



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Njuguna & 5 others v Sogomi & another (Civil Appeal 12 of 2018)  
[2021] KECA 37 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 37 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPEAL 12 OF 2018  
RN NAMBUYE, AK MURGOR & F SICHALE, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**JOHN MWANGI NJUGUNA ..... 1<sup>ST</sup> APPELLANT  
JAMES MUASYA MUTUNGA ..... 2<sup>ND</sup> APPELLANT  
WENDANI SELF HELP GROUP ..... 3<sup>RD</sup> APPELLANT  
FRANCIS KARANJA KANDA ..... 4<sup>TH</sup> APPELLANT  
GEOFREY NGUGI KIBE ..... 5<sup>TH</sup> APPELLANT  
JAMES KAMAU MUCHIRI ..... 6<sup>TH</sup> APPELLANT**

**AND**

**EVANS KALEKA SOGOMI ..... 1<sup>ST</sup> RESPONDENT  
DISTRICT LAND REGISTRAR, UASIN GISHU ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Judgment of the Environment and Land Court at Eldoret ( A. Ombwayo, J.) delivered on the 4th December, 2015 in Judicial Review No. 2 of 2013)*

**JUDGMENT**

1. This appeal concerns a decision of the District Land Registrar, Uasin Gishu, (the Land Registrar), the 2nd respondent to cancel the 1st respondent, Evans Kaleka Sogomo's registration over the property known as Eldoret Municipality Block 21(King'ong'o)/3734 ( the subject property) and to register the title in the name of the 1st, 2nd, 3rd , 4th, 5th and 6th appellants, (the appellants ) instead.
2. By way of a Notice of Motion dated 26th May, 2013, brought under Order 53 Rule 3(1) of the *Civil Procedure Rules* 2010 section 8 and 9 of the *Law Reform Act*, pursuant to leave granted by the Environment and Land Court on 6th May, 2013, the 1st respondent sought for Judicial Review orders, in particular, an order of certiorari to: remove to the High Court all records and the register



- of the subject property for purposes of review of the entries thereon quashing the decision of the Land Registrar of 6th December, 2012 cancelling the registration of the subject property in his name; quashing the decision of the Land Registrar that transferred the subject property to the appellants on 10th December 2012; an order of prohibition, prohibiting the Land Registrar from transferring or making any further entries, or registering or disposing of the subject property; and an order of mandamus to compel the Land Registrar to reinstate the 1st respondent as the registered proprietor of the subject property.
3. The application was brought on the grounds that the 1st respondent was registered as owner of the subject property. On 6th December 2012, the Land Registrar unlawfully, unprocedurally and in excess of authority cancelled the registration of the subject property in the 1st respondent's name registration and on 10th December 2012, unlawfully registered the subject property in the appellants' names. It was the 1st respondent's contention that the Land Registrar's decision was illegal, ultra vires and a breach of the rules of natural justice.
  4. The motion was supported by the 1st respondent's affidavit sworn on 20th April, 2013 wherein, it was contended that; on 12th August, 2012, he purchased the subject property from one John Mwangi Njuguna, the 1st appellant; that before the execution of the sale agreement, he conducted a search at the Lands registry where he confirmed that the subject property belonged to the 1st respondent and that it was free from any encumbrances; that upon execution of the sale agreement, he paid the purchase price and executed a transfer; that he obtained the original title deed and a consent to transfer from the Land Control Board and that thereafter, on or about the 6th December, 2012, he presented the documents for registration.
  5. It was further deponed that on or about 24th April, 2013, a neighbour living in the area informed him that some people had commenced fencing the subject property; that he immediately instructed his lawyers to conduct a search at the Lands registry; that the search revealed that the Land Registrar had registered the title of the subject property in his name and on 6th December 2012 had cancelled that registration and on 10th December 2012 had registered it in favour of the appellants.
  6. In a replying affidavit, James Muasya Mutunga, the 2nd appellant deponed that on 16th November, 2012 on behalf of 4th, 5th, 6th, and 7th respondents, he purchased the suit property for a consideration of Kshs.450,000 from John Mwangi Njuguna the registered proprietor. Upon execution of the sale agreement, he paid a sum of Kshs. 440,000; that upon obtaining consent from the Land Control Board, they paid the balance of Kshs. 10,000 whereupon, John Mwangi Njuguna transferred to the subject property to them; that a title deed was issued to them on the 10th December, 2012 in his name on behalf of Wendani Sign Post Self Help Group Trustees, Francis Kianda, Geoffrey Ngui Kibe and James Kamau Muchiri. That on 9th January, 2013, a survey was conducted whereupon the subject property was subdivided into 2 portions both measuring 0.0478 Ha.
  7. The 1st respondent did not respond to the appellant's replying affidavit.
  8. In its judgment, the Environment and Land Court found that the cancellation of the 1st respondent's title was carried out unlawfully and irregularly since the 1st respondent was not given an opportunity to be heard, or to defend his title. The judge found that the application was merited and granted the order of certiorari quashing entries Nos. 4 and 5 pertaining to the appellants' registration in respect of the subject property in the register.
  9. The trial judge also issued an order of mandamus to the Land Registrar to compel her to reinstate the 1st respondent as the registered proprietor of the subject property.



10. The appellants were aggrieved by the trial judge's decision and have brought this appeal on grounds that; the learned judge misconstrued the purpose of judicial review, which purpose is to correct errors in administrative actions; in quashing the decision of the Land Registrar cancelling the entry of the appellants as the registered proprietors of the subject property without providing the Land Registrar an opportunity to give reasons for her action; in usurping the powers of the Land Registrar by compelling her to act in a certain manner which was erroneous and prejudicial to the proprietary rights of the appellants who were already registered as proprietors of the subject property; in acting in excess of his jurisdiction under Judicial Review which ought to have ended with the order quashing the decision of the Land Registrar and did not extend to the order reinstating the cancelled registration of the 1st respondent; in quashing the appellants' registration when all that was before him was a request to quash the cancellation of the interested party by the 2nd Respondent.
11. Learned counsel Mr. Ngige Mbugua appeared for the appellants, while Mr. S.K. Korir appeared for the 1st respondent and also held brief for Mr. Odongo for the 2nd respondent. The parties filed written submissions.
12. Mr. Mbugua submitted that the learned judge fell into error when he usurped the powers of the Land Registrar by compelling her to reinstate the 1st respondent's title that was prejudicial to the appellants' proprietary rights as they were already registered as the owners of the subject property. It was contended that by so doing, the learned judge wrongly arrived at a finding on ownership of the subject property, yet two competing claims were in existence. Counsel cited the case of *Andrew M'wereria vs Land Registrar, Igembe South District & Another* [2014] eKLR in which the case of *R vs Lancashire County Council Ex parte* [1980] 1 KLR 102 was approved for the proposition that courts should not usurp the role of administrators by deciding on competing claims without giving the parties a chance to be heard.
13. It was further submitted that the order of reinstatement went beyond the trial judge's jurisdiction under a Judicial Review as it concerned a matter that required to be determined at another forum, where the parties would have an opportunity to be heard and where the evidence and materials relating to the contested property could be interrogated and subjected to cross examination. Counsel cited the cases of *Super Nova Properties Limited & Another vs District Land Registrar Mombasa & 2 Others*; *Kenya Anti-Corruption Commission and 2 Others (Interested Parties)* and *Radclift Holdings Ltd vs Registrar of Titles & 2 Others* among others for the contention that the contested issues could not be determined through Judicial Review proceedings but through a full hearing.
14. Mr. Korir opposed the appeal and submitted that the learned judge did not delve into the issue of ownership or the contested facts; that the judge merely dwelt on the cancellation of the 1st respondent's title by the Land Registrar. It was argued that, Judicial Review is concerned with the decision making process and not the merits of the dispute, and in this regard, the violation of the rules of natural justice, where the 1st respondent was not heard, was the focus of the judge's determination.
15. Counsel further argued that the learned judge rightly issued the order of mandamus which remedy merely restored the status quo ante as dictated by the maxim "ubi jus remediun" following the wrongful cancellation of the title. In other words, counsel asserted, there cannot be a wrong without a remedy. Counsel concluded by asserting that the learned judge properly exercised his discretion, and in so doing arrived at the correct decision to order the reinstatement of the 1st respondent's title.
16. We have considered the pleadings and the final submissions of the parties as well as the law. Whether or not to grant an order of certiorati or mandamus is a discretion that should be exercised by the single



judge judiciously and justly. The case of *Mbogo and other vs Shah*. 93 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.....”

