



**Chivatsi v Chief Land Registrar, Kilifi County & another; Vue & 3 others (Interested Parties) (Environment and Land Judicial Review Case 3 of 2023) [2024] KEELC 5670 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5670 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2023**

**FM NJOROGE, J**

**JULY 31, 2024**

**IN THE MATTER OF ARTICLES 10, 20, 23, 40, 60, 73 (1) & (2), 159 & 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF ABUSE OF OFFICE AND STATUTORY DUTY, GROSS TRANSGRESSION, IRRATIONALITY, ILLEGAL & UNLAWFUL ACTION TO UNLAWFULLY AND FRAUDULENTLY REGISTER TITLE NO. KILIFI/VYAMBANI/92 IN THE NAMES OF VUE TAURE VUE AND TSORI A CLEAR VIOLATION OF THE ORDER ISSUED BY LADY JUSTICE DR. M.A. ODENY ON 19TH JANUARY, 2023**

**AND**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015; SECTION 9 AND 10 PUBLIC OFFICER ETHICS ACT, CAP 183 LAWS OF KENYA; SECTION 14, 24, 25, 76, 77, 78 & 80 OF THE LAND REGISTRATION ACT AND ORDER 53 RULE 3 (1) OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF LAND REGISTRATION (GENERAL REGULATIONS, 2017)**

**BETWEEN**

**FELIX TSORI CHIVATSI ..... APPLICANT**

**AND**

**CHIEF LAND REGISTRAR, KILIFI COUNTY ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**VUE TAURA VUE ..... INTERESTED PARTY**



**ANTONY KIRINGI TSORI ..... INTERESTED PARTY**  
**DANCAN JAMES WATTA ..... INTERESTED PARTY**  
**NEWLIFE PRAYER CENTRE AND CHURCH ..... INTERESTED PARTY**

## JUDGMENT

1. On 20/2/2023, the court granted leave to the Applicant, represented by M/S Gikandi and Company Advocates, to apply for orders of Certiorari in this matter. This was done pursuant to the Applicant's application by way of Chamber Summons dated 15/2/2023 brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Section 8 and 9 of the Fair Administrative Act and Section 9 and 10 of the *Public Officer Ethics Act*.
2. Resultantly, the Applicant filed a notice of motion dated 27/2/2023 (the application herein) for the orders: -
  - a. That an order of certiorari do issue removing into this court for the purposes of being quashed the decision in the instrument made by the 1<sup>st</sup> Respondent that led to the illegal reversion registered on the 12/1/2023 against the properties known as Kilifi/Viambani/355 and Kilifi/Viambani/356.
  - b. That the costs of this application be provided for.
3. The application is anchored upon the grounds set out on its face, the statutory statement and verifying affidavit sworn by the Applicant at the leave stage. The Applicant's complaint is that he was the duly registered owner of the properties known as Kilifi/Viambani/355 and Kilifi/Viambani/356 (the suit property); that sometime in January 2023, the Applicant learnt that there was an intended gazettement of a registration of reversion instrument on 12/1/2023 against the suit property by the 1<sup>st</sup> Respondent and in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties. The Applicant stated that the 1<sup>st</sup> Respondent's decision was unreasonable, irrational and illegal for reasons that despite the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's suit Malindi ELC No. 184 of 2013 over the suit property being dismissed for want of prosecution on 20/1/2023, the 1<sup>st</sup> Respondent re-registered the suit property consolidating the same into one plot known as Kilifi/Vyambani/92, in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties, without involving or giving the Applicant a chance to be heard. To the Applicant, the 1<sup>st</sup> Respondent acted on a non-existent decree.
4. The 1<sup>st</sup> Respondent opposed the application and relied on a replying affidavit sworn by J.B Oketch on 19/6/2023. He stated that he is the Land Registrar, Kilifi County. He added that the suit property was registered to the Applicant on 3/11/2005, and a title issued. He annexed a copy of the green card and marked it JBO-1. On 14/11/2012, a restriction in favour of one Janet Tatu Tune was registered and later removed following her letter dated 7/12/2012. On 18/4/2013 the title was closed on subdivision vide Mutation No. 03993337 into new title nos. 353, 354, 355, 356 and 357. On 8/11/2022, the 1<sup>st</sup> Respondent was served with a copy of a decree and judgment dated 18/9/2015 in ELC 184 of 2013 re-issued on 22/8/2022. He exhibited the same as JBO-2. Upon seeking confirmation of authenticity of the said judgment and decree and favourable response from this court's Deputy Registrar, the 1<sup>st</sup> Respondent proceeded to rectify and amend the register in favour of the 1<sup>st</sup> Respondent and one Tsore Chival Sudi. He denied having been served with a court order dated 19/1/2023 and averred that the court is functus officio having delivered judgment in ELC 184 of 2013.



5. The 1<sup>st</sup> Interested Party filed a replying affidavit which he swore on 22/8/2023 stating that even though the 1<sup>st</sup> Respondent published property Title No. Kilifi/Vyambani/359, the same was not amalgamated as part of Kilifi/Vyambani/92. To him, the 1<sup>st</sup> Respondent only re-issued the title Kilifi/Vyambani/92 in the exact manner that the court directed and its acreage does not in any way affect the 4<sup>th</sup> Respondent's portion Kilifi/Vyambani/359. He stated that should the 1<sup>st</sup> Respondent's decision be quashed, the same should only be limited to striking out the property title no. Kilifi/Vyambani/359 from the said notice.
6. The 4<sup>th</sup> Interested Party filed a replying affidavit sworn by Samuel Dungah on 28/3/2023 wherein he stated that the 4<sup>th</sup> Interested Party is the registered owner of Plot No. Kilifi/Vyambani/359 having purchased the same from one Regina Waithera. He annexed a copy of the title, search and sale agreement to that effect as Exh. SD1. He equally exhibited a copy of the transfer, search and rates clearance certificate and marked the same Exh. SD2. The deponent added that the 4<sup>th</sup> Respondent was neither served with the pleadings in ELC 184 of 2013 nor did he participate in the said suit. In a further replying affidavit sworn on 29/6/2023, the same deponent added that the said 4<sup>th</sup> Respondent's land was not a subject matter in ELC 184 of 2013. He exhibited a copy of an amended plaint and judgment therein dated 24/9/2020 and 18/9/2015 respectively. He contested that the 1<sup>st</sup> Respondent's decision to include Kilifi/Vyambani/359 in its undated notice was ultra vires and unconstitutional. The deponent urged the court to wholly set aside the 1<sup>st</sup> Respondent's undated notice or in the alternative strike out from the said notice the property no. Kilifi/Vyambani/359.

### Submissions

7. In his submissions dated 15/5/2023, counsel for the Applicant singled out one issue for determination, that is, whether the application dated 27/2/2023 is merited. Counsel submitted that the 1<sup>st</sup> Respondent being a state organ within the meaning of Article 10 of *the Constitution*, is required at all times to carry out its duties in a manner that maintains public confidence and within the confines of the law as provided under Section 9 and 10 of the Public Officers' Ethics Act. He contested that the 1<sup>st</sup> Respondent acted on a non-existent order and the action is thereby a nullity.
8. Counsel added that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent never filed a replying affidavit thus the Applicant's evidence remains uncontroverted and the application should thus be allowed (this court has however seen and analyzed the affidavit of the respondents as herein above and this statement is incorrect.) To support this argument, counsel relied on the case of *Timsales Limited v Harun Thuo Ndungu* [2010] eKLR and *Standard Resource Group Ltd v AG & 2 others* [2016] eKLR.
9. Counsel added that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's intention was to benefit from an illegality by relying on a non-existent order and that this court should not allow it. He relied on the case of *Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & others Civil Appeal No. 266 of 1996*, eKLR. Counsel prayed that the order of certiorari be granted for reasons that the 2<sup>nd</sup> Respondent failed to issue the applicant with any notice before arriving at its decision, a clear contravention of the rules of natural justice. Counsel further relied on the case of *Nyongesa & 4 others v Egerton University College* [1990] eKLR.
10. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents identified two issues for determination in their submissions dated 21/6/2023. Firstly, whether the Applicant has met the threshold for issuing of judicial review orders and secondly, who pays the costs of the suit.
11. In relation to the first issue, Ms. Someren, Senior State Counsel, submitted that judicial review is not concerned with the merits of a decision but rather whether there was fair treatment in the decision-



making process as was discussed in the case of Cortec Mining Kenya Limited v CS, Ministry of Mining & 9 others [2017] eKLR. To counsel, the Applicant has failed to demonstrate how the 1<sup>st</sup> Respondent's decision to amend and rectify the register was irrational and illegal. She added that it is dishonest for the Applicant to suggest that the 1<sup>st</sup> Respondent was irrational in rendering her decision in publication of the notice vide the Kenya Gazette, yet it was her administrative duty to publish the notice and gazette the suit property pursuant to the court's decree. Ms. Someren argued that by dint of Section 80 of the Land Registration Act, the 1<sup>st</sup> Respondent has no powers to rectify, cancel or annul a title unless authorized by a court order; that the 1<sup>st</sup> Respondent in this case therefore acted in good faith and in compliance with the court's decree. To this end, counsel further relied on the case of Peninah Nadako Kilishwa v IEBC & 2 Others [2015] eKLR and A.B & another v R.B. Civil Application No. 4 of 2016 [2016] eKLR.

12. Ms. Someren further submitted that the applicant's case is primarily on issues of ownership of the suit property and not on how the 1<sup>st</sup> Respondent's decision was arrived at, which would ordinarily require the court to investigate through viva voce evidence, which can only be done through an ordinary suit that affords each party an opportunity to be heard. To support this argument, counsel relied on the case of Republic v NGOs, ex-parte Linda Bonyo & 4 others; Philip Opiyo Sadjah & 5 others (interested parties) [2020] eKLR.
13. In relation to the second issue, it was Ms. Someren's argument that costs must follow the event and having demonstrated that the suit is unmeritorious, the Applicant must be condemned to costs. In support, she cited Section 27 of the Civil Procedure Act and the case of Republic v Rosemary Wairimu Munene (ex-parte Applicant) v Ihururu Dairy Farmers Cooperative Society Limited, JR Application No. 6 of 2004.

### **Analysis And Determination**

14. The main issue for determination in the present proceedings is whether the Applicant has made out a case for the grant of the order of certiorari he seeks. The duty of a Court in Judicial Review proceedings was set out in the case of Pastoli v Kabale District Local Government Council and Others (2008) 2 E.A 300 where it was held as follows: -

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality .... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards ... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”



15. Similarly, the Court of Appeal in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd [2002] eKLR - C.A Civil Appeal No. 185 of 2001* held:

“...the Court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision.”

16. It is also trite that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself (See the Court of Appeal in the case of *Republic Vs Kenya Revenue Authority Ex-parte Yaya Towers Limited (2008) eKLR*).

17. The Applicant is seeking to quash the decision of the 1<sup>st</sup> Respondent in registration of a reversion instrument over the suit property in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for reasons that he was not accorded an opportunity to be heard contrary to Article 47 and 50 of *the Constitution* of Kenya and Section 76 (1) of the *Land Registration Act*.

18. The right to be heard is a Constitutional right enshrined in Article 47 and 50 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*. Article 47(1) and (2) of *the Constitution* provides as follows:

“47(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

19. Article 50(1) of *the Constitution* 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.”

20. Section 4(3)(b) of the *Fair Administrative Action Act*, 2015 further provides as follows:

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision– an opportunity to be heard and to make representations in that regard;”

21. Section 76 (1) of the *Land Registration Act* which the Applicant relied on does not fit in the circumstances herein. That section deals with cases of restrictions and compulsory acquisition, which was not the case herein. The said provision reads: -

“

“76. Restrictions



For the purposes of compulsory acquisition the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.”

22. Looking at the general circumstances in this case, the rectification of the register was done following a court order. The appropriate provision therefore would be Section 80 of the [Land Registration Act, 2012](#) which provides:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
23. The suit that prompted the 1<sup>st</sup> Respondent’s impugned actions or decision herein is said to be Malindi ELC 184 OF 2013- Vue Taura Vue & Antony Kiringi Tsori v Felix Tsori Chivatsi & Duncan James Watta. According to the 1<sup>st</sup> Respondent, the decision to issue notice for restitution or rectification of the register related to the suit property was prompted by a judgment delivered in that suit on 18/9/2015 and a decree re-issued on 22/8/2022. The 1<sup>st</sup> Respondent explained that once they were served with the said judgment and decree, they wrote to this court’s Deputy Registrar on 11/11/2022 to verify the same. The Deputy Registrar wrote back confirming authenticity on 23/11/2022. These letters were duly produced. It follows therefore that the 1<sup>st</sup> Respondent acted in line with the relevant procedures. A perusal of the said judgment reveals that the 1<sup>st</sup> Respondent was directed to amend and rectify the register by registering the Plaintiffs therein as the proprietors of the parcel Kilifi/Vyambani/92 and to issue said Plaintiffs with a title deed without requiring the surrender of the original title deeds for the subsequent subdivisions. Looking at the impugned undated notice issued by the 1<sup>st</sup> Respondent, it is clear that the same was simply in execution of the court’s orders.
24. Having established that judicial review is only concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself, I am not convinced that the Applicant has made out a case for the grant of judicial review order as prayed.
25. While the Applicant’s argument is that the final order in ELC 184 of 2013 was an order given by Odeny J on 20/1/2023 dismissing that suit, it is not said that the same was served upon the 1<sup>st</sup> Respondent so as to warrant these judicial review proceedings. Moreover, it is strange that the suit was dismissed for want of prosecution when the same had already been determined far back in 2015. It is not however for this forum to inquire into that aspect of that case, I will therefore leave it at that.
26. Another relevant issue that was raised by the 4<sup>th</sup> Interested Party was that the impugned undated notice published by the 1<sup>st</sup> Respondent erroneously included the parcel Kilifi/Vyambani/359 which was the subject of ELC 184 of 2013. I have perused the said judgment and decree; it is evident that the land in dispute therein was originally identified as Kilifi/Vyambani/92 and it was subsequently subdivided into five plots 353, 354, 355, 356 and 357. It is therefore necessary that the said notice be amended in terms of the judgment and decree.
27. The upshot of the foregoing is that the substantive judicial review notice of motion dated 27/2/2023 lacks merit and the same is hereby dismissed with costs to all the respondents and all the interested parties.



**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31<sup>ST</sup> DAY OF JULY  
2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI**

