



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. MISC APPLICATION CASE NO. 31 OF 2014

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

THE CLERK, MBEERE COUNTY COUNCIL.....3RD RESPONDENT

THE COMMISSIONER OF POLICE.....4TH RESPONDENT

EX PARTE.....DIOCESE OF EMBU REGISTERED TRUSTEES

AND

NJAGI NJUGUNA MAVEU ALIAS KIMATHERE.....1ST INTERESTED PARTY

FREDRICK NJUGUNA NJAGI.....2ND INTERESTED PARTY

JUDGEMENT

1. Pursuant to leave obtained under the former Order LIII of the Civil Procedure Rules, the *ex-parte* Applicant (hereinafter referred simply to as the “Applicant”) sought the following orders against the Respondents;

i. An order of mandamus to compel the Commissioner of Lands to consider and issue a letter of allotment to the Applicant in respect of parcel of trust land known as Title Number Evurori/Evurori/1067 allocated by the Embu County Council to the Diocese of Meru registered trustees in 1979 who subsequently assigned the same to the Applicant for the construction of Ishiara Secondary School.

ii. An order of mandamus to compel the Chief Land Registrar to consider and issue a title deed to the Applicant in respect of parcel of land known as Title Number Evurori/Evurori/1067.

iii. An order of mandamus to compel the Clerk of the Mbeere County Council to remove the caution he entered on the 7th of February 2006 claiming beneficiary ownership over the parcel of land known as Title Number Evurori/Evurori/1067.

iv. An order of mandamus to compel the Chief Land Registrar to remove the restriction it entered on the 5th of April 2006 against any dealings on the parcel of land known as Title Number Evurori/Evurori/1067.

v. An order of prohibition to stop and prohibit the Kenya Police, Divisional Headquarters Siakago from entering, interfering, trespassing or building any structures or constructing offices on the parcel of parcel of land known as Title Number. Evurori/Evurori/1067.

vi. An order of mandamus to compel the Commissioner of Police on behalf of the Kenya Police Divisions/ Headquarters’ Siakago to remove any structures, or buildings erected on the parcel of land known as Title Number Evurori/Evurori/1067.

vii. Any other or further and consequential orders and/or directions be given.

2. The said motion was grounded upon the statutory statement and the chamber summons for leave to seek the judicial review orders. It was

the Applicant's case that the defunct County Council of Embu had recommended allocation of *Title No. Evurori/Evurori/1067* (hereinafter known as the "suit property") to it for the purpose of establishing a secondary school thereon way back in 1979. The 1st Respondent had, however, failed to issue a letter of allotment for the suit property whereas the 2nd Respondent had also failed to issue it with a title deed and instead registered a restriction against the suit property. The 3rd Respondent was sued because he had placed a caution on the suit property on the basis that the property was trust land falling within the jurisdiction of the defunct County Council of Mbeere. The 4th Respondent was sued for setting up a police post or police station on part of the suit property with the concurrence of the 3rd Respondent.

3. The 1st and 2nd Respondents do not appear to have filed any responses to the said application for judicial review. The 3rd Respondent filed a replying affidavit sworn by Daniel Twala on 15th July 2008 and a further affidavit sworn by Ainea Andikwa on 24th February 2009.

4. The 3rd Respondent conceded that the suit property was trust property which was still registered in the name of the County Council of Embu. However, upon the creation of the County Council of Mbeere in 1996, the suit property fell within the jurisdiction of the latter hence it vested in it. It was further stated that the offer of the suit property by the defunct County Council of Embu lapsed since it was never perfected. It was further stated that part of the suit property had been allocated to the 4th Respondent who had established thereon a police station.

5. The 4th Respondent filed an affidavit styled "supplementary affidavit" sworn by Tom Odero OCS Mbeere Division on 4th November 2011 in opposition to the said application for judicial review. He stated that the offer of land by the defunct County Council of Embu was conditional upon approval by the District Education Board and District Development Committee among other conditions and there was no indication of the conditions having been satisfied.

6. It was further contended by the 4th Respondent that any offer for a lease in excess of 7 years by a local authority required the consent of the Minister under section 144 (5) of the Local Government Act (Cap 265) then in force. It was, therefore, contended that the actions of the County Council of Embu could not have been lawful unless the offer was a period not exceeding 7 years. It was further contended that any offer of land or recommendation of allotment by the County Council of Embu was not binding on the 1st Respondent under section 53 of the Trust Land Act (Cap 288) (now repealed)

7. With leave of court, the 1st and 2nd interested parties were joined in these proceedings. They filed a replying affidavit sworn by Fredrick Njuguna Njagi on 2nd June 2008. They asserted to have a proprietary interest over the suit property. They claimed to have resided on the suit property since 1947 and that the County Council of Embu was erroneously registered as proprietor. It was indicated that there were some pending civil suits between the interested parties and the aforesaid two local authorities. They, therefore, opposed the application for judicial review.

8. The parties herein appear to have agreed to dispose of the said application for judicial review through written submissions. The record shows that the Applicant filed its submissions on 4th June 2009, the 3rd Respondent filed on 14th April 2009 whereas the interested parties filed theirs on 29th May 2009. There is no indication of the 1st and 2nd Respondents having filed any submissions.

