



Amalia (Suing as lawful attorney of Francesco Jourban) v Chief Land Registrar & another (Environment and Land Judicial Review Case E005 of 2023) [2024] KEELC 4418 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2023**

EK WABWOTO, J

MAY 30, 2024

BETWEEN

LEONARD PETER CLAVER AMALIA (SUING AS LAWFUL ATTORNEY OF FRANCESCO JOURBAN) APPLICANT

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. This dispute is in respect to land parcels known as Land Reference No. 9953/1 and 9953/2 situated in Nairobi. The Applicant, as a lawful attorney pursuant to the Power of Attorney dated 14th September 2022 has moved this court vide a substantive Motion and Statement of Facts dated 19th October, 2023 and the same was Amended on 21st November, 2023.
2. The Applicant seeks the following reliefs:
 - a) An order of *mandamus* to compel the 1st Respondent being the Chief Lands Registrar Nairobi Central Registry to avail or reconstruct the Deed Files and any other record in respect of Land Reference Number 9953/1, Title No. I. R 37032 and Land Reference Number 9953/2. I. R 16910.
 - b) An order of *mandamus*, to compel the 1st Respondent being the Chief Lands Registrar Nairobi Central Registry to rectify the Lands Register over Land Reference Number 9953/1, Title No. I. R 37032 and the same to read and record the endorsed term of Ninety Nine years as the mother Title being of Land Reference Number 9953 as from 1st April, 1959.



- d) An order of *mandamus*, to compel the 1st Respondent being the Chief Lands Registrar Nairobi Central Registry to pull down the unregistered Lease over Parcel of Land Reference No. 15314/6 .
- e) That costs of this application be provided for.
3. On 30th November 2023, the Court directed that the application be canvassed by way of written submissions.
4. The Applicant filed written submissions dated 8th February 2024. In submissions dated 8th February 2024, the Applicant raised one issue for determination – whether or not the order of *mandamus*, sought by the Applicant can be granted?
5. Relying on Section 33(5) of the [Land Registration Act](#), it was submitted that the 1st Respondent is the sole custodian of the land records and properly mandated to reconstruct lost/damaged title abstracts.
6. It was further submitted that Applicant is applying as an Attorney the executor and the beneficial owner of the estate hinged on the fact that the registered owner had passed on. It was also submitted that Parcel of Land Reference No. 15314/6 formed part of the Will and Testament of the deceased dated 13th February, 2013 yet the purported illegal instrument are dated 30th March, 2016 since people are taking advantage that the Deed file is not available and that the property belong to a foreigner hence ease of manipulating documents and records.
7. The Applicant also asserted that the 1st Respondent lack of diligence and vigilance in his duties and responsibilities he has caused unregistered Lease to be introduced in the system resulting to issuance of Certificate of Lease to the detriment of the Applicant and the beneficial owner, who were currently unable to reconstruct the files and rectify errors under parcels LR.9953/1 I.R NO 37032 and LR.9953/2
8. Relying on the cases of [Republic v Chief Land Registrar & 2 Others; Ex parte Trojan Nomineer Ltd](#) [2020] eKLR and [R v County Registrar Thika Republic v County Land Registrar - Thika Land Registry & 2 others Ex Parte Francis Ndung'u Gitau & another](#) [2019] eKLR, it was submitted that the case was similar in characteristic where orders of *mandamus* were sought, respondents failed to file responses as directed by Court and hence the court granted the said orders.
9. The Applicant also highlighted the issue of ownership in which it was submitted that since the Applicant is not the registered owner of the suit properties, the procedure provided for under Section 33(1), (2) and (3) of the [Act](#) is not available for them.
10. It was emphasized that an error had occurred when the Certificate of title under LR 9953/1 was issued for Forty Four years, seven months instead of 99 years as per the mother titles. Relying on Section 80(1) of the [Land Registration Act](#) coupled with the case of [Mary Ruguru Njoroge v Hon. The Attorney General](#), it was submitted that the Court has discretion to make an order of rectification of a title document where there is a mistake.
11. It was submitted that the reconstruction of the deed file was crucial for the registration of the confirmation of grant which would allow the transmission and distribution of the deceased's estate. The Applicant also highlighted that the beneficial owner was in possession of the suit property and run several businesses including a hospital and children's home, and as such, would suffer alienation and great harm should the orders be denied.
12. In spite of service of the documents on 27th November 2023 at 12.00pm and 12.30pm respectively as evidenced in the affidavit of service aforementioned (see Para 4), the Respondents did not formally



enter appearance nor file any responses. The Respondents also never filed any written submissions for consideration by the court.

13. The Court having considered the written submissions filed by the Applicant and evidence tendered, is of the view that the following issues are for determination;
- i. Whether the Applicant has locus standi to file the suit?
 - ii. Whether orders of *mandamus*, can be issued as sought?
 - iii. Who bears the costs of the suit?

Issue No 1

Whether the Applicant has locus standi to file the suit?

14. . Section 4 of the [Registration of Documents Act](#) states:-

“All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:

Provided that the registration of the documents following shall not be compulsory—

- (i) any composition deed;
- (ii) any document relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property;
- (iii) any debenture issued by such a company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property, except in so far as it entitles the holder to the security afforded by a registered instrument, whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein, to trustees upon trust for the benefit of the holders of such debentures;
- (iv) Any endorsement upon or transfer of any debenture issued by any such company
- (v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to, in or over any immovable property but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest;
- (vi) any lease or license of land for any term not exceeding one year; or



- (vii) any document registrable under the provisions of the Government Lands Act (Cap. 280), the *Registration of Titles Act* (Cap. 281), the *Land Titles Act* (Cap. 282) or the *Registered Land Act* (Cap. 300):

Provided that, if any such document relates to land registrable under any such Act and also to land not so registrable, such document shall also be registered under this *Act*.

15. The general rule of interpretation would be applied to understand that function and nature of documents conferring rights upon immovable property must be registered. In addition to registration, Section 19 and 20 of the *Stamp Duty Act* outlines payment of stamp duty as a requirement for the said documents to be deemed as valid. It is worth noting that the documents and instruments must meet the sacrosanct elements under the *Land Act*.

Perusal of power of attorney dated 26th September 2022 confirms the document was registered and bears the seal confirming payment of stamp. For this reason, this Court finds that the Applicant being the duly appointed and registered power of attorney, has locus standi before the Court

Issue No 2

Whether orders of mandamus can be issued as sought?

16. The Applicant clearly stated that he is not the registered owner of the suit. As guided by the parameters and reliefs under Section 33 of the *Land Registration Act*, this Court is therefore called upon to peruse the evidence placed before it.
17. Following thorough scrutiny of the evidence, I have arrived at the determination that the Applicant has locus before this Court as duly appointed and registered power of attorney. Furthermore, the Applicant has duly acquired the confirmation of grant as issued by the High Court in Succession Cause No. 2450 of 2013 as evidenced by the Certificate of confirmation of grant with will dated 3rd April 2017. Therefore, I have no qualms in granting Prayer 2 and 3 as sought in the application.
18. With regards to Prayer 4, the Applicant sought to compel the 1st Respondent to pull down the unregistered lease over LR No. 15314/6, registered to Mr. Wilson Macharia in 2016. Save for making assertions that the unregistered lease was “snuck in”, the Applicant presented no further evidence to dispel the root of title nor was the said Mr. Macharia joined to this suit neither was he a party to this suit. The Court must consistently uphold the right to fair hearing for all and cannot condemn a party unheard. The Applicant would still have the latitude to canvass the issue of ownership against Mr. Macharia by adhering to rules of the Court and principles of natural justice. For this reason, the court is not persuaded in granting orders sought under Prayer 4

Issue No 3

Who bears the costs of the suit?

19. The general rule is that costs shall follow the event in accordance with 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. In the instant case, the Applicant has diligently presented his claims. Despite the prevailing circumstances, I am cognizant of the fact that the Respondents as public institutions did not participate and would therefore shun against situations that would percolate cycles of endless litigation. For this reason, I direct that there shall be no orders as to costs.



20. From the foregoing analysis, the Applicant has proven the case on a balance of probabilities against the Respondents and in this regard, this Court makes the following final orders:

- i. An order of *mandamus*, is hereby issued in favour of the Applicant compelling the 1st Respondent being the Chief Lands Registrar Nairobi Central Registry to avail or reconstruct the Deed Files and any other record in respect of Land Reference Number 9953/1, Title No. I. R 37032 and Land Reference Number 9953/2. I. R 16910.
- ii. An order of *mandamus*, is hereby issued in favour of the Applicant compelling the 1st Respondent being the Chief Lands Registrar Nairobi Central Registry to rectify the Lands Register over Land Reference Number 9953/1, Title No. I. R 37032 and the same to read and record the endorsed term of Ninety Nine year as the mother Title being of Land Reference Number 9953 as from 1st April,1959.

Orders accordingly.

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

E. K. WABWOTO

JUDGE

