



**Republic v National Land Commission; Wainaina & another  
(Exparte Applicants) (Judicial Review Miscellaneous Application  
E048 of 2022) [2023] KEELC 17440 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E048 OF 2022**

**JG KEMEL, J  
MAY 11, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**AND**

**DOMINIC MBUGUA WAINAINA ..... EXPARTE APPLICANT**

**JANNEFFER WANJIRU KAMUTI ..... EXPARTE APPLICANT**

**JUDGMENT**

**The Application**

1. The exparte applicants are the decree holders in ELC No Petition No 10 of 2018 - Dominic Mbugua Wainaina & anor vs The National Land Commission where Judgment was rendered on the 25/10/2019 in their favour against the National Land Commission, the Respondent herein. In this Judgement the exparte applicants were awarded damages in the sum of Kshs 800,000/- together with party and party costs in the sum of Kshs 280,754.40 making the total payable in the sum of Kshs1,080,754.40
2. The exparte applicants have brought this Application by way of Notice of Motion dated the 1/8/2022 seeking the following orders;
  - a. That the court be pleased to issue an order ofMandamus directed to the Secretary of the Respondent as its accounting officer compelling him /her to pay the Exparte Applicants herein the decretal sum of Kshs 1,080,754.40 in ELC pet No 10 of 2018- Dominic Mbugua Wainaina & anor vs The National Land Commission



- b. That the court be pleased to grant such further orders that it may deem just and expedient in the circumstances.
3. The Application is premised on the grounds annexed thereto and the supporting affidavit of Dominic Mbugua Wainaina sworn on the 1/8/2022. The deponent recounted the Judgement in ELC PET 10 of 2018 in which Judgement was given in their favour. The Court awarded them Kshs 800,000/- as exemplary and general damages for violation of their constitutional rights. Party and party costs were also taxed in their favour. A copy of the Judgement decree and certificate of costs were annexed thereto.
4. On the 16/7/2021 a Certificate of Order against the Government at the sum of Kshs 1,080,754.40 was duly issued in their favour. Despite service of the same on the 30/5/2022, the respondent has failed and refused to settle the decretal amount thus occasioning them financial loss, he averred.
5. The applicant deponed that the Secretary of the respondent has a statutory duty and obligation under section 20(4) of the National Land Commission as its accounting officer to discharge liabilities and debts of the Respondent. No appeal has been preferred or stay of execution of the Court decree.
6. He argued that the respondent in failing to settle the decretal amount acted in bad faith unreasonable and in violation of the law and their legitimate expectation that the respondent will settle the decretal amount. Refusal to settle the decretal amounts to breach of its duty and principles of Fair Administrative Action.
7. The applicant urged the court to grant their prayers arguing that this is the only way to realize the fruits of their Judgment.
8. Despite service the respondent did not file any response to the Application.

### **The written submissions**

9. The Application was canvassed through written submissions. The firm of Kimani Wanjohi Muli & Co. Advocates filed written submissions on behalf of the Ex parte Applicants.
10. The applicants submitted and reiterated the contents of the Application and the supporting affidavit.
11. As to whether the respondent is under a public duty and obligations to satisfy the court decree and order of costs issued in favour of the applicant in the Judgement, the ex parte applicants submitted that it is common ground that the respondent is a state department and thus no execution for attachment of assets can issue and the only recourse available is the writ of Mandamus to compel the respondent's Secretary as its accounting officer to satisfy the Court Judgement and decree.
12. That the respondent is established under article 67 of the *Constitution* of Kenya as an independent commission to inter alia manage public land on behalf of the National and County Governments and therefore performs both a statutory and constitutional function and thus execution process against it must follow the laid down procedure under section 21 of the *Government Proceedings Act*
13. Finally, the court was urged to grant the Application with costs.

### **Determination**

14. The key issue for determination is whether the Application is merited.
15. It is not in dispute that the applicants were granted Judgement in ELC Pet. 10 of 2018 against the respondent.
16. On the 4/2/2020 the decree was extracted as follows;



1. That a declaration be and is hereby issued that the act of revocation of the Petitioners parcel Nos Muguga/Gitaru/1745 and 1746 is a gross violation of their constitutional rights to private property and infringement of their protection afforded by article 40 of the Constitution and is an abrogation of the right to fair administrative action as enshrined by article 47 of the Constitution.
2. That a declaration be and is hereby issued that the Respondents have no right in law to interfere with the Petitioners private property without following due process of law as set out in article 40, 47 and 60 of the Constitution 2010 as well as section 14 of the National Land Commission Act No. 5 of 2012.
3. That an order be and is hereby issued declaring the acts of the 1<sup>st</sup> respondent purporting to revoke the petitioners titles unconstitutional, null and void ab initio.
4. That an order be and is hereby issued directing the 2<sup>nd</sup> respondent to rectify all relevant records and restore the petitioners as the lawful owners of land parcel Nos. Muguga/Gitaru/1745 and 1746 respectively.
5. That an order of mandatory injunction be and is hereby issued injunctioning the respondents, their agents employees or servants from purporting to interfere with the Petitioners lawful property.
6. That a declaration be and is hereby issued that the Respondents are liable to compensate the petitioners for the unlawful revocation of their property, illegal deprivation of their proprietary interest rights by the 1<sup>st</sup> respondent.
7. That a declaration is made that the respondents are liable to compensate the Petitioners in general damages for infringement of their rights to Fair Administrative Action as enshrined at article 47 of the Constitution.
8. That an order for exemplary and aggravated damages be and is hereby issued against the 1<sup>st</sup> respondent for maliciously trampling down upon the constitutional rights of the Petitioners again and again with impunity.
9. That the petitioners are each awarded Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) as general damages for infringement of their rights.
10. That each petitioner is awarded an exemplary damage Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-).

That the petitioners are awarded the costs of these proceedings.”

17. On the 16/7/2021 the Certificate of Order against the Government was issued under Order 29 Rules of the Civil Procedure Rules as follows;

“Certificate of order against the government (Under Order 29 Rules 3 of the Civil Procedure Rules)

“By a Judgment and Decree of this court dated October 25, 2019, it was adjudged and ordered that:

It Is Hereby Ordered:



That the 1<sup>st</sup> respondent herein in this suit do pay each Petitioner the sum of KES. 200,000/- as general damages, a sum of KES. 200,000/- each as exemplary damages and Party and Party costs at KES 280,754.40 taxed on 11<sup>th</sup> May 2021.

I Hereby Certify:

That the amount payable to the Petitioners by the Respondents in pursuance of the said Decree have been assessed and certified as KES 1,080,754.40 as set out below:

Particulars

- a. General damages at 200,000\*2 at KES 400,000.00
- b. Exemplary damages 200,000\*2 at KES 400,000.00
- c. Costs at KES 280,754.40

Total KES 1,080,754.40

Given under my HAND and SEAL of this honourable court this 16<sup>th</sup> day of July 2021.

Issued at thika this 16<sup>th</sup> day of July 2021.

The Deputy Registrar

Environment And Land Court At Thika.”

- 18. On the 18/5/2022 a demand was sent in writing to the Secretary of the National Land Commission and copied to the Hon Attorney General giving 21 days to pay the decretal amount of Kshs 1,080,754.40 as set out in the Certificate of Orders issued on the 16/7/2021
- 19. The ex parte applicant's Application has not been controverted despite service.
- 20. Black's Law Dictionary defines Mandamus as ;-

“A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act.”

