 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2023

FO NYAGAKA, J

MARCH 13, 2024

BETWEEN

REPUBLIC ..... APPLICANT

AND

COUNTY LAND REGISTRAR TRANS NZOIA COUNTY .... 1ST RESPONDENT

JONAH MWAMBIA- ..... 2ND RESPONDENT

AND

RICHARD MUTAI TUMWETI ..... EXPARTE APPLICANT

JUDGMENT

1. By a Notice of Motion dated 27/07/2023 the *Ex Parte* Applicant moved this Court under Order 53 Rules 1(1), (2) and (4) of the Civil Procedure Rules, Sections 4(1), ((2), (4) and (11) of the *Fair Administrative Action Act*, Article 47 of the *Constitution* of Kenya, 2010 and all enabling provisions of the law. He sought:

    a. That an order of prohibition do (sic) issue directed against the 1st and 2nd Respondents and/or other persons acting on their behalf or authorized by them from registration of any other lease than the Respondent's on Plot Number Kitale Municipality Block 4/ 351 or the subdivide plots therefrom being plots number Kitale Municipality Block 4/502, 503, 504 and 505.

    b. That an order of Mandamus do (sic) issue directed against the 1st Respondent and/or persons acting on their behalf or authorized by them to register leases on plots number Kitale Municipality Block 4/502, 503, 504 and 505 and issue respective titles in favour of the applicant.

    c. That costs of the application be borne by the 2nd Respondent.

2. The Application was based on matters which were set out in the statutory statement and verified by the Affidavit of Richard Mutai Tumwet. The statement was to the effect that the Applicant was the registered owner of Kitale Municipality Block 4/ 351 and he decided to subdivide the it into four (4) plots, being, Kitale Municipality Block 4/502, 503, 504 and 505. That he submitted his Application to the Director of Survey to subdivide the said original title. He was issued with an amended Registry Index Map (RIM) which was sent to the Trans Nzoia County Land Registry in Kitale in 2014 for registration and issuance of respective titles.

3. After that he made an application for the registration of leases. That the 1st Respondent being the Land Registrar Trans Nzoia County and who is mandated to register the leases had for no apparent reason from the year 2014 to 2022 declined to register the said leases and issue titles. That instead the land registrar had demanded a bribe before he does that. That the land registrar was transferred and another one posted to the office. The subsequent one asked the *Ex Parte* Applicant to hold on as he inquired from his predecessor why he never registered the said leases.

4. That on the diverse dates the *ex parte* applicant visited current Land Registrar to register his leases but he too declined and demanded a payment of Kshs. 3,000,000/= before he would do that. That learned counsel for the *ex parte* applicant wrote a letter requesting for the reasons for the failure to register the leases but he declined to give any but stated verbally that the Applicant had delayed hence to seek legal address from court. That the 2nd Respondent who held the office at the time of the application even sent the Ex Parte Applicant a demeaning text message whose meaning of the words would be that he was a fraud and foolish.

5. He stated that the actions by the 1st and 2nd Respondents infringed on the tenets of Articles 47 and 165 of the *Constitution* of Kenya. Further that the Respondents' actions were arbitrary, without any legal right and basis in law and contrary to rules of natural justice and fair administration action.

6. He verified his Statement by his Affidavit sworn on the same date as the application. He repeated the contents of the grounds of the Statement but in deposition form.

7. In the verifying Affidavit, he deponed that he was the registered owner of all that parcel of land known as Kitale Municipality Block 4/351. He annexed and marked as RMT-1(a) and (b) copies of both the Certificate of Registration and copy of the lease. Further, that he subdivided his plot into four (4) plots which were Kitale Municipality Block 4/502, 503, 504 and 505. He annexed and marked as RMT 2(a), (b), (c) and (d) copies of applications for registration. He deponed further that he submitted the application to subdivide the plot to the Director of Survey to issue him with an amended Registry Index Map (RIM) which was done and sent to Kitale Registry for issuance of the respective title deeds. He annexed and marked as RMT 3(a), (b) and (c) copies of letters dated 18/10/2022, 16/10/2019 and 06/12/2019 respectively.

