



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISC. APPLICATION NO. 81 OF 2014

IN THE MATTER FOR APPLICATION FOR LEAVE FOR JUDICIAL REVIEW

BETWEEN

MARY T. MUSOTSI ----- APPLICANT

VERSUS

**THE DISTRICT OFFICER/
SUB COUNTY COMMISSIONER, MALAVA ---- 1ST RESPONDENT**

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

R U L I N G

This is an Ex-parte Chamber Summons application by Mary T. Mutsotsi (the ex-parte applicant) dated 27/5/2014 and premised to be brought under **Order 53 rule 1 (1)** of the **Civil Procedure Rules, 2010**. By this application the applicant seeks leave to commence Judicial Review Proceedings namely an Order of mandamus to compel the District Officer/Sub-county Commissioner of Malava District Sub-county (the respondent) to grant the Applicant Consent to sub-divide his parcel of land known as KABRAS/CHESERO/1673.

The application is supported by a verifying affidavit by the Applicant sworn on 27/5/2014 and a statement of even date. The application was filed in court on 10/6/2014. A certificate of urgency was thereafter filed on 17/7/2014 which necessitated the matter to be placed before the Hon. Mr. Justice Chitembwe on 21/7/2014. Upon perusing the file, the Hon. Judge directed the applicant to file certain documents namely: a copy of Title Deed, copy of application for consent, payment receipt for consent plus copies of sale agreement between the applicant and the intended transferee (buyer).

Pursuant to that directive, the applicant filed a further affidavit on 1/10/2014. The Further affidavit was sworn on 30/9/2014 and on it are annexed the documents the Hon. Judge had directed to be filed.

On 1/10/2014, the application was placed before me for consideration. I adjourned it to 6/10/2014 and directed that it be heard in open court.

When the application came up for hearing on 6/10/2014, Mr. Munyendo, counsel for the Applicant, urged the application. Mr. Munyendo submitted that the Respondent had refused to grant consent to the Applicant to subdivide his land although the Applicant is the lawful owner of the land in question. He referred to the verifying affidavit, statement and further affidavit together with the annexures thereto. He

asked the court to grant leave to the Ex-parte Applicant to commence Judicial Review Proceedings by way of Mandamus to compel the Respondent to grant consent to the Applicant for purposes of subdividing his parcel of land known as SOUTH KABRAS/CHESERO/1673.

I have considered this application in its entirety and perused the documents filed in support thereof. I have also considered the submissions by counsel for the Applicant in urging the court to allow the application and grant leave to commence Judicial Review Proceedings against the Respondent.

The matter of granting leave to apply for an order of Mandamus under Order 53 rule 2 of the Civil Procedure Rules, is a matter of discretion and to allow this application, I must be satisfied that the respondent had refused to perform a legal, public or administrative duty which has resulted into an infringement of the Applicant's legal rights so that I can exercise that discretion in favour of the Applicant.

The Applicant has alleged that the Respondent has refused to grant a consent to enable the applicant subdivide his parcel of land. The Applicant's parcel of land No. SOUTH KABRAS/CHESERO/1673 is an agricultural land and any transactions relating to that parcel of land are controlled transactions, which fall under the Land Control Act (Cap. 302). Sub-division, as one of the transactions under Section 6 of the Act cannot be undertaken without the consent of the Land Control Board of the area. The first schedule to the Act contains composition of Land Control Board providing thus:

1. The Land Control Board shall consist of:-

“(a) The District Commissioner of the District in which the land control area or Division is situated, or a District officer deputed by him in writing, who shall be chairman.”
explaining why the Respondent is sued in these proceedings.

The Applicant has filed three important documents in trying to convince the court that he deserves leave to commence Judicial Review proceedings by way of Mandamus that is; the verifying affidavit, statement and further Affidavit. I have tried to look for evidence that the Respondent has refused to perform a public, legal or administrative duty to no avail. The verifying affidavit only states at paragraphs 4, 5, 6 and 7 as follows:-

4. THAT I made an application to the Malava Land Control Board for that purpose (purpose of subdivision).

5. THAT the 1st Respondent has without any justifiable cause refused to grant me consent for subdivision.

6. THAT the 1st Defendant's action is against my proprietary rights as provided for in the Constitution.

7. THAT the 1st Respondent's action of withholding consent is causing untold suffering to me as am under pressure from buyers and my children who are keen on developing their portions.

Paragraph 8 of the verifying affidavit is even more important and is worth of mention; it says-

8. THAT I am aware that people in my situation are being granted consent by the 1st Respondent and hence his action is discriminatory and denies me my right to equality before the law and a fair administrative actions.

The Applicant has simply repeated these same depositions in his statement in support of the application, emphasizing only, that no reasons have been given for the refusal.

The further affidavit filed in court on 1/10/2014 does not contain any useful information regarding the accusations levelled against the Respondent. The application for consent attached to the further affidavit is not dated, and the receipt attached thereto is dated 18/9/2014 which means it was received on the same day.

The Applicant's complaint against the Respondent is therefore not supported by any document. There is no evidence that as at the time the application was filed in court, the applicant had indeed sought consent from the concerned Land Control Board. There is also no evidence that the Board refused to grant or give reasons for refusal to grant one.

Section 6 of the Act provides how an application should be made. It provides as follows:-

"6 (1)

(2).....

(3) For the purposes of subsection (1) an application

shall be deemed to be made when it is delivered to the

authority prescribed in the manner prescribed"

As at the time this application was filed, there is no evidence that an application for consent had been made, or refused. The court is also alive to the fact that in the same Act, particularly Section 9 thereof, the Board has a discretion to grant or refuse to grant an application for consent, subject to certain considerations as are specified under that section. Thereafter there is a window of opportunity for the applicant to appeal against that decision in accordance with the Act,

There is no evidence before me to show that the Applicant did apply for consent and that the Respondent either declined to give the consent or give reasons for such refusal.

The Applicant has also stated that he is being discriminated against, but that too has not been demonstrated by way of evidence. As I have said above, there is no evidence that the application for consent was made to the office concerned as complained of and a decision failed to come from that office to enable the court to exercise its supervisory power in favour of the applicant and grant leave.

Lastly, the applicant has invoked the Constitution, stating that he has not received a fair administrative action by the Respondent as contemplated by Article 47 of the Constitution. Article 47 (1) provides as follows:-

"47 (a) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

If I understood the Applicant correctly, he is saying that by the Respondent's conduct, he has not been given reasons why his application for consent has not been granted. As I have stated elsewhere in this ruling, there is no evidence that the applicant even submitted his application for consent to expect granting of the consent, and if declined, reasons for doing so. The fair administrative action is preceded by taking steps towards seeking that administrative action and if not granted, reasons for not doing so. In the case of the applicant, I see a party who comes to court complaining without first taking steps to seek the performance of a public, legal or administrative duty in his favour.

From the above analysis, I do not see why I should grant leave to the Applicant, to initiate proceedings by way of Mandamus against a public officer when there is nothing to show that the officer concerned has refused to perform his legal, public or administrative duty.

The upshot of all this is that the applicant's application dated 27/5/2014 is dismissed.

There shall be no order as to costs.

Dated and delivered at Kakamega this 14th day of October, 2014

E. C. MWITA

J U D G E