- 21. It was held in *Republic v The Commissioner of Lands & another ex-parte Kithinji Murugu M'agere*, Nairobi High Court Misc. Application No. 395 of 2012 that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms.
- 22. In the case of *Vivo Energy Limited (Formerly known as Kenya Shell Limited) v National Land Commission* [2020]eKLR the court stated as follows:-

“... Execution proceedings against a government or public authority can thus only be as against the accounting officer or chief officer of the said government or authority, who is under a statutory duty to satisfy a Judgment made by the court against that body. This was also the holding in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (2012) where J. Githua held as follows:-

‘In ordinary circumstances, once a Judgment has been entered in a Civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled



to execute for the decretal amount even on the following day. When the Government is sued in a Civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a Judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property / goods under section 21(4) of the [Government Proceedings Act](#). The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the [Government Proceedings Act](#) (hereinafter referred to as the Act) which provides that payment will be based on a Certificate of Costs obtained by the successful litigant from the Court issuing the decree which should be served on the Hon. Attorney General. The Certificate of Order against the Government should be issued by the Court after expiration of 21 days after entry of Judgment. Once the Certificate of Order against the Government is served on the Hon. Attorney General. Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.” Emphasis added.

23. The Court was not addressed on the issue whether the National Land Commission is subject to section 21 of [Civil Procedure Act](#) by either of the parties. Be that as it may, the National Land Commission is a creature of the [Constitution](#). It is created under article 250 of the [Constitution](#) of Kenya and provides for the appointment of the Secretary to each commission who shall be appointed by the Commission and the chief executive of the Commission.
24. Article 67 of the [Constitution](#) of Kenya creates the National Land Commission for the purpose of inter alia advise the national Government on land policies and to manage public land on behalf of the county and the National government.
25. Section 20 (3) and (4) of the [National Land Commission Act](#) provides for the office and appointment of the Secretary of the Commission who shall be the accounting officer of the commission and responsible for the discharge of the duties of the commission. It states as follows;

- “(3) The secretary shall—
- (a) be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission;
  - (b) serve on such terms and conditions as the Commission may determine; and
  - (c) before, assuming office, take and subscribe to the oath or affirmation of office set out in the Second Schedule.
- (4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for—
- (a) all income and expenditure of the Commission;
  - (b) all assets and the discharge of all liabilities of the Commission;
- and



(c) the proper and diligent implementation of Part IV of this Act.”

26. The court in ELC PET 10 of 2019 - Dominic Mbugua Wainaina & anor v The National Land Commission held that the actions of the respondent were in contravention of the Constitution in cancelling the titles of the Applicants contrary to the law and awarded the Applicants exemplary and general damages in the sum of Kshs 800,000/-
27. Even if I am wrong on the issue as to whether or not the assets of an independent Commission are protected from execution, my views are that:- the Accounting Officer of National Land Commission has a legal and statutory duty to settle debts from public funds allocated to the Commission; even as an independent Commission it has a legal duty to satisfy its legal liabilities which are due; Section 3 of National Land Commission clothes the National Land Commission with capacity to undertake proceedings; it has corporate personality to sue and to be sued; Failure to pay the Applicant of the decretal amount would amount to a dereliction of public duty.
28. For the reasons above, the court is satisfied that arising out of the decree a duty was created in which the obligation to satisfy the decree of the court fell on the Secretary of the National Land Commission. The applicants have demonstrated that they have followed the law and issued the necessary notices but the respondent has blatantly ignored the same.
29. The court is therefore satisfied that the Application merits the orders sought.

**Final orders for disposal;**

30. The Application dated the 1/8/2022 is merited. I grant the following orders;
  - a. That I hereby issue an order of Mandamus directed to the Secretary of the respondent as its accounting officer compelling him /her to pay the exparte applicants herein the decretal sum of Kshs 1,080,754.40 in the case of ELC Pet. No 10 of 2018 - Dominic Mbugua Wainaina & anor vs The National Land Commission.
  - b. Costs at the discretion of the court. I note that the respondent was duly served with the Certificate of Costs and there is no evidence that the respondent took action to satisfy the decretal amount forcing the applicants to file the Application which perhaps was not necessary.
  - c. In the forgoing I make orders for costs in favour of the applicant payable by the respondent.
31. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11<sup>TH</sup> DAY OF MAY, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Ms Njunge HB Kimathi for Applicant

Respondent – Absent

Court Assistants – Kevin/Lilian

