



**Ng'ang'a & another v Republic & 2 others (Civil Appeal  
242 of 2015) [2023] KECA 740 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 740 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 242 OF 2015  
DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA  
JUNE 22, 2023**

**BETWEEN**

**MBAGE NJUGUNA NG'ANG'A ..... 1<sup>ST</sup> APPELLANT**

**PAUL GATHURU KARIUKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REGISTRAR OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**REPUBLIC ..... 2<sup>ND</sup> RESPONDENT**

**TERESIA GESARE KEBWARO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the entire Judgment and Decree of the High Court of Kenya  
at Nairobi (Odunga J) dated 27th March 2014 in Nairobi HCCC 683 of 2006)*

**JUDGMENT**

1. By a notice of motion dated 5<sup>th</sup> November 2006, filed before the High Court (Odunga J) in Nai HCCC No 683 of 2006), the 1<sup>st</sup> and 2<sup>nd</sup> appellants, the *ex parte* applicants thereto, instituted judicial review proceedings seeking an order of *mandamus* to compel the Registrar of Lands, the respondent therein, and all his officers and any other person acting under his authority to cancel the registration of title and/or the transfer of title to one Teresia Gesare Kebwaro, of the property known as Ruiru/Kiu/Block 6/20(the suit property); and that costs be provided for.
2. The *ex-parte* applicants claimed to be the registered proprietors of the suit property, having been issued with a certificate of lease for the suit property on the 13<sup>th</sup> March 1991, and that they had never assigned, transferred and/or dealt with the said property in any manner; that in the year 2001 when they attempted to apply for a search on the suit property, they were informed by the District Land Registrar that the Green Card had been misplaced.



3. Out of abundance of caution, the *ex parte* applicants instructed their lawyers on the matter, and on 16<sup>th</sup> September 2003 the said advocates wrote to the Land Registrar, Thika Lands Registry, requesting for a copy of the green card. They managed to conduct a search, which disclosed that the suit property had been registered in favour of Teresia Gesare Kibwaro, the interested party in the High Court and the 3<sup>rd</sup> respondent herein, and a certificate of lease issued on 8<sup>th</sup> October 2001.
4. The *ex-parte* applicants contested this position, insisting that the transfer of the suit property to the 3<sup>rd</sup> respondent was un-procedural, illegal and fraudulent, as the appellants had never executed any transfer and/or assignment of the suit property. The *ex-parte* applicants tried to visit the registry in a bid to peruse the transfer that was presented for registration but drew a blank.
5. It was the *ex-parte* applicant's case that there was no basis for transfer of the suit property to Teresia Gesare Kibwaro, and they prayed that the purported transfer be cancelled.
6. The notice of motion in the High Court was not opposed, and the trial court noted that, from the records, the interested party, Teresia Gesare Kibwaro, had since passed away.
7. Dismissing the suit, the trial court considered the circumstances under which the judicial review order of *mandamus* may issue, citing this court's decision in *Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njiroge & others* Civil Appeal No 266 of 1996 (CAK) [1997] eKLR which pointed out the circumstances under which an order of *mandamus* may issue, with the key principle being the performance of a public duty imposed on a person or body of persons by a statute; failure to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed; if the complaint is in relation to wrongful performance of the statutory duty, then *mandamus* is the wrong remedy to apply for as it cannot quash what has already been done; and that would require an order of *certiorari*.
8. The learned trial Judge thus held as follows:

