



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND JUDICIAL REVIEW APP. NO. 21 OF 2014

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

1. THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

2. THE DISTRICT LAND REGISTRAR, NYAMIRA DISTRICT.....2ND RESPONDENT

3. THE COUNTY GOVERNMENT OF NYAMIRA.....RESPONDENT

AND

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

RULING

1. What I have before me is an ex parte application dated 29th October 2014 by the Seventh Day Adventist Church (E. A) Limited (hereinafter referred to only as “**the applicant**”) in which it is seeking

leave of the court to institute judicial review application against the respondents. The application has been brought on the grounds set out in the verifying affidavit sworn on 29th October, 2014 by Pastor Jim Hawkins Nyangwono Nyamwanda and the statement of facts of the same date. The orders sought in the application are as follows:

a. That this honourable court be pleased to grant leave to the applicant 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) Ltd.

b. That the costs of this application be provided for.

2. The application has been brought on the following main grounds:

i. The applicant is the current equitable owner and/ or proprietor of all that parcel of land known as West Mugirango/Siamani/ 1210 the same having been expressly alienated and allocated to the applicant.

ii. The respondents which are the relevant state bodies and organs with the power and mandate to have the said parcel of land formally alienated and registered in the name of the applicant have refused, ignored, neglected and/or failed to do so and have not ascribed any reason, hindrance and/or excuse for their inaction.

iii. The applicant intends to develop the said parcel of land by establishing several institutions such as a church house, a pastor's house, a nursery school, a day care centre, a camp meeting site for use by the community around the area.

iv. The delay in having the said parcel of land registered in the name of the applicant has held back development of the same in line with the provisions of the constitution and other relevant statutes.

v. It would be in the interest of justice and in line with the National Land Policy if the orders sought are granted.

3. In summary, the facts which have given rise to the application as set out in the verifying affidavit and the exhibits annexed thereto are as follows. The applicant is a limited liability company incorporated in the Republic of Kenya under the Companies Act Cap 480, Laws of Kenya. The parcel of land known as LR No. West Mugirango/Siamani/1210 (hereinafter referred to as **“the suit property”**) was at all material times registered in the name of Gusii County Council and was reserved for Nyaigwa Nursery School. On 29th October, 1984 the applicant applied to the clerk to Gusii County Council to be allocated the suit property for the purposes of putting up a church building, a pastor's house, and a camping site.

4. By a letter dated 31st August 1989, the clerk to Gusii County Council in reference to the applicant's letter dated 23rd May, 1989, informed the applicant that the suit property was reserved for a nursery school and that if the applicant wanted to put up a modern day care centre on the same, the applicant was at liberty to do so. The applicant was also given a go ahead to manage the suit property once it had put up the said day care centre. At the meetings of Gusii County Council Works, Town and Market Planning Committee that were held on 26th March 1992 and 7th May, 1992, the applicant's application to set up a church and a camp site centre on the suit property was deliberated upon and approved. On 26th May, 1994, the clerk to Gusii County Council wrote to the Land Registrar Nyamira District confirming that the council had allocated the suit property that was initially reserved for Nyaigwa Nursery School to the applicant to establish a church and a nursery school. The said clerk asked the said Land Registrar to amend its records accordingly. On 7th March, 2007 or thereabouts, the suit property changed hands from

Gusii County Council (Reserved for Nyaigwa Nursery School) to Nyamira County Council (Reserved for Nyaigwa Nursery School and Nyamira S.D.A Church). The circumstances under which this happened are not clear from the record.

5. On 6th July, 2010, the applicant and the County Council of Nyamira applied to Nyamira Township Land Control Board for consent to transfer the suit property to the applicant. The application was rejected by the board on the ground that there was an existing dispute between the applicant and the local community over the ownership of the suit property. Nothing seems to have happened after the application for consent was rejected on 8th July, 2010 until 4th August, 2014 when the applicant through its advocates on record wrote to the 1st respondent demanding that the suit property be formally alienated and registered in the name of the applicant. No positive response was received by the applicant from the 1st respondent to that letter. This is what prompted the institution of these proceedings. The applicant had filed an earlier suit against Nyamira Primary School over the suit property which suit is said to have been withdrawn before the institution of the present suit. The nature of the dispute that the applicant had with Nyamira Primary School over the suit property that gave rise to the suit aforesaid is not clear from the record. The applicant has contended however that Nyamira Primary School has a separate and distinct parcel of land. The applicant has claimed that it intends to develop the suit land by establishing a church house, a pastor's house, a nursery school, a day care centre, and a camp site for use by the community around the area where the suit property is situated. The delay in having the suit land registered in its name has therefore held back the intended development.

6. As I have stated at the beginning of this ruling, this is an ex parte application. However, for reasons which are not clear from the record, the same was served upon the 3rd respondent. The 3rd respondent filed grounds of opposition dated 15th December 2014 in opposition to the same. In its grounds of opposition, the 3rd respondent contended that:

- a. No basis for grant of the orders sought has been laid by the applicant.
- b. The applicant has not exhausted other available remedies.
- c. Judicial review is a remedy of last resort.
- d. The applicant does not have a prima facie case with a probability of success.

7. When the matter came before me on 4th May 2015, Mr. Nyasimi, advocate, held brief for Mr. Onsongo for the ex parte applicant while Mr. Ochwangi, advocate, held brief for Mrs. Asati for the 3rd respondent. Mr. Nyasimi informed the court that the applicant wished to rely entirely on its verifying affidavit and statement that were filed herein in support of the application. He urged the court to grant the leave sought as prayed for in the application. On the part of the 3rd respondent, Mr. Ochwang'i also informed the court that the application is opposed by the 3rd respondent and that the 3rd respondent wished to rely entirely on its grounds of opposition dated 15th December, 2014. The two advocates left the matter for the court to determine on the material on record. This being an application for leave to institute judicial review application the only issues that present themselves for determination are the following:

- a. Whether the applicant has established a prima facie case against the respondent which should be pursued in a judicial review application.
- b. Whether the leave sought should be granted.

In the case of, **R vs. IRC exparte Federation of Self Employed (1982) AC 617 at page 643**, Lord Diplock stated that:

“The need for leave to start proceedings for remedies in Public Law is not new. It applied previously to applications for prerogative orders though not to civil courts

for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceeding for judicial review is actually pending even though misconceived.”

In the Court of Appeal case of, **Njuguna –vs- Minister for Agriculture (2000)1 E.A 184**, it was held that:

“The test as to whether leave should be granted to an applicant for judicial review is whether without examining the matter in any depth there is an arguable case that the reliefs might be granted on the hearing of the substantive application.”

8. The applicant has sought leave to apply for an order of Mandamus to compel the respondents to register the suit property in its name. In **Halsbury’s Laws of England, 4th Edition**, the authors have stated as follows at page 111 paragraphs 89 and 90 regarding the nature and mandate of the order of mandamus; **“The order of mandamus is of utmost extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed at 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 in the nature of a public duty. Its purpose is to remedy defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and no specific remedy for enforcing the 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 made 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.”**

9. As I have stated earlier in this ruling, the suit property was at all material times registered in the name of Gusii County Council as the freehold proprietor thereof. It was so registered on 9th May, 1973. It appears from the record that the suit property was initially reserved by Gusii County Council for Nyaigwa Nursery School. The suit property is registered under the Registered Land Act, Cap.300, Laws of Kenya (now repealed) (**“the Act”**). The registration of Gusii County Council as the proprietor of the suit property vested upon it the absolute ownership of the said property together with all rights and privileges associated therewith. Under section 85 of the Act, Gusii County Council and its successor in title, Nyamira County Council had a right to transfer, lease or charge the suit property to any person with or without consideration. In exercise of that right, the two councils had to adhere to the provisions of the repealed Constitution of Kenya, Trust Land Act, Cap.288 Laws of Kenya and the Local Government Act, Cap.265 Laws of Kenya(now repealed). Under the repealed Constitution and the Trust Land Act aforesaid, Gusii County Council and its successor in title, Nyamira County Council had power to set a part land for private use. The exercise of that power was discretionary. There was no duty imposed to set a part land either generally or to any person.

10. The question that I need to determine is whether the applicant has demonstrated on a prima facie basis that arising from the dealings that the applicant had with Gusii County Council and Nyamira County Council, the respondents herein have a public duty to transfer the suit property to the applicant which duty they have failed to perform. In my view, the failure if any by Gusii County Council and its successor in title, Nyamira County Council to transfer the suit property to the applicant after having agreed to do so, amounted to a breach of contract which is a civil wrong. Such wrong in my view does not attract public law remedy of judicial review. I am of the view that Gusii County Council and its successor in title, Nyamira County Council had no public duty to transfer and register the suit property in the name of the applicant. As I have stated above, the duty, if any existed between the parties, was contractual. A contractual duty cannot be enforced through an order of mandamus. Similarly, I have not been persuaded that the respondents herein have a public duty to transfer the suit property to the applicant. The 3rd respondent is the successor of Nyamira County Council. Under Article 62 (2) of the Constitution of

Kenya, 2010, the suit property is now public land vested in the 3rd respondent to hold in trust for the people of Nyamira County. The 3rd respondent has no power to alienate public land and cannot therefore be compelled to transfer the suit property to the applicant. The 3rd respondent cannot be compelled to exercise a power that it does not have. The court cannot command the commission of an illegality or an *ultra vires* act.

11. The power to administer public land is vested on the 1st respondent by the Constitution. The 1st has a constitutional duty therefore to administer the suit property on behalf of the 3rd respondent and the people of Nyamira County. Article 62(4) of the Constitution of Kenya, 2010 provides that public land cannot be disposed of or used save as provided for in law. The National Land Commission Act, 2012 and the Land Act, 2012 give the 1st respondent power allocate public land. The exercise of that power is however discretionary. The two statutes have provided a procedure to be followed and conditions to be met by the 1st respondent while carrying out such allocation. The 1st respondent is enjoined by the Constitution and the said statutes to follow the said procedure while allocating public land. There is no evidence before me that the provisions of the said statutes on allocation of public land have been complied with in relation to the suit property. I am doubtful if this court would be able to compel the 1st respondent to alienate the suit property to the applicant without complying with statutory and constitutional provisions relating to such alienations.

12. With regard to the orders sought against the 2nd respondent, it is not disputed that, no instrument of transfer of land or lease was executed by Gusii County Council or Nyamira County Council in favour of the applicant. Under section 85 of the Act aforesaid, the 2nd respondent could only register the applicant as proprietor of the suit property upon presentation of a duly executed instrument of transfer of land or lease a copy of which the applicant had to file with the 2nd respondent. Section 37 of the Land Registration Act, 2012 has similar provisions. I don't think that this court can compel the 2nd respondent to register the applicant as owner of the suit property in the absence of the said instrument of transfer.

13. Due to the foregoing, I am not satisfied that the applicant has established an arguable case against the respondents which would justify seeking judicial review. The applicant has not persuaded me that there is some arguable point which merits further investigation or argument in a judicial review application. I am of the view that this is one of those cases which should not be allowed to move forward. I have noted however that the suit property is now registered in the name of Nyamira County Council (Reserved for Nyaigwa Nursery School and Nyamira S.D.A Church). The applicant claims to have some equitable interest in the suit property by virtue of that reservation which it is entitled to pursue in a judicial review application. On account of that interest which the applicant claims to have on the suit property, I would reluctantly grant to the applicant the leave sought so that the court is not accused of determining the merit of the applicant's case *ex parte* at the leave stage thereby denying the applicant the opportunity to put his whole case before the court. For reasons that I have given above however, the leave would be conditional.

14. In conclusion, the application dated 29th October, 2014 is allowed in terms of prayer (a) thereof on condition that the applicant shall deposit in court before filing the application for judicial review, a sum of Kenya Shillings One Hundred and Fifty Thousand (Ksh.150,000.00) as security for the costs of the respondents and the interested party. The application for judicial review shall be filed within 21 days from the date hereof. The cost of the application shall abide the outcome of the judicial review application.

Delivered, Dated and Signed at Kisii this 5th day of June, 2015.

S. OKONG'O

JUDGE

In the presence of:

N/A for the applicant

Mr. Gitonga h/b for Asati for the 3rd respondent

N/A 1st and 2nd for the respondent

Millicent Court Assistant

S. OKONG'O

JUDGE