



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Judicial Review 8 of 2012

JOSEPH NDUATI

MWANGI.....APPLICANT

VERSUS

**COMMISSIONER OF LANDS.....1ST
RESPONDENT**

**DISTRICT LAND REGISTRAR, NAKURU.....2ND
RESPONDENT**

JUDGMENT

The ex-parte applicant, Joseph Nduati Mwangi filed the Notice of Motion dated 16/2/2012, seeking an order of prohibition to prohibit the Commissioner of Lands from issuing a new lease to any person (a third party) for the land Nakuru Municipality Block 17/108 and an order of mandamus to compel the Commissioner of Lands to register Visionaries Housing Co-operative Society as the proprietors of the land mentioned above. The application is premised on the statutory statement and verifying affidavit sworn by the applicant dated 30/2/2012, and filed with the Chamber Summons on 3/2/2012. The applicant deponed that he is the proprietor of the suit land which he purchased from one Nguru Bethwel. He exhibited the title and sale agreement (JNW1 & 2); that he has been paying the rents as per exhibited by the clearance certificate (JNM3); that he sold the land to Visionaries Housing Co-operative Society as per the agreement (JM WV) having obtained consent from the Commissioner of Lands. However, upon presentation of their name for transfer, the same was not done. Instead the Commissioner of Lands indicated the intention to register the land in the name of a third party. A search done on 28/4/2011, still indicates that the applicant is still the registered owner.

Although the respondents were served, they did not file any replying or submissions. Mr. Njuguna who appeared for the respondents on the hearing date denied having any instructions to proceed with the matter.

This being a Judicial Review application, the court is concerned not with the merits of the decision sought to be prohibited but whether the process of decision making was fair and in accordance with the statutory provisions.

There being no evidence to the contrary, the suit land does belong to the ex-parte applicant. All the documents exhibited in the certificate of lease (JNM1), Rent Clearance Certificate dated 26/9/2011

(JMW...) and Certificate of Official Search dated 28/4/2011, all show that the applicant is the registered owner.

It is also not disputed that the applicant has entered into a sale agreement with Visionaries Housing Co-operative Society. The application is whether the applicant has obtained consent of the Commissioner to sell the land in accordance with **Section 48** of the **Registered Land Act**.

There is an endorsement on the certificate of lease that was issued to the applicant in terms of a restriction, that no disposition by the proprietor will be registered without the written consent of the lessor; that restriction is made pursuant to **Section 48** of the **Registered Land Act** which reads as follows:-

“S.48. Upon the registration of a lease containing an agreement, express or implied, by the lease that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110, has been produced to the Registrar:

Provided that the Registrar may, upon receipt of adequate proof, dispense with the consent of the lessor –

(i) if he is satisfied that the lessor is dead and that there is no personal representative of the lessor; or

(ii) if he considers that the consent of the lessor or the personal representative, as the case may be, cannot be obtained or that it can be obtained only with difficulty or at unreasonable expense and shall, after making such enquiries as he may deem necessary in the circumstances, record on the document his reasons for dispensing with the consent and note such dispensation in the register.”

I do appreciate that the applicant is the registered owner of the leasehold and under **Section 27** of the **Registered Land Act** the registration vests absolute ownership of the land in the registered owner. The Section reads as follows:-

“S.27 Subject to this Act –

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”

In this case, it is an express term of the lease is that the applicant must seek consent of the lessor who is the Government of Kenya to dispose of the land.

An order of prohibition to prevent a public body or officer from acting irregularly or in contravention of the law but it has to be in respect of a future decision. In this case the applicant has not demonstrated that the respondents are acting irregularly. The onus is on the applicant to show that they have made the relevant application to the Commissioner of Lands and the Commissioner has refused to act. There is no application addressed to the Commissioner pursuant to **Section 48** of the **Registered Land Act**. Since **Section 48** requires that the consent be in writing, I would presume that the request must be in writing too.

In **Kenya National Examination Council v Rep Ex-parte Geoffrey Githinji, Njoroge & Others, CA 266/94**, the Court of Appeal said the following on the scope of an order of prohibition:-

“What does an order of prohibition do and when will it issue? It 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 law. It has not only for excess of jurisdiction or absence of it but for departure from the rules of natural justice. It does not, however, lie to correct the cause, practice of procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. I do agree with the above findings. In this case the applicant has Demonstrated that the respondent is acting in excess of its jurisdiction or in contradiction of the law that is Registered Land Act Cap 300.”

An order of mandamus lies to command a public officer/public body to perform a statutory duty which he/she has neglected or refused to perform. The applicant has the onus of demonstrating that a demand was made to the Commissioner to approve the transfer but the Commissioner neglected or refused. In this case the applicant has not demonstrated that the said demand was made.

There is also no evidence that the respondent intends to register a 3rd party as the proprietor of the suit land.

In the end, I find that the applicant seems to have brought this application prematurely without following the laid down procedure or if he did, the material to prove what he did is not before the court. Accordingly, I find no merit in the Notice of Motion dated 16/2/2012. It is hereby dismissed with the applicant bearing its own costs.

DATED and DELIVERED this 27th day of July, 2012.

R.P.V. WENDOH

JUDGE

PRESENT:

Ms Kahunga holding brief for Kahiga for the applicant

N/A for the respondents

Kennedy – Court Clerk