



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 683 OF 2006

**IN THE MATTER OF LAW REFORM ACT (CAP 26) ORDER LIII OF THE CIVIL
PROCEDURE RULES (CAP 21) SECTION 3 OF THE JUDICATURE ACT (CAP 8) THE
INHERENT POWERS OF COURT AND ALL OTHER ENABLING POWERS AND
PROVISIONS OF THE LAW**

AND

IN THE MATTER OF REGISTRATION OF LANDS ACT CAP (CAP 300)

BETWEEN

REPUBLICAPPLICANT

-VERSUS-

THE REGISTRAR OF LANDRESPONDENT

TERESA GESARE KEBWARO INTERESTED PARTY

EX-PARTE :

MBAGE NJUGUNA NG'ANG'A

PAUL GATHURU KARIUKI

JUDGEMENT

1. By a Notice of Motion dated 5th November, 2006, the *ex parte* applicants herein, **Mbage Njuguna Ng'ang'a** and **Paul Gathuru Kariuki**, seeks the following orders:

1. **THAT** an order of Mandamus directed to the respondent Registrar of Lands and all his officers and any other person acting under his authority to cancel the registration of title and/or the illegal and unprocedural transfer of title to one Teresa Gesare Kbwaro on the property known as RUIRU/KIU BLOCK 6/260 property of the Ex-parte applicants.

2. **THAT** the cost of this application be provided for.

Applicant's Case

2. The Motion is supported by a verifying affidavit sworn by **Paul Gathuru Kariuki** on

14th November, 2006.

3. According to the deponent, the ex-parte applicants are the registered proprietors of the suit property being **Ruiru/Kiu Block 6/260** having been issued with a certificate of lease. According to the deponent, the applicants have never assigned, transferred and/or dealt with the said property in any manner.

4. However, on or about the year 2001, when the applicants applied for a search on the said property for their proprietor interest, their attempts were fruitless as they were informed by the District Land Registry that the Green Card relating to the suit property had been misplaced and/or lost. The applicants however, later became apprehensive over the title and instructed their lawyers to take up on the matter and on or about the 16th of September 2003, their advocates wrote to the Land Registrar, Thika Land Registry requesting for a copy of the green card relating to the above mentioned property and managed to conduct an official search in the suit property from which they learnt of the registration of one **Teresia Gesare Kbwaro** (the interested party herein) as a proprietor of the said parcel. The applicants further learnt that a certificate of lease was also issued to the said interested party on 8th of October 2001.

5. It was the applicants' contention and case that the transfer of the suit title to **Teresia Gesare Kbwaro** is unprocedural illegal and/or fraudulent as the applicants have never executed any transfer, assignment and/or any other dealing in the suit property. Despite the applicants' consistent attempts from the Land Registrar, Thika, to peruse the transfer purportedly presented for registration, such efforts have been fruitless and the Registrar has blatantly declined and/or failed. To them there is absolutely no basis for the Thika Land Registrar to register the transfer to **Tereisa Gesare Kbwaro** hence the purported transfer must be cancelled.

6. It was further deposed that the said advocates on record notified the Chief Land Registrar of this illegality and demanded investigation and rectification of the same.

7. According to the deponent, unless the Registrar of Lands is compelled to cancel the purported transfer to **Teresia Gesare Kbwaro**, the later would further deal with the suit property and the Registrar would further register such invalid, illegal and/or fraudulent transaction which would cause the ex parte applicants great deal of injustice and prejudice

8. There is no indication that the application was opposed by the Respondents or interested party who from the records seemed to have passed away.

Determination

9. I have considered the application herein, the statement and the affidavit in support thereof as well as the submissions.

10. First and foremost, it is important to consider the circumstances under which judicial review order of mandamus do issue. The scope of the an order 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... Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

11. In this case what the applicant seeks is an order compelling the Respondent to cancel registration of the suit land in the name of the interested party. *Mandamus* however only issues to compel 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. In this case the applicant has not shown which public duty is imposed on the Respondent to cancel the impugned registration. Further the Court is not convinced that the Respondent is empowered to cancel registration of titles howsoever registered. To order the Respondent to perform an act which he has no powers to perform would amount to compelling him to perform an illegality and that the Court cannot do in the guise of an order of *mandamus*.

12. Apart from the foregoing, without seeking an order quashing the registration of the title to the suit land in favour of the interested party, an order of *mandamus* would be futile since the grant of the order would not quash the registration of the land in the interested party's name. In my view what the applicant is seeking in this application is an order of *certiorari* through the back door. Such an order cannot issue since the applicant did not seek and no leave was granted to apply for an order of *certiorari*. Under Order 53 rule 4(1) of the ***Civil Procedure Rules*** the applicant is not allowed to rely on any ground or seek a relief at the hearing except the grounds and relief set out in the said statement.

13. In the result I find no merit in the Notice of Motion dated 5th November, 2006 which I hereby dismiss but with no order as to costs.

Dated at Nairobi this 27th day of March, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Kamau for the applicant.