

**IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, SHAH & O'KUBASU J.J.A.
CIVIL APPEAL NO. 27 OF 2001
BETWEEN**

DIDA BONAYA HALAKEAPPELLANT

AND

NAIROBI CITY COUNCILRESPONDENT

**(Appeal from the Ruling of the High Court of Kenya at
Nairobi (Aganyanya, J) dated 24th September, 1999**

in

H.C.C.C. NO. 1202 OF 1999)

JUDGMENT OF SHAH, J.A

On 24th April, 1999, the High Court (Aganyanya, J) refused to grant leave to the appellant to file an application for mandamus. The order of mandamus against the respondent, Nairobi City Council, was being sought to compel the Council to issue a beacon certificate, draw and prepare relevant maps and plans and lodge them with the Commissioner of Lands, and also to take all other relevant actions to ensure that the appellant was issued with a certificate of lease in respect of Plot No. 107/1201 in Umoja Estate in Nairobi.

The facts briefly are that the Council through its then Town Clerk had allocated to the appellant the said plot measuring some 0.159 of an hectare for a term of 99 years from 1st October, 1993 at a stand premium of Shs.15,000/= and an annual rental of Shs.1,600/=. In addition the appellant was to pay for all charges in respect of roads and sewer apportionments, rates for the rateable part, stamp duty, survey, conveyancing and registration fees and any other incidental charges on demand. It is on record that the appellant paid what was due in respect of stand premium and the rent on the 23rd day of September, 1997. Why it took him over four years to pay that sum is not clear. He paid survey fees and some rent on 8th July, 1999. He paid rates upto the year 1999 on 8th July, 1999. The appellant's complaint is that he is the only one in the area in question who has not been issued with a certificate of lease.

The issue that first arises for determination is: can an order of mandamus lie against the Council requiring it to issue a certificate of lease? It is trite that an order of mandamus is an order of a most exclusive nature, and is, in form, a command issuing from the High Court, 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. **An accepted offer of grant of lease by the Council to the appellant of land within the jurisdiction of the Council is in the nature of a contract.** The Council having offered the lease, was bound in law to perform its part of the obligations undertaken by it, provided that the appellant had performed his part of the obligations.

In the event of a breach, the remedy lies in an action for specific performance as I see it and it is not a public duty cast on Council so as to qualify for the seeking of an order of mandamus. Putting it simply it is a simple contract between an individual and the Council. It can be enforced at common law. There is no public duty cast on the Council.

There is yet another point that arises for determination. There is nothing in the **Local Government**

Act, Cap 265, Laws of Kenya which casts a public duty on the Council to do any of the acts the appellant required the Council to perform and in respect of which it can be compelled by an order of mandamus to do.

The offer of a 99 year lease by the Council to the appellant can only fall under section 144(5) of the Local Government Act. It reads:

"(5)A local authority may let, or grant to any person a licence to occupy, any land which it may possess -

(a)with the consent of the Minister for any term;

(b)without the consent of the Minister, unless such consent is required by section 177 or any other written law, for a term not exceeding seven years, and may, in respect thereof, charge rents, stand premium or fees".

It can be seen that there is no mention in the record before us of the consent of the Minister for Local Government having been obtained to the grant of a 99 year lease. Even if such consent was obtained an order of mandamus would not lie when the appellant is pursuing a private right.

The learned Judge pointed out simply that there were no facts or averments before him which confirmed that the Council was under a legal duty to issue beacon certificate, draw and/or prepare relevant maps and/or plans or which ones these were. In the absence of lack of such fundamental requirements the learned Judge was but right in refusing the application for leave. I would dismiss this appeal with costs.

Dated and delivered at Nairobi this 9th day of November, 2001.

A.B. SHAH

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JUDGE OF APPEAL