



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 31 OF 2017

REPUBLIC - APPLICANT

AND

THE ATTORNEY GENERAL - 1ST RESPONDENT

THE CHIEF MAGISTRATE'S COURT MURANG'A - 2ND RESPONDENT

MWANGI MACHARIA WAGUNYA - 3RD RESPONDENT

RULING

1. The Applicant's application is brought by way of a Notice of motion dated 3/10/2017 and amended on 6/11/17 seeking the following Orders ;

a. An Order of mandamus to issue against the Chief Magistrate's Court at Murang'a compelling it to quash/ vacate/set aside the Orders dated 23/11/12 in L.D.T No. 51/09

b. Costs for the application.

2. The application is premised on the following grounds;

a. The Applicant in the year 2008 bought land parcel No. LOC 8/Matharite /1580 (the suit land) from one Mwangi Macharia Wagunya who had acquired the land through succession cause No. 409 of 1986.

b. That later in the year 2009 Paul Macharia Wagunya filed a suit in the tribunal at Kahuro against Mwangi Macharia claiming a share of the suit land who by that time had already transferred the suit land to the Applicant herein.

c. The Applicant avers that both Paul Macharia Mwangi and Mwangi Macharia Wagunya were well aware that the suit land had already been sold and transferred to the Applicant herein.

3. That in L.D.T case No. 51 of 09 an award was given on 28/7/91 as follows;

a. Land Parcel no. LOC 8/Matharite/ Kiaheho/1580 is ancestral land and the Defendant therein(Mwangi Macharia) should give the plaintiff therein(Paul Macharia Wagunya) the land he was selling to him

b. The plaintiff (Paul Macharia Wagunya) to pay the Defendant Kshs. 7,151/- once the land is

transferred to him as agreed.

4. That the award was then adopted as the judgment of the Court in the Principal Magistrate's Court at Murang'a on 30/08/91 and later an Order was extracted from that judgment on 23/11/12.

5. The Applicant contends that that judgment and subsequent Orders were erroneous as the relevant parcel of land had already been sold and transferred to the Applicant herein. Further that the judgment and Order still remains unexecuted to date. That the subject parcel of land was at the time of making the award registered in the name of the Applicant and is still is to date.

6. The Applicant has annexed a draft consent signed by himself and the 3rd Respondent herein to quash the Order dated 23/11/12 in Murang'a Principal Magistrate's Court L.D.T 51/09.

7. In a supporting affidavit to the ex-parte application filed on 15/06/17 the Applicant deposes that Paul Macharia Wagunya is already deceased therefore the judgment in L.D.T 51/09 cannot be executed. Additionally, since that judgment remained unexecuted for a period of more than 12 years it lapsed. That the subdivision and issuance of new titles happened in 08 when the suit land was registered in the name of the Applicant herein. That the balance of Kshs. 7151/- had been foregone by Paul Macharia Wagunya in succession cause No. 409/86. That the suit land has been and is still in the name of the Applicant herein.

8. The 1st and 2nd Respondents entered appearance on 1/11/17 and filed their grounds of opposition on 15/11/17 to the wit broadly;

a. That the grounds upon which the application is premised are grounds of appeal as opposed to judicial review.

b. That there was no specific duty owed to the Applicant for an Order of Mandamus to issue.

9. Parties choose to canvas the application by way of written submissions.

10. The Applicant in his submissions opposes the Respondent's contention that the grounds in the application relate to an appeal and maintains that his application is proper as it seeks to compel the Chief Magistrate to vacate its Orders dated 23/11/2012. He submits that by the time the judgment and Orders were issued the subject parcel of land had already been sold and transferred to the Applicant vide an agreement dated 8/5/08, therefore Mwangi Macharia had nothing to transfer to Paul Macharia as Ordered. That the magistrate had no powers to set aside or vary the judgment of the L.D.T hence it was adopted as is. He brings to the attention of the Court that the Applicant herein was not a party to the L.D.T suit therefore he could not lodge an appeal against the decision. He avers that the sale agreement (annexed to the application) between the plaintiff and Defendant in the L.D.T case was void as the plaintiff had not acquired letters of administration on the estate of their deceased father in whose name the subject suit land was registered in. That the agreement also lapsed as consent of the Land Control Board was not obtained within the stipulated time. He urged the Court to disregard the grounds of opposition raised by the 1st and 2nd Respondents.

11. The 1st and 2nd Respondents in their submissions are largely expounded in their grounds of opposition and have invited the Court to look into several precedent setting decisions on judicial review. They submit that as opposed to appellate jurisdiction which looks at the merits of the decision, in judicial review the Court looks at the decision making process in Order to ascertain if there was any illegality, irrationality and procedural impropriety.

Determination

12. The purpose of Judicial Review is to check that public bodies and officers do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public good. Where a public body exceeds its jurisdiction or acts unfairly or disregards the principles of natural justice, then the very

act of the public body or officer must be scrutinized.

13. The Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001** held;

“Judicial review is concerned with the decision making process not with the merits of the decision itself; the Court would concern itself with such issues as to whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account the relevant matters or did take into account irrelevant matters... the Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision”.

14. Mandamus on the other hand is an Order to compel performance of a duty. To succeed in seeking an Order for mandamus one must show the existence of a statutory duty and that that duty has not been performed. I rely on the dictum of Justice G V Odunga in **Republic Vs The Commissioner of Lands & Anor Exparte Kithinji Murugu M’Agere Nairobi Misc App No 395 of 2012** where he stated;

“The first issue is when can a Court grant an Order of *Mandamus* and what is an Order of *mandamus*? In **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 (1970) EA 543**, it was held that:

“Mandamus is essentially English in its origin and development and it is therefore logical that the Court should look for an English definition. Mandamus is a prerogative Order issued in certain cases to compel the performance of a duty. It issues from the Queen’s Bench Division of the English High Court where the injured party has a right to have anything done, especially when the obligation arises out of the official status of the Respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. Mandamus is neither a writ or course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not do something; the duty itself being of an imperative nature.”

15. In this particular application, the Chief Magistrate adopted an award of Kahuro Land Dispute Tribunal as an Order of the Court. The judicial officer is or was mandated as such under the Repealed Land Dispute Tribunal Act. The Applicant has not explained what the judicial officer failed to perform or what public duty she/he failed to perform. The application to my mind is incompetent.

16. In the end the application is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 15TH DAY OF FEBRUARY 2018.

J.G. KEMEI

JUDGE