17. In view of the above, we find that two issues fall for consideration. Firstly, whether the learned judge rightly cancelled the 1st respondent’s title, and secondly, whether the learned judge rightly issued the order of mandamus reinstating the 1st respondent’s title.

18. With regard to the decision by the Land Registrar cancelling the 1st respondent’s title, the learned Judge stated thus;

“The Registrar is also guilty of procedural impropriety because he registered the exparte applicant’s as the proprietor of the parcel of land after receiving documents of registration in respect of the exparte applicant but thereafter cancelled the registration without affording him a hearing. It is a trite principle of Natural justice that no person shall be punished unheard”.

19. In seeking redress for the Land Registrar’s decision, the 1st respondent brought Judicial Review proceedings. Under Judicial Review for relief to be granted, the applicant must demonstrate that the threshold requirements have been met. In the case of *Biren Amritlal Shah & Another vs Republic & 30 others* this Court stated thus;

“Judicial review is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question.”

20. In this case the irregular action complained of was the Land Registrar’s decision of 6th December, 2012 that cancelled the registration of the 1st respondent’s title. The 1st respondent’s grievance is that in cancelling his title and registering the appellants’ title instead, the Land Registrar did not provide him with an opportunity to explain how he came to be the owner and registered proprietor of the subject property.

21. On the question of right to a fair hearing, Article 50 of the *Constitution of Kenya* is explicit. It provides;

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

22. The right to fair hearing as enshrined by the Constitution was reiterated in the case of *Richard Ncharpi Leiyangu vs Independent Electoral and Boundaries Commission & 2 others Nyeri Civ Appeal No 18 of 2013* thus;

“The right to a fair hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law.”



23. It is not in dispute that the 1st respondent's transfer was registered against the title of the subject property. It is also not disputed that on 6th December 2012, that registration was cancelled, and on 10th December 2012, the appellants' transfer was registered and a title issued to them instead. That prior to cancellation of the 1st respondent's title, he was not provided an opportunity to be heard on whether or not his registration should be cancelled. This being the case, we are satisfied that the learned judge rightly granted the orders of certiorari sought quashing entries Nos. 4 and 5 which cancelled the 1st respondent's registration and the registration of the appellants' as the proprietors, and we so find.
24. But the matter does not end there. The learned judge then went on to issue orders of mandamus to compel the Land Registrar to reinstate the 1st respondent as the registered proprietor of the subject property. The appellants are aggrieved by this decision because they argue that by so doing, the trial judge effectively determined the question of ownership of the subject property in favour of the 1st respondent, yet there are two competing claims in existence and neither party had been given an opportunity to defend their respective titles.
25. Similar circumstances were considered by the High Court in *Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison* where the court had this to say;
- “Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application.....Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced...”
26. As is the situation in the instant case, the ownership of the subject property is undisputably contested, and the question as to who between the appellants and the 1st respondent is the rightful owner remains the issue that still requires to be determined. As the remit of the court under judicial review is limited to the decision making process, a substantive civil suit, and not judicial review proceedings is the more appropriate forum within which to resolve the ownership question. We therefore find that the learned judge went beyond the remit of judicial review which ended with the order of quashing the decision of the Land Registrar and did not extend to reinstating the cancelled registration of the 1st respondent as that was the province of another forum in a substantive suit after a full hearing of rival parties' evidence.
27. As such the appeal is allowed in part. We find it necessary to interfere with the order of reinstatement of the 1st respondent's title on the register of the subject property which is accordingly set aside
28. As the appeal has succeeded in part, each party to bear their own costs.
29. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**R. N. NYAMBUYE**

.....



**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

DEPUTY REGISTRAR

