



**Njenga v Republic & 3 others (Civil Appeal 269 of 2013)
[2018] KECA 632 (KLR) (4 May 2018) (Judgment)**

Leah Waithira Njenga v Republic & 3 others [2018] eKLR

Neutral citation: [2018] KECA 632 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 269 OF 2013
DK MUSINGA, W OUKO & SG KAIRU, JJA**

MAY 4, 2018

BETWEEN

LEAH WAITHIRA NJENGA APPELLANT

AND

REPUBLIC 1ST RESPONDENT

MINISTER FOR LANDS & SETTLEMENT 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

AS MAINA WAWERU 4TH RESPONDENT

*(An appeal arising from the Ruling and Orders of the High Court of Kenya at Nairobi
(Sitati, J.) given on the 13th day of May, 2011 in Misc. Civil Appl. No. 940 of 2005)*

JUDGMENT

1. The appellant's husband was the registered owner of Land Parcel Title No. Nyandarua/Ol Kalou/Salient/271 (the suit land), which was sold in a public auction and transferred to the 4th respondent over some debt and after a consent was entered in Nakuru PMCC No. 173 of 1988 in favour of the 4th respondent.
2. Subsequently, and despite the consent order, the appellant's husband purported to transfer the suit property to the appellant. In an effort to realize the transfer, he obtained a consent from the Land Control Board of the relevant area. The Land Registrar however declined to effect the transfer for the reason that the suit property was already registered in the name of the 4th respondent. It is this refusal that prompted the appellant to take out a motion on notice for mandamus to compel the 2nd and 3rd



respondents to transfer the suit property to the appellant and to issue to her the title deed. The motion also sought general and exemplary damages, as well as mesne profits.

3. After hearing arguments on the application and guided by the principles laid down in the well-known decision of this Court in the Kenya National Examination Council V Republic Ex-Parte Geoffrey Gathenji Njoroge & 9 Others, [1997] eKLR, Sitati, J rejected the application and concluded that an order of mandamus was not available to the appellant since a title deed had already been issued in favour of the 4th respondent; that the 2nd and 3rd respondents could not be accused of failure to perform their statutory duties; that the appellant having come to court with soiled hands by failing to disclose a previous suit involving her and the 4th respondent, was disentitled of the equitable relief of mandamus; and that the purported transfer of the suit property to the appellant by her husband was done in breach of a court order to defeat the course of justice.
4. The appellant has brought this appeal to challenge that determination arguing, on 11 grounds, which we think amounts only to the question whether, without consent of the land control board, there could be a valid sale by public auction. In her written submissions, the appellant asked us to award to her Kshs. 10 billion against the respondents for unlawful deprivation and unlawful eviction.
5. Halsbury's Laws of England, 4th Edition Volume 1 at page 111 quoted by the learned Judges in Kenya National Examinations Council vs. Republic ex parte Gathenji and Others defines the scope and efficacy of mandamus as;

....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....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.”

6. An order of mandamus, it follows from the foregoing, can only direct the performance of a public duty imposed on a person by law and only where that person has failed to perform that duty to the detriment of a party who has a legal right to expect the duty to be performed. Different consideration might apply when considering relief under Article 23(3) of *the Constitution*. Where the only complaint is that the duty has been performed but not according to the law, an order of mandamus would be inappropriate remedy because it is incapable of quashing a decision that has already been made. See Kenya national Examinations Council V. Republic ex parte Gathenji & 9 others (supra). In situations like those the only efficacious order would be certiorari because it can quash a decision already made; made without or in excess of jurisdiction, or where the rules of natural justice have not been complied with. A party in a judicial review seeking an order of mandamus must show the existence of a statutory duty conferred or vested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform.
7. In the matter before us, the appellant sought to compel the 2nd and 3rd respondents by an order of mandamus to issue to her the title deed to the suit property, which she argued had been transferred to her by her husband. The burden was upon her to demonstrate that it was a public duty for the 2nd and



- 3rd respondents to do so by virtue of their offices; and that the appellant had a legal right, or substantial interest in the matter for which mandamus was sought.
8. Our keen reading of the repealed Registered *Land Act* (Cap 300) (the Act) leaves us in no doubt that the 2nd and 3rd respondents had no role in the issuance of certificates of title, a function expressly vested in the Land Registrar. As a matter of fact there was no mention in the entire Act of the 3rd respondent.
 9. It was the Land Registrar who was responsible for administering the land registries in accordance with the Act. By section 32 (1), the Registrar had wide powers to issue a title deed or a certificate of lease to proprietors of land or a lease following the registration of any instrument of transfer to create any interest in land. Under section 149 of the Act whenever any question arises with regard to the exercise of any power conferred or imposed on the Registrar could only be determined through a “case stated’ for the opinion of the High Court.
 10. Any party, including the 2nd respondent, who is aggrieved by a decision, direction, order, or determination of the Land Registrar may appeal to the High Court.
 11. After complaining that the Land Registrar had refused to effect the transfer to her, the appellant then chose the wrong parties who could not be compelled by an order of mandamus. The 2nd and 3rd respondents were not under any public duty imposed by law to issue certificates of title and they were not at all accused of failure to perform any duty that was detrimental to the appellant.
 12. Secondly and of greater significance, the Land Registrar had already exercised the public duty under the law in favour of the 4th respondent. By section 32(1) (i) of the repealed Act, the Registrar could issue only one title deed or certificate in respect of each parcel of land or lease.
 13. Thirdly, the judicial review application was, in our view, an after- thought to try and challenge, through the back door, the consent order recorded on 24th April, 1991, in which the appellant’s husband had unequivocally agreed to give vacant possession of the suit property to the 4th respondent on or before 9th July, 1991.
 14. It is now firmly settled that a consent order can only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons; and that it cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts. See *Hirani V. Kassam* [1952] 19 EACA 131. The appellant did not allege any of these conducts.
 15. By agreeing to vacate the suit property, the appellant’s husband, no doubt, acknowledged his indebtedness and accepted the outcome of the public auction at which the 4th respondent acquired the suit property.
 16. Even after entering into the aforesaid consent, the appellant’s husband went ahead and purported to transfer the suit property to the appellant way after the 4th respondent had been registered as its proprietor. Indeed, we note with surprise that the appellant’s husband had the boldness to state on oath in his further affidavit sworn on 29th January, 2010 that;
 9. That I then became frustrated and immediately sought the Lands Board consent which fortunately gave me consent permitting me to transfer the said matrimonial property in the names of my wife to defeat the sale of my property to Mr. A.S. Waweru since I was unable to challenge the said ex parte orders in the absence of the court file.”



17. With that admission, it is clear that the consent of the Land Control Board, the foundation of appellant's prayer for mandamus, was flawed and irregular. Apart from the fact that the Land Control Board consent and the transfer to the appellant was being done to frustrate the purchaser, the alleged transfer was effected in breach of a subsisting order, judgment having been entered against the appellant's husband in favour of the 4th respondent. The purported transfer was lodged in the Lands Registry on 31st July, 1989 yet there was already a prohibitory order dated 17th February, 1989 and served on the Ol Kalou Settlement Officer on 3rd April, 1989.
18. At the same time, we note that the appellant has not challenged the factual finding by the learned Judge that she did not disclose a material fact that there had previously been a suit, HCCC No. 112B of 1994, brought by her against the 4th respondent, which was dismissed and no appeal was preferred. It is not apparent to us how the suit was terminated to conclude that the subsequent suit was res judicata. The learned Judge, however, found that, by bringing the suit, the subject matter of this appeal without disclosing that she had also brought the dismissed HCCC No. 112B of 1994, the appellant had soiled hands.
19. In view of the foregoing, an order of mandamus was therefore not efficacious in the circumstances of this case. The learned Judge properly so found.
20. Likewise, we find no basis in law for seeking an award of general and exemplary damages in a judicial review application. The claim was not raised before the trial court. It was unsupported and the figure of Kshs. 10 billion, was, as it were, plucked from the air.
21. In the result, the appeal is bereft of any merit. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY, 2018

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

