



**REPUBLIC OF KENYA**

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

**HC. MISC. APPL. NO. 129 OF 2015**

**REPUBLIC**

**VERSUS**

**THE LAND ADJUDICATION & SETTLEMENT**

**OFFICER, NAIVASHA .....1<sup>ST</sup> RESPONDENT**

**BERNARD SIAMETO SOIYANDET..... 2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR, LAND ADJUDICATION &**

**SETTLEMENT DEPARTMENT .....3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL .....4<sup>TH</sup> RESPONDENT**

**JOHN CHEGE NDUNGU .....EX PARTE APPLICANT**

**JUDGMENT**

1. By Notice of Motion dated 26<sup>th</sup> June 2015, the ex parte applicant seeks the following orders:

- 1. An order of Mandamus compelling the 1<sup>st</sup> Respondent to cause the registration and transfer of all that parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme in favour of the applicant.***
- 2. An order of Mandamus compelling the 1<sup>st</sup> Respondent to cause the registration and transfer of all that parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme in favour of the applicant.***
- 3. An order of Mandamus compelling the 1<sup>st</sup> and 3<sup>rd</sup> respondents declare the applicant the bona fide owner of all that parcel of land known as plot No. 508 Moi Ndabi Settlement Scheme.***
- 4. An order of prohibition restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from transferring all that parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme to any person other than the applicant.***
- 5. A conservatory order restraining any person from interfering with the said parcel of land pending the hearing and determination of the application herein.***

**6. A declaration that the applicant is the bona fide owner of all that parcel of land known as plot No. 508 Moi Ndabi Settlement Scheme.**

2. The application is brought under Order 53 rule 3 of the Civil Procedure Rules and is supported by an affidavit sworn by the ex parte applicant. It is deposed in the affidavit that by a sale agreement dated 20<sup>th</sup> December 2010 the ex parte applicant bought a parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme (the suit property) from the 2<sup>nd</sup> respondent at a consideration of Kshs.300, 000/= which sum was paid in cash to the 2<sup>nd</sup> respondent. Both of them proceeded to the Naivasha offices of the 1<sup>st</sup> respondent whereupon the 2<sup>nd</sup> respondent used the money received from the ex parte applicant to discharge all his liabilities with the Settlement Fund Trustees.

3. While still at the said office, the ex parte applicant and the 2<sup>nd</sup> respondent signed a transfer form in respect of the suit property and left it with the 1<sup>st</sup> respondent to process it and issue the ex parte applicant with a Title Deed. Despite reminders and demands, the 1<sup>st</sup> respondent has refused and/or neglected to issue the ex parte applicant with title documents in his name. Sometime in February 2014, the 2<sup>nd</sup> respondent re-entered the land and has refused to vacate. The ex parte applicant believes that the 1<sup>st</sup> and 2<sup>nd</sup> respondents have colluded to deny him his rights to the land. At a meeting held on 7<sup>th</sup> March 2014, the 1<sup>st</sup> respondent openly sided with the 2<sup>nd</sup> respondent and suggested that the ex parte applicant accept a refund of the purchase price.

4. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the application through a replying affidavit sworn by Mary Akoth, the Naivasha Sub-county Land Adjudication and Settlement Officer. She deposed that the suit property was allocated to the 2<sup>nd</sup> respondent. He fully paid for the plot and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents await for discharge of charge and transfer documents. She added that transfer of the plot to the ex parte applicant has not been effected since the necessary transfer documents for application for consent of Land Control Board were never completed. Her office is ready to complete the transfer so long as the parties avail the requisite documents.

5. In a supplementary affidavit sworn on 23<sup>rd</sup> August 2017 the ex parte applicant deposed that the land was allocated by Settlement Fund Trustees and is therefore exempted from the requirement of a consent from Land Control Board.

6. The 2<sup>nd</sup> respondent neither filed any replying affidavit nor participated in the hearing of the Notice of Motion despite attending court on 15<sup>th</sup> July 2015 and being granted 30 days within which to file and serve his replying affidavit.

7. The court ordered that the application be argued by way of written submissions. Accordingly, the ex parte applicant filed submissions on 10<sup>th</sup> November 2017. None of the respondents filed written submissions. Citing the provisions of Section 6(3) (b) of Land Control Act, and the case of **Joel Mutunga Ngundo –vs- Thomas Munguti Nzengu [2007] eKLR**, counsel for the ex parte applicant argued that no consent from the Land Control Board was required to effect the transfer.

8. Regarding the prayer for mandamus, it was submitted on behalf of the ex parte applicant that the 1<sup>st</sup> respondent's reliance on the provisions of the Land Control Act to demand consent of the Land Control Board is unwarranted. Accordingly, the court was urged to issue an order of mandamus to compel the 1<sup>st</sup> and 3<sup>rd</sup> respondents to perform their public duty. Regarding the prayer for an order of prohibition, counsel for the ex parte applicant argued that it is necessary to grant the order to stop the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from transferring the suit property or dealing with it contrary to procedure and rules of nature justice. In support of the submissions on the judicial review orders counsel for the ex parte applicant cited the case of **Kenya National Examination Council v Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**. Finally, it was also submitted for the ex parte applicant that a declaration should issue that the ex parte applicant is the beneficial owner of the suit property.

9. I have anxiously considered the application, the affidavits filed, the submissions as well as the authorities cited. Two issues emerge for determination: Firstly, whether the consent of Land Control Board was necessary and secondly whether the ex parte applicant is entitled to the remedies sought.

