



**Seventh Day Adventist Church (East Africa) Limited v National Land Commission & 2 others;  
School Committee Nyamira Primary School (Interested Party) (Environment and Land Case  
Judicial Review Application 21 of 2014) [2017] KEHC 6103 (KLR) (7 March 2017) (Judgment)**

*The Seventh Day Adventist Church (East Africa) Limited v  
The National Land Commission & 3 others [2017] eKLR*

Neutral citation: [2017] KEHC 6103 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISII**

**ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 21 OF 2014**

**JM MUTUNGI, J**

**MARCH 7, 2017**

**JUDGMENT**

**IN THE MATTER OF ARTICLES 2, 23, 27, 40, 60, 62, 67 AND 165 OF THE  
CONSTITUTION OF KENYA, 2010, SECTIONS 7, 8, 9 8 AND 12 OF THE LAND  
ACT, AND SECTION 5 (2) OF THE NATIONAL LAND COMMISSION ACT**

**AND**

**IN THE MATTER OF AN APPLICATION BY THE SEVENTH DAY ADVENTIST CHURCH  
(EAST AFRICA) LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS/  
WRIT OF MANDAMUS COMPELLING THE NATIONAL LAND COMMISSION, THE  
COUNTY LAND REGISTRAR, NYAMIRA COUNTY, THE DISTRICT LAND REGISTRAR  
NYAMIRA DISTRICT AND THE COUNTY GOVERNMENT OF NYAMIRA TO REGISTER  
ALL THAT PARCEL OF LAND KNOWN AS WEST MUGIRANGO/SIAMANI/1210 IN  
THE NAME OF THE SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA) LIMITED**

**BETWEEN**

**THE SEVENTH DAY ADVENTIST CHURCH (EAST AFRICA)  
LIMITED ..... APPLICANT**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR, NYAMIRA DISTRICT .... 2<sup>ND</sup>  
RESPONDENT**

**THE COUNTY GOVERNMENT OF NYAMIRA ..... 3<sup>RD</sup> RESPONDENT**

**AND**



## THE SCHOOL COMMITTEE NYAMIRA PRIMARY SCHOOL .... INTERESTED PARTY

### JUDGMENT

1. Pursuant to leave granted by this court on 5<sup>th</sup> June 2015 the ex parte applicant, the Seventh Day Adventist Church (East Africa) Ltd filed the instant Judicial Review Application vide a Notice of Motion dated 9<sup>th</sup> June 2015 filed in court on 24<sup>th</sup> June 2015 seeking interalia the following orders:-
  - i. An order/writ of mandamus be and is hereby issued, the National Land Commission, the County Land Registrar, Nyamira County, the District Land Registrar Nyamira District and the County Government of Nyamira are hereby jointly and severally compelled to register all that parcel of land known as West Mugirango/Siamani/1210 in the name of the Seventh Day Adventist Church (East Africa) Limited.
  - ii. The respondents to jointly and severally bear the costs of this suit.

The application was predicated on the grounds set out on the body of the application and on the statement and the verifying affidavit filed in support of the application for grant of leave.
2. The applicant in support of the application avers that land parcel number West Mugirango/Siamani/1219 measuring 0.40Ha (hereinafter referred to as “the suit property”) is currently registered in the name of Gusii County Council reserved for Nyaigwa Nursery School and Nyamira SDA Church as per annexure “JN-3” annexed to the verifying affidavit. The applicant states that as early as 1984 it had made an application to the clerk to the Council Gusii County Council to be allowed to utilize the suit property for purposes of developing various institutions such as church building, pastor’s house and a camp meeting site among others. After making follow up the applicant states that the clerk to the council on 31<sup>st</sup> August 1989 wrote to the applicant indicating “the council had given you a go ahead and once this is done, the plot remain managed by you in all respect.” (Annexure “JN5”). The applicant further states after sustained follow up with the County Council, the council vide minute number 10/92 (Annexure “JN6”) approved the applicant’s application for development of a church camp centre on suit property and that subsequently the clerk to the council vide a letter dated 26<sup>th</sup> May 1994 wrote to the land registrar Nyamira (annexure “JN7”) advising the land registrar of the council’s decision to allocate the suit land to the applicant”. That the council signed the appropriate Land Control Board application form “JN8” to have the suit property transferred to the applicant but the application was declined by the Land Control Board on the ground that there was a community dispute relating to the plot as per the Land Board’s Min. T/36/5/2010 annexed as “JN9”.
3. The applicant states that they withdrew an earlier suit Kisii HCC No. 491 of 1993 between the applicant and the school committee, Nyamira Primary School on 1<sup>st</sup> August 2014 to pave the way for the filing of the instant suit. The applicant’s contention is that having been allocated the suit property by the Gusii County Council they are the equitable owners of the suit property and that the respondents have no basis not to register the applicant as the owner and to issue the applicant with title to land. The applicant contends an order for judicial review by way of a writ of mandamus compelling the respondents to do their duty is merited.
4. The 3<sup>rd</sup> respondent, the County Government of Nyamira, through a replying affidavit sworn by Lamech M. Nyariki, Physical Planner of the County on 29<sup>th</sup> July 2015 opposed the application. The 3<sup>rd</sup> respondent stated that the suit property was as per the records reserved during land adjudication in



