



**Republic v County Land Registrar-Kisumu; Kenya Industrial Estates (Interested Party);  
 Clerknwell Properties Ltd (Exparte Applicant) (Environment and Land Case Judicial  
 Review Application E006 of 2022) [2024] KEELC 1281 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1281 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
 ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E006 OF 2022  
 SO OKONG'O, J  
 MARCH 7, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY LAND REGISTRAR-KISUMU ..... RESPONDENT**

**AND**

**KENYA INDUSTRIAL ESTATES ..... INTERESTED PARTY**

**AND**

**CLERKNWELL PROPERTIES LTD ..... EXPARTE APPLICANT**

**JUDGMENT**

1. Pursuant to the leave granted on 24<sup>th</sup> January 2023, the Ex parte Applicant, Clerknwell Properties Limited (hereinafter referred to only as “the Applicant”) brought this judicial review application by way of a Notice of Motion dated 24<sup>th</sup> January 2022 (sic) seeking an order of Mandamus to compel the Respondent to immediately perform its statutory duty under Section 73 of the Land Registration Act, No. 3 of 2012 by removing the caution/caveat placed on Title No. Kisumu Municipality Block 2/216 at the instance of the Interested Party
2. The Applicant’s application was based on the statutory statement and verifying affidavit both dated 1<sup>st</sup> November 2022 that accompanied the application for leave. The Applicant averred that it was the registered owner of all that parcel of land known as Title No. Kisumu Municipality Block 2/216 (hereinafter referred to only as “the suit property”). The Applicant averred that on 7<sup>th</sup> November 2019, the Interested Party which claimed to be an allottee of the suit property caused to be registered against the title of the suit property a caution prohibiting all dealings with the property. The Applicant averred



that the Interested Party's claim over the suit property had not been substantiated. The Applicant averred that on 11<sup>th</sup> May 2022, it applied to the Respondent to remove the said caution pursuant to Section 73(2) of the Land Registration Act. The Applicant averred that the Respondent served the Interested Party with a 30 days' notice requiring it to confirm whether it had any objection to the removal of the caution. The Applicant averred that the Interested Party did not respond to the notice from the Respondent. The Applicant averred that instead of the Respondent exercising its power under Section 73(3) of the Land Registration Act by removing the said caution, the Respondent served the Interested Party on 19<sup>th</sup> July 2022 with another 21 days' notice of its intention to remove the caution. The Applicant averred that even after the lapse of this second notice without any response from the Interested Party, the Respondent refused to remove the said caution. The Applicant averred that the Respondent also refused to give any reason for its failure to perform its statutory duty. The Applicant averred that it was only fair that its right to property guaranteed under Article 40 of the Constitution was upheld by the removal of the said caution. The Applicant annexed to its affidavit copies of, its certificate of lease in respect of the suit property, a certificate of official search and correspondence exchanged with the Respondent.

3. The application was opposed by the Respondent and the Interested Party. The Respondent opposed the application through Grounds of Opposition dated 1<sup>st</sup> March 2023. The Respondent contended that the application had no merit in that the order of mandamus sought against the Respondent was premature. The Respondent urged the court to dismiss the application.
4. The Interested Party opposed the application through a replying affidavit sworn by the Interested Party's Managing Director, Parmain Narikae on 27<sup>th</sup> March 2023. The Interested Party averred that it is a public body that was established by the Government of Kenya in 1967 with a statutory mandate of promoting Micro, Small and Medium industries with a focus on rural industrialization throughout the Republic of Kenya. The Interested Party averred that it was allocated a parcel of land known as Kisumu Municipality/Block II (hereinafter referred to only as "the original parcel") situated next to Kisumu Airport by the Government of Kenya through a letter of allotment dated 14<sup>th</sup> July 1973. The Interested Party averred that the original parcel was allocated to it to hold in trust for the public and that it was supposed to use the same for developing and setting up industrial sheds and incubators for Micro, Small and Medium enterprises.
5. The Interested Party averred that a proposed road divided the original parcel into two portions namely, Kisumu Municipality/Block II/7 (hereinafter referred to only as "Plot No.7") and Kisumu Municipality/Block II/8 (hereinafter referred to only as "Plot No.8"). The Interested Party averred that it developed Plot No. 7 by putting up thereon an administration block, industrial incubator and industrial parks. The Interested Party averred that in 1990, it subdivided Plot No. 8 into several portions namely; Kisumu Municipality/Block II/24 to Kisumu Municipality/Block II/76 (hereinafter referred to only as "the subdivided plots") to develop thereon industrial incubators. The Interested Party averred that the subdivided plots were amalgamated in unclear circumstances to form Kisumu Municipality/Block II/126 (the suit property) and allocated to United Millers Limited to which a certificate of lease was issued on 17<sup>th</sup> July 2003. The Interested Party averred that the illegal manner in which Plot No. 8 which was reserved for public use was allocated to United Millers Limited as Kisumu Municipality/Block II/126 (the suit property) was investigated by the Commission of Inquiry into Illegal/Irregular Allocation of Public Land (the Ndungu Commission) which recommended that the title held by United Millers Limited in respect of the suit property be revoked. The Interested Party averred that despite the finding by the Ndungu Commission that the allocation of the suit property to United Millers Limited was illegal, United Millers Limited proceeded to irregularly transfer the property to the Applicant in 2015.



6. The Interested Party averred that it had a right under Section 71 of the *Land Registration Act* to lodge a caution against the title of the suit property to protect its interest therein. The Interested Party averred that it had not been served with any notice by the Respondent of its intention to remove the caution that it lodged against the title of the suit property on 1<sup>st</sup> November 2019. The Interested Party averred that the purported notices attached to the Applicant's affidavit in support of its application were addressed to an entity known as Kenya Industrial College and the same did not bear a postal address. The Interested Party averred that its name and postal address were set out in the caution. The Interested Party averred that if it had been brought to its attention that the Applicant had sought the removal of its caution, it would have objected to the same since its interest in the suit property remains. The Interested Party averred that the Applicant's application was premature since no notice of the Applicant's application seeking the removal of the caution was served upon it. The Interested Party urged the court to dismiss the Applicant's application. The Interested Party annexed several documents to its affidavit in support of the averments therein.

### **Analysis and determination**

7. On 16<sup>th</sup> May 2023, the court directed that the Applicant's application be heard by way of written submissions and gave timelines within which the parties were to file their respective submissions. I have considered the Applicant's application together with the statutory statement, and verifying affidavit that were filed in support thereof. I have also considered the grounds of opposition and replying affidavit filed by the Attorney General and the Interested Party in opposition to the application. Finally, I have considered the submissions on record. The issue arising for determination in the application before me is whether the Applicant has made a case for the grant of an order of judicial review in the nature of mandamus sought against the Respondent. Sections 71 and 73 of the *Land Registration Act* 2012 provide as follows:

71.

- (1) A person who—
  - (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
  - (b) is entitled to a licence; or
  - (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land, lease or charge.
- (2) A caution may either—
  - (a) forbid the registration of dispositions and the making of entries; or
  - (b) forbid the registration of dispositions and the making of entries to the extent expressed in the caution.

73.

- (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.



- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

8. From the evidence on record, the Interested Party registered a caution against the title of the suit property to protect its interest in the property as an allottee thereof. The caution was registered under Section 71 of the *Land Registration Act*. The Applicant as the registered owner of the suit property had a right to apply to the Land Registrar, the Respondent herein for the removal of the said caution. Section 73 of the *Land Registration Act* provides the procedure for the removal of cautions. It is not disputed that the Applicant applied to the Respondent for the removal of the impugned caution. Upon receipt of the application, the Respondent was supposed to give notice of the application to the Interested Party and call upon it to indicate to the Respondent whether it had any objection to the Applicant's application. If the Interested Party objected to the application, the Respondent would hear the Interested Party and the Applicant on the issue and would decide whether or not to remove the caution. If the Interested Party failed to respond to the notice within the prescribed period, the Respondent would exercise its discretion whether or not to remove the caution.
9. In the present case, I agree with the Interested Party that it was not served with notice of the Applicant's application for the removal of the said caution. The purported notices produced in evidence by the Applicant were not addressed to the Interested Party and in any event, they had no postal addresses. Without giving the Interested Party notice of the Applicant's application for the removal of the caution and asking it to intimate whether it had any objection to the application, the Respondent could not exercise its power under Section 73(3) of the *Land Registration Act* by removing the caution.
10. In *Municipal Council of Mombasa v Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

“...And as the Court has repeatedly said, judicial review is concerned with the decision-making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. 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 made 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 he 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 decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”



11. In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium v Public Procurement Administrative Review Board Kenya & 2 others)* NRB CA 28 of 2016, [2017] eKLR, the Court of Appeal stated as follows:

“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.

12. In *Halsbury's Laws of England*, 4th Edition Volume 1 at page 111 paragraphs 89 and 90, the authors have explained the nature of an order of mandamus as follows:

“The order of mandamus is of most extensive remedial nature and is in the 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 defect of justice (and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and there is no specific legal remedy for enforcing that right) and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hand of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

13. In *Republic v National Land Commission Ex-Parte Ephrahim Muriuki Wilson & others* [2018] eKLR) the court stated as follows:

In this regard, it is important to mention that what emerges is that there is a land dispute, and this Court cannot allow itself to be used to resolve a land dispute disguised as a Judicial Review application. Behind the curtain of these Judicial Review proceedings is the real dispute, namely, ownership, use and or occupation of land. These questions call for the need for this Court to exercise caution, care and circumspection. First, there is the question of jurisdiction discussed earlier. Second, there is a real danger of this Court rendering a decision that will have the implication of determining ownership of the disputed land. I decline the invitation to venture into this forbidden territory.”

14. I am persuaded by the Respondent's and the Interested Party's submissions that the Applicant's application was brought prematurely. As mentioned above, the Respondent had no jurisdiction to



remove the Interested Party's caution registered against the title of the suit property without notice to the Interested Party. Compelling the Respondent to remove the said caution would amount to sanctioning an illegality. An order of mandamus cannot compel the performance of an illegal act. The order sought by the Applicant is therefore not for granting. I wish to add that it is apparent that there is a land ownership dispute between the Applicant and the Interested Party. The Interested Party is claiming the suit property through a letter of allotment while the Applicant is claiming the same property through purchase. In my view, the office of the Land Registrar is not best suited to resolve disputes over land ownership. Either the Applicant or the Interested Party should file a civil suit before the Environment and Land Court for the determination of the issue of ownership of the suit property. The Environment and Land Court will determine the dispute with finality.

### **Conclusion**

15. For the foregoing reasons, it is my finding that the Applicant has not established a case for the grant of the judicial review order sought. The Notice of Motion application dated 24<sup>th</sup> January 2022(sic) lacks merit. The same is dismissed with costs to the Interested Party.

**DELIVERED AND DATED AT KISUMU ON THIS 7TH DAY OF MARCH 2024**

**S. OKONG'O**

**JUDGE**

**Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

**N/A for the Applicant**

**N/A for the Respondent**

**N/A for the Interested Party**

**Ms. J. Omondi-Court Assistant**

