



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO 12 OF 2012

IN THE MATTER OF THE LAW REFORM ACT

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

IN THE MATTER OF THE LOCAL GOVERNMENT ACT

IN THE MATTER OF PLOT NO. GSA/21150

**IN THE MATTER OF THE GOVERNMENT LANDS ACT AND REGISTRATION OF TITLES
ACT**

**IN THE MATTER OF SECTION 106 AND 107 OF THE LAND REGISTRATION ACT NO. 3 OF
2012**

IN THE MATTER OF SECTION 47 OF THE CONSTITUTION 2010

BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

MUNICIPAL COUNCIL OF GARISSA.....RESPONDENT

MOHAMED SALAT

ABDI HILOLE

MOHAMED DUANE.....EX PARTE APPLICANTS

JUDGEMENT

Background

With leave of this court granted on 26th September 2012, the ex parte applicants (the Applicants) filed Notice of Motion on the same day seeking an order of mandamus to compel the Respondent to issue the Applicants with minutes of the full council meeting that approved the allocation of Plot No GSA/21150 to the Applicants and costs of the application. The Notice of Motion is supported by Statement of Facts of the same date and Verifying Affidavit of Mohamed Salat sworn on 25th September 2012.

Applicants' Case

The Applicants are saying that on 14th October 2009 the Town Planning Committee of the Respondent held a meeting whereby it was resolved to allocate five acres of land along Fafi Road within Garissa Municipality to Tawfiq Self Help Poultry whose office bearers as chairman, treasurer and secretary are the Applicants and that upon the allotment the Applicants paid Kshs 162,000 to the Respondent for purposes of registering the plot with the Respondent.

The Applicants further state that their attempts at processing the title documents in respect of that property have been futile because the Respondent has refused or failed to release to the Applicants the minutes of the full Council meeting that approved the allocation as per the minutes of the Town Planning Committee of 14th October 2009.

The Applicants' Submissions

Learned counsel for the Applicants has identified three issues for determination, namely:

- i. Whether or not there are in existence minutes of the full council meeting adopting the decision of the Town Planning Committee held on 14th October 2009.
- ii. Whether or not the Applicants are entitled to the copies of the minutes of the full council meeting.
- iii. Whether the Respondent has refused to give copies of the minutes of the full council meeting to the applicants and whether that refusal is justified.

To these issues, the Applicants have submitted that the minutes of the full council meeting exist because one Hussein Mohamed Roble has sworn an affidavit that he has knowledge that the minutes of 14th October 2009 exist. They have submitted that they are entitled to the minutes of the full council meeting because the law, sections 80, 81, 82, 101 and 102 of the Local Governments Act make provisions for recording of minutes, inspection of the same and entitles the public to make copies of the minutes of the proceedings of the council meetings. Finally that the tenor of the Respondent's Replying Affidavit leaves no doubt that the Respondent has refused to give copies of the minutes to the applicants.

Respondent's Case

The Respondent admits that on 14th October 2009 the Town Planning Committee of the Respondent met to accept the Applicants' offer to be allocated land along Fafi Road; that this was not a full council meeting and its decision was not final; that the Committee did not point out the exact location of the land to be allocated to the Applicants; that the number quoted by the Applicants, Plot No. GSA/21150, is only a running number put on receipts by the Respondent to process documents and that no survey has been carried out and no Part Development Plan exists to show entitlement to ownership of the land in question to the Applicants.

The Respondents further state that the process of allocating land to the Applicants was not complete and therefore the Applicants cannot claim they were successfully allocated land by the Respondent. The Respondents urged the court to strike out the Notice of Motion with costs to the Respondent.

Respondent's Submissions

The Respondent, through their counsel, has identified the following issues for determination:

- i. Whether there was a full council meeting allocating the alleged piece of land.
- ii. Whether the order of mandamus should be granted.
- iii. Whether the application should be allowed.

The Respondent has submitted that there was no full council meeting held to assess the offer and resolve whether to accept or decline and that the Town Planning Committee that met simply recommended the

allocation of unidentified land without specifically pointing out the exact parcel of land to be allocated to the Applicants; that the next stage was for land to be identified through surveying, demarcation and other processes relating to production of Part Development Plan (PDP) after which a full council meeting would have met to deal with a specific parcel of land. As a result the requisite steps for allocations were not exhausted. It was submitted that the Applicants have failed to prove that the full council meeting met to approve the allocation.

On the second issue, it was submitted that the Applicants must satisfy the court that they have a legal right to compel the Respondent to perform a certain duty. Learned counsel cited the case of **Wamwere v. Attorney General (2004) 1 KLR** to the effect that an applicant seeking a mandamus must satisfy the court that they have a specific legal right and the respondent has refused to perform a public duty which has amounted to an infringement of the legal right that the applicant has. Counsel also cited **Prabhual Gulabchand Shah v. Attorney General & Erastus Gathoni Miano, Civil Appeal No 24 of 1985** where the Court of Appeal stated that:

“The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom mandamus is sought or alternatively that he has a substantial personal interest and the duty must not be permissive but imperative and must be of a public rather than a private nature.”

Counsel submitted that the Applicants do not have a right to compel the Respondent to produce full council minutes since they are not the owners of GSA/21150 and therefore the Applicants have no interest in the actual property which would translate into a legal right capable of being enforced. It was further submitted that the piece of land in question is allocated to one Mohamed Yarrow and Abdi Hussein Gure.

It was submitted that the Respondent has not failed to perform its public duty as alleged and hence no duty to provide minutes of a full council meeting that never took place. As a result, mandamus cannot issue.

On issue three, the Respondent has submitted that the application cannot issue since the Applicants are not the owners of the said land; that the full council minutes do not exist and a PDP does not exist since there was no survey on the alleged piece of land. Relying on **Republic v. Judicial Service Commission, Ex parte Pareno (2004)1 KLR 203-209**, it was submitted:

“that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant the orders even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles.”

Determination

In my considered view, a party seeking mandamus must show that he/she has a legal right or statutory duty to performance by the party against whom the order is sought and that the party against whom the order is sought has refused to do perform that duty following a demand by the applicant.

In the **Halsburys Laws of England 4th Edition Vol 1 at 111 Paragraphs 89 and 90** it is stated that:

“The order of mandamus is of a most 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.

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 a 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.” See Kenya National Examination Council v. Republic Ex-parte Geoffrey Gathenji Njoroge & Others [1997] eKLR.

I have considered the pleadings of both parties, the authorities cited by the Respondent and the submissions. It is not in dispute that the Respondent’s Town Planning Committee sat on 14th October 2009 and resolved to allocate five acres of land along Fafi Road in Garissa to Tawfiq Self Help Poultry whose chairman, secretary and treasurer are the Applicants in this case. The extract of the minutes dated 26th October 2009 and marked “MS1” attests to this fact and the same is admitted by both parties. Following that meeting the Respondent through its officials calculated the registration and ownership fees payable to them by the applicants as Kshs 162,000 as per annexure “MS2”. By a letter addressed “To whom it may concern” and dated 14th September 2011 from the Respondent confirms payment of Kshs 162,000 and states further that there was a balance of Kshs 150,000 in respect of unpaid rates. There is no other evidence to show that the process of allocation of the five acres was completed. There is no evidence to show that the five acres was surveyed and Part Development Plan prepared. The Applicants state that the Respondent held a full council meeting to approve the allocation of the five acres to them as per the Town Planning Committee minutes. They relied on the affidavit of Mohamed Salat and Hussein Mohamed Roble that the Respondent held a full council meeting. The date when this alleged meeting was held is not given.

The Respondent has denied holding a full council meeting and has stated that the process of allocating five acres to the Applicants was not concluded and that the piece of land in question has not been demarcated nor its specific location identified. They also claim that the land quoted as Plot No. GSA/21150 has been allocated to other people.

In view of this evidence and the cited authorities I agree with the submissions of the Respondent. I hold the view that the Applicants have not demonstrated a legal right to qualify for an order of mandamus. The decision as to the ownership of the piece of land in question lies in a different forum not his one. In the words of the Court of Appeal in the **Prabhual Gulabchand Shah case, above** the Applicants have not shown that there resides in them a legal right to performance of a legal duty by the Respondent against whom mandamus is sought or alternatively that they have a substantial personal interest in the matter.

As a result, the Notice of Motion dated 26th September 2012 must fail and is hereby dismissed with costs to the Respondent. It is so ordered.

Dated, signed and delivered on 31st March 2014.

S.N.MUTUKU

JUDGE