



**Republic v Attorney General & another; Kariuki & another (Exparte) (Judicial Review Miscellaneous Application 4 of 2019) [2024] KEHC 2068 (KLR) (28 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 2068 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 4 OF 2019  
HM NYAGA, J  
FEBRUARY 28, 2024**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

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

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT ... 2<sup>ND</sup>  
RESPONDENT**

**AND**

**WILLIAM WAHOME KARIUKI ..... EXPARTE**

**PETER MAINA KARIUKI ..... EXPARTE**

**RULING**

1. Pursuant to leave granted on 26<sup>th</sup> February,2019, the ex parte Applicants filed on 20<sup>th</sup> March,2019 a Notice of Motion dated 19<sup>th</sup> March,2019 and sought:
  - a. An order of Mandamus against the second respondent, Director of Land Adjudication & Settlement, compelling the said Officer to satisfy the decree issued on 29<sup>th</sup> March,1993 in the Nakuru High Court Civil Suit Number 219 of 1998(O.S)
  - b. That in the alternative, reliefs under Article 23(3) of *the Constitution* of Kenya,2010 be invoked.
  - c. That costs of this Application and the costs in the Application for leave in Nakuru H.C. Misc. Application No. JR No. 4 of 2019, be borne by the Respondents.



2. The grounds of the application are stated in the Applicants' statutory statement of dated 7<sup>th</sup> February, 2019 and a Supporting Affidavit sworn by the 1<sup>st</sup> Applicant, William Wahome Kariuki, on his behalf and on behalf of his co-applicant Peter Maina Kariuki on 19<sup>th</sup> March, 2019.
3. He averred that on 18<sup>th</sup> February, 1966 his deceased mother was allocated plot number 66 Upper Gilgil Scheme by the Settlement Fund Trustees which is adjacent to plot no. 67 Upper Gilgil Scheme.
4. That at the time plot number 66 was allotted to his deceased mother, plot number 67 which was fifty (50) acres or thereabout was unoccupied because it was marshy and uninhabitable and for that reason it was amalgamated with the adjoining plots. No 66 belonging to his deceased mother and 52 belonging to one Elizabeth Nyokabi Ng'ang'a.
5. It was also his deposition that the said amalgamation was lawful and valid and was effected under the authority and supervision of the Senior Assistant Agricultural Officer, and in 1987, the Settlement Fund Trustees purported to sell plot number 67 to one Loice Nyaguthi.
6. He averred that his deceased father, Kariuki Wahome was at that time the one who was representing his deceased mother's estate and together with one Elizabeth Nyokabi Ng'ang'a who is also deceased moved to the High Court vide Civil Suit No. 219 of 1988(O.S.) seeking appropriate reliefs against the Settlement Fund Trustees and the proceedings were referred for arbitration presided by the District Commissioners Nyandarua District.
7. He deposed that an arbitral award was adopted in the aforesaid High Court matter and a decree was issued whereby the Settlement Fund Trustees was ordered to compensate his deceased father and Elizabeth Nyokabi Ng'ang'a with alternative plots but despite the Director of Land Adjudication being served with a copy of the said decree and numerous reminders, he has refused and/or neglected to compensate them with alternative plots.
8. The Respondents despite being duly served chose not to file any response.
9. The application was canvassed through written submissions. Only the Applicants submissions are on record.

### **Applicant's Submissions**

10. The Applicants argued that the property to be compensated to them is held by the 2<sup>nd</sup> respondent in its capacity as a public entity and as such the land is a public property before it is allocated to individuals. For these reasons the Applicants submitted that pursuant to Section 42 of the [Limitation of Actions Act](#), the land should not be subjected to the [Limitation of Actions Act](#).
11. The applicants submitted that judicial review is a right protected under Article 23(3) of [the Constitution](#) and that Article 40 guarantees its citizens the right to property.
12. In view of the above, the Applicants submitted that they deserve to have the aforesaid parcel of land transferred to them as soon as possible.
13. In buttressing their submissions, the Applicants relied on the cases of Republic vs Land Registrar, Trans-Nzoia & another Ex parte Mary Odhiambo & another [2019] eKLR, Republic vs Principal Secretary State Department of Interior, Ministry of Interior & Coordination of National Government & Principal Secretary ex parte Salim Awadh Salim & 12 others [2018] eKLR and Republic vs Town Clerk Of Webuye County Council & another [2014] eKLR.



## Analysis & Determination

14. I have considered the issues raised in this application and the Applicant's submissions. The sole issue that arises for determination is whether the ex parte Applicants are entitled to the reliefs sought.
15. The Court of Appeal in *Republic vs Kenya National Examinations Council ex parte Gathenji and 9 others*, [1997] eKLR on the nature of the remedy of mandamus held 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, 4<sup>th</sup> 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....”

16. The requirements for an order of mandamus to issue were explained by Mativo J. in *Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another (supra)* as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, [23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. [24] The 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.”

17. Republic vs Town Clerk of Webuye County Council & Another (supra) that:

“...a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of *the Constitution* particularized in Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159 (2) (a) & (b) and the Applicant’s right of access to justice protected under Article 48 of *the Constitution*.”

18. HWR Wade in his book Administrative Law Oxford University Press, 5<sup>th</sup> Edition states as follows regarding Mandamus:

“The commonest employment of mandamus is as a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him.”

19. Later on he states as follows:

“...Lord Mansfield said in sweeping terms: (in R -vs- Barker 1762) 3 Burr.1265):

“It was introduced to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one. ... The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right and no other specific remedy, this should not be denied.”

20. In the instant case the Applicants have presented sufficient evidence to demonstrate that the High Court in Civil Suit No.219 of 1988 adopted an arbitral award that was issued by District Commissioner One C.K Muhia as an order of the court.



21. The said arbitrator in his decision stated as follows: -

“Having analysed all the salient factors in the dispute the court was of the opinion that, the present status quo should not be disrupted. However, the Settlement Fund Trustee should be made to compensate the two complainants with alternative plots, and for the damages inflicted on them, caused by the negligence of the Settlement Fund”

The High court in its amended decree issued on 29<sup>th</sup> March,1993, in Civil Suit No.219 of 1988(O.S): Elizabeth Nyokabi Nganga & Kariuki Wahome vs. The Settlement Fund Trustees, ordered as follows: -

- i. That the panel of Elders award be and is hereby adopted as judgement of the court, that is to say, that the Defendant do compensate the plaintiffs with alternative plots and the present status quo should not be disrupted
- ii. That the defendants do pay the plaintiffs for damages inflicted on them caused by the negligence of the defendant.
- iii. That costs of this suit be borne by the defendant.

22. To date the above orders of the court have not been complied with. Court orders should not be issued in vain and as such I find the orders sought are merited.

23. I hereby issue an order of mandamus to compel the 2<sup>nd</sup> Respondent to satisfy the decree issued on 29<sup>th</sup> March,1993 in Nakuru High Court Civil Suit No. 219 of 1988(O.S).

24. The 2<sup>nd</sup> Respondent shall also bear the costs of this Application.

25. Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

C/A Oleperon

Mr. Mburu for Applicant

No appearance for Respondent

