



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**JUDICIAL REVIEW APPLICATION NO. 19 OF 2019**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE LAND DISPUTES TRIBUNAL MAGARINI.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL MAGISTRATES COURT, MALINDI...2<sup>ND</sup> RESPONDENT**

**AND**

**1. JEREMIAH KAZUNGU NGONYO**

**2. FREDRICK NGUMA**

**3. CHRISPUS CHARO CHEU alias CHRISPIN CHARO CHEU**

**4. MORRIS KAKA KITSAO alias KAKA KITSAO NGONA**

**5. SAMSON RAHISI KASHURU**

**6. ANTONY SHUKU KAINGU.....EXPARTE APPLICANTS**

**AND**

**KATANA GONA KALAMA**

**HARRISON KAZUNGU KATANA.....INTERESTED PARTIES**

**RULING**

This ruling is in respect of a Notice of a Preliminary Objection dated 30<sup>th</sup> January 2020 by the 2<sup>nd</sup> Interested Party on the grounds that the application dated 16<sup>th</sup> December 2019 is res judicata and an abuse of the court process.

Counsel agreed to canvas the application vide written submissions which were duly filed.

The applicants' case is that they filed a suit on 28<sup>th</sup> June 2005 and that the Interested Parties filed a suit before the then Land Disputes Tribunal, Magarini claiming that the ex parte applicants were wrongly allocated land and registered as proprietors. The tribunal delivered its decision on 7<sup>th</sup> February 2006 which was adopted as the judgment of the court by the Principal Magistrates Court at Malindi on 23<sup>rd</sup> November 2006.

That the ex parte applicants were aggrieved by the decision and preferred an appeal to the Provincial Land Disputes Tribunal vide **Appeal No. 2 of 2007**. Before the appeal could be heard and determined, the then enabling Act was repealed and the appeal was subsequently transferred to this court under **Appeal No. 7 of 2014**. The appeal was dismissed for want of prosecution on 21<sup>st</sup> June 2018.

The Applicants filed a Notice of Motion dated 9<sup>th</sup> February 2018 seeking the following orders:

**1. That an order of certiorari do issue directed at the Principal Magistrates Court at Malindi quashing the judgment and decree of the Principal Magistrates Court adopting the decision of the Magarini Land Disputes Tribunal to determine matters of ownership of land and award damages.**

**2. An order of prohibition do issue directed at Principal Magistrates Court at Malindi prohibiting the execution of the said judgment and decree against the Exparte Applicants.**

**3. That the costs of this application be in the cause.**

The Notice of Motion was supported by the grounds on the face of the application together with a supporting affidavit of Jeremiah Kazungu Ngunyo dated 16<sup>th</sup> December 2019 and the statement of facts dated 25<sup>th</sup> November 2019. In response thereto, the 2<sup>nd</sup> Interested Party filed a Notice of Preliminary Objection and a Replying Affidavit both dated 30<sup>th</sup> January 2020 which is the subject of this ruling.

### **INTERESTED PARTIES' SUBMISSIONS**

Counsel submitted that the Ex parte Applicants have not met the threshold of granting stay orders as envisaged under Order 42 Rule 6 and cited the cases of **Karunguru Estate Limited v Beatrice Wamere Karanja HCCC No. 232 of 2012; Lalji Bhimji Sanghani Builders & Contractors v Nairobi Golf Hotels Kenya Ltd HCCC No. 1990 of 1995; and Job Okuna Oyugi v L'Resh Holdings Ltd and 3 others, Nairobi Civil Application No. 404 OF 1996.**

Counsel further submitted that this matter was on appeal before this court which appeal was dismissed for want of prosecution hence the application is res judicata and an abuse of the court process.

Counsel further submitted that the Applicants herein have not come to court with clean hands as they have deliberately and intentionally failed to disclose to the Honourable Court that this matter was dealt with by the parties who are now deceased and this matter was concluded before their demise. Further that no letters of administration were taken out in any court by the applicants to enable them to deal with the estate of the deceased as this application was an afterthought.

Counsel therefore urged the court to uphold the preliminary objection and dismiss the application with costs.

### **APPLICANTS' SUBMISSIONS**

Counsel for the applicant submitted on the application for stay of execution of the orders and not the preliminary objection.

### **ANALYSIS AND DETERMINATION**

It is trite that whenever a preliminary objection is raised, it must be given priority since it has the ability to dispose of a suit at a preliminary stage. (See **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR**)

In the case of **Mukhisa Biscuit Manufacturers Ltd. v West End Distributors Ltd. [1969] E.A. 696** – the Court of Appeal said: -

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.***

***The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop”***

Section 7 of the Civil Procedure Act defines the doctrine of *res judicata* as follows:

***No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

Looking at the present application by the applicants, they are essentially seeking for orders that the court finds that the Land Dispute Tribunal acted in excess of its jurisdiction as envisaged under section 3 of the then Land Disputes Tribunal Act. From the record it is evident that a similar issue was raised before the Appeals and in the court which was dismissed for want of prosecution. The applicant ought to have filed an application for reinstatement of the appeal and not filing this application.

The applicants have also not explained why they did not follow up the prosecution of an appeal that was filed in 2014 and dismissed in 2018. The issue raised in the preliminary objection touches on the jurisdiction of the court on the doctrine of *res judicata* which if upheld then it terminates this matter. The issue raised in the preliminary objection is a pure point of law which can be dealt with vide a preliminary objection.

The Land Disputes Tribunal heard and determined the dispute on 7<sup>th</sup> February 2006 and the Magistrates Court adopted the award as judgment in November 2006. The appeal was filed in the Provincial Appeal Tribunal but before the hearing the Act was repealed and the

matter transferred to this court for hearing and determination in 2014. The applicant had followed the procedures laid down in the Act but dropped the ball at the hearing of appeal by not prosecuting the appeal.

I have considered the Preliminary Objection that this application is res judicata and the submission by counsel and find that the same has merit and is therefore upheld. The application dated 16<sup>th</sup> December 2019 is therefore dismissed with costs to the Interested Parties.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF JANUARY, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***