



Republic v County Government of Nakuru & 3 others; Ense Limited (Exparte Applicant) (Environment and Land Case Judicial Review Application 4 of 2023) [2024] KEELC 689 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELC 689 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION 4 OF 2023
A OMBWAYO, J
FEBRUARY 15, 2024
IN THE MATTER OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES
AND
IN THE MATTER OF SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY GOVERNMENT OF NAKURU 1ST RESPONDENT

THE COUNTY SECRETARY, NAKURU COUNTY 2ND RESPONDENT

THE CEC, LANDS AND PHYSICAL PLANNING NAKURU COUNTY 3RD RESPONDENT

AND

THE COUNTY DIRECTOR, LANDS AND PHYSICAL PLANNING NAKURU COUNTY DEFENDANT

AND

ENSE LIMITED EXPARTE APPLICANT



JUDGMENT

1. This is a Judicial Review application brought under the provisions of Order 53 Rule 3(1) of the Civil Procedure Rules and Sections 8 and 9 of the [Law Reform Act](#). Leave to commence the Judicial Review Proceedings was obtained on 5th October 2023. The Notice of Motion was filed on 12th October 2023.
2. The ex parte applicant seeks for the following orders;
 - a. That this honourable court be pleased to issue an order of mandamus directed at the County Secretary, Nakuru County, the CEC Lands and Physical Planning, Nakuru County and the County Director, Lands and Physical Planning, Nakuru County compelling them to immediately approve and effect subdivision and registration of the resultant subdivision of land parcel No. Nakuru Municipality Block 23/108 in strict compliance with the court order of 24th March 2023 in Nakuru ELC Civil Suit No. 146 of 2015.
 - b. That costs in this matter be paid by the Respondents.
3. The application is supported by the annexed affidavit of Ibrahim Suraw Isaac sworn on 11th October 2023. He deponed that he was the director of the Ex Parte Applicant who was the owner of land parcel No. Nakuru Municipality Block 23/108. That the applicant has been in an extensive litigation battle over a portion of the suit property in Nakuru ELC Civil Suit No. 146 of 2015 with among others the Chairman and Secretary Parents Teachers Association of Naka Primary School.
4. He also deponed that the court in Nakuru ELC Civil Suit No. 146 of 2015 issued an order on 12th November 2020 that directed that three acres of the suit property be excised and transferred to Naka Primary School. That the ex parte Applicant commenced the process of implementing the said order and submitted the requisite documents to the respondents. That the 4th Respondent received the ex parte applicant's application for approval of the subdivision plan and wrote the letter dated 7th June 2021 to the Ethics and Anti-Corruption Commission on the implementation of the said order.
5. He further deponed that on 5th December 2022 the ex parte Applicant notified the Respondents of its intention to commence legal proceedings but the Respondents through their letter dated 6th December 2022 sought for the guidance of the court. That thereafter EACC filed the application dated 15th December 2022 and the ex parte Applicant lodged a counter application dated 3rd February 2023 and both applications were resolved vide the ruling delivered on 24th March 2023. That the court ordered that three acres be excised from the suit property and transferred to Naka Primary School. That despite service of the said order, the respondents have refused to act.
6. He deponed that the Respondents actions are ultra vires and that it is in the interest of justice and fairness that the orders sought in the Notice of Motion be granted.
7. The Respondents did not file any response to the application and neither of the parties filed submissions.

Analysis and determination

8. After considering the pleadings, the only issue that arises for determination is whether the orders sought in the ex parte Applicant's Notice of Motion application dated 11th October 2023 can be granted.



9. The ex parte Applicant is seeking that orders of Mandamus be issued against the respondents compelling them to comply with the orders issued on 24th March 2023 in Nakuru ELC Civil Case No. 146 of 2015. The ex parte Applicant's application is not opposed.
10. The Court of Appeal in the case of **Republic V Kenya National Examinations Council ex parte Gathenji & Others, (1997) eKLR** explained the applicable principles for an order of mandamus to issue 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 Halsbury's Law 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. 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...."

11. The court in **Republic V Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] eKLR** held as follows;

11. "In Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441, it was held that an order of mandamus compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of mandamus to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right.
12. Secondly, the Court will only compel the satisfaction of a public duty if it has become due, and if or where there is a condition precedent necessary for the duty to accrue, an order of mandamus will not be granted until that condition precedent comes to pass. Therefore, where there is a dispute as to whether



a public duty has crystallized, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out. Lastly, whereas the Court may compel the performance of the public duty where such duty is shown to exist, it will however not compel its performance or the exercise of its discretion in a particular manner.”

12. The ex parte Applicant in this matter has annexed to its supporting affidavit a copy of an order issued in ELCC No. 146 of 2015 on 24th March 2023. The parties in the said suit are Ense Limited vs The Chairman and Secretary Parents Teachers Association Naka Primary School, Hon. David Gakaria and Dr Julius Kariuki.
13. Among the orders issued on 24th March 2023 is an order directing the ex parte Applicant herein to excise and transfer to Naka Primary School a portion of land parcel No. Nakuru Municipality Block 23/108 measuring three acres. It is important to note that the Respondents in the present matter are not parties in ELCC No. 146 of 2015. It is also important to note that the orders issued on 24th March 2023 specifically directed the ex parte Applicant herein to excise and transfer three acres of the suit property to Naka Primary School.
14. It is therefore my view that the ex parte Applicant has not laid a basis as to why it is now seeking that the Respondents herein to wit the County Government of Nakuru, the County Secretary Nakuru County, the CEC Lands and Physical Planning Nakuru County and the County Director, Lands and Physical Planning Nakuru County be compelled by an order of mandamus to facilitate the subdivision and transfer of a three-acre portion of the suit property to Naka Primary School.
15. Consequently, it is my view that the ex parte Applicant’s Notice of Motion application dated 11th October 2023 lacks merit and can be dismissed with no order as to costs since the Respondents did not participate in these proceedings. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF FEBRUARY, 2024.

A.O.OMBWAYO

JUDGE

