



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 22 OF 2010

REPUBLIC.....APPLICANT
VERSUS
THE PERMANENT SECRETARY, MINISTRY OF
LANDS AND SETTLEMENT.....RESPONDENT

EX-PARTE

THE COMMISSIONER OF LANDS.....1ST DEFENDANT
THE TOWN CLERK MUNICIPAL COUNCIL OF NAKURU.....2ND DEFENDANT
HENRY OMWERI.....1ST SUBJECT
ROBERT MURIITHI.....2ND SUBJECT
SOLOMON MWANGI.....3RD
SUBJECT
JAMES WANDERI.....4TH SUBJECT
SAMUEL TOWETT.....5TH SUBJECT
PASTOR FRANCIS W. MUGO.....6TH SUBJECT

RULING

By an application dated 18th May 2010 brought by way of a Notice of Motion, the ex parte applicants, members of Parents Teachers Association of Khalsa Primary School which was started on harambee basis seek an order of mandamus, directing the Respondent, the Permanent Secretary Ministry of Lands and Settlement to pay the school (*I think*), the sum of Kshs 1,307,760/= inclusive of the original certified sum of Kshs 486,515/= as to costs.

The facts as set out in this, and the original Misc. Application No. 102 of 1995 are not in dispute. The PTA Association of Khalsa Harambee Primary School in Nakuru were a public spirited people. In 1995, they noticed the Head of Survey, of Nakuru Municipal Council carrying out a survey of land adjacent to the school and which land formed a road reserve or green belt area along General Kariba Road, and adjacent to Freehold and Harambee Khalsa Primary Schools within Nakuru Municipality.

They successfully challenged the survey, and allotment of the road reserve to individuals commonly referred to here and elsewhere as "**private developers**" ("*pds*"). They obtained orders of certiorari and prohibition against both the Commissioner of Lands and the Town Clerk, Municipal Council of Nakuru on 23rd October 1995, together with costs. The costs were later assessed and a Certificate of Costs dated 14th February 2005 for shs. 486,515/= was issued on that date. As stated above, the said sum has attracted interest and stood at shs 1,307,460/= as of the time of the application - 18th May 2010, and must now, nearly a year later, be slightly higher.

The application herein is brought against the Respondent the Permanent Secretary, Ministry of Lands and Housing (*now Settlement*) as Accounting Officer within the Ministry and also responsible for the office and affairs of the Commissioner of Lands. The application seeks an order of "**mandamus**".

It its literal sense, the order of "**mandamus**" means "**we command**". It is now simply referred to as "**a mandatory order**" in England. It is a remedy available on application for judicial review ordering an inferior court, public authority or tribunal to perform its duties.

Halbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 says -

"The order of mandamus is of 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,. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

This passage was cited with approval by the Court of Appeal in the **Republic vs. Kenya National Examinations Council** *ex parte* **Gaithengi & 8 Others** Civil Appeal No. of 1996.

In the English case of **R (Regina) vs. Dudsheath**, *ex parte*, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

This case stands for the proposition that the order of mandamus is not only a discretionary remedy or relief that this court will grant, but that it is also only available for granting where there is no more appropriate remedy to the Applicant. In other words, a court will not grant an order of mandamus if there is in existence a satisfactory alternative remedy available to the Applicant. That court also noted that if enforcement of the order of mandamus will present problems like lack of adequate supervision, the court will show unwillingness to issue the order.

In the Uganda case of **SHAH VS. ATTORNEY GENERAL (NO. 3)** [1970] E.A. 540, Section 29(1) of the Government Proceedings Act provided -

"Any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of money provided by Parliament."

And Section 20(3) of the Government Proceedings Act (Cap 69, Law of Uganda - 1964 Edn. Vol. II) provided that -

... if an order provides for payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Treasury Officer of Accounts or such other Government Accounting Officer - as may be appropriate shall, ... pay to the person entitled or to his Advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due there unto."

Goudie J, held - (i) *mandamus* could issue to the Treasury Officer of Accounts to compel him to carry out the statutory duty to pay cast on upon him by Section 20(3) of the Government Proceedings Act,

and (ii) *the Court should in its discretion, make an order of mandamus, Order of mandamus granted.*"

In Kenya, like in Uganda, execution against the Government or Local Authorities is forbidden by virtue of section 25 of the Government Proceedings Act, (*Cap. 40, Laws of Kenya*) and Section 263(1)(a) (b) of the Local Government Act (*Cap 265, Laws of Kenya*). Section 21(3) of the Government Proceedings Act, requires the Accounting Officer for the Government Department concerned to pay to the person entitled or to his Advocate, the amount appearing by the certificate (*required by Section 21(1)*), to be due to him together with interest if any, lawfully due thereunto, unless the court by order has suspended such payment.

In this case, there was no order suspending such payment, and there is no application or cause to suspend such payment. It is clear to me that the Parents Teachers Association of Khalsa Harambee Primary School went against the grain, and took effort and courage to halt by order of court, the allocation of a road reserve, and pending the construction of the road, the only available playing ground for the school children, to private developers. And since the court made orders of payment of such costs, I have neither reason nor jurisdiction to reverse such orders. The accounting officer of the Department of Government concerned is bound to satisfy that order. Under the Interpretation and General Provisions Act, (*Cap. 2, Laws of Kenya*), the officer concerned is the Accounting Officer for the time being of the Ministry of Lands and Settlement.

Accordingly, there shall issue an order of mandamus directed to the said officer in terms of Section 21(3) of the Government Proceedings Act aforesaid.

As the action by the ex parte application was precipitated by the needs of Khalsa Primary School the subvention should be made to the Parents Teachers Association of Khalsa Primary School, for the benefit of the Primary School.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of May 2011

M. J. ANYARA EMUKULE
JUDGE