



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

JUDICIAL REVIEW NO 1 OF 2021

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS TO COMPEL THE RESPONDENTS TO
RELEASE ORIGINAL LEASE DOCUMENTS OVER KAPSABET/MUNICIPALITY NO. 85.**

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NANDI.....1ST RESPONDENT

LAND REGISTRAR NANDI COUNTY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

DHIRAJLAL ZAVERCH.....EXPARTE APPLICANT

ANJNA DHIRAJLAL DOHDIAEXPARTE APPLICANT

JUDGMENT

1. The Exparte Applicant Dhirajlal Zaverchand and Anjna Dhirajlal Dodhia were granted leave by the Honourable Court to institute Judicial Review proceedings seeking orders of Mandamus to compel to release/surrender their original lease documents of KAPSABET MUNICIPALITY 85.
2. The Substantive Motion filed pursuant to the leave so obtained and dated 3rd May 2018, was grounded on grounds internalia;
 - a) The Exparte Applicants are the sole registered proprietors of the land title no KAPSABET MUNICIPALITY 85.
 - b) The Exparte Applicant's names have not been expunged from the records or registered titles and the respective owners.
 - c) The Respondents lack jurisdiction to expunge the Ex-parte Applicant's names from the record as this is an illegal and unprocedural action on the Respondents part.
 - d) The Respondents continued to hold over the Exparte Applicants original prolonged and inconveniencing to the Exparte Applicants.
 - e) The Exparte Applicants have severally issued demand for the release of the afore stated documents to the Respondents in vain.
 - f) The Court should therefore issue an order of Mandamus to compel the Respondent to release the original lease documents.
3. It is the Exparte Applicants case through their supporting affidavit that they deposited the original Lease Certificate together with a Discharge of Charge for land parcel number Nandi/Kapsabet Municipality/ 85 on 30/8/2012 at the offices of the Respondent for assessment of stamp duty on Discharge.
4. That the stamp duty was accordingly assessed and were thereafter issued with a duly authenticated and stamped discharge of charge form

No. 10 in satisfaction of the requirements of discharging the said parcel of land to them.

5. The Respondents retained the Exparte Applicants original Certificate of Lease upon its presentation to the 2nd Respondents on the alleged ground that the ex-parte Applicants file has been expunged from the records.

6. The ex-parte Applicants verily believe that the Respondents have no legal grounds for retaining the certificate and thus seek an order of Mandamus to compel the 2nd Respondent to release the original documents.

7. In opposition to the Application, the 1st Respondent has opposed the same, and filed a Replying Affidavit through Solomon Kipkosgei Mangira, the Chief Officer Lands Environment and Natural Resources, Nandi County Government.

8. It is their view of the 1st Respondent that there are wrongly sued as they do not have custody of the original documents of title in respect to Nandi/Kapsabet Municipality/85. That there is no cause of action against the Nandi County Government.

9. At the time of writing this judgment the Replying Affidavit of the 2nd and 3rd Respondent was not in the Court file. This judgment was originally set for delivery on 7/2/2022 but was differed so that the parties could avail a copy of the Replying Affidavit. On the said 7/2/2022, Mr. Ongongo for the Exparte Applicants and Mr. Tallam for the 1st Respondent appeared in Court but there was no representation from the Attorney General's Office.

10. When the issue of the missing Replying Affidavit was raised by the Court, MR. Ogongo learned Counsel for the Exparte Applicant's undertook to inform the Office of Attorney General to avail a copy of the Replying Affidavit.

11. However by the time of writing this judgment, that Replying Affidavit was not on the Court file, hence the Court has been denied benefit of knowing the reasons why the 2nd Respondent is withholding the original lease documents.

12. On 14/12/2021 parties herein were directed to file their written submissions before 24/01/2022, and indeed all the parties complied.

EX-PARTE APPLICANTS SUBMISSIONS: -

13. The Exparte Applicant filed two sets of submissions. Submissions dated 6th March 2019 and supplementary dated 15th December, 2021.

14. The Exparte Applicants submits that this Honourable Court has no jurisdiction to expunge the exparte applicants certificate of lease from the records.

15. It is to be noted that the Honourable Court has not expunged the Exparte Applicants Certificate of lease from the records, but that it is the 2nd Respondent who expunged the same and retained the Original Certificate of Lease.

16. The Exparte Applicant submits that under the Registered Land Act the power of cancel the title under Section 143 and 159 was reserved to the Court and that the 2nd Respondent did not have power to expunged from the records the Certificate of Lease, and retain the same.

17. In this regard the Exparte applicant places reliance in the decision in **Republic vs Commissioner of Lands and 2 others Exparte Kennedy Bosire Gichana (2015) Eklr and Malindi J.R. Misc. Application No. 17 of 2018 Fahim Yasin Twalia and Another vs District Land Registrar Lamu.**

18. It is this the Exparte Submissions that the Registrar (2nd Respondent) did not have powers to expunge the records under Section 79 of the Land Registration Act.

19. That the powers to order a cancellation (expunging of records) is reserved under Section 80 of the Land Registration Act to the Courts and the Exparte Applicants submits that the action of the Registrar was therefore illegal.

20. On its part the 1st Defendant submits that it is wrongly joined in the proceedings in that it did not expunge any records neither did it retain any certificate of leases belonging to the Exparte Applicants as that is said to have been done by the 2nd Respondent and prays that the Judicial Review against it be dismissed with costs.

21. Without the benefit of the 2nd and 3rd Respondents Replying Affidavit been on the Court record, the 2nd and 3rd Respondents, submit that the Original Certificate of Lease in respect of Nandi/Kapsabet Municipality/85 was expunged from the records because there is a dispute between the Exparte Applicants and third parties on the ownership of Kapsabet/Municipality/85.

22. It is further submitted by the 2nd and 3rd Respondents that the reliefs sought in this Judicial Review application are not available to the Exparte Applicants.

23. The 2nd and 3rd Respondent further submit relying of the Replying affidavit that the property in question is currently registered in the name of Mr. Meshack Kipkorir Malakwen. They further submit that in the event the orders sought are granted, there is a possibility of duplicity of titles.

24. It is their further submissions that Judicial Review proceedings cannot be invoked where there is a dispute to be determined on its merits; as the one here. On this front, they have placed reliance in the case of **Sangani Investment Limited vs Officer in Charge Nairobi Remand and allocation Prison** and the case **Seventh Day Adventist Church East Africa Limited vs Permanent Secretary, Ministry of Nairobi Metropolitan Development and Another.**

25. The 2nd and 3rd Respondents further submit that the orders of Mandamus cannot issue in the circumstances of this Judicial Review. In support of this proposition they have quoted the Halsbury's Laws of England at paragraph 134 – where Mandamus as a Judicial Review relief that ***“commands no more than to do that which the party against whom the application is made is legally bound to perform where a general duty is imposed, a mandatory order cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode command to duty in questions to be carried out in a specific way.”***

26. The 2nd and 3rd Respondents submit that an order of Mandamus cannot be used to reverse a decision already made and indicate that the Mandamus sought is not the appropriate relief. In this regard they have placed reliance on the decision in **National Examinations Council vs Republic Exparte Geoffrey Gathnji Njoroge.**

ANALYSIS AND DETERMINATION: -

27. It is a general principle of Law that parties are bound by their pleadings, the substantive motion herein seek orders of Mandamus to compel the Respondents to released the original lease certificate together with the discharge of charge deposited at the 2nd Respondents offices.

28. The Ex-parte Applicants have not sought an order of certiorari to quash the decision to expunge the records relating to the proprietorship in relation to Nandi/Kapsabet/85.

29. As submitted by the Applicants, the 2nd Respondent did not have powers under Section 79 or any other law to expunge the records and the action of the 2nd Respondent was therefore an illegality. The process of revocation of the tile would have been through a civil suit by the third parties or the exparte applicant.

30. The 2nd Respondent equally did not have powers to confiscate the original lease certificate issued to the Exparte Applicant.

31. The 1st Respondent was clearly erroneously joined in the proceedings as he did not participate in any of the activities complained of and its joinder to the Judicial Review was warranted and therefore as against the 1st Respondent the Judicial Review is hereby by dismissed.

32. As has been observed the 2nd Respondent did not have powers either to expunge the records and/or confiscate the original certificate of lease as he purportedly did.

33. In order to expunge the records, the 2nd Respondent must have made a decision. The only way to challenge a decision made is by way of an order of ceortarian and not Mandamus as was observed in the decision in **National Examination Council versus Republic – Exparte Geoffrey Gathnji Njoroge.** Since the exparte Applicant have not sought for an order of ceortarari the same cannot issue.

34. Having found that the 2nd Respondent did not have powers under Section 79 of the Land Registration Act to expunge the Certificate of Lease, even if the Court was to direct that the Original Certificate of Lease be released to the Exparte Applicants, the decision to expunge has not been challenged by way of ceortarari; the order of Mandamus herein if so granted, is only to direct the 2nd Respondent to release the confiscated original certificate of lease.

35. The orders for Mandamus sought would be justified but only allow the Exparte Applicants to have the Original Lease document which have been expunged, which orders then would not assist the Exparte Applicants; the order would issue in vain, as there are no prayers for ceortarari before the Court.

36. In the result, the orders of Mandamus as sought would only serve an academic purpose and serve no useful of practical significance.

37. If the 2nd Respondent and the other third parties feel that the Original Certificate of Lease in the names of the Exparte Applicant, was obtained fraudulently, they ought then to more the Courts appropriately and not exercise non – existent powers.

38. In **Joccinta Wanjiru Raphael vs Wiliam Nangulu, Divisional Criminal Investigation Officer Makadara and 2 others (214) eKLR.** The Court was of the view that

“It must always, be remembered that Judicial Review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another..... the Court does not issue orders in vain even when it had jurisdiction to issue the prayed orders.....since the Court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been a delay and where the public body has done all that it can be expected to do to fulfill its duty..... where it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance,”

39. In light of the foregoing and noting that the orders of Mandamus would serve only as an academic purpose and of no useful of practical

significance noting that no orders of Ceortari can issue in the matter, the Notice of Motion application dated 30th May 2018 is dismissed with costs to the 1st Respondent.

41. Judgment accordingly.

DATED AT KAPSABET THIS 17TH DAY OF FEBRUARY, 2022

HON. M. N. MWANYALE

JUDGE

RULING DELIVERED IN THE PRESENCE OF;

- 1. MR. OGONGO FOR THE EXPARTE APPLICANT**
- 2. MS TIGOI FOR THE 2ND AND 3RD RESPONDENT**
- 3. MR. TALLAM FOR THE 1ST RESPONDENT**