



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISC. CIVIL APPLICATION NO. 85 OF 2009

REPUBLIC APPLICANT

VERSUS

COMMISSIONER OF LANDS RESPONDENT

EX PARTE: MOSES MUNGA MUNUGU

RULING

The ex parte applicant's application dated 4th November, 2009 seeks an order of Mandamus to compel the respondent to comply with this court's decree dated 11th July, 2006 in HCC No. 1006 of 2001 at Milimani Commercial Courts, Nairobi. The application was supported by an affidavit sworn by the ex parte applicant wherein he stated that in the Milimani case, a consent judgment was entered against the respondent on 11th July, 2006. The orders that were granted as shown in the decree that was extracted thereafter are as follows:

“This suit coming up for hearing on 11th July, 2006 before the Hon. Mr. Justice Azangalala in the presence of the counsel for the plaintiff and in the presence of the counsel for the 1st and 2nd defendants and counsel for the 3rd defendant and upon hearing counsel for the respective parties;

IT IS HEREBY ORDERED BY CONSENT:

1. That the 3rd defendant do hereby discharge the charge registered against Title Number L.R. 20531/7 forthwith.
2. That the 2nd defendant do furnish the 3rd defendant with a substitute security of equivalent value to Title Number L.R. 20531/7.
3. That upon receipt of the security set out in number 2 above, Title Number L.R. 20531/7 together with the duly executed discharge of charge will be released to the plaintiff's advocate.
4. That Principal Registrar of Titles do cancel and remove the 2nd defendant's name from Title Number L.R. 20531/7 and issue a title in the name of Moses Munga Munugu.

5. That the following charges namely, stamp duty charges on discharge of charge and registration fees on the new charge to be borne by the 2nd defendant.

6. That the 1st and 2nd defendants to bear the costs of his suit to be agreed or taxed.”

The ex parte applicant complained that the respondent had failed to call for the said title and cancel the name of Emali Wholesalers Limited and issue a title in his name.

The respondent through the Attorney-General filed grounds of opposition and stated as follows:

“1. That the application is bad in law, incurably defective and incompetent as the reliefs sought by the applicant in the Notice of Motion to wit “an order of Mandamus” is different from the relief sought in statement of facts to wit “an order of Prohibition”.

2. The order of Mandamus sought cannot be granted as the Commissioner of Lands was according to the applicant’s exhibit “MM1” not a party in Milimani HCCC 1006 of 2001 and such the Commissioner of Lands cannot be compelled to comply with a decree in which he was not a party.

3. The order of Mandamus sought cannot be granted as the applicant has not demonstrated any evidence of his having taken steps to have the Commissioner of Lands or his officers comply with the decree issued in Milimani HCCC 1006 of 2001 and their failure to so comply.”

The parties in the Milimani case were Moses Munga Munugu, Plaintiff versus Christopher M. Lati, Emali Wholesalers Limited, Kenya Commercial Bank Limited and the Principal Registrar of Titles as the Defendants. The Commissioner of Lands was not a party to the said suit. The consent order of 11th July, 2006 as regards the title in question was to be acted upon by the Principal Registrar of Titles. The applicant did not tell the court why he did not proceed against the Principal Registrar but chose to cite the Commissioner of Lands as the respondent. He did not even demonstrate that the extracted decree was served upon the Commissioner of Lands. It cannot therefore be said that the respondent has refused and/or failed to comply with the decree. In **KENYA NATIONAL EXAMINATIONS COUNCIL vs. THE REPUBLIC ex parte GEOFFREY GATHENJI NJOROGE** the Court of Appeal held that:

“An order of Mandamus will compel the performance of a public duty which is imposed on a person or body of persons by 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.”

In that regard, it appears that it is the Principal Registrar of Titles who failed to perform the duty as required of him by the decree aforesaid.

As regards the first ground of opposition as quoted hereinabove, it is true that in the statutory statement accompanying the application for leave, the applicant stated that the relief sought is an order of Prohibition seeking to compel the Commissioner of Lands to cancel the name of Emali Wholesalers on title number L.R. 20531/7 and re-issue in the name of Moses Munga Munugu. However, in the Chamber Summons the leave that was sought was to apply for an order of Mandamus. Msagha, J. granted the prayers sought in the Chamber Summons. In the circumstances, this court is not called upon to enquire into the leave that was granted. In my view, the reference to an order of Prohibition in the statutory statement instead of Mandamus is not a fatal stake.

For the reason that the Commissioner of Lands has wrongfully been cited as the respondent, as hereinabove stated without any indication as to whether the Principal Registrar of Titles was served with the decree and that he failed to comply with the same, this application must be dismissed with costs to the respondent, which I hereby do.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2011.

**D. MUSINGA
JUDGE**

In the presence of:

Nazi – court clerk

Mr. Kingara holding brief for Mrs. Wambugu for the Applicant

No appearance for the Respondent