



**Madey & 35 others v Community Land Registrar North Eastern Mandera & 2 others; Hussein & 27 others (Interested Parties) (Environment and Land Judicial Review Case E001 of 2022) [2024] KEELC 4767 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4767 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT GARISSA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022**

**JM MUTUNGI, J**

**JUNE 19, 2024**

**BETWEEN**

**DIYAD ABI MADEY & 35 OTHERS ..... APPLICANT**

**AND**

**COMMUNITY LAND REGISTRAR NORTH EASTERN MANDERA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS ..... RESPONDENT**

**AND**

**HARED HUSSEIN & 27 OTHERS & 27 OTHERS & 27 OTHERS & 27 OTHERS ..... INTERESTED PARTY**

**JUDGMENT**

1. The Applicants commenced these Judicial Review proceedings by way of an Ex-parte Chamber Summon application dated 14<sup>th</sup> September 2022 seeking leave to commence Judicial Review proceedings. Leave was granted and, the Applicants filed a Notice of Motion dated 14<sup>th</sup> November 2022, praying for the following orders:
  1. That the Honourable Court be pleased to issue a judicial review order of Mandamus to bring into this Court and to compel the Respondents to register the Applicants as Yuub Farmers Community.
  2. That the Honourable Court be pleased to issue a judicial review order of Mandamus to bring into this Court and to compel the Respondents to register all the property known as Yuub Farms situated off Isiolo-Mandera Road (B9 locally) about 8 kilometers to the west of Mandera Old Town, access to the property is off the B9 road and northwards onto a murram unnamed road in the name of Yuub Farmers Community.



3. That this Honourable Court be pleased to issue a judicial review order of Prohibition to bring into this Court and to prevent the Respondents from registering any interest in the suit property known as Yuub Farms situated off Isiolo-Mandera Road (B9 locally) about 8 kilometres to the west of Mandera Old Town, access to the property is off the B9 road and northwards onto a murrum unnamed road in favour of any third parties.
2. The Application was predicated upon the annexed affidavit of Diyad Abdi Madey, who averred that the Applicants have been cultivating on Yuub Farms since 1968. He averred that on 23rd June 2022, they met as a community and resolved to register themselves as a community and register their interest in the property. He averred that they subsequently lodged registration documents with the Respondents, who refused to register them as a community. He claimed that as a consequence, the Applicants are apprehensive that there shall be continued interference with their property as they cannot protect their interest through its registration. He further stated that there had been a dispute hearing in 2013 with the Chiefs, and it was decided that the Yuub Farmers owned the property. He stated that due to the continued interference with the suit property, they filed Mandera Magistrate Civil Case No. 1 of 2015 between them and the Interested Parties but the case was not decided on its merits as it was dismissed by the Magistrate's Court for want of jurisdiction.
3. The Respondents despite being served with the pleadings did not file any response. The Interested Parties, however, filed their Replying Affidavit dated 10<sup>th</sup> July 2023. The Interested Parties averred that they reside in the suit land, which is known as Bergadud Farmers, and that the land was allotted to them by the Mandera Central Division Agricultural Office vide a letter dated 7<sup>th</sup> May 1991. They averred that the Applicants had sued them in the Magistrate Court, where the matter was dismissed due to a lack of jurisdiction. It was their position that the Applicants moved to this Court clandestinely and concealed material information with a view of misleading the Court.

#### **Submissions of the parties.**

4. The Applicants filed their submissions on 20<sup>th</sup> November 2023. They submitted that the Respondents violated the Ex-parte Applicant's right guaranteed in Article 40 of the *Constitution* and Section 5 of the *Community Land Act*; that the Respondents failed to discharge their duty as mandated by Section 8 of the *Community Land Act* and Rule 8 of the *Community Land Regulations*, 2017; and that the Ex-parte Applicants had satisfied the threshold for grant of the orders of mandamus and prohibition as prayed.
5. The Applicants submitted that they had a right to own and hold property by virtue of Article 40 of the Constitution of Kenya and that the Respondents infringed on this right when they failed to register the property in favour of the Applicants. On the question of registration, the Applicants submitted that they lodged all the documentation as required by Rule 8 of the *Community Land Regulations*, 2017, but the Respondent failed to register them and/or their interests and also failed to give them any conclusive feedback. The Applicants submitted that the 1st Respondent pursuant to the provisions of the Land Community Act is charged with the responsibility of overseeing the registration of communities and issuing registration documents but in the case by the Applicant has failed and/or neglected to discharge that responsibility. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are charged with the responsibilities of overseeing the process of registering community land which they equally omitted to do. The Applicants submitted that the Respondents ought to be compelled when they fail to carry out their statutory duties by way of an order of mandamus. They relied on the cases of *Communications Commission of Kenya & 5 others versus Royal Media Services & 5 others* (2014) eKLR and *Republic Versus District Land Adjudication and Settlement Officer Maara Sub-County & 3 others; ex-parte Applicant; M'nyiri Ragwa; Njeru Kirika (Interested Party)* (2021) eKLR.



