REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. NO. 245 OF 2000

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW BY AL-SHERMAN LIMITED

AND

IN THE MATTER OF: LETTERS OF ALLOTMENT REF NOS. TP58/1/X AND 49945/62 AND L.R. NO. 24207 ISSUED BY THE COMMISSIONER OF LANDS

BETWEEN

AL-SHERMAN LIMITED.....EX PARTE APPLICANT

VERSUS

COMMISSIONER OF LANDS.....RESPONDENT

AND

1. DAVID KOMBO MP

2. HON. JEMBE MWAKALU MP ASSISTANT MINISTER

3. KATANA SHOMELA

4. BAKARI ABDALLA YUWA

5. MORRIS MANGI

6. TSS SALT MANUFACTURERS LIMITED

7. NIC BANK LIMITED

8. NATIONAL LANDS COMMISSION.....INTERESTED PARTIES

RULING

The Application

1. The Notice of Motion before the Court dated and filed in Court on 24/10/2000 prays for the following judicial review orders:

(a) An order of mandamus do issue to the Director of Surveys to recall and cancel PDP Plan No. 547/MLD/1/98 also known as Land Survey Plan No. 221977;

(b) An order of mandamus do issue to the Commissioner of Lands to withdraw, revoke, rescind and/or cancel the grant of land under L.R. No. 24207;

(e) An order of mandamus do issue to the Commissioner of Lands to make a grant of the land comprised in PDP Land No. 547/KLF/7/98 to the Applicant;

(f) An order of mandamus do issue to the Commissioner of Lands to make a grant of the land comprised in PDP Land No. 547/KLF/7/98 to the Applicant;

(g) An order of prohibition to go to the Registrar of Titles, Mombasa prohibiting him to register the Grant under L.R. No. 24207.

2. The motion is brought under theLaw Reform Act, Cap 26 Laws of Kenya and Order LIII of the Civil Procedure Rules, and is supported by Amended Statement filed under Order LIII Rule 1(2) of the Civil Procedure Rules. It is also supported by affidavit of **Mohamad Islam** sworn on 3/10/2000 and a supplementary affidavit of the same person sworn on 3/11/2009.

Brief Facts

3. The brief facts making the Ex parte Applicant's case are as follows. The Ex parte Applicant, a limited liability company alleges that it is the owner of the leasehold interest in the property known as L.R. No. 13536 registered as C.R. No. 17511. This property is situated north of Malindi and comprises 1022 Hectares bordering the Indian Ocean with the high water mark being the dividing line. This grant was given, by the Government to the Applicant, together with the exclusive right to extract salt and the Applicant agreed to pay royalty as stipulated in the said grant to the Government of Kenya. The process by which salt is to be extracted involves evaporation of the sea-water by solar energy. For this purposes, the former management of the Applicant had constructed a dyke in the waters across the two outermost tips of the Applicant's land such as to make a bow string pattern. The water in between this dyke and the Applicant's land can be trapped in controlled quantities and salinity thereof can be increased up to the point of crystallization.

4. After constructing the dyke wall the former management of the Applicant seems to have run into some financial problems. The present management then bought the shares in the Applicant sometimes in 1995. Meanwhile, because of the dyke wall the sea waters were blocked from washing up to the high water mark. As a result, the trapping areas became dry and some form of sandy reclaimed area came into being. This was and is a temporary phenomenon because once the dyke is opened up the sea waters will come through and the area will revert to its original state of being a lagoon.

5. The Applicant avers that it has since 1995 constructed one main pumping station and two subsidiary stations at the creeks on its property at a substantial cost. It has employed about 50 people and it is expected that at optimum operations, some 400 people will be needed. The Applicant has, however, been prevented and frustrated in its endeavours to commence operations by reason of strangers coming forth and laying claim on the lagoon land on the strength of purported letters of allotment from the Commissioner of Lands.

6. In an effort to protect its superior claim as the registered owner of the immediate and adjacent land and with a view to preserve the said lagoon for the purposes of its operations, the Applicant applied to the Commissioner of Lands to be issued with a grant of the same.

7. By a letter of allotment dated 18/8/1998, the Commissioner was pleased to offer the Applicant a portion thereof shown on Plan No.547/KLF/7/96. The Applicant notified the Commissioner of its acceptance thereof and paid the stand premium and preparation fees for the conveyance which the Commissioner accepted.

8. Meanwhile, unknown to the Applicant, the Commissioner on 21/8/1998 purported to grant a portion of the area already offered to the Applicant to the following (hereinafter 'Interested Parties'):

(a) Hon. David Kombo M.P.

(b) Hon. Jembe Mwakalu M.P., Asst. Min.

(c) Katana Shomela

(d) Bakari Abdalla Yuwa

(e) Morris Mangi

This area is said to be under PDP plan No.547/MLD/1/98.

9. The Applicant avers that this land was and is incapable of a grant because it falls below the high water mark and therefor is not "Land". It is not reclaimed land. Whilst it gives appearance of dry land, in fact it is not and once the dykes are opened the sea-water will cover the "Land". Thus the title is as ineffectual as title deed to the ocean. Even then the Applicant felt concerned and upon discovery of the above, the Applicant protested to the Commissioner of Lands who confirmed the overlapping. He also confirmed by a letter dated 28/1/ 2000 that the Applicant will be issued with title deed to the plot offered to it.

10. The Applicant has since then been chasing the issuance of title deed and has been assured both verbally and in writing by the Commissioner of Lands that the same is being processed pending offer of alternative land to the Interested Parties.

11. On 11/7/2000, the Commissioner of Lands wrote to the Applicant informing it of his inability to issue a title deed as the same has been given to the said Interested Parties. Thereafter at the instance of the Applicant, the Commissioner has promised to, but to date has not satisfactorily resolved the issue.

12. In the course of time the Applicant learned through a letter from the Director of Surveys that a grant may have been issued to the Interested Parties. This fact has been confirmed in these proceedings much to the dismay of the Applicant that the Interested Parties Nos. 1 to 5 had already sold the plot to the 6th Interested Party and that the transfer had been registered a day before, that is, on 10/7/2000.

13. The Applicant contends that on the basis of the evidence there was patent dishonesty on the part of the Commissioner of Lands and all the Interested Parties not to disclose this development to the Applicant. Further, that the Commissioner of Lands was guilty of fraudulent misrepresentation in making the promises to give the grant to the Applicant knowing fully well that he had no intention of honouring the same.

14. The grounds on which the reliefs are sought are that:-

(a) in point of time it was the Applicant who was first to be offered the Letter of Allotment;

(b) it accepted the allotment and paid the requisite stand premium;

(c) the Commissioner acknowledged the acceptance formally;

(d) at all times the Commissioner assured the Applicant that title deed will be issued to it;

(e) if any error of the overlapping occurred, it was due to no fault of the Applicant.

(f) in fact the blame is squarely at the feet of the Commissioner;

(f)(i) additionally the Commissioner has been dishonest in failing to disclose that he had issued the Grant to the Applicant;

(f)(ii) it was with fraudulent intent that the Commissioner assured the Applicant that he would rectify the mistake this Grant had caused when knowing fully well that he would not do so;

(f(iii) the Commissioner's wrongful actions have caused the Applicant enormous losses which need to be addressed appropriately;

(g) the Applicant ought to be granted the title also by reason of the fact that it is the immediate registered owner of all the dry land surrounding the area and the grant to it would not only prevent interference with the applicant's operations but would also consolidate the salt works holdings owned by the Applicant as the same is an integral part of the Applicant's development of salt works manufacture;

(h) if the grant to the Interested Parties is not recalled and cancelled, it will block off the Applicant's access to the sea thereby adversely affecting its operations.

(h)(i) the Interested Parties Nos.1 to 5 never genuinely intended to develop the plot;

h(ii) these parties merely viewed the grant as a license to make free and easy money;

h(iii) the Interested Party No. 6 was never a bona fide purchaser for value without notice;

(i) the Applicant also stands to suffer loss of investment being the pumping stations, dykes and other structures all of which will be rendered redundant. Applicant will also suffer loss of business returns;

(j) further, the grant to the Interested Parties is of no value other than nuisance for they would be unable to develop it in any manner as they would have no access to the main road and would be completely surrounded by mangrove swamps on the one side and the Applicant's land on the other and thus will have no place on main land to construct an infrastructural base of offices, godowns, factory etc. therefore rendering this area completely useless for development of any kind due to its isolation;

(k) if the dykes are opened the said area will be covered with sea water which is what the Applicant uses as raw material for extraction;

(l) there is alternative land available for salt works with access to both the main road as well as the sea, and which does not interfere with the Applicant's land available for the interested party.

(m) in the premises, unless the grant of the Interested Parties is cancelled the Applicant will be deprived of the use and enjoyment of its land and will stand to suffer substantial loss.

The Response

15. The Commissioner of Lands, the Respondent herein did not file any response to the application.

16. The 1st to 5th Interested Parties opposed the motion through a Replying Affidavit sworn by **Bakari Abdalla Yuwa**, the 4th Interested Party, on behalf of the 1st to 5th Interested Parties, on 10/9/2001.

17. The 1st to 5th Interested Parties' case is that sometime in 1998 they, through a company called Magarini Salt Interest Group, formally applied for the allocation of the suit premises to them through the District Plot Allocation committee, Malindi. The letter of the said application dated 26/6/1998 was attached to the affidavit and marked "BYAY 1". Subsequently, the District Physical Planning Officer prepared PDP Number 547/MLD/1/98 for the suit premises, and a Letter of Allotment was issued on 21/8/1998. A grant was soon registered on 21/1/1999 being C.R. 31954.

18. Subsequently, the 1st to 5th Interested Parties sought for funds to develop the plot, and in due course offered to sell it to the Ex parte Applicant herein but they did not agree on the price. They finally sold the plot to the 6th Interested Party herein.

19. The 6th Interested Party opposed the motion through a Replying Affidavit sworn by Tahir Sheikh Said on 22/10/2009. The 6th Interested Party's case is that it is the owner of the leasehold interest in the property known as L.R. No. 24207 registered as C.R. No. 31954; that in or about June 2000, they were approached by a group of about six to seven people who had been sent to them by the then Coast Provincial Commissioner Mr. Limo; that the said people informed them of their intention to sale the parcel of land known as L.R. No. 24207; and they were furnished with a copy of the original Grant No. C.R. 31954 which showed the leasehold interest belonging to the 1st, 2nd, 3rd, 4th and 5th Interested Parties; that upon perusing the same, they forwarded the said copy of Grant to M/s. Pandya & Talati Advocates for the purposes of conducting a search at the land registry. The said firm conducted a search and confirmed the availability of the property. Thereafter the 6th Interested Party then entered into a lawful sale agreement with the 1st to 5th Interested Parties at a sum of Kshs. 5,000,000/= for the suit property. The 6th Interested Party states that it is a stranger to these proceedings and that it is a bona fide purchasor of the suit property, which it has since mortgaged to the 7th Interested Party bank.

Submissions

20. The application was canvassed through written submissions. All parties filed submissions which I have carefully considered. The issues which I raise for determination are as follows:

(i) who is the lawful owner of the suit property; and whether this court can quash that ownership;

(ii) is there any remedy to the Applicant

Determination

(i) **Who owns the suit property; whether that ownership can be quashed.**

21. There is no doubt in this matter who is the lawful owner of the suit property. It has not been contested that the 1st to 5th Interested Parties lawfully applied for allotment of the suit plot, which application was allowed leading to the process in which a grant was finally issued to them. In the course of time, they sold the property to the 6th Interested Party who later mortgaged the same to the 7th Interested Party. The Applicants' case, however, is that the Respondent unlawfully allocated the suit property to the 1st t0 5th Interested Parties, who were themselves aware that the Applicant was the owner of the plot. Further, that the 1st to 5th Interested Parties sold the same to the 6th Interested Parties who was aware of the interest of the Applicant. Therefore, according to the Applicant, this grant was fraudulent, the subsequent sale and mortgage of the property also fraudulent and that this Court should not allow a party to benefit from an illegality.

22. However, the Applicant has not shown this Court what was illegal about the allocation process, the subsequent sale and mortgage of the suit property. What is clear however, is that there was the initial intention by the Respondent to allocate the suit property to the Applicant. However, that was not done, but the Applicant believed the property was allocated to it. The property was then lawfully allocated to the 1st to 5th Interested Parties. When this fact was brought to the attention of the Respondent, the Respondent acknowledged the mistake by its letter dated 11/7/2000 addressed to the Applicant's surveyors as follows:

> **"Further to my letter Ref 211173/13 of 3rd of July 2000 to Director of Surveys with a copy to you I wish to inform you that the land comprised in that letter of allotment has been found to be committed elsewhere as per my records. I regret the inconveniences which may have been caused to you and your client. The Government may offer alternative land to you subject to its availability."**

That correspondent confirms that the Applicant was notified that the land they were claiming had already been offered to another party and the Respondent promised to offer the Applicant an alternative land. Noteworthy is the fact that the Applicant was notified of the mistake on 3/7/2000, yet the Applicant in full knowledge of that mistake filed this petition on 24/10/2000, instead of following on the offer given of an alternative land.

23. Regrettably, as that may be, this Court exercising its judicial review jurisdiction is not unduly concerned with the merits of a decision taken by a public body. This Court cannot insist that the Respondent ought to have allocated the suit premises to the Applicant and not to the 1st to 5th Interested Parties. It is noted, however, that the allocation to the 1st to 5th Interested Parties was lawful and procedural and cannot be quashed. It is not the duty of this Court to decide who ought to have been allocated the plot. That decision, to prove rightful ownership, can only be done after the Court has conducted full hearing involving *viva-voce* evidence to prove entitlement. However, such a process is not possible in judicial review proceedings.

24. It is trite law that the jurisdiction of judicial review court is only limited to reviewing the decision-making process and not the merits of a case. This position was succinctly set out in the case of **Municipal Council of Mombasa v Republic & another [2002] eKLR** where the Court of Appeal observed as follows: -

> **"…the Court has repeatedly said, judicial review is concerned with the decision -making process, not with the merits of the decision itself……. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at" Did those who made the decision have the power, i.e. the jurisdiction to make it" Were the persons affected by the decision heard before it was made" In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters" …and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review." (emphasis added).**

25. I have noted from the pleadings that the Applicant has not challenged the procedure adopted by the Commissioner for Lands (the Respondent) in arriving at its decision to issue the grant and subsequently the title in respect of the Suit Property to the 1st to 5th Interested Parties. In particular, the Applicant has not faulted the Respondent's decision to issue the grant to the 1st to 5th Interested Parties on account that the Respondent considered irrelevant facts, or it failed to consider relevant facts in the process. Instead, the Applicant has pleaded pure points of fact relating to the ownership of the Suit Property as a basis for seeking the judicial review orders. It is the view of this Court that ownership of the Suit Property is a highly contested matter and the facts pleaded by the Applicant can only be determined in a full trial by way of production of evidence and calling witnesses to determine and ascertain the ownership as opposed to production of evidence by way of Affidavits before a judicial review court. By raising factual issues, the Applicant is asking the judicial review court to interrogate the decision of the Respondent and in extent delve into the merits of the case thereby exceeding its jurisdiction. In addition, by delving into the merits of the case, the judicial review court will not only exceed its jurisdiction but will be sitting as an appellate court over the Respondent's decision thereby interfering with the powers of such bodies to make independent decisions. This position was re-emphasized in **Republic v Kenya Revenue Authority Ex-parte Yaya Towers Limited [2008] eKLR** in which the Court cited with approval the decision in **High Court Misc. Civil Application No. 1025 Of 2003, R V Judicial Service Commission** where the Court observed as follows: -

> **"The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question." (emphasis added)**

26. See also **Chief Constable of North Wales V Evans [1982] WLR 115 at p 1173**, where Lord Brightman observed as follows: -

> **"The court will not, however, on a judicial review application act as a "Court of Appeal" from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, …The function of the court is to see that the lawful authority is not abused by unfair treatment."**

27. In addition to the foregoing, the Court of Appeal recently interrogated the power and jurisdiction of a judicial review court in the case of **Soy Developers Limited & 5 others v Cyrus Shakhalaga Khwa Jirongo & 7 others**; **Soy Developers Limited & 4 others (Interested Parties) [2019] eKLR**. The Court unanimously affirmed and reiterated its earlier decision in **Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others [2016] eKLR**, wherein the Court expressed itself as follows:

> **"..... It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act."**

28. From the foregoing this Court finds and holds that the application dated 24/10/2000 lacks merit in its entirety and is dismissed.

(iii) **Is there any remedy to the Applicant**

29. It has formed the evidence provided in these proceedings that after realizing its mistake of double allocation of the suit property, the Respondent promised to offer another property to either of the two claimants. However, the National Lands Commission, the successor in title to the Respondent herein, was joined to these proceedings but did not participate. **Mr. Makuto**, the learned counsel for the Attorney General who would be the counsel for Respondent, informed the Court on 22/10/2019 of the existence of a **letter dated 1/2/2001**, which he filed herein, in which the Ministry of Lands stated that there is an alternative property to be given to one of the parties. That letter states in part as follows:

> **"6. When the Commissioner of Land realized there was double allocation of the land, the Director of Physical Planning was informed and requested to plan an alternative site to be allocated to one of the parties.**
>
> **7. An alternative plot was planned vide PDP No. 547 MLD.2.99.**
>
> **8. Before the double allocation was sorted out, Hon. David Kombo and others were issued with a title.**
>
> **9. This unfortunate situation arose, as said earlier due to pressure of work but can be sorted out through allocation of the alternative land to Hon. David Kombo and others. The land is of the same acreage as the disputed land and lies within the**

same vicinity.

10. M/S Al-Sherman deserve the disputed plot more because they have already developed a salt works plant on their adjacent plot.

11. The alternative land is still being reserved as an alternative to Hon. David Kombo and others."

30. Although the letter states that the Applicant deserves to be given the suit property because it has made heavy investment on it, this Court declines this approach for these reasons:

(i) As I have already found there is no legal basis to quash the Respondent's decision to give the grant of the suit property to the 1st to 5th Interested Parties.

(ii) The suit property has since changed hands, and the buyer has mortgaged it to the 7th Interested Party. The suit property is therefore encumbered and free allocation would cause legal problem to various legal interests which have accrued to the 6th and 7th Interested Parties.

31. It is therefore the finding hereof that the Respondent should allocate that alternative property to the Applicant. Further, for these purposes, the National Lands Commission is hereby notified of this order.

32. In the upshot, I make orders as follows:

(i) The Notice of Motion here dated 24/10/2000 is dismissed.

(ii) The National Land Commission is ordered and directed to provide alternative property to the Applicant pursuant to the Ministry of Lands and Settlement letter dated 1/2/2001 filed in this matter.

Parties to hear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF MAY, 2021

HON. E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Ondego for Ex parte Applicant

Mr. Omolo for 1st to 5th Interested Parties

Ms. Mawia & Ms. Athman for 7th Interested Party

Mr. Makuto for Respondent

Ms. Peris Court Assistant