



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC MISC APP NO. NO. 2 OF 2013

**IN THE MATTER OF: AN APPLICATION BY WILSON NYINGEMAVINGA FOR
LEAVE TO APPLY FOR JUDICIAL REVIEW**

ORDERS OF MANDAMAS

**IN THE MATTER OF: ORDER 53 RULES 1,2,4 OF THE CIVIL PROCEURE RULES, 2010
AND SECITION 1A, 1B and 3A OF THE CIVIL PROCEDURE ACT**

AND

INTHE MATTER OF: PLOT NUMBER 5026/228

BETWEEN

REPUBLIC.....APPLICANT

AND

1. SETTLEMENT FUND TRUSTEES

2. KILIFI DISTRICT LAND ADJUDICATION AND SETTLEMENT

OFFICER

3. THE ATTORNEY GENERAL..... RESPONDENTS

AND

1. PASTOR NYALE

2. CHARLES NYALE

3. JOHN NYALE.....INTERESTED PARTIES

4. WILSON NYINGE MAVINGA.....EX PARTE APPLICANT

AND

1. MATUMBO MAVINGA

2. TEMBO MAVINGA MWANGOME

3. MICHAEL MWAGOMBO MAVINGA

4. AUGUSTINE KAJOHN KASHERO.....Affected Parties

J U D G M E N T

Introduction:

1. In the Notice of Motion dated 28th March, 2013, the Ex-parte Applicant (the Applicant) is seeking for the following orders:-

(a) That an Order of Mandamus be granted ordering and compelling that the Respondent to forthwith allocate to the Applicant, Wilson Nyinge Mavinga all that plot measuring approximately 12 acres known as Plot No.5052/228/Bureni (hereinafter referred to as the "Suit Property") that was surrendered by Vipingo Properties Limited to the 1st Respondent.

(b) That costs for the Application be provided for.

2. The Notice of Motion is premised on the grounds that the Applicant is the only squatter in occupation of the said suit property that was surrendered by Vipingo Properties Limited; that the 2nd Respondent's officers are now sub-dividing the land and that unless this court intervenes, the 2nd Respondent will completely sub-divide the suit property into several pieces and allocate the same to outsiders thus robbing off the Applicant his only home and source of livelihood.
3. It is the Applicant's contention that the Interested Parties have threatened to invade the suit property in the hope that they will be considered when the suit property is allocated. Other than the three Interested Parties sued, Matumbo and Maringa, Tembo Maringa Mwangome, Augustine Keshar, Michael Mwangombo Maringa were enjoined in the suit as Affected Parties.

The Applicant's Case:

4. In his Verifying Affidavit, the Applicant deposed that since 1940's, his family has lived in the suit property and has extensively developed it by doing mixed farming.
5. It is the Applicant's deposition that the registered proprietor, Vipingo Properties, has never been in physical occupation of the said property and that in the year 2008, the registered property ceded transfer and donated as a gift all its rights and interests as lessee of the suit property to the 1st Respondent.
6. The Applicant has deposed that in the month of July, 2012, the 2nd Respondent descended upon the suit property and commenced sub-division; that the 2nd Respondent has the duty of settling people who are in physical occupation of the same and that due to his long and uninterrupted occupation and development in the suit property, he has acquired a vested interest in the suit property.
7. In his Further Affidavit, the Applicant denied the allegations by the Affected Parties that all the children of his late father, Maringa Tembo, have exercised proprietary rights over the suit property because none of them has been in continuous occupation and possession of the land.
8. It is the Applicant's case that the 1st, 2nd and 3rd Affected Parties have obtained parcels of land from the Government elsewhere and have established their respective homes.
9. The Applicant denied ever appending his signature to the family agreement that was produced by the Affected Parties.
10. The Applicant stated that indeed the 1st, 2nd and 3rd Affected Parties are his step brothers while the 4th Affected party is his nephew. It was his deposition that the Affected parties have never

lived on the land.

The Respondent's case:

11. The Kilifi District Land Adjudication and Settlement Officer deponed that the suit property was surrendered to the Government by Vipingo Properties Limited as a gift and became public land; that on behalf of the SFT, the 2nd Respondent embarked on the exercise of settling people on the suit property which was named Burani III Settlement Scheme which is 11 acres of land and that the family of Maringa comprising three house holds is the one which has settled on the land.
12. According to the 2nd Respondent, the family of Maringa agreed to the sub-division of the land in writing, which agreement was also signed by the official of the land settlement committee which was appointed on 27th September, 2012.

