



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 287 OF 2014

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

CHIEF LANDS REGISTRAR2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

EX-PARTE

JAMES GITAU MWANGI

WINFRED MWENDIA

JUDGEMENT

1. James Gitau Mwangi, the 1st ex parte Applicant and Winfred Mwenda, the 2nd ex parte Applicant are the registered lessees of Land Reference Number I.R. 21393 (L.R. 37/386) (Original Number 37/242/21). It is their case that the certificate of lease for the said parcel of land got lost sometimes back.
2. On 23rd October, 2013 the 1st Applicant applied for a duplicate certificate of lease. As is the requirement, the loss was published by the 2nd Respondent, the Chief Lands Registrar through Gazette Notice No. 14747 of the Kenya Gazette dated 22nd November, 2013.
3. Through a letter dated 17th January, 2014 the 3rd Respondent, the Ethics and Anti-Corruption Commission (EACC) wrote to the 2nd Respondent objecting to the issuance of a duplicate certificate of lease for the reason that the land covered by the said title was public land that had been irregularly allocated. On 17th March, 2014, the applicants were informed that a duplicate certificate of lease could not be issued due to the objection by the 3rd Respondent.
4. On 22nd July, 2014 the applicants moved this court and obtained leave to apply for an order of mandamus to issue against the respondents compelling them to issue a provisional certificate of lease to them in respect of the property in question. The applicants through their notice of motion application

dated 8th August, 2014 also pray for costs of the application.

5. The Attorney General is named as the 1st Respondent.

6. According to the applicants' statutory statement dated 17th July, 2014, among the grounds upon which relief is sought are:

“a. The 2nd Respondent's decisions were made in breach of the rules of natural justice.

b. The 2nd Respondent acted ultra vires in total disregard of the powers donated to him under Section 33(3) of the Land Registration Act (Act No. 3 of 2012).

c. The decisions were irrational, arbitrary and unreasonable.

d. The decisions put into account irrelevant considerations and failed to take into account relevant considerations.”

7. Ms. Chimau who appeared for the 1st and 2nd respondents indicated to the court on 13th July, 2015 that her clients were not filing any response and they would rely on the 3rd Respondent's reply and submissions.

8. The 3rd Respondent opposed the application through a replying affidavit sworn by James Kamau Kariuki on 20th March, 2015. The 3rd Respondent's case is that it is empowered by law to investigate the conduct of any person that in its opinion constitutes corruption or economic crime pursuant to the provisions of Anti-Corruption and Economic Crimes Act, 2003 (ACECA) and Ethics and Anti-Corruption Commission Act, 2011.

9. Acting on the said mandate it conducted investigations into allegations that the land in question, which had been set aside by the then City Council of Nairobi for use as a children's playground thus constituting public property, had been irregularly allocated to a company which had later transferred the property to the applicants.

10. After the Registrar of Titles published in the Kenya Gazette a notice that a provisional certificate of title would be issued to the applicants if no objection was lodged within sixty days, the 3rd Respondent wrote to the Registrar of Titles a letter dated 17th January, 2014 objecting to the issuance of a provisional title until investigations are complete.

11. It is the 3rd Respondent's case that when the applicants objected to its letter, the applicants were informed of the reasons behind the 3rd Respondent's opposition to the issuance of a provisional certificate of title. Further, that the applicants had recorded statements on how they acquired title to the said land.

12. It is the 3rd Respondent's position that Section 33(3) of the Land Registration Act, 2012 upon which the applicants rely in seeking an order of mandamus is not couched in mandatory terms. In addition, the 3rd Respondent asserts that the grant of an order of mandamus is discretionary.

13. In their pleadings and the submissions filed in court, the advocates for the parties correctly identified the question for the determination of the court to be whether an order of mandamus can issue in the circumstances of this case. That is the issue I will proceed to determine.

14. The purpose and reach of an order of mandamus was stated by the Court of Appeal in **Kenya National Examination Council v Republic, ex parte Geoffrey Gathenji & 9 others, Nairobi Civil Appeal No. 266 of 1996** as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an ORDER

OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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 and 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom 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 out in a specific way.”

