



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 3 OF 2017

**IN THE MATTER OF: AN APPLICATION BY MASHA BIRYA DENA & GEOGREY
MUTINDA NZOU FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF: THE LAND REGISTRATRION ACT 2012; THE LAW REFORM ACT
CAP 26 LAWS OF KENYA; THE CONSTITUTION AND ORDER 53(1) & (2) OF THE CIVIL
PROCEDURE RULES 2010**

BETWEEN

1. MASHA BIRYA DENA

**2. GEOFREY MUTINDA NZOU (suing on behalf of 111 members of
Mtwapa Land Tenant Association).....EX PARTE APPLICANTS**

VERSUS

1. THE COMMISSIONER OF LANDS

2. LAND REGISTRAR MOMBASA.....RESPONDENTS

AND

1. ESTHER NZINGO KALUME

2. FRANCIS KAHINDI KALUME

3. POLA KALUME KASAMBI

4. DANIEL MBOGO.....INTERSTED PARTIES

RULING

The Application

1. The application before the court is amended Notice of Motion filed on 28th March, 2017. The

application is filed pursuant to Section 8(2) of the Law Reform Act and Order 53 rule 1 and 2 of the Civil Procedure Rules. The application is also pursuant to leave of court granted on 8th February, 2017, and prays for Judicial Review orders as follows:

(a) That an order of certiorari be issued to move into the High Court and quash the decision made by the Registrar Mombasa to issue certificate of titles on all the subdivisions emanating from Plot No. MN/III/742, 743, 744, 745, 746 and 747 from the Provisional Certificate C.R. 13874/1 in favour of the Interested Parties herein and/or any other 3rd party who any of the Interested Party shall transfer the property to.

(b) That an order of prohibition be issued prohibiting the 1st and 2nd Respondents and the four (4) Interested Parties herein and/or any other person acting under the authority from sub-dividing , alienating, disposing, demarcating or dealing in the parcels of land Plot Numbers MN/III/742, 743, 744, 745, 746 and 747.

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

2. The application is premised on the grounds that the Applicants are challenging the registration of titles emanating from sub-division from the Plot Numbers MN/III/742, 743, 744, 745, 746 and 747 and the need of the court to cancel or rectify the registration that were obtained, made or omitted through fraud by the four (4) Interested Parties. The Applicants who have permanent houses on the said parcel of land are alleged to have invested “heavily” under the approval of the concerned Interested Parties and they should be protected against third parties purchasing the irregular sub-divisions that were fraudulent. It is stated that the interests of the Applicants are not being noted by the Registrar when issuing new title deeds to third parties who are purchasing from the Interested Parties the said sub-divisions. It is alleged that the Applicants have constructed permanent structures on the suit property with the consent of the Interested Parties and authority of the County Government. The Applicants’ case is that the Registrar issuing title deed to third parties is a recipe to conflict on the land and the said action is tainted with fraud. It is stated that some of the 111 Applicants who have been residing on the said parcel for over 20 years, had been promised title deeds by 2nd Interested Party who has taken substantial amount of monies but continues to sub-divide and transfer the title deeds to strangers and the said sub-division has resulted in the 2nd Respondent issuing title deeds unprocedurally which has caused disputes and conflict on the said land. The 1st Interested Party despite having knowledge that there is a permanent building on the portions has sold the same to a third party SHARRIF ONYANGO which is highly unprocedural and illegal and there is urgent need to rectify and/or cancel the new title deeds. It is stated that the conflict has been recognized by National Land Commission who are investigating the title deeds but despite this the Respondents are continuing with the exercise of issuing title deeds to strangers.

The Response

3. The application is opposed by the Respondents and all the Interested Parties. The Respondents have not filed any response but their counsel Mr. Ngari made oral submissions to the application.

4. The 1st Interested Party opposed the application via a replying affidavit sworn by the 1st Interested Party on an unknown date but filed herein on 22nd March, 2017. The 1st Interested Party’s case is that the entire application for Judicial Review orders is fatally defective, devoid of merit, an abuse of the court process and should be struck out with costs for the reasons that the High Court lacks jurisdiction to hear and determine a dispute of whatever nature that concerns the use, occupation and title to land. That jurisdiction is reserved to the Environment and Land Court by virtue of Article 165(5) as read with Article 162(2)(b) of the Constitution of Kenya; the court lacks jurisdiction to issue an order of certiorari to quash decisions made as early as the year 2014. There is not a single decision shown to have been made within six months prior to the filing of the application for leave; the application in any event is fatally defective for being based on a fatally defective Verifying Affidavit as well as for being improperly entitled; the application seeks to litigate the merits of the Interested Parties’ titles which attempt is outside the purview of the judicial review jurisdiction.