8. Then he swore that for no apparent reason the Registrar had declined to register the leases between the year 2014 and 2022 and further demanded a bribe. That when the said Land Registrar was transferred the 2nd Respondent took over the office from him and when the deponent followed up the 2nd Respondent asked him to wait so that he would consult the predecessor to know why he declined the registrations. Then on diverse dates the *Ex parte* Applicant visited the current registrar's offices. He too declined to register the leases and demanded Kshs. 3,000,000/= before he registers the leases.

9. His further deposition was that his Advocates issued a demand letter dated 19/07/2023 for reasons why the Registrar had declined to register the leases but he did not write but verbally informed him that he had delayed and should go to Court. He annexed a copy of the letter and marked it as TMT

4. He deponed further that the 2nd Respondent had sent to him a very disturbing and demeaning text message whose excerpt he annexed and marked as RMT 5.

10. The Applicant deponed that the 1st and 2nd Respondents had infringed Articles 47 and 165 of the *Constitution* and his right to property as enshrined under Article 40. He concluded that he had made the Application in good faith.

11. The Application was opposed through a Replying Affidavit sworn by one Jonah Mbaabu Mwambia on 02/10/2023. He deponed that the Applicant was not the legal owner of land parcel No. Kitale Municipality Block 4/351. His further deposition was that a lease document was not proof of ownership unless the corresponding Certificate of Lease was issued against it.

12. He deponed further that before any registration of a lease document is done to give rise to a Certificate of Lease a ground report is done by the Land Administrator to evidence the ground situation of the parcel in issue, and that in the instant case that was never done.

13. He stated that he joined Kitale Ardhi House sometime in May, 2022 and upon doing so he discovered that there were lease documents from Nairobi Ardhi House on different year under different regimes of registers and none of them was registered. That he could not proceed to register them without investigating why his predecessor had not registered them. He annexed and marked JMM 1 copy of a letter dated 17/06/2021 written by the then Land Registrar to the County Commissioner of Trans Nzoia to the effect that the Kenya National African Union (KANU) also claimed the plot. He deponed that the plot was indeed claimed by KANU. He annexed and marked as JMM 2. He stated that he called the representative of KANU, one Francis Chemwor Psomuken to inquire the Party's position and he confirmed that the parcel was indeed owned by KANU but its records in Ardhi House Nairobi and it was in the process of reconstructing the file. He annexed as JMM 3 a copy of a letter dated 25/11/2022. He deponed that it was at this point that he advised that the matter be presented to Court for determination.

14. The 2nd Respondent deponed that he had never asked for any money for the registration of the contested lease or any other. He swore further that the Ex Parte Applicant had resorted to threatening him and he never sent any disturbing message to the said Applicant. He denied infringing Articles 47 165 and 40 of the *Constitution*. That the *Constitution* give rights over others and that the matter was a land issue hence fit for the court to determine.

15. He deponed that the Land Registrar ought not be sued in person for actions or decisions taken while performing his duties. That the Application was frivolous and vexatious for reason of targeting him as a person for actions carried out in his official capacity.

16. The Application was disposed of by way of written submissions. The Ex parte Applicant argued that the Respondents' actions contravened Section 5 of the *Fair Administrative Action Act*, Act No. 4 of 2015 and Article 47 (1) and (2) of the *Constitution* for reason of failure to give reasons as was sought through the letter dated 10/07/2023. He relied on the decision Sigugu v Minister of Lands & Ano. (213) (1) ZLR 48 (H) and an excerpt from the book Legal Forum 11 & 12 1994 Vol. 6 No. 2 Baxter where the learned author expressed that administrative power should not be used for illegal purposes.

17. With the above he submitted that the deposition by the 2nd Respondent that upon investigation he found that the plot was being claimed from KANU contravened the earlier information from the Lands Office in Trans Nzoia to the effect that the said office did not have any document in favour of KANU. He submitted that even then, these reasons where never communicated when they were demanded for vide the letter dated 10/07/2023. His submission was that the said KANU were neither a party to the instant application nor had they sought to be enjoined as a party. He relied on the decision

of *General Medical Council v Spackman* [1943] 2 All ER, 337 which held that if the principles of natural justice have been violated in respect of any decision, it was immaterial whether the same decision would have been arrived in absence of or departure from the essential principles of natural justice.