“... what the applicant seeks is an order compelling the respondent to cancel registration of the suit land in the name of the interested party. Mandamus however only issues to 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. In this case the applicant has not shown which public duty is imposed on the respondent to cancel the impugned registration. Further the Court is not convinced that the respondent is empowered to cancel registration of titles however registered. To order the respondent to perform an act which he has no powers to perform would amount to compelling him to perform an illegality and the court cannot do it under the guise of *mandamus*.”
9. The trial court was of the view that the appellants were seeking an order to compel the Land Registrar to cancel registration of the suit property, which was in the name of the Interested Party, yet there was no demonstration as regards the public duty imposed on the respondent to cancel the impugned registration. Drawing from the KNEC case (*supra*), the trial court noted that an order of *mandamus* only serves to compel the performance of a public duty which is imposed on a person or body of persons by statute, and where the person or body of persons has failed to perform the duty to the detriment of a person who has a legal right to expect the duty to be performed.
10. The learned Judge held that the Land Registrar was not empowered to cancel registration of titles, and that to order the Land Registrar to perform an act which he has no powers to perform would amount to compelling him to perform an illegality; and that, further, that without seeking an order of



*certiorari* to quash the registration of title to the suit property in favor of the interested party, an order of *mandamus* would be futile, as the grant of said order would not quash the registration of title in the interested party's name.

11. Citing the provisions under of order 53 rule 4(1) of the *Civil Procedure Rules*, the trial court in the final analysis held that an order of *certiorari* could not be granted, as the applicants were seeking a relief that had not been set out in the statement. The motion dated 5<sup>th</sup> November 2006 was thus dismissed with no order as to costs.
12. Aggrieved by the decision of the trial court, the appellants filed a memorandum of appeal challenging the judgment of the High Court on 10 grounds of appeal, which the appellants have compressed into two main arguments;
  - i. the learned Judge erred in law in his finding that the 2<sup>nd</sup> respondent was not empowered to cancel titles; and
  - ii. the learned Judge erred in holding that an order for *mandamus* could not issue as the appellants had not sought an order of *certiorari* to quash the fraudulent registration
13. On the first ground, the appellants contend that the trial court misapprehended the provision of the section 9(1) of the *Land Registration Act*, which states that:

9.(1) The Registrar shall maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format.

The appellants also referred to section 79(1) of the same Act which provides:

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 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.

Also cited are the provisions of section 80(1) of the same Act which states that:

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default



14. These provisions are cited by the appellants to support the proposition that the *Land Registration Act* imposes a public duty on the 2<sup>nd</sup> respondent to maintain the integrity of the Land Register by ensuring that the information contained therein is accurate and reliable; that in actual fact, the 2<sup>nd</sup> respondent has a statutory power to rectify the register by cancelling a title document, once it is revealed that it was obtained through fraud and/or mistake; and that, therefore, the learned trial Judge fell in error in his decision on that limb. The appellants submit that since the application was not opposed, then all the particulars of fraud were deemed to be uncontested and to be correct.
15. The appellants refer to the case of *Prabhul Gulabch and Shah v Attorney General & Erastus Gtaboni Miano*, Civil Appeal No 24 of 1995, in support of the contention that they had a legal right to performance of a legal duty by the 2<sup>nd</sup> respondent, namely, cancellation of the impugned title.
16. As regards withholding of grant of an order for *mandamus* to quash the registration which the appellants maintain was fraudulent, the appellants reproduce the order they had sought in the application to submit that they tendered evidence before the trial court to show that they were the registered proprietors of the suit property, long before the fraudulent registration was done, and that the trial court was wrong in holding that a *mandamus* order would be moot as it cannot quash the registration of the suit property in the 3<sup>rd</sup> respondent's name.
17. Pointing out that the order of *mandamus* is a very extensive remedy in nature as was explained in the case of *Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others*(*supra*), carrying with it the form at a command directed at, and requiring specific performance as to remedy defects of justice, the appellants insist that the provisions of sections 79(2) and 80(1) of the LRA apply to rectify the register by cancelling any registration fraudulently obtained, and that the intention of the Act would be achieved through an order of *mandamus*; and that in any event, rectifying the register under the said provisions would invariably amount to quashing the fraudulent title.
18. We suppose that the position taken by the appellant is akin to the infamous quote that a Rose is a Rose by any other name, whether one names it “Quash” or “Cancel” or clothe it by a more mystic name like “Mandamus”! We are thus urged to allow the appeal.
19. On the other hand, the respondents are of the view that only one issue arises in the appeal, namely, whether judicial review proceedings were the appropriate forum to seek cancellation of title. It was the respondents' case that since the appellants' claim was that the registration of the suit property to the 3<sup>rd</sup> respondent was fraudulent, and done without their consent, then, the dispute was one of ownership. The respondents argue that judicial review reliefs are restricted to the decision making process and not about the decision itself, citing the case of *Republic v Attorney General & another Ex parte Samuel Kazungu Kambi; Kenya Railways Corporation(interested party)* [2019] eKLR where this court explained the nature of the remedies in judicial review.  
It is thus the respondents' contention that the contested issue of ownership could have been ably determined by the Environment and Land Court.
20. In response to the appellants' argument that section 79 of the LRA imposed a public statutory duty on the Land Registrar to rectify and/or cancel titles, the respondents submit that the said section only categorically gives the Registrar power to rectify title, not cancellation of title, as cancellation of title, is a preserve of the High Court.



