REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 395 OF 2012

IN THE MATTER OF: AN APPLICATION BY GITHINJI MURUGU M'AGERE FOR ORDERS OF MANDAMUS AND IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 RULES 1 (1) AND (2) OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF: LETTER OF ALLOTMENT DATED 31/07/1998 AND 19/04/2002 ISSUED BY THE COMMISSIONER OF LANDS, THE PIECES OF LAND SET OUT IN THE SAID LETERS OF ALLOTMENT.

THE REPUBLIC ……..…….....APPLICANT

VERSUS

1. THE COMMISSIONER OF LANDS ……....……1ST RESPONDENT

2. THE HON. ATTORNEY GENERAL……..……....2ND RESPONDENT

AND

KITHINJI MURUGU M'AGERE…….....…EXPARTE APPLICANT

JUDGEMENT

1. By a Notice of Motion dated 24th January, 2013, the *ex parte* applicant herein, **Kithinji Murugu M'agere**, seeks the following orders:

   1. That leave having been granted on 13/12/2012 this Court now be pleased to issue an Order of Mandamus compelling the 1st Respondent to issue Leases to the Exparte – Applicant for the Plots;- Industrial plot of 4.0 hectares at Miritini – Mombasa for a term of 99 years from 1/01/1998 and commercial plot Nos. 1 – 5, (attached amended R.I.M) at Ngong Township each measuring 0.045 Hectares for a period of 99 years from 1/04/2002 in accordance with the said letters of Allotment.

   2. The costs of this Application and that of the Ex-parte Application be provided for.

Applicant's Case

2. The Motion is supported by an affidavit sworn by the applicant herein on 29th October 2012.
3. According to the *ex parte* applicant, by letters of allotment dated 31st July, 1998 and 19th April, 2002, the Respondent allotted to him Industrial plot of 4.0 hectares at Miritini – Mombasa (hereinafter referred to as the Miritini property) for a term of 99 years from 1st January, 1998 and Commercial plot Nos. 1 – 5, at Ngong Township each measuring 0.045 Hectares (hereinafter referred to as the Ngong Township properties) for a period of 99 years from 1st April, 2002. However, at that time, he was unable to pay for the Miritini plot immediately the sum of Kshs.514,700/= which was required. He, however sold some of his assets and borrowed from friends to enable me to pay after which the Respondent prepared for issue to him Lease document for 99 years from1/01/1998 for the said Miritini plot.

5. However, despite many verbal and written requests the Respondent has neglected and or refused to perform his duty of signing the said documents which according to the applicant, have been lying on his desk for a considerable period of time.

6. With respect to the Ngong plots, he bought bankers cheques from Equity Bank, to wit cheques 004529 for Kshs.120,000/= and later cheque Nos.073946, 073947 and 073948 for kshs.40,000/= each but the Respondent did not deposit any of them in the bank and the same were returned to the applicant much later without any explanation as to why he declined to accept the payment.

7. The applicant contends that the Respondent is the only Government official authorized by law to sign and issue the said documents of title and his failure to do so constitutes a breach of the statutory duty hence this Court has powers in its supervisory capacity to issue an Order compelling the Respondent to perform his said statutory duties that have been donated to him by the Law. It was further contended by the applicant that the Respondent has not even found it fit to reply to his several letters sent to him through his despite his acknowledgement of receipt copies of the said letters.

Respondent's Case

4. On behalf of the Respondent, a replying affidavit was filed sworn by **Silaskiogora Mburugu**, the Principal Land Administrative Officer in the Ministry of lands on25th September, 2013.
5. According to him, the Applicant was issued with a letter of allotment on the 31st of August 1998 and he was required to pay a sum of Kshs.514,700/= and accept the offer in writing within the requisite period of 30 days. However, the Applicant delayed in making the payments and further did not communicate acceptance of the offer in writing and the offer lapsed due to the failure thereof. Subsequently, on 30th June 2011, the Respondent wrote to the applicant requesting him to make payment to enable the Respondent process his title and since the said subsequent letter referred to the letter of allotment, the terms of the letter of allotment applied to it. The ex parte applicant made payment on the 26th day of September 2013, fifty seven days after the reminder letter, despite being given a second chance. Neither did he communicate acceptance the offer in writing.
6. Based on legal advice, the deponent believes that the ex parte applicant has not accepted the terms of the offer and hence there is no valid contract that is enforceable in law.

Applicant's Submissions

7. On behalf of the Applicant, it was submitted that under the repealed ***Registration of Titles Act*** and ***Registered Land Act*** and the former Constitution, the 1st Respondent is the officer who had the powers and authorised to issue valid titles and grants for ownership of land hence the applicant has the right to come to Court for an order of *mandamus* compelling the Respondent to execute the titles in respect of the suit properties. To the applicant, he has no other recourse in law to compel

the 1st Respondent to so act hence the order of *mandamus* sought ought to issue.

Respondent's Submissions

8. On behalf of the Respondent, it was submitted that whereas the applicant contended that he made payments in respect of allotments in respect of parcel numbers 865, 866, 867 and 868, he was silent on the acceptance of the offer and no evidence of payment was exhibited. It was therefore contended that the respondent did no more than receiving the letters of allotment. With respect to other allotment it was submitted that since the letter of reminder made reference to the letter of allotment, the terms of the said letter also apply to the reminder yet the applicant made payment almost three minths after the reminder and in addition did not communicate his acceptance of the offer in writing as provided by the letter of allotment hence it was submitted the ex parte applicant did not accept the offer. It was therefore submitted that there was no contractual relationship between the applicant and the 2nd respondent.
9. Referring to **Kenya National Examination Council vs. Republic ex parte Gathenji Njoroge & 9 Others [1997] eKLR** and **Maurice Okello vs. Permanent Secretary, Ministry of Lands and Housing**, it was submitted that the duty that is contemplated in this matter is o that arises from a contractual obligation which does not exist in the first place and even if the same existed, a contractual obligation is a private law duty as opposed to a public law duty as contemplated by the said decision. It was therefore submitted that the Court cannot compel the respondent to issue the lease even if it is its duty to do so and that the applicant must first demonstrate that he has done all he was supposed to do in order to be granted the title which the applicant has failed to do.

Determinations

10. I have considered the application, the affidavits, both in support of and in opposition to the application as well as the rivalling submissions.
11. 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."

12. It is an order sought under sections and 9 of the ***Law Reform Act***, Cap 26 Laws of Kenya as read with Order 53 of the Civil Procedure Rules by person or body from the High Court of Kenya requiring any act to be done. In other words, *Mandamus* would issue from the alternative remedy, requesting that a statutory body etc. be compelled to fulfil its statutory obligation. So *Mandamus* order can issue from the High Court commanding a body or person to do that which it is its or his duty to do. It lies to secure that performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The issue of *Mandamus* is discretionary and will only issue provided there is no other remedy available. See **Tom Byakatonda on Behalf of Rushwa Growers Coop Society vs. The Board of Directors Banyankole Kweterana Coop Union Mbarara HCMA No. 29 of 1995** and **Wade & Philips 9th Ed 607; Cephas Male vs. KCC [1992] KALR 159.**

13. It is important to note, however, 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.**
14. 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 for the 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.**
15. 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.**
16. It is now trite that 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 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 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. 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.**
17. 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."

18. 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 Moijo 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.
19. 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.
20. It was further contended that the dispute herein is contractual and hence judicial review orders ought not to issue. In my view, if as a result of the contractual relationship created between the applicant and the respondent, a statutory obligation is thereby created compelling one of the parties to carry out a certain mandate or duty, the mere fact that the duty originated from a contractual relationship ought not to bar the applicant from reliefs under judicial review.
21. As was held in **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** once allotment letter is issued and the allottee meets the conditions therein, the land in question is nolonger available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. No such allegation has been made by the Respondents herein.
22. However, there is now National Land Commission established under Article 67 of the Constitution and one of its functions is 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 nolonger the preserve of the 2nd Respondent. To compel the 2nd Respondent to issue leases to the applicant in respect of the Miritini land would be to compel him to take an action which is not within his jurisdiction. As already stated herein above an order of *mandamus* will not issue to compel an illegal action.
23. Apart from that, it is trite that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence

a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

24. Again it is trite that the remedy will not be granted where there are alternative legal remedies which are more convenient, beneficial and effectual. In this case, the wind has since the coming into operation of the National Land Commission has been taken from the sails of the 2nd Respondent. In other words the 2nd respondent has been stripped of the powers he hitherto had. Consequently, an order of *mandamus* would not issue.

ORDER

25. Accordingly, in the exercise of my discretion I decline to grant the orders sought in the Notice of Motion dated 24th January, 2013 which application is dismissed but as the Respondents are not altogether without blemish, there will be no order as to costs.

Dated at Nairobi this 11th day of February, 2014

G V ODUNGA

JUDGE

Delivered in the presence of Miss Cheruiyot for the 1st and 2nd Respondents.