18. Then he argued that the Ministry of Lands had by the letter of 06/12/2019 stated that it had confirmed that Tumweti Agencies was the 1st allottee and instructed the Land Registrar Trans Nzoia to register the subdivided leases because no one had come forward to claim the land. He argued that the decision of the Land Registrar was null and void and amounted to abuse of office. He relied on the decision of *Republic v Principal Secretary, Ministry of Internal Security & another Ex parte Schon Noorani & Another* [2018] eKLR.

19. On their part, the Respondents submitted that the Court should bear in mind the scope of judicial review and then summarized the contentions of the parties. Then they gave two issues for determination: one was whether the 1st and 2nd Respondents violated Section 5 of the *Fair Administrative Action Act*, No. 4 of 2015 and whether the order of mandamus is the most efficacious relief to grant. On whether the 1st and 2nd Respondents had violated the Section 5 of the *Act*, they submitted that they had not. They submitted that by stating that the reason for failure to register the leases was due to queries over the head lease of Kitale Municipality Block 4/351 it is clear that reasons were given. They referred also to the letter dated 25/11/2022 by KANU claiming that the lease was the party's property. They relied on the case of *Humphrey Makokha Nyongesa & Another v Communications Authority of Kenya & 2 Others* [2019] eKLR.

20. On whether the prayer for mandamus was the most efficacious, they submitted that that it is not. They began by citing the Halsburys Laws of England at para 10 (here they failed to give the volume and full citation). Nevertheless, they produced an excerpt purporting to be from the said book. It read in part thus:-

> "Commands no more than to do that which a party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandatory order cannot require it to be done at once. Where a statute which imposes a duty leaves the discretion as to the mode of performing the duty in the hands of the party against whom the obligation is laid, a mandatory order cannot command the duty in question to be carried out in a specific way."

21. Further, they relied on *Republic v Marshland and Fen District Commissioners* (1910) 1 K. B. 155 at 165 where the court stated:-

> "It may be that the Act of Parliament has granted a power rather than imposed a duty, has conferred a discretion rather than an obligation. If a power or discretion only as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court."

22. Again, they cited Nrb CACA No. 266 of 1996: *Kenya National Examinations Council - versus - Republic Ex Parte Geoffrey Gathenji Njoroge.* They then submitted that the import of Section 14 if the *Registration Act* is that the 1st and 2nd Respondents could not be compelled to exercise their discretion as it was a duty, and even if it was a duty they cannot be compelled to do it in a manner to achieve a specific result. They also relied on *Republic v Tigania East District Land Adjudication and Settlement Officer & Another Ex Parte Joseph Mathita Ikirima; Nkunja Edward Mwenda (Interested Party)* [2020] eKLR and *Republic v Chief Land Registrar & another ex parte Dubai Bank Kenya Limited* [2015] eKLR where the learned judge Odunga J (as he then was) held that the *mandamus* order which would be appropriate was one where the Respondents would be compelled to consider

the Applicant's application for registration of the vesting order and give the Applicant reasons within a certain period (30 days in that case) if the decision was adverse to the interest of the Applicant, and if they did not give any then they would be deemed not to have any then an order of mandamus would issue.

Issue, Analysis and Determination

23. Having carefully considered the application, I am of the view that the issues I need to determine herein are whether the 1st and 2nd Respondents breached the Section 5 of the *Fair Administrative Action Act*, whether the 1st and 2nd Respondents can be prohibited from registering the plot No. Kitale Municipality Block 4/351 or the subdivisions thereto in another person's name, whether the prayer for mandamus as sought is merited, and who to bear costs.

24. To begin with I must state here that through Judicial Review the High Court and courts of equal status, that is to say, the superior courts scrutinize the exercise of the functions of public law office holders and intervene, in appropriate cases, where the officers fail to act or act in a manner contrary to procedures, for instance, Standard Operating Procedures (SOPs), on contrary to rules of natural justice or, other than the merits of their decision, their decisions are unreasonable. Therefore, the courts intervene to prevent an injustice being committed. This they do in discretionary manner by quashing, preventing, requiring them to act where there is inaction but certainly not to direct them to a particular outcome otherwise that would deny the officers discretion to act. Thus, the public law wrong by the public officer(s) which becomes a subject of judicial review could be unlawfulness, *ultra vires* bad faith, unreasonableness or irrationality, unfair hearing, unfairness, biasness, arbitrariness or capriciousness. It goes without saying that judicial review concerns itself with the decision making process and not the decision per se, hence the role of the court is limited: it is supervisory and not appellate. And this power is not available in prayers to remove and overturn any decision of a Court of similar jurisdiction, or higher in hierarchy. A number of case law has lately addressed the issue of judicial review. See one or two examples like, *Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others Murtaza Turabali Patel (Interested Party)* [2022] eKLR; *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2018] eKLR; *Republic v Stanley Mambo Amuti* (2018) eKLR; *Republic v Speaker of the Senate and Another Ex-parte Afrison Export Import Limited* 2018 eKLR, among others.

25. This now turns me to the first issue in earnest. The Applicant contends that the 1st and 2nd Respondents did not give him the reason for their decision not to register the leases he presented. The law on about the need to give reasons nowadays stems from Article 47 of the *Constitution* of Kenya, 2010 as actualized by the *Fair Administrative Action Act*, Act No. 4 of 2015. Article 47 in the relevant part provides that very person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. And where such a right is or is likely to be adversely affected the person has an attendant right of being given reasons for the action.

26. Then the *Fair Administrative Act* gives the Article is deeper content as to how public officers should carry out that administrative action. Section 4 (d)(i) provides in as much the same manner as the Article in terms of material and adverse effect on one's legal right by an administrative act that reasons have to be given for such a step or none. When the officer decides to not take a step or decision he ought, too, to give reasons for not taking the step or decision.

27. In this instance, the Applicant complained that he delivered leases for registration but the Land Registrar (in charge of) Trans Nzoia County has refused to register the leases in respect of the subdivision of land parcel No. Kitale Municipality Block 4/351 which gave rise to four plots, being Kitale Municipality Block 4/502, 503, 504 and 505. His allegations were that the two Respondents had

declined to register the said leases between 2014 and 2022 and demanded a bribe of Kshs. 3,000,000/=. Further, that they had not given reasons for the refusal to so act.

28. One thing that does not accord with reason over this allegation is that the ex parte Applicant alleges on oath that the refusal to register the leases has been on since 2014. If that be the case, one wonders where he has been for nine (9) years without making an application as the instant one. Besides, the four copies of leases annexed at RMT 2(a), (b), (c) and (d) which he alleges he presented for registration are all sworn before a commissioner for oaths on 09/01/2023. At the relevant part (on the page where the ex parte Applicant affixed his photograph and signature) it is indicated, and the Commissioner for Oaths wrote the date, as follows "I Certify that the above-named appeared before me in the 9th day of January, 2023 and being known to me...." The Commissioner put a tick over the word "known".

29. In addition to the above, annextures RMT 3(a) and (b) indicate that the letter marked as RMT 3(a) which forwarded the four leases from the Cabinet Secretary to the District Land Registrar Kitale was written on 18/10/2022 and RMT 3(b) which is a letter by the Land Registrar Trans Nzoia to the Chief Land Registrar, Nairobi and which indicated that the Head Lease was returned to Nairobi because it has queries shows it was written on 16/10/2019.

30. It is not clear why the Cabinet Secretary would, from nowhere and without answering the queries by the Land Registrar Trans Nzoia, forward leases prepared and forward them for registration. Worse is that he purported to forward them to an office, the District Land Registrar Kitale, that does not exist any longer in his Ministry. Be that as it may the documents clearly show that the 1st Respondent did not decline to register what was not existing from 2014 to 10/10/2022, and actually that even if the leases were forwarded to him in October, 2022 as indicated, none could be presented to him before it was duly signed and completed for registration. That process could only be seen to have ended on 09/01/2023. Thus, I do not find merit in the allegation that the documents were presented during that period and declined.

31. But even more appalling and evident of some fraudulent activities over the registration of land parcel No. Kitale Municipality Block 4/351 is the fact that the parcel of land was purported to be registered in the name of an entity that did not exist at the time. Annexture No. 1(a), the Certificate of Registration, shows that Tumwet Agency under which name one Richard Mutai Tumwet traded at the time was registered by the Registrar of Business Names on 01/09/2006 ("first day of September, Two Thousand and Six") while and annexture 1(b), the Lease which was issued in the name of Tumweti Agency of Kitale, was signed by the Caleb T. Muhu but it was indicated in print (typed) as having been signed by one Sammy Silas Komen Maita the Commissioner of Lands on 16/04/2005. This lessee appeared before the Advocate and signed it on 09/06/2005.

32. The two documents above show that the owner, Tumwet Agency, came into existence one year and five months after the signing of the lease which is said to be the head lease. This, to me, is impossible in the ordinary course of nature and can only be demonstrative of fraud or serious queries which both the owner and the Chief Land Registrar have answers to if the registration of this parcel were ever to be proper. Could these be some of the queries that the Land Registrar Trans Nzoia raised with the Chief Land Registrar, Nairobi?

33. I do not find merit in the argument that the Land Registrar would be compelled to register leases purported to be issued against land whose ownership is shaky. It would be illegal.

34. Further, one issue that was glaringly clear from the response by the Respondents was that one other reason they could not register the leases was that the Applicant was not the legal owner of parcel No. Kitale Municipality Block 4/351. He deponed further that a lease document was not proof of ownership of a parcel of land but a Certificate of Lease issued against the lease. He deponed further that

before any registration of lease is done, a ground report ought to be issued by the Land Administrator evidencing the situation of the parcel on the actual ground, and none was done in the instant case.

35. As found elsewhere, at paragraphs 41 and 42 below, these facts were not controverted in any way by the ex parte Applicant. What I hear the Land Registrar saying by the facts is that the ex parte Applicant wants to circumvent the legal process of registration of ownership of land. He did not present to the Land Registrar a Certificate of Lease which is the title document in respect of ownership of leaseholds. If that is true, then there is no way the Registrar could act contrary to the law and remain safe: he would be exposed to personal liability in the event that it is proved to be so and a suit ensues.

36. In addition to the above, the 2nd Respondent deponed that he investigated into the issue of ownership of the parcel of land and found that the same was being claimed by the Kenya African National Union (KANU) and he annexed as JMM 2 and JMM3. He deponed further that the finding was given to the ex parte Applicant who was advised "to go to Court" over the same so that the Court could determine who the true owner was but the ex parte Applicant had resorted to threatening him.

37. On his part the ex parte Applicant claimed that he had not been given reasons, and that it was the reason his Advocates wrote, annexture RMT 4. He submitted that he was not given any reasons. The Respondents submitted that they gave him the reasons for refusal to register the leases and that it was in line with Section 5 of the Fair Administrative Act.

38. I have looked at the provisions of Sections 4 and 5 (sic) of the Act. Section 4(2) of the *Act*. It provides that, "Every person has the right to be given written reasons for any administrative action that is taken against him." Therefore, it is not in dispute that where reasons are to be given they are to be in writing. But there is an exception to the requirement that the officer gives adequate reasons for the action taken. This must be the provision that the Respondents referred to when they submitted that they acted in accordance with Section 5 of the *Act*.

39. Section 5 of the *Act* is in regard to and administrative action affecting the public. In that case the procedure for giving the notice is elaborated. It is totally irrelevant in regard to the instant application. Therefore, that cannot possibly be the provision which the Respondents referred to. This parcel of land is not claimed to be public land nor is KANU a public entity. The Respondents must have made a typing error by omitting the numeral 6. The proper one which is in line with the request made under annexture RMT 4 pursuant to Section 6 of the *Act* is Subsection 5 of the section. The provision is to the effect that;

> "(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure."

40. The 2nd Respondent deponed at paragraph 11 of his Affidavit that when he received information from the chairman of the KANU branch, one Francis Chemwor Psomuken, that the land was claimed by KANU, he advised them to seek legal address. He deponed, "...it is at this point that I advised them to go to Court to have the matter resolved as it, to me, was a land claim." Did the ex parte Applicant deny having been advised to go to Court? No. This deposition was not refuted by way of any other factual evidence or oath.

