



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC JUDICIAL REVIEW NO. 4 OF 2019

**IN THE MATTER FOR A JUDICIAL REVIEW FOR AN ORDER OF MANDAMUS AGAINST THE LAND REGISTRAR
(LAIKIPIA EAST DISTRICT)**

AND

IN THE MATTER OF LAND PARCELS NO. DAIGA/UMANDE BLOCK 10/34, 38, 78, 85, 86, 128, 230 AND 561

AND

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012 LAWS OF KENYA

AND

IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORMS ACT CAP 26 LAWS OF KENYA.

IN

REPUBLIC.....APPLICANT

VERSUS

LAND REGISTRAR LAIKIPIA EAST DISTRICT.....RESPONDENT

JOSHUA MARETE M'KIAMBATI & 7 OTHERS.....EX-PARTE APPLICANTS

JUDGMENT

A. INTRODUCTION

1. By a chamber summons dated 7th May, 2019 filed under **Order 53 Rule 1(1) and (2) of the Civil Procedure Rule, 2010**, the *ex parte* Applicants (*the Applicants*) sought leave of court to apply for an order of *mandamus* to compel the Respondent to register them as proprietors of the various suit properties specified in the statutory statement and issue them with title deeds for their respective parcels.

2. Upon leave being granted on 11th July, 2019, the Applicants filed a notice of motion dated 30th July, 2019 seeking the following orders:

a) That the Honourable court do issue an order of Mandamus directed at the Respondent herein, the Land Registrar- Laikipia East District, compelling her/him to register the ex-parte Applicants' interests in the respective green cards and issue them with title deeds for their respective land parcels.

b) That the costs of this application be provided for.

B. THE APPLICANTS' CASE

3. The said application for judicial review was based upon the grounds set out in the chamber summons dated 7th May, 2019, the statutory statement, and the verifying affidavit accompanying the said summons. It was the Applicants' case that they were *bona fide* members of Timau Farmers Company Ltd (*the company*) which was the owner of Title No. Daiga/Umande Block 10 (*Block 10*).

4. It was contended that they had been allocated various portions of land in block 10 and cleared by the company to be registered as absolute

proprietors. It was contended that in spite of presenting the relevant conveyance documents to the Respondent for registration and paying the prescribed fee the Respondent had refused to register them without any lawful justification or excuse hence the application.

C. THE RESPONDENT'S RESPONSE

5. The Respondent filed a replying affidavit sworn by R. M. Mutegi the County Land Registrar, Laikipia County on 23rd August, 2019 in opposition to the application. It was contended that there were two separate members' registers at the Lands Office for the company relating to Block 10. The directors of the company had allegedly disregarded the original members' register and prepared a new one which they wanted used in the allocation of Block 10. It was contended that the names of some of the original shareholders some of whom were in possession had been changed. A copy of the original register was annexed to the replying affidavit.

6. The Respondent further stated that the directors of the company had also sought to allocate some of the parcels which were reserved for public utilities to private individuals. In further response to the application, it was contended that the Applicants were denied registration for lawful cause and in accordance with **Section 14(c) of the Land Registration Act, 2012** due to the contradictory lists of membership registers. It was pointed out that the reasons for denial of registration were clearly endorsed on the face of the transfer documents. The court was consequently urged to dismiss the application for being frivolous and vexatious.

D. THE APPLICANTS' REJOINDER

7. The Applicants filed a further affidavit sworn by Joshua Marete M'Kiambati on 18th October, 2019. He deposed that he was the chairman of the company and stated that the original members who had failed to respond to the Company's Gazette Notice No. 78 of 2nd January, 2015 had their shares allocated to other individuals hence the reason an updated register was prepared and lodged with the Respondent. He further stated the public utility plots the Respondent was referring to were reallocated and the new plans approved by the relevant authorities.

E. DIRECTIONS ON SUBMISSIONS

8. When the matter was listed for directions on 22nd July, 2020 it was directed that the application for judicial review shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. However, the material on record shows that the Applicants filed their submissions on 15th February, 2021 whereas the Respondent's submissions were not on record by the time of preparation of the judgment.

F. THE ISSUES FOR DETERMINATION

9. The court has considered the application for judicial review, the Respondent's response in opposition thereto, as well as the Applicants' further affidavit. The court is of the opinion that the following key issues arise for determination herein:

(a) Whether the Applicants have made out a case for the grant of the judicial review order sought.

(b) Who shall bear the costs of the application.

G. ANALYSIS AND DETERMINATION

(a) Whether the Applicants have made out a case for judicial review

10. The court has considered the submissions and material on record on this issue. The Applicants' contention was that they were entitled (as of right) to be registered as proprietors of the various parcels which the company had allocated them. They did not believe that the Respondent was entitled to question the process by which they were allocated the parcels or even to exercise any form of discretion in the matter. It was submitted that, in any event, the members who failed to respond to the gazette notice of 2015 had not sought legal redress with regard to reallocation of their shares.

