



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC JUDICIAL REVIEW APPLICATION NO. 50 OF 2017
IN THE MATTER OF AN APPLICATION BY PHILIP OSOKAWINYO FOR
JUDICIAL REVIEW ORDERS OF MANDMUS

AND

IN THE MATTER OF PLOTS NO. 490 & 492 IN MASENO TOWNSHIP

AND

IN THE MATTER OF ARTICLES 22 (1), 23 (3) (a), (e), (f), (j), (k) & (m), (2) (a) & (e) OF

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 4 (1), 7 (1) (a), (2) (c), (e), (f), (j), (k), & (m), 9, 10 & 11 OF

THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION

AND

IN THE MATTER OF THE COUNTY GOVERNMENT OF KISUMU

AND

IN THE MATTER OF ORDER 53, RULE 3 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

PHILIP OSOK AWINYO.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

JUDGEMENT

Philip Osok Awinyo, (*hereinafter referred to as the ex-parte applicant*) was granted leave on 4/12/2017 to commence this application for judicial review for orders of *a declaration of rights* that the applicant has a legitimate expectation of being allotted plots No. 490 and 492 in Maseno Township, an order of *Mandamus* compelling the 1st respondent to initiate the necessary administrative procedures with a view to

allotting alternative plots of land to the applicant of equal value to plots 490 and 492 in Maseno township, an order of **Mandamus** compelling the 1st respondent further to ensure that the necessary administrative measures and procedures are completed and that the alternative plots are allotted to the applicant and that necessary documents are processed to enable to acquisition of clean title documents to the new allotted plots, an order of **Mandamus** compelling the 2nd respondent in the alternative but without prejudice to no. 3 above to compensate the applicant for all monies that were paid in respect of plots 490 and 492 in Maseno Township as well as all monies and/or expenses dispensed due to the applicant's adherence to the requisite administrative processes attendant to the allotment of the aforementioned plots such as allotment fees and rates paid, an order of **Mandamus** compelling both the 1st and 2nd respondents jointly and severally to compensate the applicant for out-of-pocket losses suffered as result of not handing over vacant possession of the plots as legitimately expected which omission/failure/refusal led to collapse of a sale agreement worth Kshs. 400,000.00. Moreover, an order of general damages and interests at court rates.

The 2nd respondent contended that the Judicial Review application did not comply with the provision of Order 53 of the Civil Procedure Rules and Section 8 of the Land Registration Act. This issue was raised through a preliminary objection and determined by the court by dismissal of the objection. The other issues raised by the 2nd respondent was that **Mandamus** did not lie and that the orders sought if granted would amount to propagating illegality. The said respondent did not file a replying affidavit. The 1st Respondent on her part through Brian Ikol contended that the contested parcels of land are within the Government Staff quarters and therefore the land was not available for allocation at the time of the purported allocation.

I have considered the judicial review application by way of notice of motion, the replying affidavit, the grounds of opposition and do find that the respondents contended that the property in dispute is Government Land thus Public Land within the staff quarters and is committed for residential use as staff houses for Civil Servants. That the department of Kisumu County Council acted beyond its jurisdiction by allocating land under the Government Land Act as it then was.

This court finds that the Judicial Review order of mandamus is meant to compel the authority to act within the law and not against the law. In this matter, the ex parte applicant was informed that the whole process of allocation of suit property was a nullity as the said property was government land with government staff quarters and was being utilized by civil servants as their residential areas and therefore not available for allocation.

The principles that guide the Environment and Land Court in the exercise of judicial review Jurisdiction were aptly restated by the Court of Appeal in **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** as follows:-

“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). 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. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Ex parte Child in Family Forces Kenya [2017] eKLR.”

This issue was settled in the case of **National Examination Council versus Republic Ex parte Geoffrey Gathenji Njoroge & 9 others** (supra), namely:

“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.”

Further that:

“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 import of the above is that the court can't compel the Respondents to act in a particular manner and perpetuate an illegality.

The principle of legitimate expectation can't be applied to assist a party to acquire property illegally. Moreover, in this case public interest outweighs private interest. In fact the alleged expectation by the applicant to be allocated land or alternative land and be issued with title documents was not legitimate as there was no land to be allocated because the land in issue was not available for allocation.

Addressing the subject of legitimate expectation, **H. W. R. Wade & C. F. Forsyth**[3] at pages 449 to 450, thus:-

*“It is not enough that an expectation should exist; it must in addition be legitimate.... **First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... **Second**, clear statutory words, of course, override an expectation howsoever founded..... **Third**, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”*

“An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added)

Lastly, this court observes that the applicant is only entitled to a refund of the sums paid for the respective parcels of land with interest at court rates from the date of filing the Judicial Review application. Moreover, the exparte applicant to be paid back by the respondent jointly and or severally all monies paid as rates. The Deputy Registrar to assess the records for purposes of establishing the amount.

The upshot of the above is that the court declines to grant a declaration of the right of legitimate expectation as prayed. Moreover, the prayers for mandamus are all rejected. Each party to bear own costs. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF January, 2020.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

MR OKERO FOR APPLICANT

N/A FOR RESPONDENTS

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE