



**Republic v Attorney General & another; Mwololo & another (Interested Parties); Kamula & 2 others (Exparte Applicants) (Environment and Land Judicial Review Case E005 of 2023) [2024] KEELC 4317 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4317 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E005 OF 2023**

**TW MURIGI, J**

**MAY 22, 2024**

**IN THE MATTER OF AN APPLICATION BY STEPHEN KIVANDI KAMULA, JOSPHINE MUTINDI KILUVA AND BELLA ROSE LAVI FOR JUDICIAL REVIEW ORDER OF MANDAMUS AGAINST THE LAND REGISTRAR MAKUENI COUNTY**

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 16, 17 AND 18 OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES ALL OTHER ENABLING PROCEDURES AND PROVISIONS OF THE LAW**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR MAKUENI COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**BONIFACE KIOKO MWOLOLO ..... INTERESTED PARTY**

**SIDIAN BANK LIMITED ..... INTERESTED PARTY**

**AND**

**STEPHEN KIVANDI KAMULA ..... EXPARTE APPLICANT**

**JOSEPHINE MUTINDI KILUVA ..... EXPARTE APPLICANT**



## JUDGMENT

1. By a Chamber Summons dated 6<sup>th</sup> March 2023, brought under Order 53 Rule 1 and 2 of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act and Sections 7 and 8 of the Fair Administrative Action Act, the Ex Parte Applicants (hereinafter referred to as the Applicant) sought leave to apply for judicial review order of Mandamus to compel the 2<sup>nd</sup> Respondent to assess the stamp duty payable and authorize transfer of title No. Makueni/Emali/234 and to remove the caution registered therein by the 1<sup>st</sup> Interested Party.
2. Upon being granted leave, the Applicants filed the substantive Notice of Motion dated 27<sup>th</sup> June, 2023 under Section 7 of the Fair Administrative Action Act 2015, Order 53 Rule 3(1) of the Civil Procedure Rules, Sections 8 and 9 of the Law Reform Act seeking the following orders: -
  - i. That an order of mandamus be issued compelling the 2<sup>nd</sup> Respondent by themselves, their servants, agents and or persons directly working under them to assess the stamp duty payable and authorize transfer of title No. Makueni/Emali/234.
  - ii. That an order of mandamus be issued compelling the 2<sup>nd</sup> Respondent by themselves, their servants, agents and or persons directly working under them to remove the caution lodged by the 2<sup>nd</sup> Interested Party in title No. Makueni/Emali/234.
  - iii. That the costs of this application be awarded to the Ex Parte Applicants.
3. The application is premised on the grounds appearing on its face and on the Statutory Statement together with the verifying affidavit of Stephen Kivandi Kamula sworn on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Ex Parte Applicants.

### The Applicants' Case

4. The deponent averred that on 12<sup>th</sup> May 2022, this court delivered its judgment in ELC Case No. 24 of 2018 in the following terms:-
  - a. An order is hereby issued directing the land Registrar to remove the caution registered by the 2<sup>nd</sup> Defendant on 7<sup>th</sup> March 2018.
  - b. An order is hereby issued directing the 1<sup>st</sup> Defendant to transfer Makueni/Emali Town/234 to the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.
  - c. Within 14 days of registration the transfer in (a) above, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs shall pay the balance of the purchase price being Kshs. 300,000/= to the 1<sup>st</sup> Defendant or his appointed Advocates.
  - d. Upon compliance with (b) above, the 1<sup>st</sup> Defendant shall give vacant possession of Makueni/Emali Town 234 within a further 14 days period in default of which the Plaintiffs shall be at liberty to evict the 1<sup>st</sup> Defendant from the suit premises.
  - e. Costs of the suit to the Plaintiffs against the 1<sup>st</sup> Defendant.
5. The Applicants asserted that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants executed the completion documents and presented the same to the 2<sup>nd</sup> Respondent for action. That the 2<sup>nd</sup> Respondent has refused to assess the



stamp duty payable in order to effect the transfer of the suit property which has been valued at Kshs 10,000,000/= . The deponent asserted that on the basis of the foregoing, they are unable to execute the decree of this court.

6. The deponent lamented that the 1<sup>st</sup> Interested Party has continued to collect rental income from the suit property due to failure by 2<sup>nd</sup> Respondent to assess the stamp duty payable to effect the transfer.
7. That despite demand being made, the 2<sup>nd</sup> Respondent has refused to assess the stamp duty payable to effect the transfer of the suit property notwithstanding that there is no stay of execution in place.
8. The Applicants contended that the continued inaction by 2<sup>nd</sup> Respondent has prejudiced their right to property under Article 40 of *the Constitution*. In addition, they asserted that the 1<sup>st</sup> Respondent has refused to remove the caution as decreed by the court. They argued that the Respondent's inaction is irrational, unreasonable and has infringed their right to fair administrative action provided under Article 47 of *the Constitution*.
9. According to the Applicants, the Interested Party will not be prejudiced if the orders sought are granted since there is no order of stay of execution that is in place.

### **The 1<sup>st</sup> Interested Party's Case**

10. The 1<sup>st</sup> Interested Party filed a replying affidavit dated 5<sup>th</sup> February 2024 in opposition to the application. He averred that he is the registered owner of the suit property. He confirmed that Makueni ELC Case No. 24 of 2018 was decided in favour of the Applicants herein. That being aggrieved by the decision, he filed an appeal to the Court of Appeal which is pending for hearing and determination.
11. He argued that the instant judicial review application is premature and is intended to circumvent his appeal which is pending before the court of appeal for hearing and determination. He asserted that the Applicants secret attempts to transfer and register the suit property in their names without his knowledge and consent is unlawful and tainted with ill motive. He urged the court to dismiss the application.
12. The parties were directed to canvass the judicial review application by way of written submissions.
13. As at the time of writing this judgment, the 1<sup>st</sup> Interested Party had not filed his submissions as directed.

### **The Ex Parte Applicants' Submissions**

14. The Ex Parte Applicants submissions were filed on 18<sup>th</sup> Jan 2024.
15. Counsel reiterated the contents of the Applicants verifying affidavit in support of his submissions. To buttress his submissions, Counsel relied on the case of Republic v Chief Lands Registrar; Ex Parte Mary Wamaitha Kaitany (2021) eKLR.

### **Analysis And Determination**

16. Having considered the application, the respective affidavits and the Applicants' submissions, the only issue that falls for determination is whether the Applicants have established grounds to warrant the grant of an order of mandamus.
17. Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty. Mandamus is a judicial command requiring the performance of a specified duty, which has not been performed.



18. Mandamus is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining

19. In the case of *R vs Kenya National Examination Council ex parte Gathengi & 8 Others* (1997) eKLR the Court of Appeal stated as follows:-

“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”.

20. The test for granting mandamus was eloquently set out in *Apotex Inc. vs. Canada (Attorney General)*. The position was reiterated in *Dragan vs. Canada (Minister of Citizenship and Immigration)* (2003) FCA 139 which listed eight factors that must be present for the writ to issue are:-

- i. There must be a public legal duty to act;
- ii. The duty must be owed to the Applicants;
- iii. There must be a clear right to the performance of that duty, meaning that:
  - a. The Applicants have satisfied all conditions precedent; and
  - b. There must have been:
    - I. A prior demand for performance;
    - II. A reasonable time to comply with the demand, unless there was outright refusal; and
    - III. An express refusal, or an implied refusal through unreasonable delay;
- (iv) ) No other adequate remedy is available to the Applicants;
- (v) The Order sought must be of some practical value or effect;
- (vi) There is no equitable bar to the relief sought;
- (vii) On a balance of convenience, mandamus should lie.

21. Firstly, the Applicants must demonstrate that there exists a public legal duty to act. This claim arises from a valid court decree, which has been appealed against. The Applicants contended that despite the suit property having been valued by the government valuer at Kshs. 10,000,000/= for purposes of assessing the stamp duty payable, the 2<sup>nd</sup> Respondent has refused to assess the stamp duty payable to effect the transfer of the suit property. In this regard, the Applicants produced the valuation report (Exhibit C). The valuation report shows that the suit property was valued at Kshs 10,000,000/= for purposes of assessing the stamp duty payable. The Applicants also produced the decree (Exhibit A) and the completion documents including the transfer of lease (Exhibit B).



22. The Applicants contended that the continued inaction by the 1<sup>st</sup> Respondent has prejudiced their right to property provided under Article 40 of *the Constitution*.
23. On the other hand, the 1<sup>st</sup> Interested Party asserted that the application is premature because his appeal is still pending for hearing and determination. In this regard, he produced a copy of the Notice of Appeal (BKMA) and Memorandum of Appeal (BKM). This court is called upon to determine whether an appeal can operate as an automatic stay of execution.
24. Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules outlines the guiding principles to be met for the grant of stay and provides that:-

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- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
25. It is clear from the above provisions that an appeal alone does not operate as an automatic stay of execution.
  26. It is not in dispute that judgment in ELC No. 24 of 2018 was delivered on 12<sup>th</sup> May 2022 in favour of the Applicants herein. It is also not in dispute that the 1<sup>st</sup> Interested Party appealed against the judgment in Civil Appeal No. 434 of 2022. The Applicants contended that the Interested Party will not suffer any prejudice if the orders sought are granted as there is no order of stay of execution that is in place. The 1<sup>st</sup> Interested Party did not rebut the Applicants averments nor adduce any evidence to show that there is an order of stay of execution in place.
  27. The duty to assess the stamp duty is owed to the Applicants. There is a clear right to the performance of that duty. The ex parte applicants have no other way of enforcing the decree. The 2<sup>nd</sup> Respondent has a legal duty to satisfy the decree.
  28. Secondly, there must have been a prior demand for performance. The Applicants averred that despite several demands, the 2<sup>nd</sup> Respondent has refused to assess the stamp duty payable to effect the transfer of the suit property. The record shows that the decree was served upon the 2<sup>nd</sup> Respondent. In this regard, the Applicants produced the decree (Annexure A) and the demand letters to the Land Registrar Makueni (Annexure D). It is crystal clear that the Applicants wrote demand letters and requested the 2<sup>nd</sup> Respondent to assess the stamp duty payable to effect the transfer of the suit property.
  29. It is also a requirement that no other adequate remedy is available to the Applicant. Indeed, in the circumstances of this case, there is no other adequate remedy available to the Applicants to effect the transfer of the suit property.
  30. Applying the above tests to the facts and circumstances of this case, I find and hold that the Applicants have satisfied the above conditions for the grant of an order of Mandamus.
  31. In the end, I find that the application dated 6<sup>th</sup> March 2023 is merited and the same is allowed in the following terms:-



- a. An order of Mandamus be and is hereby issued against the 2<sup>nd</sup> Respondent compelling them to assess the stamp duty payable and authorize the transfer of title No. Makueni/Emali/234.
- b. An order of Mandamus be and is hereby issued against the 2<sup>nd</sup> Respondent compelling him remove the caution lodged by the 1<sup>st</sup> Interested Party on Title No. Makueni/Emali/234.
- c. That the 2<sup>nd</sup> Respondent shall pay the Applicants costs of these proceedings.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

In the presence of:-

Mapesa for the Applicants.

Alfred Court Assistant.

