



**Republic v Director of Surveys & 2 others; Equity Bank (K) Limited  
 (Subject); Thea & 2 others (Interested Parties) (Judicial Review  
 14 of 2019) [2024] KEELC 5597 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5597 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT THIKA  
 JUDICIAL REVIEW 14 OF 2019**

**LN GACHERU, J**

**JULY 18, 2024**

**IN THE MATTER OF AN APPLICATION BY EQUITY BANK (KENYA) LIMITED  
 FOR LEAVE TO APPLY FOR AN ORDER OF PROHIBITION, CERTIORARI AND  
 MANDAMUS AND IN THE MATTER OF THE COUNTY GOVERNMENT OF KIAMBU  
 AND KIAMBU COUNTY SURVEYOR AND IN THE MATTER OF UNLAWFUL, IMPROPER  
 AND ULTRA VIRES DECISION TO MUTATE/SUB-DIVIDE THE LAND TITLE NO.  
 RUIRU/MUGUTHA BLOCK 1/T2210 AND ALTERATION OF RECORD AND IN THE  
 MATTER OF RECTIFICATION/AMENDMENT TO REGISTRY INDEX MAP SHHET NO. 8**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DIRECTOR OF SURVEYS ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KIAMBU ..... 2<sup>ND</sup> RESPONDENT**

**KIAMBU COUNTY SURVEYOR ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**EQUITY BANK (K) LIMITED ..... SUBJECT**

**AND**

**SOLOMON WERU THEA ..... INTERESTED PARTY**

**HANNAH WANGARI MWANGI ..... INTERESTED PARTY**

**SIMON KARIUKI GAKENGA ..... INTERESTED PARTY**



## JUDGMENT

1. This the final determination to this Judicial Review Application, which was brought vide matter a Further Amended Notice of Motion dated 30<sup>th</sup> November, 2022, which is premised on Sections 8 and 9 of the Law Reform Act, Order 53 Rule 3(1) of the Civil Procedure Rules and Sections 7 (1), (2) and 8 of the Fair Administrative Action Act. The Subject/Applicant has sought for the following orders:
  - a. That an order of Prohibition do issue, prohibiting the Respondents from further improperly altering the particulars of the Survey records particularly the Registry Index map Sheet no.8 relating to Title No. Ruiru/mugutha Block1/T2210 kept in their custody or presenting for registration a mutation for consolidation or subdivision thereof.
  - b. That an order for Certiorari do issue to remove to the Environment and Land Court for the purpose of being quashed the decision of the Respondents to alter the Survey Records, the Registry Index Map Sheet no.8 relating to Title No. Ruiru/mugutha Block1/T2210 without following proper administrative procedures.
  - c. That an order of Mandamus do issue to compel the Kiambu County Surveyor and/or director of Surveys to cancel, rectify or amend the Survey records in their custody to remove the markings for the created parcel No.T6255 and T26256 on the Registry Index map Sheet no.8 and any other record kept by them and return the survey records particulars relating to Title No. Ruiru/mugutha Block1/T2210 to the position or status or demarcation immediately prior to the registration of charge registered on 23.11.2012.
  - d. That the costs of this application be provided for.
2. This Judicial Review Application is supported by the grounds set out on the Verifying Affidavit of Kariuki King'ori, sworn on 27<sup>TH</sup> August, 2019, and the Applicant's Statement of Facts of even date.
3. The matter was transmitted to this Court for determination on 17<sup>th</sup> July, 2023, from the Environment and Land Court (ELC) at Thika (Kemei, J.) vide directions issued on 13<sup>th</sup> July, 2023.

### **Ex parte Applicant's Case**

4. It is the Applicant's case that Solomon Weru Thea, the 1<sup>st</sup> Respondent herein, as the registered owner of Title No. Ruiru/mugutha Block 1/T2210 (the suit property,) created a legal charge over it, in favour of Equity Bank (Kenya) Limited, which charge was registered on 23<sup>rd</sup> November 2012, as security for advances of Kshs.5,000,000/=, made to the 1<sup>st</sup> Respondent and Susan Kagendo Bengi T/A Mibbs Ventures.
5. The Applicant averred that as a result of default by the borrower/chargor, it decided to realize the charge by selling the charged property. It was further contended that while the Applicant's valuer was in the process of identifying the parcel of land for purposes of sale, he sought a copy of the Registry Index Map (R.I.M.), pertaining to the suit land from the Survey of Kenya records, whereupon, it was discovered that the title to the suit land no longer existed on the survey Records as it was amalgamated with Title number Ruiru/mugutha Block1/T2211, and subsequently divided to give rise to new parcels namely, Title number Ruiru/mugutha Block1/T625, and Title number Ruiru/mugutha Block1/T626, which parcels of land are not registered.



6. The Applicant further stated that the alteration of the Survey Records in relation to the suit land were carried out by the County Surveyor (Kiambu), without the Applicant's consent as the chargee, whose right had been duly reserved and noted on the register of the title.
7. It was the Applicant's contention that the County Surveyor (Kiambu), and by extension the Director of Surveys, acted illegally in effecting the changes on the R.I.M, pertaining to the suit property without following the proper procedure, inquiry and therefore amounts to abuse of power.
8. The Applicant further stated that the decision of the County Surveyor (Kiambu), and the Director of Surveys to manipulate the records related to the suit land is contemptuous and calculated to prevent the chargee from exercising its statutory power of sale in respect of the suit property pursuant to Section 96 of the Land Act.
9. The Applicant added that in altering the register in respect of title number Ruiru/mugutha Block1/T2211, the County Surveyor (Kiambu), heard the 1<sup>st</sup> Respondent alone and did not factor in the Applicant's interests in the suit land through the said charge, which entitled the Applicant to be afforded a reasonable opportunity to state its case.
10. The Applicant in its Statement of Facts dated 27<sup>th</sup> August, 2019, particularized the misconduct of the County Surveyor (Kiambu) as follows:
  - a. Altering the status of Title number Ruiru/mugutha Block1/T2210, on the R.I.M. without filing or submission of the mandatory mutation forms.
  - b. Varying the status of Title number Ruiru/mugutha Block1/T2210, on the R.I.M, by an unauthorized person and without the mandatory Land Board Consent to consolidate and sub-divide the land.
  - c. Altering the status of Title number Ruiru/mugutha Block1/T2210, on the R.I.M, without seeking the consent of the charge and without the Discharge of Charge in place thereof.
  - d. Interfering with the status of Title number Ruiru/mugutha Block1/T2210, on the R.I.M, without submission or surrender of the original title deed which to date is the custody of the Applicant.
  - e. Interfering with the status of Title number Ruiru/mugutha Block 1/T2210, on the R.I.M, in total disregard of the office of the County Land registrar or ignoring the contents of the certificate of official search.
11. In the premises, the Applicant urged the court to quash the decision of the County Surveyor (Kiambu), to vary the status of the suit land on the R.I.M, and the subsequent decisions arising therefrom on grounds of improper administrative procedure and action amounting to abuse of power.
12. The Applicant further contended that the decision and action to unilaterally alter or amend the Survey records relating to the suit property is ultra vires, irregular, without legal basis, unfair and lacking both impartiality and good faith. Further, the Applicant stated that should the alterations on the R.I.M, in respect of the suit land remain in place, it would be greatly prejudiced and stands to suffer irreparable loss and damages as it will be unjustly deprived of the chargee's interest in the suit property.

### **The Respondents' Case**

13. The Application is opposed by the 2<sup>nd</sup> Respondent through the Replying Affidavit sworn by Yusuf Isaack (a Land Surveyor, in the County government of Kiambu), on 2<sup>nd</sup> December, 2019. He averred



that according to the R.I.M, provided by the Applicant, the amendments column on the far right of the said map indicates a change of boundaries, rather than an amalgamation between the suit property and 2211 to form 6255 and 6256.

14. It was his contention that the R.I.M. in respect of the suit property was amended on 20<sup>th</sup> December, 2010, by the District Surveyor, District Land Registrar and the Director of Survey predating the registration of charge on 23<sup>rd</sup> November, 2012, by the Applicant.
15. The 2<sup>nd</sup> Respondent further contended that the process of changing boundaries requires the owner of the parcel of land in question to surrender the old title and a new title is issued. He further averred that the numbers given after a change of boundaries cannot be lower than the initial title number, hence the new number for the suit land is T6255 and not T625.
16. The 2<sup>nd</sup> Respondent also stated that the numbers indicated by the Applicant as T625 and T626, do not appear on the map in contrast to numbers T6255 and T6256, which do appear on the amendment's column number 4. He further contended that the County Surveyor works in the County government and does not engage in the alteration of boundaries. That the County Surveyor is only concerned with property meant for public use, and that the particulars of the suit property have never been in its custody, but in that of the District Land Registrar and the Director of Survey.
17. Further, it was stated that the 3<sup>rd</sup> Respondent being part of the National government is better placed to give a proper record concerning the suit land, and not the 2<sup>nd</sup> Respondent.
18. The County Land Registrar, (Ruiru) Robert Mugendi, swore a Replying Affidavit on 27<sup>th</sup> February, 2020, and averred that the suit land was registered in the name of the 1<sup>st</sup> Interested Party, vide a transfer of land registered on 27<sup>th</sup> July, 2010. Further, that the suit property is subject to a charge in favour of the Applicant registered on 27<sup>th</sup> July, 2012.
19. With respect to L.R. 1/T211, the County Land Registrar averred that it was originally registered in the name of Hannah Wangari Mwangi, who transferred the same to Simon Kariuki Gakenda, and that as per their records, it has not been amalgamated with the suit property.
20. He further averred that amalgamation is done only where the two plots in question are owned by the same person whereby, upon amalgamation, the titles are closed, surrendered and a new title is issued. He corroborated the contentions of the 2<sup>nd</sup> Respondent that the new title deeds issued after amalgamation always have a higher number than that of the amalgamated parcels. He further stated that upon receipt by his office of the Applicant's complaint letter dated 9<sup>th</sup> February, 2017, his office responded thereto through a letter dated 22<sup>nd</sup> February 2017.
21. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a further Affidavit sworn by Anne Mwangi, the National Government Lands Surveyor. She stated that the suit land was not amalgamated with L.R. 1/T2211, as claimed by the Applicant, but a change of common boundaries between the two plots. She explained that for a change of common boundary to be effected, the proprietors of the parcels of land in question must appear before the Land Registrar, who effects the change.
22. She further averred that the 1<sup>st</sup> Respondent as the proprietor of the suit property and Hannah Mwangi, the registered owner of L.R. 1/T2211, changed the boundaries of their properties. That a survey was carried out on 9<sup>th</sup> November 2009, by Z.M. Muritu, a Firm of licensed Surveyors, who indicated on pages 3 and 4 of the Mutation Form, and her office adhered to the instructions of the owners of the relevant plots to amend the R.I.M, as the Land Registrar had attested that the Mutation Forms to signify that the proprietors had agreed to change their common boundary.



23. Further the said Anne Mwangi, averred that upon change of the common boundary, the suit land and land parcel number L.R. 1/T2211, were issued with new title numbers namely, 6255 and 6256 respectively, on 20<sup>th</sup> December, 2010, and it was the responsibility of the owners of the above plots to surrender the original title to the Land Registrar for cancellation to allow for the issuance of new titles.
24. She also averred that had the Applicant carried out due diligence at the Director of Survey's office prior to the registration of the charge on 28<sup>th</sup> November, 2012, the same would have revealed changes in common boundary made by ten (10) registered owners.
25. She also alleged that the 1<sup>st</sup> Interested Party had a duty to disclose material facts to the bank as he was charging the same for a loan with the Applicant. She reiterated that the office of the Director of Surveys followed the applicable procedure in effecting the map change through the mutation lodged by the registered owners of the suit land and parcel number L.R. 1/T2211.
26. Upon considering of the pleadings, evidence and rival written submissions of the parties, this Court vide a Judgment delivered on 30<sup>th</sup> September, 2021, determined that it could not proceed to determine the issues in controversy between the parties in the current suit in the absence of Hannah Wangari Mwangi, the registered owner of land parcel number L.R. 1/T2211.
27. Consequently, the Court found and held that it was only logical to halt the determination of this Judicial Review, as it was impossible to adjudicate on the issues in contention due to non-joinder of a necessary party.
28. The Court had reasoned that a suit cannot be defeated for reason of non-joinder of a party, and issued an order directing the Applicant to enjoin Hannah Wangari Mwangi to the proceedings.
29. Pursuant to the leave granted by the court, the Applicant filed an Amended Notice of Motion dated 7<sup>th</sup> December, 2021, in which Hannah Wangari Mwangi, was enjoined as the 2<sup>nd</sup> interested Party.
30. Upon service of the Amended Notice of Motion dated 7<sup>th</sup> December, 2021, the 2<sup>nd</sup> Interested Party filed a Replying Affidavit and disclosed that she sold land parcel number L.R. 1/T2211, to one Simon Kariuki Gakenga, which disclosure led to the Applicant to file an application dated 25<sup>th</sup> October, 2022, seeking to enjoin Simon Kariuki Gakenga, as an Interested Party in the suit.
31. Consequently, on 22<sup>nd</sup> October, 2023, the Court granted the Applicant the leave sought and Simon Kariuki Gakenga, was enjoined in the suit as the 3<sup>rd</sup> Interested Party.
32. The Court issued directions on 4<sup>th</sup> March, 2024, for the parties to file brief written submissions in view of the fact that the Applicant and the Respondents had earlier made their submissions which were considered in the Judgment delivered on 30<sup>th</sup> September, 2021.

### **Ex parte Applicant's Submissions**

33. The Applicant filed written submissions on 24<sup>th</sup> April, 2024, through the Law Firm of Gathara Mahinda & Co. Advocates, and reiterated the averments contained in its Statement of Facts dated 27<sup>th</sup> August, 2019.
34. It was submitted that despite all the Interested Parties being served with the Further Amended Notice of Motion dated 30<sup>th</sup> November, 2022, they failed to enter appearance or file responses thereto. In the premises, it was submitted that the Court should draw the conclusion that the Interested Parties are not opposed to the aforesaid motion.



35. The Applicant submitted that the Director of Surveys did not apply the rules of Natural Justice in altering the R.I.M, in respect of the suit land, thereby thwarting the Applicant's legitimate expectation of fairness with respect to administrative procedures.
36. Considering everything in totality, the court finds the single issues for determination is; - whether the ex parte Applicant is entitled to the orders sought?
37. The Court has considered the available evidence and finds special character of Judicial Review proceedings was outlined in the case of *Pastoli v Kabale District Local Government Council & Others* (2008) 2 EA 300 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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.”

38. Similarly, in the case of *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR, the Court of Appeal stated;

“Judicial review is concerned with the decision making process, not with the merit itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether the 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”.

39. In the instant Judicial Review, the Applicant urged the Court to quash the decision of the County Surveyor (Kiambu), to vary the status of the suit land on the R.I.M, and subsequent decisions arising therefrom on grounds of improper administrative procedure and action amounting to an abuse of power.
40. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents refuted the applicant's claims arguing that what the Director of Surveys did with regard to the suit land was a change of boundaries, and further that there was no amalgamation of the suit property with land parcel No. LR. 1 T/2211.
41. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents averred that the Director of Survey followed the laid down procedure in effecting the change of boundary in respect of the suit property, as the owners of



the affected plots consented to the alteration of their common boundary. Further, they accused the Applicant of not having carried out proper due diligence on the suit property as the boundary change complained of was done in year 2010, while the charge in favour of the Applicant was registered in year 2012.

42. Halsbury's Law of England Volume 42 paragraph 57, provides that:

“The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it.”

43. Further, Halsbury's Laws of England, Fourth Edition, Volume 42 at paragraph 51 states as follows:

“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.”

44. In this Judicial Review Application, it is clear that the change in the boundary of the suit property that took place on 20<sup>th</sup> December, 2010, and which decision the Applicant has urged this Court to quash, actually predates the registration of the charge under which the Applicant claims on 28<sup>th</sup> November, 2012. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents contended that for boundary changes to be affected, the relevant land owner/owners need to appear in person before the Lands Registrar and the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties presented themselves before the Lands Registrar in respect of the boundary changes complained of by the Applicant in the suit. It follows that the 1<sup>st</sup> Respondent, as the registered owner of the suit property was very much aware of the boundary changes.

45. In the case of *First Choice Mega Store Limited v Ecobank Kenya Limited* [2017] eKLR, the Court interpreted the meaning of Section 90 of the *Land Act* as follows:

“[37]...The law regulates the contractual relationship between the parties by ensuring that the purpose of a charge (pledged property) is not defeated. The purpose is mainly for the property to act as security and no more. The chargor must have the chance, nay right, to redeem the property. In the absence of a notice it would be much easier for unscrupulous chargees to rid the chargor of the equity of redemption. The borrower who pledges and charges his property must be confident that the property will be held as security and when the lender must then act and start the process of selling the same, the borrower will have both notification of such action and an opportunity to redeem his property.”

46. Although the instant suit concerns the charging of title to the land, rather than a contract for disposal of land, the Court holds and finds that a chargee is placed in an analogous position to a purchaser of land with respect to the responsibility to carry out due diligence before executing the charge.



47. In the case of Nairobi ELC No. 128 of 2011 Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR, the Court held that:

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a certificate of search. Article 40 (6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the constitution* coupled with the provision of section 26(1) (a) and (b) of the *Land Registration Act* in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search.”

48. Further, in the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR, the Court observed that:

“For a purchaser who claims that due diligence was carried out at all stages, we find it difficult to believe that there was no explanation sought from the Registrar of Titles about the mysterious disappearance of the original title from the strong room of the Land Registry. It was common knowledge and well-documented at the time that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima Market....”

49. It is evident that the 1<sup>st</sup> Respondent, as chargor failed to disclose the material fact that the title to the suit land used to secure the charge registered on 28<sup>th</sup> November, 2012, ceased to exist following the change of boundaries and issuance of a new title number L.R. T6255, in its stead.

50. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties did not enter appearance in the suit despite service by the Applicant as attested by copies of return of service on record. Notwithstanding that the Interested parties did not enter appearance in the case, the Applicant was obliged to prove its case pursuant to the provisions of Sections 107, 108 and 109 of the *Evidence Act*. Moreover, the suit was opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

51. The decision of the County Surveyor (Kiambu), which the Applicant seeks to quash was rendered more than two years to the date of the registration of Charge, upon which the Applicant’s claim is founded. In the circumstances, this Court is satisfied that the said decision of the County Surveyor( Kiambu), was not calculated to defeat the Applicant’s interest in the suit property as claimed.

52. Accordingly, and based on the above analysis this Court finds and holds that the Applicant has failed to adduce sufficient evidence on why the said decision of the County Surveyor should be quashed by the Court.

53. In the Further Affidavit of Anne Mwangi, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents, submitted that had the Applicant carried out due diligence at the Director of Survey’s office, prior to the registration of the charge on 28<sup>th</sup> November 2012, the same would have revealed changes in common boundary made by the ten (10) registered owners.

54. The Applicant has not explained why it failed to conduct proper due diligence. If the instant Applicant had done proper due diligence, it should have discovered the existence of the new title number L.R. T6255, which replaced the title used by the 1<sup>st</sup> Interested Party to secure the charge dated 28<sup>th</sup> November, 2012.



55. While this Court finds the 1<sup>st</sup> Interested Party guilty of non-disclosure of material fact, in respect of the charge registered on 28<sup>th</sup> November, 2012, it is the holding and finding of the Court that the particular facts not disclosed by the 1<sup>st</sup> Interested Party would have come to light had the Applicant carried out proper due diligence as the Chargee.
56. Therefore, this court having carefully considered the issues as above, it finds and holds that the instant Further Amended Notice of Motion dated 30<sup>th</sup> November, 2022, does not meet the criteria for a proper Judicial Review Application or the threshold for grant of prerogative orders falling under the Judicial Review purview.
57. For the above reasons, the court finds and holds that the instant Judicial Review Application is not merited and the same is dismissed entirely, with costs to the Respondents herein.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 18TH DAY OF JULY, 2024.**

**L. GACHERU**

**JUDGE**

18/7/2024.

Delivered online in the presence of:

Joel Njonjo - Court Assistant.

N/A for the Applicant

N/A for the Respondents

N/A for the Interested Parties.

**L. GACHERU**

**JUDGE**

**18/07/2024**