6. The Interested Parties filed their submissions dated 20<sup>th</sup> November 2023. The gist of the Interested Parties submissions was that the remedy of Judicial Review could not be available to the Applicants as the issue of ownership of the disputed land was contested. The interested parties on their part claimed ownership of the same land that Applicants were laying claim to. The Interested Parties submitted that the Applicants filed the suit before the Mandera Magistrate's Court which raised issue of ownership of the land in dispute and the same was not decided on merits as the Court lacked jurisdiction to hear and determine the suit.
7. The Interested Party submitted that before the Magistrate's Court at Mandera sought the Applicants inter alia sought to be declared as the owners of the suit property and once the Court declared it lacked jurisdiction, the Applicants ought to have pursued the issue of ownership of the land before a Court that was seized of jurisdiction. The Interested Party submitted that the issue of ownership of the disputed suit land was such as required oral and/or documentary evidenced to be adduced which was not possible in Judicial Review proceedings where evidence cannot be adduced otherwise than through affidavits. The Interested Parties placed reliance on the Case of *Republic v Registrar Titles; Ex-parte Kenya Shell Ltd* (2013), eKLR to support this submission. In arguing that the writ of Mandamus and prohibition were not available to the Applicants, the Interested Parties relied on the Case of *Kenya National Examinations Council v Republic; Ex-parte Geoffrey Gathenji Njoroge & Others* (1997) eKLR.
8. The Applicants filed Supplementary submissions where they submitted that the Interested Parties were not substantive parties to the suit capable of seeking and receiving orders in their favour. They maintained that the case was to compel the Respondents to begin a process that they are statutorily required to do. The Applicants argued that the Letters of Allotment exhibited by the Interested Parties did not confer them with ownership rights over the suit property and in support of this submission placed reliance on the Case of *Torino Enterprises Ltd v Attorney General* (2023) KESC 79 KLR where the Court held that an allotment letter could not confer ownership of land to the holder.

### **Analysis and determination**

9. There is no dispute that the land the Applicants describe as Yuub Farms situated off Isiolo - Mandera Road (B9) within Mandera County was the same land that was the subject matter in Principal Magistrate's Court Mandera Civil Case No. 1 of 2015 where the Applicants were the Plaintiffs and the Interested Parties were the Defendants. In the Magistrate's Court vide the Amended Plaint dated 17<sup>th</sup> November 2015 the Applicants (Plaintiffs) prayed for Judgment against the Defendants jointly and severally for:-
  1.
    - (a) A declaration that the Plaintiffs individually and collectively are the legal occupiers, users and possessors of the suit land to the exclusion of the Defendants herein.
    - (b) Vacant possession and orders of eviction of the Defendants from the suit land.
    - (c) Permanent order of injunction barring and restraining the Defendants, their agents, servants or employees from entering, accessing, occupying, remaining, developing, cultivating, constructing, laying any claim and in anyway whatsoever and howsoever interfering with the Plaintiffs quiet possession and/or occupation of the suit land.
  2. Any other relief the Court may deem necessary as the ends of justice may require.
  3. Costs of the suit.



10. The Defendants in the suit filed defences as can be seen in the Judgment of the Lower Court disputing the Plaintiffs claim and averred “they have occupied the land in dispute way back from 1959 and they had inherited the same from their parents”. Without doubt therefore the claim before the Magistrate’s Court involved and concerned the ownership of the disputed property. Once the Learned Trial Magistrate made a determination that he was without jurisdiction he downed his tools and dismissed the Plaintiffs suit without determining the merits of the case and consequently the issue of ownership of the suit property was not determined.
11. The Respondents in these proceedings though served did not appear and/or file any response to the application. The Applicants in these proceedings aver that the Respondents have without any justification refused, neglected and/or failed to perform their statutory duties as envisaged more particularly under the provisions of the Community Land Act, Cap 287 of the Laws of Kenya. The Applicants principally under prayer (b) of the Notice of Motion seek an order of Mandamus to compel the Respondents to register the property known as Yuub Farms off Isiolo – Mandera Road, in Mandera County in the name of Yuub Farmers Community and under prayer (c) an order of Prohibition barring the registration of the land by the Respondents in favour of any Third parties.
12. Under Article 61(2) of the Constitution all land in Kenya is classified as Public, Community or Private. Article 63 of the Constitution provides for Community Land as follows:-
  63.
    - (1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.
    - (2) Community land consists of--
      - (a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law;
      - (c) any other land declared to be community land by an Act of Parliament; and
      - (d) land that is--
        - (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities;
    - or
    - (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the County Government under Article 62 (2).
  - (3) Any unregistered community land shall be held in trust by County Governments on behalf of the communities for which it is held.
  - (4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.
  - (5) Parliament shall enact legislation to give effect to this Article.



