



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

JUDICIAL REVIEW NO. 8 OF 2016

IN THE MATTER OF AN APPLICATION BY TURBO MUNYAKA CO-OPERATIVE SOCIETY LIMITED FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS DIRECTED TO THE COUNTY LAND REGISTRAR, TRANS-NZOIA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

AND

LAND REGISTRAR TRANS-NZOIA COUNTY.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

TURBO MUNYAKA CO-OPERATIVE SOCIETY LTD.....EXPARTE

J U D G E M E N T

1. Pursuant to leave granted by this court on 1/11/2016 the *ex parte* applicant filed the substantive notice of motion for Judicial Review Orders on 16/11/2016. The Judicial Review Notice of Motion seeks only one prayer as follows:-

(1) That this Honourable Court be pleased to issue an order of Mandamus, compelling the County Land Registrar, Trans-Nzoia to register 31 leases for Parcel Nos. Munyaka Trading Centre/13, 15, 16, 17, 18, 19,20, 21,22, 23, 24, 25, 26, 27, 28, 29, 30, 32, 34, 35, 36, 37, 38, 39,40, 41, 42, 43, 44, 45 and 88 and then release the lease certificates to the applicant.

2. The grounds upon which the notice of motion is based are set out at the foot of the motion as well as on the statutory statement. These are; that the County Land Registrar Trans-Nzoia is a Public Officer mandated by law to register leases issued by the Government and avail the lease certificates to the lessees; that the Ministry of Lands has forwarded to the County Land Registrar Trans-Nzoia thirty one leases for the said parcels with instruction to register the leases and then release the lease certificates to the

applicant; that to date the said officer, in breach of her/his statutory mandate failed and or refused to register the 31 leases, and that the refusal and/or failure to register the leases as directed by the Ministry of Lands Housing and Urban Development is extremely prejudicial to the *exparte* applicant.

3. Though a notice of appointment dated 2nd March, 2017 was filed on behalf of the respondents by the Hon. Attorney General, no response was filed to the notice of motion dated 16th November, 2016. When this matter came up before the court on 16/2/2017, only Mr. Kiarie appeared for the *exparte* applicant. The matter was adjourned to 7/3/2017 for hearing. The court gave instructions that the respondents must be served. On the 7/3/2017 only Mr. Kiarie appeared and he stated that he had served the Hon. The Attorney General and the Land Registrar. The court viewed the affidavit of service by the process server, one George Mumali sworn on 6/3/2017 and was satisfied that proper service had been effected and so the hearing proceeded.

4. In support of the motion, Mr. Kiarie submitted that no reasons had been given by the County Land Registrar Trans-Nzoia for failure or refusal to register and release the leases. He said that the applicant was a registered body under the Office of the Commissioner for Co-operative Development, having been registered as such on 8/5/1964; that the applicant owned **LR. No. 11181** which was subdivided among the society members but the trading centre comprised in parcel **No. 247** was retained by the applicant. The proper reference for this parcel is **Makutano/Kapsara Block 2/247**. This, according to the applicant is the land parcel that was subdivided into **97 plots** including public utilities.

5. The applicant has exhibited in the verifying affidavit receipt No. 2575528 for Kshs.157,470/= being monies paid to the Department of Lands in respect of subdivision. It is in the name of the *exparte* applicant. There is also exhibited the following:-

1) Letter dated 13/9/2011 from the Ministry of Lands, the Department of Surveys, to the Commissioner of Lands, referenced CR11/Vol.2/537 forwarding sealed copies of the amended Registry Index Map resultant from the subdivision of Land Ref. Makutano/Kapsara Block 2/247, Trans-Nzoia District. It shows that the survey fee has been paid vide Receipt No. A7458129 of 14th June, 2011;

2) Letter from the National Land Commission dated 5th December, 2013 to the District Land Registrar, Trans-Nzoia (through the Chief Land Registrar) forwarding lease documents for 13 plots belonging to the *exparte* applicant, for registration. The said letter is copied to the *exparte* applicant with the communication that it should "liaise with the above District Land Registrar to execute and collect your lease documents". This is followed by other letters couched in similar terms dated 14/3/2014 (one plot), 14/4/2014 (one plot), 23/4/2014 (9 plots), 23/4/2014 (5 plots), 3/12/2015 (one plot), 23/5/2016 (one plot).