5. The 1st Interested Party denies the application on the basis that there is no evidence provided that in fact the titles mentioned herein exist save for title number MN/III/742 which is annexed to the Supporting Affidavit of Masha Birya Dena. The Interested Party's case is that with such a state of evidence, it becomes impossible for the court to tell whether those titles exist, when they were issued, to whom they were issued, what interest the titles confer, who issued the titles and such like questions. Further, it is alleged that the ex parte Applicants do not state what procedural steps known to law were not followed in the issuance of the title deeds, if at all they were issued. Even though there is no title deed produced, a certificate of search for Title Number MN/III/742 shows that as at 7th September, 2014 that title was in existence. If that is the case there is no jurisdiction on the court to issue orders of certiorari against a decision effected approximately three years ago. Further the Interested Parties state that the ex parte Applicants make numerous allegations of fraud, misrepresentation, falsification of document and general deceit committed by the Interested Parties to secure the registration of the suit properties in their respective names. It is even said that the National Land Commission is now investigating the issue. If that is true, then all the allegations of fraud, illegality, falsification of documents and general deceit alleged to have been committed by the Interested Parties are all factual matters requiring evidence within an ordinary civil suit. In so far as the ex parte Applicants are seeking to impeach the validity of the titles then only an ordinary civil suit can resolve that issue fully and finally. The Interested Parties states that in fact, the ex parte Applicants appreciated this position way back in the year 2013 when they filed a civil suit before the Environment and Land Court in Mombasa being **ELC Case Number 299 of 2013 Masha Birya Dena & another vs. Francis Kahindi Kalume & 9 others**. In the aforesaid civil suit, the ex parte Applicants represented by the firm of Martin Tindi & Company Advocates in fact filed an application dated 30th November, 2015 seeking to cite certain Defendants in that suit for being in contempt of court orders. However, the ex parte Applicants abandoned that Application Notice and agreed to have the matter listed for hearing on merits. The court has listed the matter for hearing on 4th April, 2017. The ex parte Applicants are urging the same cause that they now seek to urge through this application. In particular, the ex parte Applicants' claim remains that they are tenants on the suit properties and a permanent injunction should therefore issue to restrain anyone from evicting them from the property. In light of the foregoing, the 1st interested Party states that it is quite apparent that the orders being sought in the judicial review court can and in fact should be sought before the Environment and Land Court.

6. On their part the 2nd, 3rd and 4th Interested Parties opposed the application vide a replying affidavit sworn by the 2nd Interested Party on behalf of himself and on the behalf of the 3rd and 4th Interested Parties on 17th March, 2017.

7. The 2nd to 4th Interested Parties' case is that the suit herein by the ex-parte Applicants is a gross abuse of the court process as there is another suit pending before the Environment and Land Court at Mombasa between the same parties and on the same issues now being raised herein to wit Mombasa ELC No. 299 of 2013. That the orders being sought of herein cannot issue as the Applicants' suit is time barred by virtue of the provisions of Order 53 rule 2 of the Civil Procedure Rules 2010 in that the titles in question were issued a long time ago. That all the titles mentioned in this suit touch on private properties which are owned by various individuals who have not been named in this suit. That the 2nd, 3rd and 4th Interested Parties have never had nor do they have any interest whatsoever in the parcels of land stated in this suit i.e. plots Nos. MN/III/742, 743, 744, 745, 746 and 747, and that the Applicants have failed to establish any case or complaint to warrant the issuance of the orders sought herein. In any event, the Applicants have not in any case named or sued the owners of the said parcels of land and yet they are seeking very drastic orders against the interests of the said owners.

Submissions

8. Parties made oral submissions to the application. **Mr. Tindi** for the Applicant submitted that the genesis of the Applicants' case is a letter dated 5th December, 2016. It contains the findings of the National Lands Commission. It is annexed MBD18. The Commission says it is unclear on how the parcel of land was divided into six parcels. It further says that it was clear there was fraud. The National

Land Commission recommended that a restriction be placed on the said parcel of land. The National Land Commission unearthed a fraud process that the Lands Registry office did. The applications seeks for orders to quash the action of the Registrar. Mr. Tindi submitted that the Respondents and Interested Parties did not make any factual response to the application. They only raised issues of law. Without issues of fact in the replying affidavit, Mr. Tindi submitted that there was no response to the application.

9. On the issue that the decision to be quashed was made three years ago, Mr. Tindi submitted that time started running when the National Land Commission unearthed the fraud, which was previously not known to anybody. Further, the allegations that there is a case in the Environment and Land Court and that this matter should have been filed in that court is not true because this cause also involves the Registrar who is not a party in the Environment and Land Court. Hence the application is not *subjudice* since there is no pending proceedings in Judicial Review Court.

