



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**MISC. APPLICATION NO. 1 OF 2011**

ROSELYNE NAITORE GUCHERA ..... 1<sup>ST</sup> EX PARTE APPLICANT  
BEATRICE KAARI GUCHERA ..... 2<sup>ND</sup> EX PARTE APPLICANT  
TRACY MAKENYA GUCHERA ..... 3<sup>RD</sup> EX PARTE APPLICANT  
WHITNEY KAGENDO GUCHERA ..... 4<sup>TH</sup> EX PARTE APPLICANT

**VERSUS**

MUNICIPAL COUNCIL OF MERU ..... 1<sup>ST</sup> RESPONDENT  
COUNTY COUNCIL OF MERU CENTRAL ..... 2<sup>ND</sup> RESPONDENT

**AND**

JOSPHINE KAARICA MUGAMBI ..... 1<sup>ST</sup> INTERESTED PARTY  
FESTUS GUANTAI MUGAMBI ..... 2<sup>ND</sup> INTERESTED PARTY

**JUDGMENT**

The Notice of Motion dated 18<sup>th</sup> January 2011 seeks an order of *mandamus* to be issued against the 1<sup>st</sup> respondent for the 1<sup>st</sup> respondent to be compelled to transfer to and register plot number Meru Municipality Block II/81 in the names of:-

1. *Roselyne Naitore Guchera*
2. *Kaari Guchera*
3. *Tracy Makena Guchera*
4. *Whitney Kagendo Gucheri*

5. ***Josphine Kaarika Mugambi***

6. ***Festus Guantai Mugambi***

The Notice of Motion also sought that an order of *mandamus* do issue against the 2<sup>nd</sup> respondent to compel it to transfer plot number Meru County Council Kibirichia Block 16 in the names of the *ex parte* applicants and Josephine Kaaria Mugambi now deceased. It is stated in the verifying affidavit that by a certificate of confirmation of grant in Meru High Court Succession Number 213 of 1997 the *ex parte* applicants and the interested parties were awarded various shares of their grandfather's estate. Amongst the properties awarded to them from that estate was parcel number Meru Municipality Block II/81. On that property whereupon there is a commercial premises earning an income of Kshs. 80,000/= per month. Further, they were awarded parcel number Meru County Council Kibirichia Block 16 which too has a commercial premises built on it. In the verifying affidavit of Beatrice Kaari Guchera the following is to be seen:-

6. ***That on 18<sup>th</sup> and 24<sup>th</sup> August 2010 we paid Kshs. 53,872/= and Kshs 20,000/= respectively to the 1<sup>st</sup> respondent being the required dues to enable us acquire registration of property (a) above as by court ordered. (Annexed and marked BKG2 is a copy of both receipts).***

7. ***That the relevant authorities approved the transfer transaction as evidenced by the annexed copy marked "BKG3".***

8. ***That on 18.8.2010 we also paid to the 2<sup>nd</sup> respondent Kshs. 2,000/= required for transfer of the property Meru County Council Kibirichia Plot No. 16 and several authorities approved the same, as evidenced by the annexed copy marked "BKG4".***

9. ***That there is no other remaining requirement on our part, to enable the respondents effectuate the aforesaid grant.***

10. ***That todate the respondents have inexplicably refused to transfer the aforementioned premises as by court ordered, yet there is no stay order in force.***

11. ***That the respondents told me that M/S Maitai Rimita & Co. Advocates for the 2<sup>nd</sup> interested party in the aforementioned succession cause wrote a letter halting conveyance of the suit premises, but refused to give me a copy thereof.***

12. ***That we have been to the respondents' offices on several occasions and they have utterly refused to transfer the said premises as by court ordered.***

13. ***That I am acutely aware the respondents have been compromised by the 2<sup>nd</sup> interested party to frustrate our efforts because the respondents they are (sic) collecting and appropriating rent from Meru Municipality Block 11/81 of over Kshs. 80,000/= per month.***

14. *That the interested parties would want the said premises remain in our late grandfather's name so that they continue benefiting at our expense, after strictly instructing the tenants to pay not even a penny to us.*

15. *That we are orphans and that is why the respondents and interested parties have ganged up colluded and connived at frustrating us because we have no other (sic) to turn to.*

16. *That 1<sup>st</sup> interested party has publicly vowed to disinherit us the said prime premises since we are all ladies and according to him we are not entitled to inherit the same, but should instead get married and enjoy our husband's families' properties.*

The 2<sup>nd</sup> respondent did not oppose the application. The 1<sup>st</sup> respondent opposed the application. The town clerk of the 1<sup>st</sup> respondent swore an affidavit in reply dated 25<sup>th</sup> March 2011. In that affidavit, he stated:-

3. *That the application herein is premature, incompetent and an abuse of the court process.*

4. *That it's not true that we have been compromised by any of the parties herein and this allegation is malicious, unwarranted, offensive and unfounded.*

5. *That the respondents were never parties in the said succession cause and should not therefore be put in the muddle there are in.*

6. *That it's impossible to implement the grant as the same is defective in as for plot No Meru Municipality Block 11/81 and Meru Municipality Block 11/8 are concerned.*

7. *That the respondent cannot be condemned of any refusal to implement the alleged grant because its very clear from the annexed grant that there are omissions and errors and as such the grant cannot therefore be implemented as it is.*

8. *That if the grant is implemented as it is it will cause great injustice to the parties and the respondents.*

The application was also opposed by the 2<sup>nd</sup> interested party. He deponed in his replying affidavit that not all parties who are interested in this matter had been served with the application. He however did not state the names of the other interested parties who he alleges had not been involved in this matter. He also did not state the interest of those other parties to the two plots which are the subject of this matter. He stated that he had filed an appeal against the distribution made in Meru High Court Succession Cause No. 213 of 1993. He further stated that some of the plots mentioned in that succession cause were not plots of the deceased. The 2<sup>nd</sup> interested party's counsel relied on two authorities. Firstly, he relied on the case **Republic vs. Director General of East African Railways Corporation [1977] KLR 194**. The holding of that case is as follows:-

***“Refusing the application, that mandamus did not lie as a matter of course against a public officer and the court's discretion would be exercised against the applicant because (1) there being no person de facto in the office of Director-General, it could not properly be said that there had been a failure or refusal by the Director-General to perform a public duty (ii) the applicant had an alternative remedy by seeking satisfaction either from the committee or in any eventual winding up of the corporation,***

***(iii) without there being de facto a Director-General of the corporation there could be no adequate supervision of an order by the court and as the corporation was without funds, any order to make payment would be ineffective; and (iv) where, as here, there were bars on the exercise of the court's discretion to make an order of mandamus, although the bars were not absolute, the exercise of that discretion in favour of the applicant would constitute judicial interference with the executive arm of government.***

Secondly the 2<sup>nd</sup> interested party relied on the case Meru HC Misc. Appl. No. 15 of 2010 ***ex parte Andrew Imeme Mwereria***. The High Court in this case refused to issue an order of *mandamus* because the applicant was seeking to implement an order directed to the land adjudication officer against the land registrar. Both of the two cases that are relied upon by the 2<sup>nd</sup> interested party are in my view distinguishable from our present case. They both failed for having been directed against persons or entities not in existence or not affected by the order that the applicant was seeking to implement. Those cases are not of assistance to this court. In the case ***Council of Civil Service Unions vs. Minister for the Civil Service*** [1985] AC 374 Lord Diplock summarized the grounds for seeking the reversal of an administrative decision by way of judicial review as follows:-

- ***illegality***
- ***Irrationality (unreasonableness)***
- ***Procedural impropriety***

***(See Wikipedia web page)***

In my view, the failure by the 1<sup>st</sup> respondent to register plot number Meru Municipality Block II/81 after receiving payment of the rates the consent fee and also having its relevant department give a recommendation for the transfer is irrational. I have noted that the 1<sup>st</sup> respondent hinges its failure to carry out the transfer on the fact that the grant mentioned a different parcel number to the one the *ex parte* applicant now seeks to have transferred to the parties in this case. 1<sup>st</sup> respondent however as correctly argued by the *ex parte* applicants failed to explain why it had received the transfer fees and other fees from the *ex parte* applicants and yet had failed to carry out the transfer. That failure as I have stated lacks rationality. Irrationality in Wikipedia web page is stated as:-

***“Under Lord Diplock’s classification, a decision is irrational if it is “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at it. Unlike illegality and procedural impropriety, the courts under this head look at the merits of the decision, rather than at the procedure by which it was arrived at or the legal basis on which it was founded. The question to ask is, whether the decision “makes sense.”***

The decision by the 1<sup>st</sup> respondent to refuse to complete the transfer does not make sense. There is no basis for the refusal to carry out that transfer. In Halsbury’s law of England 4<sup>th</sup> edition volume II at page 111 it is stated:-

***“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.”***

The only reason the 1<sup>st</sup> respondent gave for refusing to carry out the transfer is that it is not mentioned in the grant. That refusal and the reason for the refusal is irrational. The rights of the *ex parte* applicants and the interested parties to have the transfer effected also emanates from the fact that they applied, paid the necessary fees and their application was recommended by one of the departments of the 1<sup>st</sup> respondent. On that basis, this court has power to command the 1<sup>st</sup> respondent to carry out the transfer that has been paid for and recommended by its department. Nothing in my view turns in this case on the argument that the property is registered in a deceased person's name. The concern of this court is that the application by the *ex parte* applicants and the interested parties is to have the transfer carried out. It also matters not that one of the parties died after this action was filed. What the 1<sup>st</sup> respondent will do is to record after the name of that party that she is deceased. I therefore grant the following orders:-

***1. An order of mandamus is hereby issued by this court commanding Municipal Council of Meru to transfer and to register plot No. Meru Municipality Block II/81 in the names of:***

- 1. Roselyne Naitore Guchera***
  
- 2. Kaari Guchera***
  
- 3. Tracy Makena Guchera***
  
- 4. Whitney Kagendo Guchera***
  
- 5. Josphine Kaarika Mugambi (deceased)***
  
- 6. Festus Guantai Mugambi***

***2. An order of mandamus is hereby issued by this court commanding County Council of Meru Central to transfer and to register plot No. Meru County Council Kibirichia Block 16 in the names of:-***

- 1. Roselyne Naitore Guchera***
  
- 2. Kaari Guchera***
  
- 3. Tracy Makena Guchera***
  
- 4. Whitney Kagendo Guchera***
  
- 5. Josphine Kaarika Mugambi (deceased)***

***3. The 1<sup>st</sup> respondent shall pay three quarters of the costs of this cause to the ex parte applicants and the 2<sup>nd</sup> respondent shall pay one quarter of those costs to the ex parte applicant.***

**Dated, signed and delivered at Meru this 18<sup>th</sup> day of May 2011.**

**MARY KASANGO**  
**JUDGE**