



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO.227 OF 2016

IN THE MATTER OF THE BY KIGIO LAND AND BUILDING CO. LIMITED FOR JUDICIAL REVIEW PROCEEDINGS BY WAY OF MANDAMUS

AND

IN THE MATTER OF THE LAND REGISTRATION 2011

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAND ACT 2012

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26 AND ORDER LIII OF THE CIVIL PROCEDURE RULES, CAP 21

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF LAND REGISTRAR.....1STRESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

JUDGEMENT

1. By a Notice of Motion dated 6th June, 2016, the *ex parte* applicant herein, **Kigio Land & Building Co. Limited**, seeks the following orders:

1.That the herein applicant Kigio Land & Building Co. Limited be and is hereby granted a judicial review order by way of mandamus compelling the respondents to renew and issue a certificate of lease to the applicant.

2. The costs of this application be awarded to the applicant.

Applicant's Case

2. According to the *ex parte* applicant, since the year 1987, it has been the registered owner of all that parcel of land known as Kigio Land & Building Co. Ltd situated on land Ref. No. 209/2490/59 Nairobi. Upon the expiry of the lease of the said land, the applicant applied for the extension of the lease to which the Ministry of Lands responded vide their letter dated 30th November, 2001 informing the applicant that the application for extension of the lease had been approved and requested the applicant to forward a Deed Plan and surrender the title to I.R 6464 for exchange of a new one upon payment of Kshs 5,000/=.

3. It was averred that the applicant complied with all the requirements and paid the requisite all fees which totalled to Kshs 6640/=. However despite that it was not issued with a new title despite writing several reminders to the land ministry and having made several visits to Ardhi House.

4. To the applicant, it has been in occupation of the said building since 1987 and has faithfully and dutifully paid the requisite taxes.

5. The applicant averred that it was not until after the filing of the replying affidavit that it learnt for the first time that the lease was renewed upto January 2052. It was however contended that it had not been issued with the certificate of lease and urged the Court to compel the respondent to issue the same to the applicant.

6. In the applicant's view, the respondent is playing games akin to encouraging corruption by averring that it does not know in whose favour the lease was renewed yet the respondent is aware the applicant has been in possession of the parcel of land since 1987 and it is the applicant who had applied for renewal and met the conditions of renewal. In the applicant's view, the respondents have been known to greedily play with scenarios where leases have expired and in this case whereas the respondent knows that it is the applicant who is the *bona fide* owner and despite having been furnished with the requisite documents the respondent is troubling the applicant's members who are very old in the belief that some may die and leave uncertainty which is itself futile as the applicant is a limited liability company. To the applicant, the respondent's affidavit is full of falsehoods and evasiveness and there is no single lawful reason disclosed why they have not performed their public duty despite several trips by the applicant and compliance with the conditions of renewal but the respondent's workers have deliberately misled the applicant for irrelevant reasons.

Respondent's Case

7. In opposition to the application, the Respondent averred that the suit land was first registered for a term of fifty nine years with effect from 1st November, 1942 to 1st January, 2002 and upon its expiry the same lease was renewed for a term of fifty years with effect from 1st January, 2002 till 1st January, 2052.

8. It was however the Respondent's case that since the relevant correspondence file number 33976 is not available in the records office, it was impossible to categorically state in whose favour the lease was renewed though the pre-emptive rights of renewal would ordinarily be given to the immediate past owner.

9. It was the Respondent's case that by issuing the orders sought herein this Court would be acting in vain since the duty complained of has already been performed hence the applicant ought to pursue other remedies available to it in law. Based on **Serah Mweru Muhu vs. Commissioner of Lands & 2 Others [2014] eKLR** it was averred that since the term of the lease is discretionary, the Court cannot grant the orders sought herein. In support of this position the Respondent further relied on **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** and **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707.**

Determination

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

11. 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.”

12. 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.”

13. Similarly, in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 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.”

14. 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.

15. In this case section 30(1) of the *Land Registration Act*, provides as follows:

“*The Registrar may, if requested by a proprietor of land or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease..*”

16. In this case the applicant has averred, which averment was not controverted by the Respondent that it has made several requests to be issued with the title document to the suit property but in vain. The Respondent has despite the confirmation the lease to the subject parcel of land having been renewed, has however contended that as the relevant correspondence file number 33976 is not available in the records office, it was impossible to categorically state in whose favour the lease was renewed. This is despite clear evidence by the applicant that prior to the renewal of the lease it was the registered proprietor thereof. As was held by **Majanja, J** in Serah Mweru Muhu vs. Commissioner of Lands & 2 Others:

34. The Commissioner has admitted that the process of extension of the lease was started way back in 2009. That process was interrupted by the sale to the State. Under section 13(1) of the *Land Act* the lessee has the right of first refusal should the State wish to extend the lease. It provides that, “Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.” In the absence of reasons for refusal to extend the lease, the lessee would be entitled to an extension of the lease. In this case though, any intention to extend the lease was superseded by the State’s acceptance of the offer to purchase the land.

35. In the circumstances therefore, I am afraid that the State cannot play victim and claim the petitioner’s occupation of the suit property is illegal based on the facts. The State, in essence, proceeded to sanction an acquisition process and even made assurances towards the same fully aware of the expiry of the term of the property subject of the sale agreement.

36. I find and hold that it was not unreasonable for the petitioner to have held legitimate expectation that the lease would be extended in view of the unfolding of events. To conclude otherwise would be to suggest that the State was oblivious of the expiry of the lease term of its own parcel of land or that it was playing a hoax in order to deny the petitioner the opportunity to extend the lease by entering into a dud sale of the suit property.

37. I am in agreement with the petitioner's submission that the neglect, refusal and or failure by the Commissioner of Lands to exercise its statutory duty to renew the petitioner's lease over the suit property is a violation of Article 47(1) of the Constitution. These provisions are also augmented by Article 232 which enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information."

38. The petitioner's concern regarding the renewal of the lease was brought to the Commissioner's attention by the letter of January 2012. In the written submissions, the Commissioner attributes the failure to renew the lease term owing to a cabinet directive freezing such dealings in public land. The decision was not exhibited to the Commissioner's affidavit nor was it communicated to the petitioner as the reason for refusal or failure to renew the lease or otherwise complete the transaction. One would expect that a decision of such magnitude and public interest would be contained in some form of documentation. The constitutional duty imposed on the Commissioner is to notify the lessor the reasons why the lease could not be renewed or any expectations or conditions demanded on the part of the petitioner/lessee prior to such renewal or indeed why the modalities of the sale could not be completed. This was not done, in breach of the petitioner's right to fair administrative action under Article 47(2) which provides that, "*If a right or fundamental freedom of a person has been or is likely to be affected by administrative action, the person has the right to be given written reasons for the action.*" Silence cannot be a substitute for written reasons.

17. Whereas the learned Judge was of the view, which view I buy into, that the Respondent's discretionary power to decide the period of the renewal cannot be interfered unless unreasonable, the Court was categorical that the lessor has a pre-emptive right of first refusal in the event the lease is to be renewed.

18. Therefore having renewed the lease, it is my view that for the Respondent to rely on the alleged unavailability of the relevant correspondence file number 33976 amounts to an unreasonable reason for failure to undertake its statutory obligation and that failure invites the intervention of this Court since section 7(2)(f) of the *Fair Administrative Action Act, 2015* empowers this Court to review administrative action or decision where there is an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law. Further Article 47 of the Constitution as read with section 4(1) of the said Act provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Accordingly, in the exercise of its administrative powers, the Respondent is expected to do so expeditiously and without unreasonable delay.

19. 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.

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

Disposition and Order

21. In the result an order of mandamus is hereby issued compelling the Respondent to issue to the Applicant herein, Kigio Land & Building Co. Limited the renewed certificate of lease in respect of land Ref. No. 209/2490/59 upon payment by the applicant of the requisite charges.

22. As part of the claim had already been satisfied, the applicant will have half the costs.

23. It is so ordered.

Dated at Nairobi this 25th day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence: