



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 306 OF 2015

**IN THE MATTER OF AN APPLICATION BY GEOFFREY KARIUKI MWANGI FOR AN
ORDER OF MANDAMUS PURSUANT TO LEAVE GRANTED ON 17/2/16**

IN THE MATTER OF ORDER 53 RULES 1 & 2 CIVIL PROCEDURE RULES

GEOFFREY KARIUKI MWANGI.....APPLICANT

AND

NAIROBI COUNTY GOVERNMENTRESPONDENT

JUDGEMENT

Introductions

1. By a Notice of Motion dated 26th May, 2016, the ex parte applicant herein, **Geoffrey Kariuki Mwangi**, seeks the following orders:

1. An order of Mandamus be issued against the respondent to compel the said County Government to issue the applicant with a lease to enable the applicant to be issued with a title deed in respect of Plot No. D6/1 Huruma.

2. Costs of this application be provided for.

Applicant's Case

2. According to the applicant, he is the administrator of the estate of **Wangui Kariuki** deceased. He averred that he applied to the Land's Office Nairobi for a title deed and was asked for a certificate of lease from the City Council to enable him get a title deed.

3. Upon approaching the City Government he was informed that their survey department had yet to give the plots new numbers.

4. It is on this basis that he prayed that this Court orders the City Government to issue him with the plot

number to enable him get a title deed.

Respondent's Case

5. In response to the application, the Respondent filed the following grounds of opposition:

- 1. That the application is fatally incompetent and incurably defective and ought to be dismissed in limine.**
- 2. That the applicant has not laid any legal basis for the reliefs sought which are not grounds of judicial review applications.**
- 3. That the orders sought by the applicant do not lie as against the respondent as there is no statutory duty imposed upon the respondent to act as demanded. No legal provision has been cited by the applicant as imposing a duty to the respondent to issue a lease to a stranger.**
- 4. That the applicant has no locus standi or legal right to demand what he is not entitled to.**
- 5. That the application is frivolous, vexatious and an abuse of the court process.**

Determinations

6. I have considered the foregoing.

7. First and foremost, it is important to consider the circumstances under which judicial review orders of prohibition and mandamus would issue. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”

8. Apart from that it was held in in Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707 that:

“A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary...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 remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”

9. The question which arises in this case is whether the applicant has a legal right to be issued with and the Respondent is under a legal obligation to issue him with a lease. Under the current constitutional dispensation there is now the National Land Commission established under Article 67 of the Constitution whose functions are *inter alia* to manage public land on behalf of the national and county government. Article 62(2) of the Constitution provides that Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission while under Article 62(3) thereof Public land classified under clause (1) (f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission. Under Article 62(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. Since the land the subject of this application is held by a county government in trust for the people resident in the county, it falls under public land which under the foregoing provision cannot be disposed of or otherwise used except in terms of an Act of Parliament. It is therefore clear that the decision whether or not to alienate public land is no longer the preserve of the Respondent. To compel the said Respondent to issue a lease to the applicant in respect of the suit premises would be to compel it to take an action which is not within its jurisdiction yet an order of *mandamus* will not issue to compel an illegal action or an action which the Respondent has been divested of jurisdiction to perform since *mandamus* only issues to compel the performance of a duty which the Respondent is legally obliged to perform.

10. In the result I find no merit in the Notice of Motion dated 26th May, 2016 which I hereby dismiss but with no order as to costs as the factual averments were not controverted.

Dated at Nairobi this 3rd day of October, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Okoth for Mr Macharia for the applicant

CA Mwangi/Gitonga