



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CASE NO. 60 OF 2016

IN THE MATTER OF: AN APPLICATION BY MRAMBA SAID MRAMBA, JANET PILI MRAMBA, SAIDI MRAMBA SAIDI, ROBERT SALIMU, RUKIA MRAMBA SAIDI, JAMES BAYA MRAMBA, FATU SAIDI, KOMBO WAMWARUWA AND JUMA SAID MRAMBA FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: LAND REGISTRATION ACT CAP 300

AND

IN THE MATTER OF: LAND ACT CAP 280

AND

IN THE MATTER OF: REGISTRATION OF TITLES ACT CAP 281 (REPEALED)

AND

IN THE MATTER OF: PLOT NUMBER MN/VI/3991 AND PLOT NUMBER MN/VI/3992

BETWEEN

- 1. MRAMBA SAID MRAMBA**
- 2. JANET PILI MRAMBA**
- 3. SAIDI MRAMBA SAIDI**
- 4. ROBERT SALIMU**
- 5. RUKIA MRAMBA SAIDI**
- 6. JAMES BAYA MRAMBA**
- 7. FATU SAIDI**
- 8. KOMBO WAMWARUWA**
- 9. JUMA SAID MRAMBA.....APPLICANTS**

AND

- 1. THE CHIEF LAND REGISTRAR**

2. THE CHAIRMAN NATIONAL LAND COMMISSION

3. THE COUNTY GOVERNMENT OF MOMBASA

4. THE HO. ATTORNEY GENERAL

5. THEOPHILE MWALEKWA MWASI.....RESPONDENTS

AND

1. THEOPHILE MWALEKWA MWASI

2. PHILIP MSAGHA MBOGHOLI...INTERESTED PARTIES

RULING

The Application

1. The Notice of Motion application before the court dated 10/8/2016 prays for the following orders:

(i) An order of certiorari to remove to this Honourable Court and quash the decision of the Respondents jointly and severally to set apart and/or allocate Plot Number MN/VI/3991 and Plot Number MN/VI/3992 without considering that the Applicants and their families are in active occupation of the suit plots.

(ii) An order of certiorari to remove to this Honourable Court and quash the decision of the Respondents jointly and severally to give consent for the setting apart and/or allocating of Plot Number MN/VI/3991 and Plot Number MN/VI/3992 without considering that the Applicants and their families are in active occupation of the suit plots.

(iii) An order of certiorari to remove to this Honourable Court and quash the decision of the Respondents jointly and severally to issue Certificate of Title in favour of the 1st and 2nd Interested Parties herein with respect to Plot Number MN/VI/3991 and Plot Number MN/VI/3992 without considering that the Applicants and their families are in active occupation of the suit plot.

(iv) An order of prohibition to prohibit the Respondents jointly and severally herein from causing to register any other person as proprietor of Plot Number MN/VI/3991 and Plot Number MN/VI/3992.

(v) An order of certiorari do issue to remove into the High Court and quash the decision of the Respondents jointly and severally to issue orders of setting apart and/or allocation and to subsequently effect the said registration of Title in favour of the 1st and 2nd Interested Parties and any other orders proceedings and/or decisions issued by the Respondents jointly and severally in respect of Plot Number MN/VI/3991 and Plot Number MN/VI/3992.

(vi) An order of mandamus do issue to compel the Respondents jointly and severally to cancel and/or remove the name of the 1st and 2nd Interested Parties from its records as the owners of Plot Number MN/VI/3991 and Plot Number MN/VI/3992.

(vii) An order of mandamus do issue to compel the Respondents jointly and severally to revoke the Certificate of Title issued in favour of the 1st and 2nd Interested Parties herein as the owners of Plot Number MN/VI/3991 and Plot Number MN/VI/3992.

(viii) An order of mandamus do issue to compel the Respondents jointly and severally to issue the Applicants with a Certificate of Title depicting the Applicants MRAMBA SAID MRAMBA, JANET PILI MRAMBA, SAIDI MRAMBA SAIDI, ROBERT SALIMU, RUKIA MRAMBA SAIDI, JAMES BAYA MRAMBA, FATU SAIDI, KOMBO WAMWARUWA, JUMA SAID MRAMBA as the registered proprietors of Plot Number MN/VI/3991 and Plot Number MN/VI/3992.

