



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

JUDICIAL REVIEW APPLICATION NO.7 OF 2018

IN THE MATTER OF TRANSFER FOR LAND TITLE NO.KAJIADO/KITENGELA/8207

IN THE MATTER OF AN APPLICATION BY

CASCA TRADING COMPANY FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS;

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF LAND REGISTRATION ACT 2012

IN THE MATTER OF THE LAND ACT 2012

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

THE DISTRICT LANDS REGISTRAR KAJIADO.....RESPONDENT

-AND-

CASCA TRADERS LIMITED.....EX-PARTE APPLICANT

-AND-

PATRICK KANG'ETHE NJUGUNA.....INTERESTED PARTY

JUDGEMENT

1. Through the an Application by Notice of Motion dated 31st May, 2018, the ex- parte Applicant filed a complaint pursuant to the provisions of Order 53 Rule 3, 3(i), and 4(i) of the Civil Procedure Rules, section 3A of the Civil Procedure Act, CAP 21 Laws of Kenya. The applicant seeks the orders as follows:

- i. An order of mandamus compelling Kajiado District Registrar to register and subsequently issue the title deeds the duly executed and stamped instrument of Transfer dated 28th June, 2012 and lodged for registration on 29th June, 2012.
- ii. The cost of and incidental to the application be borne by the Respondent.
- iii. Such further relief as this Honorable court may deem just and expedient to grant.

Applicant's case

2. The Application was accompanied by a verifying Affidavit sworn by Festus Kamau Thanduru; the ex-parte Applicant's director and a statement of facts in which the applicants claim that they have colour of right over the suit property having purchased it from Patrick Kang'ethe Njuguna.

3. According to the deponent, the ex- parte applicant herein, purchased the suit property known as LR. NO. KAJIADO/KITENGELA/8207 interested party in the year 2012 at a consideration amount of Kenya Shillings two million (2,000,000) which was fully paid.

4. Further, it was deponed that despite the Applicant having made the full payment of the purchase price, the vendor who is the interested party herein having duly executed the transfers for the suit property (copy of the transfer for the suit property marked "FKTI"), having paid the stamp duty for all the four transfers as per the copies marked Exhibit "FK12" the respondent issued and released titles for the three of the parcels, LR.NOs KAJIADO/KITENGELA/ 8208,8217,8218 omitting to issue the title of the suit property.

5. It was the applicant's disclosure that, the Respondent despite being served with various demand notices he has failed to reply to the same. Further that despite being served with the suit papers, neither the Respondent nor the interested party has responded. In the Applicant's view, failure by the Respondent to respond to the suit papers raises reasonable inference that the Applicant's reasonable apprehension of foul play is not misplaced.

6. The applicant's advocate Mr. Alfred Mbugua, made several visits and correspondence, dated 2nd September 2013 and 11th August 2015, regarding the registration of the suit property and issuance of the title deed of the same which did not bore fruits. According to the Ex-parte applicant, the respondent's failure to provide any plausible reason for the delay, failure to register the Transfer Instrument occasioned frustration and inconvenience coupled with financial loss. In its view, the applicant averred that failure by the Respondent to register the Transfer Instrument amounts to an abrogation/and absolute deprivation of the Ex-parte applicant's right to property as guaranteed under Article 40 of the Constitution of Kenya 2010.

7. It was therefore the Ex-parte applicant's case that the Respondent through the aforesaid failure, breached the provisions of Article 47 of the Constitution of Kenya which provides for Fair Administration Action Act with regard to public duties and dereliction of the duty contrary to section 9 and 10 of the public Officers Act, 2003.

8. The applicant argued that the Respondent has for a period of more than five and half years abdicated his/her duty as the Registrar of Titles in Kajiado County by delaying the issuance of the Ex-parte applicant's Title Deed which occasioned the effect of frustrating the contract of sale with interested party.

9. The applicant's view in that regard is that, the Respondent in collision with other persons known to him intend to fraudulently deprive the Ex-parte applicant of ownership of the of the suit property in contravention of his constitutional and other legal rights. A demand letter was written by the applicant through the firm of Beatrice Kariuki & Associates (dated 27th March 2018 and received on the 29th March 2018, directing the Respondent to undertake the said registration but no response had been forthcoming.

Determination.

10. There was no response filed by the respondent, the District Land Registrar of Kajiado County and the interested party to the application to offer any explanation to give reason(s) as to why notwithstanding the application and presentation of documents and payment of the requisite fee for stamp duty, no title has been issued.

11. As regards the parameters of judicial review, the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996 expressed** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not

complied with or for such like reasons.”

12. **In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“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 relevant matters or did take 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 not sufficient evidence to support the decision.”

13. It must be noted in light of the above authority that the sole purpose of the remedy of Judicial Review is to make sure that the individual is accorded fair treatment by the authority to which he has been subjected. Further, it is also imperative to note that judicial review is not necessarily concerned with private rights or the merits of the decision being challenged but with the decision making process.

14. The respondent who happens to be the land registrar of Kajiado as a public officer demonstrated failure to discharge statutory duty to either register the suit property and issue a title thereafter or provide information as to why the applicants should not be issued with a title of the same. The Respondents has clearly contravened article 47 of the Constitution of Kenya, 2010 which is clear on the fact that every person is entitled to fair administrative action as regards public duties.