10. On his part, **Mr. Ngari** for the Respondent submitted that where fraud has been alleged, Judicial Review proceedings are not the correct forum. Issues of fraud can only be interrogated in a civil suit where parties can be called to give evidence. Mr. Ngari submitted that this court sits as a Judicial Review court it does not exercise its civil or criminal jurisdiction. The Applicant can seek remedy elsewhere, since fraud cannot be established through Judicial Review proceedings.

11. **Mr. Kongere** opposed the motion on behalf of the 1st Interested Party. Counsel submitted that he had four grounds why the motion should be denied. The first is that under Article 269(5) High Court is denied jurisdiction to hear any matter that the Environment and Land Court has jurisdiction to hear. The motion seeks the cancellation of titles. Secondly the Applicant has not stated when the decisions were made. It is important to establish when the order being sought to be quashed was made. A copy of the title has not been annexed but a search has been annexed made on 7th September, 2014. Even if that date is taken to have been the date, it is well beyond six months required to quash a decision. Thirdly, counsel submitted that the application seeks to establish the merit of the title issued to the Interested Party. The Judicial Review court is not an investigative court. The allegations of fraud can be addressed in the Environment and Land Court. Although the Registrar is not a party in the Environment and Land Court it can be made a party so that he answers to the said issues.

12. **Mr. Mokaya** counsel for the 2nd, 3rd and 4th Interested Parties associated himself with submissions of Mr. Ngari for the Respondent and Mr. Kongere for the 1st Interested Party. Mr. Mokaya submitted that there is an Environment and Land Court matter No. 799/2013 pending before that court. The ex-parte Applicants are the Plaintiffs in that case and the Interested Parties herein are the Defendants. There is a proper suit pending touching on the issues of ownership in Environment and Land Court this Judicial Review is an abuse of the process of this court. The issues raised herein and the prayers herein can be raised and granted in the Environment and Land Court matter. Under Article 162(2) (b) of the Constitution there is established an Environment and Land Court whose status is the same as High court. Counsel submitted that the ex-parte Applicants are not saying anything about the Environment and Land Court matter. The ex-parte Applicant has annexed some titles to the motion. The said title were issued a long time ago and so the provisions of Order 53 are not available to the Applicant. They are time barred. Mr. Mokaya submitted that no case has been made by the Applicants to warrant the orders being sought. Further it has not been demonstrated who are the owners of those titles.

Determination

13. I have considered the application and the submissions. In my view the following are the issues for determination.

- (i) Whether this court has the jurisdiction in view of Article 162(2)(b) of the Constitution.
- (ii) Whether the decision sought to be quashed were made within six (6) months before the application was filed.
- (iii) Whether if this court has the jurisdiction, this court is the best forum for adjudicating the issues

raised.

14. On the first issue, as to whether this court has the jurisdiction to hear this matter, counsel Merss. Kongere and Mokaya for the Interested Parties submitted that this court has no jurisdiction to determine matters of ownership of titles to land which is now the exclusive jurisdiction of the Environment and Land Court pursuant to Article 162(2)(b) of the Constitution. The issue to be determined first is whether or not the Judicial Review orders being sought relate to the environment and the use and occupation of, and title to land. This can easily be determined from the orders sought, and the grounds given for the orders sought. Although they are cauched in Judicial Review terms, the prayers if allowed would amount to this court determining issues of environment and occupation of, and title to land. If I am in doubt, then the doubt is easily erased by the fact that the Applicants have filed Suit No. 299 of 2013 in the Environment and Land Court where they have sued, among others, the Interested Parties. In that suit, the Applicants are not claiming ownership of title to land but they are claiming an order of permanent injunction against the Interested Parties. So, while they are not claiming ownership in the Environment and Land Court they want to use the Judicial Review process to quash titles which have been issued to the Interested Parties. While they have the right to try to do that, the best forum for that is the Environment and Land Court.

15. Since the issue of jurisdiction has been raised, it was held in **Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1** as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

16. In this matter, the Respondents as well as the Interested Parties have questioned the jurisdiction of this Court due to the existence the Land and Environmental Court. Article 165(3) of the Constitution provides as follows: (3) Subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters; ... (e) any other jurisdiction, original or appellate, conferred on it by legislation. Article 165(5)(6) and (7) thereof on the other hand provides: (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). (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

17. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is sui generis. **See Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1**. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution. The Court however appreciates that under Article

165(5) (b) of the Constitution this Court has no power to determine issues which fall within the jurisdiction of the courts contemplated in Article 162(2) and this include courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.

18. It is therefore clear that the Court established under Article 162(2) (b) has the jurisdiction to hear and determine the instant dispute which revolves around “land use planning”. Under Article 160 (1) of the Constitution the judiciary is subject to the Constitution. Since the Constitution has expressly divested the High Court of the powers to hear and determine disputes which fall squarely within the jurisdiction of the courts with similar status established pursuant to Article 162(2) of the Constitution, this Court would be acting in the excess of its jurisdiction if it entertained such disputes. Since the subject matter herein falls within the jurisdiction of Environment and Land Court as established under the Environment and Land Court Act and since the remedies sought herein are capable of being granted by the said Court, it is my view that this Court has no jurisdiction to entertain his matter and grant the orders sought herein.

