



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CIVIL CAUSE NO.171 OF 2013**

**IN THE MATTER OF AN APPLICATION BY KIMANI GACHUNGI FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF PROCEEDINGS OF PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENTS ACT, 2012**

**AND**

**IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENT ACT, 2012**

**AND**

**IN THE MATTER OF THE COUNTY GOVERNMENT OF KIAMBU**

**AND**

**IN THE MATTER OF THE TRANSITION AUTHORITY**

**AND**

**IN THE MATTER OF THE MUNICIPAL COUNCIL OF KIAMBU**

**AND**

**IN THE MATTER OF THE REPUBLIC**

**REPUBLIC**

**EXPARTE KIMANI GACHUNGI.....APPLICANT**

**- VERSUS -**

**COUNTY GOVERNMENT OF KIAMBU.....1<sup>ST</sup> RESPONDENT**

**THE TRANSITION AUTHORITY .....2<sup>ND</sup> RESPONDENT**

**MUNICIPAL COUNCIL OF KIAMBU.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. By a Notice of Motion dated 13<sup>th</sup> June, 2013, the *ex parte* applicant herein, **Kimani Gachungi**, seeks the following orders:

**1. THAT an Order of Prohibition do issue to prohibit the Respondents' agents, servants, employees and or any other person or persons claiming through them from trespassing onto, remaining upon, demolishing buildings or any other structures and interfering with all that property known PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu County.**

**2. THAT an Order of Mandamus do issue compelling the Respondents to issue a letter of lease to the Applicant pertaining to all that property known as PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu County.**

**3. THAT the leave so granted does operate as a stay of any demolition of buildings and or structures on all that property known as PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu county until the hearing and determination of this application.**

**4. THAT the costs of this application be provided for.**

#### **Applicant's Case**

2. The Motion is supported by a verifying affidavit sworn by the applicant herein on 13<sup>th</sup> June 2013.
3. According to the *ex parte* applicant, he received from the 3<sup>rd</sup> Respondent a letter dated 3<sup>rd</sup> January, 1989 which letter confirmed the allocation of all that property known as PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu County by the 3<sup>rd</sup> Respondent to the applicant and permission to build a canteen on the said premises. Subsequently, the District of Kiambu, through a letter dated 26<sup>th</sup> July, 1993, requested the 3<sup>rd</sup> Respondent to grant him an exemption of occupational licence which exemption the 3<sup>rd</sup> respondent granted vide a letter dated 1<sup>st</sup> February, 1999. On 7<sup>th</sup> September, 2009, the 3<sup>rd</sup> Respondent held a Town Planning Work, Housing and Markets Committee which resolved to re-plan the area occupied by the applicant's said tea canteen and pursuant to a resolution made thereat, the 3<sup>rd</sup> Respondent had several correspondences with the Ministry of Lands to facilitate survey and planning of the said property known as PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu county. In pursuance thereof, the applicant paid survey fees of Kshs.5,000/- as was required of him by the 3<sup>rd</sup> Respondent. The applicant thereafter made several requests for issuance of a letter of lease. However, the 3<sup>rd</sup> Respondent sent its agents, servants, employees and/or other persons acting for or on their behalf, to the applicant's business premises which persons proceeded to demolish part of the structures thereon. Despite several correspondences to the 3<sup>rd</sup> Respondent and the Commission on Administrative Justice, Office of the Ombudsman, the 3<sup>rd</sup> Respondent has refused and/or failed to address the applicant's complaints regarding the suit property. Instead, on 16<sup>th</sup> May, 2013, the applicant was served with an Enforcement Notice by the 1<sup>st</sup> Respondent, which notice gave him 7 days within which to remove his business premises situated on the suit property or face demolition of the said structures. Further, the 3<sup>rd</sup> Respondent continues to threaten to demolish the applicant's business premises and continues to withhold issuance of a letter of allotment and lease despite the applicant's several complaints to various government offices to have the issue addressed.
4. It is the applicant's contention that if the 3<sup>rd</sup> Respondent is not restrained from trespassing and interfering with the suit property through an order of prohibition, the 3<sup>rd</sup> Respondent will proceed to demolish his business premises thereon and leave him without a source of livelihood. Further, if the 3<sup>rd</sup> Respondent is not compelled to issue him with a letter of allotment and a letter of lease through an Order of Mandamus, the 3<sup>rd</sup> Respondent will continue harassing him to his prejudice.

## 1<sup>st</sup> and 3<sup>rd</sup> Respondent's Case

5. In opposition to the application, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents filed a replying affidavit sworn by **Henry Wanyundi**, the Sub-county Administrator, Kiambu Sub County Government of Kiambu on 5<sup>th</sup> July, 2013.
6. According to the deponent, upon his own request, Municipal Council of Kiambu (as it was then known, now the County Government of Kiambu) granted the ex parte Applicant a licence to operate his business of a kiosk on the suit land, which land is a public land located within Kangangi market in Kiambu Municipality. Further, the ex parte Applicant through the District Commissioner's officer requested to be exempted from paying fees for a permit and/or licence to operate the said business at the said premises and by a letter dated 1<sup>st</sup> February, 1999, the Council exempted the ex parte Applicant from paying occupation licence of his business thereon. On 10<sup>th</sup> April, 2008 or thereabouts, the ex parte Applicant wrote to the Council requesting for a Certificate of Lease for the suit premises and on 20<sup>th</sup> April, 2009, the Ministry of Local Government through the Permanent Secretary wrote to the Council requiring the Council to give a brief of the events regarding the ex parte Applicant's allegations after a complaint made to it by the ex parte Applicant herein wherein he stated that the Council was not affording him assistance regarding his request for a Lease from the Council. On 7<sup>th</sup> September, 2009, the ex parte Applicant's application for a Certificate of Lease of the suit premises was tabled before the Town Planning Works, Housing and Markets Committee for discussion and upon consultation, the committee resolved and recommended planning of the area surrounding the ex parte applicant's business premises to avoid conflict with other land users at the area since there were other occupants at the town. Thereafter, on 15<sup>th</sup> September, 2009, the Council wrote to the ex parte Applicant herein informing him of the resolution of the Committee meeting and asked him to consult the District Physical Planning Officer. As stated in the above said letter dated 15<sup>th</sup> September, 2009, the Council was open to the ex parte Applicant's request to obtain a lease certificate, on condition that the District Physical Planning Officer prepared and approved a Part Development Plan (PDP) covering the suit premises herein so as to accommodate the ex parte Applicant's request for a Lease. However, by a letter dated 18<sup>th</sup> October, 2010 the Ministry of Lands through the Department of Physical Planning informed the Council that there was need for the District Surveyor to consider re-planning the entire area where the suit premises are situated and as a result, the District Surveyor embarked on a mission to conduct a survey of the area and ground picking in order to ascertain the exact location and size of the entire area which survey was conducted after the Council paid the requisite fees of Kshs.25,000/-.
7. According to the deponent, the said survey revealed that there was no clear defined road network; there was non-uniformity of plots; and there were developed plots which lacked any urban design and/or form. From the observations, the District Physical Planning Officer informed the Council that a part development plan (PDP) would be impossible until and unless a re-planning of the whole area was conducted and advised that since there existed many developed plots within the area surrounding the suit premises, it would be prudent to conduct wide public consultations inter alia with the other owners of such developments if a re-planning and redesign was to be considered by the Council at the area.
8. The deponent contended that if the Council were to allow the District Physical Planning Officer to conduct a re-planning without involving all the stakeholders and subsequently allocate the ex parte Applicant a private plot at the said area, the interests of public and others who have acquired third party interests as a result of their businesses on the other developments thereon would be greatly prejudiced as all the developments within the area would have to be demolished yet public interest demands that the Council to act in the best interest of the public and the same will not be served if the council authorized or authorizes for a re-planning of the town for the benefit of one individual. Public interest, it was contended demands that the Council acts in the best interest of the public and the same will not be served if the council authorized or authorizes for a re-planning of the town for the benefit of one individual. To the deponent, the Council has the mandate to control development within its jurisdiction in adherence to the laws of Kenya including the **County Governments Act, 2012** (Part XI), the **Physical Planning Act**, the **Public Health Act** among others.

9. To the deponent, the ex parte Applicant herein has no registerable right over the suit premises as he was merely given a licence to operate his business at the suit premises and the licence herein is a bare licence which can be determined and withdrawn by the licensor at the licensor's pleasure as opposed to a licence for value and in fact, the ex parte Applicant has never paid fees for licenses of operating a business or any other fees or charges that belong to the Council since he was exempted from paying and he cannot thus lay claim to public land by mere reason of having been granted a licence to have possession of the council's property. According to him, without prejudice to the repealed **Local Government Act**, Cap 265, the Council had the power to grant to any person a licence to occupy any land which it possessed for a term not exceeding seven years and thus the licence granted to the ex parte Applicant herein in 1989 or thereabouts has long expired.
10. In the result, it was deposed that the orders sought by the ex parte Applicant cannot be granted by this Honourable court or enforced by the Council as the ex parte Applicant was granted a licence to operate his business at the Council's premises, which was simply a permission to the ex parte Applicant to be on the Council's land, and in any event, has long expired and never been renewed. Apart from that the council has no power or mandate to grant the ex parte applicant a lease relating to public land as defined under Article 62 of the Constitution of Kenya as he wishes since such mandate has been exclusively bestowed upon the National Land Commission under Part III of the **Land Act**, 2012 (Administration of Public Land) and thus the ex parte Applicant's Application has been overtaken by events.
11. Since public land is administered by the National Land Commission vide Article 62(2) and (3), Article 67 (2) of the Constitution of Kenya and Part II of the **National Land Commission Act**, 2012, to grant the orders sought would essentially amount to usurpation of the powers of the National Land Commission by this Honourable Court as in essence the ex parte Applicant is seeking orders to compel unauthorized entities, being the Respondents herein to grant him a lease in express violation of the law. To the deponent, even by the annexures of the ex parte Applicant in his pleadings that the Council followed the procedure and even consulted the District Physical Planning and the District Surveyor's offices under the Ministry of Lands in its attempts to resolve the matter herein and was finally of the opinion that any re-planning should not be allowed as it would affect the large public adversely while satisfying a private interest: indeed the Council has been engaged in discussions over the dispute as evidence by the several correspondences between the Council, the Ministry of Local Government, the Commission on Administrative Justice and ex parte Applicant, and the Council eloquently expressed its position regarding the matter to all the relevant parties by its letter dated 7<sup>th</sup> February, 2012 stating that the Council was not in a position to allocate the ex parte Applicant a plot due to the dynamics on the ground and the ex parte Applicant was advised to desist from developing any illegal structures without the authority of the Council which directions he chose to ignore.
12. It was deposed that on 16<sup>th</sup> May, 2013 the Council issued an Enforcement Notice to the ex parte Applicant requiring him to stop any development, seek guidance from the Council and remove any offending developments among others which the ex parte applicant ignored, failed and/or neglected. To the deponent, the ex parte Applicant has no allotment letter or any title guaranteeing his stay at the suit premises, more so to warrant him to ignore the advise and Notices of the Council which has jurisdiction over him in regard to any illegal developments and mandate to control developments within its jurisdiction.
13. It was the deponent's understanding that it is the process of decision making that will be under attack in judicial review – not the decision made and a decision of a public authority will be prohibited on such an application where the said authority has acted without jurisdiction, or exceeded its jurisdiction, or failed to comply with the rules of natural justice where those rules are applicable, or where there is an error of law on the face of the record, or the decision is unreasonable. Here, however, the Council has followed the due process and been fair to the public and the ex parte Applicant herein, while also abiding to the law.

## **2<sup>nd</sup> Respondent's Case**

14. On behalf of the 2<sup>nd</sup> Respondent the following grounds of opposition were filed:

1. **1 That the application as drawn and taken out is incompetent, inept and otherwise an abuse of the process of this Honourable Court.**
2. **That the Transition Authority has been misjoined in these proceeding the parties it is clear there was a desire to issue the applicant with the lease for the premises.**
3. **That the application lacks merit.**

### **Applicant's submissions**

15. On behalf of the applicant the contents of the verifying affidavit were reiterated in the submissions and it was further contended that in the absence of any breach of the conditions of user by the Applicant, he is entitled to continue operating his canteen and hence the status quo should be maintained and the Respondents, their agents, servants, employees and/or any other persons claiming through them prohibited from trespassing onto, remaining upon, demolishing buildings or any other structures or interfering with the suit property.
16. It was submitted that from the correspondences exchanged the applicant and the 1<sup>st</sup> and 3<sup>rd</sup> respondents and the conduct of the parties, it is clear that there has been a desire to issue the Applicant with a lease for the suit property. Since the only pending action is re-planning of the area, the applicant has good grounds to be issued with a lease for his canteen hence the mandamus prayed for ought to issue.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents' submissions**

17. On behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents it was submitted that the 3<sup>rd</sup> respondent, being a defunct body has been wrongly joined to these proceedings. While reiterating the contents of the replying affidavit filed on their behalf, it was submitted that the licence given to the applicant in respect of the public land does not give the applicant a registrable right over the property. Under the provisions of the law under which the licence was issued, i.e. section 144(5) of the repealed ***Local Government Act*** such a licence could not last for a period exceeding 7 years and since the said licence was given in 1989, the same has long expired hence the applicant is on the suit premises illegally. The orders sought by the applicant, if granted, it was submitted would greatly prejudice the interests of the public as all developments in the area would have to be demolished yet it is trite law that public interests outweighs the ex parte applicant's private interest.
18. Being merely a licensee the applicant has no registrable interest over the suit premises and hence has no basis for seeking orders compelling the Respondents to issue him with a lease moreso in light of the fact that the applicant has never paid for the said licence having been exempted from paying for the same. Without an allotment letter or title it was submitted that the application ought to be dismissed.
19. It was further submitted that the Council has no power or mandate to grant the applicant a lease to public land since that mandate is bestowed upon the National Land Commission. To grant the orders sought, it was submitted, would amount to usurpation of the powers of the said Commission by the Court.
20. As the Council has followed the due process and has been fair to the public, it was submitted based on **Republic vs. Judicial Service Commission ex parte Pareno [2004] KLR, Republic vs. National Environment Management Authority and Another [2006] eKLR** that the orders sought are not merited.
21. As the applicant illegally erected structures on the suit premises, it was submitted the Council was properly entitled to issue the enforcement notices.

### **Determinations**

22. I have considered the foregoing.
23. First and foremost, it is important to consider the circumstances under which judicial review orders of prohibition and mandamus would issue. The scope of the judicial review remedies of *Certiorari*, *Mandamus* and Prohibition was the subject of the Court of Appeal decision in **Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR** in which the said Court held *inter alia* as

follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition 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...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. The order must command no more than the party against whom the application 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... 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

24. In this case the applicant seeks an order prohibiting the Respondents' agents, servants, employees and or any other person or persons claiming through them from trespassing onto, remaining upon, demolishing buildings or any other structures and interfering with all that property known PDP/KBU/40/2010/01, located within Kangangi Market, Kiambu County. In this case, the applicant is aggrieved by the issuance of Enforcement Notice by the Council. Without the said notice being quashed, it is my view that an order of prohibition would not be efficacious in the circumstances of this case, since the actions which the applicant seek to prohibit flow from the said enforcement notice.
25. With respect to the order of *mandamus*, it is similarly my view that without quashing the enforcement notice, the grant of an order of *mandamus* would not be efficacious.
26. Apart from that it was held in in **Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707** that:

**“A *mandamus* issues to enforce a duty the performance of which is imperative and not optional or discretionary...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 remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet the mode of redress is less convenient, beneficial and effectual.”**

27. The question which arises in this case is whether the applicant has a legal right to be issued with a lease. That the applicant is a mere licensee is not in doubt. 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 no letter of allotment has been issued leave alone the conditions therein being met. In those circumstances, it cannot be said that the Respondents are under a legal duty to issue the applicant with a lease. It may be argued that taking into account the circumstances of this case and the relationship between the applicant and the 1<sup>st</sup> and 3<sup>rd</sup> respondents the applicant had legitimate expectation that he would be issued with a lease. In my view, assuming that that position was correct the applicant would only have a legitimate expectation that his application for issuance of a lease would be considered by the 1<sup>st</sup> and 3<sup>rd</sup> respondents. The Court cannot, however, compel the said respondents in considering such an application to arrive at a particular decision. In mandamus the law as clearly spelt herein above is that where a legal duty is imposed on an authority, but the duty leaves discretion as to the mode of performing it in the hands of the said authority, a *mandamus* cannot command the duty in question to be carried out in a specific way. What the applicant seeks from this court is not only an order compelling the Respondents to consider his application for issuance of a lease, but to compel the Respondents to consider the same in a particular way i.e. by issuance of the lease. That would amount to this court usurping the powers of the Respondent and substituting this Court’s discretion for that of the Respondents and that is not the role of a judicial review court.
28. Apart from that 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 no longer the preserve of the 1<sup>st</sup> or 3<sup>rd</sup> Respondent. To compel the said Respondents to issue leases to the applicant in respect of the suit premises would be to compel them to take an action which is not within their jurisdiction yet an order of *mandamus* will not issue to compel an illegal action or an action which the Respondent has been divested of jurisdiction to perform since mandamus only issues to compel the performance of a duty which the Respondent is legally obliged to perform.
29. I have also taken into account the fact that in these circumstances there is a conflict between the private interest of the applicant and the interest of the public and more so the need for the Council to properly plan the area in which the suit premises is situate for the benefit of all the residents of the said area including the applicant.
30. Further, 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 no longer 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 judicial review 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.**

31. As indicated above, the remedy of mandamus will not be granted where there are alternative legal remedies which are more convenient, beneficial and effectual. In this case, if there is a breach of the terms of the licence the applicant has a more convenient remedy in a suit for damages.
32. In the result I find no merit in the Notice of Motion dated 13<sup>th</sup> June, 2013 which I hereby dismiss with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**Dated at Nairobi this 17<sup>th</sup> day of March, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of Miss Gichumbi for the applicant.**