



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MALINDI

MISC APPLICATION NO. 1 OF 2021

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF MANDAMUS

AND

IN THE MATTER OF: THE SALIENT DICTATES OF LEGITIMATE EXPECTATION, FAIRNESS AND WEDNESBURY'S REASONABLENESS

AND

IN THE MATTER OF: EMERGING HUMAN RIGHTS JURISPRUDENCE, INTERNATIONAL LAW, PROTOCOLS

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION

AND

IN THE MATTER OF: ENVIRONMENT AND LAND COURT AT MALINDI ELC APPEAL NO. 51 OF 2010, NYIRO PANDE VS THOMAS BAYA

BETWEEN

THOMAS BAYA.....APPLICANT

VERSUS

1. LAND REGISTRAR KILIFI

2. KILIFI DISTRICT OF SURVEY

3. THE HON. ATTORNEY GENERAL.....RESPONDENTS

AND

1. NYIRO PANDE NGALA.....1ST INTERESTED PARTY

2. NYEVU KALUME BIVWANDA.....2ND INTERESTED PARTY

AND

EXPARTE APPLICANT.....THOMAS JOSEPH BAYA

RULING

This ruling is in respect of a Notice of Motion dated 23rd April 2021 by the applicant seeking for the following orders:

1. An order of mandamus directed against the 1st Respondent, Registrar of Lands requiring him to forthwith summon the 1st interested party requiring him to deliver up the Certificate of Title No. NGERENYA SETTLEMENT SCHEME/132 (suit property) together with any land survey plans for the purposes of them being corrected and further the 2nd interested party to conduct a survey and a subsequent sub-division and cause to be demarcated 2 acres in favour of the Applicant.

2. General damages.

3. That costs be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed Counsel for the applicant submitted that the applicant successfully defended an appeal lodged by the 1st Interested Party in Malindi Civil Appeal No. 51 of 2021, Nyiro Pande Ngala v Thomas Joseph Baya and duly extracted a decree dated 25th November 2015.

Counsel submitted that the 2nd Respondent has since failed to perform its duty to survey the suit property to excise 2 acres for the applicant by virtue of the court decree above. Further that the 1st Respondent has also failed to summon the 1st Interested Party to surrender the certificate of title of the suit property for cancellation and rectification. It was counsel's submission that unless the orders sought are granted, the decree will be rendered nugatory. That no appeal has since been lodged against that decree therefore the issue of pending proceedings should not arise.

Counsel therefore urged the court to allow the application as prayed.

1ST, 2ND & 3RD RESPONDENTS' SUBMISSIONS

Counsel for the 1st 2nd and 3rd Respondents filed grounds of opposition and submitted that the applicant has not met the threshold for grant of an order of mandamus as was held in the Court of Appeal case of Kenya **National Examinations Council versus the Republic ex-parte Geoffrey Gathenji Njoroge & 9 others (Civil Appeal No. 266 of 1996)**

Counsel further stated that the applicant has not disclosed material; facts as the court dismissed the appeal with costs hence there are no orders capable of being executed and or implemented in **ELC MALINDI ELC CIVIL APPEAL NO. 51 OF 2010 NYIRO PANDE NGALA VS THOMAS BAYA**

Ms Munyuny for the respondents submitted that the application lacks merit as the alleged orders for subdivision/survey and/or surrender of the Certificate of Title for the parcel of land do not exist in the said decree hence the respondents cannot be said to have failed to perform their duties.

Counsel also submitted that the application does not meet the basic tenets of Judicial Review as it is a claim of contempt of court disguised as a judicial review application which application should have been filed in ELC Civil Appeal No 51 of 2010.

It was Ms Munyuny's submission that an order of mandamus can only issue against a Respondent who has failed to perform a public duty to the detriment of a party who has a legal right to expect the duty to be performed. That there is no evidence that the court ordered the respondents to:

“correct/ direct surrender of Certificate of Title No. NGERENYA SETTLEMENT SCHEME/132 and carry out Sub division and cause to be demarcated 2 acres in favour of the applicant.”

Counsel submitted that the applicant did not disclose material facts and cited the case of **Hussein Ali & 4 others v Commissioner of Lands, Land Registrar & 7 others [2013] eKLR** where the court held that:

“It is well settled that a person who makes an ex-parte Application to court, that is to say in the absence of the person who will be affected by that which the court is asked to do is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage by him. That is perfectly plain and requires no authority to justify it.”

“Para 22. In Uhuru Highway Development Ltd. -Vs- C.B.K; H.C.C.C. No. 29 of 1995, the Court considered the issue of non-disclosure of material facts. The court adopted the decision of Viscount Reading C.J. In King -Vs- G.C for customs purposes of Income Tax (1917) 1 KB where at Page 495 he stated as follows:

“Before I proceed to deal with the facts I desire to say this, where an ex-parte application has been made to this court for a rule nisi or other process, if the court comes to the conclusion that the affidavit in support of the Application was not candid and did not fairly state the facts but stated them in such a way as to mislead the court as to the true facts, the court ought for

its own protection and to prevent an abuse of its process, refuse to proceed further with the examination of the merits.”

Counsel therefore submitted that the orders of mandamus prayed for in the application, cannot issue as it would result in rewriting the decree of the Court in ELC CIVIL APPEAL NO. 51 OF 2010.

On the issue on what entails an order of mandamus, counsel relied on the case of Republic -vs- 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;

“Para 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.”

Ms Munyuny submitted that the applicant has not satisfied any of the above requisite conditions which would enable this Honourable Court to issue the orders prayed for in this case. Further in the case of Simon Salaon Pertet & another the Court referred to the case of Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR and stated that:

“...The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.’ Further in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal while highlighting the circumstances under which judicial review of mandamus are issued, cited, with approval, Halsbury’s Law of England, 4th Edn. Vol. 7 p. 111 para 89 and stated thus: “The order of mandamus is of 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.”...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

Further Section 34 (1) of the Civil Procedure Act provides as follows;

“All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit”

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

1ST INTERESTED PARTIES SUBMISSIONS

The 1st Interested Party opposed the application and filed a Replying Affidavit on 26th May 2021 wherein he deposed that there is a pending claim relating to ownership of the suit property before this court vide **MALINDI ELC 291 of 2016** where the Applicant is an interested party which position was supported by the 2nd Interested Party in his Replying Affidavit filed on 22nd July 2021.

2ND INTERESTED PARTY'S SUBMISSIONS

Counsel for the 2nd interested party submitted that neither the Respondent nor the 2nd Interested Party were parties to the dispute between the Ex parte Applicant and the 2nd Interested Party. Secondly that there was never a claim for the subdivision of two acres and registration of the same in favour of the ex parte Applicant.

Counsel further submitted that the decree issued was a negative order which is not capable of being executed against the Respondent and/or any other party in that case as envisaged under **Section 2 of the Civil Procedure Act**.

It was counsel's submission that any execution of a decree against the government can only be where the said decree is issued against the government where it was a party to the suit as was held in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Exparte Security Fredrick Manoah Egunza (2012) eKRL**.

Counsel also relied on the case of **Mariam Hemed Kala v Attorney General & Another (2013) eKLR** where the Court noted that judicial review orders are discretionary and the court can decline to grant them. The court further held as follows:

“Again it is trite that the remedy will not be granted where there are alternative legal remedies which are more convenient beneficial and effectual. In this case, it is admitted that there are pending suits in which the issues of ownership of the suit parcels of land may be properly disposed of. In my view the issue of fraud alleged herein may be effectively determined in the said suits since the orders sought herein will not have the effect of determining the thorny issues of ownership and fraud which are at the core of the dispute between the parties herein. In other words, the orders sought herein will not in the circumstances of this case be efficacious.

Finally, counsel stated that they associate themselves with the submissions of the 1st, 2nd and 3rd Respondents and 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 an order of mandamus. The Court of Appeal in the case of **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & Others [1997] eKLR** 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.”

The order can be granted where the applicant has no other option of realizing the fruits of a judgment where the applicant is barred from executing a judgment against the government as was held in **High Court Judicial Review Miscellaneous Application No. 44 of 2012** between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, the Court expressed itself as hereunder:

“...in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree.”

The government must have been a party to the suit that judgment emanated from to enable such an order to be granted. It should be noted that in this case the applicant attached the decree of the Appeal which stated as follows:

NYIRO PANDE NGALA APPELLANT

VERSUS

THOMAS JOSEPH BAYA RESPONDENT

DECREE

CLAIM FOR

1. An order of eviction evicting the Defendant from the 2 acres of land which is within the Plaintiff's plot no. 132/Ngerenya Settlement Scheme.

2. Costs of this suit.

IT IS HEREBY DECREED BY JUDGMENT

1. That the appeal is consequently dismissed with costs.

The parties in Malindi Civil Appeal No. 51 of 2021 were the applicant and the 1st Interested Party herein who had sought to have the Applicant evicted from the suit property and the trial court issued orders in favour of the Applicant. It is also on record that the appeal court confirmed that order by dismissing the appeal by the 1st Interested Party.

There was no order issued to the effect that the 1st and 2nd Respondent be compelled to do any action. There is no clear order or decree that states that the respondents should be compelled to subdivide the suit property and cancel the present title. Such orders were also not sought for in the claim.

In the case of **Galaxy Paints Company Ltd v Falcon Guards Ltd [2000] eKLR** the court explained that parties are bound by their pleadings likewise the court can only deal with the pleadings placed before it and the issues that emanate from such pleadings.

As much as the court sympathizes with the applicant's tortious journey in realizing the fruits of his judgment, that is the far the court goes and find that the application lacks merit and is dismissed with costs. The applicant can try other avenues to execute the judgment.

DATED AND DELIVERED AT MALINDI THIS 13TH DAY OF OCTOBER 2021

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.