19. While this court is able to determine the whole application on the issue of jurisdiction alone as I have done, there are indeed several other fault lines along which the application would still have been dismissed. These include the fact that the Applicant did not bring to the court the exact titles or their copies which required to be quashed by an order of certiorari. This goes to the merit of the suit. Mr. Kongere cited ample authorities on the issue one being **Judicial Review No. 13 of 2013 vs. Ex-parte Margaret Waitherero** where the Judge had this to say:

“I raise questions on the competency of the suit because the award sought to be quashed was never supplied to the court. Now, if I do not know what it is that I am being called upon to quash what exactly is it that I will be quashing....”

20. Like in that case, it was important for the Applicants in this matter to produce all the titles that they sought to quash, or failure thereof, to provide some good reasons as why the same was not available.

21. The second issue is that the decisions to be quashed were made in 2011. Even taking into account when the Applicants became aware of the same in January, 2016, this application was filed some eight (8) months after that knowledge. Indeed, this was a proper case in which leave to commence Judicial Review proceedings ought not to have been granted in the first place. The case of **Wilson Osolo vs. John Ojiambo Ochola & Another** attest to this fact where the Court of Appeal had the following to say:

“There was quite clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of the Law Reform Act, Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed. Section 9(3) of the Law Reform Act reads: “(3) In the case of an application for an order of certiorari to remove any judgment order decree conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law;...” It can readily be seen that order 53 rule 2 (as it then stood) is derived verbatim from S.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 Limitations 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.”

22. The third issue is the allegation of fraud in the pleadings against the Interested Parties. Allegations of fraud cannot be determined in a Judicial Review forum. The process requires giving of evidence and the limited procedures provided for under Judicial Review forum cannot allow such a rigorous process to be carried out effectively. In the case of **Miscellaneous Application JR No.9 of 2012 Republic and**

Commissioner of Lands and Masai Villas Limited Ex parte Jimmy Mutinda, the court had the following to say on the issue.

“The applicant has marshalled evidence to show that he was allocated the land and complied with the terms of the allocation resulting in a grant being signed and executed in his favour but was cancelled by the internal memorandum dated 19th August 2011. The applicant alleges fraud, collusion and illegality in the manner in which the Company was issued a Grant in respect of the suit property on the part of its director who was the Commissioner of Lands at the time the allocation was made. 25. The Company on the other hand lays claim to the suit property. Its director contends that he purchased the Company after it had been allocated the property after complying with the terms of allocation. The interested party’s position is that it is the legal and indefeasible owner of the property by virtue of section 23 of the Registration of Titles Act (Repealed) and as such the remedies the applicant seeks cannot apply to the circumstances of the case. 26. Against this factual background, can the court issue orders of judicial review” I take the position that this is matter that is properly determined in another forum so that the court may test all the evidence presented on both sides in coming to the conclusion who is the lawful owner of the property. “It is for this reason that I have eschewed commenting on the totality of the evidence so as not to prejudice arbitration of the matter in that forum. 27. In this respect I wish to re-state what was held in Sanghani Investment Limited v Officer in Charge Nairobi Remand and Allocation Prison (Supra), “Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, certiorari and prohibition...” Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced... It may indeed be true that the notice that is impugned is irregular or unlawful and an order of certiorari would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being a discretionary remedy will only issue if it will serve some purpose. Certiorari is a discretionary remedy, which a court <http://www.kenyalaw.org> - Page 5/7 Republic v Commissioner of Lands & another & another Ex-parte Jimmy Mutinda [2014] eKLR may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles.....So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.” 28. I would also add that in this case the applicant alleges fraud, illegality and collusion involving the Company’s director who was a Commissioner of Lands. Such issues cannot be determined in an application for judicial review.”

23. Fortunately, for the Applicants in this matter, they still have an active case in the Environment and Land Court, in which they can canvass all their grievances with or without amendments of pleadings. It was not necessary to file those proceedings while there was always in existence an appropriate forum.

24. The upshot is that the amended Notice of Motion dated 28th March, 2017 is denied for lack of merit. Costs shall be for the Respondent and the Interested Parties.

Orders accordingly.

Dated, signed and Delivered in Mombasa this 22nd day of May, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Tindi for Applicants

Mr. Kongere for 1st Interested Party

Mr. Kongere h/b Mr. Mokaya for 2nd, 3rd and 4th Interested Parties

Mr. Ngari for Respondents

Mr. Kaunda Court Assistant