



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

JUDICIAL REVIEW NO. NO. 4 OF 2018

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR, TRANS-NZOIA....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

EX-PARTE

1. MARY ODHIAMBO

2. ANTONY OMONDI DOSIO

JUDGMENT

1. The *ex parte* applicant filed the substantive notice of motion for Judicial Review Orders on **8/8/2018**. The Judicial Review Notice of Motion seeks the follows orders:-

(1) This Honourable Court be pleased to grant an order of MANDAMUS compelling the 1st respondent to complete the registration of the applicants' grant of lease over the parcel of land known as KITALE MUNICIPALITY BLOCK 8/2016 and to release the lease title/certificate thereof to the applicants forthwith or within a period of time to be prescribed by the court.

(2) This Honourable court be pleased to grant an order of PROHIBITION prohibiting and/or restraining the 1st respondent by himself, his agents or persons acting on his behalf, from doing anything to cancel or in any other way adversely interfere with the applicants' ownership of the lease over the parcel of land known as KITALE MUNICIPALITY BLOCK 8/2016.

2. The grounds upon which the notice of motion is based are set out at the foot of the motion. However for the purposes of this judgment reference will be made to the grounds stated in **Part B** of the applicant's statement of facts. These are that: the Land Registrar (the 1st respondent) has committed procedural improprieties, that his actions amount to abuse of office, and that his actions are illegal and irrational.

3. In the applicants' words, the facts giving rise to the judicial review notice of motion are that: the 1st applicant is widow to one Jefitha George Odhiambo Dosio and the 2nd applicant is her son; that together, they are the administrators of the estate of the deceased; that the deceased was allocated land known as **Kitale Municipality Block 8/2016** initially referred to as **Residential Plot No. 20 - Kitale Municipality**. The deceased paid the monies required for completion of the allocation but then died soon afterwards. The applicants alleged that they have continued to pay rents and other outgoings to the said suit land as well to follow up on the issuance of a grant. It is averred that the survey of the land was undertaken and the results submitted to the Chief Land Registrar and the National Land Commission, and that the Chief Land Registrar approved of the same and prepared the grant document in respect of the land in the names of the applicants; subsequently, the lease documents were forwarded by the Chief Land Registrar to the 1st respondent for the registration at the local land registry at Kitale. A copy of that letter forwarding the lease notified the applicants and directed them to visit the Land Registrar to execute the lease document and collect their copy. When they visited the Land Registrar's office in Kitale on **21/6/2016** and presented their identification documents they were directed to pay **Kshs.2100/=** for opening a new register attestation and conveyance which they did. They then executed the lease documents and were informed to visit the office later to collect the lease documents. However upon going back to the land registry they were denied the same and they have never been availed the documents to date. They aver that the 1st respondent has, for a period of one and half years since the applicants signed the documents, refused to release the lease documents to them despite demand letters. The applicant alleged that they have recently learnt there is a 3rd party who is occupying and attempting to lay claim over the said parcel of the land purporting it to be an allocated to any person yet. It is alleged by the applications the 1st respondent is colluding with or facilitating 3rd parties to grab the said land parcel and that is the main motive for failure to release the lease documents. They are apprehensive if the title

documents are issued in a 3rd party name they may be subjected to protracted expensive and unjustifiable court battle with the 3rd party hence the prayers herein.

4. The respondents filed a replying affidavit dated **31/10/2018** sworn by Nelson Odhiambo the County Land Registrar. In that affidavit he admits that his office received the lease documents from Chief Land Registrar's office for registration; that it is normal to conduct a ground verification exercise to ascertain the position the land in question; that the Land Administrative Officer carried out the ground verification exercise in the presence of the applicants and found that the suit land was occupied by someone other than the ex-parte applicants and it was subsequently recommended that the matter be referred back to the head office at Nairobi. The report which is marked as **Exhibit 3** in the replying affidavit states that there is a permanent house on the suit land which does not belong to the applicants. The lease documents were therefore returned to Nairobi and the reason for their return was made clear in that report.

