



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMNAI LAW COURTS

ELC JR MISC CIVIL CASE NO. 253 OF 2012

**IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDER SO
JUDICIAL REVIEW OF MANDAMUS AND PROHIBITION AGAINST THE ATTORNEY
GENERAL, THE CHIEF LAND REGISTRAR AND THE COMMISSIONER OF LANDS**

**IN THE MATTER OF THE LAND REGISTRATION ACT 2012 SECTIONS 107 AND 108,
ARTICLES 10, 73 AND 159 OF THE CONSTITUTION**

IN THE MATTER OF LAND REFERENCE NUMBER 8747 THIKA

REPUBLICAPPLICANT

VERSUS

1. THE ATTORNEY GENERAL [SUED FOR AND ON BEHALF OF THE MINISTRY OF
LANDS].....1ST RESPONDENT
2. THE CHIEF LAND REGISTRAR.....2ND RESPONDENT
3. THE COMMISSIONER OF LANDS.....3RD RESPONDENT

EX PARTE SOUTH AND CENTRAL [THIKA] INVESTMENTS LIMITED

JUDGEMENT

1. By a Notice of Motion dated 25th June, 2012, the *ex parte* applicant herein, **South and Central [Thika] Investments Limited**, seeks the following orders:
 1. THAT this application be certified urgent and heard *ex parte* at first.
 2. THAT this Honourable Court be pleased to issue an order of Mandamus to compel the Respondents to register the Transfer and issue a title in favour of the applicant in respect of Land Reference Number 8747 located North of Thika Municipality.
 3. THAT this Honourable Court be pleased to issue an order of prohibition prohibiting the Respondents from receiving, registering, and/or accepting any challenges or contests to the Applicant's title.
 4. THAT the costs of this application be paid by the Respondents.

Applicant's Case

2. The application was supported by a verifying affidavit sworn by **Thomas Maaria Gichuhi**, a Director of the applicant on 20th June, 2012.
3. According to the deponent, the Applicant Company has brought together a group of individuals interested in investing in this country and in building its economic profile. According to him, sometime back the applicant became aware that the suit property was being sold by the National Bank of Kenya. Pursuant thereto they conducted inquiries and found out that the reserve price was Kshs.80,000,000/=. They were informed by the bank that the chargor had defaulted in loan payments and had failed to redeem the property.
4. They then proceeded to pay the deposit for this purchase through a Company owned by a colleague by the name of **Wa Gathagu Limited**. It was deposed that this was done with the express knowledge and understanding that once the current Applicant was registered, all ownership document would be processed in the name of the current Applicant and that this information was disclosed. Subsequently upon registration of the Applicant, a sale agreement was drawn.
5. He further deposed that one **Paul Muite**, a Director of the chargor, sought to join **Wa Gathagu** in case that he had filed in the High Court being Civil Case number 63 of 2004 to stop this transaction from proceeding and to amend his suit. However, the said application to join **Wa Gathagu** was dismissed though he was allowed to amend. Although the said Chargor subsequently appealed to the Court of Appeal, he was unable to pay the deposit of Kshs.1,500,000/= which he was ordered to do within thirty days.
6. However, when the applicant appeared before the Divisional Land Control Board, the said **Paul Muite** appeared with his lawyer, and working in cahoots with the local District Commissioner, sought to completely frustrate the obtaining of a Land Board Consent to a transfer in the applicant's favour and further sought to frustrate attempts by the valuer to enter the land and conduct a valuation for approval of stamp duty. Despite this the applicant was able to get all the preliminary steps done and to pay stamp duty and they then lodged the necessary transfers for registration one of which was the original title. However, the said registration was never effected on what the deponent contends were various excuses to the effect that a caveat has been lodged and that the original title is lost and that that **Mr. Muite** had complained about this transaction to the Kenya Anti Corruption Commission, a matter they knew to be false.
7. In the deponent's view, it is inconceivable that the title would be lost when it is in the custody of the Respondents.
8. Apart from the foregoing another excuse was that the file had been called for by the Minister, although the deponent's view was that the Minister has no responsibilities for transfers as his is done by technical officers at the Lands Office.
9. According to him, it is now four (4) years since the transaction began and the transfer has been frustrated by the Respondents despite the fact that the **National Bank of Kenya Ltd**, has already signed all necessary documents. In his view, the sale to the Applicant was above board and cannot be impugned at all since it was a sale of the property by the bank to the Applicant by way of exercise of its statutory power of sale under a charge instrument. It was contended that the Applicant invested Kshs.82,000,000/=[read Kenya shillings Eighty Two Million] and is yet to enjoy the fruits of the purchase.
10. It is the deponent's view that since the Applicant lodged a transfer with the Respondents on the 11th November, 2009 after the competition of the valuation for and payment of stamp duty, it is clear that the Respondents are guilty of inordinate delay in finalizing this transaction and based on legal advice from the applicant's advocates, he believes that the Respondents' actions amount to an abuse of discretion and an exercise of powers which the Respondents do not possess and/or are beyond the jurisdiction of the Respondents. Further the loss in terms of interest and business profits which has ensued and continued to accumulate from money spent on such an investment is colossal and totally irreparable. To him, in refusing to register the transfer have discriminated against the Applicant because the Respondents are on a daily basis registering transfers lodged by other Kenyans throughout the country and have failed to take into account and consider all relevant factors including the fact that the Applicant has met its commitments to pay all levies demanded by the Respondents.
11. It was the deponent's position that the actions of the Respondents are oppressive and unconscionable and that the said actions of refusal have been taken without consultation or giving

the Applicant any hearing despite several letters done to the Respondents.

12. It was deposed that the 1st Respondent was served with a statutory notice as required by the ***Government Proceedings Act*** on the 21st day of February, 2012.

Respondent's Case

13. On behalf of the Respondents' the following grounds of opposition were filed:

1. **THAT judicial review orders are specific orders directed to a particular person or body in the exercise of its/his administrative function and as such the application is lacking in specificity to the extent administrative actions done by the Respondents to which should be reviewed.**
2. **THAT the application is nuanced by mere falsehoods and hearsay which is not admissible as evidence hence no prima facie case has been established.**
3. **THAT the application is actuated with evidential and contentious allegations which need to be proved in a substantive suit through hearing including documentary and viva voce evidence, which means is not available in Judicial Review applications.**
4. **THAT the prayer of prohibition as sought is meant to be a clog on the Respondents performance of its statutory functions.**
5. **THAT in any case the acts of receiving, registering and or accepting any challenges or contests to the applicant's alleged title are done by different officer who are not parties to this proceeding.**
6. **THAT the order of mandamus cannot issue against the Respondents in performance of their discretionary statutory functions.**
7. **THAT courts of law should not by dint of the doctrine of separation of powers and the speciality accruing out of it take over the express specialized and statutory functions of the organs and officers of the executive.**

Applicant's Submissions

14. On behalf of the applicant it was submitted that the 1st Respondent acted without jurisdiction and in excess of statutory powers as provided under section 142(1) of the Registered Land Act hence based on **Republic vs. District Land Registrar Nakuru & 2 Others [2006] eKLR**, the prayers sought ought to be granted.
15. It was further submitted that the applicant's rights enshrined in Articles 40(1) and 47(1) and (2) and 50 of the Constitution have been contravened. It was submitted that the failure to register the applicant's transfer goes against the applicant's legitimate expectation and that the Respondent has not given any written sufficient reasons for the delay in effecting the said registration. Citing **Regina vs. University Dental Surgery [1993] EWHC 834**, it was submitted that the only significance of reasons is that if all other facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reasons cannot complain if the court draws inference that he had no rational reason for his decision. Further reliance was placed on **John Nduguru & 3 Others vs. Samuel Gakuya & 5 Others [2006] eKLR**.
16. According to the applicant, based on **Republic vs. Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2008] eKLR**, the doctrine of separation of powers is not applicable since the High Court has the jurisdiction to supervise any civil or criminal proceedings before a subordinate court institutions exercise power in accordance with the law and that it enables the High Court to review acts, decisions and omissions of public authorities in order to establish whether they have exceeded or abused their power.
17. In refusing to register the transfer it was submitted that the respondents have discriminated against

- the applicant and have failed to consider all relevant factors.
18. It was submitted that the said action is oppressive and amounts to an abuse of discretion and contravene the rules of natural justice.
19. It was submitted that as the Respondents have not filed any replying affidavit, the factual allegations have not been controverted and the applicant relied on **Cheruiyot Arap Lule and Another vs. Regional Centre for Services in Surveying, Mapping and Remote Sensing [2007] eKLR.**

Respondent's Submissions

20. On behalf of the respondents it was submitted that to the extent that the application seeks order of mandamus to compel the Respondents to register the transfer the subject matter of the application the order militates against statutory duty of the Respondents in exercising their discretion. Under section 14 of the ***Land Registration Act*** which is expressed in both positive and negative terms denoting the discretion of the registers to consider and either refuse or accept the registration. It was therefore submitted that the prayers ought to be to the effect that the Respondent considers the application. In support of this submission the Respondents relied on **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge and 9 Others [1997] eKLR.**
21. According to the Respondents to the extent that the applicant prays for an order of prohibition prohibiting the Respondents from receiving, registering and or accepting any challenges or contests to the Applicant title then invites the court to gag the performance of statutory duties which goes against the principle of separation of powers.
22. It was submitted that Court under Article 165 of the Constitution have special jurisdiction to determine disputes and not to bar performance of statutory duties and the statutory duties of the Respondents are captured in section 14 aforesaid. Further part VII of the Land Registration Act deals with restraints on disposition including inhibitions, cautions restrictions meant to protect interests in land. Therefore the respondents cannot be gagged from receiving any documents of receiving, registering and or accepting documents are done by different officers who are parties to these proceedings.
23. It was further submitted that the grounds of opposition depose to factual issues which this court cannot deal with. Hence the application ought to be dismissed with costs.

Determinations

24. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivalling submissions, this is the view I form of the matter.
25. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.....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.”

26. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

27. In **Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See *Halsbury’s Laws of England 4th Edition Vol (1)(1) Para 60*.

28. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See *R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282*, at P. 285.

29. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at 479 and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

30. Section 14(c) of the ***Land Registration Act***, Cap 300 Laws of Kenya, 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 this 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.”***
31. 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. 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.
32. Therefore there are circumstances under which the Court would be entitled to intervene even in the exercise of discretion. Whereas we 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.**
33. In the instant case, the applicant’s position is that despite its attempts the Respondents have not given any reason for the delay in registering the said transfer. 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 Respondents are under an obligation to consider an application to register an application for transfer and the failure to do so amounts to abuse of discretion. However, this Court cannot by way of an order of *mandamus* compel the Respondent to register the transfer. The Court can only compel the Respondents to consider the same and make a decision one way or the other. However the Respondents are obliged under Article 47(2)

to furnish the applicant with written reasons after considering the application where the decision is likely to adversely affect the applicant. 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. However, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra) 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.

34. With respect to the prayer for prohibition, it is clear that the said prayer cannot be granted since it is speculative in nature. Prohibition is only available where there is a threat of a particular action being undertaken. In this case there is no evidence that the Respondents intend to take any action which ought to invite the issuance of an order of prohibition.

Order

35. Accordingly the order which commends itself to me and which I hereby grant is an order of mandamus compelling the Respondents to consider the applicant's application for registration and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, then the Respondent will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondents to register the said transfer.

36. The applicant will have the costs of this application.

Dated at Nairobi this 25th day of March 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Gatheru for the Applicant