



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL, JUDICIAL REVIEW DIVISION**  
**MISC. CIVIL APPLICATION NO. 61 OF 2015**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW PURSUANT TO SECTION 8 AND 9 OF THE LAW REFORM ACT**

**BETWEEN**

**1. SARLA**

**DERVI**

**2. GORAVE**

**AMARNATH**

**3. VAIBHAV**

**AMARNATH.....APPLICANTS**

**AND**

**1. PRINCIPAL SECRETARY MINISTRY OF LANDS, HOUSING AND NATIONAL  
DEVELOPMENT**

**2. DEPUTY COUNTY COMMISSIONER KALOLENI SUB-COUNTY**

**3. DISTRICT LAND ADJUDICATION OFFICER KILIFI**

**4. HON. ATTORNEY-GENERAL**

**5. OMAR SHARRIF ALI.....**

**.....RESPONDENTS**

**RULING**

1. Pursuant to leave of court granted on the 24<sup>th</sup> December, 2015, the ex parte Applicant, filed on 14<sup>th</sup> January, 2016 a Notice of Motion of even date and sought two orders -

(a) An order of certiorari to quash the decision in favour of the 5<sup>th</sup> Respondent in an appeal to the Minister in Case No. 454 of 2015 with regard to parcel No. 1221 Kawala 'B' Adjudication Section in Kaloleni determined by the Appeals Board led by the Chairman who is the 2<sup>nd</sup> Respondent.

(b) That the costs of the application be in favour of the Applicants.

2. The Application was supported by the Statutory Statement attached to the Chamber Summons for leave dated and filed on 24<sup>th</sup> December, 2015, the Affidavit of Vaibhav Amarnath (the third Applicant) Verifying the Facts sworn on 24<sup>th</sup> December, 2015, and the grounds, on the face of the Notice of Motion, and the Chamber Summons aforesaid.

### **THE APPLICANTS' CASE**

3. The Applicants' case against the decision of the Second Respondent is essentially one, that the Second Respondent acted without jurisdiction in that the appeal by the Interested Party was made out of time contrary to the provisions of Section 29(4) of the Land Adjudication Act, (Cap 284, Laws of Kenya).

### **THE RESPONDENTS AND INTERESTED PARTY'S CASE**

4. The Replying Affidavit of Felix M. Kiteto, the Land Adjudication and Settlement Officer sworn on 23<sup>rd</sup> March, 2016 and filed on 24<sup>th</sup> March, 2016, merely chronicles the events leading to the registration of the Interested Party as registered owner of the disputed parcel of land, and confirms the decision of the Second Respondent in favour of the Interested Party, that is, the Fifth Respondent.

### **THE INTERESTED PARTY'S (5<sup>TH</sup> RESPONDENT) CASE**

5. The Interested Party's case is set out in the Replying Affidavit of Omar Shariff Ali, sworn on 21<sup>st</sup> March, 2016, and filed on 22<sup>nd</sup> March, 2016. The Interested Party depones on the advice of his counsel that, the Notice of Motion herein is a gross abuse of the court process as this court has no jurisdiction to hear and determine the application pursuant to Article 165(5) of the Constitution of Kenya 2010 (the Constitution), and that since the court has no jurisdiction, the Notice of Motion should be dismissed.

6. The Interested Party also depones on advice by his counsel that there is no matter of public interest raised in the Application, that the requirements of section 29 of the Land Adjudication Act were met, and that the Applicants were granted opportunity to ventilate their grievances before the Land Adjudication Appeals Board, and that the appeals Tribunal acted within its jurisdiction and without bias, and that the application is being made in bad faith, is unmerited in law and undeserving of the orders being sought, and reasons wherefore, the application should be dismissed with costs.

### **THE SUBMISSIONS**

7. In addition to the pleadings by way of Affidavits, respective counsel filed written submissions. The Applicants' counsel's submissions and authorities, dated 8<sup>th</sup> April, 2016, were filed on the same day.

8. The submissions of counsel for the Interested Party dated 20<sup>th</sup> May, 2016, were filed on 24<sup>th</sup> May, 2016, together with one authority.

### **ANALYSIS**

9. I have perused the respective submissions, and from both submissions, the essential issues for determination are –

(1) Whether this court has the jurisdiction to determine the application herein.

(2) Whether judicial review proceedings are available against private persons.

