



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
JUDICIAL REVIEW NO. 60 OF 2016

1. MRAMBA SAID MRAMBA
2. JANET PILI MRAMBA
3. SAID MRAMBA SAID
4. ROBERT SALIMU
5. RUKIA MRAMBA
6. JAMES BAYA MRAMBA
7. FATU SAIDI
8. KOMBO WAMWARUWA
9. JUMBA SAID MRAMBA.....PETITIONERS

=VERSUS=

1. THE CHIEF LAND REGISTRAR, MOMBASA
2. CHAIRMAN NATIONAL LAND COMMISSION
3. THE COUNTY GOVERNMENT OF MOMBASA
4. THE HON. ATTORNEY GENERAL.....RESPONDENTS

AND

1. THEOPHILE MWALEKWA MWASI
2. PHILIP MSAGHA MBOGHOLI.....INTERESTED PARTIES

RULING

1. This is the Ruling on a Notice of Preliminary Objection dated 7th September 2016 and filed herein on 8th September 2016. The objection is to the hearing of the Notice of Motion dated and filed herein on

10th August 2016. The said Notice of Motion seeks various orders or remedies of Judicial Review, and was filed pursuant to leave granted for that purpose on 4th August 2016. The Preliminary Objection is challenging the granting of that leave to commence Judicial Review proceedings herein. On 10th October 2016, the court directed that the Preliminary Objection be dispensed with first since it has the capacity to deal a final blow to the said Notice of Motion and dispose off the same.

The Preliminary Objection

2. The Preliminary Objection is filed by the 1st and 4th Respondents, and is based on the following grounds:

- (i) The judicial review application is frivolous, vexatious and an abuse of the court process.
- (ii) That the application grossly offends section 9 (3) of the Law Reform Act and order 53 rule 2 of the Civil Procedure Rules 2010 and leave to file the main motion ought not to have been granted in the first place.
- (iii) That it is apparent from the titles annexed by the ex-parte applicants that the said titles were issued and registered in 2011.
- (iv) That at paragraph 8 of the supporting affidavit in support of the motion the ex-parte applicant avers that “it is not clear under what circumstances the interested parties were registered as proprietors thereof.”
- (v) That as a consequences of the foregoing the ex-parte applicants cannot be allowed to go on a fishing expedition to seek “clarity” on how the interested parties were registered as proprietors.
- (vi) That as a consequence thereof entertaining this judicial review application is a waste of precious judicial time as judicial review is concerned with the decision making process and not the merits of the decision itself. Accordingly, and by virtue of ground 4 above in the absence of any revelation or averment (s) as to or of “*the decision making process*” or any averments as to “under what circumstances the interested parties were registered as proprietors thereof’ the ex-parte applicants are inviting this court to undertake a purely academic adventure!

Submission

3. Parties filed submissions to the Preliminary Objection. Mr. Ngari for the proponent of the Preliminary Objection submitted that this suit grossly offends Section 9 (3) of the Law Reform Act and Order 53 (2) of the Civil Procedure Rules 2010 and that leave to file the motion dated 10/8/2016 ought not to have been granted in the first instance.

4. Mr. Ngari submitted that under the Law Reform Act 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; and where that judgment, order decree conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

5. Mr. Ngari also referred to Order 53 rule 2 of the Civil Procedure Rules which is in the same text as the aforesaid Law Reform Act.

6. Mr. Ngari submitted that the Preliminary Objection in this suit arises by clear implication out of pleadings on record before this court which shows (on titles annexed by the ex-parte applicant) that the

said titles were registered on 14th July, 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 have only come to court after “*strangers came to the suit properties with a view to purchasing the same.*” Counsel submitted that even after the ex-parte applicants conducted a search on 21st January, 2016 when they purportedly became aware that the interested parties are the registered owners, they still waited for 7 months before filing this judicial review application in August, 2016. This again, is outside the 6 months mandatory period provided by statute.

7. Counsel submitted that the instant preliminary objection satisfies the conditions as enumerated in the leading case of **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** where it was held that a preliminary objection “*raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite side are correct. It cannot be raised if a fact has to be ascertained.*” Mr. Ngari submitted that this suit all facts are pleaded by the ex-parte Applicants and titles and a copy of search certificates exhibited by them also. Counsel submitted that accordingly, prayers 1, 2, 3, 5, seeking certiorari must fail. Mr. Ngari further submitted that the journey the ex-parte Applicants undertook by filing this application must also at this juncture come to an end with regard to prayers 6, 7 and 8 as entertaining them is a waste of precious judicial time. The prayers as drawn are incapable of being granted by virtue of the binding nature of the decision in **Kenya National Examination Council vs. Republic Ex-parte Geoffrey Gathenji Njoroge & 9 others**) where the learned judges of appeal set out the scope of an order on mandamus as it appears in Halsbury’s Laws of England, 4th Edition at page 111, as follows:

“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 at 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 purpose 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.”

“The order must command no matter that 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.”

8. Mr. Ngari added that under Section 23 of the Registration of Titles Act (repealed) provisions are given on how to challenge a title held under that regime. Section 24 of the Registration Titles Act (repealed) on its part provides remedies available to the ex-parte Applicants in lieu of this Judicial Review application. Accordingly, Mr. Ngari urged the court to uphold the Preliminary Objection and dismiss this Judicial Review application with costs.

9. **Mr. Shimaka** for the applicants to the Notice of Motion opposed the Preliminary Objection and relied on the case of **Lady Justice Joyce N. Khaminwa vs. Judicial Service Commission & Another (2014) eKLR** where the Court had the opportunity to consider the issue of leave to file Judicial Review applications. Counsel submitted that it is important to note that vide an order of this Court issued on 8th August, 2016 leave was already granted to the Applicant herein to commence Judicial Review proceedings. Hence as it is, the preliminary objection has been overtaken by events. Secondly, the 1st and 4th Respondents in their submissions have pointed out that although the titles were registered on 14th July, 2011 the Applicants only came to know of their existence upon conducting a search on 21st January, 2016. Counsel submitted that time should start running from 21st January, 2016 and not 14th July, 2011. Counsel further submitted that seven (7) months is not an unreasonable long period before instituting the proceedings, noting that they ought to have ideally been commenced within six (6) months.

10. Mr. Shimaka relied on the case of **Lady Justice N. Khaminwa** (supra) where the Judge observed that:

“whereas he is not required at this stage to go into the depth of the application, he has to show that he has not come to Court after an inordinate delay and that the application is not frivolous, malicious and futile.”

11. Mr. Shimaka submitted that the delay of one (1) month is not inordinate hence it was proper for the Court to grant the Applicants leave to file Judicial Review proceedings.

Determination

12. I have carefully considered the Preliminary Objection and submissions of parties. The only issue I raise is whether a Preliminary Objection process can be used to terminate Judicial Review proceedings the leave to commence of which had been given, especially when the Preliminary objection is purely based on the submission that leave ought not to have been given in the first place. **Mr. Ngari's** submission that the decision to be challenged took place more than six (6) months before the application for Judicial Review orders was made could be correct, but I think those are submissions to be made in the notice of motion for the Judicial Review orders. It also seems to me that once a judge has given the leave to commence Judicial Review proceedings, that decision to grant leave cannot be challenged, except through a review of the same. This is so because the judge giving the leave must have judiciously exercised his discretion and must have considered factors including the chances of success of the motion for Judicial Review orders. If anybody wishes to challenge the leave, that challenged must come by way of Judicial Review. It cannot come as a Preliminary Objection. One cannot preliminarily object to what has already been granted. However, one can challenge that grant through a review of the order granting the leave. It is also noteworthy that filing of Preliminary Objection is merely a waste of time since the grounds upon which the Preliminary Objection is based would be the very grounds upon which the substantive motion would be challenged. Therefore, prudence would require that the motion be heard on its own merit once leave has been given, and the same has not been challenged in a review. I have carefully looked of the grounds in the preliminary objection. Those grounds shall be more prudently advanced in the motion.

12. For the foregoing reasons, the Preliminary Objection is dismissed for lack of merit, and the parties are herewith directed to proceed to list the motion for hearing.

Orders accordingly.

Dated Signed and Delivered in Mombasa this 18th day of May, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Ngari for Respondents

Ms. Mukoyo holding brief Shimaka for Applicants

Mr. Chebukaka holding brief Ms. Kariuki for Interested Parties

Mr. Kaunda Court Assistant