



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC JUDICIAL REVIEW 1 OF 2019

(FORMERLY NAKURU MISC 38 OF 2019)

IN THE MATTER OF AN APPLICATION SEEKING LEAVE TO APPLY FOR ORDERS OF JUDICIAL REVIEW OF MANDAMUS AND PROHIBITION AGAINST THE ATTORNEY GENERAL, THE CHIEF LAND REGISTRAR AND THE DISTRICT LAND REGISTRAR, NYAHURURU

IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTION 107 AND 108, ARTICLES 10, 73 AND 159 OF THE CONSTITUTION

IN THE MATTER OF LAND REFERENCE No. NYANDARUA/OLJORO OROK SALIENT/2205 AND NYANDARUA/OLJORO OROK SALIENT/200

THE ATTORNEY GENERAL.....1st RESPONDENT

MINISTRY OF LAND.....2nd RESPONDENT

THE DISTRICT LAND REGISTRAR NYAHURURU.....3rd RESPONDENT

THE CHIEF LAND REGISTRAR.....4th RESPONDENT

VERSUS

EX-PARTE.....ALLAN NJUKI MURAGE & WILLIAM MWEMA MURAGE

(Suing as Administrator of the Estate of JOHN MURAGE NATHAN G THERU)

JUDGEMENT

1. The ex-parte Applicants were given leave to file the instant Motion on the 29th October 2019 whereby by a Notice of Motion dated 22nd November 2019, the Applicants herein, **Allan Njuki Murage & William Mwema Murage** sought for an order of Mandamus against the Respondents seeking that they rectify the current erroneous Green Cards of land parcel No. **Nyandarua/Oljoro Orok Salient/2205 and Nyandarua/Oljoro Orok Salient/200 to read their original values (sic) of 2.2 Ha and 9.2 Ha respectively, as per the certified copy herein included.**

2. That the Respondents to then work with the rectified Green Cards, in their office to calculate the new values of acreage of all the subdivisions of both parcels of land to date to reflect the true value of the said parcels of land namely Nyandarua/Oljoro Orok Salient/2205 reflecting 2.2 Ha and Nyandarua/Oljoro Orok Salient/200 reflecting 9.2 Ha. The same to reflect the 13 acres deducted fraudulently and/or erroneously therefrom and the same be reconsolidated to the title Nyandarua/Oljoro Orok Salient/200.

3. The Applicants also sought for prohibition orders to stop and restrain the Respondents from dealing in any way with the suit property ref No. Nyandarua/Oljoro Orok Salient/2205 to the detriment of the Applicants, as well as from receiving, registering and/or accepting any challenges or contests to the Applicants' title.

4. They also sought for orders that the report prepared by Mr. Birundu the land Registrar be adopted and implemented wholesomely as well as for costs of the Application.

5. The said Application was supported by the grounds on its face and on the verifying affidavit of William Mwema Murage dated the 22nd March 2019.

6. Upon service of the Application on the Respondents and the issuance of directions that the Application be disposed of by written submissions, the Respondents neither filed their response nor their written submissions thereto. The Applicants on the other hand filed their submissions to the effect that:-

7. They were administrators of the estate of the late John Murage Gatheru who was the registered proprietor of the land parcel No. Nyandarua/Oljoro Orok Salient/200 measuring approximately 9.2 hectares from the year 1978. That Ayub Rimui Muchina was the registered proprietor of parcel No. Nyandarua/Oljoro Orok Salient/2205 measuring approximately 2.2 hectares and further that the two parcels of land were separated by an access road.

8. That both the proprietors of these parcels of land had subsequently subdivided their respective parcels wherein Nyandarua/Oljoro Orok Salient/200 gave rise to parcels No 9502 and 9503 measuring 3.21 and 0.81 respectively as per the mutation map and not as per the official Registry Index Map. On the other hand, Nyandarua/Oljoro Orok Salient/2205 was subdivided into several plots which were subsequently sold to third parties.

9. The Applicants' submission was that it had been during the said subdivisions, that while the acreage to their land had been reduced, the acreage of parcel No. 2205 had increased. That the Respondents had thereafter without any color of law or right, declined, refused and/or neglected to cancel all the title deeds arising from the illegal subdivision of Nyandarua/Oljoro Orok Salient/2205.

10. That pursuant to service of the Notice of Motion upon the Respondents and their failure to file their responses, the Applicants' Application should be considered as conceded because their evidence was uncontroverted. Reliance was placed on the provisions of Order 53 Rule 6 of the Civil Procedure Rules as well as on the decided case in **CMC Aviation Ltd. vs Cruiser Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835** amongst others.

11. That whereas Article 40 of the Constitution protected the rights of any person to own property, Article 47 of the said Constitution reiterated the entitlement of every Kenyan to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. That it also granted individuals the rights to be given written reasons for any action that would adversely affect them through the administrative action.

12. That the parameters of Judicial Review were set out by the Court of Appeal in the decided case in **Republic vs Kenya National Examinations Council ex- parte Gathenji & Others Civil Appeal No. 266 of 1996**. The Applicants submitted that the Judicial Review application was not concerned with the private rights or the merits of the decision being challenged but with the decision making process, and that the grounds upon which the Court exercises its Judicial Review jurisdiction were incapable of exhaustive listing as was held in the case of **Republic vs The Commissioner of Lands ex-parte Lake Flowers Limited Nairobi High Court Miscellaneous Application No. 1235 of 1998**.

13. That since a rights to property was constitutionally protected, a person could only be deprived of that right as provided for under the Constitution. That the deceased John Murage Gatheru was the registered proprietor of the land parcel No. Nyandarua/Oljoro Orok Salient/200 measuring approximately 9.2 hectares from the year 1978 whereas Ayub Rimui Muchina was the registered proprietor of parcel No. Nyandarua/Oljoro Orok Salient/2205 measuring approximately 2.2 hectares.

14. That it was in the cause of subdivision of both the said parcels of land that John Murage Gatheru (deceased) had 13 acres of his land fraudulently awarded to the owner of parcel No.2205 the defendant herein, who then had his acreage increased.

15. That the fraud was discovered immediately wherein the ex-parte Applicants requested the District Land Registrar to assist them in establishing the true boundaries between plots known as Nyandarua/Oljoro Orok Salient/200 and Nyandarua/Oljoro Orok Salient/2205.

16. That the hearing and ruling had been subsequently delivered by the District Land Registrar Nyandarua wherein it had been determined that the District Surveyor re-survey the land as per the Registry Index Map in order to solve the position of the boundaries of the two parcels of land. It had also been confirmed that the owner of Nyandarua/Oljoro Orok Salient/200 whose land had previously measured 9.2 hectares now had 4.02 hectares and had thus lost 13 acres as per the ground situation. That on the other hand the owner of Nyandarua/Oljoro Orok Salient/2205 who had been allocated 2.2 hectares now had 7.04 hectares which was more than what he had been allocated.

17. That vide letters dated 23rd October 2013 and 13th August 2013, the Ministry of Lands had informed one Beth Njeri Rimui, the administrator of the Estate of the late Rimui Muchina, that the officers from the Ministry would visit Nyandarua/Oljoro Orok Salient/2205 to implement the Land Registrar's ruling.

18. That indeed vide a survey carried out by the Ministry of Land, it had been confirmed that parcel No. Nyandarua/Oljoro Orok Salient/2205 had encroached by 13 acres into the part of the parcel forming No. Nyandarua/Oljoro Orok Salient/200. Boundaries had then been established as per the Registry Index Map (RIM) and marked on the ground. That despite this, the Respondents have without any color of right declined, refused and/or neglected to cancel all the title deeds arising from the illegal subdivision of parcel No. Nyandarua/Oljoro Orok Salient/2205.

19. That the Respondents' action amounted to an abuse of discretion and an exercise of powers which they did not possess and/or are beyond their jurisdiction. The failure to act on the documents presented for registration by the Principal Registrar of Titles was thus extremely prejudicial to the ex parte Applicants.

20. That despite the Respondents having been asked in writing to comply with the law and rules of natural justice, the same has been in vain as they have failed to take into account and consider all relevant factors including the fact that the Applicants have met their commitment to pay all levies demanded of them by the Respondents.

21. In conclusion, the Applicants submitted that their Notice of Motion as filed ought to be allowed as prayed since it had met the threshold for granting of the orders of Mandamus to the Respondents.

Determination.

22. I have anxiously considered the Application, the affidavits filed, the submissions as well as the authorities cited. I have also considered the fact that despite service of the Application to the Respondents herein, they only filed their Notice of Appointment and neither filed their response to the Application nor their submission thereto. The issue that emerges for determination is whether the ex-parte applicants are entitled to the remedies sought.

23. Mandamus is a judicial remedy in the form of an order from a Court to any Government, subordinate Court, [Corporation](#), or [Public Authority](#), to do (or forbear from doing) some specific act which that body is obliged under law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty.

24. The purpose of an order for Mandamus is to remedy defects of justice. It lies in the cases where there is a specific right but no specific legal remedy for enforcing that right. The grant of an order for Mandamus is therefore an [equitable remedy](#); a matter for the discretion of the Court, the exercise of which is governed by well-settled principles.

25. An order for Mandamus, being a discretionary remedy, its Application must be made in good faith and not for indirect purposes. The Applicant must, of course, satisfy the Court that he or she has the legal right to the performance of the legal duty as distinct from mere discretion of authority.

26. An order for Mandamus is normally issued when an officer or an authority by compulsion of statute is required to perform a duty and that duty, despite demand in writing, has not been performed.

27. The Court of Appeal in the case of **The Commissioner of Lands vs. Kunste Hotel Ltd [1997]eKLR** held as follows:

Judicial Review is concerned not with private rights on the merits of the decision ... but with the decision making process ... purpose is to ensure individual is given fair treatment by the authority to which he has been subjected."

28. And in the decided case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** the Court of Appeal inter alia held 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."

29. I have considered the Ex-parte/Applicant's Application and supporting documents herein. I find that indeed there is no doubt that whereas the deceased John Murage Gatheru was registered as proprietor of the land parcel No. Nyandarua/Oljoro Orok Salient/200 measuring approximately 9.2 hectares on the 23rd October 1977, on the 2nd April 1997, Ayub Rimui Muchina had also been registered as proprietor of parcel No. Nyandarua/Oljoro Orok Salient/2205 measuring approximately 2.2 hectares.

30. That it had been at the time the proprietors of these parcels of land had sub-divided their respective parcels of land, that there had occurred either an innocent error or an intentional and malicious error in that the deceased John Murage Gatheru had lost about 13 acres of his land to Ayub Rimui Muchina when the said acreage of land had been added to the latter's parcel of land.

31. Pursuant to the said discovery, the Applicant wrote to the District Land Register via a letter dated the 25th April 2005 to establish the boundary between No. Nyandarua/Oljoro Orok Salient/200 and No. Nyandarua/Oljoro Orok Salient/2205.

32. I have also considered the fact that District Land Registrar in exercising his mandate as provided for under Section 14 of the Land Registration Act, proceeded to hear and determine the Boundary dispute via the proceedings held on the 10th April 2012, wherein a ruling was delivered to the effect that;

"The district surveyor has to re-survey the land has per RIM in order to solve the position of the boundary. The current road is what confused the situation as it does not correspond with the RIM. The owner of plot No.200 lost 13 acres who (sic) was originally allocated 9.2 hectares and now has 4.02 hectares as per the ground situation. The owner of plot 2205 was allocated 2.2 hectares as now 7.04 hectares which is extremely more than he was allocated. See the original certified copies of the green cards.

The status of the buyers must be considered since they were not aware of the ground situation. Amicable solution on the side f the buyers has been found in case of any eventuality.

Anybody who is not satisfied can appeal to the high court within 30 days no orders as to costs'.

13. I have further considered the fact that pursuant to the Land Registrar's ruling herein above, and further pursuant to the provisions of **Sections 16 to 19 of the** Land Registration Act, that a notice dated the 13th August 2013 and 23rd October 2013 was issued to the owners and occupiers of the land in question, of the intention to implement the land Registrar's ruling and to fix the boundaries. The suit land had then been visited on the 25th October 2013 and resurveyed as per the RIM to which a report dated the 30th October 2013 had been compiled and which report and sketch plan had confirmed the fact that land parcel No 2205 had encroached on parcel No 200 by an area of 5.26 hectares.

34. The report further stated that;

The boundaries were established as per the RIM and marked on the ground

The new areas are as follows;

Plot No 200 (2496 new No) is 8.17 hectares.

Plot No 2205 is 2.6 hectares.

35. These facts have neither been challenged nor Appealed by any party.

36. It is thus based on the Land Registrar's ruling in the boundary dispute as well as the resurvey of the suit land and the Land Surveyor's report that the Applicants herein seek for orders of Mandamus to compel the Respondents herein to rectify the current erroneous Green Cards of land parcel No. Nyandarua/Oljoro Orok Salient/2205 and Nyandarua/Oljoro Orok Salient/200 to read their original measurements of 2.2 Ha and 9.2 Ha respectively.

37. The Applicants have also sought for prohibition orders to stop and restrain the Respondents from dealing with the suit property ref No. Nyandarua/Oljoro Orok Salient/2205 in any way to the detriment of the Applicants, and from receiving, registering and/or accepting any challenges or contests to their title.

38. 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 not necessary, or where issues have become academic exercise; or serves no useful or practical significance. Since the Court exercises a discretionary jurisdiction in granting prerogative order 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 is 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 realized. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

39. A title deed is an essential *prima facie* evidence of ownership of land, and although there has been no evidence and/or documents placed before the court showing that the Respondents had been presented with documents for registration by the Principle Registrar of Titles but failed to act upon them, I find that all factors put together, I am satisfied that the ex-parte Applicant has made out a case that calls for the grant of the order of Judicial Review of Mandamus and prohibition herein sought.

40. The upshot of the foregoing is that the court finds merit in the ex-parte Applicant's notice of motion dated 22nd November 2019. The same is allowed as prayed with costs at a lower scale since the Application was undefended.

Dated and delivered at Nyahururu this 21st day of September 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE