



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CAUSE NO. 223 OF 2016

**IN THE MATTER OF AN APPLICATION BY SKY AFRICA HOLDINGS LIMITED FOR
LEAVE TO APPLY FOR AN ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE REGISTRAR OF TITLES, MINISTRY OF LANDS, NAIROBI

AND

IN THE MATTER OF LR. NO. 22842 (IR 76291) NAIROBI (JADE VALLEY)

BETWEEN

SKY AFRICA HOLDINGS LTD.....APPLICANT

VERSUS

REGISTRAR OF TITLES.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EX PARTE: SKY AFRICA HOLDINGS LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th May, 2016, the *ex parte* applicant herein, **Sky Africa Holdings Ltd** (erroneously also indicated as the applicant in this Motion), seeks the following orders:

1. **An order of Mandamus directed to the Respondent, the Registrar of Titles Ministry of Lands Nairobi, commanding him to reinstate the Applicant’s Title over parcel of land known as LR 22842 (IR 76291) Nairobi and more particularly shown on Land Survey Plan Number 212509 by, inter alia, reinstating the Applicant’s name in the Certificate of Title of the said property as the proprietor of the leasehold thereof and to revoke and/or cancel any dealing with the said title and any entry in the Certificate of Title of the said property made pursuant to the purported revocation of the Applicant’s Title.**
2. **The costs of and incidental to this Application.**

Applicant’s Case

2. According to the applicant, it is the registered proprietor of land reference 22842 (IR 76291) (hereinafter referred to as “the suit property”), which property was and is still charged in favour of Barclays Bank of Kenya Limited (hereinafter referred to as “the Bank”) to secure a loan facility in 2005.
3. It was averred that on 1st April 2010, the 2nd (sic) respondent herein published a Gazette Notice number 3460 in which the applicant’s suit property was listed as one of the titles which had been revoked on the ground that the said property had been reserved for public purposes and its allocation was therefore illegal and unconstitutional.
4. Aggrieved by the said decision, some parties whose titles had been revoked by the said gazette notice number 3460 moved to court and instituted legal proceedings being Petition No. 176 of 2011 before the Constitutional and Human Rights Division of the High Court, Milimani in which it successfully challenged the said gazette notice. Subsequent to the said decision, a gazette notice number 9815 dated 3rd July, 2012 and published on 20th July, 2012 and corrigenda published on 18th December, 2015 declared that gazette notice number 3460 of 2010 among others to be null and void and of no effect.
5. However, the 1st Respondent has not, despite requests by the applicant to do so, refused to effect the said Gazette Notice. According to the applicant, the 1st Respondent is under a public duty to comply with the said gazette notice and effect the said orders but has wrongfully and wilfully declined or refused to do so until or unless compelled to do so.
6. The applicant therefore prayed for the orders sought herein.

Respondent’s Case

7. In opposition to the application the respondent filed the following grounds of opposition:
 1. **That the application as drafted is not merited and is an abuse of Court process.**
 2. **That the applicant herein was not a party to the proceedings in the Consolidated Petition No. 178 of 2011 (*Power Technics Limited versus The Hon. Attorney General and Registrar of Titles*) which quashed Gazette Notice No. 3640 and gave rise to Gazette No. 9815 which it now wishes to implement.**
 3. **That by virtue of the judgement by Justice Majanja in Consolidated Petition No. 178 of 2011, the Registrar of Titles proceeded to publish the order of the Court in respect to each parcel which was the subject of the court in the aforementioned Petition.**
 4. **That the Registrar of Titles cannot effect a Court Order in favour of a party to whom it does not apply.**
 5. **That judicial review proceedings purely deal with the procedure and process of the decision making and not the merits and/or substance of the case.**
 6. **That the application is based on contradictory allegations which borders on mere belief, suspicion and speculation and hence incapable of any judicial review determination.**

Determinations

8. Having considered the application, the affidavit in support of the Motion and the grounds of opposition thereto, this is the view I form of the matter.
9. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

“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 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. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, 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...These principles mean that an order of *mandamus* compels 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done....”

10. In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 Goudie, J eloquently, in my view, expressed himself, *inter alia*, as follows:

“*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature... In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment.”

11. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393, it was held that *mandamus* is the appropriate remedy for compelling a person to perform a duty imposed on him by statute which duty he has refused to perform to the detriment of the applicant.

12. It is however clear from Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others (supra) that *mandamus* is a command requiring a person to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty and its purpose is to remedy the defects of justice. It is issued so that the ends of justice may be in all cases where there is a specific legal right or no specific legal remedy for enforcing that right. It therefore in my view that even where there is no statutory provision obliging an authority to act, where the case meets the criteria hereinabove, *mandamus* may go forth.

13. In his judgement in the petition whose decision is the basis for these proceedings, **Majanja, J** expressed himself *inter alia* as follows:

“Likewise the most appropriate relief that will cure the respondents’ breach of the petitioners’ rights is that I will quash Gazette Notice Numbers 9230, 7751, 3640 and 13104.”

14. The Court then proceeded to grant a declaration that the said Gazette Notices were null and void and of

no effect and directed the Registrar of Titles to cancel, delete and or remove all or any entries giving effect to or made pursuant to the said Gazette Notices in titles to **all the properties listed in the said Gazette Notices**. The Registrar of Titles was further directed to publish the said orders in the Kenya Gazette within 21 days from the date of the decision.

15. In my view, the success or otherwise of this application may well depend on the nature of the orders made in the said petition. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995**, **Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95**, **The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995**.

16. However, there are other orders or judgements which bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In **Conflict of Laws** (7th Edn. 1974) at page 98 by **R H Graveson** it is stated:

“An action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgement in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*.” See **Black's Law Dictionary**, 9th Edn. Page 862.

17. With respect to a decision *in rem* it was held in **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** that:

“In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

18. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Martemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant.”

19. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement *in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally.”

20. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from *Jowitt's Dictionary of English Law* (2nd Edn.) p. 1025-6 to the effect that:

“A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*.”

21. It is clear in my view that the decision of **Majanja, J** was not restricted to the parties who were before him. The Judge was clear in his pronouncement that he was making a determination on a certain state of affairs which was the powers of the Registrar of Titles to revoke titles. He therefore applied the decision to the offending Gazette Notice. The effect of that decision, in my view is that all the persons who were adversely affected by the said Gazette Notices got the benefit of the said decision whether or not they were parties to those proceedings. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148.**

22. In the instant case, the applicant's position is that despite its attempts to compel the Respondents to comply with the order issued in the said petition, the 1st Respondent has declined to do so. Where a Court issues orders and no reasons are given for non-compliance or the reasons given are not convincing and the decision arrived at adversely affects the applicants the Court would as well be entitled to conclude that there were no good reasons for refusal by the Respondent to exercise the duty or the discretion in the manner directed. In my view, one of the objects of issuing orders *in rem* is to avoid multiplicity of suits. To require the applicant to institute its own proceedings in order to benefit from the judgement *in rem* in my view is a misconception of the nature of the judgement in question.

23. In the premises I find merit in the instant Motion.

Order

24. In the result, an order of order of *mandamus* is hereby issued directed to the Respondent, the Registrar of Titles Ministry of Lands Nairobi, commanding him to reinstate the Applicant's Title over parcel of land known as LR 22842 (IR 76291) Nairobi and more particularly shown on Land Survey Plan Number 212509 by, *inter alia*, reinstating the Applicant's name in the Certificate of Title of the said property as the proprietor of the leasehold thereof and to revoke and/or cancel any dealing with the said title and any entry in the Certificate of Title of the said property made pursuant to the purported revocation of the Applicant's Title.

25. With respect to costs, the Motion herein was not properly intituled. The applicant is indicated as Sky Africa Holdings Ltd as opposed to the Republic. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 Ringera, J** (as he then was) expressed himself as follows:

“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intituled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT

EX PARTE

JOTHAM MULATI WELAMONDI”

26. Nevertheless I wish to remind public officers to seek legal advice from the Chief Legal adviser, the Hon. Attorney General, in matters which are either in Court or have the potential of giving rise to legal proceedings and take his opinion seriously in order to avoid burdening the tax payer with unnecessary costs as has happened in these proceedings. This Court has held before and it bears repetition that where public officers act in a reckless manner in the performance of their public duties hence invites otherwise unnecessary legal proceedings, such officers ought to bear the resultant costs personally and Court in my view ought to make such orders in future.

27. In this case as these proceedings were not properly intituled, there will be no order as to costs of these proceedings.

28. Orders accordingly.

Dated at Nairobi this 12th day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kangethe for the Applicant

Mr Munene for the Respondent

Cc Mwangi