



**THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJA)**

**CIVIL APPEAL NO. 133 OF 2012**

**ANDREW MEME M'MWERERIA .....APPELLANT**

**AND**

**LAND REGISTRAR IGEMEBE SOUTH DISTRICT.....1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTWIRI M' IRUGURA .....2<sup>ND</sup> RESPONDENT**

*(Appeal From the Ruling and Order of the High Court of Kenya at Meru (Lessit, J) dated 26<sup>th</sup> November 2010*

*in*

*Meru HC Misc. App No.15 of 2010 J.R)*

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**JUDGMENT OF THE COURT**

1. The Appellant moved the High Court by a Notice of Motion application seeking for an order of Mandamus to compel the 1<sup>st</sup> Respondent to cancel the names of Joseph Mutwiri Mirugura from the Land Register of **Parcel No. Kirindine "A"/3711** and enter the names of Andrew Meme M'Mwereria s the owner of the same. Upon reading and hearing the application, the Honourable Judge (**Lessit J.**) dismissed the same with costs.
2. Aggrieved by the dismissal, the appellant has moved to this court citing four grounds in his memorandum of appeal *to wit*:
  - a. ***The learned Judge erred in law and fact in not finding that the order was not being enforced against the Land Registrar (1<sup>st</sup> respondent) but only enabling the Land Registrar to rectify the Land Register in terms of the Orders of the Court issued in Meru in Misc. App. No. 1 of 1999.***
  - b. ***The learned Judge seem not to have grasped the law and facts of the matter and thus rendered the orders of the High Court in Misc. App. No. 1 of 1999 unenforceable which is illegal and unconstitutional.***
  - c. ***The leaned Judge's decision is unfair, inadequate and unconstitutional as it deprives the appellant the right to his property in and as granted in HC Misc. App. No. 1 of 1999 at Meru.***

- d. ***The learned Judge erred in law and fact in not finding that the Registrar (1<sup>st</sup> respondent) did not oppose the application or order to rectify the register nor complain of the orders sought.***
3. During the hearing of this appeal learned counsel Ms. Kiome appeared for the appellant while learned counsel Mr. D. M. Rimita appeared for the respondents.
4. To appreciate why the appellant sought for an order of mandamus, the background to the dispute between the parties hereto shall briefly be stated. The suit property is **Land Parcel No. Kirindine “A”/3711**. The disputed property was at all material times undergoing land adjudication process. During the process, both the appellant and the 2<sup>nd</sup> respondent asserted and claimed ownership to the parcel. The Land Adjudication Officer arrived at a determination that the parcel belonged to the 2<sup>nd</sup> respondent who is now the registered proprietor thereof. While the adjudication process was still underway, the appellant moved to the High Court by Notice of Motion dated 22<sup>nd</sup> January, 1999 and sought an order of *Certiorari* to quash the decision of the Land Adjudication Officer. The parties to the **Meru HC Misc. App No. 1 of 1999** did not include the 1<sup>st</sup> respondent in the present appeal. The respondent in the case is the Land Adjudication Officer and NOT the Land Registrar Igembe South District. Before the High Court delivered its ruling on 19<sup>th</sup> December, 2008, the 2<sup>nd</sup> respondent had been registered as proprietor of the parcel. In the High Court ruling, an order of *Certiorari* was issued quashing the decision of the Land Adjudication Officer which declared the 2<sup>nd</sup> respondent as the owner of the parcel. Upon the order of *Certiorari* being issued, the Appellant moved the High Court by Notice of Motion dated 7<sup>th</sup> July, 2010, seeking an order of Mandamus directed at the Land Registrar as the 1<sup>st</sup> respondent in this appeal to rectify the register and to cancel the names of Joseph Mutwiri Mirugura from the Land Register of **Parcel No. Kirindine “A”/3711** and enter the names of Andrew Meme M’Mwereria s the owner of the same. The learned Judge (**Lessit J.**) declined to grant the order of mandamus and hence this appeal.
5. Counsel for the appellant urged this court to set aside the order by the High Court dismissing the motion for mandamus and issue the order against the 1<sup>st</sup> respondent. It was submitted that the learned Judge declined to issue mandamus to compel the 1<sup>st</sup> respondent as the Registrar of Lands to rectify the register without any basis. Counsel pointed out that when the High Court (**Emukule J.**) issued the order for *certiorari*, on 19<sup>th</sup> December, 2008, the learned judge stated as follows:

***“For avoidance of doubt, any act done or step taken by any authority under the said quashed proceedings and decision is equally null and void and therefore of no effect in law. In other words, the land in issue belongs to the ex-parte applicant”***