(3) Whether the applicants were competent to file judicial review proceeding (these proceedings) without obtaining a Grant of letters of Administration.

10. I will take each of these issues in turn.

### OF WHETHER THIS COURT HAS THE JURISDICTION TO DETERMINE THE APPLICATION HEREIN

11. It was the contention of counsel for the Interested Party (wrongly as stated above, referred to as the 5<sup>th</sup> Respondent) that this court has no jurisdiction to deal with the matter at hand. It was said counsel's argument that the matter at hand is a question of title to land the jurisdiction of which is vested in the courts created pursuant to Article 162 (2) of the Constitution, and from which jurisdiction the High Court is excluded by virtue of Article 165(5) of the Constitution.

12. This is a fallacious argument. It is fallacious because it demonstrates a poor or lack of understanding of the subject called judicial review, and the remedies or reliefs that flow therefrom under Article 23 of the Constitution, and Section 29 of the Fair Administrative Action Act, 2015, and indeed its foundation, Section 8 of the Law Reform Act, (Cap 26, Laws of Kenya).

13. So to repeat what is now trite law, judicial review is not about the merits of the case, but rather the decision-making process. The broad areas of the doctrine of **ultra vires** are what Lord Diplock referred to in the case of *Civil Service Union vs. Minister for Civil Service* [1976] 2 ALL ER, as illegality, **irrationality** and **procedural impropriety** (the "I's"). "**Illegality**" refers to the question whether the decision was made according to the law, "**irrationality**" covers the whole question of the doctrine of reasonableness, whether the decision maker took into account irrelevant matters and **procedural improprieties** answered the question whether the principles of "audi alteram partem" (hear the other party) and "nemo debet esse iudex in propria causa" (no person may be judge in his own cause) were adhered to.

14. Indeed section 8 of the Law Reform Act declares that this court will not in its civil or criminal jurisdiction grant any of the judicial review orders (the prerogative orders) of **certiorari**, **mandamus** or **prohibition**. In other words judicial review is a jurisdiction which is **sui generis**, it is neither civil nor criminal jurisdiction. It does not concern itself with ownership of or title to land. Articles 162(2) and 165(5) of the Constitution are of no concern to the judicial review court, whether that court is constituted as the High Court, or the Environment and Land Court, or the Employment and Labour Relations Court. The Interested Party fails on the issue of jurisdiction of this court.

### OF WHETHER JUDICIAL REVIEW PROCEEDINGS ARE AVAILABLE AGAINST A PRIVATE PERSON

15. The answer to this issue is simply in the negative. The person described as the 5<sup>th</sup> Respondent is the person referred to in Order 53 rule (3) of the Civil Procedure Rules, as the person interested or affected by the decision being challenged by the Applicant. He is the person who must not only be served with the application but must also be informed of the hearing date of the application, and proof of such service must be satisfactory to the judicial review court and because the decision of the court, if it should grant the relief sought, may adversely affect the rights of the Interested or affected party, or (who is in these proceedings wrongly referred to as the 5<sup>th</sup> Respondent). I have however from the outset referred to him as the Interested Party. To strike him out would be contrary to the provisions of Article 259 of the Constitution, which require this court to determine any matter before it in accordance with substantive justice, without undue regard to either status of the persons concerned, or technicalities of pleading.

16. This question is therefore a non-issue in this matter, it may be an issue for example if the "*private person*" was a juridical body exercising functions which affect a substantial number of population on its decision were to affect the national economy. An example would in the context of Kenya, the Nairobi Stock Exchange, and the Central Depository System in the sale and transfer of shares, bonds and other commercial paper to raise capital. The courts could interfere by way of judicial review to ensure that the "*unacceptable face of monopoly capital or capitalism*" does not erode the substratum of the country's economy.

17. The decision herein would therefore affect the 5<sup>th</sup> Respondent, not as Respondent, (as it made no decision) but as an interested or affected person, whose interests, the subject of the decisions under challenge, may be adversely affected. It was therefore necessary to bring him on board. His appellation as a Respondent does not deny him the right of audience, as he has indeed been heard.

### **WHETHER THE APPLICANTS HEREIN WERE COMPETENT TO FILE JUDICIAL REVIEW PROCEEDINGS WITHOUT OBTAINING GRANT OF LETTERS OF ADMINISTRATION**

18. It was the contention by counsel for the Interested Party, that the Applicants were not competent to bring the application for leave to commence judicial review proceedings as they had no capacity to do so by virtue of the fact that their father, the original Respondent in the decision being challenged was deceased, and that the applicants had not obtained a Grant of Letters of Administration to give them capacity to the deceased's shoes in any litigation. This was both a question of law, and a question of fact.

19. As a question of law, Section 45 of the Law of Succession Act, (Cap 160 Laws of Kenya) prohibits any person from meddling with deceased's property unless first granted an order by the court. That order is the Grant of Letters of Administration, which may be either be limited or a full grant to administer the estate of a deceased person.

20. As a matter of fact, the Application herein was made on 24<sup>th</sup> December, 2015, when leave was granted to the Applicants to commence judicial review proceedings.

21. According to exhibit VAI annexed to the Affidavit of Vaibhav Amarnath sworn on 24<sup>th</sup> December, 2015, the Applicants (1) Sarla Dervi (2) Gorave Amarnath and (3) Vaibhav Amarnath, the personal representatives of Amar Nata Gupta who died on 24<sup>th</sup> October, 2014, were granted a Limited Grant of Letters of Administration Ad Litem, (to file a civil suit only) on 16<sup>th</sup> December, 2015.

22. The application was made on 24<sup>th</sup> December, 2015, that is some eight (8) days after the issue of the Grant limited as aforesaid. The answer to this question is therefore in the positive. The applicants had the necessary legal capacity to institute these or other proceedings on behalf of the deceased's Gupta's estate. Any contention to the contrary has no basis.

### **OF WHETHER THE ORDERS SOUGHT OUGHT TO BE GRANTED**

23. It was the Applicants' counsel's contention that the reliefs sought under the application be granted. The principal grounds were that the Board had no jurisdiction, and that the deceased was not heard because the appeal was filed against a Respondent who was already dead by the time the appeal was filed, and that therefore there was no appeal, it was never served upon the Applicants, and that in any event such appeal, if any, was filed out of time, that is outside the sixty (60) days allowed under the law, and the appeal was heard when the person affected had already died.

### **DETERMINATION**

24. I have considered very carefully the rival contentions in this matter. As a court of law my primary concern is to do justice to every party without regard to the status of the party. The facts in this matter are not disputed. The area of dispute is who is the rightful owner of Plots 31 and 1221, commonly referred to as Kawala "B" Adjudication Section. Following adjudication of the area, the late Amar Nath Gupta was adjudicated the owner of Plot No. 1221.

25. Being unhappy with the decision of the Adjudication Committee, the Interested Party appealed to the Land Adjudication Board. The Board heard the appeal on 14<sup>th</sup> June, 2011, and determined on 24<sup>th</sup> June, 2014 that the disputed Plot No. 31, be sub-divided, giving rise to Plot No. 1221. A subsequent appeal by Omar Shariff Ali the Interested Party on 24<sup>th</sup> August, 2012 and was dismissed. The date of dismissal is not stated, but the hearing having been conducted in August, 2012, the appeal was most probably determined sometime in the year 2012, and required the Interested Party to appeal within sixty (60) days

of the decision.

26. The Replying Affidavit of Felix M. Kiteto, the District Land Adjudication Officer Kilifi and the Third Respondent herein, gives a chronology of the disputes between the ex parte Applicants, and the Interested Party, Omar Shariff Ali, with the Interested Party losing the dispute at the two appeals, but succeeding in the appeal to the Minister.

27. What neither the Third Respondent nor the Interested Party do not reveal is the date or when the appeal was made to the Minister. Annexure VA7 to the Affidavit of Vaibhav Amarnath is a copy of a Summons by the Deputy County Commissioner, Kaloleni Sub-County, dated 26<sup>th</sup> October, 2015 summoning Gorave Amarnath, the son of Amar Nath Gupta (who had died on 24<sup>th</sup> October, 2014 at Pandya Memorial Hospital), to appear on 3<sup>rd</sup> November, 2015, at the hearing of the appeal by the said Omar Shariff Ali, regarding Plot No. 1221, "Kawala B". To the said Affidavit is also annexure "8" a letter dated 31<sup>st</sup> October, 2015 addressed and in reply to the Deputy County Commissioner's Summons dated 26<sup>th</sup> October, 2015 and asking the Deputy County Commissioner, to adjourn the hearing of the appeal to another date, because the notice was too short, as they were yet to be served with "*certified copies of the appeal proceedings, as well as more time to me to organize with my witnesses in support of my case.*"

