



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ENVIRONMENT AND LAND CASE No. 463 OF 2017**

**IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT NO. 19 OF 2011**

**IN THE MATTER OF A JUDICIAL REVIEW APPLICATION FOR AN ORDER OF MANDAMUS UNDER SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE CHIEF LAND REGISTRAR..... RESPONDENT**

**Ex Parte**

**WILSON TANUI BARNO**

**STANLEY KINGA MWENDIA**

**ENOCK KIPRUTO SALBEI .....APPLICANTS**

**JUDGMENT**

1. Proceedings in this matter were commenced on 8<sup>th</sup> December 2017 when the ex parte applicants filed Chamber Summons dated 7<sup>th</sup> December 2017 at the environment and Land Court Milimani, Nairobi. The matter was serialised as ELC JR No. 50 of 2017 (Milimani). It was later transferred to this court and was assigned the above case number. Having obtained leave to commence judicial review proceedings, the ex parte applicants filed Notice of Motion dated 27<sup>th</sup> June 2018 in which they seek an order of mandamus against the respondent to compel him to produce the ex parte applicant’s official land records and original title for Land Reference Number 13287/45.

2. The application is supported by the Statement of Facts dated 7<sup>th</sup> December 2017, Verifying Affidavit sworn by Wilson Tanui Barno on 7<sup>th</sup> December 2017 as well as the affidavit sworn by Wilson Tanui Barno on 7<sup>th</sup> December 2017 in support of the Chamber Summons. He deposed that the ex parte applicants are the registered proprietors of the parcel of land known as Land reference Number 13287/45 (hereinafter “the suit property”) having purchased it from one Laban Kiplagat Kiptui through a sale agreement dated 10<sup>th</sup> November 1994. Sometime around November 2016, the ex parte applicants applied for a certificate of search in respect of the suit property at the central registry in Nairobi and they were informed that the parcel file was missing. They were therefore asked by the registry to prepare a Deed of Indemnity which they duly prepared and lodged. They were also asked to produce the original of their certificate of title and they duly complied. Despite their compliance and despite a demand letter being issued, the respondent has not produced the official land records and nor returned the original of the certificate of title in respect of the suit property. The deponent inter alia annexed a copy of the certificate of title, the sale agreement, application for the search, Deed of Indemnity dated 8<sup>th</sup> December 2016, application for registration of the indemnity and demand letter dated 27<sup>th</sup> June 2017.

3. Although served and although a litigation counsel from the Attorney General’s chambers attended court on one occasion, the respondent did not file any response to the application and was absent at the hearing. The ex parte applicants’ case is thus unopposed. In brief oral submissions, counsel for the ex parte applicants argued that the court has jurisdiction to review the respondent’s actions under **Section 86** of the **Land Registration Act** and **Sections 7, 8 and 9** of the **Fair Administrative Action Act, 2015**. That the continued withholding of the land records and the original of the certificate of title by the respondent without giving reasons is illegal, unreasonable and amounts to abuse of power.

4. I have considered the application, the statement of facts, the affidavits filed and the submissions. The ex parte applicants seek the judicial review order of mandamus. The guiding principles in such an application were restated by the Court of Appeal in **Buffet Park Ltd v**

**Republic & 2 others [2019] eKLR** as follows:

... the principles that guide the High Court in the exercise of judicial review Jurisdiction are as were aptly restated by this Court in *Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR* as follows:-

*“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature. See Prabhulal Gulabuland Shah –versus Attorney General & Erastus Gathoni Mlano, Civil Appeal No. 24 of (1985) (UR). Following the promulgation of the Kenya Constitution, 2010, judicial review is available as a relief to a claim of violation of the rights and fundamental freedoms guaranteed in the Constitution of Kenya 2010. See Child Welfare Society of Kenya –versus- Republic and 2 others, Exparte Child in Family Forces Kenya [2017] eKLR.”*

5. The scope and efficacy of an order of mandamus were discussed by the Court of Appeal in **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR** 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 and 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 made 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.*

6. The respondent is the Chief Land Registrar, a public office created under **Sections 12 and 13** of the **Land Registration Act** and given the responsibility of discharging functions under the said statute. His duties as specified under **section 14 (2) (b) and (c)** of the Act include setting standards for the land registries and generally supervising the registries. He is required under **section 7** of the Act to keep in the registries a land register, parcel files containing the instruments and documents that support subsisting entries in the land register. He is further required under **section S 9 (1)** of the Act to maintain the register and any document required to be kept under the Act in a secure, accessible and reliable format and to make the information in the register accessible to the public in terms of **section 10** of the Act. He therefore had a duty to keep the documents in respect of the suit property secure and available and to produce them when called upon. The same applies to the documents that he received from the ex parte applicants. He is further bound by the national values and principles of governance under **article 10** of the **constitution** which include good governance, integrity, transparency and accountability. The respondent's actions or failures to act are thus amenable to judicial review.

7. From the material placed on record, I note that a certificate of title in respect of the suit property was issued to Laban Kiptui on 2<sup>nd</sup> August 1990. Although the ex parte applicants claim to have bought the suit property through sale agreement dated 10<sup>th</sup> November 1994, there is no evidence that they became registered proprietors thereof. Nevertheless, I am persuaded that the ex parte applicants sought a certificate of search in respect of the suit property from the respondent and that they were informed that the registry's copy of the title was missing. Indeed, a handwritten note confirming the fact of the title missing is clearly visible in the copy of the application that was annexed. Equally, I am persuaded that the respondent also demanded and was given the original of the certificate of title in respect of the suit property and that the respondent has not returned it. This is despite the fact that the respondent received a demand letter on 27<sup>th</sup> June 2017 clearly calling upon him to return the documents. No explanation has been offered for the delay or failure to produce the records and the original of the certificate of title in respect of the suit property. The particular certificate of title can only be the one in the name of Laban Kiptui since it has not been shown that any other title exists.

8. In view of the foregoing, I am persuaded that the ex parte applicants have made a case for granting the orders the order of mandamus. I therefore enter judgment in favour of the ex parte applicants and make the following orders:

a) An order of mandamus is hereby issued against the respondent compelling him to produce to the ex parte applicants the original of the certificate of title in respect of Land Reference Number 13287/45 and further compelling him to produce to the ex parte applicants the parcel file containing the instruments and documents that support subsisting entries in the land register in respect of Land Reference Number 13287/45.

b) The ex parte applicants are granted costs.

9. Judgment in this matter was to be delivered on 13<sup>th</sup> March 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of July 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kimani holding brief for Mr Oyugi for the ex parte applicants

No appearance for the respondent

Court Assistants: Beatrice & Lotkomoi