15. This is a basic requirement under section 4 of the Fair Administrative action Act no 4 of 2015 which states that Every person has the right to administrative action which is expeditious ,efficient ,lawful, reasonable and procedurally fair.

16. Section 7(1) of the same Act provides for a right to an aggrieved person to institute and apply for judicial review of the administrative decision before a court of law for the court to grant any of the reliefs under section 11 (1) and (2) of the Act. In the present case the applicant has sought a declaration for the writ of mandamus which is a command for the respondent to take the decision.

17. What is the scope and efficacy of an order of mandamus? This question has been clearly answered in Halbury Laws Of England 4th edition volume one at page 111 where the learned Authors had this to say: **“The order of mandamus is of a most extensive remedial nature and is ,in form ,a command issuing from the high court of justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of public duty, Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried in a specific way”**

18. How do these principles apply in the present application? The Land Registration Act No 3 of 2012 creates the office of the Registrar of lands with functions and powers expressly stated in sections 14 ,15,16,17,18,19 and 20 of the Act. Further section 37 (1) deals with the duties conferred upon the Land Registrar to effect transfers of land once the proprietor has met the prerequisite legal procedures as to transfer and registration .Under section 40 of the Act the transfer shall not be expressed to take effect on the happening of any event or on fulfillment of any condition or at any future time.

19. The duty imposed on the Land registrar is to consider the application for transfer of the dispositions and dealings affecting that particular parcel of land and determine that the owner has fulfilled the conditions precedent for transfer and registration.

20. In this judicial review application its premised on the grounds that the land registrar simply has failed to undertake the statutory duty of registering the disposition to land reference Kajiado/Kitengela/8207.

21. What the land registrar has done is to refuse and or neglect to determine the application for transfer of title to land as per the approved subdivisions. There is evidence that necessary consents have not been obtained from the relevant bodies. The applicant has not been favoured with the reasons for the failure or neglect occasioning non compliance with the statutory duty on the part of the land registrar.

22. I am of the conceded view that this is a clear case for an order of mandamus to issue to compel the land Registrar to determine the transfer application over title Kajiado/Kitengela 8207.

23. The uncontroverted facts of this case speak for themselves that there has been unreasonable delay on the part of the Respondent to issue the title in question. What amounts to unreasonable delay is dependent on facts of the case as was the position held by the court in the case of **Associated Provincial Picture Houses v Wednesbury Corporation (1948) 1 KB 223**. ***“It is true that discretion must be exercised reasonably, now what does that mean? It has frequently been used and is frequently used as a general description of the things that must be done. For instance a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to matters which he is bound to consider. He must exclude from his considerations matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said ,and often is said to be acting unreasonably”***

24. In the current case the registration documents of the suit property were lodged at the Kajiado Land Registry on 29th June, 2012. The Applicant has been following up through physical visits and correspondence dated 2nd September, 2013 and 11th August, 2015 vide the then Applicant's advocate, one Alfred Mbugua Waihiga. The most recent demand letter having been that of 27th March, 2018 written by the Applicant vide Beatrice Kariuki and Associates addressed to the Respondent and there has been no response up to date.

25. From the facts of this matter it is therefore clear that the Respondent acted unreasonably and irrationally by failing to register the suit property. More than 5 years have lapsed but the Respondent has never written or communicated to the Applicant in any other way on the said issue informing him of the reasons for non- registration and non- issuance of title for the aforesaid property. This is undoubtedly in contravention of article 35 of the Constitution of Kenya, 2010 which provides for the right to information and the Fair Administrative Action Act of Kenya. It is therefore the position of this Honorable court that the Respondent acted unreasonably.

26. This legal proposition on what constitutes unreasonableness was discussed in the case of Associated **Provincial Picture Houses Ltd V Wednesbury Corporation Supra**. In the present application the power to register or refuse registration of any disposition to land is vested in land Registrar unless there are compelling reasons presented before the high court for non-compliance with the statutory duty, an order of mandamus ought to be granted upon the Registrar to perform his given statutory duty. In the face of the undefended affidavit evidence by the ex-parte applicant there is nothing on record for this court to find that the respondent did not act unreasonably or irrationally in response to the to the claim by the applicant.

27. Under Section 14 of the **Land Registration Act**, Cap 300 Laws of Kenya, provides that **“General Powers of Land Registrars.**

14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—

(a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;

(b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;

(c) Refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;

(d)

(e)

30. (1) The Registrar may, if requested by a proprietor of land or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.”

Therefore, this court is of the view that the respondent who is bound by the provisions of section 30 of the Land Registration Act of 2012, Laws of Kenya failed to duly discharge his duties to enable the applicant realize his right to administer his property. In the circumstances, it is my finding that the application is meritorious and is hereby allowed.

The District Land Registrar of Kajiado is ordered by way of writ of mandamus to issue the applicant with certificate of Title documents in respect of land parcel L.R. NO. KAJIADO/ KITENGELA/8207, duly executed and transferred within the next 21 days, in default to comply the same will attract a citation for contempt proceedings.

Dated and delivered in open court at Kajiado this 3rd day of August, 2018.

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R. NYAKUNDI

JUDGE

In the presence of:

Mr. Karuga for M/s Kariuki for the ex-parte applicant.