



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. APPLICATION NO. 32 OF 2015 (JR)

IN THE MATTER OF: AN APPLICATION BY MARTHA NGINA WAMBUA, IRENE MATILDA
KATUKU AND JONES KAVINYA NZAU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF PROHIBITION

AND

IN THE MATTER OF: ORDER 53 RULES 1, 2, 4 OF THE CIVIL PROCEDURE RULES 2010 AND
SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT AND THE CONSTITUTION OF THE
REPUBLIC OF KENYA

AND

IN THE MATTER OF: HIGH COURT ENVIRONMENT AND LAND CASE NO. 129 OF 2008:
JOHN MARO GALGALO AND BRIGHTONS PRIMARY & KINDERGARTEN VS. MARTHA
NGINA WAMBUA & 2 OTHERS

BETWEEN

THE REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....RESPONDENT

AND

1. JOHN MARO GALGALO

2. BRIGHTONS PRIMARY & KINDERGARTEN.....INTERESTED PARTIES

AND

1. MARTHA NGINA WAMBUA

2. IRENE MATILDA KATUKU

3. JONES KAVINYA NZAU.....EX PARTE APPLICANTS

RULING

1. This Ruling relates to a Notice of Motion dated 18th August, 2015 and filed on 19th August, 2015. Martha Ngina Wambua, Irene Matilda Katuku and Jones Kavinya Nzau moved the court for orders of prohibition to prohibit the Respondent, the National Land Commission from reviewing the grants and disposition of their parcels of land owned by the ex parte Applicants, namely plot Nos. 3887/VI/MN, 3779/VI/MN and 3780/VI/MN (the suit properties).
2. The ex parte Applicants also sought costs, and such other orders or reliefs as the court may deem just and expedient.
3. The Notice of Motion though supported by the grounds on the face thereof as well the Affidavit of the First ex parte Applicant, Martha Ngina Wambua, is incompetent and should be struck out for the following reason.
4. Order 53, rule 4(1) of the Civil Procedure Rules provides –

“4(1) Copies of the statement accompanying the application for leave shall be served with the Notice of Motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.”
5. Rule 4(2) allows or permits the court at the hearing of the motion on application, to allow the statement to be amended, and further affidavits be filed, with prior notice of any such intention to the affected or interested person.
6. In this case, the Applicants did not seek to amend their statement and seek the relief of prohibition. The leave granted was for an order of certiorari not prohibition.
7. The Notice of Motion seeking an order of prohibition is a departure from the provisions of Rule 4(1) and (2) of the Order 53 of the Civil Procedure Rules. It is therefore incompetent and is therefore struck out.
8. I am keenly aware that I should stop here. Counsel sought for such other relief as the court may find just and expedient to grant. The order which I find just and expedient to grant is the order which was sought in the Statutory Statement paragraph B(1) and the Chamber Summons of 28th July, 2015 and filed on 29th July, 2015, the order of certiorari and for which leave was granted by orders of 29th July, 2015.
9. Though the Notice of Motion was served upon the Respondent/the National Land Commission), as per the Affidavit of Service of Abel Marube Ondieki, sworn on 4th August, 2015, the Respondent did not file any Memorandum of Appearance or take part in these proceedings.
10. However, the Interested Parties entered an Appearance on 18th August, 2015 through a Notice of Appointment dated 10th August, 2015 of Okanga & Company Advocates, and thereafter took no further part in the proceedings herein, and that despite Notices for mentions being served on them on 22nd October, 2015, per the Affidavit of Abelazo Mutua sworn on 28th October, 2015. Similar Notice was served upon the Respondent, and again it evoked no action from either the Respondent, or the Interested Parties. There is however no explanation why the mention Notice was not served upon M/S Okanga & Company Advocates for the Interested Parties who were on record. The orders herein however will not adversely prejudice the Interested Parties, as Mombasa ELC Case No. 129 of 2008 in which they are parties is still pending. The orders herein concern the Respondent at this stage.

The Applicants Case

11. The Applicants' claim that they are the registered owners of the suit properties following the execution of separate sub-leases between them and the then Municipal Council of Mombasa. The sub-lease for parcel number 3779/VI/MN was granted in 2004, and the other namely 3370/VI/MN and 3778/VI/MN were granted in the year 2006.

12. However, in the year 2008, the Interested Parties filed Mombasa ELC Case No. 129 of 2008 John Maro Galgalo and Brightons Primary School & Kindergarten vs. Martha Ngina Wambua, Irene Matilda Katuku, Jones Kavinya Nzau and Municipal council of Mombasa, in which the Interested Parties sought various orders including –

(a) a mandatory injunction against the defendants (ex parte Applicants) preventing them from entering the same suit properties;

(b) revocation of the purported sub-leases to the ex parte Applicants;

(c) a declaration that the Interested Parties are the **bona fide** lessees of the suit properties.

13. The ex parte Applicants therefore claim that the Respondent is acting at the behest of the Interested Parties, the Plaintiffs in Mombasa ELC Case No. 129 of 2008, a case which raises the same issues of ownership between the ex parte Applicants and the Interested Parties and which the E&L court is called upon to determine. Miss Chala, the ex parte Applicants' counsel submits that if the matter is left to be handled by the Respondent while the same issue is pending before court, it will lead to a miscarriage of justice, as the land court, a court of competent jurisdiction, is already seized of the matter.

14. Counsel submitted that the mandate or jurisdiction of the Respondent as provided for under Article 168(c)(v) of the Constitution of Kenya 2010 is limited to reviewing grants and disposition of public land, and that the land in this case is private land under Article 168 (b) of the Constitution which classifies land held under leasehold as private land and the Respondent has consequently no jurisdiction to review such grants.

15. In this regard, counsel relied upon the decision of the court in **REPUBLIC VS. NATIONAL LAND COMMISSION AND PIUS NGUGI (Interested Party), [2015] eKLR**, in which the court noted that the

“...parties had already submitted themselves to the jurisdiction of the court which has the mandate to deal with the matter. The Respondent had no business commencing parallel proceedings over the same parcel of land. The Environment and Land Court is in a position to determine the rival interests of the Applicant and the Interested Parties as well as the legality of the Grant.”

16. At paragraph 62 of the said Judgment, the learned Judge observes inter alia –

“The attempt by the Respondent to review the grant in question while there are court cases geared towards addressing that issue is clearly an abuse of power bordering on contempt of court.”

17. With great respect, I entirely agree with the decision, and sentiments expressed in the above captioned case. I have no material to determine whether the suit lands were private or public land at the time of allocation to the ex parte Applicants. However, as the dispute of the ownership of the suit property (whether originally public land or not) is before a court of competent jurisdiction, the National Land Commission (the Respondent herein) has no mandate or jurisdiction to review the grants and any attempt to do so, is clearly abuse of statutory power, bordering on contempt of the court process and must be stopped forthwith.

18. There shall therefore issue an order of certiorari to bring to this court and quash the decision of the Respondent as set out in the Daily Nation Newspaper dated 27th July, 2015.

19. As the Respondent took no part in these proceedings I make no order as to costs against it. And, as

regards the ex parte Applicants and Interested Parties, I direct that the costs abide the outcome in ELC Case No. 129 of 2008.

20. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 29th day of February, 2016.

M. J. ANYARA EMUKULE (MBS)

JUDGE

In the presence of:

Ms. Oyier holding brief Ms. Chala for Applicant

No Appearance for Hon. Attorney-General

Mr. Kaunda Court Assistant