



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
JUDICIAL REVIEW NO. 65 OF 2011

SIMON MUNYIRI KINYUA.....PLAINTIFF

VERSUS

NYERI MUNICIPALITY LAND CONTROL BOARD.....DEFENDANT

JUDGMENT

Simon Munyiri Kinyua (*hereinafter referred to as the ex-parte Applicant*) has sued the Nyeri Municipality Land Control Board (hereinafter referred to as the respondent) seeking for the relief of *Mandamus* compelling the respondent to give consent to transfer 0.31 Ha out of L.R. No. Ruguru/Gachika/1387. The application is based on grounds that the Nyeri Municipality Land Control Board refused to give consent to transfer of 0.31 Ha out of L.R. No. RUGURU/GACHIKA/1387, the Tribunal is enjoined by the law to give effect to its consent of sub-division by giving consent to transfer. Moreover that the Nyeri Municipality Land Control Board exercised unfair/unjust considerations in refusing to give effect to consent to transfer.

The application is supported by a verifying affidavit whose import is that the exparte applicant is the absolute registered owner of **L.R. No. RUGURU/GACHIKA/1387** and wishes to transfer by way of sale 0.31 Ha to be excised from RUGURU/GACHIKA/1387 to a willing purchaser. The Nyeri Municipal Lands Control Board gave consent of subdivision of RUGURU/GACHIKA/1387 and on the strength of the said consent for subdivision, he went ahead and sought the necessary applications to a surveyor for subdivision of the land. On the strength of the said consent for subdivision, he further went ahead and sought the necessary applications to the Director of Physically for approval of the subdivision of the land. Thereafter, he engaged a surveyor who went and physically partitioned the land. He subsequently applied for consent to transfer on 24th November, 2011 which consent the respondent denied.

He verily believes that the Land Control Board refused/failed to exercise its mandate as provided for under the Land Control Act in refusing to grant consent of transfer of 0.31 Ha out of L. R. No. RUGURU/GACHIKA/1387 of which it had given consent of subdivision.

Since the Land Control Board refused/failed to exercise its mandate as provided for under the Land Control Act in refusing to grant consent of transfer of 0.31 Ha out of L. R. No. RUGURU/GACHIKA/1387 of which it had given consent of subdivision, the Board should be compelled to give consent of transfer.

Unless the orders sought herein are granted contractual independence and ownership of property

will be compromised for which he will be gravely prejudiced.

The Notice of Motion dated 18.1.2012 was filed on 19.1.2012 pursuant to the leave obtained in court on 16.1.2012. The respondent filed grounds of objection on 5.3.2012. The gist of the grounds is that:

1. ***The application lack merits.***
2. ***The applicant has not provided any material evidence to prove that the respondent considered extraneous and unreasonable grounds in denying the consent.***
3. ***The applicant did not have any statutory right to be granted the consent hence the order sought is not available.***

The respondent also filed a replying affidavit stating that the exparte applicant had been given the consent to subdivide his land parcel as per his request. Thereafter, he brought his application for consent to transfer one of the parcels to one Dickson Wamae Kinyua. However, the board refused to grant the consent for the following reasons:

- (a) The applicant's sons pleaded that his father was disposing off the entire family land and the intended transfer would leave him destitute and homeless.
- (b) The Board was also informed by the applicant's said son that the exparte applicant had taken money from two other person purporting to sell the same piece of land.

The Board was convinced that those were reasonable grounds to decline the consent in order to protect families from being dispossessed and rendered homeless. If the piece of land is transferred, it could trigger incidences of violence within the exparte applicant's family and also create conflict among the family and the intended purchasers. The land parcel in question is agricultural land falling within the Land Control Act. The Board acted lawfully and reasonably in exercising its powers under the Act.

The exparte applicant further filed a supplementary affidavit stating that the intended reasons given for refusal of the consent by the respondent are unreasonable and have no legal foundation. Being the absolute owner of the land with no interest accruing there to in favour of his said sons, he has unencumbered right to deal with the land as intended. The allegation that he had sold the land to the other purchasers was not due for consideration by the respondent as the alleged purchasers had not laid such a claim otherwise the same was not within the respondent's mandate to consider. The respondents thus acted unreasonably, beyond their jurisdiction and failed to consider what they were enjoined to consider but instead considered extraneous matters. Without prejudice to the aforesaid, the alleged claim by his son had been dismissed by this Honourable court vide a Ruling in Nyeri High Court Civil Case No. 8 of 2007 as per the ruling therefrom dated 27.7.2007. Even if his son had a valid claim, which he denied as aforesaid, he was not seeking to alienate the whole land as he had left almost half of the original land as per the consent for subdivision on record.

I have considered the application and all affidavits on record and also find that the applicant being the absolute registered proprietor of L. R. No. Ruguru/Gachika/1387 applied for by way of sale 0.31 Ha of the said land which was to be hived from the suit land. The respondent gave consent for subdivision but on application for consent to transfer, the respondent declined. The ex-parte applicant argues that this Nyeri Land Control Board failed to exercise its mandate as provided for under the Land Control Act in refusing to grant consent of subdivision and therefore the Board should be compelled to consent to the transfer.

The respondent through ***Ms Gathangu*** argues that the consent to transfer was refused as the son of the exparte applicant pleaded with the Board not to give the consent as their father was disposing off the entire land and that the said applicant had received money from some people as consideration for the said land.

The applicant has applied for the Judicial Review order of Mandamus which relief is

discretionary. This court refers to the *Halsbury's Laws of England, 4th Edition Volume 1 at page 111 from paragraph 89*. The said treatise says that;

“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 and no specific legal remedy for enforcing that right; and it may issue in cases there,, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

The application herein seeks the court to compel the respondent to act in a specific manner. This I cannot do as I will be usurping the powers of the Board. This court only has supervisory jurisdiction over the Board to ensure that it complies with its mandate in discharging its duties under section 9 of the Land Control Act Cap. 303 Laws of Kenya.

Moreover, this court has supervisory jurisdiction over the respondent to ensure that the said respondent complies with the principles of law that an administrative body should not make an irrational decision and that the procedure in decision making is not riddled with procedural impropriety.

I have considered the decision of the Board and do find that the Board had jurisdiction to make the decision. Moreover, I do find that the reasons given by the Board in reaching the decision are not irrational as they are reasonable. Thus where does the exparte applicant want his sons to live after disposing off the land which appears to be ancestral land?

Lastly, I do find ***no procedural impropriety*** in the procedure applied by the Board in arriving at the decision.

Finally, it is trite law that an order of mandamus cannot be applied to quash a decision. Where a decision has been made, without an order of ***Certiorari, Mandamus*** will be of no help as it will not quash the decision.

The application herein is therefore dismissed as the applicant has not established that the Board's decision was tainted with illegality, irrationality and/or procedural impropriety and that without the prayer for Certiorarit, the application is incompetent. The same is dismissed with no orders as to costs as the dispute is family based. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 29TH DAY OF JUNE, 2015.

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED AT NYERI THIS 9TH DAY OF JULY, 2015.

LUCY WAITHAKA

JUDGE