The Affected Parties' case:

13. The 1st Affected Party, Matumba Maringa, gave a long history on how the family of Maringa Tembo came to settle on the suit land, which, according to him, was in the 1930's, having moved from Dindiri village.
14. According to the 1st Interested Party, he has been on the suit property since 1936 and so is his elder brother who was born in 1933.
15. It is the deposition of the 1st Affected Party that his father had three wives, that is Mechiyele Maringi Tembo, deceased, Naomi Chitsaka Maring'a, deceased and Dzame Majengo Maring'a.
16. It is the 1st Affected Party's case that all the children of the second and third wives, including himself, were born on the suit land and that their father died in 1979 and was buried in the suit property, so was his mother who died in 1982.
17. The 1st Affected Party depend that all the children of Maringa Tembo have exercised proprietary rights on the suit land and have been cultivating it.
18. According to the 1st Affected Party, the family agreed that the suit land should be sub-divided among the three families represented by their mothers; that the Applicant only occupies a small portion of the suit land and cultivates less than two (2) acres and that the entire land can not be given to the Applicant who is the last born of the entire Maring'a Tembo family.
19. The 2nd and 3rd Affected Parties reiterated that contents of the 1st Affected Party's deposition in his affidavit which I have already summarised above.
20. The grandson of Maring'a Tembo, the 4th Affected Party, deponed that him, together with with several other grandchildren, were born and raised on the suit property and have from time to time cultivated the same, either personally or through other people.
21. The 4th Affected Party gave the chronology of how his late grand father settled in the land.

The Applicant's submissions:

22. The Applicant's counsel submitted that his father was occupying the suit property as a squatter and that he had no proprietary rights over the suit property. Counsel subdmitted that the suit property neither belongs to the Ex-parte Applicant nor to the Affected Parties.
23. Counsel submitted that the Exparte Applicant has been the only squatter in occupation of the suit property since his father's demise in 1979; that he has been in possession of the land for close to 35 years and that the 1st, 2nd and 3rd Affected Parties left the suit property before the death of their father in 1979.
24. The Applicant's counsel submitted that the Affected Parties have been allocated land somewhere else by the Government; that the suit property is not ancestral land and that the Affected Parties have not demonstrated that they have been in occupation of the suit property.
25. According to counsel, the Applicant is entitled to the land under the doctrine of legitimate expectation. Counsel relied on the case of **Council of Civil Service Unions VS Minister for Civil Service [1984] 3 ALL ER 935.**
26. Counsel submitted that the Applicant had a reasonable and legitimate expectation that being the

regular practice when it comes to settlement of squatters in a settlement scheme, the squatters on the land are the only persons to be allocated the land.

27. The Applicant's counsel submitted that the 1st and 2nd Respondents are supposed to conform to the provisions of section 134 (6) of the Land Act, 2012 and Articles 47 and 60(1) of the Constitution.

The Affected Parties' submission:

28. The Affected Parties' advocate submitted that the Applicant has not annexed any form of demand by himself to any of the Respondents demanding to be allocated the suit property; that the 3rd Affected Party was appointed to represent the family of Maring'a Terebo and thus the Applicant could only have such a right through the family and that the Applicant should have disclosed to this court about the documents executed by the family and the existence of the committee which had been constituted to look into the issue of sub-division and allocation of the suit property. Counsel submitted that while filing the pleadings, the Applicant deliberately excluded all the family members of Maring'a Tembo but sued some committee members as Interested Parties.

29. Counsel submitted that since the family has already agreed the manner in which the suit property should be sub-divided, that decision should be upheld.

Analysis & findings:

30. The only issue for determination in this matter is whether this court can compel the Respondents to allocate the Applicant parcel of land number 5025/228 Bureni.

31. It is not in dispute that by way of an undated surrender document, Vipingo Properties Limited surrendered and donated as a gift the suit property to the Settlement Fund Trustees (SFT). The surrender document was forwarded to the 2nd Respondent vide a letter dated 5th December, 2008.

32. It is the Applicant's case that because he is the one who has been in possession and occupation of the land that was surrendered by Vipingo Properties Limited to SFT, he should be allocated the entire land to the exclusion of the rest of the family of Maring'a.

33. Both the Applicant and the Affected Parties are in agreement that the late Maring'a Tembo stayed on the suit land as a squatter from the year 1930 until 1979 when he died. During that period, Mr. Maring'a married three wives whose children are the Applicant and the 1st – 3rd Affected Parties, amongst others. The 4th Affected Party is the grandson of the said Maring'a Tembo.

34. The deposition of the Affected Parties is that their father, with his two wives, were buried on the suit property and that the entire family has been utilizing the land by either cultivating it themselves or through other people.

35. The Applicant's contention is that since his father died in 1979, the Affected Parties moved out of the land and that he is the one who has been utilizing the entire portion. The Applicant has argued that in the circumstances, he is the one who should be allocated the entire land under the doctrine of legitimate expectation.

36. It is the Applicant's case that pursuant to the provisions of section 134 (6) of the Land Act and Articles 47 and 60 of the Constitution, he is the one who is entitled to the entire land.

37. The Applicant has denied that he participated in the agreements dated 20th November 2010 and 14th August 2010 where the family members of Mr. Maring'a agreed to have the suit property sub-divided and allocated to three houses represented by the wives of the late Maring'a.

38. According to the family agreement that was signed on 14th August 2010, by the family, chairman and secretary, the Applicant was supposed to get 2 acres of the suit property while the rest of the family members were to get between 2 acres and ½ of an acre.

39. Article 62 (1) (c) defines public land to include land that has been transferred to the State by way of surrender.

40. The suit property having been surrendered by the registered proprietor in the year 2008 falls in the category of public land.

41. As has been correctly submitted by the Applicant's counsel, a squatter living on public land does not have proprietary interest over such land, although such a squatter will ordinarily be the first one to be considered when the land is allocated to individuals by the government.

42. Although a squatter living on public land should be given the first priority during the demarcation, survey and allocation of such land, it is the Settlement Fund Trustees under the old regime, or the National Land Commission, through a Sub-County Selection Committee, under the current regime, who have the authority to allocate land to the deserving people.
43. Section 134 (3) and (4) of the Land Act provides that it is the National Land Commission which shall assist the National and County governments in the administration of settlement programmes while the identification of the beneficiaries shall be carried out and verified by a Sub-County Selection Committee.
44. Before the enactment of the Land Act, land acquired by the SFT used to be allocated to squatters by the Director of Land Adjudication and Settlement on behalf of the SFT.
45. The practice that was employed then by the Director of Land Adjudication and Settlement in identifying the genuine squatters for the purpose of settling them was by forming local committees. Unlike the Land Act, the Agriculture Act did not have a definite formula on how such a committee was to be constituted by the Director. The Land Act has however enumerated how the sub-county committee is supposed to be constituted.
46. According to the Affidavit of the Kilifi District Land Adjudication and Settlement Officer, it was agreed after a consultative meeting that the suit property, otherwise known as Bureni III Settlement Scheme and measuring 11 acres is to be sub-divided and shared between the three family households of Mr. Maring'a.
47. The 2nd Respondent deponed that the said agreement was arrived at after the formation of a committee, representing the three households, held meetings with the family members.
48. Although the Applicant's case is that he is the only family member of the late Mr. Maring'a who is entitled to the suit property having been in occupation since 1979, he has not denied that his claim is hinged on the fact that his late father, together with his wives, are the ones who occupied the land before they died. Even if it is true that he is the only one who has been in possession of the suit property since 1979 and considering that his claim is not that of adverse possession, he has no proprietary rights over the entire suit property so as to ask this court to compel the Government to allocate him the entire land.
49. The Applicant has not pointed out any statutory provisions that states that where a squatter has stayed on public land for many years, he is the one who is entitled to the whole land.
50. I say so because for one to be granted the writ of Mandamus, he has to demonstrate that the Respondent has failed to perform a statutory even ever after demand.
51. As was held by the Court of Appeal in Municipal Council of **Kisumu -vs- Madowo (1986-1989) EA 373**, an order of Mandamus should not be sought to determine the rights but ought to be used for enforcement of existing rights.
52. The Applicant's counsel submitted that the Applicant and his late father do not have proprietary rights over the suit property. Consequently, an order of Mandamus cannot issue in such circumstances.
53. In Halsbury's Laws of England, 4th Edition Vol. 1 at 111 paragraphs 89 and 90, the author states as follows:

“... the order of Mandamus must command no more than 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 a 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.”

54. Section 134 (1) of the Land Act, 2012 has given to the National Land Commission the duty to implement settlement programmes to provide access to land for shelter and livelihood. Where that duty has not been performed, the Commission can be compelled by the court to perform it depending with the circumstances of each.
55. Notwithstanding that the duty by the National Land Commission is and the Land Adjudication and Settlement Officer is implement settlement programmes to provide access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement, the court cannot direct the Commission

or the Land Adjudication and Settlement Office or the selection committee on the acreage of land that should be allocated to each squatter. That, in my view, is a discretionary mandate of the body allocating land to the squatters and not amenable to an order of Mandamus.

56.If the 2nd Respondent, through the family committee, has decided to allocate the Applicant 2 acres of the suit property, which is public land as defined by the Constitution, this court cannot compel the 2nd Respondent to allocate the Applicant the entire land because he does not have a legal right over the entire parcel of land, neither do the Respondents have a statutory duty to allocate him the entire parcel of land.

57.Having failed to demonstrate that the Respondents have failed to perform their statutory duties, and that he has a legal right over the entire land, the applicant's claim for an order of Mandamus fails.

58.For those reasons, I dismiss the Notice of Motion dated 28th March, 2012 with costs.

Dated and delivered in Malindi this 15th day of **May**, 2015.

O. A. Angote

Judge