



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS CIVIL APPLICATION NO. 18 OF 2015

**IN THE MATTER OF AN APPLICATION BY CECILIA NJOKI MBUGUA FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, MANDAMUS AND
CERTIORARI**

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

**IN THE MATTER OF THE REGISTERED LAND ACT, CAP 300 (REPEALED) THE LAND
ACT 2012 , NO 6 OF 2012 AND THE REGISTRATION OF LAND ACT 2012, NO.3 OF 2012**

AND

**IN THE MATTER OF ARTICLES 35 (2) AND 40 OF THE CONSTITUTION OF KENYA
2010**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE SUB COUNTY PLANNER, THIKA SUB COUNTY..... 1ST RESPONDENT

THIKA SUB-COUNTY PLANNER2ND RESPONDENT

**THE COUNTY EXECUTIVE MEMBER FOR PLANNING AND DEVELOPMENT THIKA SUB
COUNTY....3RD RESPONDENT**

THE COUNTY GOVERNMENT OF KIAMBU.....4TH RESPONDENT

EX-PARTE: CECILIA NJOKI MBUGUA

JUDGEMENT

Introduction

1. By an amended Notice of Motion filed herein on 3rd October, 2015, the *ex parte* applicants herein, **Cecilia Njoki Mbugua**, seeks the following orders:

1. **That an Order of MANDAMUS be issued by this Honourable Court directing the Planning and Development Department of the County Government of Kiambu to approve the amalgamation of the Titles registered as Title No. Thika Municipality Block 11/877, Title No. Thika Municipality Block 11/878, Title No. Thika Municipality Block 11/879, Title No. Thika Municipality Block 11/880 and Title No. Thika Municipality Block 11/881.**

2. **That an Order of MANDAMUS be issued by this Honourable Court directing the County Government of Kiambu through its Planning and Development Department to proceed to issue the approval for the amalgamation of the titles being Title No. Thika Municipality Block 11/877, Title No. Thika Municipality Block 11/878, Title No. Thika Municipality Block 11/879, Title No. Thika Municipality Block 11/880 and Title No. Thika Municipality Block 11/881 into a single title.**

3. **That an Order of CERTIORARI do remove from this Honourable Court and quash the decision of Sub County Planner, Thika Sub County to suspend the developments by the Ex-parte Applicant on the property registered as Title No. Thika Municipality Block 11/877, Title No. Thika Municipality Block 11/878, Title No. Thika Municipality Block 11/879, Title No. Thika Municipality Block 11/880 and Title No. Thika Municipality Block 11/881.**

4. **That an Order of PROHIBITION be issued by this Honourable Court against the Respondents by themselves and/or servants/ Agents from stopping and/or in any way interfering with the development the ex parte Applicant wishes to carry on her land.**

5. **The costs of this application be in the cause.**

Applicants' Case

2. According to the applicants she is the holder of the original title to the property registered as Title Nos. Thika Municipality Block 11/877, Thika Municipality Block 11/878, Thika Municipality Block 11/879, Thika Municipality Block 11/880 and Thika Municipality Block 11/881 (hereinafter referred to as "the suit properties").
3. According to her, the suit properties have never been challenged and they are not in dispute. Based on legal advice, the applicant averred that as such holder of the original titles she is entitled to apply for the amalgamation of the said Titles and has fulfilled all her obligations with relation to payment of rent on the properties in question for the past 28 years in which she has been in physical possession thereof.
4. The applicant further averred that a formal request was made for the amalgamation of the said Titles and development proposal over the said properties. She disclosed that the officials at the County Planning and Development Department-Thika Sub county as well as the County Government of Kiambu required further information and documentation to facilitate the approval of the said amalgamation which information and documentation was availed without undue delay. The then Town Clerk of the Municipal Council of Thika caused the advertisement of the above mentioned amalgamation request and development proposal to be published on the 18th day of February 2013 requiring any person with objections to the said request to furnish the objection in writing within 14 days of the said advertisement but there was none. It was her case that the Sub County Planner, Thika Sub County consented to and/or approved the amalgamation request and development proposal after consultation with the County Physical Planning Officer and the District Surveyor all of whom had no objection to the said request subject to compliance with the Sub County by-laws. However, the Sub County Planner, has omitted failed and or neglected to issue her with the relevant PPA2.
5. It was the applicant's case that without reasonable or justifiable cause the Sub County Planner

- suspended approved developments on the properties in question citing complaints raised to the Governor's office relating to ownership of the properties. It was however the applicant's case that her titles to the suit property in question have not been challenged in any forum whatsoever and there is no pending suit in any Court relating to the ownership of the suit properties. Despite several requests made to the County Planner, Thika Sub County to furnish details of the purported complaints on dispute over ownership no response has been forthcoming in relation to the same.
6. The applicant therefore sought that the Court grants the orders sought herein in the interest of justice since in her view, the Respondent is a public officer under a public and statutory duty to carry out their duties diligently and according to the provisions of law, but have to date unlawfully neglected and/or refused to do so by approving the amalgamation of the Titles to the suit properties and further approving the development proposal thereto.
 7. It was contended that the said omissions by the Respondents have been detrimental to the Ex-parte Applicant and indeed if such decision is left to stand then the Ex parte Applicant would continue to suffer immense prejudice despite being an upstanding and law abiding property owner and a duly registered owner of the suit property.
 8. The applicant disclosed that the suspension of the developments by the Ex-parte Applicant on the suit properties must be lifted as the same is not only unjustifiable but illegal and definitely an affront to the Ex parte Applicant's right to own and deal with her property as she wishes hence she sought for grant of orders of Mandamus, Certiorari and Prohibition against the Respondents to compel them to approve the amalgamation of the suit properties, to quash their directive to suspend developments on the suit properties, direct the Respondents to diligently carry out their public duties to allow the development to proceed and to stop them from interfering with the said development.

Respondents' Case

9. On their part the Respondents in opposing the application filed the following grounds of opposition:
 1. **The Ex parte Applicant has delayed in filling the application.**
 2. **The intended amendment substantially deviate from the original motion for which leave was granted and will thus prejudice the Respondents.**
10. Apart from the said grounds, the Respondents vide a replying affidavit sworn by **Eunice M. Karoki**, the County Executive Committee Member for Lands, Housing and Physical Planning County Government of Kiambu, averred that prayer 1 of the notice to motion dated 13th March 2015 is misconceived as neither the County Government of Kiambu nor its officers have any authority to amalgamate titles, the said responsibility being that of the Ministry of Lands, Housing and Urban Development. Consequently prayer 1 of the notice of motion, having been directed against the wrong persons should be refused.
11. It was contended that that the land parcel numbers Thika Municipality Block11/877, Thika Municipality Block11/878, Thika Municipality Block 11/879, Thika Municipality Block 11/880 and Thika Municipality Block 11/881 have also been claimed by the Thika Juakali Association. Upon receiving the Ex parte Applicant's application for Development Approval , the County Government of Kiambu wrote to the Director, Department of Physical Planning in Nairobi seeking to confirm whether part Development Plan which was subsequently used as a basis for the issuance of the Titles was genuine and the Director, Department of Physical Planning, Nairobi responded by issuing remarks on the said Part Development Plans (PDP) to the effect that they said PDP was not in his records and was hence not genuine. Upon receiving the said information the County Government of Kiambu formed the opinion that it was improper to issue the Development Approval to the Ex parte Applicant until such time as the issues stated herein are resolved.
12. It was the Respondents' case that the approval of Development permission issued by one **S.K. Makali** on 12th February, 2013 prior to Devolution and later on 18th July, 2013 was done without all necessary inquiries having been done and was hence unlawful and that the said officer was facing disciplinary action on account of the said unlawful issuance of development approval,

which had been reversed.

13. Based on legal advice, it was contended that for judicial review to be granted, it must also take into account other factors and that other factors taken into account the Ex parte applicant's application ought not to be granted. To them, it would not be in the Public interest to grant the orders sought in the ex parte applicant's application in view of the matters outlined above.

Determinations

14. Having considered the application, the affidavit in support of and in opposition to the Motion, this is the view I form of the matter.
15. The parameters of judicial review orders of *mandamus* were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** 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* 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...”

