



IN THE HIGH COURT OF KENYA
AT NAKURU
JUDICIAL REVIEW NO.99 OF 2009

**IN THE MATTER OF AN APPLICATION BY WAIRIMU NGIGI & 30 OTHERS
LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW ORDERS OF PROHIBITION AND
MANDAMUS**

AND

**IN THE MATTER OF SUB-DIVISION OF LAND ARISING FROM THE DECREE ISSUED IN
NAIROBI HCCC NO.2286 OF 1993**

BETWEEN

WAIRIMU NGIGI & 30 OTHERS.....APPLICANTS

AND

**DIRECTOR OF SURVEY OF KENYA.....1ST RESPONDENT
DISTRICT LAND REGISTRAR OF NAKURU.....2ND RESPONDENT
COMMISSIONER OF LANDS.....3RD RESPONDENT**

RULING

Pursuant to leave granted on 30th November, 2009, the applicant has now instituted Judicial review application by way of a motion and is seeking that:

“1).....an order of mandamus be issued seeking to prohibit the Nakuru District Land Registrar from issuing titles in respect of L.R. No.380, 378, 11191/2 (NEW LONGONOT-KIJABE BLOCK 6, KIAMBU NYAKINYUA/30/13).

2)an order of mandamus be issued compelling the Commissioner of Lands to issue titles in respect of L.R. No.380, 378, 11191/2 (NEW LONGONOT – KAJABE BLCOK 6, KIAMBU NYAKINYUA/3013

**3).....costs of this application be provided for”
(Emphasis mine).**

The first relief sought cannot be correct, as mandamus does not prohibit but compels. The prayer was correctly framed in the chamber summons for leave. The mix up is clearly a typographical error.

The application is grounded on the following facts:

i) that the 1st respondent has raised a map in relation to the suit property reflecting

subdivisions which are not in accordance with the court's decree dated 31st March, 2003;

- ii) that the suit properties have not been subdivided on the ground;
- iii) that the 2nd respondent has acted contrary to the said decree by issuing titles in respect of the sub-division shown in the map despite the decree;
- iv) that the issuance of titles by the 2nd respondent has the effect of excluding some members of Kiambu Nyakinyua Farmers Company Limited.

The respondents through the Attorney General has filed grounds of opposition to the effect that the application is defective and incompetent; that the orders sought cannot be granted; that the relief sought in the motion is at variance with those sought in the statement of facts; that the application is without merit.

I have considered the application, the grounds of opposition, the written submissions and the authorities cited. I propose, first to consider the points of law raised in the grounds of opposition. First, it has been submitted that the applicant has not cited in the motion the provision of the law under which the application is brought. That the applicant ought to have cited **Section 8(1)** of the **Law Reform Act** in addition to **Order 53** of the **Civil Procedure Rules**. The application is indeed expressed to be brought under **Order 53 rules 3(1)** and **3(4)** of the revoked **Civil Procedure Rules**. There is no requirement under **Order 53** that the provision of the substantive law upon which the application is brought must be cited.

Even **Order 50 rule 10** of the **2010 Civil Procedure Rules** (equivalent to **rule 12** of the revoked **rules**) does not make it mandatory that the provision be cited. It provides:

“10. (1) Every order, rule or other statutory provision under or by virtue of which an application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

(Emphasis supplied)

The requirement is aimed at enabling the other party and the court to know at a glance the basis of the application and as such the requirement does not go to the root of the matter. The case of **Joyce Kanja Runthara & Another** Vs. **Marion Kanja & 4 others**, Meru HCCC No.169 of 2004 is a decision of a court of coordinate jurisdiction and is not binding on me.

Ground 3 is to the effect that the reliefs sought in the motion are variance with those in the statement of facts. It is a requirement of **Order 53 rule 4(1)** that no ground shall be relied upon or any relief sought at the hearing of the motion except the grounds and reliefs set out in the said statement. It has been submitted that the relief sought in paragraph (a) of the Statement of facts amounts to an injunction, which cannot issue against the 2nd respondent.

The relief sought in that paragraph is expressed to be prohibition and in terms of the decision in the **Kenya National Examination Council** Vs. **Gathenji & others**, (1996) LLR 483 (CAK) it is an order issued by 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 contravention of the laws of the land.”

(Emphasis are mine)

Inhibition restrains just like an injunction but is issued against inferior tribunals and other decision-making bodies. The language will therefore inevitably be similar to that of an injunction.

It is however, true that although prayer (b) of the statement of facts seeks an order directing the

director of surveys to implement the decision of the court, that prayers appears to have been abandoned in the motion. Grounds 2 and 4 deals with the merit of the application. It is submitted for the respondents that the order of mandamus is not available to applicants.

The applicants are seeking that the Commissioner of Lands be compelled by an order of mandamus to issue titles in respect of the suit properties in terms of the court order/decreed issued on 31st March, 2003. The court, Ranslay, J in Nbi. HCCC No.2286 of 1993 issued a decree thus:

“1. THAT it is hereby declared that the said resolution of 16th November, 1983 purporting to limit the number of its members to 1950 is null and void and of no legal effect.

2. THAT it is hereby declared that there are a total of 1403 members of the Defendant Company.

3. THAT it is hereby declared that the plaintiffs are lawful members of the Defendant Company and are entitled to share the Defendant’s assets equally with the other shareholders hereof.

4. THAT the Defendants do pay to the plaintiffs costs of his suit to be taxed and certified by the taxing officer of this court.”

Once again, the court in the Kenya National Examination Council (supra) explained the scope of order of mandamus as follows:

“.....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 a party who has a legal right to expect the duty to be performed.”

The court (Ransley, J) having determined that the applicants are members of Kiambu Nyakinyua Farmers Company Limited hence entitled to a share of the company assets, the respondents were duty bound to consider their (the applicants’) interest when issuing documents of ownership of the suit properties to the other shareholders. The applicants therefore had legitimate expectation as explained in the case of The Commissioner of Lands Vs. Kunste Hotel Limited, Civil Appeal No.234 of 1995.

It has been deposed by the applicants without being controverted that the respondents were aware of the decree in question. The respondents are expected indeed obliged in exercising their statutory powers under the **Registered Land Act** to act fairly to all those who are likely to be affected by their decision.

Prohibition, on the other hand, as explained earlier, will issue if a tribunal or body acts in excess of its jurisdiction or contrary to the law or if the tribunal or body departs from the rules of natural justice.

If the respondents are proceeding, as it has been deposed, to issue documents of title without taking into consideration the declarations in the decree, then the applicants’ rights will be violated.

For the reasons stated, there will be prohibition on mandamus as prayed in the motion, the effect of which is that the respondents are compelled by an order of mandamus to consider the decree issued on 31st March, 2003 in Nbi. HCCC No.2286 of 1993 in the discharge of their respective statutory duties; that they are prohibited from continuing to issue any titles in disregard of the said decree.

I make no orders as to costs.

Dated, Delivered and Signed at Nakuru this 15th February, 2011.

**W. OUKO
JUDGE**