28. Vaibhav Amarnath depones in paragraph 7 of his Affidavit (sworn on 24<sup>th</sup> December, 2015), that despite personal delivery of his request for more time, and also the proceedings of appeal, both were denied. The appeal appears to have proceeded ex parte. The Replying Affidavit of Omar Sharif Ali, the Interested Party is silent on this matter. He did not file any document showing the decision of the Minister or on behalf of the Minister by the Deputy County Commissioner. It is then difficult to say on what basis Omar Sharif Ali invaded and took over Plot No. 1221 of which the ex parte Applicants are beneficial owners, being the personal representatives of Amar Nath Gupta, deceased.

29. From the above, the decision of the Deputy County Commissioner is shrouded in secrecy. The grounds of appeal are neither revealed to the ex parte Applicants, to the District Land Adjudication Officer, nor to the Attorney General. The Interested Party's invasion of the ex parte Applicant's inheritance is consequently quite arbitrary and has no legal basis at all.

30. **Firstly**, the appeal to the Minister is stated to be Number 454 of 2015 (421/2015). This clearly indicates that the appeal was filed in the year 2015. The decision appealed from was rendered on or about 24<sup>th</sup> August, 2012, and required Omar Sharif Ali to appeal within sixty (60) days, in terms of Section 29(1) of the Land Adjudication Act, which says –

**"29(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act, may within sixty days of the determination, appeal against the determination to the Minister by –**

**(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and**

**(b) sending a copy of the appeal to the Director of Land Adjudication and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final;**

**(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.**

**(3) When the appeals have been determined, the Director of Land Adjudication shall –**

**(a) alter the duplicate adjudication register to conform with the decision, and**

**(b) certify on the duplicate adjudication register that it has been final in all respects,**

**and send details of the alterations a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”**

31. It is thus clear from the foregoing analysis of the facts herein, the appeal, (if any), to the Minister from the determination of August, 2012 was filed in the year 2015, well after the statutory sixty days prescribed by Section 29(1) of the Land Adjudication Act. There is also no information that extension of time was sought or was extended. That appeal was therefore statute-barred and what the statute has barred cannot be rendered lawful by an arbitrary decision of the all-powerful Deputy County Commissioner. It is a nullity **ab initio**.

32. **Secondly**, the decision of the Deputy County Commissioner was both unconstitutional and therefore illegal. It was unconstitutional because it flies into the face of Article 47 of the Constitution, which entitles and guarantees every person, an administrative action that is expeditious, just and fair and binds the decision-maker with the duty to give notice, and hear the other person who is likely to be affected, and more so adversely affected by the decision likely to be made. The decision is illegal because it defies the provisions of Section 9 of the Fair Administrative Action Act 2015 which requires the decision-maker to hear all the parties before making his determination.

33. **Thirdly**, the decision was both irrational and procedurally improper because the Minister, through his agent Deputy County Commissioner refused, despite written request by the ex parte Applicants, **firstly**, to be supplied with proceedings of the appeal, and **secondly** for adjournment of the hearing due to the short notice, denied the ex parte Applicants the right to prepare and be heard in the appeal. This too, was in breach of the ex parte Applicants’ right to fair hearing under Article 50 of the Constitution, which rights includes adequate time to prepare for one’s case or defence.

## **CONCLUSION**

34. In light of the foregoing, I am satisfied that the actions of the Minister through his delegate the Deputy County Commissioner, Kaloleni Sub-county, were not only unconstitutional but outright illegal in light of the provisions of Articles 47 and 50 of the constitution, as well as irrational and procedurally improper.

35. In the circumstances, there shall issue an order to bring to this court, and quash by order of certiorari, the purported decision of the Minister through the Deputy County Commissioner Kaloleni Sub-County, County of Kilifi.

36. As the ex parte Applicants succeed, the Interested Party Omar Sharif Ali shall also pay the ex parte Applicants’ costs herein.

37. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 25<sup>th</sup> day of August, 2016.**

**M. J. ANYARA EMUKULE, MBS**

## **JUDGE**

In the presence of:

Mr. Obara h/b Oddiaga for Applicants

Mr. Nyamboye for 5<sup>th</sup> Respondent

Mrs. Mwema for 1<sup>st</sup> – 4<sup>th</sup> Respondent

Mr. S. Kaunda Court Assistant