



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT JR APPLIC NO. 5 OF 2018

IN THE MATTER OF

REPUBLIC.....APPLICANT

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

CHIEF LAND REGISTRAR NAKURU COUNTY.....2ND RESPONDENT

THE HON ATTORNEY GENERAL.....3RD RESPONDENT

EXPARTE.....TROJAN NOMINEES LIMITED

JUDGMENT

Background

1. The application herein by the ex parte applicant is made pursuant to Articles 35, 40 and 47 of the Constitution of Kenya, the Fair Administrative Action Act, the Land Registration Act and Order 53 Rule 1 of the CPC. The substantive relief sought by the applicant are:

“B.1. Orders of mandamus by way of judicial review compelling the 1st and 2nd Respondents’ officers to reconstruct the parcel files and re-issue green cards for the parcels of land known as LR No Naivasha Block V/289 and LR No Naivasha Block V/ 291”

2. The applicant’s position is that the respondents have neglected to perform their administrative functions in contravention of sections 9, 10, and 14 of the Land Registration Act and Articles 10, 35, 40 and 47 of the Constitution of Kenya, as the said green cards were lost and or misplaced, and have remained unavailable since 7th December, 2015. John Wambugu, the applicant’s director, deposes that his company purchased the two parcels from Pineapple Edge Limited on 16th November, 1997, and that the titles were issued on the same day by the Nakuru Lands Registry.

3. Subsequently, despite the applicant having evidence of ownership of the parcels, when it sought certified copies of the green cards from the said registry, they were not issued. The applicant alleges it has information that unknown persons intended to tamper with the official records with a view to issuing fake title documents. Upon request from the applicant, the respondents have allegedly declined to reconstruct the land parcel file records, which refusal decisions they consider to be marred by malice and illegality with the intention of facilitating illegal acquisition of the parcels. In addition, they say it is an infringement of their right to ownership of property.

4. Mr Wambugu annexed to his affidavit copies of the title deeds to the parcels in the name of the applicant, copies of search certificates, copies of letters requesting the green cards and requests for reconstruction of the registry files for the parcels.

5. By consent, the court ordered that the substantive application be canvassed by way of written submissions. As directed by the court, the applicant filed its submissions dated 23rd July, 2019 and rejoinder submissions dated 25th November, 2019.

6. The record shows that on the various mention dates, Mr Munene or Mr Wanjohi appeared for all three respondents. Despite the

appearances by the counsel for the three respondents, the 1st and 2nd Respondents did not file any responses to the application or submissions in respect thereof.

7. The 3rd respondent did, however, file grounds of opposition and submissions. In the grounds of opposition, the 3rd respondent argues as follows: that the application does not meet the threshold for issuance of orders of mandamus; that there are no orders sought against the 3rd respondent (the Attorney General); that the application is based on mere speculation and is contradictory and incurably defective.

8. To the extent that the 1st and 2nd Respondents did not file any responses or submissions in respect of the application, this court deems that the application insofar as it relates to the 1st and 2nd Respondents is unopposed.

Submissions, Analysis and Determination

9. The applicant's submissions reiterate the application. It asserts that there are two issues before the court:

- a. whether the applicant's rights under Article 40 of the Constitution are threatened with violation, and
- b. whether its rights to access of information under Article 35 of the Constitution have been violated.

10. I start with the second issue. The material point in it revolves around whether or not the applicant's constitutional right to access information under Article 35 of the Constitution was violated. In his affidavit on behalf of the applicant, Mr Wachira Wambugu stated that he was the applicant's director and also its advocate. This is not contested. The applicant demonstrated, through Mr Wambugu's affidavit, that the law firm of Wachira Wambugu was engaged in meetings and correspondence with the Land Registrar, Naivasha Land Registry, in which he sought to have Green Cards for the subject parcels of land traced and placed in safe custody, and the file folders be reconstructed. (Exhibits JW4 a-c) constitute the relevant letters.

11. The applicant argued that it had shown that it had sought the information required and that his request was not attended to. It relied on the case of **Saniako N. Kibiwot v Land Control Board, Marakwet Division & 2 others [2019] eKLR** where the ELC Court stated:

“9. It is trite that in order to stand a chance of successfully moving the court in a petition such as this one the petitioner must demonstrate that he first sought the information from the appropriate office and that he was denied the same or that his request was not responded to. In Andrew Omtatah Okoiti V Attorney General & 2 Others [2011] eKLR, Musinga J., stated that:

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed”

12. In that case similar circumstances to those in the present case pertained in that the Land Control Board, the Surveyor and the Land Registrar of Marakwet had declined to avail documents to the applicant despite an access to information request. The respondents in that case, too, did not respond to the petition. The court issued an order of mandamus compelling issuance of the documents sought.

13. Article 35 on access to information, is effected by the Access to Information Act, No 31 of 2016. As argued by the applicant, sections 8-9 of the Act specify the steps to be taken to obtain access to information, which are as follows:

8. (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested.

(2) Where an applicant is unable to make a written request for access to information in accordance with subsection (1) because of illiteracy or disability, the information officer shall take the necessary steps to ensure that the applicant makes a request in manner that meets their needs.

(3) The information officer shall reduce to writing, in a prescribed form the request made under subsection (2) and the information officer shall then furnish the applicant with a copy of the written request.

(4) A public entity may prescribe a form for making an application to access information, but any such form shall not be such as to unreasonably delay requests or place an undue burden upon applicants and no application may be rejected on the ground only that the applicant has not used the prescribed form.

9. (1) Subject to section 10, a public officer shall make a decision on an application as soon as possible, but in any event, within twenty one days of receipt of the application

(2) Where the information sought concerns the life or liberty of a person, the information officer shall provide the information within forty-eight hours of the receipt of the application.

(3) The information officer to whom a request is made under subsection (2) may extend the period for response on a single occasion for a period of not more than fourteen days if — (a) the request is for a large amount of information or requires a search through a large amount of information and meeting the stipulated time would unreasonably interfere with the activities of

the information holder; or (b) consultations are necessary so as to comply with the request and the consultations cannot be reasonably completed within the stipulated time.

(4) As soon as the information access officer has made a decision as to whether to provide access to information, he or she shall immediately communicate the decision to the requester, indicating —

(a) whether or not the public entity or private body holds the information sought;

(b) whether the request for information is approved:

(c) if the request is declined the reasons for making that decision, including the basis for deciding that the information sought is exempt, unless the reasons themselves would be exempt information; and

(d) if the request is declined, a statement about how the requester may appeal to the Commission" (Emphasis supplied).

14. In the application, the applicant stated that the 1st and 2nd Respondents' officers at Naivasha Sub-county had alleged that the green cards to the suit property were lost or misplaced. In the absence of any responses from the 1st and 2nd respondents, these facts remain uncontested. To that extent, and given that proof of request for information has been demonstrated, and that no response has been proffered, there is clear evidence that these provisions have peremptorily been contravened. I so find and hold.

15. With regard to the issue whether the applicant's Article 40 rights to protection to property are threatened with violation, the applicant's core submission is that, having legally purchased the subject property in 1997, it is entitled to protection to that property. The applicant cited the following authorities:

-Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR where the majority in the Court of Appeal held:

"The thrust of Article 40 is to protect proprietary rights which are lawfully acquired. The Supreme Court in Rutongot Farm Ltd vs Kenya Forest Service & 3 Others expressed the position thus:

"Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property. The same guarantee existed in Section 75 of the repealed Constitution."

Such proprietary rights are governed by statutes. For example, in this dispute, the certificates of lease were issued under the Registered Land Act (repealed). The appellants have argued that under the Constitution and statute their titles are absolute and indefeasible, only subject to implied and expressed agreements, liabilities and the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and "to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register". It is only those titles that are capable of being protected under Article 40 that cannot be taken away except in accordance with the Constitution and the law."

16. On the strength of that authority, the applicant argues that it has inherent protection for its legally acquired proprietary interest in the titles, and points out the protection of sanctity of title is indefeasible. The applicant cites the **Elizabeth Wambui** case (supra) where Ouko JA adds:

"Both the Constitution and statute law emphasise the sanctity of title to land. The registration of a person as the proprietor of land vests in that person the absolute ownership of that land subject only to the leases, charges, conditions and restrictions, if any, shown in the register. See: Article 40 of the Constitution and sections 27, 28, 30, 32 and 143 of the repealed Registered Lands Act. Because of their relevance it is apposite to paraphrase and set out some of these provisions.

Article 40 guarantees every person the right to acquire and own property in any part of Kenya and Parliament is enjoined not to enact any law that permits the State or any person to arbitrarily deprive a person of his or her property unless the deprivation is as a result of compulsory acquisition by the Government for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. Section 143 of the Registered Land Act underscores the sanctity of title to land by stating in subsection (2) that;

"(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default".

Such, is the protection granted to a registered proprietor whose registration, as a bona fide purchaser, may only be cancelled where it is proved that it was obtained by fraud or mistake, in which the proprietor had knowledge of or was a party or substantially contributed to. The protection of innocent purchasers has been recognized from time immemorial."

The applicant also argues that the failure or refusal of the 1st and 2nd respondents to reconstruct the files for the subject properties and to issue green cards demonstrates the threat to its right to the property as guaranteed by law. It cited the case of **R v County Registrar Thika**

Republic v County Land Registrar - Thika Land Registry & 2 others Ex Parte Francis Ndung'u Gitau & another [2019] eKLR where the applicant therein sought from the ELC, *inter alia*, an order of mandamus to compel the County Land Registrar, Thika Land Registry to reconstruct the file and/or Green Card of Land Parcel No.Ndarugu/ Gacharage/794. There, as in the present case, the substantive respondents failed to respond to the application despite service and being given various opportunities by the Court to file their responses. The court granted an order of mandamus. It cited the case of **Republic v Kenya National Examinations Council Ex parte Gathenji & 8 Others, Civil Appeal No.234 of 1996**, where the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol.7 p.111 para 89* and held that:

“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 in the case of *Shah...Vs...Attorney General (No. 3) Kampala HCCM No.31 of 1969 [1970] EA 543*, the Court expressed itself *inter alia*, as follows:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.”

17. I am satisfied that the present case presents itself as a fitting candidate for the order of mandamus.

18. have also carefully considered the submissions of the 3rd respondent. They revolve around the technicality as to whether the applicant has satisfied the court to issue judicial review orders of mandamus. Given that they also argue that there is no order sought against the 3rd respondent, that is a surprising argument. They urge the court to decline the order sought on the basis that no illegality, impropriety or irrationality has been shown in respect of the respondents' decisions to attract the order.

19. In my view, the 3rd respondent's submissions cannot overcome two constitutional positions: first the right to sanctity of property and the right to access information to shore up such right, both of which have been invoked by the applicant. To that extent, and having found that the right of access has been violated, the 3rd respondent's arguments are largely superfluous in light of the failure of the 1st and 2nd respondents' failure to contest the application. I find the arguments therein wholly unpersuasive.

Disposition

20. Accordingly, and in light of the foregoing, I do determine and direct that orders of mandamus by way of judicial review compelling the 1st and 2nd Respondents' officers to reconstruct the parcel files and re-issue green cards for the parcels of land known as LR No Naivasha Block V/289 and LR No Naivasha Block V/ 291 do, and are hereby issued.

21. The applicant shall have the costs of the application.

Administrative directions

1. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

2. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

3. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 2nd Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Mr Muindi for the Applicant
2. Ms Cheruiyot for the Respondent
3. Court Clerk - Quinter Ogutu