



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

JUDICIAL REVIEW No 4 OF 2017

(FORMERLY JR 23 OF 2016)

IN THE MATTER OF APPLICATION BY KIBAIGA KIRANGU KIMIRI FOR ORDERS OF JUDICIAL REVIEW IN THE NATURE OF MANDAMUS

AND

IN THE MATTER OF COUNTY LAND ADJUDICATION & SETTLEMENT OFFICER LAIKIPIA COUNTY

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

COUNTY LAND ADJUDICATION & SETTLEMENT

OFFICER-LAIKIPIA COUNTY.....1st INTERESTED PARTY

JOSEPH CHRIS RITICH CHEMASAS.....2nd INTERESTED PARTY

EX-PARTE

KIBAIGA KIRANGU KIMIRI.....SUBJECT

JUDGEMENT

1. By Notice of Motion dated 5th October 2016, the ex parte applicant seeks the following orders:

- i. An order of Mandamus compelling the 1st interested party to release the Discharge of Charge and Transfer for all that parcel of land known as Laikipia /Suguta (Ex P and D)234 to Kibiaga Kirangu Kimiri*
- ii. That costs of the Application for leave and this Application be borne by the Interested party.*
- iii. Any other relief deemed fit by this honorable court.*

2. The application is brought under Order 53 Rule 3 and 4 of the Civil Procedure Rules and is supported by an affidavit sworn by the ex parte Applicant. It is deposed in the affidavit that the ex-parte applicant herein was the legal allottee of L.R No. *Laikipia /Suguta (Ex P and D) 234*, which land parcel he acquired from the Settlement Fund Trustee.

3. That upon payment of the requisite fee to the Settlement Fund Trustee, the land parcel was discharged to the ex-parte Applicant wherein the Director of Land Adjudication and Settlement did forward the discharge of Charge for the said land parcel to the District Land Adjudication and Settlement Officer-Laikipia for collection.

4. That the District Land Adjudication and Settlement Officer-Laikipia has however refused to release the said document to enable the ex-parte Applicant herein to submit the same to the land Registrar for issuance of a title deed despite both oral and written demands.

5. The application was opposed by both the 1st interested party vide their replying affidavit sworn on the 28th February 2017 and 2nd

interested party vide his replying affidavit sworn on the 25th January 2015 respectively.

6. On the 5th February 2018, by consent, the court directed that the application be argued by way of written submissions. Accordingly, the ex parte Applicant filed his submissions on 17th April 2018 whereas the 2nd interested party filed their submissions on the 25th June 2018. The Hon. Attorney General did not file any submissions on behalf of the 1st interested party.

7. It was the ex parte Applicant's submission that based on the decided case of **Shah vs Attorney General (No 3) Kampala HMC No. 31 of 1969 [1070] EA 543** as quoted in the **High Court sitting in Nairobi Misc Civil Application 207 of 2015(JR)**, he was suing the 1st Interested party in his capacity as the county Land adjudication and Settlement Officer Laikipia.

8. That the said 1st interested party had indeed admitted to being a civil servant who was withholding the discharge of charge for the suit property in good faith, to protect the interest of the 2nd interested party. That the application therefore was proper before the court.

9. Citing the provisions of Section 167 of the Agriculture Act Cap 318 Laws of Kenya, counsel for the ex parte Applicant argued that whereas it was the duty of the 1st interested party herein to release the discharge of Charge for the suit property, yet he had withheld the same claiming that the ex-parte Applicant had sold the suit land to the 2nd Interested party, a fact which is denied by the ex parte Applicant.

10. Counsel argued that the alleged sale agreement dated the 30th May 2014 between the 2nd interested party and one Paul Salonik was null and void ab initio for want of proper authority to sell. This is because the purported authority to sell had not been legally executed as it had neither been registered nor prepared under the prescribed form so as to donate power to sell to the seller with the result that Paul Salonik Lotongai acquired no power to dispose of the suit land to the 2nd interested party.

11. To support their position, it was their submission that the Assistant County Commissioner Rumuruti division vide, his letter dated the 1st February 2018, had confirmed that the letter of Consent dated the 31st July 2014 relied upon by the 2nd interested party herein had not emanated from their office.

12. The excuse that the 1st interested party chose to withhold the discharge of charge, because he was acting on the instructions of the Director of Criminal Investigations (DCI) Rumuruti who through his letter dated the 21st June 2016, had asked him to withhold any transactions touching on the suit land because her was a criminal case touching on the same, could not hold water because the nature of the crime had not been disclosed to the court, secondly no investigations on any crime could go on forever.

