



**Republic v District Adjudication & Settlement Officer Tigania East; M’raku
(Exparte Applicant); M’rimbere & another (Interested Parties) (Judicial Review
E012 of 2022) [2023] KEELC 19852 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19852 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
JUDICIAL REVIEW E012 OF 2022
CK YANO, J
SEPTEMBER 20, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

**DISTRICT ADJUDICATION & SETTLEMENT OFFICER TIGANIA
EAST RESPONDENT**

AND

STANLEY M’IBERI M’RAKU EXPARTE APPLICANT

AND

M’RARA M’RIMBERE INTERESTED PARTY

SARAH NKATHA INTERESTED PARTY

RULING

1. The ruling is in respect of the notice of motion dated December 7, 2022 brought pursuant to order 53 rule 3, 4 of the Civil Procedure Act and Section 8 and 9 of the Law Reform Act seeking for orders that-;
 - a. That honourable court be pleased to issue an order of mandamus compelling the respondent to demarcate LR no Ruiriri/Rwarera/409 measuring 8.79 acres (now in Mbwaa 1 adjudication Section and record it in the names of the ex-parte applicant.
 - b. Costs be provided for.
2. The application is supported by the affidavit of Stanley M’Iberi M’Raku, the ex-parte applicant sworn on December 7, 2022 and is based on the grounds that the respondent has refused, neglected and/or failed to carry out his statutory duty to demarcate to the ex-parte applicant the land he has always



occupied and register it in his names and that the action by the respondent is tantamount to abuse of the due process of the law.

3. The Ex-parte applicant averred that he is the registered owner of the said land and has annexed a confirmation letter marked ‘SMI’ by the DLASO. The applicant further stated that on October 6, 2022, he approached the DLASO Meru for consent to file eviction proceedings against the interested parties herein who have trespassed into the said land, but was informed that the land had been allocated to Tigania West Mbwa Adjudication Section which was hived from the Ruiru/Rwarera Adjudication Section. A copy of the letter has also been annexed.
4. The applicant further stated that the DLASO referred him to Tigania West DLASO and when he went there, he was informed that they had no record of the applicant’s land. The applicant averred that he informed him that he was in possession of the land to-date, but the said DLASO could hear none of that. The applicant stated that he is apprehensive that the said officer was out to defraud him of his land in cahoots with the interested parties. The applicant contended that he had gathered the land way back in 1993 as parcel No 665 but he has since sub-divided it into several portions and what is now left in his names is parcel No 4099 measuring 8.70 acres. He further contended that the respondent has refused to demarcate and survey the land despite several requests by the applicant. The applicant has deponed that he prays to be granted leave to apply for orders to compel the respondent to adjudicate the land as required under Cap 284 laws of Kenya.
5. The application is opposed by the respondent through a notice of preliminary objection dated March 17, 2023 on the following grounds.
 1. That the instant application is not instituted in the manner prescribed by the law.
 2. That the application as drafted offends order 53 rule 1 (1) of the Civil Procedure rules 2010.
 3. That being a Judicial Review application, the ex-parte applicant ought to have sought leave of the court to file a substantive application seeking orders of mandamus.
 4. That the application offends the provisions of Section 7 (2) of the Fair Administrative Actions Act in that it fails to demonstrate the administrative action or decision which requires this court’s review.
 5. That the application is frivolous, vexatious, misconceived and an abuse of court process.
6. The respondent prayed that the application and be dismissed and/or struck out with costs.
7. I have considered the application, the objection raised. There are three issues that I find are for determination-;
 - I. Whether the application offends Order 53 Rule 1 of the Civil Procedure Rules.
 - II. Whether the ex-parte applicant is entitled to the orders sought.
 - III. Who bears the costs.
8. The respondent has objected to the application on the grounds inter alia, that the same is not instituted in the manner prescribed by the law. Order 53 Rule 1 of the Civil Procedure Rules provides that no application for Judicial review orders should be made unless leave of the court has been sought and granted. It states inter alia, as follows-;

“1(1) No application for an order of Mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rules



- (2) an application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
- (3) the judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
- (4) ...