(ix) An order of prohibition do issue to prohibit the Respondents jointly and severally from issuing to any other person whomsoever and whatsoever with Certificate of Title or howsoever and whatsoever except the Applicants hereof MRAMBA SAID MRAMBA, JANET PILI MRAMBA, SAIDI MRAMBA SAIDI, ROBERT SALIMU, RUKIA MRAMBA SAIDI, JAMES BAYA MRAMBA, FATU SAIDI, KOMBO WAMWARUWA, JUMA SAID MRAMBA as the registered owners pending hearing and determination of this Judicial Review or other than as directed and or ordered by this Honourable Court.

(x) That the costs of this application be provided for.

2. The motion is premised on the grounds set out in the Statutory Statement dated 4/8/2016 and Verifying Affidavit of Mramba Said Mramba sworn on 4/8/2016 and filed herein in support of the application for leave dated 4/8/2016.

3. The Ex parte Applicants' case is that their families have lived on Plot Number MN/VI/3991 and Plot Number MN/VI/3992 since time immemorial; that they were born on the suit properties and their forefathers were also born on the suit properties and that they have raised their families thereon; they have been in active occupation of the suit properties including cultivating and building thereon and have known it to be their home; they have occupied the same peacefully without interruption ever since, until recently when strangers came to the suit properties with a view of purchasing the same; that upon enquiring from them they were informed that there are two people who claimed to

own the suit properties; that upon conducting a search it was established that the 1st and 2nd Interested Parties have been registered as proprietors of Plot Number MN/VI/3991 and Plot Number MN/VI/3992 respectively; that it is not clear how and under what circumstances they were registered as proprietors thereof and how the properties were set apart and/or allocated and consents obtained while the Applicants were in active occupation of the same; that the 1st and 2nd Interested Parties do not occupy the suit properties neither have the Applicants ever met them, despite living on the suit properties ever since their forefathers were born. It is the Applicants' case that the Respondents will suffer no prejudice if the orders sought herein are granted as prayed, and that it is in the interest of justice that the application is allowed.

The Response

4. Neither the Respondents nor the Interested Parties filed a response to the application. However, the 1st and 4th Respondents filed a Notice of Preliminary Objection on 8/9/2016. The Preliminary Objection was canvassed and was dismissed by the Ruling herein delivered on 18/5/2017. All the parties then filed submissions to the motion herein. The Ex parte Applicants' counsel Mr. Shimaka, urged the court to note that the application is not opposed and so it should be allowed as prayed.

Submissions

5. Mr. Shimaka submitted that the Ex parte Applicants were born and raised up in the suit subject land. That land was later registered in the name of the 1st and 2nd Interested Parties illegally, and that this Court has the jurisdiction to correct that unlawful act by granting orders sought herein. Counsel relied on **Postoli vs. Kabale District Registrar Taita Taveta District & Another [2015] eKLR** where the court stated that in order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality and procedural impropriety. Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Counsel submitted that acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality, and that these illegalities have been demonstrated herein.

6. On their parts, Mr. Makuto, learned Counsel for the 1st and 4th Respondents, and Ms. Kariuki, learned Counsel for the 1st and 2nd Interested Parties, submitted separately that this court has no jurisdiction to grant the orders sought pursuant to Article 165 (5) of the constitution since the matters complained of herein are within the jurisdiction of the Environment and Land Court.

7. Counsel further submitted that in any event if the Applicants have suffered any loss pursuant to the registration of the land in the names of the Interested Parties then under Sections 23 and 24 of the repealed Registration of Titles Act (Cap 281) the Applicants have a remedy in damages.

8. Counsel submitted that the application herein was filed out of time since the said registration took place in 2011 and the motion was filed in 2016. It was submitted that even after the Ex parte Applicants did a search on 21/1/2016 it still took them seven (7) months to file the motion herein, and so they had sat on their right and this court cannot help them.

The Determination

9. I have carefully considered the motion and submissions of the parties. Although there is no response to the motion, and although Mr. Shimaka has submitted that for the said lack of response I should allow the application, my view is that Judicial Review remedies are discretionary, and the court is not obligated to allow the same simply because there is no response. I have considered the submissions of the parties and in my view the following are the issues for this Court's determination:

- (i) Whether this court has the jurisdiction to hear this matter.
- (ii) Whether there are other remedies.
- (iii) Whether the motion was filed out of time.

I will address all these three issues simultaneously.

10. The purpose of judicial review is to determine whether the applicants were accorded fair administrative treatment by the concerned public body. Judicial review remedies are discretionary and are issued to address a lacuna in administrative process. A court may refuse to grant the orders sought even where the requisite grounds exist since the court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. (**Mbogo vs. Shah [1968] EA 93.**)

11. The matter at hand concerns a challenge to the interested parties title to land. It is worth noting that the Interested Parties are 1st registered owners issued with title documents under Registration of Titles Act Cap. 281 Laws of Kenya. Section 23. (1) of the Registered Titles Act (now repealed) provided that:

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, **and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**

12. This Court cannot entertain a challenge to title issued to the 1st registered owner, under the Registered Titles Act unless there is an

allegation of fraud. A determination of fraud would require parties to call witnesses and adduce evidence to enable the court reach a proper determination. Such procedures are not available for judicial review proceedings and the Applicants should be directed to file a proper case before the competent court.

13. Further, Article 165(3) of the Constitution provides as follows:

“3. Subject to clause (5), the High Court shall have-

- a. unlimited original jurisdiction in criminal and civil matters;**
- b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**
- c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-**
 - i. the question whether any law is inconsistent with or in contravention of this Constitution; (Emphasis supplied).**
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (Emphasis supplied).**
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
 - iv. a question relating to conflict of laws under Article 191; and**
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

14. Article 165 (5) limits the jurisdiction of the High Court. It provides as follows:

(5) The High Court shall not have jurisdiction in respect of matters—

- (a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
- (b) Falling within the jurisdiction of the courts contemplated in Article 162 (2).**

15. The question before this court being one of title to land is reserved for the Environment and Land Court under section 13 (2) (a) of the Environment and Land Court Act. **Section 13 (2)(a) provides that: -**

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**

16. In **Kisauni Bridge Limited v Kenya Urban Roads Authority & another [2019] eKLR** the court of appeal affirmed that Article 165(5) of the Constitution precludes the High Court from entertaining matters that are exclusively reserved for the Environment and Land Court as well as the Employment and Labour Relations Court.

17. Further, Section 24 of the Registration of Titles Act (repealed) provides that any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of the Act, may bring and prosecute an action in law for the recovery of damages against the person responsible for the fraud. It is worthy of note that both Sections 23 and 24 of the said Act have been preserved under Section 106 (3) of the Land Registration Act. This therefore means that the Ex parte Applicants have not been left without remedy if they prove that their land was given out through an act of fraud.

18. Finally, the record before this Court shows that the said titles were registered on 14/7/2011 at 2.00 p.m. In short the acts the Ex parte Applicant wants quashed happened prior to 2011 and the Ex parte Applicants seemingly only came to court in 2016 after “strangers came to the suit properties with a view of purchasing the same.” Even after the Ex parte Applicants conducted a search on 21/1/2016 when they purportedly became aware that the Interested parties are the registered owners of the suit premises, they still waited for seven (7) months before filing this Judicial Review application in August, 2016. This again, is outside the six (6) months mandatory period provided by statute.

19. From the foregoing paragraphs of this Ruling it is the inescapable finding that the application herein dated 10/8/2016 is not merited. The

same is dismissed with costs to the Respondent and the Interested Parties.

Dated, Signed and Delivered in Mombasa this 28th day of April, 2020.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Ngare holding brief Ms. Kariuki for 1st and 2nd Interested Parties

Mr. Makuto for Respondents

No Appearance for Applicants

Mr. Kaunda Court Assistant