41. Where a fact in issue is sworn to by way of an affidavit and the same is not controverted by another oath by the adverse party to demonstrate a contrary fact, the issue is taken to be admitted. And for this matter I am prepared to hold as I do that the ex parte Applicant was duly informed of the prevailing fact or the registration of the parcel of land in the name of KANU and advised to seek a remedy from

the Court. As was held in *Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another* [2016] eKLR,

> " As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see *Mereka & Co. Advocates v Unesco Co. Ltd* 2015 eKLR, *Prof Olaka Onyango & 10 Others v Hon. Attorney General* Constitution Petition No. 8 of 2014 And *Eliud Nyauma Omwoyo & 2 Others v Kenyatta University*). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence."

42. Also, in *Daniel Kibet Mutai & 9 Others V Attorney General* [2019] eKLR the Court of Appeal held that:-

> " (34) The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants' claims?"

43. Therefore, in relation to the submission by the Respondents that they gave reason for refusal in terms of Subsection 6(5) of the Act, it is clear that once the Land Registrar informed the *ex parte* Applicant that the land was claimed by another party, namely KANU, and advised him to "go to court", I agree that they met the requirements of the law and there was no need for them to give others again. They cannot be compelled again to give the reasons.

44. Regarding the second issue, as to whether the 1st and 2nd Respondents can be prohibited from registering the plot No. Kitale Municipality Block 4/351 (hereafter parcel No. 351) or the subdivisions thereto in another person's name, the immediate question to answer is whether, in terms of the allegations by the *ex parte* Applicant, land parcel No. Kitale Municipality Block 4/351 exists or not, or it is the subdivisions, being plots No. Kitale Municipality Block 4/502, 503, 504 and 505 (hereinafter parcel Nos. 502, 503, 504 and 505) that exist. Granted that Annextures RMT 2 (a) - (d) are genuine and they exist, then parcel No. 351 does not exist. If the parcel Nos. 502, 503, 504 and 505 do not exist, then there was nothing the Land Registrar, Trans Nzoia was required to register and he declined. The ex parte Applicant ought to have elected as to which the proper position of the facts are.

45. The above notwithstanding, there is no evidence whatsoever from the Applicant that the Respondents intend to register the original parcel of land in any other person's name. Therefore, the prayer for prohibition is nothing but hot air, conjecture and a figment of imagination. Courts of law do not act on assumptions or imaginations but facts. I reject the prayer.

46. Lastly, 2nd Respondent raised the issue that he was sued in his personal capacity in these Judicial Review proceedings and that it was wrong and contrary to law since he only exercised his authority in his official capacity as the Land Registrar Trans Nzoia. He deponed that the Application was therefore frivolous and vexatious because it targeted him as a person. None of the parties submitted on this factual contention. Be that as it may I have to determine it on merits.

47. Indeed, the acts complained of by the ex parte Applicant were acts allegedly done by the said Jonah Mwambia in his official capacity as the Land Registrar Kitale. There is no evidence whatsoever from the Applicant to demonstrate that Jonah Mwambia acted beyond his authority as a person or illegally so as to expose him directly to the judicial review proceedings as herein. I therefore find the limb of the application, in so far as it is directed to Jonah Mwambia in person, not only frivolous but malicious, an abuse of the process of the court.

48. I now turn to the third issue, the one whether the prayer for mandamus can issue as it is. The ex parte applicant claimed that the 1st Respondent (since this Court has determined that the prayers against the 2nd Respondent in person are an abuse of the process) declined to register the leases in respect of parcel Nos. 502, 503, 504 and 505. He argued that the Respondents had not given him written reasons for the failure to register his leases.

49. An order of mandamus can only issue to a public official to perform his duty or obligation if he has not. It cannot be issued to him/her to act or carry out his duty in a particular way unless the law specifically provides that he/she must act in that way. I have carefully evaluated the facts stated in the supporting affidavit and the Statement of Facts relied on. I have also given a deep consideration of the affidavit in response.