10. To determine whether consent of Land Control Board was needed, it is necessary to examine the genesis of the dispute: the transaction between the ex parte applicant and the 2<sup>nd</sup> respondent as stated in the sale agreement dated 20<sup>th</sup> December 2010. It is stated in the said agreement that the suit property was sold to the ex parte applicant at a consideration of Kshs.300, 000/=. The parties to the agreement agreed to take all necessary steps to ensure successful completion of the transaction. Though the ex parte applicant is blaming the 1<sup>st</sup> respondent for the current state of affairs, the 1<sup>st</sup> respondent has taken the position that the parties to the sale agreement need to move the transaction forward by providing the “requisite transfer documents” which according to her had been requested for.

11. From the material placed before the court, it is clear that the transaction between the ex parte applicant and the 2<sup>nd</sup> respondent had virtually been concluded: a sale agreement had been signed and transfer deposited with the 1<sup>st</sup> respondent. Indeed, the 2<sup>nd</sup> respondent despite attending court once and being given a chance to file an affidavit to dispute the ex parte applicant’s version of events had not done so. The 1<sup>st</sup> respondent has not denied having received the transfer document. All that the 1<sup>st</sup> respondent has stated is a general statement that she awaits “requisite transfer documents”. On the face of her not specifically denying receipt of the ex parte applicant’s and 2<sup>nd</sup> respondent’s transfer document, the 1<sup>st</sup> respondent needed to be specific on which particular documents she needs. Failure to do so leaves the court with no option but to find, as I do, that the ex parte applicant and the 2<sup>nd</sup> respondent had provided the documents which were needed from them.

12. Regarding the suggestion that consent of the Land Control Board was necessary, I reiterate that all that remains is a conveyance between the ex parte applicant and the 1<sup>st</sup> respondent. Pursuant to the provisions of Section 6(3) (a) of the Land Control Act, the transaction between the ex parte applicant and the 1<sup>st</sup> respondent does not require consent of the Land Control Board. The Section provides:

**6. Transactions affecting agricultural land**

**(1) Each of the following transactions that is to say—**

**(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**

**(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;**

**(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

**(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).**

**(3) This section does not apply to—**

**(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be**

*held under separate titles; or*

*(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.*

13. In view of the foregoing, I have no hesitation in finding that consent of the Land Control Board is not necessary in the remaining conveyance and transfer of the suit property from the Settlement Fund Trustees to the ex parte applicant.

14. Now to the second issue, whether the ex parte applicant is entitled to the reliefs sought. Principally, the ex parte applicant seeks orders of mandamus, prohibition and declaration. From the onset, it is important to remember that the proceedings herein are brought pursuant to the provisions of Order 53 of the Civil Procedure Rules, 2010 and Sections 8 and 9 of the Law of Reform Act, Chapter 26 Laws of Kenya. Under these provisions, the only relief that is contemplated are orders of mandamus, certiorari and prohibition. The court cannot grant a declaration as is sought at prayer 6 of the Notice of Motion. For that reason, prayer 6 is dismissed.

15. The nature and scope of judicial review orders of mandamus and prohibition were discussed by the Court of Appeal in Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others (supra) where the Court of Appeal stated:

*What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.*

*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 HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> 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. 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.”*

*At paragraph 90 headed “the mandate” it is stated:*

*“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.”*

*What do these principles mean? They mean that an order of mandamus will compel 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.*

16. From the foregoing, it immediately becomes clear that mandamus and prohibition can only be issued against public bodies. The 2<sup>nd</sup> respondent herein is certainly not a public body. His only involvement in the matters leading to these proceedings is being the vendor in respect of the suit property. He has no public duty to perform in the entire transaction. He ought not to have been joined as a respondent. His participation in the proceedings if any, should have been as an interested party. For that reason, the reliefs sought cannot issue against the 2<sup>nd</sup> respondent. The claim against him is dismissed. I however do not award him any costs since he did not defend the proceedings.

17. I have already demonstrated that the reasons advanced by the 1<sup>st</sup> respondent and by extension the 3<sup>rd</sup> respondent for not proceeding with transferring the suit property to the ex parte applicant are not valid. The 1<sup>st</sup> respondent has herself admitted that the suit property has been fully paid for. The 1<sup>st</sup> and 3<sup>rd</sup> respondents are public officers serving in public bodies. Since the settlement fund trustees have been fully paid in respect of the suit property, there is no valid reason why the said respondents are not facilitating transfer and registration of the suit property in favour of the ex parte applicant. In the circumstances, I am satisfied that the ex parte applicant has established his case as against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents.

18. I therefore make the following orders:

- a) I grant an order of mandamus compelling the 1<sup>st</sup> Respondent to cause the registration and transfer of all that parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme in favour of the ex parte applicant.
- b) I grant an order of mandamus compelling the 1<sup>st</sup> and 3<sup>rd</sup> respondents to declare the ex parte applicant the bona fide owner of all that parcel of land known as plot No. 508 Moi Ndabi Settlement Scheme.
- c) I grant an order of prohibition restraining the 1<sup>st</sup> and 3<sup>rd</sup> respondents from transferring all that parcel of land known as Plot No. 508 Moi Ndabi Settlement Scheme to any person other than the ex parte applicant.
- d) The claim against the 2<sup>nd</sup> respondent is dismissed with no order as to costs.
- e) Costs of the proceedings are awarded to the ex parte applicant and shall be paid by the 1<sup>st</sup> and 3<sup>rd</sup> respondents.

19. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of June 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kagucia for the ex parte applicant

No appearance for the respondents

Court Assistants: Gichaba & Lotkomoi