21. The respondents further submit that the appellants failed to prove that the Registrar of Lands has a public duty to cancel titles; and, therefore, the trial court's decision to dismiss the appellants' claim was well reasoned, owing to the nature of the relief of mandamus.
22. This being a first appeal and as has been reiterated in several decisions of this court, our primary duty is to evaluate the evidence on record in order to come to our own independent conclusion on the evidence and the law, as contemplated by rule 29(1) (a) of the Court of Appeal Rules. This duty has been reiterated in *Selle & another v Associated Motor Boat Company & others* [1968] EA 123 where this Court stated:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

23. In our view, the main issue in this appeal is whether orders *mandamus* were the appropriate relief cancellation of title to suit property. The crux of the appellants' case is that the trial court erred by dismissing its claim for orders *mandamus* to cancel the title registered in favor of the 3<sup>rd</sup> respondent.
24. It is a cardinal principle that save in the most exceptional circumstances, judicial review jurisdiction would not be exercised and the court must not exercise it where there exists an alternative remedy. In *RE Preston* [1985]AC 835 AT 825D, Lord Scarman was of the view that a remedy by judicial review should not be made available where an alternative remedy exists and should only be made as a last resort. See also *R (Regina) v Dudsheath ex-parte Meredith* [1950] 2ALL ER 741 AT 743.
25. Whether or not to grant an order of *certiorari* or *mandamus* is a discretion that should be exercised by a court judiciously and justly, as expressed in the celebrated case of *Mbogo v Shab* 1968 EA 93, where Sir Charles Newbold, President, put it succinctly thus:

“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice...”

26. This court in *Njuguna & 5 others v Sogomi & another* (Civil Appeal No 12 of 2018)[2021]KECA 37( KLR) (23 September 2021)(judgment) at paragraph 26, held:

“as the situation in the instant case the ownership of the subject property is contested, and the question as to who between the appellants and the 3<sup>rd</sup> respondent is the rightful owner remains an issue that still needs to be determined. As the remit of the court under judicial review is limited to the decision making process, a substantive suit, and not judicial review proceedings is the more appropriate forum within which to resolve the ownership question.”