3) Letters dated 5/5/2015, from the *exparte* applicant to the Land Registrar Office, Kitale. The first letter marked "OGN 11" appears to be forwarding some documents to the County Land Registrar, pursuant to an oral request by the latter during a meeting, to enable registration of the lease documents. The second letter simply seeks that the *exparte* applicant be issued with the lease document (sic).

4) Letter from Kiarie & Co. Advocates to the Chairman of the National Land Commission requesting the National Land Commission to avail a surrender to the Land Registrar, which the Land Registrar had denied ever having received from the Commission, to enable processing of the leases.

5) Two letters to the Land Registrar dated 1/3/2016 and 24/5/2016 respectively, seeking to have the *exparte* applicants documents released to it. The letter of 1/3/2016 is written by the *exparte* applicant, and it requests for any reason preventing release of the applicant's documents. The contents of the letter dated 24/5/2016 show that it was in reaction to a letter referenced TN/KTL/3758 from the Land Registrar asking the *exparte* applicant to collect its leases. It seems to avail certain documents requested by the Registrar so that the leases may be released.

6) Letter dated 15/6/2016 from the *ex parte* applicant to the Chief Land Registrar, stating that the *ex parte* applicant has complied with the request by the Land Registrar to provide certain documents to enable the Land Registrar release the *ex parte* applicant's leases, yet the latter had failed to release the documents.

6. Most of the *ex parte* applicant's letters exhibited in the affidavit bear the stamp of the Ministry of Lands. This may be evidence that they were received in that parent ministry, yet nothing appears to have been done to end the *ex parte* applicant's long wait for its leases.

7. An order of mandamus is 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, so held the Court of Appeal of Kenya in ***Republic versus Kenya National Examination Counsel, Ex parte Gathenji & Others, Civil Appeal No. 266 of 1996***. In addition the said decision stated, 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. The order, the court said, must command no more than the party against whom the application is made is legally bound to perform.

8. In that case the court stated that an order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.

9. There are conflicting signals as to whether the 1st respondent has registered the leases in question or not. The order sought by the applicant seeks to compel the 1st respondent to "register.....and then release the lease certificates" to the applicant. The letter annexed as exhibit "OGN 11" seems to suggest that the leases were not registered as at 5/5/2015. The applicant's further letter dated 24/5/2016 gives one the impression that the leases have been registered and the *ex parte* applicant is being invited to go and collect them.

10. However it is proper to conclude that, going by the prayer for mandamus outlined above, they are not yet registered. The process of obtaining leases did not commence at the local, Land Registrars level. Rather, the Land Registrars role is the last among several that comprise the process. It is evident that the Ministry of Lands was involved in the process. The Director of Surveys on the 13th September, 2011 forwarded an amended Registry Index Map to the Commissioner of Lands and indicated that survey fees had been paid for the land in question. Soon thereafter, the National Land Commission transmitted lease documents to the District Land Registrar while advising the *ex parte* applicant to liaise with the Land Registrar to execute and collect the lease documents.

11. The act of registration involves some element of discretion. This is particularly so if the requests for registration is made by a person or a body outside the normal circle of governmental bodies or persons involved in land administration matters. However I find the current situation that the *ex parte* applicant finds itself to be quite intriguing in that the request for registration emanated from another office within the circle of governmental bodies and persons who handle land administration issues. It is at this point that the extent of the discretion of the County Land Registrar comes into sharp focus.

12. Where the County Land Registrar's office is the starting point of a registration, a great amount of discretion may be attributed to him. In view of the necessity of element of co-operation between him and other governmental offices in service of the public which have taken part in the earlier parts of the process, including the surveying and issuance of the lease documents for his registration it appears to the court that the County Land Registrar's discretion is whittled down to the bare minimum; he is at the tail end of the process, and, save for any relevant issue that he may raise with his predecessors in the said process, he would be obliged to register the leases in question. The issue that would have entailed the exercise of discretion would have been the decision as to whether the lessee is entitled and if so, at what terms, to leases. That was not for the Land Registrar to make. This stage of the process appears to have been concluded in another office when the leases were sent to the County Land Registrar for registration.

13. The discretion entailed in this registration of fresh leases would be different in scope from that

involved in, say, registration of a vesting order or a transfer of lease between individuals or bodies.

14. In the circumstances it would have been seemly had the Registrar, either prior to or after the request by the *ex parte* applicant, offered some sound explanation or reason as to why the leases could not be registered, or the delay despite their having been dispatched to him for the purpose. **Article 47 (2)** of the Constitution obliges a Public Officer to furnish the *ex parte* applicant with a reason or reasons for failure or delay in administrative action such as the registration of its leases.

15. Inertia on the part of the County Land Registrar adversely affects the *ex parte* applicant in that though a decision has been made to issue it with leases, those leases are only good when they are registered by the Registrar.

16. The question that remains is whether this court would be entitled to intervene given the circumstances of this case. In the case of **Republic -vs- Chief Land Registrar, Ex parte Stephen Karanja Kungu, eKLR**, the court stated as follows:-

“Therefore there are circumstances under which the court would be entitled to intervene even in the exercise of discretion. Whereas we appreciate the fact that the decision whether or not to register the transfers in favour of the applicant by the respondents is an exercise of discretion this court is empowered to interfere with the exercise of discretion in the following situations:- (1) where there is an abuse of discretion, (2) where the decision maker exercises discretion for an improper purpose, (3) where the decision maker is in breach of the duty to act fairly, (4) where the decision maker has failed to exercise statutory discretion reasonably, (5) where the decision maker acts in a manner to frustrate the purpose of the Act donating the power, (6) where the decision maker fetters the discretion given, (7) where the decision maker fails to exercise discretion, (8) where the decision maker is irrational and unreasonable”.

17. In the Stephen Karanja Kungu case cited above, as in this case the *ex parte* applicant was aggrieved at the failure to give any reason for the delay in the registration of a transfer and/or vesting order. The court granted an order of mandamus compelling the respondents to consider the application of the applicant for registration of the vesting order and transfer in favour of the applicant and furnish the applicant with the reasons therefore if its decision is adverse to the applicant. In default of such reasons, an order of mandamus would issue forthwith compelling the respondents to register the said transfer.

18. The manner in which the court dealt the application or an order of mandamus in the Stephen Karanja Kungu case cited above is appealing. However as stated before herein above, the *ex parte* applicants never applied for registration of leases to the Registrar. His role is simply the end part of a process that appears to have begun in other offices, including offices above him. The Registrar has not even filed any responses to the applicant’s case herein so as to provide the court with any compelling reason or reasons which justifies his delay. As things stand he is now the recalcitrant tooth in the cog, which has brought the entire process of issuance of the subject leases to a premature halt. In this case the court is alive the necessity of ensuring that the person who is charged with the performance of a part of a process that the applicant relies on to realize its rights to own property as envisaged by Article 40 of the Constitution, does not unnecessarily derail that process and escape censure for inordinate and unexplained delay.

19. In this case therefore I hereby grant an order of mandamus compelling the 1st respondent to register the leases as prayed and release them to the applicant forthwith. Costs of the application will be borne by the respondents.

Signed, dated and delivered at Kitale on this **17th** day of **March, 2017**.

MWANGI NJOROGE

JUDGE

Judgement read in open court.

In presence of:

Ms. Mufutu holding brief for Mr. Kiarie for Exparte Applicant

N/A for Respondents

Court Assistant - Isabellah.

MWANGI NJOROGI

JUDGE

17/3/2017