



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. JUDICIAL REVIEW APPLN. NO. 44 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**NATIONAL LAND COMMISSION.....RESPONDENT**

**AND**

**PATRICK NTHENGE**

**AMOS NGUTI**

**ROSEMARY MUTUKU.....EX-PARTE APPLICANTS**

**JUDGMENT**

1. In the Notice of Motion dated 22<sup>nd</sup> October, 2018, the Ex-parte Applicants have sought for the following orders:

***a. That this Honourable Court be pleased to grant an order of mandamus compelling the Respondent to give approval to process the settlement and/or issuance of Certificate of Titles in favour of the Applicants and other residents of Kwa Drake Farm.***

***b. That the costs of this Application be borne by the Respondent.***

2. According to the Ex-parte Applicants' Affidavit, the residents of the Kwa Drake Farm have been in occupation of the said land for a period of sixty (60) years; that through the then Chairman of Kwa Drake Farm, the residents filed a suit being High Court Machakos Civil Case No. 12 of 2005 and that the court entered its Judgment on 30<sup>th</sup> August, 2005.

3. According to the Ex-parte Applicants, the court decreed that: the whole of Kwa Drake Farm belongs to the residents who live there; that the Title Deeds which had been issued were null and void and that the Kwa Drake Farm residents had acquired the land by way of adverse possession.

4. The Applicants finally averred that the residents of Kwa Drake Farm have had several correspondences with the Respondent and that the Respondent has failed to grant an approval for the settlement and or processing of titles in favour of Kwa Drake Farm residents since the decree was issued by the court.

5. The Ex-parte Applicants finally averred that under Article 67 of the Constitution and Section 5 of the National Land Commission, the Respondent has abdicated its public duty of issuing approvals for settling of the residents of Kwa Drake Farm. Although the Respondent was served with the Notice of Motion, it did not file a response.

6. In his submissions, the Applicants' advocate submitted that under Article 67 (2) of the Constitution, it is the mandate of the Respondent to manage public land on behalf of the National and County Governments; that the Applicants and other residents of Kwa Drake Farm have been occupying the said land for more than sixty (60) years and that over the past years, there have been various correspondences from the Ministry of Lands to the Respondent seeking approval for the processing of titles in favour of the Ex-parte Applicants.

7. The Ex-parte Applicants are seeking for an order of mandamus compelling the Respondent to give approval to process the settlement and/or issuance of Certificates of Title in their favour.

8. The Application is premised on the order that was granted by the court in Machakos HCCC No. 12 of 2005 in which Muvua Wambua sued

three individuals and the then Commissioner of Lands.

9. The Decree shows that the court found that Kwa Drake Farm residents have acquired the land by way of adverse possession; and that the residents should be issued with certificates of ownership.

10. Mandamus is an order issuing from the Superior Court directed at an inferior body or tribunal commanding it to perform a duty of a public nature which it has failed or neglected to perform. In the case of **Kenya National Examinations Council vs. Republic Ex-parte Geoffrey Gathenji Njoroge & Others, Nairobi Civil Appeal No. 266 of 1996**, the Court of Appeal held 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 made is legally bound to perform... 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.”***

11. Although the Respondent is constitutionally mandated to manage all public land on behalf of the National and County Governments, there is no law compelling, or demanding the Respondent to allocate the Ex-parte Applicants public land. Indeed, this court, cannot compel the Respondent to issue Title Deeds to the Ex-parte Applicants in respect to the suit land without even knowing if indeed the said land is public land and the actual acreage.

12. In any event, the Ex-parte Applicants are relying on the Decree of the court in Machakos HCCC No. 12 of 2005. The Decree annexed on the Application is not accompanied with the Judgment of the court. It is not therefore clear to this court the circumstances that gave rise to the Decree. Indeed, it would appear that even after the District Land Adjudication Officer asked the Ex-parte Applicants for the certified copy of the court proceedings and Judgment in HCCC No. 12 of 2005, they never did so.

13. Furthermore, the only Plaintiff in Machakos HCCC No. 12 of 2005 was Muvua Wambua. The Ex-parte Applicants were not parties to the suit. It is also not clear to this court why the name of the Judge who issued the Decree is not indicated, and why the Plaintiff in that matter did not seek for the enforcement of the Judgment.

14. The totality of the analysis of the evidence before me shows that the Ex-parte Applicants are not entitled to an order of mandamus. If indeed a Decree in Machakos HCCC No. 12 of 2005 was issued by the court, then they should enforce it by filing an appropriate Application, subject to limitation of time, in that matter.

15. For those reasons, I dismiss the Notice of Motion dated 22<sup>nd</sup> October, 2018 with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2020.**

**O.A. ANGOTE**

**JUDGE**