



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

JR 21 OF 2013

HUSSEIN ABDALLA HILE.....1ST APPLICANT

AHMED ALI HILLE.....2ND APPLICANT

VERSUS

THE GOVERNOR COUNTY OF MARSABIT.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF MARSABIT.....2ND RESPONDENT

AL-UL SUNA MOSQUE & MADRASSA.....INTERESTED PARTY

JUDGMENT

1. The ex parte applicant filed the substantive Judicial Review Motion on 13.8.2013 seeking for an order of mandamus to compel the governor and the county government of Marsabit to effect transfer of plot no.227 at Manyatta Burji Moyale from the 2nd applicant Ahmed Ali Hille to 1st applicant Hussein Abdalla Hille.
2. The grounds in support of the application are that the respondent has refused to effect transfer of the subject matter yet the 1st applicant intends to develop the plot.
3. The interested party was enjoined in the proceedings because he had lodged an objection with the clerk Moyale county council claiming an interest in the suit land on behalf of Sunna Mosque and Madrassa Manyatta Burji.
4. The suit has a chequered history where it was at some point dismissed on 19.2.2018 having been in limbo since 4.12.2014 but the suit was reinstated via this court's ruling of 27.3.2019.
5. On 9.10.2014, a notice of appointment of "Otieno Arum & Co advocates" was filed to act for the interested party. On 3.7.2019, a notice of change of advocates was filed by "Ali & Company" to act on behalf of the interested party in place of Otieno Arum & Co. advocates and subsequently thereafter on 10.7.2019, a counsel for the interested party was in court when the court gave a date for pre-trial directions on 5.11.2019. On 5.11.2019, Mr. Abubakar advocate representing the interested party informed the court that the interested party had filed a response to the applicant's suit on 14.11.2014, but the affidavit was not in the court file. He therefore sought orders to put in a reply to the substantive notice of motion. The interested party was granted one month (by 5.12.2019) to file their response and thereafter to file submissions by 27.2.2020. However, the replying affidavit and/or submissions were not filed by the time the court gave a date for judgment. It follows that the interested party though very much aware of the suit neglected to participate in the prosecution of the same.
6. As for the respondents, they never made any formal appearance in this court despite being served on several occasions. On 5.11.2019, Mr. Abubakar for the interested party had addressed the court as follows:

"I have gotten a text from John Bahaile who has been instructed to act for the 1st and 2nd respondents. He intends to put in his response within 14 days".

7. The court granted these respondents similar directives as those applicable to the interested party. The rider to these directions was that documents filed outside the given time-lines were to stand as expunged. The respondents filed their memorandum of appearance and replying affidavit on 27.2.2020. No explanation was advanced as to why respondents failed to comply with the orders of 5.11.2019 yet the matter was mentioned in court on that very day of 27.2.2020. In the circumstances, the documents of the respondents (replying affidavits and annexures) stand as expunged. Just like the case of the interested parties, I conclude that the respondents were aware of the matter but

they neglected to prosecute the same.

8. I must however express my dismay regarding the conduct of the interested party and the respondents. **Section 1A (3) of the Civil Procedure Act** provides that:

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

9. The lackluster attitude of these two parties (respondents and interested party) are a classic example of how non-compliance with court's directions affects the administration and dispensation of justice. This is a matter whereby the input of the respondents was very crucial in determining the matter. As the matter stands now, the court will only consider the case as presented by the *ex parte* applicants.

10. The case for the applicants is that Ahmed (2nd *ex parte* applicant) is the owner of plot 227 at Manyatta Burji. The documents of ownership are the 3 annexures marked AAH1 which are; land rent receipt for plot 227 dated 9.7.2013 from Moyale county council, a document titled “Land rent and conservancy fees on your plot no.227 from Moyale county council addressed to Ahmed dated 25.11.1997 and a land rent receipt for plot 227 dated 13.3.2012 from Moyale county council.

11. Ahmed desired to give the plot his brother's son Hussein as a gift hence Ahmed swore an affidavit to that effect (see annexure ‘AAH 2’. Ahmed then filled the relevant transfer form with the county council of Moyale on 19.6.2012 of which he paid the relevant fees for the application for a plot transfer. The Land Transfer form is “AA 3 (4)”, while the receipt for the payment for the transfer application is “AA 3 (5)”. That the interested party then lodged the objection to the transfer which is annexure ‘AAH4’ of which the *ex parte* applicant contends that the interested party has no document to support his claim over the suit land. The *ex parte* applicants then engaged an advocate who communicated to the respondents to facilitate the transfer but no response was forthcoming. The advocate's letter dated 21.5.2013 is “AA4 (5)”.

12. It is against this background, that the *ex parte* applicants are seeking the order of *mandamus plus costs*.

13. It has been submitted for the *ex parte* applicants that the latter have a legitimate expectation from the respondents as they have been paying rates. Thus 2nd applicant believed that he could legally transfer the suit land to 1st applicant. On this point the *ex parte* applicants have cited the cases of:

- **Communication commission of Kenya vs Royal Media services limited (2014) eKLR and**
- **Pastoli vs Kabale District local government council and others (2008) 2 EA 300.**

14. The *ex parte* applicants have also raised the issue of procedural fairness, contending that the *ex parte* applicants were not heard and the decision made by the respondent was not fair hence leading to breach of rules of natural justice. It is also averred that the decision made was unreasonable to the reasonable man's understanding. On this point the *ex parte* applicant relied on the provisions of article 47 of the constitution as well as the following case law:

- **Pastoli vs Kabale District local government council and others (supra),**
- **Martin Nyaga Wambora vs speaker of the Senate (2014) eKLR at 151,**
- **Judicial service commission vs Mbalu Mutava (2015) eKLR ,**
- **David Oloo Onyango vs Attorney General (1987) eKLR,**
- **Republic vs County Director of Education, Nairobi & 4 others Ex parte Abdukadir Elmi Robleh (2018) eKLR,**
- **Msagha vs Chief Justice & 7 others Nairobi HCMCA no. 1062 of 2004 {2006} 2 KLR 553.**

15. The *ex parte* applicant also submitted on the scope of Judicial Review, citing the provisions of article 2 (1) (21) (1), 22, 23 and 165 (3) of the Kenyan Constitution, averring that the state and state organs have a fundamental duty to observe, respect, promote and fulfill the rights and fundamental freedoms contained in the bill of rights and that this court has jurisdiction and the power to grant relief over matters concerned the alleged breach, denial, violation or threat of any right and fundamental freedom.

16. The *ex parte* applicants further cited provisions of section II (1) (f) of the Fair Administrative Action Act 2015 to the effect that the court has the mandate to grant any order that is just and equitable. On this point, the *ex parte* applicants have relied on the following authorities:

- **Republic vs Ambrose Odwaya O Onyango & another Ex parte Caesar Ngige Wanjao {2014},**
- **Republic vs Kenya National Highways Authority ex parte John Mwaniki Kiarie (2016) eKLR,**
- **Primrose Management Limited vs Chairman of the Business Premises Rent Tribunal, Nairobi & another (2015) eKLR.**

Determination

17. The issue for determination is **whether this court can compel the respondents to facilitate transfer of the suit plot as between the Ex-parte Applicants**. I am in agreement with the legal principles advanced by the *ex parte* applicant on the scope of Judicial Review, the issue of legitimate expectation as well as the issue of procedural fairness. Nevertheless the court must consider the facts of this case in order to make a finding as to whether the orders sought for are warranted.

18. In the case of Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001, it was held that;

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters.....”

The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself- such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but is a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

19. In the case of Republic vs. The Registrar of Companies Ex Parte Transglobal Freight Logistics Limited Nairobi HCMA No. 711 of 2005, Emukule, J held inter alia that:

“Judicial Review, now regulated by Order 53 provides the means by which judicial control of administrative action is exercised, the subject matter of every judicial review is a decision made by some person or body of persons or else a refusal by him to make a decision. To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision- maker, although it may affect him too. It must affect such other person either (i) by altering rights or obligations of that person which are enforceable in or against him in private law, or (ii) by depriving him of some benefit or advantage which either (1) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which has been given an opportunity or (2) he has received an assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.....The matter in question here qualifies for Judicial Review.”

20. The question is “which decision of the respondent was made so as to enable the court scrutinize the process thereof? Ordinarily in Judicial Review proceedings the decision sought to be impugned is availed or at least the date of decision is mentioned.

21. A perusal of the documents, the statement of facts and the affidavit in support of the main motion clearly indicate that this is a situation whereby the respondents failed to make a decision. The submissions of the ex parte applicant to the effect that the respondent had rendered itself on the matter in issue is not in tandem with the ex parte applicant’s claim.

22. The letter written by Otieno & Abib to the respondent on behalf of the ex parte applicants is dated 21.5.2013. It was not responded to. The documents availed by the ex parte applicants do indicate that the ex parte applicants’ interests in the suit plot was recognized by the respondents who even levied various fees including fees for application for the transfer of the suit plot. In the circumstances, the ex parte applicants had a legitimate expectation that their application for transfer would be considered.

23. In the case of Geothermal development limited vs Attorney General and 3 others (2013) eKLR, it was held that:

“Article 47 enshrines the right of every person to fair administrative action”. Article 232 enunciates various values and principles of public service including responsive, prompt effective, impartial and equitable provision of services and transparency and provision to the public of timely, accurate information”.

24. Section 4 (1) of the Fair Administrative Action Act which is a mirror to Article 47 of the constitution provides that:

“Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair”.

25. A writ of mandamus compels a party who has not acted, or has neglected to act within his legal mandate to conduct that particular act and/or function. In Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the court explained the principles and objective of the writ of mandamus when it held 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 turn 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 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.”

26. In the present case, the court can discern that the ex parte applicants have some interest in a suit parcel known as 227. However, the court does not know the actual nature of the interest and the extent thereof. Further, the court doesn’t know the legal regime governing the suit parcel i.e whether it is in community land, whether it has undergone adjudication or not, whether it has been surveyed or not. The land however appears to be unregistered.

27. Under these circumstances the court can only compel the respondent to consider and make a determination on the exparte applicants' application for transfer of the parcel 227. The exparte applicant is entitled to have a clear response from the respondent negative or positive such that if there is a dispute regarding ownership, the exparte applicant will be able to ventilate their claim in the usual manner in ordinary courts.

28. This court will therefore apply the efficacy test in compelling the respondent to carry out its statutory mandate and embrace the rules of natural justice.

Final orders

(1) An order of mandamus by way of Judicial review is hereby issued calling for and compelling the respondents to consider the application for transfer of land plot no.227 made by Ahmed Ali Hille.

(2) Time is of essence, but again, the court has taken cognizance of the prevailing health circumstances appertaining to the Covid 19 pandemic. As such, the compliance period given to the respondent is 120 days failure to which the exparte applicants are at liberty to commence contempt proceedings.

(3) The respondent is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE