



**Republic v County Land Registrar Nyamira County; Nyachienga  
 (Exparte Applicant) (Environment and Land Miscellaneous Application  
 E005 of 2024) [2024] KEELC 7459 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7459 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E005 OF 2024**

**JM KAMAU, J**

**NOVEMBER 13, 2024**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW**

**ORDER OF**

**CERTIORARI & PROHIBITION**

**AND**

**IN THE MATTER OF: SECTION 78 & 79 (4) OF THE LAND**

**REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE ACT**

**(CAP 21) AND ALL OTHER ENABLING**

**LAW AND THE INHERENT JURISDICTION**

**OF THE COURT**

**AND**

**IN THE MATTER OF: THE UNLAWFUL CANCELLATION OF**

**ENTRIES BY THE COUNTY LAND**

**REGISTRAR -NYAMIRA COUNTY ON 18TH**

**MARCH, 2024.**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY LAND REGISTRAR NYAMIRA COUNTY ..... RESPONDENT**



AND

JANE BOSIBORI NYACHIENGA ..... EXPARTE APPLICANT

### JUDGMENT

1. This is a case seeking the Court's prerogative orders of Certiorari urging the Court to remove into this Court and quash the Decision of the Respondent made on 18/3/2024 cancelling entries numbers 4, 5 & 6 and instead making alternative entries 7, 8 and 9 in the register for Title No. Ekerubo Settlement Scheme/69. He also seeks the costs of the suit. The same is contained in the Notice of Motion dated 14/6/2024 and amended on 10/7/2024. The said Motion is supported on the grounds on the face of the Motion and also contained in the Verifying Affidavit of the Ex parte Applicant sworn on the 15/4/2024 that: -
  - a. The Ex parte Applicant is the registered proprietor of L.R No.Ekerubo Settlement Scheme/69 which she obtained from the Settlement Fund Trustee on 13/1/2010 and was issued with a Title Deed thereto on the same date. The same was her late husband's, Christopher Nyachienga Ondera in Ekerubo Farmers Society.
  - b. She has paid all the respective outstanding loan balance in respect to the land and was issued with all the clearance documents.
  - c. The Ex parte Applicant was summoned to sign blank mutation forms and Application for Consent of the Land Control Board and she complied with the Demand by the Assistants County Commissioner, Esi Division after which the Respondent placed a restriction against the and in the Register but later removed the same as Entry No. 6 in order to facilitate rectification of the Register as Entry No. 7 on 18/3/2024 hence cancelling Entries numbers 4 and 45 of the Register albeit fraudulently.
  - d. The above actions were affected without any Notice and/or hearing. And no reasons were given in writing for the actions.
2. The Ex parte Applicant believes that the rectification was done in total disregard to section 79(2) of the Registered Land Act, 2012.
3. On his part, the Respondent, Mr. Martin Manwari Osano, filed an Affidavit in response, the same sworn on 20/6/2024. According to him, when he received the Ex parte Applicant's demand letter dated 8/2/2024 addressed to the Assistant County Commissioner through her Advocates, Momanyi Aunga & co. Advocates, he did place a restriction against the suit land pursuant to the provisions of Section 76(1) of the Land Registration Act. He acknowledges that the suit land had been "duly registered" in the name of the Ex parte Applicant on 13/1/2010. That after later realizing that the suit land belonged to one Nyachienga Ondera who was deceased, but originally owned by Ekerubo Farmers' Co-operative Society from the Society's Register and after perusing the share certificate, he suspected "some elements of fraud" and that there was no clear explanation as to how the property had been transferred to the Ex parte Applicant. He finally said that he invoked his powers under Section 70(2) of the Land Registration Act, 2012 to rectify the Register. He also says that the suit land measures 47.5Acres and belongs to a polygamous family and that any transaction "has to be done as per the law." I invited both parties to file their written submissions and Counsel for the Ex parte Applicant complied.



4. I must point out here that the Interested Party herein Jane Bosibori Nyachienga did not participate in the proceedings.
5. I have studied the Respondent's Replying Affidavit where he has insisted that he possesses power to cancel a Title Deed and rectify the same. I will come to this issue later. But the merits or otherwise of what the Land Registrar did aside, we need to look at one very important thing viz; whether the Respondent invited the parties and more particularly the registered proprietor of the land to make representations before the Title in her name was cancelled and "rectified."
6. The Jurisdiction invoked by the Ex parte Applicant herein has no interest in how the suit property was acquired, the intention of the Respondent nor whether the same was to remain in the name of the Ex parte Applicant or whether the cancellation of the Title was merited or not.
7. The Court is interested in the process that was used by the Respondent to have the name of the property's registered proprietor, Jane Bosibori Nyachienga cancelled. Secondly, the Court must enquire whether the Respondent had the requisite jurisdiction and powers to cancel the Title Deed.
8. The Respondent has chosen to be candid enough to justify his actions.
9. There are 2 issues for determination in this matter:
  - a. Whether the Respondent acted in excess of his mandate, power and/or jurisdiction?
  - b. Whether due process was followed before the Respondent, Land Registrar, Nyamira cancelled the Ex parte Applicant's Title i.e. Ekerubo Settlement Scheme/69?
10. Before the Court proceeds to determine these issues, this Court appreciates that the Respondent's action was an administrative one that he attempted to discharge. But his actions called for fairness under the Fair Administrative Actions Act.
11. A certificate of Title is conclusive evidence of ownership and is prima facie evidence that the registered proprietor is the owner. Section 24 of the *Land Registration Act* 2012, gives the registered proprietor absolute rights over land, it provides:

Subject to this Act—

  - (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease
12. Further, this Title is protected under Section 26 of the same Act which provides:
  - (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b)



where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. Flowing from the foregoing provisions, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired procedurally. The circumstances when Title can be cancelled or revoked have been enumerated under Section 26(1) (a) & (b) of the [Land Registration Act](#).
14. Section 79(2) of the [Land Registration Act](#), provides for the Rectification of the Register by the Registrar.
  - (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—
    - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
    - (b) in any case and at any time with the consent of all affected parties; or
    - (c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.
  - (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.
  - (3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.
  - (4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—
    - (a) the process of investigation including notification of affected parties;
    - (b) hearing of the matters raised; and
    - (c) the criteria to be followed in coming up with the decision.
15. Sub-section (1) above envisions rectification that does not affect the rights/interest of the registered proprietor. Loosely translated, basic and apparent errors or mistakes. And even then, the rectification can only occur with the proprietor's consent.
16. However, sub-section (2) provides for a situation where the Title was obtained through malpractices or by mistake,
  - (a) The proprietor has by fraud or lack of proper care caused or substantially contributed to the error, mistake or omission; or
  - (b) It would for any other reason be unjust for the alteration not to be made.
17. In the first state of affairs, the registered proprietor is issued with a 90 Days' Notice of the intention to alter the register. The Registrar must give audience to the Title Holder before making any cancellation or changes. The law also gives an aggrieved party a right to seek recourse in Court.



18. As to the cancellation on the ground of fraud, in the case of Kisumu Misc No. 80 of 2008 Republic V Kisumu District Lands Officer & another [2010] eKLR the Court held that:

“.....it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration”.

19. Similarly, the Court of Appeal in Mombasa Appeal No. 98 of 2016 Super Nova Properties Limited & another v District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018] eKLR agreed with the trial Court that

“The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law”.

20. The Respondent claimed that Title to the Suit land was cancelled because of fraud. He had the onus of proving the said fraud by dint of Sections 107 to 109 (inclusive) of the *Evidence Act*. The cancellation was based on issues of fraud. It was not shown that such allegation of fraud was properly placed before the Respondent or at all nor was the Court guided as to how the Land Registrar concluded so. Allegations of fraud are grave and it is only fair that evidence be tendered. There is no procedure in adducing evidence before the Land Registrar, but the Court has been vested with the said procedure and it can fairly examine issues of fraud.

21. Accordingly, the Land Registrar did not have the power to cancel the Ex parte Applicant’s Title as it affected the rights of the registered proprietor.

22. But even if for instance this Court were to find otherwise, which is doubtful, this was a quasi-judicial action and it was only proper that parties be accorded fair hearing. Rules of procedure are the handmaidens of justice. They are to facilitate the administration of justice in a fair, orderly and predictable manner. Article 159(2) (d) of the *Constitution* of Kenya, 2010 and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. But these provisions should not be used as a means of avoiding observance to procedure.

23. Did the Respondent follow the process prescribed in the Act to have the property’s registered proprietor, Jane Bosibori Nyachienga cancelled? The Respondent has chosen to give his justification of doing so. The Respondent did not produce any documents or even say that he gave the Ex parte Applicant any audience. This Court will only be guided by availability of evidence and with lack of the said evidence, there is nothing to inform this Court that the hearing was conducted. If cancellation of Titles were to take place without any formal documentation, or without following the law then it would be easy for fraudsters to have their way in the cancellation of Titles. We shall have thrown the sanctity of Title Deeds to the dogs.

24. The *Land Registration Act* requires that the registered proprietor be served with a 90 Days’ Notice. The Land Registrar has to give Notice to the affected parties and more particularly the registered proprietor of the land in question before effecting the cancellation and/or any change of ownership. He cannot do it whimsically, capriciously or arbitrarily. However good his intentions are. I do agree with the Ex parte Applicant that the Land Registrar in cancelling the Ex parte Applicant’s Title as he did, acted outside the scope of his mandate and he had no jurisdiction to do so and in total disregard of Section 79 of the *Land Registration Act*.

25. The upshot of the above is that the Petitioner wholly succeeds in this Suit and is also awarded costs of the same.



**JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 13TH DAY OF NOVEMBER, 2024.**

**MUGO KAMAU**

**JUDGE**

**In the Presence of: -**

Court Assistant: Brenda

Applicant's Counsel: Ms. Nyaenya

Respondent's Counsel: Mr. Ranah

