



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO 289 OF 2012

IN THE MATTER OF THE SURVEY ACT CHAPTER 299 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT NO. 18 OF 1990

AND

IN THE MATTER OF D.O CASE NO.69 OF 2002

REPUBLIC.....APPLICANT

VERSUS

THE DISTRICT SURVEYOR THIKA

THE DISTRICT SURVEYOR MURANG'A

THIKA DISTRICT LAND REGISTRAR.....RESPONDENTS

AND

ARAM NG'ANG'A

WILSON KAIRA

OBADIAH NGUGI KIHURIA.....INTERESTED PARTIES

EXPARTE: JANE NJAMBI NDUNG'U WANJIKU

JUDGEMENT

Introduction

1. By a Notice of Motion dated 28th July, 2012 the ex parte applicant herein, **Jane Njambi Ndung'u Wanjiku**, seeks the following orders:

1. **That this honourable court be pleased to grant the applicant an order by way of judicial**

review order of Mandamus directed to the District Surveyor Thika, the District Surveyor Murang'a and the Land Registrar Thika to compel the Thika District Land Registrar to cancel the entries relating to the parcel of land known as L.R No. LOC 5/KABATI/1036 and the District Land Surveyor Thika to survey original land parcel Number LOC 5/KABATI/922 whose subdivisions are LOC. 5/KABATI/1036,1037,1038,1039 and 1040.

2. That costs be provided for.

Ex Parte Applicant's Case

2. According to the Applicant, she is the wife of one **Ndungu Mwaura**, while her father in law, one **Mwaura Kahinga**, is deceased. She averred that before the death of her father in law, he had sub-divided land known as LOC5/KABATI/922 into 5 portions L.R. LOC 5/KABATI/1036, 1037, 1038, 1039 and 1040.

3. It was disclosed by the Applicant that there was an attempt by Thika and Murang'a District Surveyors to fix beacons on parcel No. 1036 yet no ground survey was done in respect of the said parcel. According to the Applicant the said intended action was illegal and contrary to law.

4. According to the Applicant, there were earlier complaints from one **Milka Wambui** that their land was being grabbed. It was disclosed by the applicant that some three men, **Mr. Aram Nganga, Mr. Wilson Kaira** and **Obadiah Ngugi Kihuria** had been claiming the said land parcel LOC 5/KABATI/1036, yet the said parcel of land was not surveyed on the ground. It was contended that the aforesaid three people that their land should be carved out of all the sub-divisions L.R. LOC 5/KABATI/1037, 1038, 1039 and 1040. However, when they discovered that there were no beacons on the ground they started filing cases against the applicants in this matter some of which were instituted before the Tribunal at Kandara and which gave rise to an order in Thika Principal Magistrate's Court in D.O Case No. 69 of 2002.

5. The Applicant however averred that she applied for the orders at Thika court to be vacated and a ruling was delivered.

6. According to the Applicant, the District Surveyor Thika had difficulties in fixing the beacons for the said LOC 5/KABATI/1036.

7. The Applicant therefore sought an order cancelling all the five portions and for the resurvey of the suit land. She sought an order compelling the Registrar of Lands, Thika to cancel the title and to carry out a proper survey in accordance with the Survey Act and not to purport that the LOC 5/KABATI/1036 will cut across all the other portions Nos. 1037, 1038, 1039 and 1040 which portions are already sub-divided along the main road and sold out and fully developed by third parties.

Respondents' Case

8. The application was opposed by the Respondents.

9. According to them, they received a court order from Thika Law Courts, dated 22nd May 2009 ordering the surveyor to replace beacons on LOC 5/KABATI/1036 in terms of the decree of the tribunal. It was disclosed that the parcel of land L.R. LOC 5/KABATI/922 had been sub divided into LOC KABATI/1036, 1037, 1038, 1039 and 1040 which are located in Murang'a District which is not under the 1st Respondent's jurisdiction. The Respondents averred that he called the then District Surveyor Murang'a, informing him of the said Court order and requested the latter to supply him with the necessary documents in his possession to enable him establish the boundary. The 1st Respondent further wrote to the OCS Kabati Police Station, the District Surveyor Murang'a, the D.O. Kandara Division and the Chief Kagunduini location advising them of the intention to visit the ground and effect the court order. On the 8th July 2009 the 1st Respondent sent his colleague, **Stephen Gatheru**, accompanied by representatives from Murang'a Survey office, to visit the ground and establish the boundary.

10. It was disclosed that the establishment of the boundary could not be completed since an overheated disagreement arose between the owners of the parcels of land and they left without completing the process of establishment of the boundary. To the Respondents, the parcel of land had already been demarcated and the survey was meant just to establish the boundary according to the mutation form and registry index map. To the 1st Respondent, he does not have powers to cancel an entry relating to a parcel of land and as such cannot be compelled to do so. To him, since the parcel land had already been surveyed in the year 1993, he cannot be ordered to do that had already been done unless it is to re-establish the boundaries.

11. It was the Respondents' submission that since there is an underlying dispute between the parties relating to the ownership of the land, such dispute can only be resolved in a forum in which parties are given an opportunity to adduce viva voce evidence and not in judicial review proceedings.

12. It was submitted that the applicant and the interested parties having frustrated the process of establishing the boundary, the applicant had come to court with unclean hands and hence was undeserving of an order of mandamus.

13. To the Respondents, the subject land having been the subject of a dispute before the tribunal in which an award was given and executed by the Thika Law Courts, the said decision was valid until set aside by the Court hence the orders sought herein could not be granted.

Determinations

14. Having considered the application, the response thereto, the submissions made on behalf of the parties and the authorities cited, this is the view I form of the matter.

15. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition 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:

“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* 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.”

16. Similar position was adopted in Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 where Goudie, J expressed himself, *inter alia*, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so...*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice.”

17. It is therefore clear that a person 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. Where there is no such a duty or it is not clear to the Court that such a duty exists the Court would be reluctant to grant such an order.

18. In this case, the applicant’s case, from the submissions seems to be that the manner in which the suit parcels were surveyed has denied her access to the road hence she is unable to carry out business while the interested parties whose parcels traverse the other parcels enjoy the benefit of having their land abutting the road. The applicant has however not pointed out to the Court which law, statutory or otherwise compels the respondent to undertake what they want the Court to compel the respondents to undertake in the circumstances of this case.

19. In my view what the Applicant intends to achieve may properly be achieved in a civil suit in which

evidence would be taken and all the parties heard thereon since the orders being sought by the applicant may have the consequence of affecting other persons who are not parties to these proceedings. As is stated in *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’” [Emphasis added].

20. In the premises, in the exercise of my discretion, I decline to grant the orders sought herein.

Order

21. Consequently, the Notice of Motion dated 28th July, 2012 fails and is dismissed but with no order as to costs.

Dated at Nairobi this 13th day of June, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Mutisya