



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MISC CIVIL APPLICATION NO. 4 OF 2020 (JR)

IN THE MATTER OF: THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE LAND ACT NO.6 OF 2012

AND

IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF: THE SURVEY ACT CAP 299

AND

IN THE MATTER OF: AN APPLICATION BY ABDULMANAN

MOHAMED OMAR, UMMI MOHAMED OMAR AND ABUBAKAR

MOHAMED OMAR FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN ACCORDANCE WITH ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE DIRECTOR OF SURVEY

2. THE HON. ATTORNEY GENERAL.....RESPONDENTS

1. ABDULMANAN MOHAMED OMAR

2. UMMI MOHAMED OMAR

3. ABUBAKAR MOHAMED OMAR.....EXPARTE APPLICANTS

AND

KILIFI LAND REGISTRAR.....INTERESTED PARTY

RULING

Upon leave being granted, the Ex-parte Applicants filed an Amended Notice of Motion dated 10th May 2021 seeking the following orders: -

a) That an order of mandamus do issue against the director of surveys compelling him by himself, his servants, agents and or persons directly working under him to amend the survey record of the register index map sheet no 12 for the Kilifi/Jimba registration section and include in the said register index map [RIM] Plot Number Kilifi/Jimba/1145.

b) That costs of this application be provided for.

Counsel agreed to canvas the application vide written submission which were duly filed.

APPLICANT'S SUBMISSIONS

The Applicant relied on the grounds on the face of the Application together with the statement of facts and affidavit of Abdulmanan Mohamed Omar dated 30th July 2020. The Ex-parte Applicants' case is that despite the Plot Number Kilifi/Jimba/1145 being physically in existence, the Director of Survey has declined to amend the RIM Sheet Number 12 for Kilifi/Jimba to include the suit property even after the same was allotted by the Settlement Fund Trustees to the Ex-parte Applicants late father, one Mohammed Shee Omar. That the Ministry of Lands and the Interested Party had initiated the process but demanded a court order midway, in order to finalize the same.

Counsel relied on the case of **Republic v Director of Surveys & another Ex parte Seven Island Watamu Limited; Watamu Mens Friday Limited & another (Interested Parties) [2021] eKLR** where the court gave similar orders.

RESPONDENT /INTERESTED PARTY'S SUBMISSIONS

The Respondents and the Interested Party opposed the application and filed a Replying Affidavit sworn by Mr. Lee Dzoro, the Malindi District Surveyor, on 17th February 2021 and Grounds of Opposition dated 24th May 2021. Mr. Lee admitted that the suit property was not included in the relevant RIM and deponed that according to the RIM, there exists a Survey Plan Number F/R 133/46 published on 8th November 1976 and that it was not possible to include the suit property without interfering with the existing Survey Plan.

Mr. Lee stated that there was a discrepancy in allocation of land in the Kilifi/Jimba area and if at all there was any allocation to the deceased herein, the 1st Respondent was not aware.

Counsel submitted that the Applicant is not entitled to an order of mandamus and relied on the case of **Republic v Principal Secretary, Ministry of Internal Security & another Ex-parte Schon Noorani & another [2018] eKLR** where the court outlined the factors that must be present for orders of mandamus to issue as follows: -

“29. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. The eight factors that must be 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 Order 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.”*

It was counsel’s submission that there is an elaborate process to be followed by the Director of Survey under Section 33 of the Survey Act which provides:

Section 33. Director may cancel authentication of plan.

(1) Where, before a document or instrument to which an authenticated plan is attached, or in which reference to such a plan is made, is registered-

(a) The plan is found to be inaccurate by reason of any error or omission in the survey; or

(b) The plan does not conform with the terms and conditions subject to which permission to subdivide the land to which the plan relates has been given, the Director may cancel the authentication of such plan and may recall any copies which may have been issued, and in every case the provisions of section 31 shall apply.

(2) The Director shall forthwith upon the cancellation of the authentication of any plan notify in writing-

(a) The registered owner of the land to which such plan relates or, in the case of Government Land, the Commissioner of Lands; and

(b) The Surveyor by whom the survey was executed; and

(c) The Registrar

Counsel submitted that when dealing with Survey Plans the 1st Respondent has a duty to notify all registered affected by a Survey Plan and that in this case there existed a Survey Plan which was not in sync with the amendments sought.

Counsel relied on the case of **Republic v KNEC Ex parte Gathenji & others Civil Appeal No. 266 of 1996**, and stated that the Respondents herein have not refused to perform their statutory duty which is a requirement before the orders of mandamus can be granted.

Counsel therefore urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the Applicant has met the threshold for grant of Judicial Review order of mandamus.

The purpose of Judicial Review is as was set out in the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, where the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

The scope of an order of mandamus was set out by the Court of Appeal in the case cited by the Respondents, **Kenya National Examination Council –v- Geoffrey Gathenji Njoroge & 9 others, Civil Appeal No. 266 of 1996**. The court quoted with approval **Halsbury’s Laws of England, 4th edition, volume 1** at page 111 from paragraph 89 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 office and is in the nature of a public duty..... The order must command no more than the party against whom the application is made 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.

The Applicants’ case was that on 20th September 2000, their late father was offered the suit property vide a letter of offer signed by the Director of Land Adjudication and Settlement. An official receipt annexed shows that the deceased paid Kshs 49,000/- and upon a transfer and discharge of charge, a title was issued in the deceased’s name on 29th August 2001. However, several years later, the suit property is yet to reflect on the Registry Index Map (RIM). The Applicants averred that there was no other title issued to any other person in relation to the

suit property, and that they are in occupation of the suit property.

It is on record that the Respondents' did not deny the fact that the suit property did not appear on the RIM and that the 1st Respondent admitted that he was mandated to carry out such amendments. The Respondents and the Interested Party however averred that the said amendments could not be done for reasons that there existed another Survey Plan and further that it would involve notifying other affected parties.

It is therefore clear that a person seeking an order of mandamus must satisfy the Court that the action he seeks to compel the Respondent to perform is a duty which the Respondent is under a duty whether at common law or by statute to perform.

The Respondent is under a statutory duty to ensure that all survey plans are authenticated and do not contain any errors. Section 33 of the Survey Act gives the Director of Surveys to amend and or rectify the RIM. What the Applicant wants is for the RIM to be rectified to reflect what in on the ground and what the Applicant is in occupation of.

There is no dispute as to the ownership of the suit land of which the Applicant has a title to and occupation thereof. The Respondent also admits that the RIM does not reflect the Applicant's land on the ground. It is the Survey office which can solve this issue and nobody else as they are the custodians of all the survey maps of the country. The Respondent states that they will have to involve other parties who may be affected by the exercise of rectification, this is part of their mandate and this should not be a reason not to do what they are statutorily expected to do.

I therefore find that the Director of Surveys is under a duty to amend the survey record of the Register Index Map (RIM) Sheet No. 12 for the Kilifi/Jimba Registration Section and include in the said Register Index Map [RIM] Plot Number Kilifi/Jimba/1145 following the laid down procedures and processes. The Application is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF MARCH, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.