50. The contention by the Applicant is that his application for registration of four leases being for parcel Nos. 502, 503, 504 and 505 has not been effected and the reasons thereof not given. The Respondent agrees that it has not registered the leases because the initial parcel No. 351 does not belong to the Applicant. On a deep analysis of the documents presented before me I have found that the ownership of the land by the Applicant is questionable for the various reasons I have given above. I have also found that reasons were given except they were given to him pursuant to Section 6(5) of he *Fair Administrative Action Act*.

51. If this Court were to agree with the *ex parte* Applicant it means that reasons had not been given it would mean the order of mandamus that could issue is not to compel the Land Registrar (1st Respondent) to register the leases in favour of the ex parte Applicant as that would amount to ordering him to act in a certain way. As was held by Justice Mativo J (as he then was), in *Republic v Principal Secretary, Ministry of Internal Security & Another Ex-Parte Schon Noorani & another* [2018] eKLR:-

> "Mandamus is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either."

52. The learned judge stated further that:-

> "Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. v Canada (Attorney General)*,[23] and, was also discussed in *Dragan*

v Canada (Minister of Citizenship and Immigration).[24] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

53. It is beyond peradventure herein that the 1st Respondent is under a duty to act and that duty, when it comes to registration of ownership of parcels of land, as in the instant case, is to the whole public of which the ex parte Applicant is one. What the 1st Respondent argues is that it gave reasons but rather than the ex parte Applicant following its request, he chose to threaten the 2nd Respondent and sue him personally. Further, he chose to pray for an order of mandamus as it is.

54. Having found that the reasons for declining to register the parcels Nos. 502, 503, 504 and 505 in the name of the ex parte Applicant, absent of the findings I have made above, can the order the *ex parte* Applicant prayed for issue? No. Therefore, on the one hand, I disagree with the submissions by the ex parte Applicant that the decision of the 1st Respondent is null and void and amounts to an abuse of power by a public authority. On the other hand, I agree with the Respondent's submissions that this Court cannot compel the Respondents to carry out their duties in a manner as to achieve a certain result, which is the registration of the leases in favour of the *ex parte* Applicant. My finding is that this Court cannot compel the Land Registrar to act in a specific way, that is to say, to exercise his judgment on the registration of the leases in a way that is in favour of the ex parte Applicant. To do so would be to substitute the mind of the Court with the discretion and reasoning of the Registrar. I respectfully and politely decline.

55. In sum, I have found that the respondents did not breach Section 5 of the *Act*. They did not violate the right to property of the ex parte Applicant. The Respondents were not presented with a Certificate of Lease over parcel No. Kitale Municipality Block 4/351. The ownership of the parcel of land No. 351 by the ex parte Applicant is wholly suspect and appears to be fraudulent. The Land Registrar by name Jonah Mwambia was wrongfully sued in these judicial review proceedings. There is no evidence that the Respondents are in the process of or intend to register the suit parcel No. 351 or the subdivisions thereof in favour of any person, as at present time hence the order of prohibition cannot issue. The

order of mandamus compelling the Respondents to register parcel Nos. 502, 503, 504 and 505 in the name of the ex parte Applicant cannot issue.

56. Allegations of soliciting for a bribe in order to carry out an official function are extremely serious and ought to be acted upon. But if, on the other hand the allegations are false, then the individual who makes such allegations ought to be brought to book. Our society needs to be clean, just and efficient. If is for that reason that I make the further order below.

57. Lastly, it is strange that the Kenya African National Union (KANU) party was not enjoined to these proceedings. They too ought, through the 1st Respondent who allegedly investigated this matter to the extent of getting through to and receiving information from them, to be made aware of the findings of this Court. Thus, it is directed that the Land Registrar Trans Nzoia, the Chief Land Registrar, Nairobi, and Mr. Mwambia the 2nd Respondent, and the individuals or parties who contend over the ownership of parcel No. Kitale Municipality Block 4/351 are to be served with this Judgment in order to consider sorting out the issue of ownership as soon as practicable rather than keeping either the ex parte Applicant or KANU guessing over the same.

58. The upshot is that the instant application dated 27/07/2023 is absolutely merit without and is dismissed with costs to the 1st Respondent.

59. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN KITALE VIA ELECTRONIC MAIL THIS 13TH DAY OF MARCH, 2024.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.