



Republic v Land Registrar, Nakuru District & another; Nakuru War Memorial Hospital Ltd (Exparte Applicant) (Environment and Land Judicial Review Case 1 of 2024) [2024] KEELC 5368 (KLR) (18 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 1 OF 2024**

YM ANGIMA, J

JULY 18, 2024

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, NAKURU DISTRICT 1ST RESPONDENT

HON. ATTORNEY GENERAL 2ND RESPONDENT

AND

NAKURU WAR MEMORIAL HOSPITAL LTD EXPARTE APPLICANT

JUDGMENT

introduction

1. Vide a chamber summons dated 27.10.2023 filed pursuant to Order 53 rules 1, 2 & 4 of the *Civil Procedure Rules*, 2010, Sections 8 and 9 of the *Law Reform Act* (Cap. 26), Section 3A of the *Civil Procedure Act* (Cap.21) and all other enabling provisions of the law, the ex parte Applicant (the Applicant) sought leave of court to institute judicial review proceedings against the Respondents seeking, inter alia, an order of certiorari to call for and quash the decision of the 1st Respondent published in the Kenya Gazette Notice No. 6309 dated 19.05.2023 cancelling its title over Title No. Nakuru Municipality Block 11/107 (the suit property) and an order of prohibition to prohibit the Respondents from, inter alia, investigating, cancelling, revoking, reviewing or howsoever dealing with the suit property.
2. The application was based upon the grounds set out in the statutory statement of even date together with a verifying affidavit sworn by Dr. Simon Mwangi on the same date. The Applicant pleaded that the 1st Respondent’s action of purporting to cancel its title for the suit property was amenable to judicial



review on account of, *inter alia*, alleged irrationality, illegality, bias, breach of the rules of natural justice, breach of the Constitution and the law, and unreasonableness. It was also pleaded that the 1st Respondent acted ultra vires since he had no legal authority to revoke the certificate of lease in the first place.

3. The record shows that leave was granted by the Environment and Land Court sitting at Nakuru (Hon. Lady Justice (Dr.) M.A. Odeny on 31.10.2023 on the basis of which the Applicant filed its substantive application for judicial review dated 06.11.2023.

Application for Judicial Review

4. By a notice of motion dated 06.11.2023 expressed to be based upon Sections 8 and 9 of the Law Reform Act (Cap.26), Order 53 rule 3(1) & (3) of the Civil Procedure Rules and the leave of court granted on 31.10.2023 the Applicant sought the following judicial review orders:
 - a. That this honourable court be pleased to grant an order of *certiorari* to call for and quash the decision of the 1st Respondent herein vide the Kenya Gazette Notice No. 6309 of 19.05.2023 in respect of cancellation of a certificate of lease of all that parcel of land known as Nakuru Municipality Block 11/107 duly registered under the name of Nakuru War Memorial Hospital Limited.
 - b. That this honourable court be pleased to grant an order of prohibition prohibiting the Respondents from dealing in any manner whatsoever, investigating, cancelling, revoking and/or reviewing the certificate of lease of all that property known as Nakuru War Memorial Hospital Limited.
5. The application was supported by the supporting affidavit sworn by Dr. Simon Mwangi on 27.10.2023 as well as the statutory statement of even date filed with the application for leave to apply for judicial review. The application was also based upon the grounds set out on the face of the motion. The Applicant contended that at all material times it was the registered proprietor of Title No. Nakuru Municipality Block 11/107 (the suit property) on which it was operating a medical facility. It was pleaded that the 1st Respondent had published Gazette Notice no. 6309 dated 19.05.2023 (the gazette notice) purporting to cancel the Applicant's certificate of lease for the suit property on the ground that it had been issued erroneously.
6. The Applicant contended that the 1st Respondent's said action was illegal, unconstitutional and in breach of the rules of natural justice since it was never accorded an opportunity of being heard prior to the said cancellation or revocation of its title. The Applicant further contended that the 1st Respondent's said action was in violation of Article 47 of the Constitution of Kenya (the Constitution) and that, in any event, he had no legal authority to cancel or revoke a certificate of lease and to order that the suit property should revert to the government.

C. Respondents' Response

7. The Attorney General filed a replying affidavit sworn by Eric Munene Nyamu, the Land Registrar – Nakuru sworn on 15.11.2023 on behalf of the Respondents. The 1st Respondent stated that he issued the certificate of lease to the Applicant by mistake since the latter had not presented the mandatory accompanying documents such as rates clearance certificate, land rent clearance certificate, discharge of charge, and a ground report from the concerned land officer.
8. The 1st Respondent stated that upon discovery of the said mistake he wrote a letter dated 27.04.2023 notifying the Applicant of the anomalies and calling for submission of the missing documents to be



presented within 90 days. It was further stated that it was upon the Applicant's failure to oblige that he commenced the process of cancellation of the certificate of lease.

9. The 1st Respondent accused the Applicant of non-disclosure of material facts in that it had failed to disclose the existence of a charge in favour of Barclays Bank of Kenya Ltd hence he was unable make the necessary entry and to sign the white card for the suit property. It was also the 1st Respondent's case that he had received a protest letter from the County Government of Nakuru on the extension of the Applicant's lease whose tenure had expired on the basis that it was never consulted on the extension. The court was consequently urged to dismiss the application for judicial review.

D. Applicant's Supplementary Affidavit

10. The Applicant filed a supplementary affidavit sworn by Dr. Simon Mwangi on 11.07.2024 in which he reiterated the contents of his supporting affidavit sworn on 06.11.2023 and the verifying affidavit sworn on 27.10.2023. The deponent stated that he had inadvertently omitted to annex a copy of Gazette Notice No. 6309 dated 19.05.2023 referred to in his verifying affidavit hence he annexed a copy thereof to the supplementary affidavit.

E. Directions on Submissions

11. When the matter came up on 13.06.2024, it was directed that the application for judicial review shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Applicants' submissions were filed on 11.07.2024 whereas the Respondents' submissions were not on record by the time of preparation of the judgment.

F. Issues for Determination

12. The court has perused the application for judicial review together with the Applicant's statutory statement, verifying affidavit, supporting affidavit and supplementary affidavit. The court has also considered the Respondents' replying affidavit in opposition thereto. The court is of the view that the following are the key issues which arise for determination herein:
 - a. Whether the Applicant has demonstrated the grounds for judicial review set out in the application.
 - b. Whether the Applicant is entitled to the reliefs sought in the application.
 - c. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether the Applicant has demonstrated the grounds for judicial review set out in the application

13. The court has considered the material and submissions on record on this issue. The Applicant set out numerous grounds of judicial review including; illegality, breach of the rules of natural justice, breach of the *Constitution*, irrationality, unreasonableness, bias, malice and *ultra vires*. The court takes the view that in an application for judicial review an Applicant need not prove all the grounds set out in the subject application. As long as he is able to demonstrate at least one legitimate ground for judicial review he is entitled to succeed.
14. The remedy of judicial review is essentially designed for control of administrative action of public authorities, tribunals and inferior courts for the purpose of ensuring legality and propriety of



their actions and to prevent them from exceeding their jurisdiction. See. *HWR Wade & Forsyth, Administrative Law* (10th Edition). The court also agrees with the purpose of judicial review as enunciated in the case of *Republic - v- Cabinet Secretary in-Charge of Internal Security & 3 Others ex parte Jean Eleanor Magaritis Otto* [2015] eKLR where it was held, *inter alia*, that:

“21. However, according to *Judicial Review Handbook*, 6th Edition by Michael Fordham at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority/power.”

15. The scope of judicial was judicially considered by the Court of Appeal in the case of *Municipal Council of Mombasa - v- Republic & Umoja Consultants Ltd* [2002] eKLR as follows:

“...That is the effect of this Court’s decision in the Kenya National Examination Council case and as the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider 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 – and that, as we have said, is not the province of judicial review.”

16. It is evident from its written submissions that the Applicant was aggrieved primarily by two matters. First, that it was not accorded an opportunity to be heard by the 1st Respondent prior to adverse action being taken against it. It was submitted that it was against the tenets of natural justice, Article 47 of the *Constitution* and the *Fair Administrative Action Act* for the 1st Respondent to cancel the Applicant’s certificate of lease without reference to it. The Applicant cited several authorities in support of that submission.
17. The second matter was that the Applicant considered that the 1st Respondent to have acted ultra vires and without legal authority in purporting to cancel its certificate of lease. It was submitted that there was no provision in the *Land Registration Act*, the *Land Act*, or any other law which empowered the 1st Respondent to revoke, cancel or annul a certificate of lease through a gazette notice as he did. The Applicant cited several authorities in support of its submissions in that regard. It relied, *inter alia*, upon the cases of *Republic - v- Naivasha District Land Registrar & Others ex parte Grace Wanjiru Ng’ang’a & 2 Others* [2022] eKLR; *Kuria Greens Limited - v- Registrar of Titles & Another* [2011] eKLR; and *Republic - v- Registrar of Titles Mombasa & 2 Others ex Parte EMFIL Limited* [2012] eKLR.



18. In the *Ex Parte Grace Wanjiru Ng'ang'a case* it was held that:

“It is now settled law that a land registrar has no power to cancel a title and that cancellation can only be done by a competent court of law. See *Sabina Nyambura Githina & Another v Land Registrar, Thika Land Registry & 3 others; Real Capital Ltd (Interested Party)* [2021] eKLR and *Kuria Greens Limited v Registrar of Titles & Another* [2011] eKLR. Clearly therefore, the first respondent acted without jurisdiction when she purported to nullify the titles in respect of parcel numbers Gilgil/Gilgil Block 1/ 9563 to 9570 (Kekopey). Equally, the second respondent’s action in deleting the said parcel numbers from the registry index map is a nullity and without jurisdiction since it was founded on another nullity. See *Macfoy v. United Africa Co. Ltd* [1961] 3 All E.R. 1169.”

19. The court has not had the benefit of the Attorney General’s submissions since they had not been filed by the time of preparation of the judgment. The court has considered the Applicant’s submissions on the alleged violation of the rules of natural justice. The court is of the opinion that if the 1st Respondent had no legal authority to cancel the certificate of lease in the first place then it would have been an exercise in futility to accord the Applicant a hearing before doing that which was ultra vires. In other words, no matter how many hearing opportunities the 1st Respondent would have afforded the Applicant that would not have granted him the legal authority to revoke the certificate of lease. In the premises, the court shall not examine the allegation of breach of the rules of natural justice or fair administrative action.

20. The impugned gazette notice dated 19th May, 2023 was in the following terms:

“The *Land Registration Act*

(No.3 of 2012)

Loss Of A Certificate Of Lease

Whereas War Memorial Hospital Limited is registered as the proprietor of all that piece of land known as Nakuru Municipality Block 11/107, situated in the District of Nakuru, and whereas sufficient evidence has been adduced to show that the said certificate of lease was erroneously issued, whereas all efforts made to compel the registered proprietor to surrender the certificate of lease issued in respect of the said piece of land to the Land Registrar for cancellation from the date hereof, provided that no objection has been received within that period. I intend to dispense with the production of the said certificate of lease and revert it to Government of Kenya and upon registration the certificate of lease issued earlier to the said War Memorial Hospital Limited, shall be deemed to be cancelled and of no effect.

Dated the 19th May, 2023.

Em. Nyamu

Mr/5164894 Land Registrar, Nakuru District”

21. The court has considered the 1st Respondent’s response and explanation on why he published Gazette Notice No. 6309 dated 19.05.2023. His explanation was that he considered that the certificate of lease had been issued by mistake because the Applicant had failed to present certain crucial documents to facilitate the registration of the lease and issuance of the certificate of lease. The missing documents were said to include rates clearance certificate, land rent clearance certificate, discharge of charge and a ground status report.