27. In *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & others* Civil Appeal No 266 of 1996(*supra*) this court held inter alia as follows:
- “... only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without or in excess of jurisdiction, or where the rules of natural justice are not complied with. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”
28. It is therefore quite clear that an order of *mandamus* cannot be sought to quash a decision, nor can it be sought to compel the exercise of discretion in a certain matter. Where a decision has already been made, unless that decision is quashed, *mandamus* would not be an efficacious remedy. In other words, in the circumstances of this particular case, an order of *mandamus* cannot stand alone without an order of *certiorari*.
29. In this court’s view, unless and until there is a finding that the issuance of the disputed title was unlawful, there is no public duty imposed on the Land Registrar to cancel a title. Put differently, the legality of the issuance of title must first be determined before an order of *mandamus* can be properly granted.
30. The appellants have tried to convince this court that sections 79(2) & 80(1) of the LRA give the Land Registrar power to cancel titles. A proper reading of those sections is quite clear, in ordinary parlance, and according to the *Collins English Dictionary* [<https://www.collinsdictionary.com>], rectification means to correct a mistake or to make right by removing an error, while to cancel denotes revoking, deleting, making invalid or annulling. When considered in this context, the interpretation given by the trial judge in relation to section 72(2) as regards the powers of the Land Registrar would hold, especially because section 79(1) is elaborate on what the Land Registrar may do in carrying out rectification, alluding to; errors, mistakes or omissions not materially affecting the interests of any proprietor, a dimension or area shown in the register is found to be incorrect, correcting the name, address or other particulars of the proprietor.
31. That position was taken by this court in *Redcliff Holdings Limited v Registrar of Titles & 2 others* [2017] eKLR in its findings that section 79 of the *Land Registration Act* gives the Registrar powers to rectify minor errors but not cancel titles. Indeed, section 80 of the Act fortifies this by stating that the court can order rectification of a register by directing that any registration be cancelled or amended.
32. However, when one considers that rectification involves correcting by removing an error, then the position taken by the appellants, that it invariably involves cancellation, appears valid.
33. Nonetheless, even with the foregoing observation, it is not lost on us that the basis of the appellants’ claim is that the registration of the suit property to Teresia Gesare Kebwaro was done fraudulently and without their consent. Thus, the nature of the dispute revolves around ownership. We have mulled over the question of the most appropriate forum for seeking the right remedy. As submitted by the respondents, and we agree, Judicial Review, is about the decision making process, and not the decision itself.
34. There is no gainsaying that the role of the court in Judicial Review is the review of a decision; proposed decision; or refusal to exercise a legal duty, particularly the manner in which a decision is made. A lot of attention is focused on whether the processes followed by the decision-maker are proper, and the decision is within the confines of the law, and if that turns out to be in the affirmative, then a court will not interfere.



35. The principles that guide a court to grant orders of judicial review were set out by this court in *Kingdom Kenya 01 Limited v the District Land Registrar, Narok & Fifteen(15) others* [2018] eKLR wherein the court stated thus:

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. ...The purpose of JR is to ensure that the individual is given fair treatment by the authority to which he has been subjected [Judicial Review] being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. [Judicial Review] as a remedy may also be invoked where the issues in controversy as between the parties are contested. ... The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantial personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.”

36. What is revealed from the record is that the dispute does not revolve around issues that would be described as falling in the public law realm; rather, it is purely private individuals contesting the issue of land ownership. Further, the reliefs sought are discretionary in nature, and, guided by the decision in *Kingdom Kenya 01 Limited v the District Land Registrar, Narok & Fifteen (15) others* (*supra*), when determining whether the trial court exercised its discretion judiciously, we reiterate that we can only interfere with the exercise of that discretion if we are satisfied that the learned Judge misdirected himself in law; misapprehended the facts; took account of considerations which he should not have taken into account; failed to take into account a consideration which he should have taken into account; or that his decision, albeit a discretionary one, is plainly wrong. Our finding is that there was no significant misapprehension that would warrant our interference with the trial court’s decision.

37. We are therefore in agreement with the trial court’s judgment that *mandamus* was not the appropriate forum for which the appellants would seek cancellation of title. This court also agrees with the submissions of the respondents that the core issue herein was that of ownership, and that the Environment and Land Court would have been best placed to determine the matter and give appropriate orders as it were.

38. The foregoing determinations suffice to dispose of this matter.

This court finds no reason to interfere with the judgment of the trial court and we hold that the appeal lacks merit. Accordingly, it is hereby dismissed with costs to the respondents.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JUNE, 2023.**

**D. K. MUSINGA, (P)**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

**DEPUTY REGISTRAR**

