



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
MISC. APPLICATION NO. 535 OF 2016

**IN THE MATTER OF AN APPLICATION BY RAMESHCHANDRA GOVIND GORASIA,
MANAGING DIRECTOR OF TAJ MALL LIMITED, FOR LEAVE TO APPLY FOR ORDERS
OF MANDAMUS AND CERTIORARI**

AND

**IN THE MATTER OF THE CHIEF MAGISTRATE’S COURT AT MILIMANI LAW COURTS
CRIMINAL CASE NO. 1043 OF 2015**

AND

IN THE MATTER OF THE PENAL CODE AND CRIMINAL PROCEDURE CODE

AND

**IN THE MATTER OF ARTICLES 27(1) & 27(4), 29(a), 39, 40, 47, 48 & 50 OF THE
CONSTITUTION OF KENYA, 2010**

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR GENERAL OF DIRECTORATE OF
CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2nd RESPONDENT

EX PARTE:

RAMESHCHANDRA GOVIND GORASIA

RULING

Introduction

1. By a Chamber Summons dated 14th November, 2016, the applicant herein, **Rameshchandra Govind Gorasia**, seeks leave to apply the following orders:

- a. An order of Mandamus to compel the 1st respondent to investigate and confirm from Siesta Investments Limited (the complainant in Milimani Criminal Case No. 1043 of 2016) about the existence of another title in respect of L.R. No. 20273, I.R. No. 63978 in the name of Sigma Limited and whether they have paid land rent and rates for the property from the date of issuance of the grant to date.
- b. An order of mandamus to compel the 2nd respondent to charge the Directors of Sigma Limited as co-accused persons in Criminal Case NO. 1043 of 2016 with the offence of Forgery, Uttering a false document and making a false document in respect of title issued as I.R. No. 63978, L.R. No. 20273 issued in the name of Sigma Limited.
- c. An order of mandamus to compel the 1st respondent to investigate and confirm from Jayest Patel, a director of Siesta Investments Limited (the Complainant in Milimani Criminal Case NO. 1043 of 2016) that the person or entity in actual possession of land reference No. 20273 is China Road & Bridge Corporation.
- d. An order of Mandamus to compel the 2nd respondent to charge the directors of China Road and Bridge Corporation as co-accused persons in Criminal Case NO. 1042 of 2016 with the offence of Forcible Detainer in respect of land reference No. 20273.
- e. An order of Mandamus to compel the 1st respondent to investigate and confirm to the 2nd respondent and the ex parte applicant the legality of the process of issuance of the grant No. I.R. 141915 in the name of Siesta Investments Limited since under Section 12(1) of the Land Act only the National Land Commission can allocate public land.
- f. An order of Certiorari to quash the decision of the 2nd respondent to solely charge the ex parte applicant at the Chief Magistrate's court, Milimani Law courts in Criminal Case NO. 1043 of 2016 in respect of the parcel of land known as land reference No. 20273 yet Taj Mall Limited was a bona-fide purchaser for value from one Evans Ombogo Matunda.
- g. That the costs of this application provided for;

2. The applicant also seeks and order that leave so granted by this honourable court to institute judicial review proceedings of certiorari do operate as a stay of the criminal proceedings pending against the ex parte applicant before the chief magistrate's court, Milimani Law Courts in Nairobi Criminal Case No. 1043 of 2016.

3. According to the applicant, he is the Managing Director of **Taj Mall Limited**, the registered proprietor of LR No. 202273 which was transferred to the said company by the grantee thereof, one **Evans Ombogo Matunda** on 14th April, 2009.

4. It was averred that a company called **Siesta Investments Limited** (hereinafter referred to as "Siesta") claims to be the owner of the same parcel of land by virtue of a grant issued in 2013 after the coming into effect of the *Land Act, 2012*.

5. On the basis of a complaint lodged by the said **Siesta**, the Respondents have charged the applicant with the offence of forgery, uttering a false document, making a false document and forcible detainer before the CM Milimani Criminal Case No. 1043 of 2016 based on a complaint lodged by the said Siesta which is well aware of the existence of another title being IR No. 63978 & LR No. 202 73 issued to **Sigma Limited** (hereinafter referred to as "Sigma"). However **Siesta** has not lodged any complaint against **Sigma**. Similarly, Siesta has not lodged any complaint against **China Road & Bridge Corporation** who are the persons or entities in actual possession of the disputed parcel of land.

6. It was also averred that the 1st Respondent has not bothered to investigate or take any action to confirm the authenticity of the titles held by **Taj Mall Limited & Sigma Limited** which were both issues under

IR 63978. Likewise the 1st Respondent has not bothered to investigate or take any action to confirm that **China Road & Bridge Corporation** is in actual possession and control of the property known as LR No. 20273 or to charge the said **Sigma** or **China Road & Bridge Corporation**.

