



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. APPLICATION NO. 169 OF 2013 (JR)

**IN THE MATTER OF AN APPLICATION BY MERCY KARIMI FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDER OF MANDAMUS AGAINST THE DISTRICT LAND
REGISTRAR, EMBU**

AND

**IN THE MATTER OF TRANSFER OF PERSONAL REPRESENTATIVE OF PARCEL OF
LAND NO. NGANDORI/KIRIGI/18**

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

THE DISTRICT LAND REGISTRAR, EMBU..... RESPONDENT

MERCY KARIMI.....EX-PARTE APPLICANT

AND

PETER PHINEAS MURIITHI &

SAMUEL NYAGA.....INTERESTED PARTIES

J U D G M E N T

1. This is the application dated 20/12/2013 seeking an order of mandamus compelling the District Land Registrar Embu to effect the registration of the transfer by personal representative under form RL 7 in respect of parcel of land Ngandori/Kirigi/18 as ordered by the High Court in Embu Succession Cause No. 391 of 2011.
2. The application is supported by the verifying affidavit of Mercy Karimi stating that she is the administratrix of the deceased's father estate which comprises Ngandori/ Kirigi/18. She stated that presented a copy of the transfer form RL 7 to the Land Registrar Embu for registration and paid Kshs.1,000/= as registration fee. When she went to see the Registrar on the progress but was met with hostility and was finally told that the same would not be registered.
3. The interested parties filed a replying affidavit stating that they are the legal representatives of the estate of the deceased. They were joined as interested parties vide the application dated 7/3/2014. The deceased had bought the entire parcel Ngandori/Kirigi/18 from Charles Njagi Ileri his younger brother on

13/10/1975. Their late brother took possession but the seller refused to obtain the land control board consent and transfer of the land to their deceased father. Their late father subsequently filed an originating summons for adverse possession against the seller.

4. The court further issued temporary injunction restraining the respondent seller from wasting, disposing, encumbering or otherwise interfering with the title of Ngandori/Kirigi/18 pending hearing and determination of the suit. Both parties however died before the said suit was heard and determined. The interested parties filed an application dated 8/11/2013 to have the suit which had abated and the said application is still pending in court.

5. The 2nd interested party has been in actual occupation of the land and continues to be in occupation of Ngandori/Kirigi/18 since the deceased died in the year 2009. The ex parte applicant did not inform the 2nd interested party when she filed Embu Succession Cause No. 391/11 and did not disclose the existence of the pending case and the fact that the 2nd respondent was in occupation of the said parcel of land.

6. The interested party presented the facts of the matter to the Land Registrar Embu after they realized the ex parte applicant had fraudulently obtained grant and that the ex parte applicant was in the process of registering and implementing the grant with a view of dispossessing the interested party of Ngandori/Kirigi/18. If the ex parte applicant is allowed to implement the grant pending determination of Nairobi HCCC No. 625 of 1998, the interested parties will be denied a chance to ventilate their claim in Ngandori/Kirigi/18. The interested party supports the Land Registrar's decision to implement the grant until the said suit is heard and determined.

7. In a further affidavit, the applicant stated that upon perusal of Nairobi HCCC No. 625 of 1998, it was established that the same was dismissed with no orders as to costs on 18/9/2002.

8. Parties filed written submissions.

9. The ex parte applicant submitted that the issues for determination are whether the applicant has established a right to compel the respondent to exercise the public duty; whether the duty by the Registrar is a public duty; whether the registrar has refused to perform the public duty and whether the applicant has demanded the performance of the public duty. Section 81 (2)(a) of the Land Registration Act provides that upon confirmation of grant the registrar may without requiring the personal representative to be registered registrar by transmission any transfer by the personal representative.

10. The ex parte applicant cited and attached the case of **REPUBLIC VS DIRECTOR OF FISHERIES EX PARTE WANAINCHI MARINE PRODUCTS (KENYA) LIMITED [2002] 2 KLR 581** where the court found that the director of fisheries had a statutory duty to issue the licence.

11. The interested party submitted that their deceased had filed Nairobi HCCC 625 of 1998 claiming adverse possession. The court issued temporary injunctive against Charles Njagi Ileri. The interested parties filed an application dated 8/11/2013 to revive the suit which had abated and the same is still pending before the ELC Nairobi. If the orders sought are granted the applicant will suffer irreparable loss. The respondent acted within his powers in withholding the registration of RL7 Forms. The interested parties have a beneficial interest on the said parcel of land.

12. The law applicable is Article 165(6) of the Constitution provides that;

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

13. Order 53 of the civil procedure rules.

14. The nature of judicial review proceedings was discussed in the case of **REPUBLIC VS KENYA NATIONAL EXAMINATIONS COUNCIL EX PARTE GATHENJI & OTHERS CIVIL APPEAL NO. 266 OF 1996 [cited in the case of Republic v Chief Magistrate Milimani Commercial Court & 2 others**

Ex-Parte Violet Ndanu Mutinda & 5 others [2014] eKLR the court of appeal held 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.....

15. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001** (cited in the case of **Republic v Chief Magistrate Milimani Commercial Court & 2 others Ex-Parte Violet Ndanu Mutinda & 5 others [2014] eKLR (supra)**) it was held:

“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.”

16. The exparte applicant seeks that the Land Registrar Embu should be compelled to sign the transfer documents for Parcel Ngandori/Kirigi/18. The interested parties claim that the orders should not be granted until a pending suit to determine ownership of the said parcel has been determined. Annexure PPN 2 of the replying affidavit is a court order granting an injunction restraining the seller of parcel Ngandori/Kirigi/18 from wasting, damaging, alienating, disposing encumbering, selling the said parcel pending hearing and determination of Nairobi HCCC 625 of 1898 (OS).

17. The exparte applicant in the further affidavit states that the Nairobi HCCC No 625 of 1998 was dismissed with no order as to costs according to a court order dated 18/9/2002. Handwritten proceedings were attached to the further affidavit as annexure MK 1. The proceedings were not certified and do not also bear a stamp of the court that is alleged to have issued them. It is borne by the record that after the suit was dismissed on 18/9/2002 for non-appearance by the parties, the matter still remains active.

18. On 3/6/2003 the proceedings indicate that the plaintiff was unwell and did not attend court and that parties were negotiating out of court. The question is whether the suit was reinstated between its dismissal on 18/9/2002 and when it came up for hearing on 3/6/2003 or is it that the application for reinstatement is still pending in that case.

19. The interested parties claim in their affidavit that they made an application dated 8/11/2013 for reinstatement of Nairobi HCCC No. 625 of 1998 which abated after the parties to the suit died and that the same is pending determination. Although no evidence has been adduced to show whether any further

orders were issued for a temporary injunction against the sale or dealing of the said parcel of land the suit is still pending in court between the parties.

20. It is not in doubt that the suit has been mentioned several times after the dismissal order with advocates for both parties in attendance the last date in court being 2/5/2014. The case file is therefore still active although the record does not show that any hearing date has been fixed recently.

21. It the applicant relied on the case of ***REPUBLIC VS DIRECTOR OF FISHERIES EXPARTE WANANCH MARINE PRODUCTS (KENYA) LTD [2002] 2 KLR 581*** where the court found that the Director had a statutory duty and issued an order of mandamus compelling him to issue a fish export license to the applicant. This case is distinguishable form the one before me. In that case the director had allowed the applicant to process and export the fish to Europe in anticipation on an export license. He was therefore under an obligation to issue the licence since consignment had reached Europe.

22. In the case before me, it has not been established that after the dismissal order of 18/9/2002, the proceedings were closed. The file is still active to date with a pending application for reinstatement yet to be determined. The applicant's advocate was in court on 2/5/2014 and successfully applied for time to file a replying affidavit to the notice of motion. This confirms that the case between the parties on determination of ownership Nairobi ELC No. 625 of 1998 is still pending.

23. The respondent in this case may have been served with some order staying registration of the applicant as the co-owner of the land Ngandori/Kirigi/18 through transmission. The registrar's duty to the applicant is a public duty but will also involve protecting the rights of other interested parties. It has not been denied that the 2nd interested party has been in occupation of the suit premises for many years after his parents died. The parents of the parties in this case were the original parties in Nairobi ELC No. 625 of 1998 and are now deceased.

24. After the death of the applicant's father, she did not inform the interested parties that she had filed a succession cause to give the respondents an opportunity to lodge their claim on the land. This has not been denied. It is therefore appropriate that the parties settle or have the pending case determined before the respondent can be compelled to register the applicant as the proprietor through transmission.

25. It must be appreciated that judicial review is concerned with the decision making process, and not with the merits of the decision itself. The order of mandamus compels performance of a public duty imposed by statute on a person or a body. This order can only be granted where the applicant proves that the officer or body concerned has refused to perform the duty and that the person or body has not acted reasonably.

26. It was held in the case of ***JUDICIAL SERVICE COMMISSION EXPARTE PARENO 1 KLR 203 – 209*** the judicial review orders are discretionary and are not guaranteed, and hence a court may refuse to grant them even where the requisite grounds exist for the court has to weigh one thing against another and decide whether the remedy is appropriate in the circumstances. The parties herein ought to have the land dispute determined before the orders in the succession cause can be enforced. The orders for dismissal of the case made on 18/9/2002 did not bring the case to an end since the parties are still in court and the interested parties application is still pending.

27. I come to the conclusion that the applicant has failed to demonstrate that she deserves the orders sought. The application has no merit and is hereby dismissed with costs to the interested parties.

28. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 7TH DAY OF SEPTEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Anyona for Ithiga for Interested Party