



No. 520/15

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL MISC NO. 285 OF 2011

SIMON SALAON PERTET.....APPLICANT

VERSUS

KAJIADO NORTH DISTRICT LAND REGISTRAR &

THE DISTRICT LAND REGISTRAR KAJIADO.....1ST RESPONDENT

COMMISSIONER OF LANDS.....2ND RESPONDENT

THE HON ATTORNEY GENERAL3RD RESPONDENT

THE OLEKEJUADO COUNTY COUNCIL4TH RESPONDENT

JUDGMENT

1. **Simon Salaon Pertet**, described as the applicant herein filed a judicial review application seeking that the court grants;-
 - i. An order of mandamus directed to the **Kajiado District Land Registrar** through the office of the **Attorney General** compelling the 1st and 2nd Respondents to register the Applicant as the registered owner of **Land Reference Number Ngong/Block 2 /638 Plot No. 131 Vol. II.** (hereinafter subject premises)
 - ii. An order of certiorari to quash the decision of the 1st Respondent to register **Grace Wanjira** as the proprietor of the subject premises;
 - iii. An order of prohibition to prohibit the 1st respondent from registering, mortgaging, charging, leasing, subleasing the subject premises;
2. The application is supported by a statement of facts and grounds upon which the relief is sought that; the decision by the 1st respondent to transfer and register **Grace Wanjira** as the proprietor of the subject premises is wrong, unlawful, arbitrary and fraudulent; the applicant was allotted the subject premises on 27th May, 1992; he has been paying all requisite fees to necessitate a transfer; he has been in occupation of the premises for more than fifteen (15) years; the decision by the 1st respondent is biased, unlawful, bad in law and illegal; damages will not be sufficient as compensation for loss of property.

3. In a verifying affidavit in support of the application, the applicant reiterated what is stated in the grounds upon which the application is based and added that he learned of the double allocation of the subject premises in December, 2011.
4. The respondents (1st, 2nd and 3rd) filed grounds of opposition whereby they stated that the court lacks jurisdiction to entertain proceedings as they are civil in nature; Judicial Review remedies are public in nature and cannot be used to enforce private laws; judicial review can only be granted in the name of the State; judicial review is only concerned with decision making process as procedure but not the merits of the decision.
5. In a response thereto the applicant averred that the respondents are public bodies and the purposes of judicial review is to ensure that the individual is granted fair treatment by the authority to which he is subjected; the respondents failed to comply with rules of natural justice by condemning the applicant and violating his proprietary rights.
6. Jurisdiction has been questioned in this matter. The court is therefore obligated to deal with the issue, failure to which the entire court process would become a nullity. In the case of the owners of **Motor-vessel Lillians versus Caltex Oil Kenya Ltd [1989] KLR 1** at page 14 Nyarangi ,J stated:-

“Jurisdiction is everything, without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction “.

This court has unlimited original jurisdiction in criminal and civil matters. (see **Section 165 (3) (a)** of the **Constitution**) Judicial Review is however, a special jurisdiction that is neither criminal nor civil in nature. This court is however, clothed with jurisdiction to ensure that public bodies or persons and tribunals do not act in excess of their powers.

7. In the case of **Republic -versus -Permanent Secretary/Secretary to the Cabinet and Head of Public Service Office of the President and 2 Others – Exparte Stanley Kamanga Nganga [2006] eKLR** – it was stated that the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large.
8. In the case of **Republic –versus- Judicial Service Commission, Misc Civil Application No. 1025 of 2003** the court stated that :-

“The remedy of judicial review is concerned with reviewing not the merits of a decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected...”

9. From the foregoing it is apparent that the High Court exercises its supervisory functions through judicial review which is a remedy available against a public body in a public law matter.
10. Looking at the respondents in this matter, their duties are public in nature. Their activities and/or authority is derived from statute. Their duties being public in nature they are amenable to judicial review. In the case of **Nicholas Njeru versus Attorney general & 8 others [2013] eKLR** the Court stated thus:-

”... it is well settled principle of law that the High Court is given supervisory powers to check the excess of jurisdiction and compliance with the rule of law by inferior tribunals and other public bodies or persons discharging such acts. For example an order of certiorari is a quashing order issued by the High Court to quash decisions of our inferior court or tribunal, public authority or other body which is susceptible to judicial review”

An order of prohibition is an order by the High Court directed at an inferior tribunal, public authority forbids that body to act in excess of its jurisdiction or contrary to law;

whereas mandamus is an order in form of a command directed to any person/corporation or inferior tribunal requiring him or them to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty. See (Halbury's law of England 4th Edition Vol. 1 paragraph 119).

... he urged us to find that the Chief Land Registrar had no powers or jurisdiction to cancel the registered land titles. We agree these prayers could perfectly fitted the bill under judicial review as they see to supervise the powers of the person exercising public authority”

The 1st and 2nd respondents are both public bodies whose action can be subjected to judicial review. The argument raised by the respondents that this is a private law matter and hence not susceptible to judicial review but it should be brought as a civil suit is not true. In an instant where the complaint is about the decision being against natural justice or biased, the matter will be amenable to judicial review. The matter is therefore properly before this court.

11. It is contended that judicial review can only be granted in the names of the state. Judicial Review proceedings are normally considered to emanate from a special jurisdiction as I have aforesaid. After leave was sought by the *ex parte* applicant and granted by the court, the substantive motion ought to have been brought in the name of the state. The jurisdiction is donated to this court by **Section 8 and 9 of the Law Reform Act**. Therefore the procedure laid down must be followed to the letter. This was stated in the case of –*Jotham Mulati Welamondi versus The Electrical Commission of Kenya. Bungoma H.C. Misc Application No. 81 of 2002 1KLR 486* that:-

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of certiorari, mandamus or prohibition are issued in the name of the Republic and applications therefore are issued in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for mandamus is:-

“Republic (applicant) Versus the Electoral Commission of Kenya (Respondent) - Ex parte Jotham Mulati Welamondi”

12. In the case of *Republic versus Chairman, Kajiado Central Land Tribunal & 2 Others, Ex parte Timaiyo (2012) eKLR Makhandia, J* (as he then was) stated that;-

“This being a special jurisdiction and with a mandatory procedure, failure to comply with mandatory procedural law is not a technicality that can be cured under either the constitution and or “the double O” principle would apply to civil proceedings. However, as I have already demonstrated, judicial review proceeding does not fall in that category.”

13. In the instant case the Republic which is seized of the authority to check powers of the public authority was overlooked. This was detrimental to the applicant. Consequently, the application is fatally defective. The same fails. Accordingly it is struck out with costs to the 1st, 2nd and 3rd respondents.

14. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 27TH day of JANUARY, 2015.

L.N. MUTENDE

JUDGE