



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

JUDICIAL REVIEW NO. 9 OF 2015

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF MERU.....1ST RESPONDENT

THE DIRECTOR OF PHYSICAL PLANNING.....2ND RESPONDENT

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

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

AND

EVANGELINE T. ARITHI.....1ST INTERESTED PARTY

CHARLES KABURU BARUA.....2ND INTERESTED PARTY

AND

EX-PARTE APPLICANT.....JEREMIAH M’NJOGU M’TURUGOJI

JUDGMENT

INTRODUCTION

The Applicant vide an Ex-parte Chamber Summons application under **Order 53 Rule 1 CPR** dated 4th May 2015 and brought under certificate of urgency sought leave to apply for an order of mandamus to compel or order the County Government to recommend approval of part Development Plans of plot number MERU MUNICIPALITY BLOCK 11/792 & BLOCK 11/793 through the Meru County Land Management Board. The said application is supported by a verifying affidavit, statement of facts and grounds shown on the face thereof. When the said application was placed before the duty Judge on 22nd June 2015, the same was certified urgent. The Applicant was also granted leave to commence these Judicial Review proceedings.

On 25th June 2015, the Applicant filed his substantive motion under **Order 53 Rule 1, 2, 3 & 4 CPA** and **Section 8 & 9 of the Law Reform Act Cap. 26 Laws of Kenya**. On 16th September 2015, the 1st Interested party filed a replying affidavit and on 1st October 2016, the 2nd Interested party filed his replying affidavit. On 9th March 2016, the 1st Respondent filed her replying affidavit. On 16th November 2016, the Applicant filed an application for leave to enjoin the 4th and 5th Intended Respondents in these proceedings. On 20th December 2016, the Applicant filed a supplementary affidavit.

EX-PARTE APPLICANT’S CASE

The Ex-parte Applicant is seeking an order of mandamus to compel the County Government of Meru through the County Land Management Board to recommend for approval of the Part Development Plan (P.D.P) for Plot No. MERU MUNICIPALITY BLOCK 11/792 & BLOCK 11/793 to the Director of Physical Planning to enable the office to approve the Part Development Plans (P.D.P’s) of the plots referred herein. He stated that he is one of the owners of plot No. MERU MUNICIPALITY BLOCK 11/792 & BLOCK 11/793 situated at Cathedral area in Meru County and that he has on several occasions requested the County Government of Meru for approval through the County Land

Management Board but they have refused and/or failed to do as requested.

The Ex-parte Applicant further stated that the Interested parties have partnered with him as a beneficiary for the pursuance of amendment of overlapping survey of their plots, Rim amendment of the plots survey documents and to pay for all survey and other costs up to the registration and issuance of lease certificates referred herein. It is the Ex-parte Applicant's contention that after the survey overlap was amended and the RIM amendment was also amended, the office of the Director of Physical Planning was requested by the office of the Director of Surveys to advise as to whether the amended P.D.P No. MERU/167/00/5 drawn had been approved by the office of the Director of Physical Planning. In conclusion, the Ex-parte Applicant further contends that their part Development Plan (P.D.P) at the office of the Director of Physical Planning since the year 2000 to date yet plots were allocated based on P.D.P No. MRU/167/95/20, on 27th July 1995 and MRU/167/5 dated 20th June 2000 and the survey has been carried out using the Part Development Plan (P.D.P) drawn in the year 2000 which is MRU/167/00/5 of 20/7/2000.

The Ex-parte Applicant also argued that the County Government of Meru is mandated through the County Land Management Board to recommend for approval for Physical Development Plans to the Director of Planning and that the 2nd Respondent's key activities include preparation of regional and local physical development plans, feasibility studies into matters concerning physical planning and advising on matters concerning alienation of land and the most appropriate use of land such as change of user, extension of user, extension of leases, sub-division of land and amalgamation of land.

1ST RESPONDENT'S CASE

The 1st Respondent contends that **Article 67 (1) of the Constitution of Kenya 2010** establishes the National Land Commission as an independent commission whose duties are laid out in **Article 67 (2)** of the said Constitution which inter alia mandates the National Land Commission to manage public land on behalf of the National and County Governments. The 1st Respondent also argues that the County Land Management Boards are a product of National legislation under **Section 18 (1) of the National Land Commission Act**. By virtue of the foregoing, the 1st Respondent is of the opinion that the prayers being sought against her is a fanciful and hilarious attempt at deep sea fishing for relief against an innocent party and that the orders being sought is legally untenable and that the same ought to be dismissed with costs.

1ST INTERESTED PARTY'S CASE

The 1st Interested party stated she is the heiress of her late husband's plot No. MERU MUNICIPALITY Plot Block RI – 11/793 allocated to her late husband. She stated that together with the 2nd Interested party herein partnered with the Ex-parte Applicant to pursue the amendment of overlapping survey of their two plots to meet costs of RIM amendment of the plots, to meet survey costs and to meet costs of every other requirements up to the issuance of lease certificate of the said plots.

2ND INTERESTED PARTY'S CASE

The 2nd Interested party contends that he was allocated plot No. R2/BLOCK 11/792 in the year 1995 and that by consent with the 1st Interested party, they agreed to partner with the Ex-parte Applicant to pursue an amendment of overlapping survey of their plots, to meet all costs for the registration and issuance of certificate of leases for the suit plots.

ANALYSIS AND DECISION

I have considered the affidavit evidence both in support and in opposition to these Judicial Review proceedings. I have also considered the submissions and the applicable law. The Court of Appeal in the case of **Kenya National Examination Counsel Vs Republic, Ex-parte Geoffrey Gathenji & 9 others, Nairobi Civil Appeal No. 266 of 1996** aptly summarized the purpose and reach of an order of mandamus as follows:

“The next issue we must deal with is this; what is the scope and efficacy of an ORDER OF MANDAMUS? Once again we twin to HALSBURY's LAW OF ENGLAND, 4th Edition, Volume 1 at Page 111 FROM PARAGRAPH 89. That learned treatise says:

“The order of mandamus is of a most 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 2nd that may be done, in all cases where there is a specific legal right and 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”.

At paragraph 90 headed “the mandate” it is stated:

“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 composed, 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”.

What do these principles mean? They mean that an order of mandamus will compel 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 expect the duty to be performed”.

From the pleadings and the annexures thereto, it is apparent that pursuant to **Section 18 of the National Land Commission No. 5 of 2012**, the Commission vide Gazette Notice No. 77 00 dated 24th October 2014 established practice guide-lines for County Land Management Boards on processing of Development Applications. The preamble of the guidelines reads as follows:

“These guidelines shall direct County Land Management Boards (CLMB) in the processing of development applications and management of public land in accordance with National Land Commission Act, 2012 and other relevant laws. The C.L.M.Bs are established under Section 18 of the National Land Commission Act, 2012 to manage land. The function of the board as stipulated in Section 9 (a) of the National Land Commission Act 2012 is to process applications for:

- ***Allocation of public land***
- ***Change and extension of user***
- ***Sub-division of public land***
- ***Renewal of leases***
- ***Perform any other function assigned by the Commission or any other written law”.***

The documents annexed to the affidavits both in support of these proceedings indicates that UNS. Plot No. R2 was allocated based on PDP No. MRU/167/95/20 of 27th July 1995. The PDP was later superceded by PDP No. MRU/167/00/5 of 20th June 2000. The new PDP interchanged positions of UNS. Plot No. R2 and R1. The County Land Management Board was repealed vide Act No. 26/16. By the time of the Gazettement of the said guide lines, the land parcels which are the subject of these proceedings were not public land as the same had been alienated into private land. It therefore follows that the 1st Respondent is not bound to perform a duty that is not public in nature and where an alternative legal remedy for enforcing that right is available and more convenient and indeed effective.

The substantive motion giving rise to these judicial proceedings dated 22nd June 2015 seeks to compel the County Government of Meru through the County Land Management Board to recommend for approval of the Part Development Plan (P.D.P) for plot numbers MERU MUNICIPALITY BLOCK 11/792 & BLOCK 11/793 to the Director of Physical Planning to enable the office to approve the P.D.Ps of the referred plots. Since **Section 18 of the Land Commission Act** which created the County Management Boards was repealed vide Act No. 26 of 2016, I also agree with the 1st Respondent that the repealed County Land Management Board could only recommend the issuance of a lease after the Part Development Plan (P.D.P) and Registry Index Map (R.I.M) had been processed and approved by the Director of Surveys. There is no evidence indicating that these processes were followed and in my view, the Board had no basis for making such recommendations. I also note that for the County Physical Planning officer to approve the issuance of a lease for allotment made prior to the establishment of County Governments, the Ex-parte Applicant ought to provide evidence of ownership of the suits plot such as the minutes of allocation by the former Municipal Council of Meru approved part Development Plan (P.D.P) and approved Registry Index Map (R.I.M). It was the duty of the Ex-parte Applicant to provide the 1st Respondent all the relevant documents to ensure that the Registry Index Map (R.I.M) is amended to reflect the proper demarcation and beacons of the parcels of land which are the subject of these proceedings. From the foregoing, it is my finding that Ex-parte Applicant has not demonstrated that the 1st and 2nd Respondents have failed to discharge their duties to warrant the grant of the prerogative orders sought.

In the final analysis, I find the Notice of Motion dated 22nd June 2015 lacking in merit and the same is hereby dismissed with costs.

DATED AND SIGNED AT KERUGOYA COURT THIS 7TH DAY OF FEBRUARY, 2020.

.....
E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED AND SIGNED IN OPEN COURT AT MERU THIS 10TH. DAY OF FEBRUARY, 2020.

L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: