



Republic v Land Registrar, Kisumu & 2 others; Bonyo (Ex parte Applicant); Akech (Interested Party) (Environment and Land Case Judicial Review Application E007 of 2022) [2024] KEELC 1298 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1298 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E007 OF 2022
SO OKONG'O, J
MARCH 7, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, KISUMU 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

ANDERICUS OCHOLA ONYANGO 3RD RESPONDENT

AND

PAUL OKUNGU BONYO EX PARTE APPLICANT

AND

HIPOLITUS ODHIAMBO AKECH INTERESTED PARTY

JUDGMENT

1. All that parcel of land known as Kisumu/Buoye/5975(hereinafter referred to only as “the suit property”) was registered in the name of the 3rd Respondent, Andericus Ochola Onyango. On 8th February 2021, the suit property was transferred to the name of the ex-parte applicant, Paul Okungu Bonyo (hereinafter referred to only as “the Applicant”). On 29th April 2021, the Interested Party, Hipolitus Odhiambo Akech registered a caution against the title of the suit property claiming “beneficiary interest”. On 30th June 2021, the 1st Respondent, Land Registrar, Kisumu expunged from the register the registration of the Applicant as the owner of the suit property and the title that was issued to him and reinstated the 3rd Respondent as the owner of the suit property. Pursuant to the leave



that was granted on 17th November 2022, the Applicant brought this judicial review application by way of Notice of Motion dated 5th December 2022, seeking the following orders;

1. An *order of Certiorari* to remove to this court and quash the decision of the 1st Respondent to expunge from the register the registration of the Applicant as the owner of the suit property and the issuance of a title deed in respect thereof to him.
 2. An order of Prohibition prohibiting the 1st Respondent from cancelling or revoking the title deed for the suit property issued to the Applicant.
 3. The costs of the application be provided for.
2. The Applicant's application was based on the statutory statement and the verifying affidavit both dated 15th November 2022 that accompanied the application for leave. The Applicant averred that he was at all material times registered as the owner of the suit property which he acquired from the 3rd Respondent on 8th February 2021. The Applicant averred that on 30th June 2021, the 1st Respondent unilaterally, unprocedurally and illegally expunged entries in the register of the suit property relating to the transfer of the property to the Applicant and issuance of a title deed to him in respect thereof. The Applicant averred that the 1st Respondent neither gave him a notice of its intention to cancel his title nor did it give him a hearing before taking the action. The Applicant averred that he wrote several letters to the 1st Respondent seeking an explanation for the unilateral and unprocedural action but the 1st Respondent never responded to the said letters. The Applicant averred that the 1st Respondent violated the rules of natural justice and fairness by denying him a hearing before an adverse administrative action was taken against him.
3. The Respondents entered appearance but never responded to the application despite having been given ample opportunity to do so. The Interested Party neither entered appearance nor participated in the proceedings of the court. The application was argued by way of written submissions. The Applicant filed submissions dated 27th July 2023. The Respondents and the Interested Party did not file submissions.

Analysis and Determination

4. I have considered the Applicant's application together with the statutory statement and verifying affidavit filed in support thereof. I have also considered the submissions by the Applicant. The issue arising for determination in the application before me is whether the Applicant has made a case for the grant of the orders of judicial review sought. The Applicant's case is straightforward. The Applicant was the registered proprietor of the suit property. The 1st Respondent cancelled his registration as the owner of the suit property and the title that had been issued to him. The 1st Respondent did not give him a hearing before taking that action. The 1st Respondent also refused to give him an explanation or reason for the action.
5. 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...”

6. 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”.

7. In the book, *H. W. Wade and C. F. Forsyth, Administrative Law*, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principles A quashing order issues to quash a decision which is ultra-vires. A prohibiting order issues to forbid some act or decision which will be ultra-vires. A quashing order looks to the past, a prohibiting order to the future.”

8. In *Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others* [1997]eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“.... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land....Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

9. Judicial review is now both a statutory and a common law remedy. Section 4 of the *Fair Administrative Action Act* 2015 provides as follows:

4.



- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;
 - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6;
 - e. notice of the right to legal representation, where applicable;
 - f. notice of the right to cross-examine or where applicable; or
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
 - a. attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.”

10 Section 7 of the *Fair Administrative Action Act* 2015 provides as follows:

11.

- (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-
 - a. a court in accordance with section 8; or
 - b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
 - a. the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;



- (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;
- b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - c. the action or decision was procedurally unfair;
 - d. the action or decision was materially influenced by an error of law;
 - e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - f. the administrator failed to take into account relevant considerations;
 - g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - h. the administrative action or decision was made in bad faith;
 - i. the administrative action or decision is not rationally connected to-
 - i. the purpose for which it was taken;
 - ii. the purpose of the empowering provision;
 - iii. the information before the administrator; or
 - iv. the reasons given for it by the administrator;
 - j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
 - k. the administrative action or decision is unreasonable;
 - l. the administrative action or decision is not proportionate to the interests or rights affected;
 - m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;
 - n. the administrative action or decision is unfair; or
 - o. the administrative action or decision is taken or made in abuse of power.
12. From the material and evidence on record, it is my finding that the Applicant's application has merit. It is not disputed that the Applicant was registered as the proprietor of the suit property on 8th February 2021. It is also not disputed that the registration of the Applicant as the owner of the suit property and its title to the property were cancelled by the 1st Respondent on 30th June 2021. It is also not in dispute that the Applicant was not given a hearing before his title was cancelled and that upon inquiring from the 1st Respondent the reason for the cancellation of its title, no explanation came forth.
13. Section 79 of the *Land Registration Act* 2012 provides as follows:

79.



- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
 - a. in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - b. in any case and at any time with the consent of all affected parties; or
 - c. if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
- (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.
- (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.
- (4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—
 - (a) the process of investigation including notification of affected parties;
 - (b) hearing of the matters raised; and
 - (c) the criteria to be followed in coming up with the decision.

14. Under Section 79(1) of the [Land Registration Act](#), the Land Registrar has the power to rectify the register of land in; formal matters, with the consent of the parties and in cases of a resurvey which is not the case herein. Section 79(2) of the [Land Registration Act](#) gives the Land Registrar the power to rectify the register of land or lease where registration has been obtained by fraud. Section 79(4) of the [Land Registration Act](#) provides that before a decision is made to rectify a register on account of fraud, an investigation must be carried out into the circumstances under which the registration sought to be rectified was effected and the registered proprietor of the land or lease as the case may be must be given a hearing.

15. The Applicant herein was entitled to a fair administrative action guaranteed under Article 47 of the [Constitution](#) and Section 4(1) of the [Fair Administrative Action Act](#) 2015. The Applicant was entitled to be heard before its registration as the owner of the suit property was cancelled by the 1st Respondent. In *Attorney General v Ryath* [1980] AC 718 at page 730, Lord Diplock stated that:

“It has long been settled that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.

16. In *Harlsbury's Laws of England*, 4th Edition at page 76 paragraph 64, the authors have stated as follows regarding the rules of natural justice:

“Implicit in the concept of fair adjudication lie two cardinal principles namely, that no man shall be a judge in his own cause (*nemo iudex in causa sua*), and that no man shall be condemned unheard (*audi alteram partem*). These principles, the rules of natural justice,



must be observed by courts, tribunals, arbitrators and all persons and bodies having a duty to act judicially, save where their application is excluded, expressly or by necessary implication.”

17. The 1st Respondent’s decision to cancel the Applicant’s title without giving him an opportunity to be heard and reason for the decision was unreasonable, arbitrary, procedurally flawed and ultra vires its powers.

Conclusion

18. For the foregoing reasons, it is my finding that the Applicant has established a case for the grant of the orders of judicial review sought in the Notice of Motion application dated 5th December 2022. The application is allowed in terms of prayers 1 and 2 thereof. The Applicant shall have the costs of the application to be paid by the 1st and 2nd Respondents.

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 1st and 2nd Respondents

N/A for the 3rd Respondent

N/A for the Interested Party

Ms. J. Omondi-Court Assistant

