



Republic v County Land Registrar, Kilifi & 4 others; Bhaijibhai & another (Exparte Applicants) (Miscellaneous Application 4 of 2023) [2023] KEELC 21787 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 4 OF 2023**

EK MAKORI, J

NOVEMBER 23, 2023

IN THE MATTER OF: AN APPLICATION BY SAIFUDIN

**ABDUL HUSSEIN BHAJIBHAI AND
NOORDIN ABDUL HUSSEIN BHAJEE
FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROHIBITION, AND**

MANDAMUS

BETWEEN

REPUBLIC APPLICANT

AND

THE COUNTY LAND REGISTRAR, KILIFI 1ST RESPONDENT

THE CHIEF LAND REGISTRATION OFFICER, KILIFI 2ND RESPONDENT

THE LAND REGISTRAR, KILIFI 3RD RESPONDENT

**THE LAND ADJUDICATION & SETTLEMENT OFFICER,
KILIFI 4TH RESPONDENT**

DAMARIS AKINYI NONDI 5TH RESPONDENT

AND

SAIFUDIN ABDUL HUSSEIN BHAJIBHAI EXPARTE APPLICANT

NOORDIN ABDUL HUSSEIN BHAJEE EXPARTE APPLICANT



JUDGMENT

1. The Ex-parte Applicant seeks several prerogative orders:
 - i. An order of Certiorari to remove to the ELC and quash the Land Register (Green Card) in favour of James Opiyo Opondo and Damaris Akinyi Nondi as well as the title deed for parcel No. Mariakani/Kawala "B"/98 in the names of Damaris Akinyi Nondi.
 - ii. An order of Certiorari to remove to the ELC and quash the Land Adjudication and Settlement Records in the names of James Opiyo Opondo and Damaris Akinyi Nondi regarding the title deed for parcel No. Mariakani/Kawala "B"/98.
 - iii. An order of Mandamus directing the County Land Registrar Kilifi, the Chief Land Registration Officer Kilifi, and the Land Registrar Kilifi to reinstate/restore entries in the land register (Green Card) and other records in the names of Saifudin Abdul Hussein Bhajibhai and Noordin Abdul Hussein Bhajjee as absolute proprietors of the land parcel No. Mariakani/Kawala/"B"/98
 - iv. An order of Prohibition to issue to prohibit the County Land Registrar, The Chief Land Registrar, Land Registrar, Kilifi, and Land Adjudication and Settlement Officer to remove into this Court and prohibit the Land Registry Kilifi County from issuance and release of title deed relating to land parcel No. Mwanda/Mbalamweni Adjudication Section 1282 until the hearing and determination of this case.
 - v. Any other relief as the court may deem fit.
 - vi. Costs of the application be provided.
2. This matter was canvassed by way of written submissions.
3. The Ex-parte applicant averred that a 1st title was issued in this matter on 3rd November 2014 to the Ex-parte applicant. A subsequent one was issued on January 2020 but backdated on 28th January 2018 in favour of one James Opiyo Opondo who had died on 7th November 2007 and the title was changed to the name of Damaris Akinyi Nondi the 5th respondent on 21st July 2020. The applicant takes issues with the manner the respondents did the transfers without recalling the 1st title and giving the Ex-parte applicant a chance to be heard before a second title was issued hence the prayers sought in the current application. Having died on 7th November 2007, James Opiyo Opondo could not possibly have been registered as the proprietor of this land on 28th January 2014. This would mean the Land Registrar acted in excess of the statutory powers in creating a backdated Green Card and entering his name in the register in 2014 long after his demise.
4. The Ex- parte applicant submitted that the existence of the two titles for the same parcel of land is contrary to public policy, amounts to an abuse of power, and is unreasonable within *Wednesbury Principles* (*Associated Provincial Pictures House v Wednesbury Corporation* [1948] 1 KB 223).
5. The issue on the title to this land has been litigated in Land Dispute Tribunal Case No. 14 of 2000 between Walter John Odiero and the 2nd applicant Noordin Abdul Hussein Bhajjee whose determination was in favour of the 2nd respondent and the same adopted as the judgment of the court by the Resident Magistrates Court at Kalloleni in Land Award No. 17 of 2001. There was filed Mombasa HCCC No. 100 of 2010, which was transferred to Malindi and allocated ELC Case No. 7 of 2014.



- There was yet another Land Dispute Tribunal Case No. 19 of 2010. In which the 5th respondent did not succeed,
6. Malindi ELC No.7 of 2014 was heard and finalized in favour of the 5th respondent. An appeal was preferred in Malindi Civil Appeal No. 139 of 2019 the Court of Appeal set aside the orders made in ELC Case No. 7 of 2014. Despite the findings of the Court of Appeal, 1st – 5th respondents have failed to recall for cancellation the title held by the 5th respondent.
 7. The 1st to 4th respondents contended that the core issue in this matter is the ownership of the suit property between the two titles which is the ‘real’ one.
 8. The 1st to 4th respondents are of the view that the threshold to award prerogative orders has not been met. The cases in *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd, Nairobi* [2002] eKLR, *Pastoli v Kabale District Local Government Canal & Others* [2008] 2 EA 300 at pages 300-304, *Kenya National Examination Council v Republic Ex-parte Geoffrey Gathenji & 9 Others, Republic v Non – Governmental Organization Ex-parte Linda Bonyo & 4 Others and Philip Opiyo Sadjah & 5 Others (Interested Parties)*[2020] eKLR.
 9. The 1st to 4th respondent contended that the 1st respondent placed a restriction on the suit property under Section 76 of the *Land Registration Act* pending the verification of Civil Appeal No. 139 of 2019. The applicant needed to move the court to remove the restriction and desist from filing this suit.
 10. The 5th respondent submitted similarly to what the 1st to 4th respondents stated adding that the applicant is taking a shortcut to have the ownership of the suit property determined in favour of the Ex-parte applicant. The threshold for an award of prerogative orders has not been met. The case of *Civil Service Union v Minister for Civil Service* [1985]AC 374 at 401 D, quoted with approval in *Republic v Cabinet Secretary National Treasury & Another Ex-parte Car Importers Association of Kenya* [2016] eKLR is quoted.
 11. The 5th respondent is of the view that because there are two titles over one property the court needs to do an investigation (a hearing) to determine who the ‘real’ title holder is. That cannot be achieved through Judicial Review. The cases in *Seventh-day Adventist Church Ltd vs Permanent Secretary Ministry of Nairobi Metropolitan Development & Another* [2014]eKLR , *Hurbert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, *Munyu Maina v Hiram Gathiba Maina* [2023]eKLR and *Republic v Commissioner of Land & Another Ex-parte Jimmy Mutinda* [2014]eKLR.
 12. The 5th respondent also submitted that the time within which to seek JR orders lapsed. It has been more than 6 months since the titles were issued. The case of *Republic v Council of Legal Education & Another Ex-parte Sabiba Kassamia & Another* [2018]eKLR, addressed the issue of timelines within which to seek JR orders.
 13. After reviewing the materials and submissions placed before me the issues that fall for the determination of this Court are whether the application has met the threshold for grant of orders in the nature of JR and who should bear costs.
 14. In the case of *Republic v Cabinet Secretary National Treasury & Another Ex-parte Car Importers Association of Kenya* [2016] eKLR the Court had this to say:

“In the same case CCSU VS. Minister of Service (supra), Lord Diplock summarized into three major grounds for such review as illegality, irrationality, and procedural impropriety. The ultimate decision to grant judicial review remedies is discretionary. The court must not



only establish whether any of these grounds exist in the applicable case, but the court must also look at the efficacy of the remedy sought.”

15. We have two titles. The court needs to check how the two titles were obtained. Each party needs to tender evidence to show how he/she acquired the title; the court goes to the root of the titles and determines who amongst the two has the ‘real title’. That is the province of the civil jurisdiction of the ELC and not Judicial Review. This has been determined by this court in a thread of decisions see for instance *Seventh-day Adventist Church Ltd vs Permanent Secretary Ministry of Nairobi Metropolitan Development & Another* [2014] eKLR:

“Where an applicant brings judicial review proceedings with a view to determining contested matters of facts with an intention of securing a determination on the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits”.

16. In *Hurbert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR, *Munyu Maina v Hiram Gathiba Maina* [2023]eKLR the Court held:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

17. The Court of Appeal in the case of *Munyu Maina vs. Hiram Gathiba Maina* [2013] eKLR, held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances including any and all interests which need not be noted on the register.”

18. I can see parties have been wrangling over the ownership of the suit property with the most significant case going all the way to the Court of Appeal in Malindi Civil Appeal No 139 of 2019 – reported



as *Bhajjee & another v Nondi & another* (Civil Appeal 139 of 2019) [2022] KECA 119 (KLR) (18 February 2022) (Judgment) Court had this to say:

“The suit by the respondents was however instituted by a plaint lodged with the High Court on April 8, 2010, before the consent in the letter dated August 12, 2010, was granted. Therefore, at the time of inception of the suit, no consent had been granted by an adjudication officer, and the trial Judge erred in finding that such consent existed. The lack of consent rendered the said suit and the entire proceedings thereunder a nullity. It is also notable that under section 30(4) of the *Land Adjudication Act*, the orders given in such proceedings are subject to any appeal process and determination, and we hereby find the said orders given by the ELC to be null and void ab initio. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

19. It is our view that our holding hereinabove on the issue of the jurisdiction of the ELC is sufficient to dispose of this appeal, and in any event, we are also precluded by our findings from going into the merits of the parties’ respective cases as urged in the ELC, having found that the said Court had no jurisdiction, and the proceedings before it were a nullity.

19. From the foregoing the Court of Appeal never decided the appeal and determined which title is real between the parties. It questioned the process of acquisition and adjudication. It found this Court (Olola J.) was prematurely moved. The parties had to go to the drawing board and start the process afresh. Certainly, the JR process cannot be the panacea. It will further complicate the issues.

20. It has been stated that the Court was moved well outside the time within which to file JR the case in *Republic v Council of Legal Education & Another Ex-parte Sabiha Kassamia & Another* [2018]eKLR is cited where the Court stated:

“The above provisions have been the subject of numerous judicial determinations in this county. In *Ako vs Special District Commissioner, Kisumu & Another* [16] cited by Mr. Oduor, the Court of Appeal was emphatic that “it is plain that under sub-section (3) of section 9 of the *Law Reform Act* [17] leave shall not be granted unless application for leave is made inside six months after the date of the judgment.”

The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.

12. Similarly, the Court of Appeal in *Wilson Osolo -Vs- John Ojiambo Ochola & Another*[18] the Court of Appeal expressed itself thus:-

“It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the *Law Reform Act*. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under order 49 of the



Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here."

21. From the record six months had lapsed since the two titles were issued that is in 2014. It is a fringe issue here. I need not belabor on it.
22. The upshot is that the motion dated 8th of February 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 23RD DAY OF NOVEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Njage H/B for Masake for the 5th Respondent

Mr Mogaka for the Applicants

Court Clerk: Happy

In the Absence of:

AG for 1st to 4th Respondents

