



Republic v Land Registrar, Nyeri County Registry & another; Markerryl Company Limited (Exparte Applicant) (Environment and Land Judicial Review Case E001 of 2024) [2025] KEELC 2928 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2024**

JO OLOLA, J

MARCH 28, 2025

IN THE MATTER OF: AN APPLICATION BY MARKERRYL COMPANY LIMITED FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS, PROHIBITION AND A DECLARATION AGAINST THE DECISION OF THE CHIEF LAND REGISTRAR IN RESPECT OF THE PROPERTIES KNOWN AS NYERI MUNICIPALITY BLOCK 1/1584, BLOCK 1/585, BLOCK 1/586 AND BLOCK 1/1302 AND IN THE MATTER OF: ARTICLES 10 (2), 35, 40, 43, 47 & 48 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT, 2012

AND

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

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, NYERI COUNTY REGISTRY 1ST RESPONDENT

ETHICS AND ANTI CORRUPTION COMMISSION 2ND RESPONDENT

AND

MARKERRYL COMPANY LIMITED EXPARTE APPLICANT



JUDGMENT

Background

1. By the Notice of Motion dated 3rd May, 2024, Markerryl Company Limited (the Ex-parte Applicant) prays for the following:
 - a. Spent;
 - b. The Honourable Court be pleased to issue, upon hearing and determination of these proceedings, Judicial Review orders as follows:
 - i. A declaration be and is hereby issued that the decision of the 1st Respondent to place the restriction on the subject properties violated Articles 10, 40 and 47 of *the Constitution* of Kenya, as read together with Section 77 of the *Land Registration Act* and the principles of natural justice;
 - ii. An order of certiorari be and is hereby issued quashing the decision of the Respondents made on 8th February, 2012 placing a restriction over the subject properties on the instruction of the 2nd Respondent;
 - iii. An order of Mandamus be and is hereby issued to the 1st Respondent to vacate, remove, lift and /or deregister the restriction placed on the subject properties on 8th February, 2012;
 - iv. An order of prohibition be and is hereby issued prohibiting and/or restraining the Respondents from placing and /or registering any further inhibitions, cautions, and/or restrictions in any manner that violates the provisions of the *Land Registration Act* 2012 and/or interfering with the Ex-Parte Applicants quiet enjoyment over the subject properties;
 - v. Any other orders that this Honourable Court may deem mete and just; and
 - c. Costs be borne by the Respondents jointly and severally.
2. The application is supported by the grounds set out on the body of the Motion as well as two Supporting Affidavits sworn by the Ex-Parte Applicant's director Viktah Maina Ngunjiri.
3. The Ex-Parte Applicant avers that it is duly registered as proprietor of all those parcels of land known as Title No. Nyeri Municipality Block 1/1584; 1585, 1586 and 1302. It further avers that the 1st Respondent placed a restriction over the said process as no notice was given prior or subsequent to the registration of the restrictions.
4. In addition, the Applicant avers that the restriction was registered without itself being given an opportunity to make representations thereon contrary to *the Constitution* and the Fair Administrative Actions Act.
5. The Ethics and Anti-Corruption Commission (the 2nd Respondent) is opposed to the application. In a Replying Affidavit sworn on 4th June, 2023 by its investigator. Esther Wambugu, the 2nd Respondent avers that there are on-going investigations concerning the said properties which are suspected to have been part of Government houses in Kimathi Estate, Nyeri.



6. It is the 2nd Respondent's Case that in the discharge of its statutory mandate under Section 11(1) of the *Ethics and Anti-Corruption Commission Act* 2011, it requested the 1st Respondent to register a restriction in the register of the subject properties pending conclusion of its investigations in order to forestall dealings which would complicate the intended recovery process.
7. The 2nd Respondent avers that preliminary investigations have revealed that the subject properties were hived off Government properties after the same were irregularly sub-divided. The 2nd Respondent denies that the registration of the said restriction has violated the Ex-Parte Applicant's Constitutional and legal rights in any way. On the contrary, the 2nd Respondent avers that the actions were taken in the public interest to safeguard the suit properties.

Analysis and Determination

8. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Applicant and the 2nd Respondent. The 1st Respondent did not file any response to the application.
9. The Ex-Parte Applicant is the registered proprietor of the parcels of land known as Nyeri Municipality Block 1/1584; 1585; 1586 and 1302 (the suit properties). It is their case that on 3rd April, 2024 while conducting routine searches on the properties, they discovered that the 1st Respondent had on 8th February, 2012 placed a restriction over the subject properties on the request of the 2nd Respondent who was said to be conducting investigations in relation to the suit properties.
10. It is the Ex-Parte Applicant's case that the said restriction was irregularly and illegally placed on the suit properties and that the same constitutes a violation of its rights under *the constitution*. Accordingly, the Applicant urges the Court to declare that the decision of the 1st Respondent to place the restriction on the suit property violates Articles 10, 40 and 47 of *the Constitution* of Kenya as read together with Sections 77 of the *Land Registration Act*. The Applicant has also urged the Court to grant an order of Certiorari to quash the said decision, an order of Mandamus compelling the 1st Respondent to remove the said restriction as well as an order of prohibition restraining the Respondents from registering any further restrictions over the subject properties.
11. The 2nd Respondent is however opposed to the grant of the said orders. It is the 2nd Respondents case that there are on-going investigations on a series of properties comprising Government houses in Kimathi Estate of Nyeri town which properties including the suit properties herein are suspected to have been alienated to private entities.
12. The 2nd Respondent asserts that sometimes in the year 2012, in the discharge of its statutory mandate under Section 11(1) of the *Ethics and Anti-Corruption Commission Act*, 2011, it did request the 1st Respondent to register a restriction in the register of the suit property pending the conclusion of its investigations regarding the circumstances under which the suit properties came to be registered in the name of the Ex-Parte Applicant.
13. It is the 2nd Respondents case that the said restrictions were placed to forestall any dealing with the suit properties in a manner that would complicate the recovery process. They aver that preliminary investigations have since revealed that the suit properties were hived off the compounds of Government houses situated in Kimathi Estate in Nyeri town.
14. The 2nd Respondent further avers that it has filed claims and counter claims for the recovery of the said parcels of land and that it is now specifically awaiting receipt of the official search and parcel file



from the Land Registry in Nairobi to enable it to complete its investigations herein. It denies that it has violated any constitutional or other legal rights of the Ex-Parte Applicant through its actions and asserts that its investigations are on course and that it is in the public interest that the orders sought by the Applicant be denied.

15. As was stated by the Court of Appeal in *Municipal Council of Mombasa v Republic and Umoja Consultants Limited* [2002] eKLR

“Judicial review is concerned with the decision making process, not with the merits of the decision 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 in making the decision the decision maker took 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 no sufficient evidence to support the decision touching on violation of fundamental rights”.

16. More recently in *Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti* [2018] eKLR, it was held that:

“ 37. The entrenchment of the power of Judicial review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of court to in such cases be guided by the purposes values, and principles of *the constitution* and the constitutional dictate to develop the law on that front. First, parties who were once denied judicial review on the basis of the public – private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his right. Second, the right to access the court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the Court ...

38. Third, an order of Judicial review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3) (f). Fourth, Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with Section 8 or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7(2) of the Act provides for grounds for applying for Judicial Review. Fifth, Article 159 Commands courts to administer justice without undue regard to procedural technicalities.”

17. In the matter before me, it was not in dispute that the Ex-parte Applicant was registered as the proprietor of the suit properties on 30th May, 2011. According to the 2nd Respondent, about a year later in 2012, in the discharge of its statutory mandate, it did request the 1st Respondent to register a restriction in the register of the suit properties pending conclusion of investigations it had launched in regard to the circumstances under which the Applicant came to be registered as proprietor of the suit properties.



18. It was not in dispute that the Land Registrar had the power to register a restriction on a parcel of land. In that respect, Section 76(1) of the [Land Registration Act](#) provides as follows:

“(1) 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.”

19. Arising from the foregoing, it was apparent that the law places a duty on the Registrar to issue notices and to conduct some preliminary inquiries prior to the registration of the restriction. While the wording of the said section 76(1) of the [Land Registration Act](#) does not place a mandatory duty on the Registrar to give notices to the persons the Registrar may consider fit to receive them, the Registrar does not have such discretion when it comes to the proprietors that are to be affected by the restriction. In this respect, Section 77 of the Act provides as follows:

“77. Notice and effect of restriction.

1. The Registrar shall give notices, in writing, of a restriction to the proprietor affected by the restriction.
2. An instrument that is inconsistent with a restriction shall not be registered while the restriction is still registered except by order of the court or of the Registrar.”

20. That being the case, it was clear to me that in registering a restriction, the law required the Land Registrar concerned to inform the person who was to be affected by the restriction in writing. Given the effects of a restriction on how a proprietor would thereafter deal with his/her property, it was also clear to me that the principles enunciated under Article 47 of [the Constitution](#) should apply at the point in time of the registration of the restriction. The said Article provides as follows:

“47. Fair administrative action:

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.
3.”

21. In the matter before me, the Exparte Applicant has asserted that they have to date, more than 12 years after the restriction was registered on their land, not been given any notice of the same. That assertion has not been contested by either of the Respondents and the only inference one can make is that no notice was issued as stated by the Applicant.



22. According to the 2nd Respondent, it had placed the restriction on the suit properties in the discharge of its mandate as provided under section 11(1) (j) of the [Ethics and Anti-Corruption Commission Act](#). The said section simply provides as follows:

“In addition to the functions of the Commission under Article 252 and Chapter Six of [the Constitution](#), the Commission shall:

- i. Institute and conduct proceedings in court for purposes of recovery or protection of public property or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payments of compensation or other punitive and disciplinary measures.”

23. As it were, that provision neither ousted the mandatory provisions of Section 77 of the [Land Registration Act](#) nor did it limit the requirements of due process. As was stated in *Accounting Officer Kenya Ports Authority v Public Procurement Administrative Review Board and 3 Others* [2019] eKLR.

“...It is irrelevant whether the Tribunal would have arrived at the same decision even if it has afforded the parties an opportunity of being heard before making its decision. It must always be remembered that where a party has a right to be heard that right cannot be taken away by the mere fact that the Tribunal considers that the said party’s contribution is unlikely to affect the decision. See *Onyango Oloo v Attorney General* [1986-1989] EA 456:

“the principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard ... There is a presumption in the interpretation of the statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice ... A decision in breach of the rules of natural justice is not cured by holding that the decisions would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at Denial of the right to be heard renders any decision made null and void ab initio.”

24. It was also apparent that when the Applicant came to learn of the restriction, they wrote a letter to the Respondents herein dated 8th April, 2024 seeking for the removal of the restriction. It is the Applicant’s case that the 1st Respondent has to-date failed to act upon and/or respond to the said request. It is to be noted that the removal of a restriction is provided for under Section 78(1) of the [Land Registration Act](#) as follows:

“78. Removal and variation of restrictions.

- (1) The Registrar may, at any time and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction.”

25. Arising from the foregoing, it was again clear to me that upon receipt of the Applicant’s letter, it was incumbent upon the Land Registrar to conduct a hearing to give all the parties affected by the restrictions an opportunity of being heard and thereafter order the removal or variation or retention of the restriction. By failing to notify the Applicant of the imposition of the restriction and again failing to hear them when they applied for its removal, the 1st Respondent acted illegally and failed to



comply with the mandatory provisions prescribed by the empowering statute law to the detriment of the Applicant.

26. It follows that I am persuaded that there is merit in the Motion dated 3rd May, 2024. I allow the same and hereby make the following orders:
- a. A declaration is hereby issued that the decision of the 1st Respondent to place the restriction on the subject properties violated Articles 10, 40 and 47 of *the Constitution* as read together with Section 77 of the *Land Registration Act* and the Principles of Natural Justice.
 - b. An order of certiorari is hereby issued quashing the decision of the Respondents made on 8th February 2012 placing a restriction over the subject properties.
 - c. An order of mandamus is hereby issued directing the 1st Respondent to remove, vacate and/or deregister the restriction placed on the subject properties on 8th February 2012.
 - d. An order of prohibition is hereby issued restricting the Respondents from placing and/or registering any further inhibitions, cautions and/or restrictions over the subject properties in any manner that violates the provisions of the *Land Registration Act*, 2012.

27. The Ex-Parte Applicant shall have the costs of this suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 28TH DAY OF MARCH, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Wanjohi Advocate for the Ex-parte Applicant
- c. No appearance for the 1st Respondent
- d. Mr. Ayoo for the 2nd Respondent

