



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE JJA)

CIVIL APPEAL NO. 5 OF 2015

BETWEEN

JANE WANGECHI WARIARI (suing as the legal representative of the estate of Hiram Ndung'u Ng'ayu Deceased).....APPELLANT

AND

THE REGISTRAR NYERI.....1st RESPONDENT

JAMES MWAURA KIGUTU.....2ND RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri

(Ombwayo, J.) Dated 5th November, 2014)

In

(Misc. Appl. No. 136 of 2011 (JR))

JUDGMENT OF THE COURT

Introduction & Background

1. The appeal before us relates to Land Parcel No. **Nyeri Municipality Block 111/141**(suit land) whose Register was opened on 31st July, 2013 and one **Peter Mahugu (Peter)** was registered as the owner and a certificate of lease issued to him on 1st August, 1983. On 18th August, 2005 the title changed into the names of **Mathew Nderitu Rubia** (Mathew) at a consideration of Ksh. 1,295,000/- with the certificate of lease issued to him on the same date. When **Mathew** passed on, a grant of representation was issued by Embu High Court in Succession Cause No. 122 of 2007 and the estate passed on title to the suit land by way of sale for valuable consideration to **Hiram Ndung'u Ng'ayu (Hiram)**, the late husband of the Appellant on the 28th day of November, 2008.

2. The **Land Registrar**, Nyeri (Registrar) purporting to be acting under powers donated to her by **Section 17** of the now repealed Registered Land Act, Cap 300 Laws of Kenya (RLA) caused the publication of

Kenya Gazette Notice No. 2410 of 11th March, 2011 expressing her intention to cancel an alleged erroneous entry of title in favour of the said **Hiram** after the expiry of sixty (30) days from the date of publication.

3. The Appellant **Jane Wangechi Wariari** (Jane) suing as the legal representative of the estate of **Hiram** was aggrieved by that publication and moved to the High Court of Kenya at Nyeri and presented a Judicial Review Misc. Application Number 136 of 2011, in the first instance seeking leave of court to apply for an order of *certiorari* to remove into the court, for purposes of quashing, the decision of the Registrar, to cancel the entry in the register in respect of **Hiram** as the proprietor of the leasehold interest in LR. No. Nyeri/Municipality Block 111/141 as published in Kenya Gazette No. 2410 of 11th March, 2011.

4. The substantive Notice of Motion dated and filed on the 3rd August, 2011 pursuant to leave granted on the 19th day of July, 2011 sought

“an order of certiorari to issue removing into the High Court for purposes of quashing the decision of the Land Registrar Nyeri, to cancel the entry in the register of Hiram Ndung’u Ng’ayu (deceased) as the proprietor of the leasehold interest in LR. No. Nyeri/Municipality Block 111/141 as published in the Kenya gazette No. 2410 of 11th March, 2011”.

5. The Registrar purporting to act under the same powers donated by **section 17** of the RLA caused publication of Kenya Gazette Notice No. 5171 of 13th May, 2011 expressing her desire to cancel the alleged erroneous entry of title in favour of **Hiram** and substitute therewith the name of **Peter Mahugu Waweru (Peter)** after the expiry of thirty (30) days from 13th May, 2011. Gazette notice No. 5171 was duly effected and a title was issued in favour of **Peter Mahugu (Peter)** on the 22nd day July, 2011,

6. **James Mwaura Kigutu** holding a power of Attorney on behalf of Peter filed two replying affidavits in opposition to the Appellant’s Judicial Review Application deposited on the 22nd day of April, 2013 and filed on the 23rd day of April, 2013 and another deposited and filed on the 31st day of March, 2014. The merit disposal of the Judicial Review application resulted in its dismissal by **A. Ombwayo, J.** on 5th of November, 2014.

The Appeal

7. The appellant was aggrieved by that dismissal order and she has appealed to this Court raising five grounds of appeal alleging that the learned judge erred in law and facts:

- **in failing to comprehend the nature of Judicial Review process and principles applicable thereto, thus applying the wrong principles.**
- **in holding that Judicial Review process was not applicable in the circumstances, thus failing to appreciate the nature of the suit.**
- **in holding that the “Notice of Motion is at variance with the statement of facts” on grounds that were not apparent and that were not relevant to the orders sought.**
- **in relying on irrelevant and inapplicable technicalities and proceeding therefrom to deliver a judgment that was against the substance of the suit.**
- **The judgment was rendered per incurium.**

Appellant’s submissions

8. **Mr. C. M. Kingori**, learned Counsel for the appellant urged us to allow the appeal on the grounds that

the learned trial Judge fell into error when he ruled that the relief substantively sought in the main motion was at variance with the statement of facts thereof as both are identical; **Section 17** of the RLA only donated to the Registrar power to cancel errors which do not affect legal rights of the proprietor; the learned trial judge having upheld the Appellant's main complaint that the Registrar had no jurisdiction to cancel title to the suit land, the court should not have withheld the relief of *certiorari* from the appellant; the learned trial judge misapprehended the real issues in controversy by assuming that the relief sought related to a dispute over the ownership of the suit land and therefore evidence needed to be adduced. He submitted further that the learned judge proceeded on a wrong premise when he failed to note that the Appellant was attacking the procedural lapses in the Registrars action which the learned Judge himself acknowledged to be a genuine complaint, he ought therefore to have faulted the process and then directed the parties to any other appropriate forum for the interrogation of any other issues that may have arisen in the proceedings that were alien to the judicial review.

First Respondent's submissions.

9. **Mr. F. O. Makori** learned counsel for the 1st Respondent urged us to dismiss the appeal on the grounds that Gazette No. 2410 of 11th March, 2011 only expressed the Registrar's intention to alter the entries in the register of title with regard to the suit land; it is Gazette Notice number 5171 of 11th May, 2011 which effected changes in the title with regard to the suit land which the Appellant did not apply to quash; granting the order that had been sought by the Appellant with regard to the first Gazette Notice would have been an exercise in futility as it would not have reversed the position with regard to the changed status in the title to the suit land in favour of the interested party; the learned trial Judge properly addressed his mind to and applied correctly applicable principles of law to the issues before him, found the Appellant's claim wanting and rightly disallowed it; the Registrar acted within the powers donated to her by **section 17** of the RLA and lastly that the issue of ownership of the suit land having been alive in the rival arguments, could not have been ignored by the learned trial Judge who rightly found that those matters were not proper matters for determination by way of judicial review procedures.

10. To buttress the 1st Respondent's opposition to the appeal, **Mr. Makori** relied on the decision on the cases of **Kenya National Examination Council versus Republic exparte Geoffrey Gathenji Njoroge and others [1997] eKLR** on the efficacy of the relief of *certiorari*, and **Kimote Musau versus Makumi Muluva Muthwethau and 2 others [2015] eKLR** in which this Court reiterated that;

“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;

He also relied on the case of **Kogi Kamau versus Jane Nduta Kitutha [2014] eKLR** for the proposition that the Registrar is empowered under **section 17** of the RLA to cancel any entry in the register which he is satisfied ceased to have any effect; the case of **Biren Amritlal Shah & another versus Republic and 30 others [2013] eKLR** for the proposition that Judicial review is not concerned with private rights or the merits of the decision being challenged but with the decision making process to ensure that the individual is given fair treatment by the authority to which he had been subjected.

The second Respondent's submissions.

11. **Mr. C. N. Ngugi** learned counsel for the 2nd Respondent also opposed the appeal arguing that the relief sought by the Appellant in the substantive notice of motion was at variance with the statement of facts contrary to the requirement in **Order 53 rule 4(1)** of the Civil Procedure Rules. In his submissions the relief intended to be sought at the leave stage and that sought in the substantive Notice of Motion should be consonant with the relief specified in the statement of facts. The entire proceedings were therefore incompetent and ought to have been struck out. He argued in the alternative that quashing of Gazette Notice No. 2410 of 11th March, 2011 would have been an exercise in futility as the Appellant had not moved to quash Gazette notice number 1571 which had divested the ownership of the suit land from the appellant's deceased husband in favour of the interested party; and lastly that the underlying issue in

controversy was ownership of the suit land, a relief alien to Judicial review. It was therefore only prudent for the learned trial Judge to direct the disputants to the right forum for the resolution of their dispute as he did.

12. To buttress, the 2nd Respondent's opposition to the appeal, **Mr. Ngugi** relied on the case of **Kenya National Examination Council (supra)** for the proposition that Courts of law do not or ought not to act in vain by making futile orders; the case of **Peter Odoyo Ogada & 9 others versus IEBC & 14 others [2013] eKLR** for the proposition that where a legitimate grievance is demonstrated, there is a corresponding legitimate expectation that there will be redress or relief from the courts; the case of **Republic versus National Environmental Management Authority [2011] eKLR** for the proposition that where there is an alternative remedy provided for by an Act of Parliament, it is only in exceptional circumstances that an order for Judicial review would be granted; and lastly, the case of **Republic versus Chief Land Registrar & 3 others [2014] eKLR** for the proposition that Judicial review is not available to a party who is not only aggrieved by the process but may also want to ventilate other issues arising from the same matter.

Appellants' reply

13. In response to the Respondents' submissions, **Mr. Kingori** abandoned the claim for the relief of *mandamus* but reiterated that the relief of *certiorari* was available to the appellant as it was sought to be directed at the intended illegal action of the Registrar; once Gazette Notice No. 2410 of 11th March, 2011 was quashed, it would invalidate Gazette Notice No. 1571 of 13th May, 2011 which had directly flowed from it. He conceded that the statement of facts is a primary document in judicial review proceedings but reiterated that the relief sought by the Appellant was competent as it was not at variance with the relief specified in the statement of facts as there is no requirement in **Order 53 rule 4(1)** of the Civil Procedure Rules that the relief in the substantive Motion be stated verbatim as set out in the statement of facts.

Mandate of this Court

14. This is a first appeal. It is therefore our duty to analyze, re-asses and re-evaluate the evidence on the record and reach our own conclusions on the matter.

Analysis

15. We have revisited the entire record placed before us, and re-analyzed, re-assessed and re-evaluated it in the light of the grounds of appeal put forth by the Appellant, the rival arguments of the parties as well as the principles of law cited before us. Two issues arise for our interrogation:

- *What is the scope of judicial review proceedings?*
- *Did the learned Judge exercise his discretion properly in dismissing the application?*

16. In Prayer 1 of the substantive motion, the appellant sought an order of *certiorari* to quash the intention of the Registrar to cancel the registration of Hiram as the proprietor of the suit land. Paragraph 8 of the identical affidavits in support of the *ex parte* application for leave and the substantive Notice of Motion clearly stated that the appellant's grievances arose from the Registrar's intention expressed in Gazette Notice No. 2410 of 11th March, 2011 to cancel the entry indicating that Hiram was the proprietor of the suit land. The relief sought as specified in paragraph 3 of the statement of facts, indicated that the Appellant sought to quash the Registrar's intention to cancel Hiram's proprietorship to the suit land without specifying the Gazette notice intended to be quashed. Gazette Notice No. 2410 of 11th March, 2011 provided expressly that the Registrar was desirous of cancelling the erroneous entry of the certificate of lease issued to Hiram under section 17 RLA while Gazette notice No. 5171 of 13th May, 2011 on the other hand specified clearly that the Registrar was desirous of cancelling the erroneous entry in respect of Hiram and the certificate of lease issued to him and reinstate the name of Peter and a

certificate of lease to be issued to him under section 17 of the RLA. Also exhibited were copies of certificates of lease that had been issued in favour of both Hiram and Peter.

17. The grounds in support of the appellant's plea for certiorari were set out in paragraph 4 of the statement of facts thus:-

“(a) The Land Registrar has no powers to cancel and/or revoke title to land.

(b) The Land Registrar's action amounts to deprivation of property and is unconstitutional.

(c) The Land Registrar's action amounts to intermeddling with a deceased persons property contrary to the law.

(d) The decision to revoke the title is against the tenets of natural justice.

(e) The decision is thus ultra vires made without jurisdiction and is illegal.”

18. The learned trial Judge made a specific finding thus:-

“Mr. Wahome argues that section 17 of the Registered Land Act cap 300 laws of Kenya (repealed) gave the land registrar the power to cancel the entry in the Registration which he is satisfied ceased to exist. I agree, however in the case before court the cancellation was not in respect of an entry that ceased to exist but was in respect of an entry that was suspected to have been fraudulently entered thus: I agree with Mr. Kingori that the land Registrar could not exercise his powers under the said section.”

19. Despite that finding, the learned trial judge went ahead to withhold the relief of certiorari from the appellant and gave these two reasons,

“However this Court finds that Judicial review is not the best process of settling this dispute as evidence on affidavits cannot be properly tested due to the fact that it does not involve cross-examination and Re-examination. The facts herein are contested and therefore there is need for viva voce evidence in a suit filed in the proper manner.

The upshot of the above is that an order of certiorari cannot be granted as prayed in the notice of motion as it varies with the prayers sought in the statement.”

This is what the Appellant has invited us to upset, while the Respondents urge otherwise.

20. The two Gazette notices were indicated to have been anchored on section 17 of the RLA which had donated power to the Registrar to cancel or delete obsolete entries in a register. Upon registration as proprietor of the suit land, Hiram's proprietary rights became subject to the provisions of **section 27 and 28** of the RLA which stipulated clearly that a proprietor's rights of title could only be defeated in terms of the provisions of **section 142 and 143** of the RLA; **142(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 omission not materially affecting the interests of any proprietor.

b. In any case and at any time with the consent of all persons interested.

c. Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

(2) Upon proof of the change of the name or address of any proprietors, the Registrar shall, on

the written applicaiotn of the proprietor make an entry in the register to record the changes.”

“143(1) subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained made or remitted by fraud or mistake.

(2) The Register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land lease or charge for valuable consideration unless such proprietor had knowldege of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission fraud or mistake or substantially contributed to it by his act, neglect or default.”

Determination

21. The learned trial Judge in dismissing the Appellant’s application exercised his discretionary power. In the case of **Republic versus Mwangi S. Kimenyi Exparte Kenya Policy and Research analysis** (KIPPPRA) – Civil Appeal 160 of 2008 this Court stated that:-

“Judicial Review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law not private law.”

That being the case we can only interefere with the learned trial Judge’s exercise of discretion under certain well defined principles set out time and in a long line of cases emanating from this Court. In **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] KLR 125** this Court held that:-

“2. The Court of Appeal may only interfere with the exercise of the courts judicial discretion if satisfied:

- a. That the judge misdirected himself on law; or*
- b. That he misapprehended the facts; or*
- e. That he took into consideration matters of which he should not have taken into account; or*
- d. That he failed to take into account of considerations of which he should have taken account; or*
- e. That his decision albeit a discretionary one, was plainly wrong.”*

22. The relief that was withheld from the appellant was an order of *certiorari*. In determining whether the plea for this relief met the threshold for granting we adopt the principles of case law recited above as stating the correct position. In addition, the case of **Ishmael S. Mboya & 2 others versus Mohamed Haji Issa & another Civil Appeal No. 232 of 2004** held that the remedy of *certiorari* like its sister reliefs of prohibition and mandamus is of a prerogative nature and is only available against public bodies made for purposes of remedying excess of jurisdiction or absence of it but also for a departure from the rules of natural justice or contravention of the laws of the land. There is, however, an attendant caveat in the exercise of the said discretion as was set out in the case of **Commissioner of Lands versus Kunste Hotel Ltd Civil Appeal No. 234 of 1995**, to the effect that judicial review is concerned not with private rights or the merits of the decision but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected to. In withholding the relief of *certiorari*, the learned Judge opined that the matter raises complex issues which call for adduction of *viva voce* evidence; subjection of such evidence to both cross-examination and re-examination. This no doubt arose from the grounds the appellant had put forth in support of her application set out in paragraph 4 of the statements of facts. Ground 4(a) (d) and (e) fell within the perview of judicial review while grounds

4(b) and (c) fell within civil law procedures. The issue that we have to ponder, and which the learned trial judge did not address his mind to is whether these could have been severed to allow those falling within the purview of judicial review procedures to be dealt with as such and leave the rest for litigation in an appropriate forum.

23. The power purportedly invoked by the Registrar under **section 17** of the RLA was limited to cancellation and or deletion of obsolete entries. The Appellant displayed a certificate of title in the name of Hiram. In the absence of demonstration by the Registrar that Hiram's title had become obsolete and ceased to have effect, Hiram's interest in the suit land stood protected by the provisions of **sections 27,28, 142 and 143** of the said Act. The learned trial Judge therefore rightly held that the Registrar had no power to rectify the register of the suit property in the manner done. The Registrar therefore acted in excess of the powers donated to her by **section 17** of the RLA. On this account, the Appellant ought to have been granted the relief of *certiorari* to quash the Registrar's decision as contained in Gazette No. 2410 of 11th March, 2011. This would have been in line with principles of case law, recited above that an order of *certiorari* quashes a decision already made and will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with. The Registrar purported to do that which was not permitted by **section 17** of the RLA. She also acted contrary to law as she flouted the clear provisions of **sections 27,28, 142 and 143** of the same Act. She also violated the rules of natural justice as she had failed to observe the precautions set out in **sections 28,142 and 143** of the same Act with regard to protection of proprietary rights once vested and the need to divest these only upon hearing the proprietor. Allowing the relief of *certiorari* would not have foreclosed or shut any of the parties from litigating issues requiring adduction of viva voce evidence, cross-examination and re-examination of the parties before an appropriate forum.

24. The second reason given for withholding the relief from the appellant was because the relief sought in the substantive motion was at variance with the relief specified in the statement of facts and therefore in contravention of the provisions of **order 53 rule 4(1)** of the Civil Procedure Rules. **Order 53 rule 4(1)** of the Civil Procedure Rules provides:-

“Copies of statement accompanying the application for leave shall be served with the notice of motion and copies of any affidavits accompanying the application for leave shall be supplied on demand and no ground shall, subject as hereinafter in this rule provides, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”

The import of that provision is that a party cannot rely on a ground or seek relief which has not been set out in the statement of facts. The Appellant in paragraph 3 of the statement of facts stated that she was seeking, *inter alia*, an order of *certiorari* to bring into the High Court for quashing the decision of the Registrar, to cancel the registration of Hiram as the proprietor of the leasehold interest in L.R. No. Nyeri/Municipality Block III/141. From the record, it is clear that right from the Appellant's *ex parte* application for leave to the substantive Notice of Motion, the decision which the Appellant sought to be quashed was the one which was contained in the Gazette No,2410 of 11th March, 2011. The fact that the statement of facts did not specifically mention the Gazette Notice Number in its paragraph 3 did not in any way cast any doubt as to the decision sought to be quashed.

25. We take a broad approach in resolving this matter as this Court did in the case of **Douglas Mbugua Mungai versus Harrison Munyi Civil Application No. Nai 167 of 2010** where it stated that:-

“We are as a matter of statute law required to take a broad view of justice and taking into account all the necessary circumstances, factors and principles and be satisfied at the end of the exercise that we have acted justly”.

See also the case of **Stephen Boro Gituba versus Family Finance Building Society & 3 others CA No. Nai 263 of 2009** in which the Court stated that the overriding objective principle enshrined in sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9, Laws of Kenya operates to overshadow technicalities. The learned trial Judge himself followed those principles when he excused an irregularity

whereby the Appellant replicated and filed a fresh affidavit in support of the substantive Notice Motion instead of annexing the affidavit she had filed in support of the ex parte chamber summons for leave. We find no prejudice caused by the omission to specify the Gazette notice number in the statement of facts since it had been clearly specified in the reliefs set out in both applications. We are also not in doubt that the granting of an order of *certiorari* to quash Gazette Notice No. 2410 would render Gazette Notice No. 5171 of 17th May, 2011 otiose and the actions of the Registrar based on those notices null and void.

261 The upshot of the above is that we allow this appeal. We set aside the orders of the learned Judge made on the 5th day of November, 2014 and substitute them with an order of *certiorari* to issue quashing Gazette Notice Number 2410 of 11th March, 2011.

2. The Appellant will have costs of both the appeal and of the court below to be borne by the 1st Respondent.

Dated and delivered at Nyeri this 24th day of June, 2015.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy to the original.

DEPUTY REGISTRAR