



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC. APPLICATION NO. 406 OF 2012

IN THE MATTER OF AN APPLICATION BY DUBAI BANK KENYA LIMITED FOR AN ORDER OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF THE LAW REFORM ACT (CHAPTER 26) LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

AND

UKAMBA AGRICULTURAL INSTITUTE.....INTERESTED PARTY

***EX PARTE:* DUBAI BANK KENYA LIMITED**

JUDGEMENT

1. By a Notice of Motion dated 30th November, 2012, the *ex parte* applicant herein, **Dubai Bank Kenya Limited**, seeks the following orders:

1. That an order of Mandamus does issue to compel the Chief Land Registrar , to forthwith register the vesting order issued by Justice Ogola on 29th June 2012 at the Milimani Commercial and Tax Division Case Number 172 of 2012 and accordingly issue a good and valid title to the suit property being L.R. No 209/10350 City of Nairobi in favour of the Applicant, Dubai Bank Kenya Limited forthwith.

2. That an order of Prohibition does issue to prohibit the Chief Land Registrar from making any entries or further changes or dealings in the suit property being L.R. No. 209/10350 City of Nairobi in any manner that is prejudicial to the Applicant herein.

3. That the costs of this application be borne by the Respondents.

Applicant's Case

2. The application was supported by an affidavit sworn by **Hassan Zubeidi**, the ex parte applicant's chairman on 30th November, 2012.

3. According to the deponent the Interested Party is the registered proprietor of the suit property being L.R No. 209/10350-City of Nairobi which the Applicant purchased vide a sale Agreement dated 2nd August 2011 and deposited of Kshs. 38,100,000/= with the balance of Kshs 215,900,000/= being payable upon completion.

4. It was however deposed that notwithstanding the said payment the interested party failed to complete the transaction leading to the institution of High Court Civil Case No. 172 of 2012 at the Milimani Commercial Court for specific performance by the ex parte applicant. Pursuant to the institution thereof, on 29th June 2012, **Justice Ogola** delivered a ruling in High Court Civil Case No. 172 of 2012 at the Milimani Commercial Court wherein, the learned judge ordered *inter alia* that a vesting order does issue vesting a good and valid title to the suit property L.R. No. 209/10350- City of Nairobi to the Applicant herein or its nominee free from any encumbrances whatsoever which order remains unchallenged to date.

5. However, the 1st Respondent has declined, neglected and/or failed to comply accordingly despite the Applicant lodging and resubmitting the application for registration of the said vesting order with the 1st Respondent for issuance of title.

6. It was therefore the ex parte applicant's case that the Respondents have failed, neglected and/or refused to comply with court orders and/or to discharge their statutory duties and there is no other effectual means of compelling the Respondent to so comply save by means of the prerogative orders sought. In addition it was deposed that significantly, the vesting orders herein were issued by the learned judge after the interested party maintained that it did not have the original title documents to the said property to allow it transfer the same to the Applicant notwithstanding that there was undoubtedly the registered proprietor thereof. Further, the orders were issued with the full knowledge that dubious entries had been made in the registry of title regarding the suit property and it was therefore trite to issue the said orders to protect the interests of the Applicant herein.

7. It was disclosed that the Applicant is not amused by the silence on the part of the Respondent coupled with the refusal and/or delay to register the orders aforesaid and as such he Applicant is apprehensive that entries may be made in the register that would substantially prejudice the Applicant herein since the Respondents have not at the very least given any reason for their decision and/or indecision herein.

8. In the applicant's view, no party would be prejudiced if the orders sought are granted as neither the Respondents nor the Interested Parties have challenged the said orders of **Justice Ogola** by way of Review or Appeal or otherwise.

Respondents' Case

9. On their part the Respondents opposed the application vide the following grounds of opposition:

1. That orders sought to be executed arise out of a contract between private parties, which issues are outside the judicial review ambit and the Respondents are not privy to.

2. That the orders sought to be executed were obtained at the interlocutory stage in the HCC Civil Suit No. 172 of 2012 which is still pending between parties to which the 1st and 2nd Respondents were and are not parties.

3. That in any case, the orders are in capable of execution at this stage being final in

nature as the execution therefore will dispose of the main suit without being heard on merit.

4. That the orders are incapable of execution given that there exists previous valid court orders issued, touching on the suit land which orders have not been challenged or set aside.

5. That the orders sought to be executed are substantively and procedurally incompetent and contrary to the provisions of order 53 of the Civil Procedure Rules and hence un-executable to that extent.

Determinations

10. Having considered the application, the affidavit in support of the Motion and the grounds of opposition thereto, this is the view I form of the matter.

11. 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:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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.”

12. In Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

13. In Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision 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 and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.

14. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285*.

15. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300. In that case the Court cited with approval Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

16. Section 14(c) of the *Land Registration Act*, Cap 300 Laws of Kenya, provides that the Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act **“refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”**

17. It is therefore clear that the decision whether or not to register any instrument, certificate, document, plan, information or explanation is an exercise of discretion. However, public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights donated to him or her by Parliament in my view without proper reasons would amount to wrong exercise of discretion. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

18. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. Whereas we appreciate the fact that the decision whether or not to register the transfer in favour of the applicant by the Respondents is an exercise of discretion this Court is empowered 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 Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323.**

19. In the instant case, the applicant's position is that despite its attempts the Respondents have not registered a lawful order of this Court. As was held in **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 the Respondents are under an obligation to consider an application to register the vesting order. However, this Court cannot by way of an order of mandamus compel the Respondent to register the vesting order. The Court can only compel the Respondents to consider the same and make a decision one way or the other. However the Respondents are 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 applicant. 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** (supra) 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.

20. With respect to the prayer for prohibition, it is clear that the said prayer cannot be granted since it is speculative in nature. Prohibition is only available where there is a threat of a particular action being undertaken. In this case there is no evidence that the Respondents intend to take any action which ought to invite the issuance of an order of prohibition.

Order

21. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus compelling the Respondents to consider the applicant's application for registration of the vesting order and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, then the Respondents will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondents to register the said vesting order and issue the ex parte applicant with certificates evidencing the applicant's interest thereon.

22. The applicant will have the costs of this application.

23. It is so ordered.

Dated at Nairobi this 18th day of February, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Munyaka for the Applicant

Mr Odhiambo for the Respondent