



MOMBASA MAIZE MILLERS LTD ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

COMMISSIONER OF LANDS ::::::::::::::::::::::::::::::::::: RESPONDENT

AND

1. VENANT MWASHUMA

2. HASSAN ABUBAKAR NITELE

3. MR. ABDULKARIM SALEH MUHSIN ::::::::::: INTERESTED PARTIES

RULING

In its Notice of Motion dated 12th August 1997 (the Application) expressed to be brought under the Law Reform Act Cap 26 of the Laws of Kenya and Order 53 of the Civil Procedure Rules, the Ex- Parte Applicant (the Applicant) claims that it is the registered proprietor of **ALL THAT** piece of land situate on Mombasa Island comprising 3.5 acres or thereabouts and known as **Title No. Mombasa/ Block XIII/ 155** which said piece of land fronts an unmarked access road that joins Mwangeka Road. On the 31st July 1997 the first and second Interested Parties approached the Applicant's General Manager, Mr. Mohamed Ali Islam, and offered to sell to the Applicant for Shs. 5,000,000/= the piece of land known as **Title No. Mombasa/ Block XIII/ 415** (the suit piece of land) that had been allocated to them. The Applicant did not accept that offer. Instead it filed this application initially naming the first and second Interested Parties but later on joined the third Interested Party. The application seeks a host of orders. They are:

“a) A declaration that the alienation and excision of the whole of the access road, being an extension of Mwangeka Road in the Municipality of Mombasa and fronting Mombasa/Block XIII/155, by the Commissioner of Lands was illegal and null and void;

b) A further declaration that the subsequent survey and demarcation of the said road, now numbered as Mombasa/Block XII/415 and a lease thereafter issued to VENANT MWASHUMA an HASSAN ABUBAKAR MTELE in respect thereof by the Commissioner of Lands is (sic) illegal, null and void ab initio;

- c) An order of Mandamus to go to the Commissioner of Lands to withdraw, cancel and remove any records relating to the creation of Mombasa/Block XIII/415 which was illegally allocated to the them**
- d) A further Order of Mandamus to go to the Commissioner of Lands to revoke rescind and/or cancel the lease dated 18th July 1997 in respect of Mombasa/Block XIII/415 to VENANT MWASHUMA and HASSAN ABUBAKAR MTELE;**
- e) An order to go to the Commissioner of Lands to restore the said access road to the condition and status ante and to Prohibit the Commissioner, his servants or agents and all or any other persons whosoever from acting in any manner whatsoever, prejudicial or detrimental to the Applicant's vested rights of direct use of free and unhindered passage through the said access road fronting Mombasa/Block XVII/155;**
- f) An Order for general damages for the Applicant against the Government of Kenya.”**

The Application is based on the grounds that as the suit piece of land is an unnamed road of access fronting the Applicant's said piece of land it was, in contravention of section 185 of the Local Government Act and section 12 of the Government Lands Act, illegally allocated to the first and second Interested Parties and that by reason of that illegal allocation the Applicant has been denied access to its said piece of land and the same is now land locked. The application is supported by the Applicant's statement filed at leave stage and the affidavits of the Applicant's said General Manager.

In response the first Interested Party, on his own behalf and on behalf of the second Interested Party, swore a replying affidavit in which he deposed that the application is misconceived and incompetent for fouling the provisions of Order 53; that the suit piece of land was legally allocated to the them as it was an open bushy and unutilized government land; and that the Applicant has never used the suit piece of land as an access road as its said piece of land is separated from the suit piece of land by a two meter high concrete wall fence.

The third Interested Party also swore a replying affidavit and deposed *inter alia* that this suit is bad in law as the Applicant, not having any proprietary interest in the suit piece of land, has no *locus standi* to bring these proceedings; that the President of the Republic of Kenya had powers under the Government Lands Act to allocate un alienated pieces of Government land like the suit piece of land; that being a *bona fide* purchaser for value without notice the third Interested Party's title to the suit piece of land is indefeasible; and that he is ready to surrender part of the suit piece of land to the Government to provide access to the Applicant's piece of land.

Perhaps because of the long time it has taken to have this matter heard the parties' advocates agreed to rely on written submissions.

In their submissions counsel for the Applicants referred me to the Deed Plan for the area and contended that the suit piece of land is clearly an extension of the Mwangeka road forming a cu-de-sac adjoining the Applicant's said piece of land. That, they said, is clear from the third Interested Party's own Surveyor's letter annexed to the replying affidavit of the third Interested Party. By the illegal allocation access to the Applicant's property is completely blocked thus rendering it useless. Citing **section 84 of the Government Lands Act** and the case of **Insurance Company of East Africa Ltd Vs The Attorney General & 2 Others, Mombasa HCCC No. 151 of 1997** counsel submitted that, before being closed by some competent authority after inviting comments from interested parties as required by law, the Commissioner of Lands has no powers to alienate a road reserve which is trust land vested in the Local Authority for the area and not in the Government. The purported allocation and subsequent issue of the title deed in this case should therefore be declared null and void. And with that declaration the third Interested Party's title is also null and void as the first and second Interested Parties had no valid title to pass on to him.

The submissions for the first and second Interested Parties were short and precise: Declarations do not lie in judicial review proceedings and, without first cancelling the title to suit piece of land orders of mandamus cannot issue. They cited the case of **Kenya National Examinations Council Vs Republic, Ex- Parte Geoffrey Githinji Njoroge & Others Civil Appeal No. 266 of 1996 (CA)** for the latter proposition. They concluded that the Applicants are also not entitled to general damages as none have been proved.

For the third Interested Party the submissions were that the issues raised in this matter should have been urged by the Attorney General and not the Applicant who has no locus standi. And in the absence of fraud or misrepresentation his title to suit piece of land is indefeasible.

I have given serious consideration to these rival submissions and the pleadings as a whole. To start with I agree with counsel for the first and second Interested Parties that declarations and general damages do not fall within the purview of our judicial review jurisdiction. Unlike in England where the relevant statutes have been amended to accommodate such claims, as is clear from **Section 8 (2) of the Law Reform Act**, our judicial review jurisdiction is still limited to the law that was obtaining in England under **the Administration of Justice (Miscellaneous Provisions) Act of 1938**. That section reads as follows:

“In any case in which the High Court in England is, by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 of the United Kingdom, empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order”

Section 7 of the English Administration of Justice (Miscellaneous Provisions) Act of 1938 had no provision for the grant of declarations or award of damages. The prayers for declarations and damages have therefore no legal basis and are hereby dismissed.

Having disposed of the prayers seeking declarations and damages, I now wish to consider those seeking orders of mandamus.

I have at beginning of this ruling set out verbatim the prayers in the Applicant's Notice of Motion dated 12th August 1997. In a nutshell the prayers seeking orders of mandamus are sought to compel the Commissioner of Lands to revoke and or rescind the allotment of the suit piece of land and cancel all the registry records relating to it including the title deed issued to the third Interested Party. Therefore the issue to be determined here is whether or not orders of mandamus can issue in the circumstances of this matter. To determine that issue it is important to remember that no order of certiorari is sought in this application and the alleged illegal acts of the Commissioner of Lands are still intact. Can an order of mandamus issue in such a situation?

The scope of the order of mandamus is succinctly set out in **Volume 1 of Halsburys Laws of England 4th Edition at page 111** thus:

“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 purposes 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.”

After quoting the above passage the Court of Appeal stated in **the Kenya National Examinations Council case** that an order of mandamus issues to:

“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.”

Is it part of the Commissioner of Lands duty imposed by statute to revoke allotments of public land? I do not think so. No provision to that effect has been cited to me and I know of none. The order of mandamus was therefore not the appropriate remedy to seek in this matter. As was stated in the **Kenya National Examinations Council case** “**If the complaint is that the duty... has not been performed according to law mandamus is the wrong remedy to apply for because, like an order of prohibition, an order**

of mandamus cannot quash what has already been done.” That can only be done by an order of certiorari. I therefore again agree with counsel for the first and second Interested Parties that mandamus cannot issue in this case where the illegal act sought to be prohibited or reversed is still intact. The prayer for mandamus is therefore rejected.

As is well known prohibition looks to the future. It is issued to prohibit what has not been done. It cannot do anything about what has already been done. In this case the prayer for an order of prohibition is couched in such way that it could only be efficacious if the alleged illegal act had been quashed and an order of mandamus issued. As matters stand now an order of prohibition will be futile and cannot therefore issue.

In the upshot this application fails in its entirety and it is hereby dismissed with costs to the Interested Parties.

DATED this 18th day of December 2007

D.K. MARAGA

JUDGE