9. The Applicant's advocate submitted that the defunct County Council of Embu approved the allocation of the suit property to the Diocese of Meru Registered Trustees in 1979 and requested the 1st Respondent to issue a letter of allotment to that effect. It was submitted that when diocesan boundaries were altered, the Diocese of Embu became the beneficial owner as a result of an *assignment* by the Diocese of Meru Registered Trustees. However, no instrument of assignment was exhibited in the proceedings.

10. It was submitted that the 1st Respondent had failed to act on the recommendation or request by the defunct County Council of Embu to issue a letter of allotment to the Applicant. It was further submitted that notwithstanding the division of the County Council of Embu into two with the resultant creation of the County Council of Mbeere, the recommendation for allotment was lawful and binding on the 1st Respondent.

11. The Applicant's advocates submitted that the 1st Respondent had failed or neglected to perform his duty of managing trust land under section 53 of the Trust Land Act (now repealed) by failing to consider the recommendation for issuance of a letter of allotment to the Applicant. The Applicant relied on the case of ***Republic Vs Kenya National Examination Council ex-parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR.***

12. The 2nd Respondent was faulted for registering a restriction against the suit property which, it was submitted, was illegal and an infringement of the Applicant's legal rights. It was submitted that the caution by the 3rd Respondent over the suit property was illegal and made in bad faith because the Applicant had beneficial ownership of the suit property.

13. The 3rd Respondent submitted, *inter alia*, that the Applicant had no registrable interest in the suit property; that the 1st Respondent was not legally bound to issue a letter of allotment; that the orders sought against the 4th Respondent were not available by virtue of section 16 of the Government Proceedings Act. It was further submitted that there was inordinate delay in filing the instant application and that there was no bad faith in cautioning the suit property.

14. The court has considered the application for judicial review, the statutory statement, verifying affidavit and annexures thereto, the replying affidavits and submissions on record. The main question for determination and upon which all the prayers sought are hinged is one, that is, whether the Applicant is legally entitled to the allocation of the suit property which it is conceded is trust land.

15. It must be borne in mind that the proceedings herein are judicial review proceedings and as such any reliefs can only be granted on the well established grounds for judicial review known to law. Such grounds include; illegality, ultra vires, unreasonableness, irrationality,

abuse of power or discretion, breach of the rules of natural justice, etc. See *H.W.R Wade & C.F. Forsyth, Administrative Law, 10th Ed, (2009) Oxford University Press.*

16. I have perused the application for leave to apply for judicial review including the statutory statement. The Applicant has not come out clear on what specific grounds the reliefs are being sought. The Applicant has simply given a lengthy and convoluted story about its pursuit for the suit property for nearly 30 years and how the 1st Respondent had failed to issue a letter of allotment.

17. It is not sufficient for an Applicant to come to court and throw his entire story before the court and state: here is my story; please give me the remedies I have sought in my papers! It is not enough for the Applicant here to state that the 1st Respondent has failed to act on the request or recommendation of the defunct County Council of Embu. It must be demonstrated that the 1st Respondent was under a *legal* or *statutory* duty to act on the recommendation. It must be demonstrated that a refusal to issue a letter of allotment was not merely an exercise of discretion but a violation of some recognized legal right or principle of fair treatment.

18. In the case cited by the Applicants ie *Republic Vs Kenya National Examination Council ex-parte Geoffrey Gethenji Njoroge & 9 Others* (supra) it was held regarding the order of mandamus as follows;

“The next issue we must deal with is this; what is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURYS LAWS OF ENGLAND 4th Edition, volume 1 at page 111 from paragraph 89. That learned treatise says:-

“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...

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 to be carried out in a specific way.” (emphasis added).

19. I have quoted most of the passages on *mandamus* cited by the Court of Appeal in the KNEC case because they were left out by the Applicant’s counsel in his written submissions. 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. So, where the duty- bearer has a discretion to act one way or another, an order of *mandamus* cannot issue to compel him to act in a particular way, or to the liking of the Applicant.

20. The court is satisfied from a reading of *section 53 of the Trust Land Act (Cap 288)* (now repealed) that the obligation which was vested in the 1st Respondent was to administer trust land on behalf of the County Councils gave him a discretion to execute grants, leases, licences or other documents in relation to trust land. There was no legal obligation on the 1st Respondent to alienate trust land upon every request from a local authority. In the circumstances, the court finds no basis for granting an order of *mandamus* against the 1st Respondent as framed or at all.

21. There is also one intriguing aspect about this suit. Since the adoption of the Constitution of Kenya 2010, the responsibility of managing public land on behalf of the National and County Governments was vested in the National Land Commission by virtue of *Article 67 (2) (a)* thereof and the *National Land Commission Act*. The office of the Commissioner of Lands is no longer in existence in the Republic of Kenya. It is, therefore, unclear if the Applicant has ever engaged the National Land Commission in the past 7 years or so.

22. Since the basis of the Applicant’s prayers for judicial review has failed, then it would follow that there would be no basis for consideration or granting of prayer Nos 2, 3, 4, 5, 6 and 7 of the notice of motion dated 11th June 2007.

23. The upshot of the foregoing is that the court finds no merit in the Applicant’s notice of motion dated 11th June 2007 and the same is hereby dismissed with costs to the 3rd and 4th Respondents only.

24. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 12TH day of APRIL, 2018

In the presence Ms Nakato holding brief for Mr Nyiha for the *ex parte* Applicant, Mr Momanyi holding brief for Mr Mayaka for the Attorney General for the 1st, 2nd and 4th Respondents but in the absence of the 3rd Respondent and the Interested parties.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

12.04.18