What do these principles mean? They mean that an order of mandamus will 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.”

15. An order of mandamus will therefore issue where a statutory duty is owed to an applicant and the public body or officer, after being asked to perform the statutory duty, has refused or failed to discharge that duty and there is no other efficacious remedy available to the applicant. In matters of discretion, the court will in most cases direct the public body or officer to exercise the discretion but it cannot direct the manner the discretion is to be exercised.

16. However, there is an exception to the rule that in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be exercised. The exception was expressed by Panganiban, J in the Philippines case of **First Philippine Holdings Corporation v Sandiganbayan**, 253 SCRA 30, February 1, 1996 when he stated that:

“Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is ‘gross abuse of discretion, manifest injustice or palpable excess of authority’ equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue.”

17. Have the applicants met the conditions for grant of an order of mandamus? Section 33(3) of the Land Registration Act, 2012 provides that:

“If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.”

18. Sixty days after the gazettelement of the loss of a certificate of title, the Registrar of Titles is allowed by the law to issue a duplicate certificate of lease or title.

19. The term ‘may’ is used meaning the Registrar of Titles has discretion but as was stated in **Padfield v**

Minister of Agriculture Fisheries and Food [1968] A.C.997 even if a statute were to confer upon a decision-maker an “**unfettered discretion**” the interpretation of the extent of that discretion belongs to the judiciary. In that regard it was stated at page 1060 of the judgement that:

“[T]he use of that adjective [unfettered], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the minister rather than by the use of adjective.”

20. I was surprised when the 2nd Respondent whose exercise of power is the subject of these proceedings and the Attorney General who is the chief legal advisor of the national government opted not to file any responses to the applicants’ application. In essence, the application stands unopposed since the 3rd Respondent has no mandate to answer questions directed at the exercise of statutory power by the 2nd Respondent. In this matter, the 3rd Respondent is more of an interested party than anything else.

21. It is indeed a correct statement of law that the 3rd Respondent is mandated to enquire into the circumstances under which what was once public land was allegedly irregularly converted to private land. If crime was committed in the process, the 3rd Respondent is entitled to prosecute or take any other action within its statutory powers.

22. The issue before the 2nd Respondent was the loss of a certificate of title. On the face of it, the law would recognize the applicants as the owners of the land in question. Article 40 protects the right to property and the 2nd Respondent has a duty to facilitate that right by issuing a duplicate certificate of registration where it has been established that the original title actually got lost and the registered owners are the applicants. The 2nd Respondent has no control over the investigations by the 3rd Respondent and it would be an infringement of the Constitution to refuse to issue a duplicate certificate of title on the grounds that investigations are ongoing in respect to the acquisition of the property. If later it is established that the applicants actually unlawfully acquired the property, there are lawful mechanisms that can be engaged in order to ensure that the law is upheld.

23. This is a case where the 2nd Respondent has surrendered its statutory duties to another state entity. What the 2nd Respondent ought to have done was to establish whether at the time of the loss of the certificate of title the applicants were the registered owners. The 2nd Respondent has not answered that question. The applicants are entitled to an answer from the 2nd Respondent.

24. In the circumstances of this case, I remit back this matter to the 2nd Respondent who is directed to consider the applicants’ application for the issuance of a duplicate certificate of title within sixty days from the date of this judgement. Failure to do so will lead to the invocation of the exception identified by Panganiban, J in **First Phillipe Holdings Corporation** (supra) so that an order of mandamus will issue compelling the 2nd Respondent to issue a duplicate certificate of title to the applicants. Of course the 3rd Respondent will be at liberty to exercise the statutory powers given to it in order to secure the public interest.

25. Each party is ordered to bear their costs of these proceedings.

Dated, signed and delivered at Nairobi this 26th day of Feb., 2016

W. KORIR,

JUDGE OF THE HIGH COURT