IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 1 OF 2013

BETWEEN

DICKSON NGIGI NGUGI.....APPELLANT

AND

COMMISSIONER OF LANDS.....RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya at

*Nairobi (**George Dulu, J.**) delivered on 19th day of January, 2010 in*

H.C. Misc. Application No. 181 of 1993)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the judgment and decree of the High Court (**Dulu, J**.) dismissing the appellant's application for judicial review orders of mandamus and prohibition.

[**2**] By a notice of motion application dated 12th February, 1993 the appellant sought an order of mandamus directed at the Commissioner of Lands, the respondent herein, to issue a lease to the appellant in respect of land title, **LR No. 519/223 (suit land**) and an order of prohibition to prohibit the Commissioner of Lands, his servants or agents from further proceeding with sub-division and alienation of the suit land or any part thereof.

The application was supported by the appellant's affidavit to which he annexed various documents. He stated in the supporting affidavit, *inter alia*; that, by a letter dated 14th August 1968, he applied to the District Commissioner, Nakuru for allocation of a licence to a piece of land in Njoro, Nakuru District; in about June, 1969 a piece of an unallocated government land became available and he applied to the Vice President of the Republic of Kenya for allocation; the Minister for Lands and Settlement recommended to the Commissioner of Lands and approved the allocation of 118 Hectares; on 7th June 1977 the appellant was issued with a Letter of Allotment for 118 Hectares; he complied with the conditions of allotment and made the required payment; the Commissioner of Lands directed the Director of Surveys to carry out a survey of the suit land; after the survey the Commissioner of Lands in collusion and collaboration with the County Council of Nakuru and the provincial administration allowed strangers to move onto and remain in the suit land; the Commissioner of Lands purported to sub-divide the suit land into smaller portions and has purported to allot the same to third parties; unless prohibited, the Commissioner of Lands would issue title deeds to the purported allottees and that the Commissioner of Lands was in breach of the earlier agreement.

[**3**] Amongst the documents the appellant annexed to the supporting affidavit is a letter of allotment dated 7th June, 1977 from the Commissioner of Lands to the appellant which stated partly thus:

> **"LETTER OF ALLOTMENT – NJORO TOWNSHIP UNSURVEYED LAND AREA – 118 HECTARES**
>
> **I have the honour to inform you that the Government hereby offers you a grant of the piece of unsurveyed land to the following terms and conditions and the payment of charges specified hereunder; -**
>
> **Area of the unsurveyed land – 118 Hectares User – Agricultural purposes.**

Term – The plot will initially be allocated to you for a period of 3 (three) years.

After the expiration of the first three years subject to the land being developed to the satisfaction of the District Agricultural Officer you will be entitled to a freehold title on payment of the purchase price amounting to Shs. 235,400/-.

Annual Rent – within the first 3 years the rent payable will be Shs. 2,354/-per annum.

The value of the permanent improvements to be effected on the land within the first three years shall be made to the satisfaction of the District Agricultural officer.

You are therefore required to forward to this office a total sum of Shs. 6,484/15 which is made up as follows: -

Annual Rent from 1st June, 1977 to 31.12.1977 - Shs. 1376.15

Conveyance fees - Shs. 350.00

Registration fees - Shs. 50.00

Stamp duty - Shs. 4708.00

Survey fees payable on demand

Total = Shs. 6484.15"

A receipt dated 22nd June 1977 shows that the appellant paid the Shs. 6,484/125 on that date.

[**4**] The respondent filed a replying affidavit sworn 23rd November, 1993 by **Phoebe Amiani**, a Senior Lands Officer, in which she stated, among other things, that the appellant was required to develop the land within the period of three years to qualify for a freehold grant; that since no development was carried out, the allocation was cancelled; that the suit land has been sub-divided and allocated to various public bodies for the benefit of the public; that part of the suit land was earmarked for development of Nakuru Airport and that there was no collusion between the Commissioner of Lands, provincial administration and Nakuru County Council to allow strangers to occupy the land. She annexed about seventy one letters of allotments issued apparently to the staff of Egerton University allocating to each unsurveyed residential plot. The plot sizes measured approximately between 0.21 and 0.24 hectares.

