



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 3 OF 2018**

**REPUBLIC.....APPLICANT**

**VERSUS**

**CHIEF LAND REGISTRAR.....1<sup>ST</sup> RESPONDENT**

**KIRINYAGA DISTRICT LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**JAMES NDUNGU KABIRU.....INTERESTED PARTY**

**JAMII BORA BANK.....EX-PARTE APPLICANT**

**JUDGMENT**

**INTRODUCTION**

The Ex-parte Applicant commenced these proceedings with a Ex-parte Chamber Summons under certificate of urgency dated 24<sup>th</sup> October 2018 brought under *Section 8 (2) of the Law Reform Act, Cap. 26 of the Laws of Kenya, Order 53 Rule 1 of the Civil Procedure Rules 2010* made under *Cap. 21 of the Laws of Kenya and Part III of the Fair Administrative Actions Act, No. 4 of 2015*. The Ex-parte Applicant sought the following orders:

- (1) Spent.**
- (2) Leave be and is hereby granted to commence Judicial Review proceedings for an order of mandamus to compel the 2<sup>nd</sup> Respondent to transfer property Land Reference Number MWEA/MUTITHI/SCHEME/121 to the Interested party.**
- (3) The leave granted do operate as stay and caveat against any action on the Registrar of property Land Reference No. MWEA/MUTITHI/SCHEME/121.**
- (4) Costs of this application be provided for.**

That application is supported by a statutory statement, grounds upon which relief is sought and a verifying affidavit. The verifying affidavit is further supported by numerous annexures marked “**P.O.1 – P.O. 7.**”

When the application was placed before the duty Judge, it was directed to be served for interparties hearing on 13/12/2018. On the said 13/12/2018, the matter was called out and only the Ex-parte Applicant was present through her advocates and upon being satisfied that the Respondents were duly served, the Ex-parte Applicant was granted leave to apply to commence Judicial Review proceedings for an order of mandamus to compel the 2<sup>nd</sup> Respondent to transfer property Land Reference No. MWEA/MUTITHI/121 to the Interested party. The Court also directed the leave so granted do operate as a stay and caveat against any actions on the Register of property Land Reference No. MWEA/MUTITHI/121. The Ex-parte Applicant was also directed to file the substantive motion within 21 days from the date thereof.

On 17<sup>th</sup> January 2019, the Ex-parte Applicant filed the substantive motion for an order of mandamus compelling the 2<sup>nd</sup> Respondent to transfer property Land Reference No. MWEA/MUTITHI/121 to the Interested party being a bona fide purchaser for value of the suit property. the Ex-parte Applicant also sought the costs of the application. On 5<sup>th</sup> February 2019, the 3<sup>rd</sup> Respondent entered Appearance and

on 1<sup>st</sup> April 2019, the 2<sup>nd</sup> Respondent filed a replying affidavit through the 3<sup>rd</sup> Respondent.

### EX-PARTE APPLICANT'S CASE

The Ex-parte Applicant through her Debt Recovery Manager deponed through the supporting affidavit that by a letter of offer dated 21<sup>st</sup> July 2015, the Ex-parte Applicant agreed to advance a finance facility to one Martin Robin Kinuthia in the sum of Kenya Shillings Twenty four million five hundred thousand only (Ksh. 24,500,000/=). He stated that the said sum was secured by a legal charge over property Land Reference No. MWEA/MUTITHI/121 (hereinafter referred to as "the property") owned by the said Martin Robin Kinuthia. The said Martin Robin Kinuthia defaulted in repaying the loan as a result of which the Ex-parte Applicant's right of statutory power of sale crystallized and was exercised in compliance with the law. On 14<sup>th</sup> September 2017, the property was advertised for sale by way of public auction and was sold to the highest bidder, the Interested party herein for a sum of Ksh. 15,500,000/=. The Ex-parte Applicant further stated that there was a deficit of Ksh. 23,352,572.31 which the Ex-parte Applicant is currently pursuing against the said Martin Robin Kinuthia vide H.C.C.C No. 186 of 2018. The Ex-parte Applicant further stated that the 2<sup>nd</sup> Respondent has to date failed to effect the transfer of the property to the Interested party who is a purchaser for value in a public auction. The Ex-parte Applicant further contends that the action and/or inaction by the 2<sup>nd</sup> Respondent in failing to effect the transfer of the suit property to the Interested party has prejudiced the legal rights of the Interested party and in bad faith, without authority, is unfair, violates the legitimate expectations of the Interested party and is taken in or made in abuse of the 2<sup>nd</sup> Respondent's power.

