



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO. 7 OF 2017**

**IN THE MATTER OF AN APPLICATION BY PHILIP KIMAIYO KOMEN AND LEONARD  
CHERUIYOT AKORI FOR LEAVE TO APPLY FOR AN ORDER OF MANDAMUS DIRECTED  
TO THE COUNTY LAND REGISTRAR, UASIN GISHU**

AND

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

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

AND

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

REPUBLIC.....APPLICANT

VERSUS

COUNTY LAND REGISTRAR, UASIN GISHU.....1<sup>ST</sup> RESPONDENT

HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT

EX PARTE:

PHILIP KIMAIYO KOMEN.....1<sup>ST</sup> APPLICANT

LEONARD CHERUIYOT.....2<sup>ND</sup> APPLICANT

**JUDGMENT**

**Philip Kimaiyo Komen and Leonard Cheruiyot Akori, (hereinafter referred to as the ex-parte applicants)** came to court by way of chamber summons dated 27.9.2017 praying that Leave be granted to the Applicants to apply for judicial review by way of an order of *mandamus* compelling the County Land Registrar, Uasin Gishu County to register the properties known as Eldoret Municipality Block 8/168 and Eldoret Municipality Block 8/169 in favor of *Leonard Cheruiyot Akori* and *Philip Kimaiyo Komen* respectively within 7 days from the date of this decision and that Leave be granted to the Applicants to apply for judicial review by way of a *declaration* declaring that Leonard Cheruiyot Akori and Philip Kimaiyo Komen are entitled to registration and occupation of the properties known as Eldoret

Municipality Block 8/168 and 8/169 respectively. The costs of the application were to abide the final outcome of the substantive motion. The application was accompanied with a statement under Order 53, Rule 12 of the Civil Procedure Rules. Leave was granted on 27.9.2017 upon which the Notice of Motion was filed on the same date.

In the Notice of Motion, the *exparte* applicant prays for the substantive order of Judicial Review by way of ***mandamus*** compelling the County Land Registrar, Uasin Gishu County to register the properties known as Eldoret Municipality Block 8/168 and Eldoret Municipality Block 8/169 in favor of Leonard Cheruiyot Akori and Philip Kimaiyo Komen respectively within 7 days from the date of the decision. The *exparte* applicants appear to have abandoned the prayer for a declaration.

The application is supported by the affidavit of ***Philip Kimaiyo Komen***, the 1<sup>st</sup> applicant who deposes that he has been authorized by the 2<sup>nd</sup> applicant to swear the affidavit on his behalf and states that in May 2010, they made inquiries at the Ministry of Lands in Eldoret with a view to finding out whether the properties known as Eldoret Municipality Block 8/168 and 8/169 were available for allocation. The Ministry of Lands in Eldoret informed them that the leases over the suit properties expired on 1<sup>st</sup> August 2007 and the previous owner had not applied for an extension or renewal of the said leases. The Ministry of Lands further informed them that the suit properties were available for allocation to any deserving person. Thereafter, by a letter dated 16<sup>th</sup> June 2010 they submitted applications for allocation of the suit properties to the Commissioner of Lands as well as the Ministry of Lands.

On 15<sup>th</sup> June, 2011, the Commissioner of Lands confirmed receipt of their applications and directed the first respondent to ascertain the status of the suit properties. By a letter dated 21<sup>st</sup> June 2011, the Uasin Gishu District Land Office notified the Commissioner of Lands that the suit properties were vacant. The letter of 21<sup>st</sup> June, 2011 also indicated that the leases over the suit properties had expired and that the suit properties have never been developed. Their applications for allocation of the suit properties were approved and letters of allotment issued on 19<sup>th</sup> February, 2013. The 2<sup>nd</sup> applicant was allocated the property known as Eldoret Municipality Block 8/168 while the 1<sup>st</sup> applicant was allocated the property known as Eldoret Municipality Block 8/169. They accepted the offer contained in the letters of allotment and met other conditions set out therein including payment of the stand premium as required. In addition to the above, the applicants have been paying land rent and rates as shown in some of the rent clearance certificates.

The leases over the suit properties in their favor were executed and forwarded to the 1<sup>st</sup> respondent for registration by the National Land Commission on 13<sup>th</sup> August 2013. That despite the Ministry of Lands and the National Land Commission's directive that the 1<sup>st</sup> respondent registers the leases over the suit properties in the applicants' favor, no registration has been done to date.