[**5**] The respondent raised a preliminary objection to the application for judicial review. Apparently, the appellant's counsel was not present at the time of hearing of the application. The High Court by a ruling delivered on 9th July 1996 upheld the preliminary objection and dismissed the application mainly on the grounds that the application was incompetent for the reason that no leave to apply for judicial review was sought and obtained prior to the filing of the application; that the application did not disclose the public duty that the Commissioner of Lands is bound to perform but has not performed; and that the facts relied on did not disclose a cause of action. Subsequently, the appellant applied for the ruling dismissing the application to be set aside on the ground that failure by his counsel to attend the hearing was due to confusion caused by the transfer of the hearing of the application to a judge other than the one before whom it was listed. However, the application for setting aside was dismissed on 31st July, 1996. The appellant appealed to the Court of Appeal in **Civil Appeal No. 297 of 1997** against the ruling of 31st July, 1996. On 8th May, 1998, the Court of Appeal allowed the appeal with the result that the appellant's application to set aside the ruling of 9th July 1996 was allowed.

[**9**] Before the hearing of the application for judicial review resumed, seventy allotees of part of the suit land filed an application dated 6th February, 2007 for leave to be joined in the application for judicial review as interested parties. The application was allowed by consent on 21st February 2007. The case of the interested parties was supported by the affidavit of **Anthony Karanja**. He deposed that he was allocated plot No. Njoro Township /Block 2/187 by the Commissioner of Lands and subsequently issued with a lease; that the other interested parties have been allocated with a plot each, all curved from LR No. 519/223; that majority of interested parties have built on their respective plot and are in actual possession of approximately 44 acres; that he is the chairman of Egerton Golf Estate Welfare Association which runs the estate and that the interested parties would suffer huge and irreparable damage and loss if the orders sought were granted.

[**10**] The interested parties opposed the application on grounds, *inter alia*, that an order of mandamus cannot issue to compel the Commissioner of Lands to issue title for land in respect of which he had already issued ownership documents to interested parties before the application was filed; an order for prohibition cannot issue to prohibit the Commissioner of Lands from allocating the land which he had already sub-divided, allocated and received payments before judicial review was sought; that at the time the plots were allocated to the third parties, the appellant's temporary occupation licence had expired and the appellant had no proprietary interest in the land; that the appellant by accepting to be allocated 50 acres out of the suit land relinquished his claim to the rest; and that the application is belated as the appellant should have sought the orders in 1984 before he accepted the allocation of 50 acres.

[**11**] The High Court dismissed the application for two reasons which we, for clarity, quote verbatim namely;

"(i) I find and hold that the applicant did not comply with the requirement of developing of the land within 3 years from June 1997. He has not demonstrated that anybody with the support of Government officials prevented him from developing the land up to the lapse of the 3 years period in June 1980. The term of the letter of allotment was not extended and therefore there was nothing that the applicant can enforce against the Commissioner of Lands through judicial review proceedings as

from 7th June 1980 the letter of allotment having lapsed without complying with the terms of developing the land.

(ii) Since the applicant contends that the allocation of plots to third parties was wrong he should have applied for cancellation of allotment to third parties first before asking for orders of mandamus and prohibition. He has not asked for orders of certiorari to cancel the allotments already made before he made the application, therefore the orders of mandamus and prohibition, in the circumstances of the case are not available to him."

[**12**] The appellant states in the grounds of appeal that the learned Judge erred in making those findings and further in failing to hold that the appellant failed to comply with a condition for developing the land due to sufficient reasons which were beyond his control; in not holding and finding that the executive actions cannot hold or suspend the operation of law in particular the Government Lands Act; and in failing to hold and find that the respondent did not have power to allocate private land to private individuals.

[**13**] The bedrock of the appellant's case for judicial review orders dated 7th June 1977 was the letter of allotment of unsurveyed agricultural land measuring 118 hectares. As the letter of allotment quoted above in para 3 states, the government offered a grant of the unsurveyed land subject to the terms and conditions and payment of charges specified therein. The land was allocated for agricultural use initially for a term of 3 years and subject to the land being developed to the satisfaction of the District Agricultural Officer, the appellant would be entitled to a freehold title on payment of the purchase price of Shs.235,400/-. The annual rent for the first 3 years was Shs. 2,354/-. The total sum of Shs. 6,484/15 that the appellant was required to pay within 30 days of the offer included annual rent for 6 months as amounting to Shs. 1,376/15. There was no dispute that the appellant accepted the offer and paid the Shs. 6.484/15 within the stipulated 30 days.

