



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT KISUMU

JUDICIAL REVIEW APPLICATION NO. 1 OF 2018

IN THE MATTER OF AN APPLICATION BY UNITED MILLERS LIMITED

FOR LEAVE TO APPLY FOR ORDERS OF MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF ARTICLES 22, 23, 40, 47, 50(1) AND 67 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 78 OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 14 OF THE NATIONAL LAND COMMISSION ACT, 2012

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF TITLE NO. KISUMU MUNICIPALITY/BLOCK 12/40

BETWEEN

REPUBLIC.....APPLICANT

EX-PARTE UNITED MILLERS LIMITED

VERSUS

THE COUNTY LAND REGISTRAR, KISUMU COUNTY LAND REGISTRY.....1ST RESPONDENT

STATE DEPARTMENT OF HOUSING &

URBAN DEVELOPMENT KISUMU COUNTY DIRECTOR OF HOUSING.....2ND RESPONDENT

THE ETHICS & ANTI-CORRUPTION COMMISSION.....3RD RESPONDENT

AND

THE AGRICULTURE AND FOOD AUTHORITY.....INTERESTED PARTY

JUDGEMENT

United Millers Ltd hereinafter referred to as ex parte Applicant has come to court against the County Land Registrar and the State Department of Housing and Urban Development and the Kisumu County Director of Housing, the E.A.C.C. and the Agriculture and food Authority praying for an order to **review the Decree of the Judgement of the 3rd day of February 2020 and an order of Mandamus to compel the respondents to jointly and/or singularly remove the restriction registered as entry No. 7 on the 28th day of March, 2017 against Title No. Kisumu Municipality/Block 12/40.**

An order of Mandamus to compel the Respondents to jointly and/or singularly remove the Objection registered as entry No. 8 on the 23rd day of May, 2017 against Title No. Kisumu Municipality/Block 12/40.

An order of prohibition prohibiting the Respondents and the Interested Party jointly and/or singularly from further placing any restriction, caution and/or encumbrance against Title No. Kisumu municipality/Block 12/40. The costs of this Application be provided for.

The application is based on grounds that:

- i) The Ex-parte Applicant is the registered proprietor of the leasehold interest of all that parcel of land known as Title No. Kisumu Municipality/Block 12/40.**
- ii) The Ex-parte Applicant acquired the subject property in February 1998 as a bonafide purchaser for value from the then Cotton board of Kenya (formerly Cotton Lint & Seed Marketing Board) a statutory body established under the Cotton Act, Cap 335 laws of Kenya, which is now repealed by the crops Act No. 16 of 2013.**
- iii) The Ex-parte Applicant moved the Honourable Court vide the Notice of Motion dated 23rd January, 2018 for order of mandamus and prohibition against the 1st, 2nd, and 3rd Respondents.**
- iv) The Honourable court on the 3rd day of February, 2020 ordered the 2nd Respondent to remove the restriction registered as entry No. 6 on the 15th day of May, 2008 against title No. Kisumu Municipality/Block 12/40.**
- v) The said restriction registered as No. 6 was removed vide entry number 9 on the 28th day of February, 2020.**
- vi) The Applicant on removing the said entry No. 6 discovered that restrictions No. 7 and 8 had already been registered against title No. Kisumu Municipality/Block 12/40 on the 28th day of March and 23rd day of May, all of 2017 all unknowledgeable to the ex-parte Applicant.**
- vii) The entries No. 7 and 8 registered against title No. Kisumu municipality/Block 12/40 are both marred with procedural impropriety as the ex-parte Applicant was condemned unheard, thus violating the rules of Natural Justice.**
- viii) The continuance existence of the said restrictions lack proportionality to the aim it seeks to achieve as it violates the Ex-parte Applicant's constitutional right to own and enjoy its property.**
- ix) At the time of the suit, restrictions No. 7 and 8 were registered against title No. Kisumu Municipality/Block 12/40 on the 28th day of March and 23rd day of May, all of 2017 all unknowledgeable to the ex-parte applicant.**
- x) There has been discovery of new and important matter of evidence with respect to the 1st and 2nd respondents infringing on the rights to the Ex-parte Applicant.**
- xi) The application has been brought without inordinate delay.**
- xii) That it is in the interest of justice that the prayers sought in the application be allowed.**

The application is supported by the affidavit of Sunil Narsh Shah that basically reiterates the grounds of the application. The Respondents have not replied to the application meaning that they do not oppose the application or are not interested. The application before me is basically for Judicial Review order of mandamus.

The efficiency and scope of the order of mandamus was discussed by the court of appeal in the the case of Kenya National Examinations Council vs. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR:

“an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refused to perform the same.”

In this case, I do find the 1st Respondent has a duty to remove a restriction where no cogent explanation has been given as to why the restriction has to be retained. I do grant an order of Mandamus to compel the respondents to jointly and/or singularly remove the restriction registered as entry No. 7 on the 28th day of March, 2017 against Title No. Kisumu Municipality/Block 12/40.

An order of Mandamus to compel the Respondents to jointly and/or singularly remove the Objection registered as entry No. 8 on the 23rd day

of May, 2017 against Title No. Kisumu Municipality/Block 12/40.

I do decline to grant an order of prohibition prohibiting the Respondents and the Interested Party jointly and/or singularly from further placing any restriction, caution and/or encumbrance against Title No. Kisumu municipality/Block 12/40 as the same presupposes that there will be a future illegality and that the same is likely to be abused. Costs of the application to the applicant.

DATED AT KISUMU THIS 29th DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE