



Republic v Commissioner of Lands & another; Nguyo (Exparte Applicant); Mulwa (Interested Party) (Judicial Review Application E006 of 2022) [2023] KEELC 16508 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION E006 OF 2022
A NYUKURI, J
MARCH 22, 2023
IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS
AND
IN THE MATTER OF KINGI NZIOKI NGUYO
AND
IN THE MATTER OF TRANSFER OF LAND PARCEL NUMBER
MACHAKOS/MUA HILLS/203 FROM KINGI NZIOKI NGUYO
AND JOHN MULWA NZIOKI TO BERNARD MUTINDA MULWA**

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER OF LANDS 1ST RESPONDENT

LAND REGISTRAR, MACHAKOS 2ND RESPONDENT

AND

KINGI NZIOKI NGUYO EXPARTE APPLICANT

AND

BERNARD MUTINDA MULWA INTERESTED PARTY



JUDGMENT

Introduction

1. By a substantive Notice of Motion dated 28th May 2022 filed pursuant to leave of court granted on 18th May 2022, the *Exparte* Applicant sought the following Judicial Review orders;
 - a. That orders of *Mandamus* do issue to the Land Registrar, Machakos County to supply to the *Exparte* Applicant with;
 - i. Certified copies of the duly filled application for consent of Land Control Board to transfer Land Parcel Registration Number MAchakos/mua Hills/203, allegedly executed by Kingi Nzioki Nguyo and John Mulwa Nzioki in favour of Bernard Mulwa Nzioki which application led to entry No. 4 in the register for Machakos/mua Hills/203.
 - ii. A certified copy of duly filled out form of Transfer of Land for Land Parcel Number Machakos/mua Hills/203 allegedly executed by Kingi Nzioki Nguyo and John Mulwa Nzioki in favour of Bernard Mulwa Nzioki which led to the disposition of interest exhibited as entry No. 4 dated 13th November 2017 in the register for Machakos/mua Hills/203.
 - b. That the costs of this application be paid by the Respondents.
2. The application was premised on the grounds on its face and the supporting affidavit sworn by Kingi Nzioki Nguyo, the *Exparte* Applicant. The Applicant's case is that the Applicant and one John Mulwa Nzioki were allottees of land in Mua Settlement Scheme by the Settlement Fund Trustees measuring 5.8 Hectares and have been in possession of the said land since 1960. Further, that on 7th July 2017, the Settlement Fund Trustees executed a discharge of charge in favour of the Applicant and John Mulwa Nzioki, which discharge of charge was registered on 16th October 2017 culminating in the Applicant and John Mulwa Nzioki to be registered as tenants in common of all that parcel of land known as Machakos/mua Hills/203 (suit property) in equal undivided shares.
3. The Applicant averred that thereafter, Bernard Mutinda Mulwa, the Interested Party herein and who is the son of John Mulwa Nzioki was illegally and unprocedurally issued with title to the suit property. That the said transfer provoked the Applicant to file ELC CMCC NO. 4 of 2018 Kingi Nzioki Nguyo v. John Mulwa Nzioki and Bernard Mutinda Mulwa, seeking cancellation of the title issued to Bernard Mutinda Mulwa on grounds that the same was obtained by fraud. That the said suit was transferred to this court for hearing and determination when the Chief Magistrates Court held that it had no jurisdiction to hear and determine the matter.
4. The Applicant maintained that the Land Registrar Machakos County was in possession of duplicate copies of original application for consent of Land Control Board to transfer suit property which led to entry No. 4 dated 13th November 2017 on the register by virtue of the duty ascribed to her under Section 9 and 10 of the [Land Registration Act](#) and that she was also in possession of duplicate copies of the original filled out form for transfer of land, for the suit property allegedly executed by Kingi Nzioki Nguyo and John Mulwa Nzioki in favour of the Interested Party that led to the disposition of his interest in the suit property shown in entry No. 4 dated 13th November 2017 by virtue of her duty under Sections 9 and 10 of the [Land Registration Act](#).



5. It was the Applicant's assertion that he needed the two documents so as to have them subjected to a document examiner/handwriting expert with a view to establish if the same were signed by him, for purposes of using the said evidence in the civil suit stated hereinabove. He produced a copy of the green card for the suit property, plaint in ELC CMC No. 4 of 2018 and a letter dated 24th June 2019 to the Land Registrar Machakos seeking documents sought in this application.
6. The Attorney General entered appearance for the Respondents and on 8th November 2022, counsel for the Respondents informed court that he did not wish to oppose the application, and therefore did not file any response to the application.
7. The Interested Party filed a replying affidavit sworn on 4th July 2022 by himself. It was his case that the *Exparte* Applicant and his father one John Mulwa Nzioki are brothers and that the suit property was purchased by his father and registered in the *Exparte* Applicant's names on account of the reason that his father was already a member of Lukenya Ranching and Farming Society Limited and could not be allowed to be a member of two schemes.
8. He stated that the suit property was purchased through a loan and the Applicant and the Interested Party's father John Mulwa Nzioki agreed to contribute in the payment of the loan but that the Applicant was unable to pay part of the loan, which led to him selling his share to the Interested Party on 4th February 1989; on agreement that the Interested Party pays the loan balance of Kshs. 25,000/- and that he also pays the *Exparte* Applicant Kshs. 88,000/- being the agreed purchase price of the Applicant's share in the suit property.
9. He stated that he paid the balance of the loan on behalf of the *Exparte* Applicant and when his father paid his part of the loan, the two applied for consent to be registered as proprietors of the suit property. He stated that the Applicant's interest in the land was extinguished on repayment of the loan. That later, the Interested Party's father gave the Interested Party his share and the two registered proprietors transferred the suit property to the Interested Party. He stated that the Applicant had sought for similar orders in CMC ELC No. 4 of 2018 but the same was dismissed.
10. He maintained that he had been in occupation of the suit property since 1989 and that the Applicant has not met the conditions for grant of orders of mandamus. To support his case, the Interested Party attached a copy of the agreement between him and the *Exparte* Applicant, receipts for payment at the Settlement Fund Trustees undated application for consent from the *Exparte* Applicant to John Mulwa Nzioki seeking to jointly own the suit property with John Mulwa Nzioki; letter of consent from the District Commissioner dated 30th May 1989 for transfer of land from Kingi Nzioki Nguyo to Kingi Nzioki Nguyo and John Mulwa Nzioki; incomplete undated application for consent from Kingi Nguyo Nzioki and John Mulwa Nzioki for consent to transfer the suit property to Bernard Mutinda Mulwa; letter of consent dated 3rd November 2017 from the Central Land Control Board for transfer of land from Kingi Nzioki Nguyo and John Mulwa Nzioki to Bernard Mutinda Mulwa; as well as application for registration dated 16th October 2017.
11. The application was disposed by way of written submissions. On record are the *Exparte* Applicant's submissions dated 26th July 2022 and the Interested Party's submissions dated 8th August 2022.

Exparte Applicant's Submissions

12. Counsel for the *Exparte* Applicant submitted that the *Exparte* Applicant had met the conditions for grant of a writ of Mandamus to be issued and stated the seven factors which must be present that is;
 - i. There must be a public legal duty to act.



- ii. The duty must be owed to the applicant
 - iii. There must be a clear right to the performance of that duty, meaning that;
 - a. The applicant has satisfied all conditions precedent.
 - b. There must have been –
 - 1. Prior demand,
 - 2. A reasonable time to comply with the demand, unless there was outright refusal,
 - 3. An express refusal or an implied refusal through unreasonable delay.
 - iv. No other adequate remedy is available to the Applicant.
 - v. The order sought must be of some practical value or effect.
 - vi. There is no equitable bar to the relief sought.
 - vii. On a balance of convenience, mandamus should lie.
13. Reliance was placed on Sections 9, 10 and 12 of the [Land Registration Act](#) to argue that Mandamus should issue as sought in accordance with the provisions of Articles 35 and 48 of the [Constitution](#) which respectively protect the right to access to information and access to justice. Counsel urged that the transfer of the suit property to the Interested Party was fraudulent which led to him filing ELC CMCC No. 4 of 2018 and that having wrote to the Land Registrar Machakos to give him the documents that resulted in entry No. 4 on the register, without any response, the only option was to seek the orders herein to enable him pursue his suit.
14. According to counsel, the replying affidavit filed herein by the Interested Party is misplaced and does not address the issue before court. It was counsel’s view that the matter raised in the replying affidavit ought to be raised in the suit filed by the Applicant in ELC CMCC No. 4 of 2018.

Interested Party’s Submissions

15. Counsel for the Interested Party submitted that the Exparte Applicant did not inform court that he made a request to be supplied with the documents sought but that the request was declined by the Registrar. Counsel referred to the case of [Republic v. Kenya National Examinations Council Exparte Gathenji & Others](#) [1997] eKLR, for the proposition that an order of Mandamus compels the performance of a public duty imposed on a person or body of persons by statute but the person has failed to perform their duty. Further reliance was placed on the case of [Shah v. Attorney General](#) (NO 3) [1970] EA 543, 549, for the proposition that an order of Mandamus shall not issue as a matter of course but can only be issued where a specific act by law required to be done has been omitted and that therefore courts should be cautious not to interfere with the management of the Executive Department of Government.

Analysis and Determination

16. Having carefully considered the Notice of Motion and the response filed by the Interested Party, the sole issue that arise for determination is whether the Exparte Applicant is deserving of the orders of Mandamus as sought in the Motion.



17. Orders of Mandamus which are Judicial Review orders are now reliefs made available by Article 23 (3) (f) of the Constitution as a Constitutional supervision of power meant to safeguard Constitutional principles, values and purposes. An order of Mandamus is a discretionary remedy issued to compel performance of a duty by a person or body of persons who has failed to perform a duty, where the Applicant has a legal right to expect the duty to be performed.
18. The Black's Law Dictionary, 11th Edition, defines *Mandamus* as follows;
(Latin “we command”) A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act.
19. In the case of Republic v. Principal Secretary, Ministry of Internal Security & Another Exparte Schon Noorani & Another [2018] eKLR, at paragraph 29, the court in adopting the reasoning in *Apotex Inc v. Canada (Attorney General)* 1993 Can L11 3004 (F.C.A) [1994] I.F.C 742 (C.A) aff'd 1994 Can LL47, (S.C.C) [1994] 3 S.C.R 1100 and *Dragan v. Canada (Minister of Citizenship and Immigration)* 2003 FCT 211 (Can L11) [2003] 4. F. C 189 (T.D) aff'd 2003 FCA 233 (Can L11) 2003 FCA 233), set out the following seven factors which must be demonstrated for the writ of mandamus to issue.
- i. There must be a public legal duty to act;
 - ii. The duty must be owed to the Applicants;
 - iii. There must be a clear right to the performance of that duty, meaning that;
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been;
 1. A prior demand for performance;
 2. A reasonable time to comply with the demand, unless there was outright refusal; and
 3. An express refusal or an implied refusal through unreasonable delay;
 - iv. No other adequate remedy is available to the Applicants.
 - v. The order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought.
 - vii. On a balance of convenience, mandamus should lie.
20. Essentially therefore, for an Applicant to obtain *Mandamus*, which is a discretionary and equitable remedy, they are obligated to demonstrate that the Respondent has a legal duty owed to the Applicant to perform, which they have failed to perform despite demand; no other adequate remedy exists for the Applicants and the balance of convenience lies in favour of grant of mandamus.
21. In the instant suit, the Exparte Applicant relied on Sections 9, 10 and 12 of the Land Registration Act to argue that the Land Registrar Machakos owed him a duty to furnish him with copies of application for consent of the Land Control Board and the transfer of land from the Applicant and his co-tenant in common to the Interested Party. He states that he has filed ELC CMCC No. 4 of 2018 seeking cancellation of the Interested Party's registration of the suit property on grounds of fraud. In paragraph 6 of the supporting affidavit, the Exparte Applicant was categorical that he has never executed any instrument in disposition of his interest in the suit property transferring the same to the Interested



Party or to anyone else. He stated that he needed the documents sought to subject them to examination by a document examiner and handwriting expert.

22. The statutory provisions relied upon by the *Exparte* Applicant are Sections 9, 10 and 12 of the [Land Registration Act](#). Section 9 of the [Land Registration Act](#) provides as follows;

1. The Registrar shall maintain the register and any document required to be kept under this [Act](#) in a secure, accessible and reliable format including –
 - a. Publications, or any matter written, expressed, or inscribed on any substance by means of letters, figures or marks, or by more than one of those means, that may be used for the purpose of recording that matter;
 - b. Electronic files; and
 - c. An integrated land resource register.

Section 10 provides for access to the register as follows;

Subject to the [Constitution](#) and any other law regarding freedom of and access to information, the Registrar shall make information in the register accessible to the public by electronic means or any other means as the Chief Land Registrar may reasonably prescribe.

Section 12 provides for appointment of Land Registrar and other officers.

23. Therefore, the issue is whether the Land Registrar Machakos under the law owes the *Exparte* Applicant, the duty to supply him with certified copies of application for consent of the Land Control Board and transfer forms that culminated in the registration of the Interested Party as the registered proprietor of the suit property. While the Land Registrar Machakos did not file any response in opposition to the application, the response by the Interested Party that the suit property was lawfully transferred to him does not address the issues herein as it only addressed the merits of Machakos ELC No. 4 of 2018 which is a claim for the suit property on grounds that the Interested Party's registration thereof was by fraud.