Phoebe Amiani stated in her replying affidavit that for the appellant to qualify for a freehold grant, he was required to develop the land within the period of three years to the satisfaction of the District Agricultural Officer which the appellant did not do resulting in the cancellation of the allocation. The appellant in his replying affidavit sworn on 10th July 1995 stated that his attempts to develop the land had always been frustrated by some public officers and that upon payment of Shs. 6,484.15 he was entitled to remain the owner until and unless the grant was forfeited in accordance with the provisions of the Government Lands Act.

[**14**] The appellant's counsel both in the submissions in the High Court and in this Court submitted that farming on the suit land was rendered impossible within the 3 years of the receipt of allotment letter due to three factors. First, the presence of squatters on the suit land; second the Provincial Physical Planning Officer decided to ignore or render ineffective the allocation of suit property by purporting to allocate part of the suit land to different persons and to non-existent institutions and, third, the attempt by provincial administration to take all the allocated land and arrange to allocate 50 acres to the appellant.

That there were other people farming the land at the time of the allocation is evident from various correspondences. We refer to only two. By a letter dated 20th July 1981, the Clerk to Nakuru County Council informed the appellant partly as follows:

"Even at the time the said land was allocated to you, people of Njoro had been cultivating it with the authority of the Government for several years previously. You are aware that the District Commissioner, Nakuru, has in the past informed wananchi at a public baraza to continue cultivating the land unmolested, until informed otherwise.

In the circumstances, the council will do nothing to alter the status quo until we are advised by the District Commissioner".

By a letter dated 21st May, 1984, the Provincial Commissioner, Rift Valley Province wrote to the Commissioner of Lands in support of the appellant's application to be allocated part of the suit land thus:

"Mr. D. N. Ngugi has been to see me with the request that since he has had interest on this land for a long time, he should be considered for allocation of part of the land. I sincerely sympathise with his situation because since he was allocated this land on T.O.L. basis, (*Temporary Occupation Licence*) he was unable to make use of the land because there were people cultivating the same piece of land on temporary basis and flatly refused to vacate despite his constant requests. I support Mr. Ngugi's application for allocation of part of this land provided ample land is left for the development of the town…."

It is the first factor stated by the appellant's counsel which is relevant to the condition for development of the suit land. The other two factors arose after the expiry of the 3 years in about June 1980.

[**15**] As **Dr. Kamau Kuria**, learned Senior Counsel for the appellant and **Mr. Eredi**, the Deputy Chief State Counsel for the respondent correctly contended, the first legal issue for determination in this appeal is the nature of grant of land by the State to an individual through a letter of allotment. The determination of this issue necessarily involves the construction of the relevant provisions of the repealed **Government Lands Act (Cap 280) (Act)** particularly, the provisions of part IV which related to the disposal of un-alienated government agricultural land. We will refer to a few provisions.

Section 19 and 20 of the Act provided that:

"19. Subject to any general or special directions of the President, the Commissioner may cause land available for alienation for agricultural purposes to be surveyed and divided into farms.

20. Leases for farms shall, unless the President otherwise orders in any particular case or cases be sold by auction."

Section 27(1) provided in part:

"Subject to subsection (2), every lease under this part shall, subject to the provisions of this Act –

(a) be granted for a term equal in length to the period by the end of which the lessee is required by the lease to have completed the developments thereby required by him;

(b) be at a rent calculated at the rate of one per cent on the unimproved value of the land at the commencement of the term;

(c) contain a provision whereby the lessee, on the expiration of the term and on due compliance with covenants and conditions contained in the lease, shall be entitled to a grant of freehold of the land on payment to the Government of the unimproved value of the land at the commencement of the term, either –

(i) In one sum before the issue of the grant, or

(ii) …."

Section 32 and 33 of the Act dealt with covenants as to development. Section 32 provided that the First Schedule shall have effect as part of the Act. The First Schedule presented the nature and value of developments to be effected and maintained in three and five years on land leased for agricultural purposes for various sizes of land. Section 33 provided;

"Except where expressly varied or excepted, there shall, by virtue of this Act, be implied in every lease under this Part covenants by the lessee –

(a) that he will within the first three years of the lease effect or place on the land leased improvements of the nature and to the value specified in the First Schedule as the improvements to be effected within such time upon a farm of the like area.

(b) that he with at all times after the expiry of the third year of the lease have and maintain on the land leased improvement of the nature and to the value required under the last preceding covenant.

…"

By **Section 95** of the **Act,** every conveyance lease or licence of/or in respect of Government Land is required to be registered, and by **Section 136(1),** the limitation period for institution of suits for anything done under the Act is one year after the cause of action arose.

[**16**] Referring to section 27 of the Act, the appellant's counsel submitted, *inter alia*, that once a grant has been made through a letter of allotment and the grantee accepts the same and complies with the conditions, he becomes the owner of the land and the respondent is under a legal duty to issue to him the relevant title documents; that by four letters in which the Commissioner of Lands referred to the suit land as private land, the Commissioner of Lands waived condition for development and that the Commissioner of Lands had abused his power by revoking the grant given to the appellant without following the laid down procedures relating to forfeiture. On the other hand, the respondent's counsel submitted that the letter of allotment is not proof of title and is only a process in the allocation of land and the legal right can only crystallize after registration. He relied on two cases; **Wreck Motors Enterprises v Commissioner of Land and 2 Others, Court of Appeal Nairobi, Civil Appeal No. 71 of 1997** and **Joseph Arap Ng'ok v Justice Moijo ole Keiwua, NAI Civil Application No. 60 of 1997.**

On his part **Mr. Makori,** learned counsel for the interested parties submitted that the suit property did not become private land and continued to be vested in the government as lead lessor because the appellant did not fulfill the terms upon which the land was allocated to him.

[**17**] Construing the letter of allotment together with the relevant provisions of the Act, it is evident that the letter of allotment was for grant of a lease of unsurveyed farm of 118 Hectares initially for a term of 3 years as a first stage. Before the lease could be granted the land had first to be surveyed. The documentary evidence particularly the letter of the surveyor dated 10th January, 1978 shows that the survey was not completed. Admittedly, the appellant did not even take possession of the land because as the correspondence disclosed, the land was occupied by people from the area with government permission and they resisted attempt to vacate the land. If the people occupying the land were doing so unlawfully, the respondent had power under Section 130(1) of the Act to institute legal proceedings for the recovery of the land.

As is clear from Section 27(1) of the Act, the next stage was issuance of a lease for a term of three years containing the covenants and conditions in the lease, including the provision for entitlement to freehold on the expiry on the term. The third stage was the registration of the lease in terms of section 95 and 97 of the Act. As Section 110(1) of the Act provides no evidence, *inter alia*, of grant of a lease is receivable in a civil court unless the lease is effected by an instrument in writing and the instrument has been registered.

[**18]** On the above analysis of the law, it is clear that the letter of allotment granted the appellant a mere contingent right to a grant of a lease. To be entitled to a grant of lease, the land had to be surveyed and the applicant had to fulfill the conditions stipulated in the letters of allotment. Since a conveyance, lease or licence of over one year in respect of government land had to be effected through an instrument in writing and which had to be registered, the term of three years indicated in the letter of allotment, the covenant as to development within the three years and also the provision for entitlement to freehold upon the expiry of the lease were terms to be contained in the proposed lease.

Contrary to the contention of the appellant's counsel, the letter of allotment is not a grant of lease. Therefore, the authorities relied on by the appellant on the legality of a grant of government land such as **Fletcher v Peck 10 US 87 (1810); Commissioner for Local Government**

Lands and Settlement v 1 Kadherbhai (1929-1930) KLR 12 XII are not directly relevant.

[**19**] Moreover, the covenant as to development within the three years of the grant of lease was a mandatory statutory requirement of leaseholds of agricultural land unless expressly varied or excepted. By section 3(a) as read with section 7 of the Act, the Commissioner of Lands had delegated power to vary or remit covenants contained in an agreement or lease or to extend or except time for performing conditions contained in any agreement or lease. The contention that the respondent waived the condition as to development is with respect, inapplicable to the circumstances of the case. Firstly, the covenants did not exist as a lease containing the covenant was not executed. Secondly, the covenants were not expressly varied or excepted in accordance with the Act, and thirdly, this was not a case where the appellant was seeking relief from forfeiture of a lease for breach of covenant under S.77 of the Act. Incidentally, the acceptance of purchase money would not operate as a waiver of forfeiture for breach of covenant or condition (S.80 of the Act).

[**20**] By February 1993 when the application for judicial review orders was filed, more than 15 years had elapsed since the letter of allotment was issued. This was far beyond the stipulated one year for commencing proceedings against the government for anything done under the Act.

By the judicial review application, the appellant sought an order of mandamus directing the Commissioner of Lands to issue a lease in respect of the suit land. In the written submissions dated 15th December, 2006, the appellant's counsel stated that the word "lease" was a typographical error and should be replaced with "freehold title". In the course of oral submissions in the High Court made on 19th March 2009, the appellant's counsel formally sought an amendment to that effect. That is the nature of the order of mandamus that the appellant sought at the trial to be issued with a freehold title.

In the absence of a registrable lease granting the appellant a leasehold interest in the suit land and without fulfilling the mandatory conditions for grant of lease as to development or having been expressly excepted from fulfilling the condition, the letter of allotment lapsed before implementation and the appellant had no legal or equitable proprietary interest in the suit land which could be enforced by an order of mandamus. Indeed, an order of mandamus would compel the Commissioner of Lands to grant a freehold title to government land in contravention of the provisions of the Act. That would be against public policy.

[**21**] The second ground why the orders of mandamus and prohibition were not granted was for the reason that part of the suit land had been allotted to third parties and the order of certiorari had not been sought to quash the allocations. The appellant contended that that finding was erroneous and that the Commissioner of Lands abused his powers by revoking the grant given to the appellant without following the correct procedure. The respondent's counsel relied on **Nyambari Traders & Welfare Association v County Government of Kiambu & 2 Others [2016] eKLR** for the proposition that where a decision has been made and is being challenged, mandamus cannot stand alone without certiorari and submitted that the appellant had sought orders of certiorari for cancellation of the allotments already made to third parties. The counsel for the interested parties submitted that orders of judicial review are discretionary and the court has to consider whether in the circumstances of each case the remedy sought is efficacious. He contended that orders of mandamus and certiorari if granted would result in total chaos.

[**22**] It is true that judicial review orders are discretionary remedies. The Court may not grant them although an applicant has shown a case warranting the grant of such orders. The grounds upon which the court may decline to grant the orders include the conduct of the applicant such as unreasonableness, undue delay, whether the decision has been acted upon and whether other appropriate remedies are available. In this case, the appellant moved the court after 15 years and after part of the suit land had been allocated to the interested parties in 1991 by the Commissioner of Lands. The correspondence show that part development plan of the said land were prepared by the Rift Valley Provincial Planning Officer for all the plots which were eventually allocated to the interested parties and other plots which were reserved for shops, nursery school and for special purposes. The correspondence also shows that the appellant applied for allocation of part of the suit land and with the recommendation of the Provincial Commissioner, Rift Valley he was allocated 50 acres in about 1985. The letter dated 10th December, 1985 from the District Agricultural Officer and the receipts dated 13th November, 1985 show that the appellant paid over Shs. 42,000/- for the allocation of the 50 acres.

[**23**] The suit land claimed by the appellant includes the 44 acres which was sub-divided into plots and allocated to the interested parties and the 50 acres that were allocated to him. The appellant stated in his further affidavit sworn on 19th March, 2007 that about 40 allotees have constructed houses on their respective plots. The status of the remaining land was not disclosed to the trial court. However, it is clear that by the time the application for judicial review was filed, the status of the suit land had greatly changed to the extent that the suit land was no longer un-alienated government land.

[**24**] Firstly, without an order of certiorari quashing the previous allocations an order of mandamus would require the Commissioner of Lands to perform a duty which is legally impossible. Thus, an order of mandamus or prohibition would not be efficacious. Secondly, the orders sought would not be appropriate in the circumstances. If issued, they would occasion great injustice to innocent third parties who were allocated the land by the same Commissioner of Lands. The above circumstances show that had the appellant proved entitlement to the judicial review orders that he had sought, and which he failed to do, there was sufficient justification for dismissal of his application.

[**25**] For the foregoing reasons, the appeal has no merit and is dismissed with costs to the respondent and to the interested parties.

Dated and Delivered at Nairobi this 8th day of February, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

F. SICHALE

……..……

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR