



**Kariuki v Registrar of Titles, Nairobi & 5 others; Parkion & 6 others
 (Interested Parties) (Environment and Land Judicial Review Case
 E003 of 2022) [2024] KEELC 4020 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4020 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
 ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2022**

EK WABWOTO, J

APRIL 30, 2024

**IN THE MATTER OF ARTICLES 2, 10, 22, 40, 47, 48,
 50 AND 64 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF SECTIONS 24, 26 AND 79 OF THE LAND REGISTRATION ACT, 2012

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW
 REFORM ACT, CAP 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF SECTION 7 AND 8 OF THE
 FAIR ADMINISTRATION ACTION ACT, 2015**

BETWEEN

BETWEEN

HEZEKIAH MWANGI KARIUKI APPLICANT

AND

REGISTRAR OF TITLES, NAIROBI 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CHIEF LAND REGISTRAR 3RD RESPONDENT

DISTRICT LAND REGISTRAR 4TH RESPONDENT

STEPHEN O AMBANI 5TH RESPONDENT

DIRECTOR OF SURVEY, KENYA 6TH RESPONDENT

AND



MARTIN OLE PARKION	INTERESTED PARTY
STEPHEN KOIYAKI	INTERESTED PARTY
FRED YESHO MUZUNGYO	INTERESTED PARTY
GIDEON LENANA NAKUO	INTERESTED PARTY
ANGELA NKATETO LEEYIO	INTERESTED PARTY
NDATANI ENTERPREISES LIMITED	INTERESTED PARTY
KENYA RAILWAY CORPORATION	INTERESTED PARTY

JUDGMENT

1. Before the Court for determination is the Notice of Motion dated 9th March 2022 wherein the *Exparte* Applicant Hezekiah Mwangi Kariuki seeks the following reliefs:
 - a. That an Order of *Certiorari* be issued compelling the Respondents to quash the decision of the 6th Respondent in cancelling the deed plans for land parcels Nos. L.R No. 31666-31673, 31674-681 and 31577-31596 dated 21st February 2022.
 - b. That an Order of *Mandamus* compelling the Respondent to revoke the said Cancellation and restore the said deed plans as they are.
 - c. That an Order of Prohibition to restrain the Respondents from future interfering with the said deed plans and titles to the said land parcels.
 - d. That the Court do grant any or further relief that the Honourable Court deem fit and just to order in the circumstances.
 - e. That the cost of this application be provided for.
2. The application was supported by the affidavit sworn by the *Exparte* Applicant and statement. It was averred that the *Exparte* Applicant is the duly registered owner of all that parcel of land known as L.R 31587 located in Machakos. It was also averred that he has purchased various portions from L.R 31581, 31585, 31584 and 31588 all located in Machakos. It was also averred that the issuance of the said titles is also premised on the existence of a survey records and that in cancelling the said survey records the Respondents are effectively cancelling the existing titles of the said parcels.
3. It was also averred that only a Court of law can cancel the title and the Respondent's actions are unfair, ultra vires and unreasonable. It was also averred that the said cancellation deprives the Applicant an opportunity to be heard and contrary to the principles of legitimate expectations.
4. The application was opposed by the Respondents and the Interested Parties.
5. The Respondent filed a Replying Affidavit dated 4th May 2022 sworn by Wilfred Muchae the Principal Land Surveyor under the office of the 6th Respondent. It was deposed that the records held and maintained at the Survey Record office at Nairobi in respect to the said properties indicate that the subject properties were surveyed out of a parcel of land initially reserved as a Quarry for the East Africa Railway and Harbors (Now Kenya Railway). That a new Grant Cadastral Survey of the Quarry parcel reserved for the East Africa Railways and Harbors (Now Kenya Railways) is represented on two cadastral plans, Number F/R Number 359/67- Survey Computations (Comps No 58065 & F/



R Number 496/119- Survey Comps No. 58245, which Survey records were presented to the Director of Survey for Examination and Approval on 31st December 2009 and 16th February 2010 respectively by Hon. G. Gitari- licensed Land Surveyor Trading as Geo-Acre Surveys. These records were examined approved and authenticated by the Director of Surveys on 12th January 2010 and 19th February 2010 which were annexed as “WM2” and “WM3”.

6. It was deposed that on or about 11th February 2022, it came to the notice of the Director of Surveys that the new Grant Surveys that were registered as such by the Director as Cadastral plan No F/R No. 421/56-Survey Comp No.68693- & Cadastral plan Nos F/R No. 431/90-91 Survey Comps No 70446 were surveys conducted based on letters of Allotment dated 2nd January 1995 in the case of Cadastral Plan to F/R No 421/56- Survey Comps No 68693 the Survey which was conducted on 6th March 2017, Twenty-two (22) years later while the New Grant Survey represented on Cadastral Plan Nos F/R No 431/90-91 Survey Comps No 70446 was based on letters of Allotment dated 10th January 2008 and which was Conducted on 3rd April 2017, 9 years later. It was also averred that the disparity of period of 13 years between the issuance of the first batch of letters of Allotments of the Survey represented on Cadastral Plan Nos F/R No. 421/56-Survey Comp No 68693 and those of Cadastral Plan No S.F/R No. 431/90-91- Survey Comp No 70446 is unexplainable yet the Part Development Plan used as the basis of the issuance of the letters of allotment is common in both cases.
7. It was also averred that upon investigations, it was discovered that Kenya Railways was not aware of the sub-division of the land and neither did they grant their consent as to the said sub-division as required by the law.
8. The 6th Respondent further averred that the notice to cancel the New Grant Survey was Communicated by the Director of Surveys and the Chief Land Registrar and Director of Surveys were equally served with the notice. The notice was dated 11th February 2022 and the same was marked as “WM18”. No responses were received and action was taken by Director of Surveys towards the cancellation of the New Grant Survey. The 6th Respondent averred that the said action was justified, fair, unbiased, reasonable and provided an opportunity to those affected to be heard as due process was followed.
9. The 1st to 4th Interested Parties Supported the application and filed written submissions dated 25th July 2023 which this Court has outlined in its judgment.
10. The 5th Interested Party filed a Replying Affidavit dated 6th April 2023 sworn by Angela Nkateto Leeyio. It was averred that the Applicant failed to disclose the existence of other matters relating to the said properties. This included Kajiado ELC 776 of 2017 Angela Nkateto Leeyio - v- Stephen Nakuo and Others. It was averred that the said case substantially touches on Parcel of the Land being Original number titled Kajiado/Kaputie/Kaputie North/120 and 12 which parcel of land borders the Railway line and property of the 7th Interested Party.
11. It was also averred that the Applicant had also filed another suit in Machakos ELC JR E005 of 2022 where similar orders were being sought. It was averred that the application is an abuse of the court process and should be dismissed.
12. The application was also opposed by the 7th Interested party who filed a Replying Affidavit sworn by Nathaniel Ochieng, Senior Land Surveyor for Kenya Railways Corporation on 26th May 2023.
13. The 7th Interested party averred that it is the registered owner of the parcel of land known as L.R No. 28348 (Stony Athi Railway Quarry) located in Kajiado County measuring approximately 98.38 Hectares as indicated on Deed plan Number 304929 dated 12th January 2010. It was also averred that



- the said parcel has always been government land specifically reserved as a quarry for purposes which entail the excavation of rocks and other materials necessary for railway purposes.
14. It was also averred that the applicant and other individuals have been irregularly allocated parcels number L.R.No. 31666 to 31681 and 31577 to 31596 resulting from the irregular sub-division of its parcel L.R. 28348 and an adjacent parcel of land L.R Nos Kajiado/Kaputei/ 120 & 121 belonging to the 5th Interested Party.
 15. It was contended that Kenya Railways was never aware of the said subdivision of its parcel L.R No. 28348 nor did it ever grant its consent to the sub-division of L.R No. 28348 as required by law. It was also averred that Kenya Railways was aware of the communication by the Director of Surveys to the Applicant and other individuals of its intention to cancel the surveys relating to the titles by way of a letter dated 11th January 2022 addressed to the Surveyor Stephan O. Ambani who is also the 5th Respondent herein.
 16. It was also averred that the Applicant despite being aware of the Director of Surveys intention to cancel the respective survey plans and relocation of the deed plans for L.R. Nos 31587, 31581, 31584, 3185 and 31588 herein made no response, objection and or representation to the Director that may have led to a hearing on the issue of cancellation. It was also averred that after cancellation, a further joint survey was carried out on 9th and 10th May 2022 and the conclusions of the joint Survey were captured in the joint team's report dated 21st July 2022.
 17. The 7th Interested party averred that the Applicant has no legitimate interest over the land and that the actions of the Director of Survey towards cancellation of the survey report for the parcel of land L.R. Nos 31587, 31581, 31584, 31585 and 31588 was fair, just and reasonable.
 18. The 6th Interested Party also opposed the application vide a Replying Affidavit sworn by Alexander Muema Muthengi, its Director and Shareholder on 6th April 2023.
 19. It was averred that the 6th Interested Party entered into an agreement for the purchase of 1.6 acres which was to be hived off the then land known as Kajiado/Kaputie-North/11934, from Matin Ole Parkion, the 1st Interested Party herein. The sub-division of the property known as Kajiado/Kaputitei-North/11934 was completed and the Title for 1.6 acres obtained and registered as Kajiado/Kaputitei North/505445, which was subsequently transferred to the 6th Interested Party. It was further averred that the 6th Interested Party sub-divided the property known as Kajiado/Kaputei-Plot/ 7231 into 47 plots on 17th June 2010 which action was known to the 1st Interested Party.
 20. The 6th Interested Party averred that due to the alleged claims by different parties in respect to the properties, the 6th Interested Party Commissioned a survey on the properties whose report made a finding that the Applicant's title has overlapped upon the 6th Interested party and other occupants' properties. It was also averred that the issue of the boundary dispute relating to which County the property is located was reported to the Ministry of Lands and Physical Planning which held several meetings with various stakeholders and government officials together with Chief Land Registrar and Director of Survey and finally in April 2022 Confirmed the same being in Kajiado and not Machakos County as claimed by *Exparte* Applicant.
 21. The 6th Interested Party urged the Court to dismiss the Application for the reasons that the application seeks two conflicting reliefs; an Order of *Certiorari* and *Mandamus* and further that the court cannot direct another party to quash a decision as prayed for by the Petitioner.
 22. The application was canvassed by way of written submissions; the Applicant filed written submissions dated 5th July 2023. The 1st to 4th Interested Party filed written submissions dated 25th July 2023, the



- 5th Interested Party filed written submissions dated 2nd June 2023, the 6th Interested Party filed written submissions dated 30th June 2023 while the 7th Interested Party filed submissions dated 30th May 2023. No written submissions were filed by the Respondents.
23. The *Ex parte* Applicant submitted on the following issues; whether the letter dated 21st February 2022 by the Ag. Director of the Survey cancelling the said survey records of the captioned parcel was indeed an invitation to respond to the intended cancellation or information on the already cancelled records to the affected parties; whether the said letter was received by the *Ex parte* Applicant, whether the letter accorded the *Ex parte* Applicant an opportunity to be heard and whether the 6th Respondent had the jurisdiction to cancel survey records for existing titles.
 24. It was submitted that the letter dated 21st February 2022 had no provision notifying the affected parties that they had an opportunity to come forward and be heard before the decision could be made. It was submitted that as per the said letter it appeared that a decision had already been made and all the said letter was doing was to communicate the decision so made. Reliance was made to the case of *Republic - v- the Honourable Chief Justice of Kenya and others - v- Ex parte Moiyo Mataiya Ole Keiwa* Nairobi HVMCA No. 1298 of 2004 and [*Republic - v- Truth Justice & Reconciliation Communication & Another Ex parte Beth Wambui Mugo* \(2016\) eKLR](#)
 25. It was further submitted that the *Ex parte* Applicant's right to fair administrative action as enshrined under Article 47 of the [*Constitution*](#) of Kenya 2010 and Sections 4(11), (2) and (3) of [*Fair Administrative Act*](#) had been violated.
 26. The *Ex parte* Applicant also submitted that the cancellation of the survey records herein renders the title non-existent and only the Court has such powers. Reliance was made to the case of the [*Republic - v- Registrar of Titles in Mombasa & 2 others EmFill Ltd* \(2012\) eKLR](#).
 27. Counsel urged the Court to grant the orders sought as prayed in the Application.
 28. The 1st & 4th Interested Parties submitted on the following issues; whether due process was followed by the 6th Respondent in arriving at the decision to cancel the survey records and titles to the impugned parcels and whether this Court should review and vary and /or set aside the decision of the 6th Respondent to cancel the survey records by the 5th Respondent.
 29. It was submitted that judicial review proceedings are concerned with the decision-making process and not the merits of the decision made. It was submitted that the purported cancellation of the titles to the suit properties by the 6th Respondent is untenable in law for want of the involvement of the 1st to 4th Interested Parties since the Interested Parties have proprietary rights in the suit properties hence any decisions regarding the suit properties ought to have been communicated directly to them before being undertaken.
 30. It was also submitted that the said decision for cancellation was made without issuance of any notice to the Interested Parties or at all and the letters purported to have been sent to the 5th Respondent by the 6th Respondent dated 11th February 2022 and 21st February 2022 convey a decision that had already been made by the 6th Respondent without issuance of any notice to the Interested Parties. It was further submitted that the Cancellation of the Survey records by the 6th Respondent violates the principles of natural justice since the 1st to 4th Interested Parties are not accorded the right to a fair hearing.
 31. On whether this Court should review and vary and /or set aside the decision of the 6th Respondent to cancel the survey records by the 5th Respondent, it was submitted that the 6th Respondent did not follow the required procedure in arriving at their decision to cancel the survey records as obtained by the 5th Respondent. It was submitted that the impugned decision was made by the 6th Respondent suo



moto and the 1st to 4th Interested Party was condemned unheard. The 1st to 4th Interested Parties cited the cases of the *Republic - v- Public Procurement Administrative Review Board, Shenz Instrument Co. Ltd & Another, Exparte Kenya Power & Lighting Company Ltd* (2019) eKLR and *Onyango Oloo - v- A.G* (1986-1989) E.A 456.

32. Counsel urged the court to grant the prayers sought in the Application.
33. The 5th Interested Party in opposing the Application submitted on the following issues; whether the Applicant has established sufficient grounds to warrant the Court to grant the Judicial Review orders sought; whether this Application is sub judice to Machakos ELC Petition No. E005 of 2022 and whether this Application is an abuse of the Court process.
34. It was submitted that the prayers sought by the Applicant are fatally defective and self- defeating as the Applicant seeks under prayer (1) an Order of *Certiorari* and *Mandamus* at the same time and within the same prayer. Additionally, the Court cannot issue a *Mandamus* Order directing another party to quash its own decision. It was submitted that the prayers cannot be granted as sought.
35. It was also submitted that the Applicant herein has not met the threshold for grant of the reliefs sought, he does not possess any proprietary rights over the said parcels of lands Kajiado/Kaputei 120,121 & 28348. Further the decision by the 6th Respondent to cancel the said title deed was just, legal, fair and reasonable.
36. It was also argued that the Applicant was duly served with the notice of intention to cancel the title deeds. It was also argued that the 6th Respondent had the power to Cancel the deed plan and issue new grants as it was within the purview of his constitutional Mandate, the Applicant has not demonstrated before the Court that the 6th Respondent acted in excess of his mandate and the Applicant was also granted a chance to be heard which he bypassed.
37. On whether the application is sub judice Machakos ELC JR E005 of 2022 and Kajiado ELC 776 of 2017, it was argued that the Applicant moved without disclosing to the Court that there were two matters before the Court to wit Kajiado ELC 776 Of 2017 and Machakos ELC E005 Of 2022 touching on the same subject matter being parcel of land Kajiado/Kaputei/Kaputei North/120 and 121 and deliberately withheld this fact before the Court in an attempt to mislead the Court.
38. It was also argued that the current Application and Machakos ELC JR Petition No. E005 of 2022 both seek the same reliefs and challenge the same decision. Both of them arise from the same similar issues.
39. Counsel also submitted that application is an abuse of the Court process and reliance was placed in the case of the *Satya Bhama Ghadbi - v- the Director of Public Prosecutor & Others* (2018) eKLR.
40. The 7th Interested Party submitted on the following issues; whether the Respondents exercised their statutory duties as envisaged in the Law and whether the Orders of Judicial Review are available.
41. It was argued that the Respondents exercised their Statutory duties as envisaged in the Law when they cancelled the survey records. Counsel Submitted that the Director of Survey had Powers to Cancel the said surveys as per Section 33 of the *Survey Act*. It was argued that the said procedure was followed and done in compliance with the Law. It was argued that the 6th Respondent communicated to the affected parties through their Surveyor by way of two letters dated 11th February 2022 and 21st February 2022 and further that despite being duly notified of the Director of Survey's decision to cancel the survey plans, the Applicant did not oppose the same or make any representation to that effect. It was also submitted that Judicial review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made but the decision-making process itself.



42. It was also submitted that the Applicant has failed to meet the threshold for the Orders sought as he has failed to prove that the decision by the Director of the Survey was made contrary to the Law. It was also argued that the Order sought cannot be granted as prayed.
43. It was argued that prayer No. 1 of the Application seeks two Orders, being Orders of *Certiorari* and *Mandamus*, which are conflicting prayers and are mutually exclusive. As such the same cannot be granted. It was also argued that prayer No. 2 of the application seeks *Mandamus* which in effect seeks to compel the 1st to 4th Respondents to quash the decision of the 6th Respondent. It was also argued that the said prayer cannot be granted since it seeks to compel the other parties to interfere with a decision that is the sole priority of the 6th Respondent as per the provisions of the [Survey Act](#).
44. The Court has considered the Application for the judicial review and the written submissions filed by the parties. The following are the salient issues for consideration herein;
- i. Whether the application is sub judice to Machakos ELC JR Petition No. E005 of 2022 and Kajiado ELC 776 of 2017.
 - ii. Whether the *Exparte* Applicant has made a case for grant of the Judicial Review Orders sought.
45. The 5th Interested Party contested the Application on the basis that it is sub judice in view of Machakos ELC Petition E005 of 2022 Gideon [Lenana & Others - v- Director of Surveys & others and Kajiado ELC Case No. 776 of 2017](#), [Tutayo Ene Lecyo Lenkolo - v- Stephen Nakuo and Others](#).
46. The 6th Interested Party argued that the Applicant didn't disclose the existence of those suits to this Court and the same was an attempt to mislead the Court. It was also submitted that the Application herein was filed to arrest the Orders issued in Kajiado ELC 776 of 2017 and stop the Implementation of the Chief Land Registrar's Report that would have settled the matter. It was also argued that the instant application and Machakos ELC JR Petition E006 of 2022 both seek the same reliefs and challenge the same decision of the Director of Survey.
47. The sub judice principle is captured in Section 6 of the [Civil Procedure Act](#), which stipulates as follows: -
- “6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”
48. In this regard, section 6 of the [Civil Procedure Act](#) expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
49. The basic purpose and the underlying objective of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings.



50. *The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, had occasion to pronounce itself on the subject of sub-judice. It aptly stated: -

The term ‘sub-judice’ is defined in *Black’s Law Dictionary* 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”.

51. In the case of *David Ndi & others versus Attorney General & Others* 2021 eKLR, a bench of five Judges inter alia stated;

“The rationale behind this provision (Section 6 of the *Civil Procedure Act*) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”

52. The Court has perused the pleadings in Kajiado ELC No. 776 of 2017 and Kajiado ELC Petition NO. E005 of 2022 which were annexed to the Replying Affidavit sworn by the 6th Interested Party. The Court has noted that in Kajiado ELC No. 776 of 2017 seeks inter alia Orders directing the Director of Survey to fix boundaries of Title Number Kajiado/Kaptutei North/120 and an Order directing the District Land Surveyor to Cancel all title deeds obtained from the illegal parcel and sub-division of Title Number Kajiado/Kaptutei North/81. While Machakos ELC Petition No. E005 of 2022 seeks inter alia a declaratory Order against the Respondent’s action, also seeks Orders of *Certiorari* to be issued quashing the decision of the 1st Respondent to Cancel the Petitioner’s deed plans, the Petition also seeks an Order of *Mandamus* Compelling the Respondents to undertake Confirmation of the boundary where the Petitioner’s properties are situated and to cease interference.
53. From the perusal of the said Pleadings, it is indeed evident that they all relate to the suit parcels herein and seeks similar orders as sought herein. The *Exparte* Applicant never responded to the said issue either in his pleadings nor in his submissions and in the circumstances, it is the finding of this Court that this application presents the same issues which are being litigated in the other cases that were filed earlier. This application presents a sad scenario of not only having parallel proceedings on the same issues and same suit parcels but also a greater risk of coordinate Courts granting conflicting orders. Similarly, this Court is being invited to determine substantially similar issues pending before the other courts. The Applicant did not disclose in his pleadings the existence of the earlier suit.
54. In my view, whichever way we may wish to look at the issues herein, there is a high probability that the issues touching on the instant suit and the other pending suits in respect to the suit properties may affect the future dealings of the said properties This Court must therefore be aware of such a possibility and be alive to the fact that proceeding with this suit may lead to different courts granting conflicting



orders over the same subject property. The *Exparte* Applicant ought to await the outcome of the other pending suits before moving this court.

55. In view of the foregoing, this Court has no option but to strike out the entire application. Each Party shall bear own costs of the proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF APRIL, 2024.

E. K. WABWOTO

JUDGE.

In the presence of:

Mr. Kalwa for the *Exparte* Applicant.

N/A for the Respondents.

N/A for the Interested parties.

Court Assistant: - Caroline Nafuna.

