REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPL. NO. 966 OF 2005

REPUBLIC...APPLICANT

VERSUS

PERMANENT SECRETARY,

MINISTRY OF LANDS & HOUSING....1ST RESPONDENT

COMMISSIONER OF LANDS.............2ND RESPONDENT

EX PARTE: CHARLES MUKABI SIHULI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 6th July, 2005, the *ex parte* applicant herein, **Charles Mukabi Sihuli**, seeks the following orders:

> **1. That an order of Mandamus be issued to the Commissioner of Lands compelling him to issue the applicant herein with a certificate of lease for property known as Nairobi Block 26/143 together with all the improvements thereon.**
>
> **2. That an order of prohibition be issued against the Permanent Secretary, Ministry of Lands & Housing prohibiting the Permanent Secretary from demanding any payment and/or depriving the applicant his proprietory rights over the property known as Nairobi Block 26/143 and/or any manner dealing with the said parcel of land and all the improvements thereon contrary and/or to the detriment of the applicant's proprietory rights.**
>
> **3. That the costs of this application be provided for.**

Applicant's Case

2. According to the *ex* parte applicant, land Title Number Nairobi Block/26/143 situated at Kileleshwa within Nairobi area and measuring 0.025 ha. or thereabout was allocated to him by the Government of Kenya way back on 19th May, 1999. Pursuant to the said allocation which he accepted, he paid the a sum of Kshs. 570,700/= to the Government of Kenya as consideration for the said property in fulfillment of clause Number 2 contained in the said letter of allotment and he was issued with the relevant receipts.

3. The applicant averred that subsequently a lease in respect of the subject property to wit Nairobi Block 26/143 was prepared and duly executed by himself and the Commissioner of Lands but which lease the Land Registrar declined to have registered to facilitate the issuance of a certificate of title in respect of the said property in spite of the fact that the applicant had fulfilled all the conditions contained in the letter of allotment.

4. According to the Applicant, he has been in quiet and uninterrupted occupation of the subject property since the time the house was allocated to him way back in 1999. However, late last 2004 and to his utter surprise and shock, he received a letter of offer purportedly from the Permanent Secretary, Ministry of Lands & Housing requiring him to pay inter-alia, the purchase price for the subject property allegedly on the basis that the house was allocated to him without following the laid down Government procedures governing disposal of government assets.

5. The applicant averred that prior to the said letter of offer, he was neither a party to any deliberations culminating into such a decision nor was he aware that there were such deliberations which are illegal, contrary to law, unconstitutional, null and void for all intents and purposes.

6. The applicant averred that unless issued with a certificate of title for the subject property which he legally owns and in which he has incurred substantial amount of money and time, he stands to suffer irreparable loss without any justifiable cause or reason and without being afforded a hearing not to mention that these are the premises where I reside with my family up to date.

7. It was the applicant's case that the refusal by the Commissioner of Lands to issue him with a certificate of lease as well as the purported letter of offer are ill motivated, capricious, whimsical and contrary to the rules of natural justice and fair play and the fundamental rights as enshrined in the Constitution of the Republic of Kenya.

Respondent's Case

8. In opposition to the application, the Respondent averred that the Government House Number MG 732 "B", (herein after referred to as the House) was officially allocated to the ex parte Applicant who was then the husband to the Interested Party in this suit. By a letter dated 9th September, 2004, the 1st Respondent informed the ex parte applicant that the said House was alienated to him without following the laid down Government procedures governing disposal of Government assets hence the alienation was both irregular and illegal. The letter sought to regularize and validate the alienation by offering the House for sale to the ex parte Applicant.

9. It was averred that the selling price including rent arrears for the house as at 9th September 2004 was Kshs. 3,372,000.00 and the ex parte Applicant was expected to signify his acceptance or otherwise of the offer in writing and to pay 10% deposit of the total cost of purchasing the house by 31st October 2004. The balance of the purchase price was to be cleared within 90 days with effect from 1st November 2004. According to the Respondent, it was a term of the offer that in case the Ex parte Applicant failed to respond by 31st October 2004, the house would be declared available for sale to other civil servants.

10. It was disclosed that the Ex parte Applicant applied to purchase the house through application serial number 001004 and paid a total of Kshs. 1,178, 733 being deposit of the purchase price plus rent arrears leaving a balance of Kshs. 2,193, 267.00. On 6th December, 2004, the 1st Respondent wrote to the Ex parte Applicant informing him that since he had paid the requisite deposit of the purchase price, he had been allocated the House and that he was required to pay the balance within 90 days from the execution of the Sale Agreement. In addition he was required to pay the stamp duty and other transfer charges, land rent, local authority rates and service charge where applicable.

11. It was the Respondents' case that up to date, The Ex parte Applicant has never paid the balance of the purchase price for the house as well as rent arrears from October 2004 to date.

12. It was averred that vide a letter dated 7th March 2014, the Ministry wrote to The Ex parte Applicant requiring him to pay the outstanding rent arrears amounting to Kshs. 2, 442, 000 as at March 2014 failure of which legal measures would be taken to recover the same. To this request, the applicant responded vide a letter dated 9th April 2014, requesting to be informed of the total amount of money he should pay to retain the house in his possession and as his property. Vide a letter dated 14th April 2014, the Ministry listed the total amount payable by The Ex parte Applicant amounting to Kshs. 4,722,636.80 being the balance of the purchase price, rent arrears from November 2004 to April 2014 and insurance premium for fire as from 2006 to 2014 and the applicant was given 21 days' notice from 25th August 2014 to vacate the house as he had not paid the amounts enumerated above.

13. The Respondent's case was that since the applicant failed and/or refused to raise the balance of Kshs.2, 193, 267 within 90 days as required in the letter of offer hence he is not eligible to own the house. Indeed and contrary to what he alleges in his Application, the Ex parte Applicant owes the 1st Respondent rent amounting to Kshs. 2,508,000 as at April 2014.

Applicant's Rejoinder

14. In his rejoinder, the applicant reiterated the contents of the verifying affidavit and confirmed that the lease for the suit property was indeed drawn in his favor by the Ministry of Lands and Housing and that the instrument was in fact signed by the relevant officer and him thereby sealing the contract for lease between them.

15. For unexplained reasons however, the lease was not registered. It was his case that as far as the law is concerned the 1st and 2nd respondents cannot deny the existence of a valid lease between him and the Ministry of Lands and that the only thing that the 1st and 2nd respondents can do at this point is to move to revoke but NOT deny the existence of a Lease. However, as the respondents have not sought to nullify the lease, they have no legal basis to decline to register his interest in the suit premises.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application, the submissions filed and authorities relied upon.

17. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** in which the said Court held *inter alia* as follows:

> **"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* compel 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."

18. Similar position was adopted in in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** where it was held:

"A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary…The order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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 and no specific remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual."

19. It is therefore clear that where there is a duty imposed on a person either at common law or by statute seeking an order of *mandamus* must satisfy the Court that the action he seeks to compel the respondent to perform is a duty which the respondent is under a duty whether at common law or by statute to perform. That was the position adopted in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where the Court held that:

"In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata*, and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty."

20. In this case, it is clear that the applicant has a lease in his favour and the only thing that has not been done is the registration of the same. Whereas the Respondent contends that the allotment was issued irregularly, no step has been taken by the Respondents to nullify or cancel the title. In **Dr. Joseph N K Arap N'gok vs. Justice Moijo Ole Keiwua & Others Civil Application No. Nai. 60 of 1997** it was held that title to landed property can come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. See also **Wreck Motors Enterprises vs. The Commissioner of Lands & Others Civil Appeal No. 71 of 1997.**

21. According to **Warsame, J** (as he then was) in **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004:**

"…a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or mis-representation or that the allotment was out rightly illegal or it was against public interest… There is a difference between title to land and title document and one acquires title to land the moment a letter of allotment is issued and you meet the conditions in that letter…Once the conditions are met, the land is nolonger available for alienation."

22. Whereas under Article 40(6) of the Constitution, protected proprietory rights do not extend to any property that has been found to have been unlawfully acquired, the said Article however employs the use of the words ***"found to have been unlawfully acquired"***. Therefore there must be a finding that the property in question was unlawfully acquired. It has not been contended that any such finding has been made with respect to the subject property.

23. Whereas the 1st Respondent may well be entitled to rents accrued from the suit property, in my view that does not entitle the Respondents from registering a lease which was issued in favour of the applicant after the applicant complied with the conditions in the letter of allotment unless and until that allotment is lawfully revoked or cancelled.

24. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(1) In proceedings for judicial review undersection 8 (1), the court may grant any order that is just and equitable, including an order(a)declaring the rights of the parties in respect of any matter to which the administrative action relates;***
>
> ***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
>
> ***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
>
> ***(d) prohibiting the administrator from acting in a particular manner;***
>
> ***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
>
> ***(g) prohibiting the administrator from acting in a particular manner;***
>
> ***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(i) granting a temporary interdict or other temporary relief; or***
>
> ***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

25. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision.

26. Pursuant to section 11(1)(f) of the aforesaid Act, this Court has the power to compel the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right, as is the case herein.

27. It follows that I find merit in this application.

Order

28. In the result an order of *mandamus* is hereby issued compelling the Respondents to facilitate the registration of the lease dated 24th December, 2002 issued in favour of the applicant herein in respect of Land Parcel No. **Nairobi Block 26/143** to the Applicant herein, **Charles Mukabi Sihuli**, upon payment by the applicant of the requisite registration charges.

29. As part of the claim has already been satisfied, each party will bear own costs of these proceedings.

30. It is so ordered.

Dated at Nairobi this 19th day of December, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukabi the applicant in person

Miss Maina for the Respondent

CA Ooko