16. It is not in doubt that the decision whether or not to issue approval for amalgamation and development plan is an exercise of discretion on the part of the 1st respondent. In such circumstances the Court is only entitled to interfere with the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See **Republic vs. Minister for Home Affairs and Others Ex Parte Sitanze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**
17. However when it comes to orders of *mandamus*, on the authority of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) 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. In my view whereas the 1st Respondent is under an obligation to consider an application for amalgamation of the suit parcels and approval of a development plan, this Court cannot, however, by way of an order of *mandamus* compel the 1st Respondent to issue such a plan

as the Court can only compel the 1st Respondents to consider the same and make a decision one way or the other but not in a particular manner. However the 1st Respondent is obliged under Article 47(2) to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicants. Where no reasons are given and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for exercising the discretion in the manner it was exercised. However, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court would be entitled to interfere where in making the decision the decision maker fails to take into account relevant matters or takes into account irrelevant matters.

18. In this case one of the reasons why the approval of the amalgamation has not been given is that the Respondents have no power to amalgamate the suit lands. If I understand the applicant's case correctly, what she is seeking are approvals to enable her lodge applications for the said amalgamation with the relevant Ministry. To her without approvals from the Respondents she cannot lodge the application for the same.
19. The Respondents however contend that that the suit parcels are claimed by Thika Juakali Association. Apart from bare allegations, there is no evidence that the said Association is claiming the suit parcels. In fact according to the applicant, she is the one in possession thereof.
20. It was further alleged that the Director, Department of Physical Planning in Nairobi confirmed that the PDP held by the applicant was not in his records and was hence not genuine. The applicant has however exhibited a letter dated 3rd October, 2014 from the Chief Land Registrar confirming that the said lands are leased to the applicant.
21. Section 24 of the ***Land Registration Act*** provides as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

22. Under the provisions of Article 40(6) of the Constitution, property rights protected under Article 40 of the Constitution do not extend to any property that has been found to have been unlawfully acquired. The crucial words in Article 40(6) are "***found to have been unlawfully acquired***". Therefore there must be a finding that the property in question was unlawfully acquired.
23. In this case the applicant has shown that prima facie, she is the registered proprietor of the suit parcels of land. Her contention that she is in possession thereof is not controverted. Despite a notice having gone out requesting any objection to be lodged against her claim thereto, none was forthcoming. In my view, if the respondents contend that the applicant acquired the said properties unlawfully, it is upon them to go to Court to prove their claim.
24. Article 40(3) of the Constitution provides:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

25. The said Article accordingly protects the right of any person to own property. That Article must be read with the provision of Article 47 of the same Constitution which provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

26. From the foregoing provisions it is clear that the right to property is constitutionally protected and a person can only be deprived of that right as provided under the Constitution.

27. Pursuant to the said Article, Parliament enacted the ***Fair Administrative Action Act, 2015*** and section 4 thereof provides:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

28. The thread that runs across both the Constitutional decree and the statutory mandate is that the reasons for the adverse decision must be in writing. In this case, there is no positive averment or evidence that the respondent has furnished the applicant with written reasons why the applicant's applications have not been approved. Where an authority obliged to furnish reasons for its actions or inactions fails to do so the Court may well conclude that it had no reasons or sufficient reasons and would proceed to compel it to undertake its statutory mandate.
29. Under section 5 of the **Fair Administrative Action Act**, some of the grounds for seeking and granting judicial review orders are that there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law.
30. According to **Judicial Review Handbook**, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.
31. Therefore the failure to adhere to the letter and spirit of the Constitution constitute a ground for the grant of orders of judicial review. In this case there is no evidence that the provisions of Article 47 of the Constitution were complied with by the 1st respondent.

Order

32. Accordingly the order which commends itself to me and which I hereby grant is an order of *mandamus* compelling the 1st Respondents to consider the applicants' application for approval of the said amalgamation and the said development plan and furnish them with reasons thereof in the event that the said decision is adverse to the interests of the applicants within 30 days from the date of service of this order. In default of such reasons, then the Respondents shall be deemed not to have any reasons for not approving the said plan in which event an order of *mandamus* shall issue compelling the Respondents upon payment of the requisite fees to approve the said amalgamation and the said development plan.
33. The applicant will have the costs of this application.
34. It is so ordered.

Dated at Nairobi this 26th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

Cc Mwangi