



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 219 OF 2014**

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF LANDS.....1<sup>ST</sup> RESPONDENT

THE CHAIRMAN NATIONAL

LAND COMMISSION.....2<sup>ND</sup> RESPONDENT

EX-PARTE

**DR. N.B. FRIDE NILSSON (suing as a Director of Faith Homes of Kenya)**

**JUDGEMENT**

1. Through the notice of motion application dated 22<sup>nd</sup> July, 2014, the ex parte Applicant Dr. N.B. Fridre Nilsson suing as a director of Faith Homes of Kenya prays for orders as follows:

**“1. THAT the Applicant DR. N.B. FRIDE NILSSON (Suing as a Director of Faith Homes of Kenya) be granted Judicial Review orders in the nature of *mandamus* directed towards the Respondents; the Principal Secretary to the Ministry of Lands; and the Chairman of the National Land Commission to carry out the amalgamation of the playing field adjacent to the parcel of land known as Land Reference No. 29/14527 with the said L.R. No. 209/14527.**

**2. THAT the Applicant, DR. N. B. Fridre Nilsson (Suing as a Director of Faith Homes of Kenya) be granted Judicial Review orders in the nature of *Prohibition* directed to the Respondents preventing them from allocating or otherwise alienating the suit property in any way prejudicial to the Applicant.**

**3. THAT the costs of this Application be costs in the cause.”**

2. The 1<sup>st</sup> Respondent is the Principal Secretary of the Ministry of Lands and the Chairman of the National Land Commission is the 2<sup>nd</sup> Respondent.

3. From the papers filed in Court, the Applicant's case is that he is a director of Faith Homes of Kenya a non-governmental organisation (NGO) registered under the Non-Governmental Organizations Co-ordination Act, 1990. He is also the proprietor of a school known as Sunflower Academy which is constructed on L.R. No. 209/14527. Adjacent to the school is an open field which the school has always used.

4. It is the Applicant's case that on 23<sup>rd</sup> April, 2008 he wrote a letter to the then Minister of Lands Hon. James Orengo. The letter which was copied to the Commissioner of Lands informed the Minister that the parcel of land adjacent to their school was in danger of being grabbed. The Minister directed that the matter be brought to the attention of the Commissioner of Lands for action.

5. Through a letter dated 16<sup>th</sup> May, 2008 the Commissioner of Lands directed the Applicant to apply for an amalgamation of the open field with L.R. No. 209/14527. The Applicant acted as advised and applied for the amalgamation of the open field with the land of the school.

6. The amalgamation was not done. The Commissioner for Lands thereafter did not reply to the Applicant's further enquiries. The Applicant informed the Court that the land has since been overrun by third parties who have put up structures on it.

7. A perusal of the statutory statement dated 5<sup>th</sup> June, 2014 shows that the Applicant seeks judicial review orders on three grounds. The first ground is that the Applicant's application for amalgamation was premised on the respondents' conduct which created hope for an amalgamation. Failure to amalgamate the two parcels of land therefore breached the Applicant's legitimate expectation.

8. Secondly, the Applicant asserts that the respondents' inaction was contrary to the law, in bad faith and unreasonable. The Applicant contends that the respondents were under a duty to make the said allocation and their refusal to do so was unlawful.

9. Thirdly, the Applicant argues that the respondents' inaction amounted to wrongful abdication or abandonment of their duties and powers.

10. The circumstances under which the orders of certiorari, mandamus and prohibition are issued were well illuminated by the Court of Appeal in the case of **Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji & 9 others, Nairobi Civil Appeal No. 266 of 1996** when it stated:

**“That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It 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 – See HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> Edition, Vol. 1 at pg.37 paragraph 128.....**

**The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“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 where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“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.”

What do these principles mean? They mean that an order of mandamus will compel 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.....

Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

11. It is the Applicant’s case that he is entitled to be allocated the parcel of land in question. Counsel for the Applicant cited the decision of the Court of Appeal in **Commissioner of Lands v Kunste Limited [1997] eKLR**. In the above cited case, the Court held that the Commissioner of Lands ought to have consulted Kunste Limited before allocating a plot adjacent to the hotel to a third party as Kunste Limited had applied for the allocation of the same plot.

12. Dismissing the Commissioner of Lands’ argument that he could exercise his discretion and allocate the plot to whomsoever he desired, the Court observed:

“The appellant was exercising his statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that discretion clearly affected the legal rights of Kunste Hotel Ltd. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision..... It is, therefore, our view and we so hold, that the appellant should have consulted the hotel along with the other parties before he decided to allot the plot to the interested party. He was aware of the request Mr. Kagiri had made in 1976. Consequently it does not lie in the appellant’s or anybody else’s mouth to argue, as counsel for the interested party sought to do, that in absence of registration the interest Kunste Hotel seeks to protect was non-existent, and it was, therefore, disentitled to a hearing before the plot was allotted to the interested party.”

13. Although it was submitted for the Applicant that the facts in the cited case are similar to the facts in this case, such argument is incorrect. In the case before me, it is not known whether the land in question has been allotted to anybody else. What is only clear is that third parties have invaded the parcel of land and developed it.

14. The only thing the Commissioner of Lands did in this matter was to invite the Applicant, through the letter dated 16<sup>th</sup> May, 2008, to make a formal request for the allocation of the plot so that it could be amalgamated with LR. No. 209/14527. The Applicant has not demonstrated that the respondents have taken any other action in respect to the said parcel of land.

15. The respondents are only guilty of failing to communicate to the Applicant on the progress of his

application for amalgamation. The respondents as public bodies are supposed to communicate with those who seek services from them. The Applicant has however, not applied for an order of mandamus to direct the respondents to respond to his application.

16. As already stated, the Applicant has not established grounds for issuance of an order of mandamus directing the respondents to amalgamate the open field with parcel No. 209/14527. The application for an order of mandamus therefore fails.

17. The Applicant is, however, entitled to know the fate of his application for amalgamation. The current status of the plot is unknown. If the plot has not been allotted, then an order to preserve the same, pending communication to the Applicant by the respondents, is deserved. As such, an order of prohibition is issued directing the respondents not to allocate or in any manner alienate the parcel of land in question without giving a hearing to the Applicant. This order is issued on condition that the parcel of land in question has not been allocated to a third party. If the land has already been allocated then this order automatically becomes redundant.

18. There will be no order as to costs.

Dated, signed and delivered at Nairobi this 8<sup>th</sup> day of Oct., 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**