13. Based on the above, the ex-parte Applicant submitted that the court issues an order of mandamus to compel the 1st interested party to perform their public duty as prayed and that if the 2nd interested party was aggrieved, the right thing for him to do would be to file suit against the seller Paul Salonik Lotongai.

14. The Application was opposed by the 2nd interested party who claimed that he was a purchaser of the suit land, for value having bought the same from the ex parte Applicant's agent who held a duly executed authority to sell dated the 30th May 2014, executed by the ex-parte Applicant.

15. Further, that the said sale had been sanctioned by the ex parte Applicant's wife who had signed a spousal consent in accordance to the Oaths and Statutory Declaration Act, following which the ex-parte Applicant had applied for and obtained the necessary consent form the Land Control Board Rimuruti, in accordance to the Land Control Act. There having been properly executed documents, the sale thus installed him as the proprietor of the suit land herein.

16. That upon execution of the sale agreement and the transfer of the suit land thereafter to the 2nd interested party, it was not proper for the ex-parte Applicant to file the present application as he had ceased being the proprietor of the said suit land. That it was thus in order for the 1st interested party to withhold the said documents for lawful purpose.

17. That having so transferred the land to the 2nd interested party, the ex-parte Applicant was not entitled to obtain the documents from the 1st interested party. That claims of forgery herein could not hold water until the criminal proceedings proved otherwise. That Judicial Review proceedings were special proceedings and allegations by the Ex-parte Applicant on the legality of the sale would require a lengthy trial through an ordinary suit and not through a Judicial Review.

18. That the application did not disclose any Respondent and was therefore not proper before the court. The ex-parte Applicant ought to have sued the interested party as a Respondent. The application therefore ought to be dismissed.

19. I have anxiously considered the application, the affidavits filed, the submissions as well as the authorities cited. The issue that emerges for determination is whether the ex parte applicant is entitled to the remedies sought.

20. 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.

21. 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.

22. 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.

23. 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.

24. **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."

25. I have considered the ex-parte/applicant's application and supporting documents herein. I find that indeed there is no doubt that he was allotted the suit land by the Settlement Fund Trustee (SFT) in the year 2002. That after payment of the requisite fees to the Settlement Fund Trustee, a Discharge of Charge and a Transfer in his favour were forwarded to the County Land Adjudication and Settlement Officer, Nanyuki on the 24th May 2016 for his collection. The officer has however refused to release the said documents to the applicant to enable him deliver the same to the County Land Registrar for issuance of a title deed, for reasons that the 2nd interested party had claimed purchaser's interest in the suit property having bought the same from the ex-parte Applicant's agent, one Paul Salonik Lotongai, a fact which has been refuted by the ex-parte/Applicant.

26. I have considered the alleged Authority to sell issued to Paul Salonik Lotongai supposedly by the ex-parte Applicant herein as well as the spousal consent allegedly signed by the ex parte Applicant's wife wherein she describes herself as a 'male of sound mind' wherein I have submitted them to comparison with documents executed by the ex-parte Applicant namely his verifying affidavit, supporting affidavit, supplementary affidavit as well as his copy of the identity card. Although I am not a handwriting expert, yet the difference in these two sets of documents is glaring to the effect that whereas the ex-parte Applicant has thumb printed on the second set of documents, the first set of documents bears a semblance of his purported signature.

27. The same case applies to the spousal consent in comparison with her identity card.

28. Alongside the above anomaly, I have also considered the letter from the Assistant County Commissioner dated the 1st February 2018 whose contents are to the effect that the consent dated the 31st July 2014 did not emanate from their office and further that no meeting was held on the 31st July 2014 because the same had been postponed to the 23rd July 2014 and was held at the District Officer's Office and not in the District Commissioner's offices as stipulated by the 2nd interested party herein.

29. I have also considered the fact that the purported authority to sell was not registered in the land's office and therefore is of no legal consequences.

30. One of the purposes of judicial review is to review administrative action for the purpose of ensuring that public agencies and officers act fairly towards the citizen and that they abide by the law. This court shall not shy away from facilitating the realization of the objective.

31. All the above 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 herein sought.

32. The upshot of the foregoing is that the court finds merit in the ex-parte Applicant's notice of motion dated 5th October 2016. The same is allowed as prayed with costs to be borne by the interested party herein.

Dated and delivered at Nyahururu this 17th Day of January 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE