



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

JUDICIAL REVIEW NO. 2 OF 2019 (JR)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF LAND ADJUDICATION ACT, CAP 284 LAWS OF KENYA

BETWEEN

JACKSON AYUKA NYANGARA.....EX-PARTE APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR TRANSMARA.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

A. INTRODUCTION

1. The ex-parte Applicant herein vide an Application by way of an Ex-parte Chamber Summons dated 28th June, 2019 and brought under Certificate of Urgency; sought Leave of the Court to file the present Notice of Motion.
2. The same was place before the Honourable Judge and Orders were issued on the same date; 28th June, 2019 granting the ex-parte Leave to file the substantive judicial review proceedings.
3. Consequently, the ex-parte Applicant filed the Notice of Motion, albeit unsigned and undated, on the 22nd July, 2019 and sought for the following orders: -
 - a) An Order of MANDAMUS do issue to the DISTRICT LAND REGISTRAR – TRANSMARA the 1st Respondent herein to compel it to erase the names of DANIEL KETERE & MOSES LEKINA NAIMODU from the register as the registered owners of all that piece of land situate in Trans Mara District Ololchani/ Plot No. 89 and register JACKSON AYUKA NYANG'ARA the ex-parte Applicant herein in the register as the owner of all that piece of land situate in Trans Mara District Ololchani/ Plot No. 89.
 - b) Costs of this Application be provided for.
 - c) Such further or other relief as the Honourable Court may deem just and fair to grant.
4. The Application is anchored on the grounds set out on its face and further on the grounds set out in the Statutory Statement dated 28.06.2019 and the Verifying Affidavit sworn on the 26.06.2019; which I have noted accordingly.
5. In a nutshell, the gist of the ex-parte applicant's claim is that the district land registrar in blatant disobedience of the finding and order of

the adjudication board passed on the 18/6/1990 that the applicant be replaced as the owner of the parcel of land known as Trans Mara/ Ololchani/ 89 and erase the names of Daniel Ketere and Moses Lekina from the register.

6. He also claims that he has suffered loss and has been unable to purposefully use the said land for commercial and gainful business purposes. Search was conducted and the title still bears the name of the vendors thereon. The land does not have any conflict or dispute known to him.

7. It is his assertion that the 1st Respondent has unreasonably refused to inform the Applicants the reason for failure to effect the said changes in the register to reflect the details of the Applicant herein for over 3 decades. The said refusal is to the detriment of the Applicant and which delays may escalate the land rates and rent for the said land.

8. The substantive motion was opposed. The Respondents filed Grounds of Opposition dated 08.09.2019 in response to the Notice of Motion Application dated 22.07.2019. It is the Respondents' assertion that the Application is intended to curtail the statutory obligations and duties of the Respondents by directing a Public Officer to exercise his/her statutory discretion in a particular manner.

9. They further contend that the ex-parte applicant has not exhausted the avenue provided in law requiring that a party aggrieved by the decision of the land registrar to file an objection which has not been filed by the ex-parte applicant herein.

10. And further that the Application does not meet the threshold for the award of judicial review orders.

11. When the matter came up before me on the, I issued directions that the substantive judicial review motion be disposed by way of written submissions. All the parties were given sufficient time to file and serve their submissions. However, I have noted that the Respondents did not file their submissions.

APPLICANT'S SUBMISSIONS

12. The gist of the application is on the refusal of the District Land Registrar, Trans Mara, to register the name of the ex-parte applicant and issue him with a title deed as the proprietor of all that land situate in Trans Mara/ Ololchani/ 89.

13. He relied on the case of R vs Commission of Lands and Another exparte Kithinji Mungu Miagere Nairobi H.C. Misc. Application No. 395 of 2012 where G.V. Odunga J laid down the 13 prerequisites for granting the relief of mandamus.

14. He submitted that the 1st Respondent has a duty imposed on him by the constitution and the statute, to register his name in the land register as the registered owner of all that land known as Trans Mara/ Ololchani/ 89 and issue him with the title deed of the said land; pursuant to the provisions of section 65 of the Land Registration Act.

