



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KITUI

ELC.MISC.APPLICATION NO.5 OF 2021

(FORMERLY MACHAKOS MISC.NO.61 OF 2018)

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS BY KITUI AFRICAN TRADERS LTD

IN THE MATTER OF: PLOT 95 KALUNDU MARKET, KITUI TOWN

REPUBLIC.....APPLICANT

VERSUS

COMMISSIONERS OF LAND.....RESPONDENT

EX PARTE.....KITUI AFRICAN TRADERS LTD

JUDGEMENT

1. The application before court is the Amended Notice of Motion dated 9th March, 2015. The same is brought under 53 Rule 3 of the Civil Procedure Rules 2010 and Section 9 of the Law Reform Act and seeks the following orders;

A) That a Judicial Review Order of Mandamus do issue compelling the Chief Land Registrar of the Republic of Kenya to issue a title document (a lease) to the ex parte Applicant upon payment of the requisite fees, in respect of plot No.95 Kalundu Market pursuant to the judgment of the court dated 28th June, 1996 in Kitui SRMCC NO.92 OF 1995, between Kitui African Traders Ltd. –VS- The Municipal Council of Kitui.

B) That the costs of this application be provided for

2. The Application is supported by the affidavit of Francis Malombe Mbuvi, the managing director of the Ex-parte Applicant sworn on 29th May 2009. It is further supported by the Statement of Facts dated 29th May 2009.

Brief Background

3. The applicant claims to have been allotted a plot at Kalundu Market by the plot Allocation Committee of the Commissioner of Lands through the County Council of Kitui sometime in August 1971. The said plot was subsequently surveyed and given plot number 95 and part development plan prepared and approved by the relevant authorities. By a letter dated 5th July 1988 the Applicant wrote to the Commissioner of Lands requesting issuance of title documents (lease). That as a result of the request, the Commissioner of Lands wrote to the Permanent Secretary Ministry of Local Government seeking for approval to issue title documents to the Ex parte Applicant.

4. That on 1st March, 1995, the Permanent Secretary Ministry of Local Government sought a site Inspection Report from the County Council of Kitui. In the meantime, the area where the plot was situated fell under the Jurisdiction of the Municipal Council of Kitui.

5. That by a letter dated 22nd May, 1995 the Municipal Council of Kitui wrote to the Permanent Secretary, Ministry of Local Government opposing the Applicants application to be issued with title documents in respect of plot No. 85 Kalundu Market. The Applicant stated that before the opposition raised by the Municipal Council of Kitui, the County Council of Kitui and the District Land Officer Machakos had submitted their recommendations to the Permanent Secretary Ministry of Local Government.

6. That due to the refusal by the Municipal Council of Kitui to allow the Commissioner of Lands to issue title documents to the Applicant, the Applicant filed a suit for declaration and permanent injunction against the said Municipal Council of Kitui in KITUI SRMCC NO.92 of 1995.

7. The Municipal Council filed its defence and after a full hearing the court found for the Applicant by making a declaratory order that plot No.95 Kalundu Market is the property of the Exparte Applicant. The Municipal Council filed an appeal in Machakos HCCA No.150 of 1996 Municipal Council of Kitui –VS- Kitui African Traders Limited, but the appeal was dismissed on 3rd June 2000.

8. The Applicant claims that decision of the court declaring plot No.95 Kalundu Market as property of the Applicant is valid, has not been set aside and still holds and has force of law. That the said decision can only be implemented by the Respondent in this case who is the custodian of title documents for parcels of land lying within all the Municipalities. Further that the decision of the Court supersedes all administrative objections including those raised by the Municipal Council of Kitui and the Respondent is bound to comply with the orders of the court and this court has the necessary Jurisdiction to compel the Respondent to comply and enforce the orders.

9. The Respondent filed grounds of Objection stating that;

A) The application herein is unmerited and therefore an abuse of the due process of the court.

B) That the applicant has not followed the procedures required to acquire land under the municipality as the said land is under the Municipality of Kitui and therefore has to ensure the allotment letter, and then register the same as a lease.

C) That the applicant must first acquire an allotment letter from the Municipal Council or the County Council as it is presently known.

D) THAT the follow the procedure of allotment as hereunder;

i. Preparation and execution of a lease emanating from the allocation of land as per section 12 of the Act.

ii. Upon receipt of the cadastral plan/map, a lease in a prescribed form will be executed by a designated officer of the National Land Commission duly gazette on behalf of the county or national Government.

iii. The executed lease document and the cadastral map/plan shall be forwarded to the Chief Land Registrar for registration and issuance of a certificate of lease to the proprietor.

iv. The National Land Commission shall forward the documents in above to the Chief Land Registrar in a prescribed form.

v. THAT bearing in mind the above procedure of allocation of public land, the plot has not crystallized to the registration stage where the District Land Registrar/ Chief Land Registrar has a role to play.

vi. THAT it is until the same reaches the registration stage that the Applicant can then seek this Honorable Court to compel the Chief Land Registrar to issue it with a title.

vii. THAT the applicant is seeking to compel the commissioner of land to issue a title when he has not shown that he made an application to the commissioner for issuance of a title and has also not shown whether the plot has crystallized to the registration stage.

viii. THAT the application seeks that this Honorable Court directs the Commissioner of Land to exercise or not exercise his/her discretion in a particular manner hence usurp the said officer's authority.

10. When this matter came up for hearing on 22nd November 2021, the applicant was directed to serve the County Government of Kitui for the reason that the Municipal Council of Kitui the predecessor of the County Government of Kitui was a possible interested party in these proceedings having been the defendant in the initial suit being Magistrates Court case number 92 of 1995 between the Exparte Applicant and the Municipal Council of Kitui. The said suit forms the basis of the current application. The County Government was duly served but did not enter appearance or file any documents in reply to the application herein.

11. The applicant filed written submissions in which the Counsel has urged the Court to allow the application on the ground that the Respondent is the authority mandated to issue documents (lease) in respect of parcels of land situate within a Municipality as is sought by the applicant. That despite attempts, the Respondents have not registered a lawful order of this court. The Applicant relies on the authority of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] Eklr in settling the parameters of judicial review.

Analysis and Determination

12. Having read the Amended Notice of Motion dated 9th March, 2015, the supporting affidavit and the Statement of Facts dated 29th May 2009 and having considered the Respondents Grounds of Opposition and the submissions by the Exparte Applicant, I am satisfied that judgement was entered on 28th June, 1996 in favour of the Applicant in SRMCC NO.92 of 1995, between Kitui African Traders Ltd. –VS- The Municipal Council of Kitui. The following orders were made;

a) THAT plot No. 95 Kalundu Market within the Municipality of Kitui is the property of the Plaintiff

b) By entering and subdividing the plot, the defendant was a trespasser and I make orders that it pays to the plaintiff Kshs.40,000/- as

damages for trespass

c) I issue a permanent injunction restraining the defendant, its agents servants or employees from depriving the plaintiff of the subject plot. The defendant its agents servants or employees are further restrained from entering the plot and doing any work thereon.

d) The Defendant will also pay the plaintiff costs of this suit

13. From the facts set out above, I am satisfied that the Commissioner of Lands who was the predecessor of the Respondent herein did allocate to the Applicant plot number 95 Kalundu Market within the County of Kitui (formerly Municipality of Kitui) and the same was only pending issuance of a letter of allotment. However, for reasons that were dealt with in great detail in the initial suit SRMCC NO.92 of 1995, between Kitui African Traders Ltd. –VS- The Municipal Council of Kitui the then Municipal Council of Kitui refused and/or failed to give recommendation for issuance of a letter of allotment to the applicant.

14. It is the courts view that the judgement in the above suit settled any and all of the issues and objections raised by the said Municipal Council of Kitui that prevented the Respondent herein from issuing the Applicant with a letter of allotment and ultimately the title document. Further, the Court is of the view that the objections raised by the Respondent in the Grounds of objection relate to the procedures to be followed in order to acquire land under the former municipality or County. I find that the issues raised were dealt with extensively by the Trial court and judgment was rendered.

15. The Court is of the view that the Respondent is under a legal duty following the judgment of the Court to implement the same and proceed to issue the Applicant documents of title to the plot. Under Section 30 of the Land Registration Act it is the duty and obligation of the Respondent to issue a proprietor of land a certificate of title or certificate of lease. The section states;

“The Registrar may, if requested by a proprietor of land whose name appears in the register 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 the case of **Republic vs Kenya National Examination Counsel ex parte Gathenji & Others, (1997) eKLR**, the court considered the scope and efficacy of an order of mandamus: -

“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 and 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.”

17. In the case of **Republic Vs. Attorney General & Another Ex-Parte Ongata Works Limited [2016] eKLR** Odunga J referred to the case of **R (Regina) Vs. Dudsheath, Ex Parte, Meredith [1950] 2 ALL E.R. 741, AT 743**, where Lord Goddard C. J. held as follows:

"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... "

18. **The Court has considered that the Applicant made various attempts to get the Respondent to issue the title documents but the same were not issued. I am thus satisfied that the orders sought are deserved.** I therefore find that the application herein has merit and the same is allowed as follows;

1. That a Judicial Review Order of Mandamus do issue compelling the Chief Land Registrar of the Republic of Kenya to issue a title document (a lease) to the exparte Applicant upon payment of the requisite fees, in respect of plot No.9 5 Kalundu Market pursuant to the judgment of the court dated 28th June, 1996 in Kitui SRMCC NO.92 OF 1995, between Kitui African Traders Ltd. –VS- The Municipal Council of Kitui.

2. That the costs of this application be awarded to the Exparte Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 23RD DAY OF FEBRUARY, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court in the presence of-

C. Nzioka.....Court Assistant

M/S Ngala holding brief for Kalili Advocate.....for the Ex-parte/Applicant

No Attendance.....for the Respondent