



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC CIVIL APPLICATION NO. 22 OF 2016 (JR)**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO**

**APPLY FOR THE JUDICIAL REVIEW ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26**

**LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF LAND PLOT NO. 293 NKUBU MARKET**

**AND IN THE MATTER OF NKUBU PMCC NO. 88 OF 2007**

**BETWEEN**

**MONICAH KAJUJU**

**JOHN MWITI RINGERA.....EX-PARTE APPLICANTS**

**-V-**

**PRINCIPAL SECRETARY MINISTRY OF INTERIOR &**

**COORDINATION OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide the Notice of Motion application brought pursuant to Order 53 Rule 1 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act (CAP 26) Laws of Kenya and filed in court on 3<sup>rd</sup> August 2016, the Ex-parte Applicants is seeking leave to apply for an order of mandamus against the Respondents, compelling them to comply with the court decree dated 13<sup>th</sup> June 2012, issued in Nkubu PMCC No. 88 of 2007, together with costs and interests accrued and in default the Respondents be committed to civil jail until full compliance with the said decree in full, within 30 days from the date of ruling of this court.

2. The gist of the application is that the Ex-parte Applicants were the alleged owners of Plot No.293 at Nkubu market which had been occupied by the Administration Police without their consent/authority and that the said illegal invasion prompted the filling of Nkubu PMCC No. 88 of 2007-John Mutea Ringera & Monica Kajuju v The District Commissioner Imenti South & The Attorney General, which suit was determined in their favour. The Nkubu court had declared that the Ex parte Applicants were the legal owners of the said property. The Applicants contend that their efforts to implement the decree had been resisted by Administration Officers who had on a number of occasions threatened to shoot them should they step on the property.

3. The Application was opposed via a Replying Affidavit sworn by Joseph M. Kisangau the Deputy County Commissioner Imenti South Sub

County who contended that it was not in dispute that the Applicants have a judgment and decree in their favour in Nkubu civil case No.88 of 2007. The Respondents however aver that the said judgment and decree were obtained through misrepresentation of facts as the plot in question did not exist in the records at the Meru Central Land Registry and neither did it exist on the ground and that the Applicants were reopening their case through the backdoor, upon realization that the land was non-existent.

4. When the matter came up for hearing on 24<sup>th</sup> September 2018, the court directed that the application be canvassed by way of written submissions.

5. It was submitted for the Ex-parte Applicants that the circumstances under which an order of Mandamus is issued were set out in ***Republic v Kenya National Examinations Council ex-parte Gathengi & 8 Others Civil Appeal 234 of 1996*** where the Court of Appeal cited with approval a passage from the Halsbury's Laws of England 4<sup>th</sup> Edn Vol 7 p. 111. It was further submitted the Applicants had moved this court to compel the satisfaction of a judgment already decreed in its favour by a competent court of law and the Respondents had not given any reason why the decree had not been satisfied more than four years down the line and that if the court were to decline to grant the order, the person who is entitled to a judgment may be left without an effective remedy despite holding a decree.

6. On the other hand, it was submitted for the Respondents that the Application was a roundabout way of challenging the lower court's decision by way of judicial review and that the Applicants had not meet the prerequisites for an order of mandamus to be issued namely; that a demand must be made to the respondent to make good the claim, the demand relates to an express statutory duty, the respondent must have refused or failed to exercise that specific duty and that the respondent must not have performed that duty in any other manner.

7. I have carefully considered this application and the rival submissions by the parties. This is essentially an application where the Ex-parte Applicants seeks leave to apply for an order of mandamus against the Respondents to comply with the court decree dated 13<sup>th</sup> June 2012 issued in Nkubu PMCC NO. 88 of 2007. It is not in dispute that the said decision has never been appealed against. The contention by the Respondents that the judgment and decree in the lower court were obtained through misrepresentations of facts since the Applicants alleged that they were the legal owners of the suit property is without basis since such issues ought to have been raised at the trial. As I alluded to earlier, the judgment of the court trial court of 13<sup>th</sup> June 2012 has never been appealed against or reviewed and the same still stands to date. The allegations by the Applicants that their efforts to implement the decree have been resisted by the Respondent's agents were not rebutted by the Respondents.

8. It is now settled that leave must be sought and obtained before making an application for judicial review. Waki J (as he then was) in ***Republic Vs County Council of Kwale & Another Exparte Kondo & 57 others Mombasa HCM CA NO. 384 of 1996*** stated as follows;

***“ The purpose of application for Leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived .... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant, the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”***

9. Odunga J in ***Lady Justice Joyce Khaminwa Vs Judicial Service Commission & another (2014)e KLR*** stated thus;

***“The rationale for the requirement that leave be sought and obtained is to exclude frivolous vexatious or applications which prima facie appear to be an abuse of the process of the court or those applications which are statute barred. However, leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case. Leave stage is therefore a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralyzed for months because of pending court actions which might turn out to be unmeritorious”.***

10. From the circumstances of this case and based on the material before court and in absence of a satisfactory explanation by the Respondents that they had resisted efforts by the Applicants to implement the decree, I find the instant application to be meritorious.

11. Accordingly leave is hereby granted to the Applicants to apply for orders of mandamus against the Respondents herein. The substantive motion is to be filed within 21 days from today.

12. The costs of this application shall abide the outcome of the main motion.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20<sup>TH</sup> MARCH, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Miss Nyaga for Exparte Applicant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**