Meanwhile, by a plaint dated 18<sup>th</sup> July 2014, an entity known as Hasham Lalji Properties Limited filed suit in **Eldoret ELC Case Number 256 of 2014 - HashamLalji Properties Limited v Philip Kimaiyo Komen & 2 Others** challenging the allocation of the suit properties in the applicants favor. That upon the filing of the suit in Eldoret Environment and Land Case Number 256 of 2014, the court issued interim orders which in essence required the parties to maintain status quo. By an application dated 12<sup>th</sup> May 2016, they applied to strike out the suit in Eldoret Environment and Land Case Number 256 of 2014 on the basis that it did not disclose a reasonable cause of action and that by a ruling that was delivered on 15<sup>th</sup> June 2017, the court found that the plaintiff in Eldoret ELC Case Number 256 of 2014 had not disclosed a reasonable cause of action as it had no proprietary interest over the suit properties and as a result, the court proceeded to strike out the suit filed by HashamLalji Properties Limited.

They extracted the order striking out the plaintiff's suit in Eldoret ELC Case No. 256 of 2014 on 16<sup>th</sup> June, 2017 and registered the said orders with the first respondent on 21<sup>st</sup> June, 2017 and while registering the order striking out the suit on 21<sup>st</sup> June 2017, their advocates requested the 1<sup>st</sup> respondent to register the suit properties in their favor but no action has been taken on this request. By a letter dated

24<sup>th</sup> July 2017, their advocates on record requested the 1<sup>st</sup> respondent to register the leases over suit properties as required. The letter of 24<sup>th</sup> July 2017 made it clear that the suit properties were lawfully allocated to them after the leasehold interest held by the previous proprietor, Mr. Bahadurali Hasham Lalji expired. This particular proprietor did not apply for renewal or extension of the lease.

The legality of the allocation of the suit properties to them has formed the subject of investigations by various authorities including the National Land Commission which have concluded that the suit properties were lawfully allocated to them and that a letter from the National Land Commission dated 5<sup>th</sup> March, 2014 which was enclosed in the letter to the first respondent. The letter reads: -

***"The Commission upon receipt of the letter of complaint dated 27<sup>th</sup> August 2013 caused investigations to be conducted and a report over the same has been prepared advising that Hasham Nrali Hasham Lalji and Hasham Lalji Properties Ltd who were the immediate owners of the properties never developed the property and that they failed to apply for renewal of the lease upon its expiry in 2007, In the circumstances the land reverted to the Government and it was open for allocation to any other prospective developer who applied for the same.***

***It is for this reason that Leonard Cheruiyot Akori and Philip Kimaiyo Komen who had applied for the land were allocated the same and the lease forwarded to your offices on 13<sup>th</sup> August 2013 for registration.***

***Accordingly, you may proceed to register the lease as forwarded by the Chief Land Registrar and forward a copy of the same to the Commission for purposes of our records. "***

Despite complying with all conditions set out in the letters of allotment and fulfilling other procedural requirements, the 1<sup>st</sup> respondent has unlawfully delayed or refused to register the suit properties as required and that notwithstanding the above, the first respondent has not registered the suit properties in their favor. Their advocates have also not received any response to their letter dated 24<sup>th</sup> July, 2017 or reasons for the failure or delay in registering the leases over the suit properties in our favor.

In addition to the above, the applicants have instructed their advocates to request the 1<sup>st</sup> respondent to register the leases over the suit properties but in vain. In particular, their advocates have requested the 1<sup>st</sup> respondent to register the suit properties on various occasions thus on 9<sup>th</sup> September 2013, the firm of J. K Kiplagat & Company Advocates requested the first respondent to supply reasons that had prevented her from registering the leases over the suit properties in favour of the applicants and no reasons have supplied to date. By a letter dated 20<sup>th</sup> March 2014 their advocates notified the first respondent that they had complied with requisite procedures and requested her to register the suit properties as required. The first respondent did not respond to this letter or furnish reasons for the delay and failure to register the suit properties. By a letter dated 24<sup>th</sup> April 2014, their advocates once again informed the 1<sup>st</sup> respondent that her refusal to register the lease over the suit properties in their favor was illegal. This letter has not elicited any response to date.

This court has considered the application for the Judicial Review orders, supporting affidavit, grounds of opposition and does find that it is not disputed that the applicants applied for and were allocated the suit properties by the Commissioner of Lands. The application and letters of allotment are produced as exhibits PKK1 and PKK4 to the affidavit sworn on 27<sup>th</sup> September, 2017. The decision to allocate the applicants the suit properties was premised on the 1<sup>st</sup> respondent's letter dated 21<sup>st</sup> June, 2011 which notified the Commissioner of Lands that the said properties were available for allocation.

Upon receipt of the letters of allotment, the applicants complied with the conditions therein, including payment of the stand premium. The leases over the suit properties were eventually executed and forwarded by the National Land Commission to the 1<sup>st</sup> respondent by a letter dated 13<sup>th</sup> August, 2013. This letter is produced as exhibit PKK7 to the affidavit sworn on 27<sup>th</sup> September, 2017. The letter

notified the 1<sup>st</sup> respondent that registration fees had been paid and directed her to register the leases in favor of the applicants.

The allocation of the suit properties to the applicants has been subject to investigations by a number of state agencies including the Commission, which authored the letter dated 5<sup>th</sup> March, 2014. This letter reads in part as follows:

***“In the circumstances, the land reverted to the Government and it was open for allocation to any other prospective developer who applied for the same.***

***It is for this reason that Leonard Cheruiyot Akori and Philip Kimaiyo Komen who applied for the land were allocated the same and the lease forwarded to your offices on 13<sup>th</sup> August, 2013 for registration.***

***Accordingly, you may proceed to register the lease as forwarded by the Chief Land Registrar and forward a copy of the same to the Commission for purposes of our records.”***

The applicants invite the court to consider the full tenor and effect of Commission’s letter dated 5<sup>th</sup> March, 2017. The applicants have on a number of occasions requested the 1<sup>st</sup> respondent to register the leases or provide reasons for the refusal and delay to register the leases. The recalcitrance on the part of the 1<sup>st</sup> respondent is what has necessitated the instant application. The respondents have not filed any response to the allegations made and therefore the facts as contained in the supporting affidavits are not controverted.

I have considered the submissions of the ex parte applicants as eloquently as presented by **Mr. Netia** and the submissions by the Attorney General on behalf of the respondent ably represented by **Mr. Odongo** and do find that the first issue the court should consider is whether an order of mandamus should issue. In the case of **Republic Vs Kenya National Examination Council Ex-parte Gathenji & Others – Civil Appeal No. 266 of 1996**, the Court of Appeal held that:

***...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. The order must command no more than the party against whom the application 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...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. 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 but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”***

In the case of **Republic Vs Land Registrar, Trans Nzoia County & Attorney General Ex-parte Turbo**

Munyaka Co-operative Society Ltd (2017) eKLR, Environment and Land Court, Kitale sitting Justice Njoroge held that:

**“The process of obtaining leases did not commence at the local. Land Registrar’s level. Rather, the Land Registrar’s 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 13<sup>th</sup> 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 lease documents.”**

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

I am persuaded by the decision of Justice Odunga in Republic Vs Chief Land Registrar, Ex-parte Stephen Karanja Kungu[2014] eKLR, where it was held that:

***“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 favor of the applicant by the respondents is an exercise of discretion the 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.”***

This court finds that the County Land Registrar, Uasin Gishu has not given reasons why she failed to register the leases as directed by the National Land Commission. A failure by a public body or authority to state the reasons for its action or failure to take action amounts to procedural impropriety and an affront to fair administrative action contrary to Article 47(1) and (2) of the Constitution of Kenya. The respondent has no good reasons for deferring or delaying to register the leases as no reasons have been given for the said failure. Article 47(2) of the Constitution of Kenya provides that every person has the right to a fair administrative action that is expeditious efficient lawful reasonable and procedurally fair. Moreover, that if a right or a fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. This court finds that action includes failure to take action. Failure to make a decision, or failure to give reasons for the said failure is unconstitutional as it goes against the core tenets of Article 47(1) and (2) of the Constitution.

The court further finds that the delay or refusal to register the leases contravenes the applicant’s legitimate expectation. The principle of legitimate expectation is clearly espoused in the case of Republic (Bibi) Vs Newham London Borough Council (2001) EWCA Civ 607 [2002] 1WLR 237 at page 19, where it was stated:

***“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”***

The Supreme Court of Kenya in Communications Commission of Kenya & 5 Others Vs Royal Media Services Limited & 5 Others [2014] eKLR held that:

***“An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its powers to fulfill. A party that seeks to rely on the doctrine of legitimate expectation, has to show that he has locus standi to make a claim on the basis of the legitimate expectation.”***

It is clear that by refusing to register the leases, the respondent is in breach of the principle of legitimate expectation as the ex-parte applicants have been allocated the suit properties in dispute and the respondents' duty is to register the leases as directed by her superiors and that she has no discretion to exercise in such a matter. It is important to note that the applicants applied for allocation of the plots, the relevant authorities allocated the plots and executed the leases and forwarded them to the first respondent for registration. I have said so much in this matter and I need to pen off. I do find that the applicants have demonstrated that the failure by the 1<sup>st</sup> respondent to register the leases in respect of the suit property is a procedural impropriety, unreasonable and in breach of the applicants' legitimate expectation. The upshot of the above is that I do grant an order of ***mandamus*** compelling the 1<sup>st</sup> respondent to register the leases over the properties known as Eldoret Municipality Block 8/168 and Eldoret Municipality Block 8/169 in favor of Leonard Cheruiyot Akori and Philip Kimaiyo Komen respectively. Orders accordingly.

**Dated and delivered at Eldoret this 24<sup>th</sup> day of November, 2017.**

**A. OMBWAYO**

**JUDGE**