### RESPONDENTS CASE

The Respondents through the 2<sup>nd</sup> Respondent stated that on 14<sup>th</sup> April 2009, land parcel No. MWEA/MUTITHI/ SCHEME/121 measuring 2.0 Hectares was registered in the name of one Samuel Kanja Kinunu. On 16<sup>th</sup> November 2009, the entry referred to above was cancelled pursuant to a Court order in Wanguru SRM Arbitration Case No. 10/2009 and one Ndoro Njinjo issued with a title deed on 17<sup>th</sup> November 2009. On 26<sup>th</sup> February 2010, the suit land was transferred to Nelson Mbuko Rintari and Josphat Kamau Gitogo and a title deed issued to them on 1<sup>st</sup> March 2010. Consequently, the land was transferred to Patrick Paul Kariuki on 13<sup>th</sup> October 2010 and later to T. Gas Kenya Limited on 11<sup>th</sup> March 2015. The Respondents further stated that on 14<sup>th</sup> September 2015, Martin Robin Kinuthia the Interested party herein was registered as proprietor of the suit property who thereafter charged the same date as security for a loan advanced by the Ex-parte Applicant herein. The Respondents contend that on 16<sup>th</sup> November 2011, the Hon. Justice Ong'udi delivered a ruling in Misc. E.L.C J.R No. 81/200 (Embu) between Samuel Kanja Kinunu Versus Ndoro Njinjo quashing the decision of Wanguru Land Disputes Tribunal Case No. D 26/Vol 5/379 and the subsequent judgment in Wanguru SRM's Arbitration Award Case No. 10/09. She stated that the Hon. Judge however, erred in ordering that the 1<sup>st</sup> Respondent's title be restored forthwith. It is further stated that the error referred herein above was rectified by the Hon. Justice Ong'udi on 20<sup>th</sup> January 2015 following an application for rectification by the Applicant herein. The Respondents further contend that the award quashed by the Hon. Justice Ong'udi is the award that conferred title to Ndoro Njinjo. The import of the ruling of 16<sup>th</sup> November 2011 and of 20<sup>th</sup> January 2015 is that the suit land reverted back to Samuel Kanja Kinunu and all entries subsequent to entry 12 of the green card should have been cancelled. She stated that the ruling of 20<sup>th</sup> January 2015 was not brought to the attention of the Land Registrar until 2016. She stated that on 11<sup>th</sup> February 2015, the Land Registrar wrote to the Deputy Registrar High Court of Kenya at Embu seeking guidance and advice on the fate of the Ex-parte Applicant herein in the event that the Land Registrar effected the Amended order of 20<sup>th</sup> January 2015 which letter did not elicit any response. She further stated that the Land Registrar has not effected the order of 20<sup>th</sup> January 2015 for reasons that no direction has been given by Court on the fate of the Ex-parte Applicant's interest in the suit land. The Respondents further contend that the Land Registrar has not effected the transfer of the suit land pursuant to the sale by auction for reason of the existence of the Court order of 20<sup>th</sup> January 2015. In conclusion, the Respondent argued that there are two competing interests over the suit land and that effecting registration of one will defeat the other. They therefore sought this Court's direction as to whether to register the Court order of 20<sup>th</sup> January 2015 or to register the transfer of the suit property in favour of the Interested party as sought by the Ex-parte Applicant.

### ISSUES FOR DETERMINATION

- (1) **Whether the Applicant has established the principles for the grant of the order of mandamus?**
- (2) **Who shall bear the costs of this Judicial proceedings?**

The circumstances under which Judicial Review order of mandamus are issued were set out by the Court of Appeal in the case of **Republic Vs Kenya National Examination Council Ex-parte Gathenji & others Civil Appeal No. 266 of 1996 (unreported)** where it was held as follows:

***"The order of mandamus is of a most extensive remedial nature, and is, inform, 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 2<sup>nd</sup> that justice may be done, in all cases where there is a specific legal right or 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 where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed".***

My understanding from the above decision by the Court of Appeal is that an order of mandamus can only issue in circumstance where there is a specific legal right but no specific legal remedy available for enforcing that right as execution cannot issue against the Government in the ordinary way.

**Section 14 (c) of the Land Registration Act, Cap. 300 Laws of Kenya**, provides that the Chief Land Registrar, County Land Registrars or any other Land Registrar may, in addition to the powers conferred on the office of the Registrar by this Act, “**refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed**”.

It is clear in my view from my reading of the section above that the decision whether or not to register any instrument, certificate, document, plan, information or explanation is an exercise of discretion. However, that discretion must be exercised in a manner that is accountable to the people of Kenya. It must be remembered that the Respondents who are civil servants holding office in public authorities are not entitled to abuse of discretion given to them by virtue of those offices, but must carry, on their duties for the benefits of the people of the Republic of Kenya. To deny a citizen his/her lawful right(s) donated to him or her by Parliament without proper reasons would in my view amount to an abuse of discretion and therefore an abuse of authority which can attract some disciplinary measures or even amount to a criminal offence. **Article 129 of the Constitution** provides that Executive authority is derived from the people of Kenya and is to be exercised in accordance with the Constitution for their well-being and benefit. In this case, this Court is entitled to intervene in circumstances where it is satisfied that a public officer performing a public duty has abused his/her discretion and in a manner that is incompatible with the principles of service to the public. The Ex-parte applicant in this case has made general allegations against the 2<sup>nd</sup> Respondent for failing to effect the transfer of the suit property to the Interested party. She has not given specific dates she visited the office of the 2<sup>nd</sup> Respondent and presented the transfer instrument and the 2<sup>nd</sup> Respondent failed to register the same. The Ex-parte Applicant has not annexed the documents she presented to the 2<sup>nd</sup> Respondent which she refused to register. There is even no letter of complaint or protest by the Ex-parte Applicant to the 2<sup>nd</sup> Respondent after she allegedly refused to effect the transfer of the suit property in favour of the Interested party. I also note that the Interested party who is alleged to have bought the suit property from a public auction has not sworn an affidavit confirming the averments by the Ex-parte Applicant. My understanding is that the complainant in this case should be the Interested party and not the Ex-parte Applicant. The Ex-parte Applicant sold the security in exercise of their statutory power of sale and were paid in full. The person who bought the property should be the one pushing for registration as proprietor of the property he bought with respect to the prayer for mandamus. I find that such an order cannot issue as the Ex-parte Applicant has not demonstrated that the 2<sup>nd</sup> Respondent was presented the requisite instruments for transfer and registration but failed to exercise his/her discretion in accordance with **Article 129 of the Constitution of Kenya, 2010**.

The order that commends for this Court is that the Notice of Motion dated 2<sup>nd</sup> January 2019 fails and the same is hereby dismissed. I order each party to bear his/her own costs of this suit.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 29<sup>th</sup> day of May, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Muriithi holding brief for Mr. Rotich for Applicant
2. Respondent/Advocate – absent
3. Interested party – absent