



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 218 OF 2015

MARIAKANI ESTATE COMMUNITY ORGANIZATION.....
.....APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF NAIROBI.....1ST
RESPONDENT

REGISTRAR FOR LANDS.....2ND
RESPONDENT

RULING

The applicant herein has come to court by way of a Chamber Summons dated 12th March 2015 under **Order 53 Rule 1 and 2 of the Civil Procedure Rules, 2010 and section 8 (1) and (2) of the Law Reform Act** seeking for leave to apply for the Judicial Review remedies of mandamus and prohibition against the respondents. *The orders sought are that:-*

1. *Leave be granted to the applicant to apply for an order of Mandamus directed to the County Government of Nairobi and the Registrar of Titles to desist forthwith from alienating, selling, transferring or disposing of L.R. No. 209/6612 comprising 240 housing units otherwise known as Mariakani Estate (hereinafter referred to as the "Estate").*
2. *Leave be granted to the applicant to apply for an order of prohibition prohibiting the County Government of Nairobi and the Registrar of Titles from selling, transferring or disposing of the Estate and that leave, if granted, operates as stay pending the hearing and determination of the substantive motion.*

The grounds stated on the face of the application are that the applicant is a welfare organization comprising of residents of the entire 240 houses found in the Estate, that the residents have inherited these houses through family generations since the year 1963, that the initial plan of the Estate was to be a low income residential for Africans with the object of making them purchasers in future and that the officials of the defunct City Council of Nairobi purported to secretly transfer the Estate to the Local Authority Provident Fund ("LAPF") without their knowledge in a purported statutory swap. The applicant argues that the procedure used to put in place the transfer was irregular, unlawful, null and void in that the transfer was signed on 18th March 2013 long after the City Council of Nairobi had ceased to exist as an entity and the County Government of Nairobi was in place. Further grounds relied on are that the

applicant had a legitimate expectation that any sale of the Estate should involve them and further that they are therefore apprehensive that the County Government is in the process of entering into a further sale of the Estate which would dilute their interests considering that no evidence was tendered prior to the transfer to indicate the amount of debt or the necessity for the sale. The applicant believes that the Estate was grossly undervalued given the location and acreage thereof.

This application is supported by the statutory statement and the verifying Affidavit of Edward Thairu who is the vice chairperson of the applicant. He stated that they pay rent to the County Government of Nairobi. He averred that sometime in 2013, former officials of the now defunct City Council of Nairobi secretly purported to transfer the Estate to the LAPF. The applicant has now come to challenge the process of the sale and transfer of the Estate which was conducted on 18th March 2013 without following the due legal process since the City Council of Nairobi was subject to the transitional process which entailed two phases namely Phase one being the period from the year 2012 to 4th March 2013 and phase two the period from the General Election up to three (3) years. He states that the former officials of the Nairobi City Council including the Mayor, the Town Clerk, the Chairman of the Finance Committee and the Head of Legal Department signed a transfer and lodged it with the second respondent purporting to transfer alienate /dispose or sell the Estate to the LAPF which transfer fell in the bracket of the second phase of the transition period and therefore required the sanction of the treasury, the transition authority, the commission for Revenue Authority, and the Ministry of Local Government in charge of matters relating to intergovernmental relations which sanction was never granted. He believes that the officials of the defunct City Council of Nairobi could not be deemed under Article 260 of the Constitution and as such their acts were *ultra vires*, null and void and offended the provisions of section 7, 10, 11, 12, 13 of the Leadership and Integrity Act and that the said officials were no longer employees of Nairobi County Government therefore they had no locus to effect a transfer. He elaborated this by stating that the purported signature of the Mayor George Aladwa Omwera had no legal effect as the office of Mayor had ceased to exist as at 18th March 2013, the signature of the Chairman Finance Committee had no legal effect as the Finance Committee had ceased to exist as at 18th March 2013, the signature of the Director of City Council of Nairobi had no legal effect as the office of the Legal Director had ceased to exist as at 18th March 2013 therefore the officials were *ultra vires* and incompetent *ab initio* as Mr Roba Duba the purported Town Clerk was then the MP for Moyale Constituency. Mr Joshua Aduma was then the MP for Nyakach Constituency. Further that the actions of the said officials were further defeated by the fact that all assets of the former Local Authorities were by law now invested in the County Governments. The applicant is further aggrieved in that the sale was made as a debt swap for a consideration of only Kenya Shillings one billion five hundred and fifty million which constitutes a paltry figure given the nature and extent of the Estate which is made up of 240 housing units covering an area of ten acres. Further that the reason advanced for the debt swap was the payment of statutory debts but the amount of debt was not outlined or revealed. He therefore seeks an order of Mandamus directed at the County Government of Nairobi and Registrar of titles to restrain any further dealing in alienating or disposing of the Estate and an order of prohibition directed at the County Government of Nairobi and the Registrar of titles from making any transfer, alienating or disposing or any dealing whatsoever or howsoever or with any persons whatsoever in regard to the Estate and a declaration that the purported transfer is and was null and void.

FINDING

Judicial review is a challenge on administrative action or decision. It invokes the supervisory jurisdiction of the High Court donated by **Sections 8 and 9** of the **Law Reform Act** and **Article 165 (6)** of the **Constitution** which makes it clear that the said jurisdiction is to be exercised over decisions of subordinate courts, any person, body or authority which exercises a judicial or quasi-judicial function or those who are charged with the performance of public acts and duties. The remedy of mandamus is aimed at compelling the performance of a statutory or public duty which a public body or officer has failed to perform without legal justification. Principally, this application is seeking leave to commence judicial review proceedings, it is important to examine the purpose and the principles which guide the court in the exercise of its discretion in deciding whether or not to grant the leave sought. This discretion, as in all other cases, must be exercised judiciously depending on the circumstances of each case. The requirement that leave must be sought and obtained before making an application for judicial review is

meant to protect the court process from abuse by litigants from filing applications with no chances of success. The court in **Republic Vs County Council of Kwale & Another Ex-parte Kondo & 57 others Mombasa HCM CA NO. 384 of 1996** held that,

“ 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 parties 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”

Leave to commence judicial review proceedings is not granted as a matter of procedure even though at this stage the applicant is not expected to get into the substance of the anticipated application for judicial review. However, it has to satisfy the court that it has a prima facie arguable case. What the court needs to look at in this stage is whether the applicant has met the requirements for the grant of leave as sought in this application.

The applicant has come to court seeking for an order of mandamus to compel the Respondents desist from alienating, selling, transferring or disposing of the Estate. **Halsbury’s Laws of England, 4th Edition** describes an order of mandamus as,

“...a most extensive remedial nature, [it] is 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 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 made 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.”

The applicant comprises of the residents of the Estate. The residents of the Estate pay their rent to the 1st Respondent. On behalf of the residents, the applicant has raised the issue of legitimate expectation. In **Council of Civil Service Unions Vs Minister for Civil Service [1984] 3 All ER 935** the court held that for one to claim legitimate expectation the actions of the other party

?.....must affect the other person by depriving him of some benefit or advantage which either -

(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue doing until there has been communicated to him some rational grounds for withdrawing it in which he has been given an opportunity to comment, or

(ii) He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity to advance reasons for contending that they should not be

withdrawn.”

As residents of the Estate who have dutifully paid rent to the 1st Respondent, every decision regarding the Estate including the disposal thereof is of interest to the residents who will no doubt be most affected. They could be rendered homeless. To that extent therefore, I find that the applicant as the umbrella body under which those residents are litigating has a legitimate expectation that their interests are taken into account in any decision relating to the Estate. Further, the order of prohibition is meant to stop or prevent the making of contemplated illegal decisions or actions or their implementation. In the same way, the applicant is entitled to place forward its position in regard to any further transaction relating to the Estate. Overall, I find that the applicant is entitled to be granted leave to seek the orders stated earlier as residents of the Estate.

Arising from the foregoing, I hereby allow this Application. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF APRIL 2015.

MARY M. GITUMBI

JUDGE