15. The ex-parte applicant herein has demonstrated in evidence by the sale of land agreement and the findings and decision of the objection lodged with the Adjudication Officer which was allowed in his favor and has thus satisfied the statutory requirement in the sale of land transaction.

16. The refusal to register the names of the ex-parte applicant violates the principle of legitimate expectation and amounts to an abuse of power.

17. I have read and considered the substantive motion and the response thereto; together with the evidence adduced and the submissions by the ex-parte Applicant and the various authorities cited in support of his case and I have taken the same into account in arriving at my decision.

B. DETERMINATION AND ANALYSIS

18. The issues for determination from the present Application are as follows: -

a) Whether an Order of Mandamus can issue against the Respondents

A) Whether an Order of Mandamus can issue against the Respondents

19. **Section 65** of the Land Registration Act states that

“If a person has become entitled to any land, a lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of an interested person supported by instruments of transfer or such evidence as the Registrar may require, register the person entitled, as the proprietor”

20. 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.

21. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[29] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[30] 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.

22. The efficacy and scope of an order of mandamus and prohibition was set out by the Court of Appeal in the case **Kenya National Examination Council –Vs- 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.

.....If the complaint is that the duty has been wrongly performed, i.e that the duty has not been performed according to law, then mandamus is a wrong remedy to apply because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”(emphasis mine).

23. The land in dispute herein was acquired by the ex-parte applicant jointly with Nelson Ayaye Otieno vide a sale agreement dated 03/11/1978 from Daniel Keteere and Moses Lekina Naimodu, who were the registered owners of the said parcel at the time but are since deceased.

24. The said vendors had no issue with the said sale and during the hearing at the Adjudication Board they accordingly stated that they have no objection to the land being registered in the names of the ex-parte applicant and his co- purchaser since they had paid the purchase price in full. Thus the ownership of the land has not been disputed.

25. I have carefully considered the above principles and applied them to the facts of this case. I find no doubt that the ex-parte applicant has demonstrated that the 1st Respondent had a public legal duty to act, conferred upon him by the law. It is beyond doubt that the duty is owed to the ex-parte applicant. The applicant has ably demonstrated a clear right to the performance of the said duty. Also, from the material before me, the Applicant has satisfied all conditions precedent; he lodged an objection with the Adjudication Officer/ Board, a hearing was conducted and a determination made hence the Finding of the Adjudication Board as attached, he took the said decision of the Board to the Land Registrar, the 1st Respondent herein for purposes of effecting the registration and has been making several inquiries on the progress of the same and the latest being the lodging of the caution to ensure that his interests on the suit land are well protected before instituting the present suit.

26. It is therefore clear that the 1st Respondent therefore, has a duty to effect registration of any person who has become entitled to land. However, the 1st Respondent has been reluctant to carry out the orders of the Adjudication Officer 30 years later and has failed to give any reasons for his refusal to fully comply with the same.

27. In view of the foregoing; the Applicant's prayer for an order of Mandamus is merited. The upshot of the foregoing is that, I find that the Notice of Motion Application dated 22.07.2020 is not merited and the same if therefore dismissed with costs to the Interested Party.

28. I accordingly find and hold that the ex-parte's Notice of Motion Application dated 22.07.2020 is merited and I all the same and order that:-

a. An Order of MANDAMUS do and is hereby issued to the DISTRICT LAND REGISTRAR – TRANSMARA the 1st Respondent herein to compel it to erase the names of DANIEL KETERE & MOSES LEKINA NAIMODU from the register as the registered owners of all that piece of land situate in Trans Mara District Ololchani/ Plot No. 89 and register JACKSON AYUKA NYANG'ARA the ex-parte Applicant herein in the register as the owner of all that piece of land situate in Trans Mara District Ololchani/ Plot No. 89.

b. Each party to bear their own costs.

DATED, SIGNED and DELIVERED virtually at NAROK on 27th day of OCTOBER, 2021.

MOHAMMED KULLOW

JUDGE

In presence of:-