5. The applicants filed their submissions on the motion on **17/10/2018**. They cited **Republic -vs- Attorney General & Another Ex-parte Ongata Works Ltd [2016] eKLR, Pastoli -vs- Kabare District Local Government Council & Others** and **Republic -vs- Public Procurement Administrative Review Board and 2 Others 2015 eKLR, Republic versus Kenya National Examination Counsel, Exparte Gathenji & Others, Civil Appeal No. 266 of 1996 Section 12 of the Land Registration Act 2012, Section 4 of the Fair Administrative Action Act**, and aver that it is in the interest of justice that the orders be granted.

6. The respondents filed their written submissions **22/11/2018**. They cited **Municipal Council of Mombasa -vs- Republic & Umoja Consultant Ltd Civil Appeal No. 185 of 2011, Council of Civil Servant Unions -vs- Minister for the Civil Service 1985 AC 374, District Commissioner Kiambu -vs- Republic & Others Ex-parte Ethan Njau 1960 EA 109, Seventh Day Adventist Church East African Ltd -vs- National Land Commission 2017 eKLR, Republic -vs- Chief Land Registrar Ex-parte Dubai Bank Kenya Ltd 2015 eKLR Halsbury's Laws of England 4th Edition Volume 1 page 37 para 28, Western Fish Products -vs- Penwith District Council & Another 1981 ALL. ER page 204, Maritime Electric Company Ltd -vs- General Dairies Ltd QB 227 and Republic -vs- Judicial Service Commission Ex-Parte Pareno 2004 1KLR 2003.**

7. The issues that arise for determination in this matter are as follows:

(a) Are the applicants entitled to orders of mandamus?

(b) Should an order of prohibition issue?

8. As seen from the prayers in the motion, the order of mandamus sought is an order "compelling the 1st respondent to complete the registration of the applicants' grant of lease over the parcel of land known as **KITALE MUNICIPALITY BLOCK 8/2016** and to release the lease title/certificate thereof to the applicants forthwith or within a period of time to be prescribed by the court."

9. An order of mandamus was defined by Court of Appeal in the case of **Republic versus Kenya National Examination Counsel, Exparte Gathenji & Others, Civil Appeal No. 266 of 1996** as a command issuing from the 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*, so held the **Republic versus Kenya National Examination Counsel, Exparte Gathenji & Others, Civil Appeal No. 266 of 1996**; 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. The order, the court said, must command no more than the party against whom the application is made is legally bound to perform.

10. The applicants aver that an order of mandamus is a discretionary writ issued by the court to compel a public officer to do what they are under a duty to do. They cite the case of **Republic -vs- Attorney General & Another Ex-parte Ongata Works Ltd [2016] eKLR** where the decision in **Republic versus Kenya National Examination Counsel, Ex parte Gathenji & Others, Civil Appeal No. 266 of 1996** was quoted in the terms set out in the immediately preceding paragraph. In that case it was also stated as follows:

"In the English case of R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 All E.R. 741, at 743, Lord Goddard C. J. said -

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

In Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, it was stated as follows:

"The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings. The applicant should therefore have enforced the mandamus order using this method. There is only one rider - an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those

covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution.””

11. HWR Wade in his book **Administrative Law Oxford University Press, 5th Edition** states as follows regarding Mandamus:

“The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him.”

12. Later on he states as follows:

“...Lord Mansfield said in sweeping terms: (in R -vs- Barker 1762) 3 Burr.1265):

“It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one. ... The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right and no other specific remedy, this should not be denied.”

13. It is clear that mandamus will issue if the duty is in the nature of a public duty, affects the rights of the individual and there is no other specific appropriate remedy. The court can not also order the person it is directed at to perform more than he is able to perform. Mandamus will not therefore issue where to do or not to do the act giving rise to the application has been left in the discretion of the authority concerned.

14. In this case the Land registrar received the lease documents from the Chief Land Registrar. He was supposed to release the lease documents after the applicants had signed the same. It must be presumed that all the preliminaries to the allocation of the land to the deceased and the preparation of the lease documents had been undertaken before the lease documents were prepared.

15. It is stated in the replying affidavit that the refusal was well grounded as a report showed that there was another person in occupation of the suit land and that there was a house thereon which did not belong to the applicants.

16. The refusal to release the documents affected the rights of the applicants the harder question that arises lies in whether the release of such documents is a public duty. There is therefore need to determine whether the release of the documents was a matter within the discretion of the Land Registrar.

17. Whereas it is not in doubt that there is a lease that has been prepared in the names of the applicants. What is not clear is whether the Land Registrar decided against releasing them after the execution of the lease documents by the applicants and their registration. This information should have been revealed by the respondents which they did not. What the land registrar states in his replying affidavit is that there was, as a matter of policy and procedure, a ground verification exercise to ascertain the position of the land in question. The ground verification exercise did not reveal whether the land is registered in the name of another person or not, hence the applicant’s apprehension that the land may end up being registered in another person’s name.

18. In my view when the Chief Land Registrar has already issued a lease for its registration in the name of an individual it is clear that a decision has been made at a higher level than that of the office of the Land Registrar that the individual be registered as the lessee. It is not denied that applicants have been made to pay the requisite outgoings to facilitate the registration of the lease at the local registry. Survey of the land has been conducted. The point at which they find themselves is that of waiting for the release of the registered lease and nothing else, and as the applicant’s counsel calls it, “*the tail end of the process.*” It has not been disputed that the applicants have been paying the rents and rates in respect of the suit land.

19. Ordinarily third party occupation of unalienated government land which has already been identified for allocation an individual should raise issues as to how it came about, and in my view since no unregistered rights can vest upon an individual in respect of Government land such occupation should not bar the registration of title in the name of or its release to the applicant.

20. The applicants’ argument is that under **section 12** of the **Land Registration Act** the Land Registrar is charged with the public duty of registering land titles among other duties and that his failure to release the lease documents is a procedural impropriety, abuse of office, illegality and irrationality and a denial of the applicant’s right to hold property and to enjoy ownership thereof.

21. In the current case the Land Registrar may be said to be vested with only the duties of registering the lease and releasing it as instructed by the Chief Land Registrar. The Land Registrar does not peg his refusal to release the lease documents on any statutory provisions in his replying affidavit. The interest in the land passed to the applicants when the lease was prepared and executed by the parties. The applicants became lessees and they were entitled to the title documents. The applicants had a legitimate expectation that the lease would be subsequently released by the 1st respondent at the end of the registration process. That did not come to pass. This court concludes that the 1st respondent’s role in the matter at this stage was merely administrative.

22. **Section 4** of the **Fair Administrative Action Act** provides as follows:

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to Section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to -

- (a) attend proceedings, in person or in the company of an expert of his choice;
- (b) be heard;
- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

23. I do not find anything in the 1st respondent's response that even remotely suggests that the 1st respondent issued any response to communications, either oral or written, from the applicants as they awaited the release of the documents. The delay in releasing the title documents is said to have lasted for a period in excess of one and a half years hence occasioning the filing of these judicial review proceedings.

24. In detaining the title documents and in failing to issue a response setting out reasons for failure to release them, the 1st respondent violated the provisions of **Sections 4(1) and 4(2) of the Fair Administrative Action Act** set out above. The applicant's counsel's submission that the 1st respondent's conduct is in violation of the **Fair Administrative Action Act** is in my view correct.

25. In my view the response to the applicants' inquiries should have been made within a reasonable time. By the greatest stretch of imagination a delay of two years since the execution of the lease documents by the applicants can not be deemed to be reasonable time. It reeks of the very inefficiency impliedly decried by the **Fair Administrative Act** in its provisions in **section 4**.

26. The Land Registrar can not also be deemed to have acted in a procedurally fair manner. In my view whatever the situation obtained on the ground, it was necessary for him to note that the applicant's interests in the land had accrued. His position is rendered worse by the fact that no other person is alleged to be the holder of title over the same land such that the registration of the applicants would in effect be a double allocation. His task was to register the lease and release the same to the applicants as he communicated with the Chief Land Registrar over any other details that may have come to his notice during or after the registration of the lease.

27. I find that the applicant's judicial review Notice of Motion is merited. Accordingly I allow the application and grant the following orders.

(a) **An order of MANDAMUS compelling the 1st respondent to complete the registration of the applicants' grant of lease over the parcel of land known as KITALE MUNICIPALITY BLOCK 8/2016 and to release the lease title/certificate thereof to the applicants within 14 days hereof.**

(b) **The respondents shall bear the costs of these proceedings.**

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kuria for the respondents

N/A for the applicants

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019