



**Republic v Land Registrar Nyandarua & 4 others; Ngugi (Exparte Applicant) (Environment & Land Miscellaneous Case 9 of 2023) [2024] KEELC 3491 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3491 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND MISCELLANEOUS CASE 9 OF 2023**

**YM ANGIMA, J  
APRIL 25, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND REGISTRAR NYANDARUA ..... 1<sup>ST</sup> RESPONDENT**

**PETER NGUGI KAINAMIA ..... 2<sup>ND</sup> RESPONDENT**

**JOHN MURAYA KAINAMIA ..... 3<sup>RD</sup> RESPONDENT**

**PETER MURAYA KAINAMIA ..... 4<sup>TH</sup> RESPONDENT**

**MICHAEL NGOTHO GITAHU ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**ELIZABETH WANGARI NGUGI ..... EXPARTE APPLICANT**

**JUDGMENT**

**A. Applicant's Application**

1. By a notice of motion dated 04.07.2022 expressed to be brought under Sections 3 & 3A of the *Civil Procedure Act* (Cap.21), Order 53 rule 3 of the *Civil Procedure Rules*, 2010, the *Law Reform Act* (Cap.26) and all other enabling provisions of the law, the ex-parte applicant (the applicant) sought a judicial review order of mandamus to compel the 1<sup>st</sup> respondent (the Land Registrar-Nyandarua) and the “holders” of the Title Nos Nyandarua/Ol’Kalou South 173 and 174 to restore them to the late Munyao Kakunia (the deceased) and expunge any other claimant’s name from the land register.
2. The application was based upon the statutory statement dated 27.04.2022 and the verifying affidavit sworn by Elizabeth Ngugi on 27.04.2022. The applicant later filed a further affidavit sworn on 31.08.2022 and another further affidavit sworn on 21.12.2022 in support of the said application.



3. It is, however, not easy to ascertain with any reasonable precision the substantive grounds upon which the application for judicial review is based from the applicant's pleadings and affidavits. The application was poorly drafted and incoherent. What the court can glean from the statutory statement is that the applicant was pleading that the deceased was the legitimate owner of both Parcel Nos. 173 and 174 which were once part of Plot No. 90 and that he had been defrauded of his land by the 2<sup>nd</sup> – 5<sup>th</sup> respondents.
4. It was pleaded that the 5<sup>th</sup> respondent had improperly and fraudulently acquired parcel 173 by claiming to have purchased it from the deceased whereas the latter had never sold the land during his lifetime. It was further contended that the 2<sup>nd</sup> – 4<sup>th</sup> respondents had acquired Parcel 174 by filing Nairobi HCCC No. 1994 of 1979 against the deceased whereby they obtained a favourable judgment through fraudulent means by wrongfully claiming that their father had contributed towards the purchase of Plot 90 from the Settlement Fund Trustees (SFT). The applicant thus contended that the High Court judgment "had no basis at all and cannot satisfy the logic" in paragraph 7 of the statutory statement.
5. In her further affidavit sworn on 31.08.2022 the applicant contended that the sale agreement dated 1977 between the 5<sup>th</sup> respondent and the deceased was not enforceable because Plot 90 was not in existence at the material time as it had already been subdivided into two parcels, that is, Parcels 173 and 174. She also disputed that the 5<sup>th</sup> respondent had been in possession of Parcel 173.
6. By her further affidavit sworn on 21.12.2022 the applicant stated that although the deceased had intended to sell part of Plot 90 in 1977, he was denied the requisite consent by the SFT hence he could not validly sell any part of the land. It was the applicant's contention that the judgment in Nairobi HCCC No. 1994 of 1979 was not genuine as it was never issued by Hon. Justice Mbogholi Msagha as purported by the 2<sup>nd</sup> – 4<sup>th</sup> respondents.
7. The applicant further contended that the Deputy Registrar never signed the transfer form for Parcel 174 and that the 2<sup>nd</sup> – 4<sup>th</sup> respondents had never obtained the consent of the Land Control Board for subdivision of Parcel 174. The applicant further claimed that the deceased was never made aware of the judgment in Nairobi HCCC No. 1994 of 1979 hence the reason he did not appeal the judgment.

## **B. Response by the Respondents**

8. There is no indication on record of the 1<sup>st</sup> respondent having filed a response to the application despite the Attorney General having appeared on his behalf on several occasions.
9. The 2<sup>nd</sup> to 4<sup>th</sup> respondents filed a replying affidavit sworn by John Muraya Kainamia on 08.12.2022 in opposition to the application. They stated that their late father and the deceased had in the 1960s jointly bought Plot 90 measuring about 65 acres from the SFT although the deceased was later on registered as sole proprietor of the entire land. It was pleaded that when the deceased refused to give them their entitlement of one half of Plot 90 they sued him in Nairobi HCCC No 1994 of 1979 whereby they obtained a judgment against him for 30 acres out of Plot 90. It was their case that pursuant to the said decree Parcel 174 was sub-divided into Title Nos Nyandarua/Ol'Kalou South 1627 measuring 30 acres which was registered in their names and Parcel 1628 measuring 2.5 acres which was retained by the family of the deceased.
10. The 2<sup>nd</sup> – 4<sup>th</sup> respondents' further pleaded that sometime in 2012 when the family of the deceased invaded Parcel 1627 they successfully sued them in Nyahururu ELC No. 245/2017 whereby they obtained a judgment against them in 2019. It was thus their case that the issues raised in the application for judicial review were fully ventilated in the two previous suits hence the applicant had no legitimate claim over what was previously Parcel 174.



11. The 5<sup>th</sup> respondent filed a replying affidavit sworn on 20.07.2022 in opposition to the application for judicial review. He pleaded that vide a sale agreement dated 29.12.1977 the deceased sold to him and one Samuel N. Mundia a portion of 30 acres out of Plot 90 at a consideration of Kshs.67,500/=. It was further pleaded that the deceased applied and obtained all the necessary approvals and consents whereupon he transferred the portion of 30 acres to them in 1979. It was his case that in 1996 the said Samuel N. Mundia transferred his interest in Parcel 173 to him absolutely whereupon he became the sole owner of the property. It was thus his case that the applicant had no interest whatsoever in Parcel 173. He consequently prayed for dismissal of the application for judicial review with costs.

### **C. Directions on Submissions**

12. When the matter came up for directions it was directed that the application for judicial review shall be canvassed on the basis of the affidavits and material on record and the written submissions of the parties. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the applicant filed written submissions dated 05.03.2023 and 25.04.2023 whereas the 5<sup>th</sup> respondent's submissions were filed on 02.06.2023. The 1<sup>st</sup> respondent did not file any submissions whereas the 2<sup>nd</sup> – 4<sup>th</sup> respondents informed the court that they intended to rely entirely upon their replying affidavit and did not wish to file any submissions.

### **D. Issues for Determination**

13. The court has considered the pleadings, affidavits and material on record in this matter. The court is of the opinion that the following are the key issues which arise for determination herein:
  - a. Whether the applicant has made a case for the grant of the judicial review orders sought.
  - b. Who shall bear costs of the suit.

### **E. Analysis and Determination**

#### **Whether the applicant has made a case for the grant of the judicial review orders sought**

14. The court has considered the material and submissions on record. The applicant submitted that the deceased was the sole and absolute allottee of Plot 90 from SFT and that there was no credible evidence to demonstrate that he ever validly sold any portion thereof to either the 5<sup>th</sup> respondent or the father of the 2<sup>nd</sup> – 4<sup>th</sup> respondents. It was her contention that Parcels 173 and 174 were illegally transferred to the 2<sup>nd</sup> – 5<sup>th</sup> respondents hence their titles ought to be cancelled.
15. In her submissions dated 15.03.2023 the appellant attacked the judgment rendered in Nairobi HCCC No. 1994 of 1979 as follows:

“The contest in this case is that Mbogoli (J) never had before him any evidence to make the judgment he made in the Nairobi 1994/1979 and those parties claiming to be plaintiffs were not the transactors (sic) of the alleged loan, or purchase funding of the Ol’Kalou land they claim...

Many facts are visible in this Nairobi Judgment – where it appears that the plaintiff never participated in the purported sub-division of Nyandarua/Ol’Kalou South Plot 90 and confirming their falsehood of evidence – because that would have had confirmation. The court too ignored un rebutted statement of the defendant that he never took a loan from the father of the plaintiff...”



16. It is thus clear that applicant is aggrieved by the judgment of the High Court in Nairobi HCCC No. 1994 of 1979. That is the judgment which deprived the deceased 30 acres out of the original Plot 90 and handed the same to the 2<sup>nd</sup> – 4<sup>th</sup> respondents. The trial court found that the 2<sup>nd</sup> – 4<sup>th</sup> respondents were telling the truth and held that the deceased was holding one half of Plot 90 in trust for their father who had contributed towards the purchase of the land.
17. In the case of *Municipal Council of Mombasa -vs- Umoja Consultants Ltd* Civil Appeal No. 185 of 2001 it was held as follows:
- “Judicial review is concerned with the decision making process, not with the merits of the decision itself. The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a Court of Appeal over the decider which 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...”
18. The main principles to be considered in an application for judicial review were propounded in the Ugandan case of *Pastoli -vs- Kabale District Local Government Council & Others* [2008] EA.300-304 as follows:
- “In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety. See *Council of Civil Service Union -vs- Minister for the Civil Service* [1985] A.C 2 and also *Francis Babikirwe Muntu and Others -vs- Kyambogo University*, High Court, Kampala, Miscellaneous Application No. 643 of 2005 (UR). Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Re an application by *Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph E.
- Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision (*Al-Mehdawi -vs- Secretary of State for the House Department* [1990] AC 876).”
19. The court is of the opinion that a party aggrieved by the judgment of a court of competent jurisdiction ought to prefer an appeal against it to a higher court. The aggrieved party is not at liberty to challenge the judgment through judicial review proceedings in a court of co-ordinate jurisdiction. The court finds the instant application to be incompetent and untenable in so far as it relates to the 2<sup>nd</sup> – 4<sup>th</sup> respondents who participated in the previous proceedings.
20. The court has also considered the applicant’s claim to Parcel 173. The applicant has challenged the sale of the said parcel by the deceased and given various reasons why she thought the sale was improbable.



The sale was said to have taken place in 1977 during the lifetime of the deceased. There is no evidence on record to demonstrate that the deceased had challenged the transaction with the 5<sup>th</sup> respondent between 1979 and the time of his demise in 2008 or thereabouts.

21. The court is further of the opinion that judicial review proceedings are not the appropriate mode of challenging on inter vivos sale transactions which was said to have taken place more than 47 years ago. A party challenging a sale transaction can only properly do so through a normal civil suit where oral evidence can be taken and tested through cross-examination for the court to determine where the truth lies. Such a dispute cannot be resolved through affidavit evidence alone in judicial review proceedings. The court is thus of the opinion that the application against the 5<sup>th</sup> respondent is also untenable. As a result, the court finds and holds that the applicant has not made out a case for the grant of the judicial review orders sought.
22. The applicant's allegation that the deceased was not aware of the judgment in the Nairobi Case was answered by this court vide the ruling dated 11<sup>th</sup> April, 2024 in Nyandarua ELCLC No.99 of 2023 as follows:

“ 22. However, a perusal of the court file reveals a different story. The record shows that vide a chamber summons dated 15.08.2002 the late Munyao sought leave of court to change advocates after judgment. He swore a supporting affidavit on 25.07.2022 in which he acknowledged that judgment was delivered against him on 29.04.1999.

23. The record further shows that vide a letter dated 12.03.2002 Munyao requested the Deputy Registrar of the court to supply him with copies of proceedings, the judgment and “any subsequent orders”. It is also evident that vide a chamber summons dated 07.02.2007 Munyao applied for stay of proceedings (including execution proceedings) pending the hearing of his intended appeal to the court of appeal. He also swore a supporting affidavit on 07.02.2007 in which he stated, inter alia, that:

“2. That this matter was heard on 30<sup>th</sup>, 1<sup>st</sup> November, and 1<sup>st</sup> December, 1998 and 1<sup>st</sup> March, 1999 and judgment delivered on 29<sup>th</sup> April, 1999 and a decree subsequently issued.

3. That I had requested for certified copies of the proceedings and judgment to enable me file an appeal in the Court of Appeal against the said judgment.

4. That, however, proceedings have been going on to enforce the judgment which I intent to appeal against and my intended appeal may be rendered nugatory if these proceedings are not stayed.”

24. So, if Munyao was not made aware of the existence of the judgment why did he swear the 2 supporting affidavits? Why did he apply for stay pending appeal? And why did he request for copies of the judgment and “subsequent orders” if he was not aware of the existence of the judgment?”



### **Who shall bear costs of the suit**

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful parties should not be awarded costs of the suit. As a result, the 2<sup>nd</sup> – 5<sup>th</sup> respondents shall be awarded costs of the suit. However, the 1<sup>st</sup> respondent shall not be awarded any costs since the Attorney General did not file any response to the application for judicial review and was absent during most of the court sessions.

### **F. Conclusion and Disposal Order**

24. The upshot of the foregoing is that the court finds no merit in the application for judicial application. As a consequence, the court makes the following orders for disposal thereof:
- a. The application for judicial review dated 04.07.2022 be and is hereby dismissed.
  - b. The 2<sup>nd</sup> – 5<sup>th</sup> respondents are hereby awarded costs of the suit to be borne by the applicant.
- It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 25<sup>TH</sup> DAY OF APRIL, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Elizabeth Ngugi the Ex-Parte Applicant in person

N/A by the Attorney General for the 1<sup>st</sup> Respondent

Mr. Ndichu for the 2<sup>nd</sup> – 4<sup>th</sup> Respondents

Mr. Nderitu Komu for the 5<sup>th</sup> Respondent

C/A - Carol