22. The court is of the view that once the Applicant's lease was accepted and a certificate of lease issued as evidence of its registration the 1st Respondent could not lawfully take the unilateral action of cancelling the certificate about 2 years after its issuance by simply publishing a notice of "loss" of the certificate of title in the Kenya Gazette. The court is of the opinion that upon issuance of the certificate of lease certain legal rights accrued to the Applicant under Sections 24 and 25 of the [Land Registration Act](#), hence the 1st Respondent was not at liberty to unilaterally cancel or nullify the certificate.
23. The court is of the view that if the 1st Respondent had failed to demand and keep all the necessary supporting documents before issuance of a certificate then that would not constitute evidence of a mistake as known to law but merely evidence of negligence in the performance of public duties. The court is further of the opinion that there is no provision of law either in the [Land Act](#) or the [Land Registration Act](#), which authorizes a land registrar to cancel a certificate of title on account of his own negligence.
24. The court finds it strange that the 1st Respondent opted to employ the avenue of publishing a notice of "loss" of a certificate of title for the suit property whereas no such loss was ever reported by the Applicant. The material on record shows that at all material times the Applicant was in possession of the certificate of lease which was alleged to have been lost. The court finds the publication of such a misleading notice to be evidence of malice or bad faith.
25. The court is unable to believe the 1st Respondent's reasons as the basis for publication of the gazette notice intended to nullify the Applicant's certificate of lease. The real reasons for the notice appear to be contained in the notice of motion dated 02.11.2023 by the County Government of Nakuru in which it sought to be joined in the judicial review proceedings as an interested party. The County Government of Nakuru was essentially laying a claim to the suit property and it was contended in the said application that the Applicant had obtained an extension of lease of the suit property fraudulently and illegally. The allegations of fraud and illegality also appear in the 2 letters annexed to the 1st Respondent's replying affidavit in which the County Government of Nakuru was staking a claim to the suit property.
26. It is the opinion of the court that if the 1st Respondent was persuaded that the Applicant had obtained an extension of the lease and certificate of lease through fraudulent and unlawful means then that was not a matter which could be resolved administratively through publication of a gazette notice to nullify the certificate of lease. Such a dispute required some form of judicial adjudication for a determination to be made on whether or not the extension was obtained through fraudulent and unlawful means.
27. The court agrees with the Applicant's submission that the 1st Respondent had no legal authority to revoke a certificate of lease duly issued upon an extension of lease by the relevant authorities. The court accepts as good law the authorities cited by the Applicant to the effect that a land registrar has no legal authority to revoke, cancel or nullify a certificate of lease or other title document on the basis that it was obtained through fraud or improper and unlawful means. The court is satisfied that the 1st Respondent acted without or in excess of jurisdiction and that his action of publishing Gazette Notice No. 6309 was ultra vires. As a result, the court is satisfied that the Applicant has demonstrated at least one of the grounds for judicial review set out in its application.

b. Whether the Applicant is entitled to the reliefs sought in the application

28. The court has considered the material and submissions on record on this issue. The court has already found that the Applicant has demonstrated its claim for judicial review. The Applicant has submitted that it is entitled to both an order of certiorari and order of prohibition. The nature and scope of the remedy of prohibition was considered by the Court of Appeal in the case of [Kenya National](#)



Examination Council - v- Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR. The court stated thus:

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids the tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an interior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury’s Laws of England, 4th Edition, Vol. I at page 37 paragraph 128...”

29. Whereas the court readily agrees with the Applicant that it is entitled to the order of certiorari to quash the impugned gazette notice, the court does not agree that an order of prohibition should issue in the circumstances of this case. The court is of the view that prohibition look to the future, that is, either to on-going or contemplated future action. The material on record shows that the impugned notice was published in 2023 and there is no evidence of contemplated future action on the part of any of the Respondents. There is no allegation or demonstration that the Respondents intend to review, revoke, investigate, or cancel the lease or certificate of lease in future. The 1st Respondent’s notice was simply intended to ‘revert’ the lease to the Government of Kenya upon expiry of 30 days from the date of publication of the gazette notice. There is no indication on record to suggest that the 1st Respondent intends to take any other or further unlawful action against the Applicant moving forward. In the event, the court is not inclined to grant an order of prohibition.

c. Who shall bear costs of the application

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Since the Applicant has been successful in one of the two main prayers sought in the application for judicial review the court is of the opinion that each party should bear its own costs of the action. As a result, the court shall make an order to that effect.

H. Conclusion and Disposal Order

31. The upshot of the foregoing is that the court finds merit in the Applicant’s application for judicial review dated 06.11.2023. As a consequence, the court makes the following orders for disposal thereof:
- a. An order of *certiorari* be and is hereby granted to bring up and quash the decision of the 1st Respondent made vide Kenya Gazette Notice No. 6309 dated 19.05.2023 in respect of cancellation of the certificate of lease of parcel No. Nakuru Municipality Block 11/107 in the name of Nakuru War Memorial Hospital Limited.
 - b. The prayer for an order of prohibition is hereby declined.
 - c. Each party shall bear its own costs of the application for judicial review.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 18TH DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:



Mr. Karanja for the Ex-parte Applicant

Ms. Adomeyon for the Attorney General for the 1st and 2nd Respondents

C/A - Carol

Y. M. ANGIMA

JUDGE

