



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. JR. MISCELLANEOUS APPLICATION NO. 240 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS

AND

**IN THE MATTER OF CIVIL SUIT NUMBER 3033 OF 2008 IN THE 1ST CLASS
MAGISTRATE'S COURT AT NAIROBI (CITY COURT)**

AND

IN THE MATTER OF PARCEL OF LAND KNOWN AS L.R. NO. 27/134 NAIROBI

AND

IN THE MATTER OF LAND REGISTRATION ACT (CAP 300) LAWS OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

CHIEF LAND REGISTRAR RESPONDENT

EX PARTE - STEPHEN KARANJA KUNGU

JUDGEMENT

1. By a Notice of Motion dated 23rd June, 2014, the *ex parte* applicant herein, **Stephen Karanja Kungu**, seeks the following orders:
 1. **THAT this Honourable Court be pleased to grant an order of Mandamus to compel the Respondent to register or at the very least consider the Applicant's Application for registration of the Vesting Order and subsequently the Transfer in favour of the Applicant in respect of parcel of land known as L.R. Number 27/134 Nairobi within such duration and subject to such conditions as this Honourable Court may deem just.**
 2. **THAT the costs of this Application be provided for.**

Applicant's Case

2. The application was supported by applicant on 18th June, 2014.
3. According to the Applicant, he purchased land parcel known as L.R. No. 27/134 for Kshs. 3,400,000/= at a public Auction held on 18th June 2009 by Ideal Auctioneers pursuant to a Notification of Sale issued in Execution of a decree passed in Civil Suit Number 3033 of 2008 in the 1st Class Magistrates Court in Nairobi – City Court. Subsequently, the said property was vested in him by the said Court vide a Vesting Order dated 10th November 2009 and the Executive Officer of the Honourable Magistrate's Court executed the Transfer in his favour pursuant to orders therein in a bid to effectuate the registration of the said property to him. According to the applicant, neither the said sale nor the vesting order has been challenged or impeached.
4. Following the purchase thereof, the applicant took possession of the said property and having obtained the said Prohibitory Order, Vesting Order and the Transfers, he applied to the Respondent for the registration of the same. Despite that, the said Vesting Order as indeed the Prohibitory Order and the said Transfers aptly executed by the Executive Officer are yet to be registered by the Respondent in his favour almost four years down the line despite writing to the Respondent on numerous occasions requiring him to register the said Vesting order and Transfer not just in discharge of the Respondent's conventional duty but also in compliance with Court orders and processes.
5. It was therefore the applicant's view that whereas registration processes is an exercise of discretion by the Respondent, the said discretion must be exercised legally, reasonable, expeditiously, fairly and in accordance with the rule of natural justice and that the registration of the particular instruments in questions herein is more or less a peremptory legal duty of the Respondent that cannot be arbitrarily abdicated. To exacerbate the situation, the Respondent has not given any reasons for the failure and/or delay in registering the said critical instruments that draw their origin from a Court process. In the circumstances, the applicant has not enjoyed the sanctity of registration of his interests in the said property and the probity of a certificate of title thereto notwithstanding that he is a *bona fide* purchaser of the said property for value and further that his ownership thereof has been sanctioned by the Court.
6. It was the applicant's view that the Respondent has frustrated his substantive and procedural legitimate expectations that the Respondent would effectively and expeditiously register the said instruments and/or give reasons for any delay and/or failure to register the same and that the Respondent's conduct in failing, delaying and/or neglecting to register the said instruments without giving any reasons for the decision and in so doing disregarding his plight smacks of impropriety, illegality, wednesbury unreasonableness, irrationality and the same is callous, oppressive, unfair as well as an utter breach of the rules of natural justice.
7. He deposed that he was ready, able and willing to fulfil the requirements by Respondent to effectuate the registration of the said instruments.
8. The application was not opposed by the Respondent.

Determinations

9. 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.
10. The parameters of the order of mandamus 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:

“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.”

11. 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.***”
12. 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.
13. It is true that the 1st Respondent has discretion to register the applicant. However it is trite law that where a statute gives statutory or public body discretion, that discretion ought to be properly exercised. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held as follows:

“On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and

justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...“

14. 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.**
15. 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 and/or vesting order. 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 the said instruments 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.
16. However, as was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001,** 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.
17. To decline to exercise a power on some extraneous grounds amounts to abuse of power and as was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) while citing **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire Country Council [1986] AC:**

“A power which is abused should be treated as a power which has not been lawfully exercised..... Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc (supra)* the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must pass a much higher test than that of rationality from the standpoint of the public body. The unfairness and arbitrariness in the case before me is so clear and patent as to amount to abuse of power which in turn calls upon the courts intervention in judicial review. A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: “I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground

upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.” The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd* [1982] AC 617 that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: “Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers.” Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston*, reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council* [2001] EWCA 607, [2002] WLR 237, that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief.”

18. In this case, the Respondent has not made a decision. It follows that at this stage the Court can only compel him to make a decision one way or the other.

Order

19. 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 of the Vesting Order and subsequently the Transfer in favour of the Applicant in respect of parcel of land known as L.R. Number 27/134 Nairobi and furnish the applicant with therefor 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 forthwith compelling the Respondents to register the said transfer.

20. The applicant will have half the costs of this application.

Dated at Nairobi this 23rd day of July 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Chege for Mr Kago for the Applicant

Cc Kevin