



Republic v National Land Commission & 2 others; Gatitu Building Co Limited (Exparte Applicant) (Environment and Land Court Judicial Review Application 30 of 2019) [2022] KEELC 13585 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEELC 13585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND COURT JUDICIAL REVIEW APPLICATION 30 OF 2019
MD MWANGI, J
APRIL 28, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

CABINET SECRETARY LANDS 3RD RESPONDENT

AND

GATITU BUILDING CO LIMITED EXPARTE APPLICANT

JUDGMENT

Background

1. The *ex-parte* applicant in this matter is a corporate entity by the name of Gatitu Building Company Ltd. The applicant *vide* his substantive notice of motion application prays for an order of *mandamus* to compel the respondents, National Land Commission, the Chief Land Registrar and the Cabinet Secretary Lands to issue the applicant with a land title in respect to the property known as LR No 209/8363/41 situated within Nairobi County. The applicant further prays for the costs of the suit.
2. The applicant’s case is based on the grounds on the face of the application which I replicate here below:
 - a. The *ex-parte* applicant is the proprietor of that property known as LR No 2098363/41 by virtue of an agreement for sale dated October 8, 1997 and a deed plan issued by the lands office on June 30, 1983.



- b. That the *ex-parte* applicant is a bona fide purchaser for value and proprietor of the property known as LR No 209/8363/41 who has been in possession of the said property for over thirty years and has put up multiple residential dwelling units on the property.
- c. That the *ex-parte* applicant runs a hotel business on the said property known as LR No 209/8363/41 and has been in possession of the same for over thirty (30) years.
- d. That the property known as LR No 209/8363/41 is a subdivision of LR No 209/8363 whose title was not issued to the *ex-parte* applicant before the mother title expired.
- e. That the *ex-parte* applicant has been denied a title to their property known as LR No 209/8363/41 by the respondent because the duration of the mother title LR No 209/8363 has lapsed.
- f. That the mother title known as LR No 209/8363 is a lease for a duration of thirty-six (36) years and six (6) months issued in 1974 whose term lapsed and could not be extended in time because the original proprietors are all deceased.
- g. That the original proprietors of LR No 209/8363 John Kagai Gachenga, William Kyengo Mwangangi and Sophia Nyokabi Mathu are all deceased hence there is no one available and alive to apply for extension of the lease to the mother title.
- h. That the *ex-parte* applicant has been denied the right to fair administrative action and denied the right to property.

The Ex-Parte Applicant's case.

- 3. The notice of motion application is supported by a verifying affidavit sworn by Stephen Minae Gate on March 25, 2021.
- 4. In a nutshell, the *ex parte* applicant's case is that it acquired by way of purchase, the property known as LR No 209/8363/41 on October 8, 1997 as evidenced by an agreement for sale of even date.
- 5. The subject property is a subdivision of LR No 209/8363. The original proprietors of LR No 209/8363 are John Kagai Gachenga, William Kyengo Mwangangi & Sophia Nyokabi Mathu who are all deceased, according to the applicant.
- 6. Since the date of purchase, the applicant has been the user of the portion LR No 209/8363/41 for over 30 years now.
- 7. The duration of the lease of the mother title LR 209/8362 has expired and since all the original proprietors are deceased as alleged by the applicant, there is no one alive to apply for extension of the lease of the mother title.
- 8. The applicant states that it has put up multiple residential premises on the subject premises.
- 9. The applicant had not been issued a title in his name in respect of the suit premises LR No 209/8363/41 before the expiry of the term of the head lease and the demise of the original proprietors.
- 10. In order to safeguard his interests, the *ex-parte* applicant affirms that he had applied for issuance of a title to his specific portion of land LR No 209/8363/41. The respondents however, declined on the basis that the duration of the lease of the mother title had expired and no application for extension of the lease period has been received from the original registered proprietors.



11. The ex parte applicant alleges that the refusal by the respondents to issue him a lease for his specific portion amounts to a violation of the right to fair administrative action and right to property. Further that the respondents are in contravention of their statutory duties under both the Land Act and the land Registration Act.
12. The respondents were served with the substantive notice of motion applicant. Indeed, on January 20, 2022 they were represented in court by Ms Nadi Mohammed who was holding brief for Madam Caroline for the 1st respondent and Mr Allan Kamau who was holding brief for Me Motari for the 2nd and 3rd respondents. On the said date, both respondents were granted 21 days to file their responses but none did.