9. The reason for the leave was explained by Waki J (as he then was) in *Republic V County Council of Kwale & another Ex-parte Kondo & 57 others*, Mombasa HCMCA No 384 of 1996 as follows-;

“The purpose of application for leave to apply for Judicial Review is firstly to eliminate at an early stage any applications for Judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... leave may only be granted therefore if on the material available the court is of the view, without going into the matter in dept that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigations at a full inter partes hearing of the substantive application for Judicial review. It is an exercise of the court’s discretion but as always it has to be exercised judicially.”

10. A perusal of the file indicates that the applicant was granted leave by the court to commence Judicial review proceedings on December 5, 2022 and the court directed that the substantive motion to be filed and served within 21 days. The application herein was filed on December 9, 2022, which was within the 21 days period. Therefore, the respondent’s objection in that regard is misconceived and not sustainable and is overruled.

Whether the Ex-parte Applicant is Entitled to the Relief Sought

11. It is common ground that an order of mandamus will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. Mandamus is a judicial command requiring the performance of a specified duty which has not been performed. Originally a common law writ, mandamus has been used by court to review administrative action.
12. Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
13. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite ground for it exist. The court has to weigh one thing against another to see whether or not the remedy is the



most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.

14. In the present case the complaint arises out of alleged neglect and/or failure of the respondent obligation to carry out a statutory duty to demarcate the ex-parte applicant's land. In his affidavit in support of the application, the ex-parte applicant has deponed that on October 6, 2022 he approached the DLASO Meru for a consent to file eviction proceedings against the interested parties and was referred to Tigania West DLASO whose jurisdiction the suit land now lies. Although the ex-parte applicant alleged that when he went to the Tigania West DLASO, he was informed that there was no record of his land, there is no evidence to show that the applicant approached the respondent as advised in the letter dated October 6, 2022. Moreover, the said letter was for a request for consent to file suit under Section 30 of the *Land Adjudication Act* Cap 284 Laws of Kenya. I have not seen any request made for demarcation of the applicant's land. Mandamus is an equitable remedy that serves to compel a public authority to perform its public duty and it is a remedy that controls procedural delays.
15. The test for mandamus is set out in *Apotex Ins Vs Canada (Attorney General)*, and was also discussed in *Dragan Vs Canadian (Ministry of Citizenship and Immigration)*. The eight factors that must present for the writ to issue are -;

- “(i) There must be a public legal duty to act.
- (ii) The duty must be owed to the applicants
- (iii) There must be a clear right to the performance of that duty meaning that;
 - a. The applicants have satisfied all conditions precedent, and
 - b. There must have been-;
 - I. A prior demand for performance.
 - II. A reasonable time to comply with the demand, unless there was outright refusal and
 - III. An express refusal or an implied refusal through unreasonable delay
 - (iv) No other adequate remedy is available to the applicants
 - (v) The orders sought must be of some practical value or effect
 - (vi) There is no equitable bar to the relief sought
 - (vii) On a balance of convenience, mandamus should lie”

16. In the case of *District Commissioner, Kiambu Vs R and others, ex-parte Ethan Njau* (1960) EA 109, the court of appeal for Eastern Africa held inter alia that:-

“... a distinct demand for action and its refusal is, as a general rule, a prerequisite for the grant of an order of mandamus, in the present case it was doubtful if there had been a clear demand for the relief sought...”



17. The grant of orders of mandamus is discretionary and the court is entitled to take into account the nature of the process against which Judicial review is sought and satisfy itself that there is reasonable basis to justify or decline the orders sought. In the present case just as in the case referred to hereinabove, there is no evidence that a distinct demand for action was made by the applicant which was refused. In the absence of any evidence, it is doubtful if there had been a clear demand for the relief sought that was directed to the respondent and which he refused to act. The only documents in support of the application is from DLASO, Meru who is not a party to these proceedings and a letter to the DLASO, Tigania West requesting for consent to file suit. I have not seen any demand for demarcation to be carried out as sought in the application herein. Therefore, I am unable to find any grounds to grant the orders sought.
18. In this result, I find that the application has no merit and the same is dismissed.
19. Each party to bear their own costs.
20. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF SEPTEMBER, 2023

In the presence of

Court Assistant - V. Kiragu/Lenah. M

Ms Kithaura for respondent

No appearance for ex-parte applicant

No appearance for interested parties.

C.K YANO

JUDGE

