**REPUBLIC OF KENYA**

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

**LAND CASE NO.4 OF 2018(JUDICIAL REVIEW)**

**IN THE MATTER OF APPLICATION BY FRANCIS OWINO MWAHA FOR AN ORDER OF MANDAMUS**

**-AND-**

**IN THE MATTER OF THE LAND PARCEL NUMBERS KISUMU /RATA/248 AND 2745**

**BETWEEN**

**REPUBLIC**

**EX-PARTE: FRANCIS OWINO MWAHA…..……APPLICANT**

**-VERSUS-**

**THE DIRECTOR OF LAND ADJUDICATION &SETTLEMENT .....1ST RESPONDENT**

**THE COUNTY LAND REGISTRAR, KISUMU COUNTY.....2ND RESPONDENT**

**-AND-**

**MARK ODEMBO OCHOLA.....1ST INTERESTED PARTY**

**JOHN PANDE NYANGAGA.....2ND INTERESTED PARTY**

**JUDGEMENT**

Francis Owino Mwaha herein after referred to as the expert applicant has come to court seeking orders that an order of mandamus compelling the first and second respondence to cause the original land parcel number 248 Rata adjudication section to be registered in accordance with the adjudication register in the names of Petro Mwaha and Marco Odembo as proprietors in common as follows

1PETRO MWAHA 3/4

2MARCO ODEMBO1/4

The application is sought on the facts and grounds that the Applicant is the son of the late Petro Mwaha Ulolo a.k.a Petro Mwaha Ulolo a,k,a. Mwaha ulolo and also the administrator of the deceased`s intestate pursuant to a Grant of letters of Administration intestate issued to him in Kisumu CMC Succession Cause No.794 of 2016. At all material times during land adjudication, the late petro Mwaha Ulolo and Mark Odembo Ochola a,k,a Mariko Odembo ( the 1st Interested party herein)became registered as co-proprietors in common of the then land parcel No.248 Rata Adjudication section measuring 0.71ha. or thereabouts.

The Adjudication Register for the said land parcel No. 248 Rata Adjudication Section expressly stated that the said Petro Mwaha and Mariko Odembo were co-registered as **‘’proprietors in common as follows-Petro Mwaha ¾ and MARIKO Odembo ¼ .**

4. An Objection was lodged by Petro Mwaha Ulolo as the plaintiff, and the decision and award of the Land Adjudication Officer dated 20th August ,1975 was that ***‘’land parcel 248 to be sub-divided the upper portion to remain in the name of the defendant MARK ODEMBO and the lower portion to MWAHA ULOLO and he is to get the new number.”***

Petro Mwaha Ulolo further appealed against that decision to the minister in Appeal Case No.598 of 1985,which was also dismissed, and in doing so, the Special District Commissioner upheld the decision of the land Adjudication Officer and directed that ' ***'The p/No.248 to be sub-divided between the parties –the upper portion to remain in the name of MWAHA ULOLO and get a new number L.A.O to implement this soonest.''***

In purporting to implement the decisions of the Land Adjudication Officer and of the special District Commissioner, the Director of Land Adjudication settlement (the 1st Respondent herein)caused land parcel No.248 to be subdivided ***''to create p/No.2745 for Mwaha Ulolo measuring 0.21Hac.while Mark Odembo retained the old number thus measuring 0.5 Hac.''***

The effect of the decision of the Director of Land Adjudication & Settlement was that Petro Mwaha got only one-quarter(1/4 ) of the original parcel No.248,while Mark Odembo received three-quarters(3/4 );instead of Mark Odembo taking the smaller portion measuring 0.21ha.as envisaged in the adjudication register, he erroneously got the bigger portion measuring 0.5ha.

The applicant contends that neither the decision and award of the Land Adjudication Officer dated 20th August ,1975 in Objection No.107/72,nor the subsequent Appeal to the Minister in Appeal Case NO.598 of 1985,changed or interfered with the respective shares of Petro Mwaha and Mariko Odembo which remained as '***'proprietors in common as follows –Petro Mwaha and Mariko Odembo ¼''*** as noted in the Adjudication Register.

The applicant further contends that there was an error in the implementation of the Land Adjudication Officer that '' **both the plaintiff and the Defendant were registered as the owners of parcel 248 with remarks that the *plaintiff owns 1/ 4 and the Defendant ¾* ;''**Petro Mwaha was the plaintiff in the said Objection,and his share as registered in the adjudication register was ¾ of parcel No.248,and not ¼ ;further that finding which was clearly a mistake or typing error was not part of the final decision or award, and therefore should not have formed part of what was being implemented.

The Applicant therefore contends that both the Objection as well as the Appeal to the Minister having Failed and/or having been dismissed, the 1st and 2nd Respondents were under a duty to cause registration the registration of land parcel NO.248 RATA Adjudication Section to be effected only '' **in accordance with the adjudication register''** as they were required to do by section 28 of the Land Adjudication Act,Cap.284,as well as the then Section 11(2A) of the Registered Land Act,Cap.300(repealed).

**The reliefs are sought on grounds that** Pursuant to Section 27 (3) of the Land Adjudication Act, Cap.284, when all objections have been determined and the Adjudication Register had become final/ the Director of Adjudication was required to forward the said Register to Chief Land Registrar for implementation.

Under the then Section 28 of the Land Adjudication Act, Cap. 284, upon receipt of the Adjudicator Register, the Chief Land Registrar was required to ''cause registrations to be effected **in accordance with the adjudication register''**

Under the section 11 (2A) of the Registered Land Act, Cap .300, (repealed) the Chief Land Registrar was required, upon receipt of an Adjudication Register, to charge of the registration District concerned, **who shall prepare a register for each person shown in the adjudication register as an owner of land …….''**

The Adjudication Register for land parcel No. land parcel No. 248 Rata **Adjudication Section** expressly stated that Petro Mwaha and Mariko Odembo were to be registered as '' **proprietors in common as follows – petro Mwaha ¾ and Mariko Odembo ¼ ''.**

Neither the Objection proceedings nor the subsequent Appeal to the Minister changed or interfered with the respective shares of Petro Mwaha and Mariko Odembo which remained as ''proprietors in common as follows – petro Mwaha ¾ and Mariko Odembo ¼ as noted in the Adjudication Register.

The 1st and 2nd Respondents were therefore under obligation to cause land parcel no. 248 Rata Adjudication section ''to be effected in accordance with the adjudication register'' in the names of Petro Mwaha and Mariko Odembo as '' proprietors in common as follow – Petro Mwaha ¾ and Mariko Odembo ¼ '' and they failed to discharge that duty.

The 1st and 2nd Respondents have instead caused the original parcel No. 248 Rata Adjudication Section to be implemented by giving Petro Mwaha only 0.21ha. Or one – quarter (¼) thereof, while giving Mark Odembo 0.5ha. or three – quarters (3/4 ) thereof, which was a wrong implantation which amounts to no implementation all

The 1st and 2nd Respondents should therefore be compelled to implement the correct registration of land parcel No. 248 Rata Adjudication Section according to law. The application supported by the affidavit of Francis Owino Mwaha sworn on 17/10/2018.

The Court of Appeal stated in the case of ***Kenya National Examinations Council vs. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR*:**

> **"and order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refused to perform the same**."

In the same case, the Court expounded on the scope and efficacy of an order of mandamus. It enunciated 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 to expect the duty to be performed. The Court, in that case, adopted passages from the ***Halsbury's Laws of England***, 4th edition, volume 1 paragraph 89 where the editors posit that the purpose of

an order of mandamus 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 the mode of redress is less convenient, beneficial and effectual."**

The Court also adopted the statement at paragraph 90 of the same volume of the ***Halsbury's Laws of England*** thus:

> **"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 required 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."** [Emphasis]

That is not to say that the remedy of an order of mandamus is not available where the performance of a statutory duty entails or involves the exercise of discretion on the part of the person or body on whom the discretion is conferred. Discretion, itself, must be exercised reasonably. Lord Greene, M. R of the Court of Appeal in England expounded on the subject years ago, in 1947, in ***Associated Provincial Picture Houses, Ltd. vs. Wednesbury Corporation*** (above) where he stated:

> **"it is true that discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must *direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his considerations matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably. Similarly, you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority*."**

Lord Greene then summarize the principle thus:

> **"…the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere**."

The respondent was under a duty to register the exparte applicant and the interested party in accordance with the adjudication register but he did not do so and therefore acted in breach of the duty.

However, I have considered the application and found that applicant has not applied for an order of ***Certiorari*** to quash the decision of the Director Of Land Adjudication And Settlement and the County Land Registrar Kisumu to give Petro Mwaha 0.21Hactare instead of 0.5Hactare and giving Mark Odembo 0.5 Hectare instead of 0.1Hactare. The decision has already been implemented and therefore ought to be quashed first.

I do find an order of mandamus cannot be issued in this circumstances .The application for judicial review order of mandamus is dismissed with costs.

**DATED, DELIVERED AND SIGNED THIS 28th DAY OF APRIL, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**