



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 325 OF 2013
IN THE MATTER OF AN APPLICATION BY JACKSON MUSYOKA MUNYALO FOR
LEAVE TO COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW

IN THE MATTER OF JUDICATURE ACT AND ORDER 53 OF THE CIVIL
PROCEDURE RULES SECTIONS 8 AND 9 OF LAW REFORM ACT

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS

BETWEEN

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

EX PARTE: JACKSON MUSYOKA MUNYALO

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 16th April, 2014, the *ex parte* applicant herein, **Jackson Musyoka Munyalo**, seeks the following orders:

1. That this honourable court be pleased to grant an order of mandamus against the 2nd Respondent compelling him in person or through its agents and/or officers to issue a letter of

allotment to the Applicant in respect of the leasehold piece of land located in Thika known as SSS/V/129.

2. That this honourable court be pleased to grant order of mandamus to issue against the 2nd Respondent compelling him to issue a title deed to the Applicant in respect of the leasehold piece of land located in Thika known as SSS/V/129.

3. That this honourable court be pleased to grant an order of mandamus to issue against the 2nd Respondent compelling him to allow the term of the lease herein to start running from the date of issuance of the title deed.

4. That the costs of this application being the cause.

Applicant's Case

2. According to the applicant, he bought the piece of land located in Thika known as SSS/V/129 (hereinafter referred to as "the suit property") from Kenya Cannery Sacco Society Limited (hereinafter referred to as "the Society") in the year 1981 and the society transferred the suit property to him.

3. Over the years he has made all the payments as requested by the 2nd Respondent on various occasions including payments for conveyancing preparation, rent stamp duty and further legal fee.

4. However, in 1987 the 2nd Respondent wrote to him asking him to pay an amount that he had already paid and he explained that he had done so and attached the relevant receipt. On 14th May 2002 the applicant went to the 2nd Respondent in an effort of finding out why his letters were un-replied to and on retrieving the file it was found that the applicant's file had been marked p/a meaning file away. Thereafter the 2nd Respondent wrote to the director of surveys asking for the survey details of the suit property to which the director of surveys replied informing the 2nd Respondent that a survey had been carried out but had not been processed as a letter of allotment had never been supplied. The 2nd Respondent then proceeded to request for a letter of allotment from Kenya Canner Sacco Society Limited and the society did inform him that it was him who was supposed to issue the letter of allotment and that he never issued the same and requested that he proceeds to issue the said letter of allotment.

5. It was averred by the applicant that he had visited and written to the land department on several occasions in an effort to follow up the matter herein but his visits bore no fruits. On further enquiries to the Ministry of Land the applicant discovered that the National Land Commission via its agents wrote a letter to the Director of Surveys and attached a fake Sketch Plan which aspect was noted by the Director of Surveys.

6. To the applicant, there have been various irregularities from the Department of lands, for instance he forwarded a cheque in payment of a demand letter of Kshs 16,775/= and was not issued with a receipt and it was only after he made numerous visits to the Ministry of Land that he was issued with a photocopy of the receipts as opposed to the original receipt or its duplicate.

7. The applicant averred that he was now retired and the suit property is one of his few assets and without title document he was unable to prove ownership of the suit property herein and hence cannot transact with it in any way. It was therefore his contention that his right to own property has been and is being infringed without any rational and reasonable cause from the 2nd Respondent hence the orders sought in the instant application.

Respondent's Case

8. On behalf of the Respondents, the following grounds of opposition were filed:

1. That the Applicants Notice of Motion is unmerited and therefore an abuse of the court process.
2. That the 2nd Respondent cannot be compelled to issue the Applicant with an allotment letter unless issues of ownership are determined.
3. That there are well laid down rules and procedures that requires a party to surrender an allotment letter before being issued with the new allotment letter.
4. That even if the 2nd Respondent is compelled to issue a title deed to the Applicant the same will be in vain since the 2nd Respondent will require the Applicant to surrender the old allotment letter to them before issuing the Applicant with the title deed.
5. That the 3rd Respondents actions and decision was within the provision of the law.

Determinations

9. I have considered the application, the affidavits, both in support of and in opposition to the application as well as the rivalling submissions.

10. The first issue is when can a Court grant an order of *mandamus* and what is an order of *mandamus*? In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543**, it was held that:

“Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. Mandamus is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature

...In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment...Mandamus does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory...”

11. It is important to note that an order of *mandamus* is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of *mandamus* must show the existence of a statutory duty conferred or invested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform. See **Republic vs. Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others Nairobi HCMCA No. 747 of 2006 [2008] 3 KLR (EP) 521**.

12. Therefore, *mandamus* is a peremptory order requiring the Respondent to perform a specified public

duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by *mandamus* depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct a writ of *mandamus* against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution in granting of the writ, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant *mandamus* where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. See **Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.**

13. It has further been held that *Mandamus* is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that *mandamus* may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has “a public element” which may take any forms, and fall under the classic formula of “any body of persons having legal authority to determine questions affecting the rights of subjects” like non-statutory self-regulating bodies. Thirdly, *mandamus* may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of *mandamus* against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in **Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245.**

14. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** *inter alia* 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...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.”

15. See **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443; Halsburys Laws of England 4th Edition Vol 1 at 111 Paras 80, 90.**

16. With respect to the powers of the registrar it was held by the East African Court of Appeal in **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109** that:

“Mandamus to the registrar is certainly one method of putting right an erroneous entry in the register, and is peculiarly applicable when the fault is alleged to lie with the registrar. If that official refused to act in circumstances in which he should act, mandamus would appear to be appropriate. There seems to be no reason why it should not lie in a case where it is

necessary to invoke the wider powers of a court...Mandamus will not be granted if the performance of the act involves a breach of the law.”

17. In this case, the applicant’s case is that he acquired the suit property from the allottee, Kenya Cannery Limited. It is however clear that even from the Applicant’s own case that no letter of allotment was issued to Kenya Cannery Limited. However, in a letter dated 21st September, 1987, the Commissioner of Lands seemed to have appreciated that the suit property had been transferred to the applicant. There was a reference to an allotment and the fact that the Department of Lands seemed to have received some payments towards the suit parcel clearly indicate that the applicant’s interest in the suit land was acknowledged by the Commissioner for Lands. I therefore reiterate my holding in **Commissioner of Lands & Another vs. Kithinji Murugu M’agere [2014] eKLR** in which I expressed myself as follows:

“In this case, the applicant’s case is that having been allotted the suit parcels of land, the Respondents ought to be compelled to issue him with the title documents. In Dr. Joseph N K Arap N’gok vs. Justice Moiwo Ole Keiwua & Others Civil Application No. Nai. 60 of 1997 it was held that title to landed property can only come into existence after the issuance of the letter of allotment meeting the conditions stated therein and actual issuance thereafter of title documents pursuant to the provisions under which the property is held. In this case save for the Miritini property no evidence has been exhibited that the applicant paid the requisite fees for the Ngong Township properties. Accordingly, it is not possible to find that the applicant had met the conditions specified in the letter of allotment with respect to the said property. In the premises there is no basis upon which I can find that the applicant has shown that he has a legal right, or substantial interest the performance of which must be done by the Respondents. With respect to the Miritini property, it is contended by the Respondents that in the absence of an acceptance by the applicant, it cannot be said that the applicant fulfilled the conditions specified in the letter of allotment. Whereas it is true that the applicant was expected to express his acceptance of the offer, no format was provided for the same. In my view expression of acceptance may be either expressly in writing or by conduct. One of the ways in which such acceptance may be expressed by conduct is by remission of the requisite charges specified in the letter of allotment. To deny an allottee the rights accruing from a letter of allotment simply because he has not expressly intimated his acceptance thereof in writing when he has in fact paid the requisite fees which has been acknowledged by the allotting authorities would in my view be irrational and unreasonable. Accordingly I would not decline to grant the orders merely for failure to expressly express acceptance of the offer of allotment.”

18. The acceptance of the payment towards the suit property coupled with the contents of the letter dated 21st September, 1987 in my view amounts to a tacit acknowledgement that the suit property had been allotted to the said Kenya Cannery Limited and it has not been contended that Kenya Cannery Limited had no power alienate its rights therein. To the contrary the letter dated 21st September, 1987 appreciated that this was the position.

19. However, as expressed hereinabove, the applicant has to show that there is a duty imposed on the respondent to act and the respondent as failed to act in accordance with that duty. It has therefore been held that generally a demand for the actions to be taken is a prerequisite to the grant of an order of mandamus. See **The District Commissioner Kiambu vs. R & Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109.**

20. In this case it is clear that all the forensic ammunition has been directed at the 2nd Respondent. In fact there is no allegation at all that the 1st Respondent is under a duty to issue titles. It follows that no order can issue against the 1st Respondent.

21. With respect to the 2nd Respondent, the Supreme Court in **National Land Commission v Attorney-General & 7 others [2015] eKLR** expressed itself as follows:

“The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in land. The task of registering land title lies with the National Government, and the Ministry has the authority to issue land title on behalf of the said Government. That the Ministry of Land is the special entity with authority to register and issue land title, in this Court’s opinion, bears restating. Land title, by its singularity as the mark of entitlement to landed property, is the ultimate expression of a vital property right, quite apart from being the very reference point in numerous financial and business transactions, national and international. On that account, the sole national repository to issue, and to guarantee the validity and integrity of title, is the central State machinery, as a player on the international plane, acting through the Executive organ.”

22. Although the Court appreciated that in the process of issuance of titles particularly titles to public lands, there ought to be a consultative process between the Ministry and the National Land Commission, the latter has no power to issue titles to land. It follows that to compel the 2nd Respondent to issue the applicant with documents of title to the suit property would amount to compelling it to act without or in excess of its jurisdiction. Mandamus, as stated above only compels the performance of a legal duty and not an unlawful one. This Court accordingly cannot compel the 2nd Respondent to act in the manner sought in these proceedings.

23. The Supreme Court however appreciated that there is a need for the various legal instruments touching on land in this country to be harmonised. Accordingly whereas I decline to grant the orders sought herein and proceed to dismiss the Notice of Motion dated 16th April, 2014, there will be no order as to costs.

Dated at Nairobi this 4th day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Alusiola for Mr Odhiambo for the Applicant.

Cc Muriuki.