



Republic v Land Registrar-Nyamira County; Oriku & another (Exparte Applicants); Mayieka (Interested Party) (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 7487 (KLR) (7 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7487 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024**

JM KAMAU, J

NOVEMBER 7, 2024

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012;

AND

**IN THE MATTER OF: APPLICATION BY LIVINGSTONE MAYIEKA
ORIKU AND SARAH KWAMBOKA MAYIEKA FOR LEAVE**

TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS;

BETWEEN

REPUBLIC EXPARTE APPLICANT

AND

THE LAND REGISTRAR-NYAMIRA COUNTY RESPONDENT

AND

LIVINGSTONE MAYIEKA ORIKU EXPARTE APPLICANT

SARAH KWAMBOKA MAYIEKA EXPARTE APPLICANT

AND

MARY KWAMBOKA MAYIEKA INTERESTED PARTY

JUDGMENT

1. The Ex parte Applicants herein were granted leave on 6/5/2024 to apply for orders of certiorari to remove into this Court for purposes of being quashed the Decision of the Land Registrar, Nyamira County, of 8/3/2024 of registering a restriction over L.R No.Central Kitutu/Mwabosire/739, a rectification of the Register of the said parcel of land, the Decision on Entries 7 and 8 respectively of the suit land, an order of Mandamus against the Respondent to restore the 2nd Ex parte Applicant’s name



over the Title on Entries Numbers 5 and 6 respectively and also an order prohibiting the Respondent from cancelling the 2nd Ex parte Applicant's Title over Central Kitutu/ Mwabosire/737.

2. On 17/5/2024, the *Ex parte* Applicants herein did file the substantive motion pursuant to the aforementioned orders above. The same was framed as follows: -
 1. The Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable court and quash the decision of the Respondent, County Land Registrar, Nyamira, dated 8th March 2024 creating a restriction over L.R. No. Central Kitutu/ Mwabosire/737 and stopping further dealings until the interest of Mary Kwamboka Mayieka, the Interested Party is addressed;
 2. The Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable court and quash the decision of the Respondent, the Land Registrar, Nyamira, of 8th March 2024 to wit, rectification of the register over L.R.No. Central Kitutu/ Mwabosire/737 under Section 79(2) *Land Registration Act*, by cancelling the entries number 5 and 6 reinstating entry no.2;
 3. The Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable court and quash the entries no.7 and 8 in the land register over parcel no. L.R. No. Central Kitutu/Mwabosire/737.
 4. The Honourable Court be pleased to issue order of Mandamus directing the Respondent, the Land Registrar, Nyamira, and compelling him/her to restore the 2nd Ex parte Applicant's title over the parcel of land known as LR. No. Central Kitutu/Mwabosire/737 by reinstating the 2nd Ex parte Applicant's name in the register of the said property as the proprietor thereof as entries number 5 and 6.
 5. An Order of Prohibition to prohibit the Respondent, the Land Registrar, Nyamira, from cancelling the 2nd Ex parte Applicant's Title over LR. No. Central Kitutu/Mwabosire/737.
 6. The costs of this Application be provided for.
3. The Grounds given for the same were that:
 - a. The 2nd *Ex parte* Applicant is the registered proprietor of LR. No. Central Kitutu/ Mwabosire/737.
 - b. On 8/3/2024 without proper care and also without Notice to the Ex parte Applicants and in complete violation of Section 79(2)(b) of the *Land Registration Act* the 2nd Respondent placed a Restriction against the suit land and thereafter proceeded to rectify the Register by cancelling the 2nd Ex parte Applicant's Title over the parcel of land without complying with the procedural requisites under Sections 76 and 79 of the *Land Registration Act*.
 - c. This Decision and action deprived the 2nd *Ex parte* Applicant of her proprietary rights over the suit property.
 - d. The actions were taken without Notice to the registered proprietor.
 - e. The action was effected unilaterally and without regard to the law, particularly Section 79(2) of the *Land Registration Act*.
 - f. The reasons for the action were never brought to the *Ex parte* Applicants to date.



4. In the Verifying Affidavit by the 2nd *Ex parte* Applicant with the 1st *Ex parte* Applicant's authority sworn on 2/5/2024, the 2nd *Ex parte* Applicant, Sarah Kwamboka Mayieka deponed that the suit property was purchased by both *Ex parte* Applicants in 1977 and the same registered in the name of the 1st *Ex parte* Applicant on 12/9/1990. She has grown tea thereon since then. The 2nd *Ex parte* Applicant was later served with proceedings from Nyamira CM CC ELC Suit No. E014 of 2024 with Mary Kwamboka Mayieka as the Plaintiff and one Livingstone Mayieka Oriku, herself and 2 others as Defendants. That is how she came to know that her name in the Suit property had been cancelled and replaced with that of the 1st *Ex parte* Applicant.
5. In an Affidavit in response sworn on 22/5/2024, the Interested Party, Mary Kwamboka Mayieka deponed that she is the 2nd wife of the 1st *Ex parte* Applicant since January 1979 and that the second *Ex parte* Applicant is the 1st wife. She claims that the suit land was purchased in October 1979 and not 1977 from the Tea proceeds from the suit land. She also depones that the 1st *Ex parte* Applicant has been incapacitated since 2020 and could therefore not conduct any transaction upon which the 2nd *Ex parte* Applicant took advantage and the transfer of the suit land in her name was effected and a Title Deed issued to her. Consequently, the Deponent moved the Land Registrar to place a restriction over the suit property and to cancel and accordingly rectify the Register. The Land Registrar acted and reverted the land to the 1st *Ex parte* Applicant. The 1st *Ex parte* Applicant's incapacitation also made it impractical to give consent to the filing of the suit and/or authority to the 2nd *Ex parte* Applicant to swear the Verifying Affidavit, the foundation of the current suit. The Interested Party therefore urged this court to dismiss the suit herein due to uncleanliness of the 2nd *Ex parte* Applicant's hands. The Interested Party, in order to defend the incapacitation of the 1st *Ex parte* Applicant attaches to her Affidavit a copy of Discharge Summary from Moi Teaching and Referral Hospital showing that one Livingstone Mayieka was admitted in the said Hospital on 19/8/2021 and discharged on 28/8/2021. But the Discharge Invoice shows the date of discharge to be 30/8/2021 and the number of days spent in hospital as 11. Nowhere in all the medical documents is it indicated that the 1st *Ex parte* Applicant was ever incapacitated. The same also refers to a period long before the transfer of the suit property to the 2nd *Ex parte* Applicant – about 16 months earlier.
5. The Respondent never responded to the Suit.
6. The Jurisdiction invoked by the *Ex parte* Applicants herein has no interest in how the suit property was purchased or acquired, the intention of the 1st *Ex parte* Applicant nor whether the same was to remain in the name of the 1st *Ex parte* Applicant or whether the transfer to the 2nd *Ex parte* Applicant was sanctioned by the 1st *Ex parte* Applicant or not.
7. The Court is interested in the process that was used by the Respondent to have the property's registered proprietor, Sarah Kwamboka Mayieka cancelled and the same reverting of the Title to the 1st *Ex parte* Applicant. Secondly, the Court must enquire whether the Respondent had the requisite jurisdiction to cancel the Title Deed in the name of the Interested Party.
8. The Respondent has chosen to be silent. His input and production of documents to show the process would have helped this Court a great deal.
9. There are 2 issues in the matter for determination:
 - a. Whether the Respondent had powers and/or jurisdiction to act as he did?
 - b. Whether due process was followed before the Respondent, Land Registrar, Nyamira cancelled the 2nd *Ex parte* Applicant's Title?



10. Before the Court can move to determine these issues, this Court appreciates that the Respondent's action was an administrative role that the Respondent attempted to discharge. But the responsibility 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 legally and procedurally. The circumstances when Title can be cancelled or revoked have been enumerated above 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 Land 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 registered property loosely translated, basic and apparent errors or mistakes. 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 fraud or any other 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 former case where the Land Registrar has jurisdiction, the registered proprietor is issued with a 90 Days' Notice of the intention to alter the register. The Registrar must hear the Title Holder before making any cancellation or changes. The law also gives an aggrieved party a right to seek recourse in Court.
 18. In 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 Interested Party claimed that Title to the Suit land was cancelled because of fraud. She had the onus of proving the said fraud by dint of Sections 107 to 109 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 told 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 2nd 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. Did the Respondent follow the process prescribed in the Act to have the property's registered proprietor, Sarah Kwamboka Mayieka cancelled and the same reverting to the 1st Ex parte Applicant? The Respondent has chosen to be silent. One would be excused to conclude that the Interested Party must have colluded with the Land Registrar (the Respondent) to have the property transferred into the name of the 1st Ex parte Applicant. The Respondent's input and production of documents to show the process may have given the Court a different perspective. The Interested Party did not make it better. She should have at least explained how the proper procedure was followed before the actions of the Respondent. 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, then it would be easy for fraudsters to have their way in the cancellation of titles.
23. 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 Applicants that the Land Registrar in cancelling the 2nd Ex parte Applicant's Title as he did, acted outside the scope of his mandate and he had no jurisdiction to do so in total disregard of Section 79 of the Land Registration Act.
24. The upshot of the above is that the Petitioner succeeds in this Suit and is also awarded costs of the same.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 7TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Ex-parte Applicant's Counsel: Mr. Asuma

Respondent's Counsel: Ms. Opiyo

Interested party: Mr. Kimaiyo

