



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISCELLANEOUS CIVIL APPL. NO. 371 OF 2014

**IN THE MATTER OF AN APPLICATION BY BERNADETTE ELIZABETH MUMBURA FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

AND

IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT, CAP 281 (REPEALED)

AND

IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BERNADETTE ELIZABETH MUMBURA.....APPLICANT

VERSUS

THE REGISTRAR,

THIKA SUB-COUNTY LANDS REGISTRY.....1ST RESPONDENT

THE RATING AUTHORITY,

THIKA SUB-COUNTY RATES SECTION.....2ND RESPONDENT

JOSEPH KUNGU MBUTHIA.....INTERESTED PARTY

***EX-PARTE* : BERNADETTE ELIZABETH**

MUMBURA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 23rd October, 2014, the *ex parte* applicant herein, **Bernadette Elizabeth Mumbura**, seeks the following orders:

1. That an order of Mandamus be issued by this honourable court directing the Registrar of Titles, Lands Registry to confirm that the *Ex parte* Applicant, Bernadette Elizabeth Mumbura, herein is indeed the holder of the tile to the property registered as L.R. No. 4953/2954 and therefore she is expected to pay all rates and rent due on the property.
2. That an order of mandamus be issued by this honourable court directing the Rating Authority Thika sub-County to rectify the records at the rates Section in relation to the property registered as L.R. No. 4953/2954, Thika to remove the name of Joseph Kungu Mbutia as the registered owner of the said property and replacing the same with Bernadette Elizabeth Mumbura who is the actual holder of the said title.
3. That the grant of such leave do operate as stay of any action of the Respondents, either jointly and/or severally to pursue any legal claim against the *Ex parte* Applicant in relation to the property registered as L.R. No. 4953/2954, Thika pending the hearing and determination of the Judicial Review Application.
4. That id leave to apply is granted, a direction that the hearing of the application for judicial review be expedited
5. The costs of this application be in the cause.

Applicant's Case

2. The Motion is supported by a verifying affidavit sworn by the applicant herein on 27th September, 2014.
3. According to the *ex parte* applicant, she was at all material times the holder of the original title to the property known as L.R. No. 4953/2954, Thika (hereinafter referred to as “the suit property”) which title, according to him has never been challenged and is therefore not in dispute thus she is under obligation to pay rates thereon to the Thika Sub-county.
4. She however expressed her inability to pay the same due to the fact that the records at the Rates Section in the Thika Sub-County office reflect the 2nd Respondent herein as the registered owner of the subject property and therefore shouldered with the responsibility to pay rates over the same property and this was despite a formal request having been made to the Rates Section in the Thika Sub –County Office to amend their records to reflect the applicant’s name as the legal holder of the title and registered owner of the subject land and therefore responsible to pay the rates thereto.
5. The applicant was therefore apprehensive that as a result of the failure by the Thika Sub-County Offices to effect the said amendments, the rates, including interest and penalties, continue to accrue as no payments have been made.
8. That I am further advised by my advocates on record that the officials at the Rates Section in the Thika Sub-County Offices declined to make the said changes thereby necessitating the application herein.
9. She therefore sought the orders herein since in her view, the 1st Respondent being a Public Officer under a public and statutory duty to carry out their duties diligently and according to the provisions of law, has to date unlawfully neglected and/or refused to do so and continues to omit to do so and specifically to correct the records at the Rates Section in the Thika Sub-County office to reflect her as the holder of the original title to the property known as L.R. No. 4953/2954, Thika therefore responsible for the payment of rates over the said property.
6. 13. That the failure by the 1st Respondent to correct the records at the Rates Section in the Thika Sub-County Offices has been detrimental to the Applicant herein and indeed if such decision is left to stand then I will continue to suffer untold as an upstanding and law abiding property owner.

1st and 2nd Respondent's Case

7. In opposition to the application, the 1st and 2nd Respondents filed the following grounds of opposition:
1. **That the application as drawn and taken out is incurable defective incompetent and is otherwise an abuse of court process.**
 2. **That the application offends the mandatory provisions in Order 53 of the Civil Procedure Rules and the Law Reform Act Cap 26.**
 3. **That this is a matter that requires the court to examine documents and parties to adduce evidence since it involves matter of ownership and the same can only be properly dealt with in the Environment and Land Court.**
 4. **That there is no clear relief sought as the application is neither here nor there.**
 5. **That the application herein be dismissed with costs to the Respondents.**

3rd Respondent's Case

8. In opposition to the application, the 3rd Respondents filed a replying affidavit sworn by himself on 18th November, 2014.
9. According to him, the *ex parte* Applicant has consistently stated that the 3rd Respondent is the registered owner of the suit property and which also claims ownership of the same. In his view it is not within the purview and scope of the powers of the Registrar of Titles Lands Registry to rectify the records at the rates section.
10. He disclosed that there is a dispute as to who should be the registered owner and that creates confusion as both the Applicant and himself lay claim or ownership to the suit property. He therefore was of the view that the matters being raised by the Applicant are not of a Judicial Review nature. Whereas the Applicant avers she has a title to the property which title was acquired on 11th December, 2000, the 3rd respondent contended that he purchased the property from **Patrick Babu M. Malaki** on 19th February, 1999 and received the allotment letter from him. Subsequently the 2nd Respondent through its successor Municipal Council of Thika has been demanding land rates from him and he has duly been making payments as and when they fall due.
11. To the 3rd Respondent, the manner the proceedings have been commenced is incurably defective and the filing of the substantive motion was irregular in form and the same ought to be struck out with costs since where there is a question as to title, ownership and/or possession of land the court cannot grant prerogative writs as the same would amount to conferring title to one party at the expenses of another.
12. According to him, in order to effect the transfer of records from the vendor's name to his name a letter dated 10th August, 1999 from the Ministry of Lands was written to the 2nd Respondent's officer and that all along he has considered himself as the registered owner and land rates have always been demanded from him hence the dispute herein is on ownership and this court cannot be called upon to address such issues.
12. To the 3rd Respondent where two persons are claiming ownership of the suit property the 2nd Respondent cannot be compelled to act with a view of giving effect to one party's documents to the exclusion of the other as that would be unjust and prejudicial to him. Further an order of mandamus being a prerogative writ, the same is not available where factual issues that have drastic consequences as in this case where there are rival claims of ownership.

Determinations

13. I have considered the foregoing.

14. The first issue for determination is the competency of the application. The applicant in these proceedings is indicated as **Bernadette Elizabeth Mumbura**. This Court has, based on the authority of **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779**, said time and again that in judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned.
15. The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intitled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

16. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486** Ringera, J (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

**THE ELECTORAL COMMISSION OF KENYA.....
RESPONDENT.**

EX PARTE JOTHAM MULATI WELAMONDI”

17. It is clear from the title of the proceedings herein that the Motion herein is far from being an epitome of impeccable, elegant or paragon drafting. However in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005** the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

18. Therefore whereas, the application is not properly intitled, that failure is not fatal to the application as it does not go to the jurisdiction and it has not been alleged that the mistake has prejudiced the Respondent in any material aspect. I however must state that the failure by a party to properly intitle the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.

19. In her Chamber Summons seeking leave, the applicant herein sought leave to apply for the following orders:

1. **That an order of Mandamus be issued by this honourable court directing the Rating Authority through its authorized officers to rectify the records at the Rates Section Thika**

- Seub-County in relation to the property known as L.R. No. 4953/2954, Thika to reflect the registered owner as Bernadette Elizabeth Mumbura (the Ex parte Applicant herein).
2. That an order of Mandamus be issued by this honourable court directing the Registrar of Titles, Lands Registry to rectify the records at the Rates Section Thika sub-county in relation to be property known as LR. No, 4853/2954, Thika to remove the name of Joseph Kungu Mbutia as the registered owner of the subject property.

20. These were the same reliefs which were indicated in the Statement that the applicant would be seeking from the Court.

21. Order 53 rule 4(1) of the *Civil Procedure Rules* provides:

Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

22. Whereas under rule 4(2) of the said Order the Court is empowered to allow an application to amend the Statement, no such application was made and therefore no such order was granted.
23. In this case whereas the substance of the order sought in prayer 1 of the Chamber Summons is the same as prayer 1 in the Motion, it is however clear that whereas in the application for leave the order was sought against the “Rating Authority” in the Motion the substance of the same relief is now sought against the “Registrar of Titles, Lands Registry”. The Registrar of Titles is however not a party to these proceedings. One of the purpose for the requirement that leave be sought before the commencement of the substantive Motion is to avoid frivolous applications which are unlikely to see the light of the day and one such occasion would be where the orders are sought against an entity against whom such orders are incapable of being granted such as the 3rd Respondent herein. Therefore leave stage is not just a formality and it is only those parties against whom leave has been sought and obtained that substantive Motion can be directed against.
24. Similarly, prayer 2 in the Summons was directed at “The Registrar of Titles, Lands Registry” while its counterpart in the Motion is directed against “The Rating Authority”. As I held in Republic vs. Kenya Railways Corporation exp Sheets & Hardware Limited & Another HCMA No. 2 of 2009, such discrepancy renders the application incompetent.
25. It is important to consider the circumstances under which judicial review orders of prohibition and mandamus would issue. 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...” [Emphasis mine].

26. In this case the applicant seeks in prayer 1 an order of *mandamus* be directing the Registrar of Titles, Lands Registry to confirm that the *ex parte* Applicant, **Bernadette Elizabeth Mumbura**, herein is indeed the holder of the title to the property registered as L.R. No. 4953/2954 and therefore she is expected to pay all rates and rent due on the property. The applicant claims that she is the registered proprietor of the said property yet she is seeking an order compelling the Registrar of Titles to confirm that she is indeed the holder of the said title. A confirmation of ownership of a registered landed property is simply by way of a search. One does not required an order of *mandamus* to confirm his/her proprietorship of land. If the applicant is the proprietor of the said property, it is my view that the order she seeks in prayer 1 is superfluous and this Court is not in the business of granting such orders.
27. With respect to the second limb of the said order that the said registrar be compelled to confirm that the applicant is expected to pay all rates and rent due on the property, the applicant has not cited any legal provision which compels the said Registrar to give such a confirmation. If the Respondents have declined to accept rates from the applicant, the applicant has recourse if properly advised to do so by seeking appropriate declaratory orders rather than in the proceedings of this nature.
28. This position also takes care of the second prayer since the application has failed to cite any provision under which the Respondents are under a legal obligation to rectify their records. If the 3rd Respondent chooses to pay rates in respect of a property which does not belong to him, he has himself to blame for doing so.
29. The applicant and the 3rd respondents herein seem to be squabbling over the proprietorship of the suit property. As to whether the 3rd Respondent can lawfully claim the suit property based on the strength of an allotment letter when another person is the registered proprietor thereof and secondly whether a property which has been allotted is available for further allotment and issuance of title is a matter which ought to be canvassed before the Environment and Land Court rather than before a Judicial Review Court.
30. Apart from that the effect of granting the orders in the manner sought herein would be to quash the 3rd Respondent’s allotment letter. As the Court of Appeal held in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others** (supra) an order of *mandamus* cannot quash what has already been done.
31. Having considered the application herein it is my view that this application is not only incompetent but also unmerited.
32. Accordingly the same is dismissed.
33. On the issue of costs the same is in the discretion of the Court and the conduct of a party, before, during or even after the proceedings may disentitle the party even though successful to a favourable award of costs. I have perused the record herein and from the record it is clear that not even a single authority cited by the 3rd Respondent was exhibited. With respect to the 1st and 2nd Respondents, this dispute would have been avoided had they not taken pro-active steps to arrest the situation.
34. In the premises the order which commends itself to me and which I hereby make with respect to costs is that each party shall bear own costs of these proceedings.

Dated at Nairobi this 28th day of September, 2015

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Patricia