



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA AT NYAHURURU**

**JUDICIAL REVIEW No 7 OF 2018**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: SECTIONS 3, 4, 7, 9, AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, ACT NO. 4 OF 2015**

**IN THE MATTER OF: ARTICLES 10 AND 60(1) OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: SECTIONS 7, 134(6), 134(7), 134(8) AND 135(1) (C) OF THE LAND ACT, ACT NO. 6 OF 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND SETTLEMENT FUND BOARD TRUSTEES.....1<sup>st</sup> RESPONDENT**

**DIRECTOR OF LAND ADJUDICATION & SETTLEMENT..2<sup>nd</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT**

**OFFICER NYANDARUA COUNTY.....3<sup>rd</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....4<sup>th</sup> RESPONDENT**

**AND**

**FLORA MWENJA (suing as the representative to the estate of**

**EZEKIEL NGURE MWENJA (DECEASED).....APPLICANT**

**JUDGEMENT**

1. By Notice of Motion dated 1<sup>st</sup> April 2019, *the ex parte* Applicant herein, Flora Mwenja (wrongly described in the title as the applicant), substantially seeks an order of *Mandamus* against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein, to issue to the *ex parte* Applicant the allotment letter and/or any title documents to the suit property. She of course also seeks the ancillary order for provision of costs.

2. Of importance is to note that the Respondents herein, after entering appearance on the 17<sup>th</sup> December 2018 upon service of the chamber summons filed under a certificate of urgency where the Applicant sought leave to file and/or apply for an order of *Mandamus* against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, they neither filed their response to the application nor appeared to prosecute the same wherein the leave so sought was granted.

3. The Applicant then filed their substantive application but again, there was no response by the Respondents upon service. Directions were taken that the application be disposed of by way of written submissions.

**Applicant's Case**

4. According to the Applicant's statement of facts, she applied to be allocated land to the predecessor of the 1<sup>st</sup> Respondent (Settlement Fund Trustee) sometime in the year 1985 wherein the said request was acceded to and the Applicant was instructed to pay an initial deposit of Ksh. 325/= being payment for registration and conveyancing fees for parcel No.713 Mawingo Salient Settlement Scheme, which monies were paid on the 28<sup>th</sup> February 1985 wherein the deceased was issued with a receipt number Z455202.
5. That sometime in the year 1994 vide a letter dated the 29<sup>th</sup> November 1994, the Nyandarua District Land adjudication settlement officer wrote to the Director of Settlement confirming that the suit property had been allocated to the Applicant and further directed that the documents for the allotment of the parcel of land should be prepared in favour of the Applicant.
6. The Director of Land Adjudication and Settlement had then failed, refused and/or ignored to process the documents more specifically the allotment letter in favour of the Applicant despite the Applicant's valiant efforts to have the Respondents herein process the documents, more specifically, the allotment letter in favor of the Applicant.
7. That vide letters dated the 25<sup>th</sup> November 2013 and 1<sup>st</sup> July 2015, the third Respondent had confirmed to the 2<sup>nd</sup> Respondent that the Applicant had complied with all the conditions of getting an allotment letter and also confirmed that vide an official search certificate, that the suit property was still registered in the name of the 1<sup>st</sup> Respondent's predecessor and therefore advised the 2<sup>nd</sup> Respondent to issue out an allotment letter to the Applicant.
8. The 2<sup>nd</sup> Respondent has still failed to issue out the necessary documents to the Applicant despite all the records indicating that he should be issued with documentation to process the title deed to indicate his proprietorship over the parcel of land.
9. That the actions of the Respondent were in contravention of the provisions of Articles 10 and 60(1) of the Constitution and Section 134 of the Land Act and more specifically:
  - i. That the actions of the Respondent were in violation of the Applicant's dignity as they threatened to take away the Applicant's source of income by refusing to grant him the title to his property which was his security.
  - ii. That the Respondents' actions were not transparent and accountable.
10. That the Respondents, being public offices had failed to carry out their mandate as per the laws of the land. Infact, from the facts herein it was clear that the Applicant had complied with all the necessary and legal procedures to enable him be granted and/or to allow all the Respondents herein to issue him with the allotment letters to the suit subject when especially after his application had been allowed and the Applicant had been shown the suit parcel.
11. That after the confirmation of the allotment of the suit property, the Applicant had met some conditions set up by the 1<sup>st</sup> Respondent which conditions were to enable the Respondent process the Applicant's allotment letter into a title deed. The conditions met by the Applicant included:
  - i. The suit property filed had its boundaries clearly marked out.
  - ii. The Applicant had constructed two dwelling units on the suit property
  - iii. The Applicant had also utilized around four acres of the suit property for farming.
12. This conditions had been confirmed by an officer of the 2<sup>nd</sup> Respondent and the same had been communicated to the 1<sup>st</sup> Respondent vide letters dated 1<sup>st</sup> July 2015 and 25<sup>th</sup> November 2013. Despite the fulfillment of these conditions, the 1<sup>st</sup> Respondent still refused to issue the Applicant with the necessary documents to allow him process his allotment letter into a title deed so as to be lawfully registered as proprietor of the suit property.
13. That the Applicant made several inquiries by physically going to the first and second Respondent's offices before he decided to make formal complaints and follow ups. This too did not yield any results to which the Applicant decided to file the present Judicial Review seeking for orders of Mandamus to compel the Respondents to issue him with the title documents over the suit property.
14. That the Applicant had satisfied the court that the action he sought to compel the Respondents to perform was a duty under which they were to perform whether at common law or by statute. That it was the duty of the 1<sup>st</sup> Respondent to issue the Applicant herein with a letter of allotment over the suit property to enable the Applicant process the allotment into a title from the lands registry. This duty was imposed upon the 1<sup>st</sup> Respondent by Section 134(6) of the Land Act.
15. That vide a letter dated the 1<sup>st</sup> July 2015, the suit land had already been surveyed by the Respondent and it was clearly ready to be allotted. That although the letter dated 25<sup>th</sup> November 2013 indicated that the suit property had already been documented to one Michael M. Gichuki, a search by the Applicant at the land registry revealed that the land was still registered in the name of the Settlement Fund Trustee and that the said Michael M. Gichuki owed the Settlement Fund Trustee of the sum of Ksh. 50,000. The 1<sup>st</sup> Respondent comments herein had the ability to recover the debt owing by taking back the possession of the property under the provisions of Section 174 of the Agriculture Act.
16. The Applicant relied on the decided case of **Kenya National Examinations Council vs. Republic of ex parte Geoffrey Gathenji Njoroge & Others [1977] eKLR** to submit that from the evidence herein above stated, the Respondent had a statutory duty to provide the

Applicant with the allotment documents over the suit property and they had failed to perform their duties and thus this honorable court could compel them to perform their statutory duty.

17. They also relied on the case of **Mureithi & 2 Others vs. Attorney. General & 4 Others [2006] 1KLR** to submit that the Respondents herein had no discretion on whether or not to issue the allotment documents to anyone who had complied with the requirements after making the application because the said document was to be issued as of right.

18. That the failure of the Respondents to conduct their mandatory duty clearly affected the fundamentally protected right of the Applicant to own property to his detriment. That there was no other avenue that could be used by the Applicant to obtain the allotment documents to the suit property. This duty was statutorily bestowed on the Respondents herein only and that no other bodies could carry out the said mandate.

19. That the Applicant had satisfied the conditions and all principles of being granted the order of Mandamus and it was therefore their humble prayer that the judicial review application be allowed and the order of Mandamus compelling the Respondents to issue the ex parte Applicant with the allotment document to the suit property be granted.

### **Determination**

20. I have 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.

21. It is of importance to point out that the deceased **E M NGURE** filed suit against the Respondents herein in Nyahururu Environment and land being **E M Ngure v District Land Adjudication and Settlement Nyandarua & 2 Others [2017] eKLR** wherein he sought for the following orders:

- i. A declaration that he was the legitimate owner of the parcel of land Plot No. 713 Mawingo settlement scheme
- ii. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be ordered to transfer and issue the title deed for Plot No. 713 Mawingo settlement scheme.
- iii. The plaintiff further sought for orders that the 2<sup>nd</sup> Defendant be ordered to sign transfer forms and all transfer documents for the plot No. 713 Mawingo settlement scheme in favor of the plaintiff and in default the Deputy Registrar of the court to sign the same to facilitate the transfer.

22. The Plaintiffs case was dismissed for reasons that:

*‘.....the plaintiff failed to tender sufficient evidence in court of the allotment of No. 713 Mawingo settlement scheme, it cannot therefore be said that he holds a lease over the same so as to obtain an order from this court to compel the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to transfer and issue the title deed for Plot No. 713 Mawingo settlement scheme to him’.*

23. The court of Appeal in the case of **James Njuguna Chui vs John Njogu Kimani [2017] eKLR** held that

*The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spectre of endlessly repetitive litigation hanging over their heads like the sword of Damocles. It also protects the court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated courts but, worse, by having contradictory decisions emanating from the court or courts over the same issue, courtesy of the repeat litigation.*

24. Upon dismissal of the above captioned suit, the Plaintiff’s Representative, the ex-parte Applicant herein has now decided to institute Judicial Review proceedings against the Respondents herein seeking the same orders in a matter that was between the same parties based on the same subject suit and having been decided and finalized by a competent court having jurisdiction.

25. I therefore find that this Application is Res judicata and in contravention of the provisions of Section 7 of the Civil Procedure Act Cap 21 which provides that:

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”***

26. I find that this court has no jurisdiction to hear a matter that has thus been ousted by the operations of Section 7 of the Limitations of Actions Act and the only recourse in the instant case is to dismiss the suit. However in case I am wrong at arriving at the decision that this application is Res judicata, I shall consider the following;

27. It is the Applicant’s case that the after he had made an application to be issued with an allotment letter after complying with all the conditions and taking possession of the suit land being plot No. 713 Mawingo Salient Settlement Scheme thereof, the 1<sup>st</sup> Respondent had, failed to issue him with a letter of allotment for the suit property despite the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents having confirmed that he had complied

with all the conditions to enable him get the allotment letter.

28. In the case of **Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR** the Court of Appeal held that 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. **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."*

34. The Court of Appeal in the decided case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** inter alia held 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 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...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."*

35. As was held in **Rukaya Ali Mohamed vs. David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004** that once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. No such allegation has been made by the Respondents herein.

36. 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 not necessary, or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative order 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 realized. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000**.

37. In this case, there was no evidence that the Applicant was issued with the allotment letter which he now seeks the order of Mandamus to compel the Respondents to issue him with one. The question then arises as to what conditions he was basing his allegations of compliance on so as to be issued with the letter of allotment. Accordingly, it is not possible to find that the Applicant had met the conditions specified in the letter of allotment with respect to the said property. In the premises there is no basis upon which I can find that the Applicant has shown that he has a legal right, or substantial interest the performance of which must be done by the Respondents. It becomes clear upon consideration of the entire scope of the order of Mandamus that it is not meant to allow the courts to micro-manage the affairs of other government agencies or inferior tribunals.

38. Accordingly, in the exercise of my discretion I decline to grant the orders sought in the Notice of Motion dated 1<sup>st</sup> April 2019 which application is dismissed with no order as to costs.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of November 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**