



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
MILIMANI LAW COURTS
JUDICIAL REVIEW APPLICATION NUMBER 241 OF 2014

**IN THE MATTER OF AN APPLICATION BY ESTHER WARINGA NDIRANGU, JOSEPH
WAWERU CHEGE AND DANIEL KAMAU NDUNGU FOR ORDERS OF MANDAMUS**

AND

**IN THE MATTER OF THE NATIONAL COMMISSION AND THIKA DISTRICT LAND
REGISTRAR**

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012,

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 5 OF 2012

AND IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 [REPEALED]

REPUBLIC

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

THE THIKA DISTRICT LAND REGISTRAR.....2ND RESPONDENT

AND

EX PARTE:-

EASTHER WARINGA NDIRANGU.....1ST APPLICANT

JOSEPH WAWERU CHEGE.....2ND APPLICANT

DANIEL KAMAU NDUNGU.....3RD APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 14th July, 2014, the *ex parte* Applicants herein, **Easther Waringa Ndirangu, Joseph Waweru Chege and Daniel Kamau Ndungu** seek the following orders:
 - a. **That this Honourable court do grant judicial review order of mandamus to compel the respondents to immediately complete the subdivision of all that parcel of land known as THIKA NUMBER RUIRU/KIU BLOCK 2/2854 THIKA the suit property herein.**
 - b. **That this Honourable court do grant judicial review order of mandamus to compel the respondents to immediately register and issue to the ex parte applicants their TITLE DEEDS after subdivision of the suit property herein.**
 - c. **That in the alternative and without prejudice to the foregoing this Honourable court do grant judicial review order of mandamus to compelling the respondents to return forthwith to the ex parte applicants their ORIGINAL TITLE DEED NUMBER RUIRU/KIU BLOCK 2/2854 THIKA and any other documents belonging to the ex parte applicants and in the 2nd respondents possession.**
 - d. **That the costs of this suit and application be provided for.**

Ex Parte Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Esther Waringa Ndirangu**, the 1st Applicant herein on 24th June, 2014.
3. According to her, sometimes in the year 2010 the applicants purchased parcel of land known as Title Number Ruiru/KIU Block 2/2854 (hereinafter referred to as "the suit property") situated in Thika district from one **Joseph Kimani Gatheca** (hereinafter referred to as "the Vendor") vide a sale agreement was executed between the parties thereto on 21st January, 2010 and were issued with a title document registered in their respective names.
4. According to the applicants, they pursued the right and lawful procedures to acquire the suit property and the suit property was successfully transferred from the vendor to them as the rightful and lawful joint and several registered owners.
5. It was deposed that sometimes in May, 2010 the applicants instructed a surveyor to subdivide and/or partition the subject land and that being desirous of owning their individual titles to the land after the surveyor processed the mutation forms they lodged all the original documents with the 2nd Respondent. However, the Respondents failed, refused and/or neglected to complete, register and issue to them the three [3] subdivision title deeds without offering any explanation of their refusal to do so. Similarly, the Respondents failed, refused and/ or neglected to return to them the original title deed and other documents which were presented to them for subdivision process and/or offer any explanation of their refusal to do so. Both these inactions, the applicants contend have been committed despite the applicants' demands and requests thereby unjustifiably unlawfully interfering with their rightful title to the suit property to their detriment.
6. It was contended that the Respondents have unlawfully and continuously tampered, hampered and interfered with the applicants' peaceful enjoyment and title of the suit property. To the applicants, the respondents' refusal to register the subdivisions and/or return the title is intentionally meant to dispossess them of their legally acquired property, the suit property herein. On the authority of **Kent Libiso and Another vs. Cirkon Trust Co. Ltd & 2 Others ELC Suit No. 288 of 2011** and **George Njuguna Kinunu vs. Njeri Kibui ELC 228 of 2011**, the applicant contended that the decision to place the restriction was unconstitutional in light of Article 47(1) of the Constitution.
7. They therefore averred that unless the respondents are compelled by this Honourable court, the effect to their actions is to dispossess the applicants of the suit property hence the orders sought herein since the Thika district registrar of lands are under a public duty to complete, register and issue to them the three [3] Sub Title Deeds of the suit property.
8. The applicant submitted that under section 76(1) as read with section 77 of the ***Land Registration Act***, (hereinafter referred to as "the Act") there is a requirement for notice to the proprietor of the land before a restriction is made thereon. In support of this submission the applicants relied on **Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140**.
9. It was submitted that the Respondents neither complied with the procedure thereunder nor were the applicants given a hearing by the Registrar in breach of the principle of natural justice. Since

the Respondent's decision was unreasonable, in bad faith and intended to achieve an ulterior motive, it was submitted that an order of mandamus ought to issue and based on **Cape Holdings Limited vs. Attorney General & Another [2012] eKLR**, it was submitted that:

“It is the duty of the court to ensure that public power and authority are not used as tools to intimidate, harass and achieve an ulterior motive not pertaining to that which the system was even formed to perform.”

10. The applicant further relied on **R vs. Commissioner for Co-operatives ex parte Kirinyaga tea Growers Co-operatives Savings and Credit Society Ltd [1999] 1 EA 245, 249** in which the Court of Appeal held:

“It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.”

11. The applicant relied on **Ezekiel Misango Mutisya vs. National Lands Commission & 6 Others [2014] KLR** in which this Court held that:

“It is clear that before the Registrar registers a restriction on any land he must direct such inquiries to be made and notices to be served and hear such persons as he considers fit.

12. The applicant therefore urged the Court to grant the order of mandamus to compel the Respondents to complete the sub-division of the suit parcel and to register and issue the *ex parte* applicants with the title deeds thereafter.

Respondents' Case

13. In opposition to the application, the Respondents filed the following grounds of opposition:

1. **That currently there is a restriction lodged against the parcel of land in question and land title number: Ruiru/Kiu Block 2/2854 hence restricting the mandate of the respondents.**
2. **That the restriction on title No. Ruiru/Kui Block 2/2854 is by one Anthony Mindu for the beneficiary interest of the 1st Applicant; Esther Waringa Ndirangu.**
3. **That according to section 77 (2) of the land act an instrument that is inconsistent shall not be registered while a restriction is still registered except by order of court or of the registrar.**
4. **That the orders being sought against the 1st and 2nd respondents should not be effected as the same will be illegal unless the said restriction is lifted.**
5. **That the applicants have failed to perform their due diligence at the registry through a search to establish status of the title in question.**
6. **That this application be dismissed with costs to the respondent.**

Determinations

14. I have considered the foregoing and this is the view I form of this matter.

15. The scope of the judicial review remedy of *Mandamus* was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

“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...”

16. Section 14(c) of the Act 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 the 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. That discretion is however not unfettered and the aforesaid provision itself provides for circumstances under which it may be exercised and expressly provides that it may be exercised where 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 the Act is not performed. 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 I 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 applicants’ position is that the 2nd Respondent has not given any reason for failing to register their instruments and issue them with titles. The Respondent has however contended albeit wide grounds of opposition that there is a restriction registered on the suit land. There is however no evidence of the same. That notwithstanding section 77(2) of the Act provides:

An instrument that is inconsistent with it shall not be registered while the restriction is still registered except by order of the court or of the Registrar.

20. The 2nd Respondent was however obliged to comply with section 76(1) of the said Act and direct

such inquiries to be made and notices to be served and hear such persons as the Registrar considered fit. One of such persons to be heard ought to have been the registered proprietor of the land upon which a restriction was sought to be registered. Even if such inquiries were not made before registration of the restriction, the 2nd Respondent was required by section 77(1) thereof to give notice, in writing, of the restriction to the proprietor affected by the restriction, in this case the ex parte applicants. The applicants contend this was never done and there is no evidence to the contrary.

21. This position was confirmed in Matoya vs. Standard Chartered Bank (K) Ltd & Others [2003] 1 EA 140 where it was held that:

“A restriction is ordered to prevent any fraud or improper dealing with a given parcel of land and the land registrar does this whether on its own motion or if so asked by way of an application by the person interested in that land but before ordering the restriction the registrar is bound by law to make inquiries, send out notices and hear all those other people he may think fit first and he is not to move by whim, caprice or whatever influence personal or otherwise just to impose a restriction since he has a duty to inquire and be satisfied that his duty to order restriction is not hurting a person who was not heard and that indeed the restriction is in general good that frauds and other improper dealings are prevented.”

22. In my view, in exercising his/her discretion on whom to hear the Registrar must take into account the provisions of the relevant law and the Constitution and with respect to the Constitution, Article 47 thereof provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

23. As discussed elsewhere in this judgement procedural fairness encompasses that an opportunity of a hearing be afforded to the persons who are likely to be affected by the administrative decision. In my view one of the persons who ought to be given an opportunity of being heard before a restriction is registered is the proprietor of the land in question.

24. In this case the Land Registrar has not sworn any replying affidavit to explain the circumstances under which the restriction was registered. It was the onus of the Land Registrar to shed light on whether the provisions of section 76(1) of the Act were complied with. As far as the Applicant was concerned its position was that it was not notified before the restriction was registered. In other words it was asserting a negative and as was held by **Seaton, JSC** in the Uganda case of J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991 [1993] VI KALR 85:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant. The burden of proof in any particular case depends on circumstances in which the claim arises.”

25. Similarly, the Supreme Court of Uganda in Sheikh Ali Senyonga & 7 Others vs. Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990 [1992] V KALR 30 was of the view that the general rule that he who alleges must prove applies and since it was the appellants who were alleging that the fifth appellant was qualified, to hold that the negative must be proved by the respondents would be to impose an unnecessary burden on them.

26. Article 40(3) of the Constitution bars the State from depriving a person of property of any description, or of any interest in, or right over, property of any description unless certain conditions including the requirement that the deprivation be carried out in accordance with the Constitution, are met. Therefore Article 47 of the Constitution must be complied with before a person is deprived of his or her interest in any property of any description or his interest therein is restricted. That Article requires that the process be procedurally fair and one of the ingredients of a fair procedure is the right to be afforded an opportunity of being heard before a decision is made.

27. In this case, in the absence of any evidence that the 2nd Respondent complied with the provisions of section 76(1) of the **Land Registration Act**, this Court has no option but to find that from the available evidence, it would seem that the said restriction was improperly registered hence the decision may well have been tainted with procedural impropriety. See **Ezekiel Misango Mutisya vs. National Lands Commission & 6 Others** and **In the Matter of An Application by Reuben Wamburu Karoba and Nairobi Miscellaneous Civil Application No. 31 of 2015.**

28. Section 78 of the aforesaid Act provides:

(1) The Registrar may, at anytime and on application by any person interested or at the Registrar's own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

29. 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 2nd Respondent is under an obligation to consider an application to register the subdivisions in question and issue titles arising therefrom and the failure to do so amounts to abuse of discretion. However, this Court cannot by way of an order of *mandamus* compel the 2nd Respondent to exercise his discretion in a particular manner unless he declines to exercise it one way or the other. However the Respondents are obliged under Article 47(2) to furnish the applicants with written reasons after considering the application where the decision is likely to adversely affect the applicant and 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. Similarly where the authority fails to exercise discretion and does not furnish reasons for the failure to do so or gives reasons which are unsatisfactory, the Court would be entitled to conclude that there were no reasons to failure to act in which event it would be perfectly in order to compel the authority to act in a particular manner. Similarly, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** 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.

Order

30. Therefore the order which commends itself to me and which I hereby grant is an order compelling the 2nd Respondent to commence the process of the removal of the said restriction as provided under section 78(1) of the Act within 15 days from the date of service on the 2nd Respondent of this order. In default, an order of *mandamus* shall issue compelling the 2nd Respondent to remove the same and consider the applicant's pending applications as provided by law within a further period of 15 days from the date of expiry thereof. In further default thereof, it would be deemed that the 2nd Respondent has no reason not to register the said instruments in which event an order of *mandamus* shall issue compelling the 2nd Respondent to complete the subdivision of all that parcel of land known as THIKA NUMBER RUIRU/KIU BLOCK 2/2854 THIKA and to immediately register and issue to the *ex parte* applicants their Title Deeds after subdivision of the suit property herein.

31. The costs of this application shall be paid to the applicants to be borne by the 2nd Respondent.

32. Liberty to apply granted.

Dated at Nairobi this 22nd day of July, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Ndege for Miss Njuguna for the ex parte applicant

Cc Patricia