



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. JR APPLICATION NO. 10 OF 2014

**IN THE MATTER OF: AN APPLICATION BY GROVE DEVELOPMENT LIMITED FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW AND ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF: THE LAND ACT, ACT NUMBER 6 OF 2012

AND

IN THE MATTER OF: THE NATIONAL LAND COMMISSION, ACT NUMBER 5 OF 2012

AND

**IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 40 AND 67 OF THE CONSTITUTION OF
KENYA, 2010**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

1. THE NATIONAL LAND COMMISSION

2. DR. MOHAMED A. SWAZURI

3. DIRECTOR OF PHYSICAL PLANNING.....RESPONDENTS

AND

GROVE DEVELOPMENT LTD.....EX PARTE APPLICANT

RULING

Introduction:

1. This Ruling relates to two applications –

(1) **The Notice of Motion** dated 18th January, 2016 allegedly by the Trustees of Achinakulo Clan, for orders that –

- (a) the court do strike out the case on the ground that it is abuse of the court process;
- (b) in the alternative the Ruling of the court made on 30th July, 2015 be set aside;
- (c) a temporary injunction be granted restraining the ex parte Applicant from alienating or dealing adversely with the property known as Kwale/Diani Beach/20 situate in Kwale County;
- (d) costs of the application be provided for.

2. The Second application is the **Notice of Motion dated 26th February, 2016**, and is brought by the County of Kwale which describes itself as the Second Interested Party. It seeks the following orders –

- (1) that the orders issued on 30th July, 2015 be stayed pending the hearing and determination of the application herein;
- (2) that the proceedings in this matter and Ruling and orders made on 30th July, 2015 be set aside;
- (3) that the County Government of Kwale be joined as a party in these proceedings, either as an Interested Party or Fourth Respondent;
- (4) the costs of the application be provided for.

3. Since the two Notices of Motion raise substantially the same issues, I will determine them together. I will refer both to the Achinakulo Clan and the County of Kwale as the Applicants, and where applicable as the respective Applicants.

4. The Applicants raise the same issue, namely that they were Interested Parties and ought to have been served, and that if there was service (at least in respect of the government of the County Government of Kwale, it was not a proper or valid service, and counsel for the Government of Kwale County say that fraud vitiates everything, and for that reason alone, the proceedings herein and Ruling therein should be set aside.

5. The clan is lost in the historical argument that the suit-land belonged to their ancestors since time immemorial. The clan whose status in law is undefined purported to appoint trustees the supposed Interested Parties on behalf of the clan. They too plead through their counsel, that they were not heard, and for the same reason, the proceedings and Ruling and orders herein delivered on 30th July, 2015 be set aside, and they be made Interested or Parties to these proceedings.

6. Both applications were however opposed by the ex parte Applicant, **Firstly** in respect of the Application dated 18th January, 2016m by the Replying Affidavit of Nitin Pandya sworn on 21st March, 2016, and filed on 23rd March, 2016, and **secondly**, in respect of the Application dated 26th February, 2016, by the Grounds of Opposition dated 7th March, 2016, and filed on 9th March, 2016, and contends that –

- (1) the applications are misconceived, devoid of any merit and a flagrant abuse of the court process;
- (2) that the Interested Party (the Clan) has no proprietary interest in the suit property despite claiming the same is ancestral land;

(3) that without any proprietary interest in the suit property, the clan lacks any rights, proprietary or otherwise, capable of being protected, by the court;

(4) and in the absence of such proprietary interest in the suit property, the clan is not entitled to any of the orders sought and will not suffer any prejudice;

(5) the Notice of Motion dated 18th January, 2016 is wholly incompetent as an afterthought and only liable for dismissal with costs.

7. In addition to those basic pleadings for and against the two Applications counsel for the Government of the County of Kwale filed on 5th May, 2016 written submissions dated 15th April, 2016. Counsel for the Clan also filed on 9th May, 2016 written submissions dated 6th May, 2016.

Analysis and Determination

8. The court was subjected to a long list of cases on the setting aside of Judgments/Rulings on the premise that the Notice of Motion, the subject of the Ruling of 30th July, 2015 was some interlocutory application or a judgment in a civil suit. It was not, and cases cited by both counsel are wholly inapplicable as I shall demonstrate below. The citation of alleged breach of some provision of the Constitution such Article 47 (fair administrative action) or fair hearing (Article 50), are mere red herrings.

9. The applications herein are both said to be brought under the provisions of Order 10 rule 11, Order 50 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, 2010. These rules are all procedural rules relating to consequences of non-appearance, default of defence, and failure to serve (Order 10 rule 11), and the direction that all applications to court shall be made by way of Notice of Motion (Order 51, rule 1). All this is in order in respect of ordinary civil suits. The Ruling herein was in relation to a Judicial Review Application which rooted in Sections 8 and 9 of the Law Reform Act.

10. Section 8 of the Law Reform Act (Cap 26, Laws of Kenya) prohibits the High Court from issuing any of the judicial review orders of certiorari, prohibition or mandamus in either its civil or criminal jurisdiction. That means that judicial review jurisdiction is neither civil nor criminal. It is a jurisdiction which said to be “**sui generis**”, a special jurisdiction. The case of the **Wellamondi vs. The Chairman Election Commission of Kenya [2002] 1KLR 486** explains all this very clearly.

11. Order 53 of the Civil Procedure Rules, is made under Section 9 of the Law Reform Act, and not Section 81 of the Civil Procedure Act, [Cap 21, Laws of Kenya). Order 53 rule 3(1) (2) (3) and (4) provide –

“1.

2. The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings.”

12. The only person or party who would be directly affected by the orders herein, was the Government of the County of Kwale. In compliance with the requirements of Order 53 rule 2, this court made a specific finding in its Ruling on 30th July, 2016 that the Notices of Motion for the judicial review orders be served upon the Government of the County of Kwale, and that this was done. There is no explanation why they failed to enter appearance then, and take part in the proceedings. It is now late in the day to claim that they were not served. In any event notice of delivery of the Ruling was duly given, and since the County Government had taken no part, it was not mandatory that it should be served with the Judgment/Ruling date. The lamentations of the court on the failure of both the County Government of Kwale, and the Chairman of National Land Commission the Second Respondent are clear from paragraph

26 of the Ruling.

13. As for the Clan, I agree with submissions by counsel for the ex parte Applicant that having no plausible proprietary interest in the suit-land, and having had no part in the determination of the decision, the subject of the Ruling of 30th July, 2015, the clan cannot be described as a person or body which would be “**directly affected**” by the decision of the court in the Judicial Review application. For the purpose of the application herein, the clan is a busy body with no discernible interest recognized in law. The ex parte Applicant had no dealings with it.

14. Neither the clan, nor the Government of the County of Kwale took part in the proceedings leading to the Ruling of 30th July, 2016. If they had, their remedy would be an appeal under Section 9(2) of the Law Reform Act.

15. In the circumstances, I find and hold that the Notice of Motion dated 18th January, 2016 and 26th February, 2016 are both wholly incompetent, an afterthought and are hereby dismissed with costs to the ex parte Applicant.

16. There shall be orders accordingly.

Dated, Signed and Delivered at Mombasa this 24th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Manyalla holding brief Tobino for ex parte Applicants

Miss Akiee holding brief Gikandi for Interested Party

Mr. Kaunda Court Assistant