24. On whether the Land Registrar owes the Applicant the duty to supply him the application for consent from the Land Control Board, Section 8 of the [Land Control Act](#) Cap 302 Laws of Kenya provides for application for consent as follows;

1. An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate Land Control Board within six months of the making of the agreement for the controlled transaction by any party thereto; provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any as it may think fit.
2. The Land Control Board shall either give or refuse its consent to the controlled transaction and, subject to any right of approval conferred by this Act, its decision shall be final and conclusive and shall not be questioned in any court.

25. Therefore, applications for consent of the Land Control Board are submitted to the relevant Land Control Board, for purposes of obtaining the consent for transfer. Although the Applicant has sought to be supplied with application for consent of the Land Control Board from the Land Registrar, he has not demonstrated that the Land Registrar is in possession of the same as the application is submitted to the Land Control Board and not the Land Registrar. This court will not issue orders in vain, and therefore declines to grant the same.



26. On whether the Land Registrar should supply the transfer to the *Exparte* Applicant, Section 37 of the [Land Registration Act](#) provides for the requirements for transfer as follows;
1. A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
 2. A transfer shall be completed by –
 - a. filing the instrument; and
 - b. registration of the transferee as a proprietor of the land, lease or charge.
27. An instrument of disposition of land can only take effect upon registration. Section 43 of the [Land Registration Act](#) provides as follows;
1. Every instrument affecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
 2. No instrument affecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.
28. It therefore follows that a transfer of title which is the mandate of the Land Registrar cannot be effected without a duly filled transfer form in the prescribed form and a transfer can only take effect upon registration of the instrument of transfer. The fact that the suit property was transferred to the Interested Party on 13th November 2017 is not in dispute. The Applicant's position is that he never executed any transfer instrument and demands that the instrument relied upon by the Land Registrar to effect the transfer as noted in entry number 4 of the register be supplied to him. Since Section 9 of the [Land Registration Act](#) No. 3 of 2012 requires the Land Registrar to maintain documents used in the registration of the title herein, he owes the *Exparte* Applicant the duty to avail documents upon which entry number 4 in the register was made, upon demand.
29. The Applicant attached annexure KNN2 being a letter to the Land Registrar Machakos dated 24th June 2019 whereof through his advocate, the *Exparte* Applicant sought for the documents sought herein, yet no response was given. The Land Registrar did not deny receiving the demand letter. While the demand was made in 2019, this suit was commenced in July 2020 when leave to seek for Judicial Review was filed and subsequently upon grant of leave being made, the substantive application herein was filed on 3rd June 2022. In my view therefore, a reasonable time to comply had been availed to the Land Registrar but she failed to comply.
30. Under Article 35 of the [Constitution](#), every citizen has a right of access to information held by the state or another person which is required for the exercise or protection of any right or fundamental freedom.
31. The Applicant has stated, which is not disputed by the Interested Party that ELC CMCC No. 4 of 2018 is pending hearing and determination, which suit he seeks to protect his right to property in respect of the suit property. That he needs the evidence of the instrument used in the transfer of his property to the Interested Party to demonstrate that the transfer was fraudulent. In my view therefore, as the transfer instrument registered by the Land Registrar to pass the suit property to the Interested Party is necessary document to enable the *Exparte* Applicant enforce his proprietary interests, the Land Registrar ought to be compelled to supply the same to the Applicant as there is no equitable bar to that relief and the balance of convenience tilts in favour of grant of *Mandamus*.



32. Although the *Exparte* Applicant sued the Commissioner of Lands as the 1st Respondent, I note that under the 2010 Constitution that office is no longer in existence. In any event, no allegations or claims were made against the 1st Respondent. In the premises, the suit as against the 1st Respondent is struck out.
33. In the premises, I find and hold that the *Exparte* Applicant has proved his claim as against the 2nd Respondent, namely; the Registrar of Lands Machakos on the required standard and I enter judgment for the *Exparte* Applicant as against the 2nd Respondent as follows;
- a. An order of *Mandamus* be and is hereby issued to the Land Registrar Machakos County compelling him/her to supply to the *Exparte* Applicant with a certified copy of the duly filled out form for transfer of land for Land Parcel Number Machakos Mua Hills/203 allegedly executed by Kingi Nzioki Nguyo and John Mulwa Nzioki in favour of Bernard Mulwa Nzioki which led to the disposition of interest exhibited as entry No. 4 dated 13th November 2017 in the Register for Machakos/Mua Hills/203.
 - b. The costs of the suit shall be borne by the 2nd Respondent.
34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Mbindyo for Applicant

Ms Nzili holding brief for Mr. Munyao for Interested Party

No appearance for Respondent

Ms Josephine – Court assistant