7. It was the applicant's case that the Respondents herein are either colluding to defraud or defrauding the said **Taj Mal Limited** of its property by charging the applicant in the said criminal case.

8. To the applicant, the acts of the Respondents are clearly discriminatory and an abuse of powers bestowed upon the Respondents to uphold the rule of law and ensued justice for all the parties involved in the matter yet Taj Mall is an innocent purchaser for valuable consideration hence the criminal charges levied against him are made in bad faith and full of malice. The applicant therefore accused the Respondent of breaching their statutory duties.

9. It was submitted by **Mr Mungai**, learned counsel for the ex parte applicant while reiterating the foregoing that by these proceedings, the Respondent ought to appear before this Court and explain to the Court why other persons ought to have been investigated and possibly charged have not been so investigated and charged.

10. He confirmed to the Court that if the said persons are similarly charged with the applicant, the applicant would have no cause to complain.

11. I have considered the material placed before this Court as well as submissions made by learned counsel.

12. The requirement for leave was explained by a three judge bench comprising **Bosire, Mboghli-Msagha & Oguk, JJ** in **Matiba vs. Attorney General Nairobi H.C. Misc. Application No. 790 of 1993** in which the Court held that it is supposed to exclude frivolous vexatious or applications which *prima facie* appear to be abuse of the process of the Court or those applications which are statute barred. Similarly, in **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex Parte Nzioka [2006] 1 EA 321**, Nyamu, J (as he then was) held that leave should be granted, if on the material available the court considers, without going into the matter in depth, that there is an arguable case for granting leave and that leave stage is a filter whose purpose is to weed out hopeless cases at the earliest possible time, thus saving the pressure on the courts and needless expense for the applicant by allowing malicious and futile claims to be weeded out or eliminated so as to prevent public bodies being paralysed for months because of pending court action which might turn out to be unmeritorious. See also **Republic vs. The P/S Ministry of Planning and National Development Ex Parte Kaimenyi [2006] 1 EA 353**.

13. **Waki, J** (as he then was), on the other hand, in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others Mombasa HCMCA No. 384 of 1996** put it thus:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

14. This position was confirmed by the Court of Appeal in Meixner & Another vs. Attorney General [2005] 2 KLR 189 in which the Court held that the leave of the court is a prerequisite to making a substantive application for judicial review and that the purpose of the leave is to filter out frivolous applications hence the granting of leave or otherwise involves an exercise of judicial discretion.

15. The circumstances which guide the grant of leave to apply for judicial review remedies were enumerated in Mirugi Kariuki vs. Attorney General Civil Appeal No. 70 of 1991 [1990-1994] EA 156; [1992] KLR 8 as follows:

“If he [the Applicant] fails to show, when he applies for leave, a *prima facie* case, on reasonable grounds for believing that there has been a failure of public duty, the Court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables the Court to prevent abuse by busybodies, cranks and other mischief-makers...”

16. In Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), the Court stated:

“Application for leave to apply for orders of judicial review are normally *ex parte* and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court’s discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved.”

17. This position was appreciated by *Majanja, J* in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* in which the learned Judge expressed himself as follows:

“I do not read the Court of Appeal to be saying that the Court should not have regard the facts of the case or have at best a cursory glance at the arguments. As I stated in *Oceanfreight Transport Company Ltd vs. Purity Gathoni and Another Nairobi HC Misc. Appl JR No. 249 of 2011 [2014] eKLR*, “In my view, the reference to an “arguable case” in *W’Njuguna’s Case* is not that the issue is arguable merely because one party asserts one position and the other takes a contrary view.” The duty of the court to consider the facts is not lessened by the mere conclusion that the case is frivolous, or that leave is underserved by examining the facts...Indeed, if leave was to be considered a matter of right then the purpose for which leave is required would be rendered otiose.”

18. What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceeding is not a mere formality and that leave is not granted as a matter of course. The applicant for leave is under an obligation to show to the court that he has a *prima facie* arguable case for grant of leave.

19. Whereas he is not required at that stage to go into the depth of the application, the applicant must disclose the existence of *prima facie* grounds for the grant of judicial review reliefs. Such grounds must *prima facie* be based on the facts as averred by the applicant in the verifying affidavit. It is therefore not enough to simply throw the grounds for the grant of judicial review and contend that a *prima facie* case has been made out. A *prima facie* case, in my view is made out when the applicant’s case if true may justify the grant of the orders of judicial review. Where the facts disclosed, even if true cannot possibly

justify the grant of judicial review remedies, a *prima facie* case, for the purposes of judicial review cannot be said to have been made out.

