



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL APPLICATION NO. 33 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

EX PARTE: ISAAC NGUGI

JUDGEMENT

Introduction

1. The facts as can be gleaned from the verifying affidavit are that on 20th September, 2012, **Majanja, J** in Constitutional Petition No. 407 of 2012 issued prohibitory orders in respect of Land Reference No. 330/354 (Original Number 330/40/16/4) which orders were registered against the said title.
2. Following the hearing of the said petition, judgement was delivered therein on 30th September, 2013 by which the said petition was dismissed. Thereafter the applicant through his advocates applied for the removal of the said prohibitory order in order to facilitate the distribution of the subject estate.
3. However vide a decision made on 1st October, 2014, the Land Registrar rejected the application for registration of the said decree and the consequential removal of the prohibitory order registered in the encumbrance section in respect of the subject property on the ground that the said decision only dismissed the petition without raising the prohibitory order and that the LR No. was not mentioned in the decree.
4. In the applicant's contention, pursuant to the said decision dismissing the petition, all orders made herein including the prohibitory order were dismissed and effectively done away with. Since the prohibitory order was not issued in the execution of the decree but was a form of injunction pending the determination of the petition, the applicant contended that there was no necessity for an order raising the prohibitory order to be issued.
5. It was therefore contended that the decision of the Registrar was clearly unreasonable, wrongful and unjustifiable and ought to be quashed on the ground of irrationality.
6. It is important to note that the application was not opposed hence the factual averments are not controverted.

7. In the premises the applicant now seeks, vide the Notice of Motion dated 9th February, 2016 for an order of mandamus compelling the Respondents to effect the registration of the decree issued in the said petition and consequently remove the prohibitory order registered against the suit property.

Determinations

8. Having considered the issues raised in this application, this is the view I form of the matter.

9. The parameters of judicial review 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...”

10. In **Shah vs. Attorney General (No. 3) Kampala HMC No. 31 of 1969 [1970] EA 543**, Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *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.”

11. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**, it was held that *mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

12. It is however clear from **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) that mandamus is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It therefore my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, mandamus may go forth.

13. In his ruling dated 20th September, 2012 in the said petition which was instituted by the applicant herein, **Majanja, J** directed that a prohibitory order be issued by the Court in respect of the suit property and that any further dealing in respect of the suit property would be subject to the orders/directions of the Court. Those orders were clearly meant to secure the interests of the 1st Respondent in those proceedings, Nairobi Hospital, and in order to facilitate the release of the cadaver of **Mary Wamaitha Ngugi**. The Court proceeded to grant liberty to the parties to apply for further and other orders.

14. On 30th September, 2013, the Court proceeded to dismiss the petition but said nothing about the prohibitory orders. In arriving at its decision, the Court noted that the issue of the holding of the deceased's body had been settled by the orders issued on 20th September, 2012. It is therefore clear that even at the time of the determination of the petition, the Court was alive to the existence of the prohibitory orders which were to secure the interests of the Hospital. It is beyond peradventure that the said conservatory orders were not granted pending the determination of the petition but were to remain in force pending further orders of the Court. In other words the said orders could only be vacated on the orders of the Court since they were not necessarily pegged on the petition but were meant for securing the interest of the parties and those of the Hospital in particular. This was clearly appreciated by the Court when it recognized that it had to "balance the interests of the petitioner to have his mother accorded a dignified burial within a reasonable time and the right of the hospital to expect payment of hospital bills which the petitioner has undertaken to settle."

15. In these proceedings, Nairobi Hospital for whose benefit the prohibitory orders were issued was not made a party. There is no evidence at all that it was ever served with these proceedings. Order 53 rule 3(3) of the **Civil Procedure Rules** provides that the notice shall be served on all persons directly affected. Clearly the Nairobi Hospital is a party directly affected by the orders sought in these proceedings and to grant the orders sought herein would be a violation of the rules of natural justice. This Court cannot under the guise of protecting the applicant's rights trample on the rights of others. As 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].

16. In this case since the Court had granted the parties liberty to apply, an alternative avenue was left open to the parties in which all the parties to the petition could be heard before orders could be granted. I do not see any impediment to the applicant herein making an application in the petition for the grant of the order he seeks in these proceedings. That was also the position in the English case of **R (Regina)vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "

17. Similar views were expressed in **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194**, in which Chesoni, J (as he then was) stated:

“Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government...All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist.”

18. Having considered the issues raised herein, it is my view that in the exercise of this Court’s discretionary powers the orders sought herein ought not to be granted. First the grant thereof would adversely affect the rights of Nairobi Hospital without being afforded an opportunity of being heard. Secondly the applicant’s remedies can be granted in the petition. Thirdly without the applicant obtaining the orders for the removal of the prohibitory orders whose lifespan were not expressly stated to be dependent upon the determination of the petition, which petition itself the applicant herein lost, but was meant to protect the interests of the Hospital, it has not been shown to my satisfaction that the Respondents are legally bound to remove the prohibitory orders. Lastly, it is not lost to me that the authority that is empowered to remove the said order is the Land Registrar, to whom letters were addressed and who, for reasons unknown to this Court was never made a party to these proceedings.

19. It follows that this application is unmerited and fails. The same is dismissed but with no order as to costs. The applicant is however at liberty to move the Constitutional & Human Rights Division for appropriate orders if he so wishes.

20. Orders accordingly.

Dated at Nairobi this 31st day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kibanya for the Applicant

CA Mwangi