6. Counsel for the appellant submitted that it is the above statement by Emukule, J. that they seek to enforce by an order of mandamus. It was submitted that the 2<sup>nd</sup> respondent never appealed against the order which remains in force. That failure to grant an order of mandamus means that the appellant will have a decree which is unenforceable and this court should ensure that all court orders are not only obeyed but enforceable. Counsel urged this Court to invoke the overriding objective principles and issue the order for mandamus so that court orders cannot be in vain. Citing the case of ***Republic - v- The Attorney General & another ex p. James Alfred Kosoro, JR Misc. App. No. 44 of 2012***, it was submitted that apart from mandamus, the appellant has no option of ensuring that the decree he was awarded in 1999 in the form of *Certiorari* is realized. That unless mandamus is issued, the appellant will forever be left babysitting his barren decree. Counsel reiterated that access to justice under **Article 48** of the **Constitution** cannot be ensured when persons in whose favour a decree has been issued cannot enjoy the fruits of the decree due to inaction by a public officer.
7. We have considered the submission by counsel for the appellant and note that in declining to issue the order for mandamus, the Honourable Justice Lessit, J. expressed herself thus:

***“The current application for the order of mandamus sought here seeks to compel an officer who was not a party to the earlier proceedings to take action that will effect the belated order of certiorari. I do not think it will be a proper exercise of discretion to***

***allow the order sought. Not only was the earlier order made belatedly, the current application is seeking to enforce it against an officer who was not a party to the earlier proceedings. In the circumstances, I decline to grant the order...as it will only go to complicate the matter further”.***

8. Counsel for the respondent D. M. Rimita opposed the appeal. He submitted that the order for mandamus that was being sought before Lessit, J. is discretionary and the judge judiciously exercised her discretion in declining to grant the order. It was further submitted that there was nothing to enforce in the order of Justice Emukule, J. All that Emukule, J. did was to issue an order of certiorari and there is no order capable of execution. Counsel urged this Court to take into account that the dispute between the appellant and the 2<sup>nd</sup> respondent was land which was then undergoing adjudication process. Adjudication has various stages and when the final stage was reached, the land was registered and title issued. It was submitted that adjudication process is done by the Land Adjudication Officer while registration is done by the Registrar of Lands. Counsel submitted that the Registrar of Lands receives the final results from the land adjudication office and issues titles pursuant thereto. Counsel submitted that the office of Land Adjudication is distinct from the office of Registrar of Lands and each has different statutory functions and **Section 142 of the Registered Land Act** does not permit the Registrar of Lands to cancel registration. Counsel submitted that the Registrar of Lands was not a party to the *certiorari* proceedings and an order of mandamus cannot issue against a person who was not party to the proceedings. Counsel submitted that the 2<sup>nd</sup> respondent raised the issue of fraud on the part of the appellant and there is a civil suit being **Meru HCC C No. 39 of 2010** between the parties hereto pending before the High Court to determine ownership of the disputed parcel of land. It was submitted that issuing an order for mandamus would be sanctioning fraud on the part of the 2<sup>nd</sup> respondent.
9. Learned State Counsel Ms Teresia Gathagu appeared for the 1<sup>st</sup> respondent and opposed the appeal. Counsel associated herself with the submissions of the 2<sup>nd</sup> respondent and emphasized that there was no order made by Emukule, J. to cancel any title. That the order of certiorari presented to the Registrar of Lands was not directed to the Registrar of Lands who was not a party to the proceedings pursuant to which the order was made. It was submitted that the land adjudication process was complete when certiorari was issued and the said *certiorari* was an order in futility.
10. Counsel for the appellant in reply submitted that the **HCCC No. 39 of 2010** referred to by the 2<sup>nd</sup> respondent is *res-judicata* and sub-judice and this court should ignore the same.
11. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in **Selle -vs- Associated Motor Boat Co., [1968] EA 123**, thus:

***“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)”.***

12. This Court further stated in **Jabane - vs- Olenja, [1986] KLR 661, 664**

***“More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular Ephantus Mwangi -vs- Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870.”***

13. In evaluating the evidence on record, this Court is mandated not to give undue regard to technicalities through the overriding objectives as enshrined in **Sections 3A and 3B** of the **Appellate Jurisdiction Act** and as stated in **Douglas Mbugua Mungai -vs- Harrison Munyi, – Civil Application No. Nai. 167 of 2010:**

***“We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly” As was stated in Stephen Boro Gitihia- vs- Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009. “The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”***

14. We have evaluated the evidence on record and analyzed the Ruling of the High Court Lessit, J., and also the Ruling made by Emukule, J. It is our considered view that there are three pertinent issues in this appeal:

***i. Can an order of mandamus issue against a person who was not a party to proceedings where the initial court order was made?***

***ii. Can an order of mandamus issue to enforce an order of certiorari?***

***iii. Should judicial review Orders of Certiorari and Mandamus be issued to resolve property disputes and to confer title to property?***

***iv. Should mandamus issue when there is an alternative remedy?***

15. The appellant is seeking an order of mandamus against the 1<sup>st</sup> respondent who was not a party to the initial proceedings in **Meru High Court in Misc. App. No. 1 of 1999**, in which the order of certiorari was made. It is trite law that no order can be made and enforced against any person who was not a party to the proceedings and was not heard in those proceedings. In the instant case, the 1<sup>st</sup> respondent was neither a party to **Meru HCC Misc. App. No. 1 of 1999**, where Emukule, J., issued the order of *Certiorari* nor was the 1<sup>st</sup> respondent heard in the case. Further, the process of land adjudication had already been finalized when an order of *certiorari* was issued and it is not within the statutory powers of the Land Registrar to deal with adjudication issues or objections or complaints relating to adjudication. In the case of **District Commissioner, Kiambu -v- R, and Others Ex Parte Ethan Njau, 1960 EA 109**, it was held that an order of mandamus could not be issued against a person if it would not be within his power to comply with it. To this extent, the order sought by the appellant for mandamus against the 1<sup>st</sup> respondent must of necessity fail as he was not a party to the proceedings where *certiorari* was issued.

16. The appellant is seeking an order of mandamus to rectify the register and make him the registered proprietor of the suit property. We have examined the provisions of **Section 142** of the **Registered Land Act (Cap 300 now repealed)** which outlines the powers of the Registrar to rectify the register. It is provided that the Registrar may rectify the register in cases of errors or omissions not materially affecting the interest of any proprietor; with the consent of all parties and where upon survey, a dimension or acre in the register is found to be incorrect; or upon proof of change of name or address. We have also examined **Section 143** of the **Registered Land Act** which allows the Registrar to rectify the register upon a court order. We have perused the Decree issued in **Meru HCC Misc. App. No. 1 of 1999**, and we are satisfied that the decree is an order for *Certiorari* and not an order for rectification of the register. There being no order to rectify the register, we find that the Lessit, J., did not err in declining to grant the order for mandamus. We are fortified in our holding by the dicta in **Republic -v- The Attorney General & another, ex p. James Alfred Kosoro JR Misc. App. No. 44 of 2012** where it was stated that mandamus is a remedy through which a public officer is compelled to do a duty imposed upon him by law. In the instant case, the appellant has neither demonstrated that there is a court order against the 1<sup>st</sup> respondent nor has it been shown that the 1<sup>st</sup> respondent is under any statutory or judicial obligation to rectify

- the register. An order for certiorari is not necessarily an order for rectification of the register unless the order expressly states so and the registrar is a party to such rectification proceedings.
17. In the instant case, the appellant is seeking an order of mandamus to confer title upon him in relation to the suit property. Judicial review proceedings are not concerned with the merits of a particular decision. Consequently, whether it is the appellant or 2<sup>nd</sup> respondent who is entitled to ownership of the disputed property is not a matter to be determined by way of judicial review. In the case of ***R -v- Lancashire County Council Ex p Gayer, (1980) 1 WLR 1024*** it was stated that courts should be acutely conscious that they do not usurp the role of the administrator by assuming the task of deciding how resources are to be allocated as between competing claims. We adopt the above dicta in ***R -v- Lachashire County Council Ex p Gayer, (supra)*** and observe that it is not the duty of the Registrar of Land to determine adjudication disputes and this Court cannot compel him to do what is outside his statutory mandate. The judicial remedy of certiorari and mandamus were neither created nor established to settle ownership disputes, nor to create and confer title to land.
  18. The respondent alluded to the fact that **HCCC No. 39 of 2010** is pending before the High Court to determine ownership of the suit property and the alleged fraud on the part of the appellant. The appellant replied that this suit is *sub-judice* and *res-judicata*. We agree with the appellant that matters involving this case should be dealt with at the hearing of the suit. We make no further reference to the case.
  19. Our overall re-evaluation of the facts of this case leads us to emphasize the discretionary nature of the writ of mandamus. Lord Goddard C.J in ***R - v- Dunsheath, ex parte Meredith, (1950) 2 All ER 741, 743*** stated that mandamus is neither a writ of course nor a writ of right. In the case of ***Republic -v- Director-General of East African Railways Corporation Ex Parte Kaggwa, 1977 KLR 194***, it was correctly stated that an order for mandamus did not lie as a matter of course against a public officer and the court's discretion should be exercised before such an order can issue and if the exercise of discretion to grant mandamus would constitute judicial interference with the executive arm of government, the same cannot issue. It is our considered view that in the present case, an order for mandamus if granted would be contrary to the process and procedure outline for land adjudication and the mode for settling land adjudication disputes. The appellant has not cited any statutory provision that allows the 1<sup>st</sup> respondent to be involved in land adjudication disputes and to participate in management and resolution of land adjudication matters. In the case of ***Shah - v- Attorney General, (NO. 3) (1970) E.A 543, 549***, it was stated:

***“The courts are reluctant to direct a writ of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts will proceed with extreme caution for the granting of the writ which would result in interference by the judicial department with the management of the executive department of government”.***

20. From the analysis conducted here above, we are of the considered view that the Lessit, J., did not err in refusing to grant the order of mandamus. The totality of our re-evaluation of the evidence on record and application of law to the facts of the case lead us to the conclusion that this appeal has no merit and is hereby dismissed with costs.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of January, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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**JUDGE OF APPEAL**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**