



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT NYAHURURU

JUDICIAL REVIEW No 7 OF 2018

IN THE MATTER OF: AN APPLICATION TO APPLY FOR JUDICIAL ORDERS OF MANDAMUS

AND

IN THE MATTER OF: SECTIONS 3,4,7,9, AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT, ACT No.4 OF 2015

AND

IN THE MATTER OF: ARTICLES 10 AND 60(1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTIONS 7,134(6), 134(7), 134(8) AND 135(1C) OF THE LAND ACT, ACT 6 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAND SETTLEMENT FUND BOARD TRUSTEES.....1st RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT...2nd RESPONDENT

DISTRICT LAND ADJUDICATION SETTLEMENT

OFFICER NYANDARUA COUNTY.....3rd RESPONDENT

THE HON ATTORNEY GENERAL.....4th RESPONDENT

AND

FLORA MWENJA (Suing as the Legal Representative to the estate

of EZEKIEL NGURE MWENJA (DECEASED).....EX-PARTE APPLICANT

RULING

1. The Applicant vide his Chamber summons dated the 15th May 2018, herein substantially seeks for leave to apply for an order of *mandamus* against the 1st and 2nd Respondents herein to compel them to issue her with an allotment letter over the suit land known as Plot No. 713 Mawingo Salient Settlement Scheme as well as costs for the Application.

2. The said application is supported by the grounds on the face of it and on the verifying affidavit by the Applicant dated the 15th May 2018.

3. A date for hearing of the same inter-parties was fixed for the 8th October 2018 wherein on that date, service had not only been effected, but Counsel for the Applicant was also before the Court of Appeal. An adjournment was sought by counsel who was holding his brief.

4. The matter was rescheduled for hearing for the 16th January 2019. In the meantime, the application was served upon the Hon the Attorney General who then entered appearance for the 1st, 2nd, 3rd and 4th Respondents on the 17th December 2018 and filed their memorandum of appearance on the 15th January 2019.

5. On the 16th January 2019, there was no appearance for the Hon the Attorney General wherein counsel for the Applicant sought to file his written submissions to the application. Leave was granted to the Applicant to file their written submissions 14 days from the 16th January 2019 and for the Respondent to file theirs 7 days upon service. The matter was then set for mention for the 5th February 2019 to confirm compliance and to take a date for ruling.

6. On the said day, none of the parties were present and neither were the written submissions filed as ordered. The court proceeded to issue a date for the ruling for the 26th March 2019. In the meantime the Applicant filed her written submissions on the 12th February 2019 without leave to file the same of time.

7. There was no response by the Respondents herein. The Application is therefore deemed unopposed.

8. I have considered the Applicant's unopposed application *Order 53 Rule 1* of the Civil Procedure Rules, is the applicable law on leave to commence Judicial Review proceedings. The said proviso provides as follows:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall be made ex-parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.

9. As seen from the above, no application for judicial review orders should be made unless leave of the court was sought and granted.

10. In the case of the **Republic v County Council of Kwale & another ex parte Kondo & 57 others (1998) 1 KLR (E&L) the court held** as follows:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived... Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially”.

11. In the present application, the substantive issue that requires to be determined is whether an arguable case has been shown for leave to be granted to the Applicant to commence judicial review proceedings. The Applicant is seeking an order of *mandamus* against the 1st and 2nd Respondents herein to compel them to issue her with an allotment letter over the suit land known as Plot No. 713 Mawingo Salient Settlement Scheme.

12. It was held in **R vs Panel on Take-Overs and Mergers, ex parte Datafin PLC, (1987) QB 815**, that in order to ascertain whether a particular action, decision or failure to act is amenable to judicial review, the Courts will generally consider whether the relevant matter arose out of the exercise of a public function. The question whether a function that is exercised has a public element will depend on a number of factors, including the source of the power being exercised, and if legislation is that source of power, this is a strong indicator that the relevant matter is amendable to judicial review.

13. In the case of **Republic vs Kenya National Examinations Council exparte Gathenji and 9 Others, [1997] eKLR** the court held that orders of mandamus could only issue against a person, corporation or inferior tribunal 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, 4th 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..... .”

14. Section 135 of the Land Act provides as follows:

(1) There is established a Fund to be known as the Land Settlement Fund which shall be administered by a board of Trustees known as the Land Settlement Fund Board of Trustees.

(1A)The Board of Trustees shall be a body corporate with perpetual succession and a common seal, and which shall in its corporate name, be capable of—

15. The 1st Respondent is a statutory corporation, and its powers are donated by section 134 of the statute. Mandamus can therefore issue against it as a corporation.

16. The government created a settlement scheme for the purpose of re-settling squatters on the land wherein the scheme was managed by the Settlement Fund Trustees. Most of these schemes were constituted from the farms that the SFT had acquired from the white farmers. After the amalgamation of parcels and sub-division into viable units, there was conversion of the land registration thereafter.

17. It is the Applicant’s submission that after the deceased had been allotted the suit plot and had made the necessary payments for registration and conveyancing and the said monies had been received on behalf of the 1st respondent herein and communication made to the 2nd Respondent herein, the 2nd Respondent has failed and/ or refused to process the allotment letters in favour of the

Applicant despite efforts by the Applicant, as shown by the Applicant's documents herein annexed as FM 3-11, to have the same processed.

18. In *Re Bivac International SA (Bureau Veritas)* (2005) EA. 43 the High Court expounded on the issue of discretion and stated that:-

"... whereas Judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors that led to the exercise of the court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the court by tossing a coin or waxing a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review sought, the grounds and possible principles of administrative law involved."

19. I have considered the application before the court. The institutions intended to be sued are public bodies that is subject to judicial review orders. The documents placed before the court do establish an arguable case for the applicant against the Respondents. The application is thereby merited.

20. In the foregoing, leave to file an application for an order of mandamus against the Respondents is granted as prayed. The same shall be filed within 21 days upon delivery of this ruling.

Dated and delivered at Nyahururu this 26th day of March 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE



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