11. The Applicants further contended that the Respondent had acted beyond the scope of his authority by refusing to act on the company's updated register of members. It was further submitted that the Respondent had failed to summon the directors of the company and the Applicants and accord them a hearing if he had any suspicion on the genuineness of the transactions. The Applicants relied upon the cases of **Adan Abdirahani Hassan & 2 Others v. The Registrar of Titles [2013] eKLR** and **Republic v. County Land Registrar, Kisumu County & 2 Others ex- parte United Millers Ltd [2020] eKLR** in support of their application.

12. The court has also considered the Respondent's response to the application. It was contended that the company had two contradictory membership registers and that it was not clear whether the second register was genuine. The Respondent was concerned that some of the names in the original register had been deleted and new ones inserted in the second register without involving the original members. There was also concern that some of the plots which had been reserved for public utilities were being allocated to individuals and two examples were pointed out in the replying affidavit.

13. The Respondent relied upon **Section 14 (1)(c) of the Land Registration Act, 2012** which stipulates that:

“The Chief Land Registrar, County Land Registrars or any other Land Registrars may, in addition to the power conferred on the office of the Registrar by this Act -

a. ...

b. ...

Refuse to proceed with registration if any instrument, certificate, document or plan or information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed.”

14. The nature of the order of *mandamus* and the circumstances under which it may be granted were considered by the Court of Appeal in the case of **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR**. The Court quoted from **Halsbury’s Laws of England (3rd Edition)** as follows: -

“...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. 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. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

15. It would appear that whereas the Registrar was of the view that he had a discretion on whether or not to register transfer documents presented to him, the Applicants were of the view that the Respondent was duty bound to register the transfers and that he had no discretion in the matter. In the opinion of the Applicants, the Respondent was supposed to act mechanically and register all documents presented for registration without exception. The Applicants were further of the opinion that it was the duty of the members of the company whose names were deleted from the original register to seek legal redress after their registration

16. The court is unable to agree with the position taken by the Applicants in this matter. The Respondent is a public officer who holds an important position of trust. A Registrar is not duty bound to register all transfer presented for registration. The court is of the opinion that a registrar ought to act with diligence, caution and circumspection. He must satisfy himself that the documents presented for registration are in order in all respects. That is why he is given a measure of discretion in the exercise of his statutory duties. That is why he is empowered to call for additional information or documents.

17. There is no doubt in the instant case that the company has two registers which do not seem to be identical. There is an original register and another register which the Applicants called an “updated” register of members. There is no doubt that the Respondent is in possession of copies of both. There is no doubt that some members names were deleted from the original register and new ones inserted in the second register. The court is of the opinion that the Respondent was entitled to decline registration of the Applicants’ conveyance documents on the basis of the existence of the two contradictory registers.

18. The court is further of the opinion that the Respondent was entitled to withhold registration until such time that a satisfactory explanation was given for the changes in the register of the company’s members. It would appear that the Respondent was not satisfied with the company’s explanation that the second register was merely an “updated” register. The Respondent does not appear to have been satisfied that the gazette notice of 2015 by the company’s directors could legally extinguish the interest of the original shareholders in Block 10. It was not contended that the Respondent acted irrationally or unreasonably in the exercise of his statutory discretion within the meaning of the case of **Associated Provincial Pictures Houses Ltd v Wednesbury Corporation [1948] LKB 223**.

19. In the case of **Pastorali v Kabale District Local Government Council and Others [2008] 2 EA 300** the court explained irrationality as follows:

“...irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards”

20. The court has considered the authorities cited by the Applicant and finds the same not relevant to the matters in question herein. In the case of **Adan Abdiraham Hassan & 2 Others** (supra) the Registrar of Titles had cancelled the Petitioner’s title over the suit property by simply publishing a gazette notice to that effect. The court found that the Registrar had unlawfully undertaken the cancellation without due process and consequently the cancellation was nullified.

21. On the other hand, the case of **United Millers Limited** (supra) concerned the refusal of the County Land Registrar to remove a restriction entered against the suit property for a period of over 10 years without undertaking any investigation or making a conclusive decision on the matter. The court also found that even the Ethics and Anticorruption Commission which had opposed the removal of the restriction had not filed any proceedings for recovery of the suit property as constituting public land.

(b) Who shall bear costs of the application

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd**

[1967] EA 287. The court finds no good reason why the Respondent should not be awarded costs of the application. Accordingly, the Respondent shall be awarded costs of the application.

G. CONCLUSION AND DISPOSAL

23. The upshot of the foregoing is that the court finds no merit in the application for judicial review. Accordingly, the Applicants' notice of motion dated 30th July, 2019 is hereby dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DATED and SIGNED in Chambers at NYERI this 24th Day of March, 2021 and delivered via Microsoft Teams platform.

In the presence of:

Mr. Maheli for the Applicants

Mr. Muthuri for the Attorney General for the Respondent

Court assistant - Wario

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HON. Y. M. ANGIMA

JUDGE

24.03.2021