



**Kahiro (Suing as the Legal Administrator of the Estate of Michael Kahiro Macharia) v
Land Adjudication and Settlement Officer, Nakuru & 2 others (Environment and Land
Judicial Review Case E4 of 2023) [2023] KEELC 19113 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E4 OF 2023**

**A OMBWAYO, J
JULY 28, 2023**

BETWEEN

**JOICE WANGARI KAHIRO (SUING AS THE LEGAL ADMINISTRATOR OF
THE ESTATE OF MICHAEL KAHIRO MACHARIA) APPLICANT**

AND

**LAND ADJUDICATION AND SETTLEMENT OFFICER, NAKURU 1ST
RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 2ND
RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The *ex parte* applicant Joice Wangari Kahiro has come to court as the administrator of the estate of Michael Kahiro Macharia against the respondent by way of notice of motion dated 17th April 2023 seeking judicial review orders of *mandamus* thus that this honorable court be pleased to issue orders of *mandamus* compelling the 1st and 2nd Respondents herein to give effect to the orders of this Honorable Court as issued and decreed on 24 June, 2011. That costs of this application be provided for. The judicial review application is premised on the facts that the suit herein is on the premise of disputed ownership over Plot no 133 Solai Settlement Scheme, that had been referred to the ministerial probe committee in . 1990 and finding delivered therein in 1994, declaring the suit property be divided into 133A and 133 B, to be occupied by both parties. That a further suit was instituted on the premise of a dispute over land ownership of Plot No.133 Solai Settlement Scheme, in a suit serialized as Nakuru HCC No. 181 of 2006 where the court directed that the deceased herein was the rightful owner of plot no. 133 as per the judgment delivered and the Plaintiff therein (in Nakuru HCC No. 181 Of 2006) to



occupy plot no. 139 as issued. The court on June, 2011, directed that titles be issued on the basis of the earlier sub-division by the department of settlement.

2. I have considered the application and the submission on record and do find that there is a judgment and a decree of the court that should be enforced by the respondents. There has been a demand that the respondent comply with the court order but they have refused or neglected. The judicial review order of *mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schen Noorani & another* [2018] eKLR quoted with authority *Apotex Inc. v Canada (Attorney General)*, and, was also discussed in *Dragan v Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:-

- 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:
The Applicants have satisfied all conditions precedent; and
There must have been:
I prior demand for performance;
 - (ii). A reasonable time to comply with the demand, unless there was outright refusal; and
 - (iii) 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.

7. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. A succinct understanding of an order of *mandamus*, therefore is premised on an existing public duty, where the fulfillment of the same is yet to be achieved due to delay or an ignorance of the orders or directions bestowed upon the public office. In our case, we stress that the *Ex-parte* Applicant has followed due process and their claim is based on a duty owed but yet to be fulfilled. The Court in *Republic v County Secretary Narok County Government & another Ex parte SEC & M Company Limited* (2021 eKLR quoted with authority the case of *Republic v The Attorney General & Another Ex parte James Alfred Koros* (2013) (2012) eKLR which held as follows;

“...in the present case the *ex parte* applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done he will forever be left baby-sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the *Constitution* which enjoins the State to ensure access to justice



for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgment have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. "

8. The applicant has satisfied this court that judgment was made and decree issued and that a demand has been made to the respondents to comply without success and therefore I do hereby grant judicial review orders of *mandamus* compelling the 1st and 2nd Respondents herein to give effect to the orders of this Honorable Court as issued and decreed on 24 June, 2011. Costs to the applicant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF JULY 2023.

A O OMBWAYO

JUDGE