13. Section 7 of the [Community Land Act](#) provides for the procedure for registration of Communities who claim an interest in or right over Community Land. The Community Land Registrar is mandated under Section 7(2) of the Community Act to initiate the process of registration of a Community having any interest over Community land by giving notice of public meeting for the purpose of electing members of the Community Land Management Committee.
14. Section 8 of the [Community Land Act](#) provides for the procedure for recognition and adjudication of Community Land. The provisions of Section of the Act are reproduced hereunder:
  - 8.(1) Subject to this Act and any law relating to adjudication of titles to land, the Cabinet Secretary shall, in consultation with the respective County Governments, develop and publish in the Gazette a comprehensive adjudication programme for purposes of registration of community land.
  - (2) The Cabinet Secretary shall, in consultation with the County Governments ensure that the process of documenting, mapping and developing of the inventory of community land shall be transparent, cost effective and participatory.
  - (3) The inventory of community land referred to in subsection (2) may be accessed by the County Governments for ease of access by members of the community.
  - (4) The Cabinet Secretary shall issue a public notice of intention to survey, demarcate and register community land.
  - (5) The notice shall—
    - (a) contain the name of the community;
    - (b) state which land is to be adjudicated;
    - (c) invite all interested persons with overriding interests or any other claim on the land, to lodge their claims;
    - (d) specify an area or areas of land to be a community land registration unit; and
    - (e) be for a period of sixty days.
  - (6) The Cabinet Secretary shall cause the land to be adequately surveyed but such survey shall exclude—
    - (a) all parcels already in use for public purposes; and
    - (b) adjudicated private land.
  - (7) A cadastral map of the land shall then be produced and presented to the Registrar for registration.
15. It is not apparent whether within Mander County there has been recognition and adjudication of Community Land as envisaged under Section 8 of the [Community Land Act](#) but whatever the case maybe, it is evident, as between the Applicants and the Interested Parties, there is a live dispute as to the ownership of the land that the Applicants wish to be registered as owners of. My understanding of Section 8 of the [Community Land Act](#) is that before a Community could be registered as owner of any specific Community land, all claims and/or disputes touching on such land have to first be resolved and determined as under Section 8(5)(c) under the Act. The [Community Land Act](#) under Sections 39



to 42 makes provisions for Dispute Resolution Mechanisms which the parties to a dispute relating to Community Land could invoke.

16. In the present matter both the Applicants and the Interested Parties stake ownership claims to the subject land in dispute. The Interested Parties hold Allotment Letters over that suit land issued to them by the County Government of Mandera in January 2013. The Applicants claim to have been utilising the land since 1968 as Yuub Farm and claim that it was only from 2005 when the Interested Parties started intruding and trespassing on the land. The Applicants assert that in October 2013 they attempted to resolve the matter before the Chief but as no settlement was reached they filed the suit before the Mandera Magistrate's Court Civil Case No. 1 of 2015. The ownership issue was however not decided on merit as the Court stated it lacked the Jurisdiction to handle the matter vide its Judgment delivered on 4<sup>th</sup> March, 2022. The Applicants henceforth decided to seek registration of the land under the [Community Land Act](#) and when they failed to get an appropriate response from the Registrar of Community Land they initiated the present Judicial proceedings.
17. Registration of Community Land confers ownership rights synonymous to those conferred upon registration under the [Land Registration Act](#) (Cap 300). Section 11 of the [Community Land Act](#) provides as follows:-
  11.
    - (1) Community land shall be registered in accordance with the provisions of this Act and the [Land Registration Act](#) (Cap. 300).
    - (2) The Cabinet Secretary shall by a notice in the Gazette, appoint an adjudication officer in respect of every community registration unit who shall—
      - (a) facilitate in consultation with the respective county governments the adjudication of the community land including the recording of community land claims, demarcation of community land and delineation of boundaries; and
      - (b) perform any other function conferred by this Act.
    - (3) Upon adjudication, the title relating to community land shall be issued by the Registrar in the prescribed form.
18. There is no doubt what the Applicants were seeking when they sought to be registered under the [Community Land Act](#) was to be conferred ownership rights over the suit property. In a way they sought to short circuit the Interested Parties with whom they had a running dispute but even under the registration process under the [Community Land Act](#), the ownership dispute would have needed to be resolved between them and the Interested Parties.
19. Coming back to these proceedings it is necessary to consider whether Judicial Review was the appropriate remedy given the circumstances.

In the Case of [Republic v Officer Commanding Traffic Nairobi Area & 2 Others](#) [2014] eKLR, Odunga, J. (as he then was) stated as follows:-

“Judicial Review applications, as is well known, are not the right forum to resolve disputed matters of evidence as to do so would require the parties to adduce viva voce evidence. As was



Judicial Review, on the other hand, is only concerned with reviewing the decision-making process, and the evidence is found in the affidavits filed in support of the application..... Whereas the underlying dispute herein is indeed 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.”

20. In my view, and on the basis that the dispute herein is one of ownership of the suit property and requires determination in an appropriate forum other than in these proceedings, the orders sought should not be granted. I say so because, as was pointed out in the case of *Sanghani Investment Limited*, (supra), Judicial Review remedies are discretionary. The Court can only exercise that discretion in a situation where such exercise will result in the resolution of the issues in dispute. In the circumstances herein, it is clear that even if the Respondents are compelled to register the Petitioners, the dispute as to ownership of the suit property will remain unresolved. A Court of Law should not act in vain.
21. For the avoidance of doubt, I wish to put reliance for the above finding on the Case of *Republic v Registrar of Titles & Ex parte Kenya Shell Limited* [2013] eKLR where Odunga, J. (as he then was) observed as follows:

“Determination of the issues raised herein necessarily requires that oral and/or documentary evidence be adduced in the absence of which, it would be an exercise in futility for this Court to attempt a resolution of the dispute between the parties herein. However, that is not the jurisdiction of a Court exercising Judicial Review powers under Sections 8 and 9 of the *Law Reform Act* Cap 26 Laws of Kenya. Where the determination of the dispute before the Court requires the Court to make a resolution on conflicting issues of fact that is not a suitable case for Judicial Review since Judicial Review jurisdiction is a special jurisdiction which is neither Civil nor Criminal and the *Civil Procedure Act* does not apply. It is governed by Sections 8 and 9 of the *Law Reform Act* being the substantive law and Order 53 of the *Civil Procedure Rules* being the procedural law. Section 8 of the *Law Reform Act* specifically sets out the orders that the High Court can issue in Judicial Review proceedings and the orders are, mandamus, certiorari and prohibition. In order to determine the questions in this dispute, it is my view, that it would be necessary to make certain findings in the nature of declarations yet declarations do not fall under the purview of Judicial Review for the same reason that the Court would require viva voce evidence to be adduced for the determine the case on the merits before the rights of the parties herein. 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. Here, there are serious factual issues which require to be resolved and which go beyond the Court’s jurisdiction in Judicial Review proceedings. See *Commissioner of Lands v Hotel Kunste* Civil Appeal No. 234 of 1995. In *Republic v Judicial Service Commission ex parte Pareno* [2004] 1 KLR 203-209 it



was held that Judicial Review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the Court is a Judicial one, it must be exercised on the evidence of sound legal principles. The Court does not issue orders in vain even where it has jurisdiction to issue the prayed orders.”

22. After evaluating the evidence and the material presented before the Court by the Applicants and the Interested Parties, I entertain no doubt that the issue that is central in this matter is the ownership of the disputed land. I am satisfied that the issue cannot be resolved in the instant Judicial Review proceedings. There would be necessity for the parties to adduce evidence orally and to be cross examined to determine who between the Applicants and the Interested Parties is the owner of the land. That is not something that the Court can do in a Judicial Review proceeding as there is no option to take viva voce evidence. Simply this was not the correct forum for the parties to settle their dispute. The parties will need to either approach a competent Court through the appropriate procedure to have the dispute adjudicate or await the application of Section 8 of the *Community Land Act* by the Cabinet Secretary declaring an adjudication programme for registration of Community Land within Mandera County when they can have their respective interests in regard to the land they lay claim to adjudicated and delineated for registration purposes.
23. For the foregoing reasons I find and hold the Judicial Review application to be lacking in merit. The Notice of Motion application dated and filed on 14<sup>th</sup> November 2022 is dismissed.
24. Each party to bear their own costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 19<sup>TH</sup> DAY OF JUNE 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