20. In this case the applicant seeks leave to compel the 1st and 2nd Respondents to institute criminal proceedings against the 3rd Respondent. The Court of Appeal in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR expressed itself *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* 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... 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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

21. In Shah vs. Attorney General (No. 3) Kampala HCMC 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.”

22. 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.

23. Therefore, *mandamus* is a peremptory order requiring the Respondent to perform a specified public duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by *mandamus* depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct an order of *mandamus* against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution in granting of the order, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant *mandamus* where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. See **Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.**

24. It has further been held that *mandamus* is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that *mandamus* may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “any body of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, *mandamus* may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of *mandamus* against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in **Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245.**

25. It is therefore clear that for leave to apply for an order of *mandamus* to issue, the applicant must establish on a *prima facie* standard that the person or body concerned has failed or refused to perform the duty imposed on it to the detriment of a party who has a legal right to expect the duty to be performed. Accordingly, it has been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of *mandamus*. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

26. Although there may be circumstances warranting the waiver of the requirement for the demand, it is upon the applicant to satisfy the Court that such circumstances do in fact exist.

27. In this case when asked by the Court whether a demand in form of a complaint had been lodged with the respondents, **Mr Mungai**, learned counsel instead of satisfying the Court on the existence of circumstances warranting the waiver of the above condition, informed the Court that complaints had been made though there was no averment to that effect in these proceedings. In an attempt to show the existence of such a complaint, learned counsel referred to the letter dated 21st June, 2016 written by Embakasi Police Station to Police in Charge, Syokimau Standard Gauge Railway in reference to Land Reference No. 20273 which it was stated as follows:

The above subject matter has been brought to this office to seek your assistance.

They are requesting your office to obtain a lease agreement which Chinese leased to you and that the said piece of land belong to Taj Mall Limited and somebody might have forged the documents to enable him lease the plot.

Kindly accord them your necessary assistance.

28. With due respect even if this letter had been written by the ex parte applicant herein which it was not, the letter is not a complaint addressed to any person to carry out the investigations in the nature intended in these proceedings. It was simply a request by the author to the addressee to assist some other person whose identity is not even disclosed in the body or anywhere else in the letter. That kind of a letter does not in my view amount to a demand or a complaint directed to the Respondents herein by or on behalf of the ex parte applicant for the Respondents to commence investigations into the complaints by the ex parte applicant.

29. Under Article 157(4) of the Constitution the 1st Respondent herein is empowered to direct the Inspector-General of the National Police Service to investigate any information or allegation of criminal conduct and when he does so, the Inspector-General is bound to comply therewith. Under Article 157(6) (a) of the Constitution, the 1st Respondent is empowered to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed. In carrying out his mandate it is provided that the 2nd Respondent does not require the consent of any person or authority in order to commence criminal proceedings and in so acting is not under the direction or control of any person or authority.

30. In this case, there is no evidence that the 1st Respondent has failed or refused to carry out his obligations. It has not been shown that the applicant has raised the issue with the 2nd Respondent to direct the 1st respondent to undertake any investigations and that both Respondents have declined to do so. In my view the applicant ought to have shown that despite bringing to the Respondents' attention the commission of the alleged offences, they have declined to act. This Court cannot, in circumstances under which the Respondents exercise discretionary powers, permit a party to commence judicial review in the nature of *mandamus* when the prerequisite conditions are not shown to exist. It is the existence of the prerequisite conditions, in this case a demand for action or complaint, which can establish the existence of a *prima facie* case for the purposes of grant of leave.

31. With respect to the prayer for certiorari, it is clear that the same is intricately intertwined with and depends of the prayer for *mandamus* that without leave being granted for an application for *mandamus*, the said prayer cannot stand on its own. In other words the prayer for certiorari as sought in prayer (f) is consequential to the preceding prayers.

32. From the material placed before me as well as the submissions made by **Mr Mungai**, it seems that the applicant's cause of action is substantially a claim in the nature of the right to information as opposed to one for judicial review. Such a claim in my view ought to be properly dealt with pursuant to Article 35 of the Constitution.

33. In the premises it is my view and I hereby find that the applicant has failed to disclose a *prima facie* case for the purposes of leave.

34. Consequently leave is declined with the result that these proceedings are rendered incompetent and are hereby struck out but with no order as to costs.

35. It is so ordered.

Dated at Nairobi this 23rd day of November, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Agwara for Mr Mungai for the Applicant

CA Mwangi