Courts Direction.

13. The ex parte applicant proposed to rely on the affidavit evidence of the verifying affidavit on record. The court allowed the request of the *ex-parte* applicant and directed the filing of written submissions within 7 days. The ex parte applicant complied and the court has had the opportunity to peruse the submissions and the authorities cited therein.

Issues for Determination.

14. Having considered the ex parte applicant's application and the supporting affidavit as well as the submissions filed, the court identifies the following issues for determination: -
 - a. Whether the ex parte applicant has the legal capacity to claim pre-emptive rights to allocation of the subject property.
 - b. Whether an order of *mandamus* can be granted in the circumstances of this case.

Analysis and Determination.

A. Whether the ex parte applicant has the legal capacity to claim pre-emptive rights to allocation of the subject property.

15. The lessee of a leasehold tenure has a pre-emptive right to allocation of the land on expiry of the lease provided that he/she is a Kenyan citizen and the land is not required by the county or national government for public purposes.
16. In this case, the lessees of the land, the subject matter of this matter, LR No 209/8363 are John Kagai Gachenga, William Kyengo Mwangangi & Sophia Nyokabi Mathu. The *ex-parte* applicant claims that all of them are dead.
17. The *ex-parte* applicant claims to have purchased a portion of the land that was to be excised from the main title – as per the deed plan exhibited. However, the applicant claims that the original lessees passed on before the process could be completed.
18. I note from the pleadings, including the affidavit in support of the application and the annexures, that the ex parte applicant has not attached any evidence verifying the alleged deaths of the 3 original lessees. So, besides the statement of the deponent in the verifying affidavit, there is no evidence whatsoever to corroborate the fact of the alleged death of the original leaseholders.
19. Even if it was true that the original leaseholders are deceased, the ex parte applicant is not the legal representative of their respective estates.



20. Section 82(a) of the *Law of Succession Act* provides that:-
- “Personal representatives shall subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate”.
21. The court in *Alexander Mutunga Wathome v Peter Lavu Tumbo & another* (2015) eKLR rightly emphasized that:-
- In law, one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the *Law of Succession Act*. In addition, section 82 of the *Law of Succession Act* provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person.”
22. Accordingly, only the personal representative(s) of the estates of the deceased (if they are so deceased) original leaseholders would have the legal capacity, to claim the pre-emptive rights over the suit property LR No 209/8363 or any portion of the same, for that matter.
23. The ex-parte applicant in his bid to justify his application argues that he has been in possession of the portion of the suit property for over 30 years. Now that all the original proprietors are deceased there is no one to apply for extension of the lease.
24. The *ex-parte* applicant’s argument holds no water. First and foremost, he has not even bothered to demonstrate any efforts he may have undertaken to find the dependants of the estates of the original leaseholders. Secondly, the *Law of Succession Act* has provided the mechanisms on how to deal with instances where dependants of a deceased person (who are otherwise entitled to, fail to apply for letters of administration.)
25. This court’s finding therefore in respect of the first issue is that the ex- parte applicant lacks the legal capacity to claim the pre-emptive rights over the suit property.

b. Whether an order of Mandamus can be granted in the circumstances of this case.

26. The court having already made a finding that the ex parte applicant lacks the legal capacity to lay claim over the pre-emptive rights of the suit property would be in order to dismiss this matter at this juncture. However, I will go ahead to consider this 2nd issue.
27. An order of *mandamus*, as the court of appeal pronounced in the case of *Republic v Kenya National Examination Council ex parte Gathenji & others* (1997) eKLR, is in the form of a command issuing from the High Court of justice directed to any person, corporation or inferior tribunal, ‘requiring him or her to do some particular thing therein specified which appertains to his or their office and is in nature of a public duty.’
28. The Court of Appeal elaborated that an order of *mandamus* will 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 the party who has a legal right to expect the duty to be performed.
29. In this case, the *ex-parte* applicant is not the original lessee. He therefore has no legal right over the suit property. Further and as the court has already determined, he has no legal capacity to claim the



pre-emptive rights. His application does not therefore meet the threshold for the grant of an order of mandamus.

30. In conclusion, the court finds that the applicant has not proved his case. It is hereby dismissed.

31. The court will not however condemn the *ex-parte* applicant to costs since the respondents have not participated in these proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Masinde h/b for Mungai for the Ex Parte Applicant

N/A for the Respondents

Court Assistant: Hilda

M.D. MWANGI

JUDGE