1970 for Nyaigwa Nursery School. Copy of Adjudication Record dated 19<sup>th</sup> August 1970 annexed as “LMN1”. The 3<sup>rd</sup> respondent further states that the management and development of Nursery School is a devolved function of the County Government which the County should be left to undertake. The 3<sup>rd</sup> respondent denies that the suit property has ever been allocated to the applicant stating that the applicant has its own land adjacent to the suit property where it has developed the facilities it states it wishes to develop on the suit property.

5. The 2<sup>nd</sup> respondent, District Land Registrar, Nyamira, on 15<sup>th</sup> February 2016 filed a replying affidavit sworn by Kennedy Edward Bosire Mose, Senior Land Registrar Nyamira County in opposition to the applicant’s application. The 2<sup>nd</sup> respondent stated that land parcel number West Mugirango/Siamani/1210 was created during the demarcation and adjudication process as evidenced by the adjudication record annexed as “KEBMI”. That the adjudication record and the abstract of title (green card) in respect of the property shows that the property was reserved for Nyaigwa Nursery School. Abstract of title annexed as “KEBMII” and that the Gusii County Council who were registered as the owners were constituted Trustees. That following the creation of Nyamira County Council, they became Trustees in respect of the suit property when the title of the suit property was transferred to them from Gusii County Council. The 2<sup>nd</sup> respondent further averred that he has not failed to perform any public duty bestowed upon him such that an order of mandamus can issue against him to compel him to perform such duty. The 2<sup>nd</sup> respondent further avers that the court lacks the requisite jurisdiction to grant the orders sought by the applicant as any such action would violate section 9 (3) of the Land Act, 2012.
6. Pastor Nicholas Kibagendi Arunga of the applicant swore a supplementary affidavit filed in court on 22<sup>nd</sup> February 2016 in reply to the respondents replying affidavits. The applicant reiterated that the registered title apart from showing that the property was reserved for Nyaigwa Nursery School also showed it was reserved for Nyamira SDA Church and disputed the 3<sup>rd</sup> respondent’s assertion that the suit property has never been allocated to the applicant stating that the documents tendered in evidence showed otherwise. The applicant contended that the delay in having the land registered in its name has hindered its development of the suit property. Though having been served with the judicial review application the 1<sup>st</sup> respondent did not file any response to the application by the applicant.
7. The application was argued by way of written submissions. The ex parte applicant’s submissions were filed on 5<sup>th</sup> April 2016, the 2<sup>nd</sup> respondent’s on 20<sup>th</sup> June, 2016 and the 3<sup>rd</sup> respondent’s on 21<sup>st</sup> June 2016. I have reviewed and considered the parties filed written submissions. The applicant submits that it has sought from each of the respondents that they discharge their respective duties and/or functions to have the suit property registered in its name to no avail and that has necessitated the institution of this suit to have them compelled to perform and execute their duties. The applicant argues that under Section 5 of the National Land Commission Act No. 5 of 2012 the commission’s functions inter alia include the monitoring of registration of all rights and interests in land. Further the applicant submits the land registrar under section 65 of the Land Registration Act, 2012 has a duty to effect registration of any person who has become entitled to land. Section 65 of the Act provides:-
  65. If a person has become entitled to any land, a lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the registrar shall, on the application of an interested person supported by instruments of transfer or such evidence as the registrar may require, register the person entitled, as the proprietor.



8. The applicant cited the case of *Mureithi & 2 Others –vs- Attorney General & 4 Others* [2006] 1 KLR (E&I) 707 in support of its submissions. In the case *Nyamu, J.* (as he then was) stated as follows:-

“A mandamus issues to enforce a duty the performance of which is imperative and not optional or discretionary.”

The Judge in illustrating the scope and the intervention role of an order of Mandamus referred to *Harlsbury’s Laws of England* 4<sup>th</sup> Edition Vol. 1 at page III paragraph 89 where it is stated thus:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon 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.”

9. The applicant also referred the court to the case of *Republic –vs- Attorney General & Another Ex parte Jackson Musyoka Munyalo* [2015] eKLR where *Odunga, J.* considered the circumstances where an order of Mandamus would issue. The judge in the case was emphatic that Mandamus compels the performance of a legal duty and not an unlawful one. With regard to when an order of mandamus could issue against a land registrar, the judge cited with approval the decision of the East African Court of Appeal in the case of *District Commissioner Kiambu –vs- Republic & Others Ex parte Ethan Njau* [1960] E.A 109 where the court held thus:-

“Mandamus to the registrar is certainly one method of putting right an erroneous entry in the register, and is peculiarly applicable when the fault is alleged to lie with the registrar. If that official refused to act in circumstances in which he should act, Mandamus would appear to be appropriate. There seems to be no reason why it should not lie in the case where it is necessary to invoke the wider powers of a court...Mandamus will not be granted in the performance if the act involves a breach of the law.”

10. The second respondent in its submissions argues that the suit property was during the process of land adjudication reserved for *Nyaigwa Nursery School* and a title deed issued in the name of *Gusii County Council in Trust for Nyaigwa Nursery School* on 9<sup>th</sup> May 1973. The 2<sup>nd</sup> respondent thus contends the suit property, following the process of adjudication was constituted as public property. The 2<sup>nd</sup> respondent further submits that the subsequent registration of the applicant as a co-owner or joint owner with the *Nyaigwa Nursery School* was dubious as the court order used to effect the registration was not express on those terms.
11. The 2<sup>nd</sup> respondent observes the applicant has employed all manner of approaches to wrestle the suit property for its exclusive possession and use and ownership oblivious of the fact that it is merely only a co-owner as per the title documents. Where a property is co-owned any dealing with such property of necessity must invite the approval and consent of all the owners. The effect of the applicant’s efforts, the 2<sup>nd</sup> respondent argues would be to privatize what was essentially a public property and that in the 2<sup>nd</sup> respondent’s view would require the approval and sanction of the National Land commission and the County Government of *Nyamira* as the custodians of public land.
12. The 2<sup>nd</sup> respondent submits that there is no duty or obligation that he has failed to perform so as to be compelled by an order of mandamus. The 2<sup>nd</sup> respondent asserts that no valid registrable document



has been presented to him for registration that he has failed to register and argues the various letters exchanged with the applicant notably from the County Council do not constitute instruments that the 2<sup>nd</sup> respondent can act upon to effect registration under the provisions of the [Land Registration Act](#), 2012. The 2<sup>nd</sup> respondent relied on the following authorities:

1. Shah –vs- Attorney General No. 3 (u) EA 543 – Goudie, J.
  2. Kenya national [Examinations Council –vs- Republic C. A Nbi No. 266 of 1996](#)
  3. Mombasa Technical Training Institute –vs- Agnes Nyevu Charo & 108 Others [2014] eKLR
13. In the case of Shah –vs- Attorney (Supra) the court held that in considering an application for Mandamus the court should consider and take into account “a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequence of granting it, and the nature and extent of the wrong or injury which would follow a refusal...and it may be granted or refused depending on whether or not it promotes substantial justice” echoing a statement of an American court (People –vs- Board of Education of City of Chicago 323 U.S 733)

In the case of Kenya National Examinations Council –vs- Republic (Supra) the court stated thus:-

“...An 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 refuses to perform the same, if the complaint is that the duty has been wrongly performed i.e that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because like an order of prohibition an order of mandamus cannot quash what has already been done. Only an order of certiorari can quash a decision already made...”.

14. In the instant case it has to be demonstrated what duty imposed by statute on the 2<sup>nd</sup> respondent that he has failed and/or refused to perform. Of course the pre-requisites for the performance of that duty must equally be shown to have been satisfied as the 2<sup>nd</sup> respondent could not be expected to perform a duty that would result in a breach of the law. The 2<sup>nd</sup> respondent contends that Nyamira County Council held the suit property in trust for Nyaiywa Nursery School and as pre-primary education had become a devolved function the consent of the County Government would be a pre requisite before any transfer of such property could be effectuated. Further, the 2<sup>nd</sup> respondent submits, the property having been reserved for a public purpose, the National Land Commission equally would be required to accord its approval. Consequently the 2<sup>nd</sup> respondent submits that he had no statutory authority in the circumstances of this matter to do what the applicant is seeking to compel him to do through an order of mandamus.
15. The 3<sup>rd</sup> respondent, the County Government of Nyamira submitted the prayer of the order of mandamus as drawn is ambiguous as it is not clear against whom it is directed. The 3<sup>rd</sup> respondent avers that the application does not disclose what it is that the 3<sup>rd</sup> respondent has failed to do to require it to be compelled by the order of mandamus. The 3<sup>rd</sup> respondent states that the applicant in its statement of facts and the verifying affidavit concede that its application to the Nyamira Township Land Control Board for transfer of the suit property in its favour was rejected on 8<sup>th</sup> July 2010 on the ground that there was a wrangle between Nyaiywa Community and the church. The 3<sup>rd</sup> respondent contends that it has no relationship with Nyamira Township Land Control Board, which is itself a creature of the [Land Control Act](#), Cap 302 Laws of Kenya and whose functions are distinct and separate from those of the 3<sup>rd</sup> respondent.



16. The 3<sup>rd</sup> respondent further submits that the applicant has not demonstrated that the 3<sup>rd</sup> respondent has failed to perform any duty that it is required by statute to perform to invite an order of mandamus as sought by the applicant. The 3<sup>rd</sup> respondent relies on the same authority cited by the applicant, *Mureithi & 2 Others –vs- Attorney General & 4 Others* [2015] eKLR. The 3<sup>rd</sup> respondent further asserts that the applicant has not established it has a legal right and entitlement to the suit property as the interest of Nyaigwa Nursery School in whose favour the land was initially reserved appears to have been overlooked. The Land Control Board acknowledged there was a wrangle involving the applicant and the community in regard to the suit property. This wrangle has not been resolved. The 3<sup>rd</sup> respondent submits that in the circumstances of this matter judicial review would not be an appropriate cause of action to deal with the issues at play and that a full hearing would be necessary for a just decision to be arrived at. Judicial review is not concerned with the merits of a decision but rather whether the appropriate procedure was followed in arriving to the decision. See *Mureithi & 2 Others –vs- Attorney General & 4 Others* (Supra).

### **Determination;**

17. Having reviewed the pleadings and the evidence as set out by the parties in their respective affidavits and further having considered the submissions by the parties the issue to determine is whether the applicant has set out a case for grant of an order of mandamus. The scope of judicial review has been considered in various court decisions. In the case of *Commissioner of Lands –vs- Kunste Hotel Limited* (1995-1998) 1 EA the Court of Appeal held that:-

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he has been subjected.”

The judges in the case went on to cite the English case of *Chief Constable Evans* [1982] 1WLR 1155 to further illustrate the point where Lord Hailsham of St. Marylebone stated as follows:-

“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”

18. Where there exists an alternative remedy the courts will ordinarily not grant judicial review orders. In the case of *Khobesh Agencies Ltd & 32 Others –vs- Minister of Foreign Affairs & International Relations & 4 Others* [2013] eKLR the court held that judicial review jurisdiction is a special jurisdiction given to the court under the provisions of Sections 8 and 9 of the [Law Reform Act](#) Cap 26 Laws of Kenya. Odunga, J. in the case inter alia stated:-

“...Section 8 of the [Law Reform act](#) specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are mandamus, certiorari and prohibition. Any other remedy such as declaration does not fall under the purview of judicial review for the simple reason that the court would require viva voce evidence to be adduced for the determination of the case on the merits before making such a declaration...:”

19. In the matter before me the applicant seeks an order of mandamus against the respondents. In other words the applicant wants the respondents to be compelled to have the applicant registered as the owner of the suit property. The applicant to succeed has to demonstrate the respondents had specific duties imposed on them by statute which they failed to do to the prejudicial of the applicant and hence the justification for the writ of mandamus to be issued to compel the respondents.



In the case of Republic –vs- Attorney General & Another Ex parte Jackson Musyoka Munyalo [2015] eKLR Odunga, J. stated:-

“...mandamus is a peremptory order requiring the respondents to perform a specified public duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by mandamus depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course.”

20. The evidence adduced by way of affidavit and the annexures thereto clearly establishes that the suit property was registered in the name of Gusii County Council on 9<sup>th</sup> May 1973 as the freehold proprietor thereof but with a reserved user by Nyaigwa Nursery School. The Gusii County Council and indeed its successor in title, Nyamira County Council could deal with the suit property in any manner it pleased only having regard to the operative law notably the previous Constitution of Kenya, Trust *Land Act*, Cap 288 Laws of Kenya and the Local Government Act, Cap 265 Laws of Kenya. Under the repealed Registered *Land Act*, Cap 300 Laws of Kenya Section 85, the Gusii County Council and its Successor Nyamira County Council had the right to transfer the suit land to any person with or without any consideration and in that regard they could set aside land for private use. The exercise of that power was however discretionary and no duty was imposed on them to set aside any land either generally or to any person.
21. It is the applicant’s case that it had agreed with Gusii County Council and subsequently with Nyamira County Council for them to transfer the suit land to the applicant. Failure by the council to transfer the property to the applicant in my view constituted a breach of an agreement and/or contract which invited a civil remedy through the civil court and not an action by way of a judicial review which falls under the province of public law. The Nyamira County Council (now the County Government of Nyamira) did not owe a public duty to the applicant to transfer the suit property to it. If any duty or obligation existed it could only have been contractual which duty cannot therefore be enforced by way of a writ of mandamus.
22. Following the enactment of *the Constitution* of Kenya, 2010 and the creation of the National Land commission and the creation of the devolved units in the nature of the forty seven (47) County Governments the land law regime was radically altered.
23. Under Article 62 (2) of *the Constitution* 2010 the suit property being land held by the County Government is public land and the National Land Commission is charged with the duty of administering the same on behalf of the County Government. The 3<sup>rd</sup> respondent has no power to alienate public land as this function has now been given to the National Land Commission which has to follow the laid down procedure in the Land Commission Act 2012 and *Land Act* 2012 in exercising that power which at any rate is discretionary. Article 62 (4) of *the Constitution* restricts disposal of public land and provides thus:-

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- (4) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.

24. The suit property to the extent that it was held by the County Council and reserved for Nyaigwa Nursery School is constituted a public property which cannot be disposed otherwise than in compliance with the law. The 1<sup>st</sup> respondent would require to follow the law to alienate the property



to the applicant. There is no compliance with the laid down procedure to enable the suit property to be transferred to the applicant. There is no public duty that the 1<sup>st</sup> respondent has failed to perform so that an order of mandamus can issue against it.

25. As relates to the 2<sup>nd</sup> respondent, the Land Registrar Nyamira, there is no demonstration that he has failed to perform any public duty. No valid transfer with the necessary supporting documents has been placed before him to register and he has failed to register. Notably the applicant admitted that its application to the Nyamira Township Land Control Board for the transfer of the suit property to itself was rejected. A consent from the Land Control Board was a pre requisite for the Land Registrar to register any transfer in respect of the suit property and hence in the absence of one, the land registrar would not have been in a position to register any transfer of the suit property in favour of the applicant. There is no evidence that the applicant appealed the decision of the Nyamira Township Land Control Board declining to grant consent to the transfer of the suit property.
26. From what I have discussed hereinabove it is abundantly clear that the applicant has not shown that any of the respondents had a statutory duty/obligation that they were required to perform and failed to perform such duty to the prejudice of the applicant. A writ of mandamus as illustrated above through the cited authorities only compels the performance of a legal duty and not an unlawful one. To compel the 1<sup>st</sup> respondent to alienate the suit property to the applicant, without adhering to the law would be to require the 1<sup>st</sup> respondent to act in abuse and in excess of its mandate or jurisdiction. The 2<sup>nd</sup> respondent can only register valid transfers whereas the 3<sup>rd</sup> respondent has no mandate to alienate public land without following due process.
27. The upshot is that the applicant's Notice of Motion dated 9<sup>th</sup> June 2015 lacks any merit and I decline to grant the orders sought therein. The said Notice of Motion is dismissed with costs to the respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 17<sup>TH</sup> DAY OF MARCH, 2017.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the applicant  
..... for the 1<sup>st</sup> and 2<sup>nd</sup> respondents  
..... for the 3<sup>rd</sup> respondent  
..... for the interested party  
..... Court assistant

