



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR ECL CASE NO. 89 'A' OF 2011**

**REPUBLIC .....APPLICANT**

**VERSUS**

**COMMISSION OF LANDS .....RESPONDENT**

**ELDAS RANCH LTD.....INTERESTED PARTY**

**EX-PARTE**

**HAJI IBRAHIM ALI HUSSEIN**

**JUDGEMENT**

The ex-parte Applicant Haji Ibrahim Ali Hussein is a resident of Eldas in Wajir County. Through the notice of motion dated 21<sup>st</sup> October, 2011 he prays for **“an order of certiorari to remove into this Honourable Court and quash the respondent’s decision contained in Kenya Gazette Notice No. 9245 published on 5<sup>th</sup> August, 2011 setting aside 3665 hectares of land in Eldas, Wajir.”** He also prays for the costs of these proceedings.

The application is supported by a statement of facts and the Applicant’s verifying affidavit which were filed together with the application for leave dated 5<sup>th</sup> October, 2011

According to the papers filed in Court by the Applicant, the grounds upon which the orders are sought are that the land in question is community land not available for alienation save in the manner specified by Article 64 of the Constitution. Other grounds are that due process for setting apart the land has never been followed and that the County Council of Wajir (the Council) which is alleged to have sanctioned the transaction had disowned its involvement in the process. Another ground is that there are pending court proceedings concerning the matter.

In the verifying affidavit, the Applicant avers that he is one of the residents of Eldas in Wajir and they graze their livestock within Eldas area. It is the Applicant’s case that the land in question has been held by the Council in trust for the benefit of the residents of the area. He averred that the government has established water pans and other facilities in the area for the benefit of the residents. The Applicant asserts that after it came to their knowledge that Eldas Ranch Ltd (the Interested Party) was making arrangements to acquire the land for private purposes he was, together with three others, mandated by the area residents to file a suit for declaratory orders and they did indeed file **Meru HCCC No. 108 of 2010, HAJI IBRAHIM ALI HUSSEIN & 5 OTHERS v THE COUNTY COUNCIL OF WAJIR &**

**ANOTHER** seeking a declaration that the intended allocation of 3665 hectares of land at Eldas by the Council in favour of Eldas Ranch Limited was unconstitutional and illegal.

The Applicant avers that the Council did not enter appearance in the said case but instead sent them letters disowning the intention to set apart the said land. The Applicant asserts that he later learned about the decision to set apart the said land after perusing Notice No. 9245 in the Kenya Gazette of 5<sup>th</sup> August, 2011. The Applicant contends that the decision is illegal and unconstitutional since the Commissioner of Lands (the Respondent) had no power to set apart public land and that due process was also not followed.

It is the Applicant's case that the residents of the area will suffer substantial loss if the decision is not quashed as they will be denied their livelihood and access to their ancestral land.

The Respondent opposed the application through grounds of opposition dated 20<sup>th</sup> April, 2012. According to the Respondent, the process for setting aside trust land as provided by Section 13 of the Trust Land Act, Cap. 288 was duly followed. It is the Respondent's case that it acted after receiving the consent of the Minister for Local Government to set apart the land in question as per Section 144 of the Local Government Act. The Respondent contends that the matter is sub-judice as the Applicant clearly indicated in his application that the matter of setting apart the land is pending in court. The Respondent accused the Applicant of failing to pursue available remedies and material non-disclosure of facts.

Eldas Ranch Limited opposed the application through a replying affidavit sworn by its Director Mr. Hussein Unshur Mohammed on 18<sup>th</sup> November, 2011. Through the said affidavit, Eldas Ranch Limited informed the Court that by a letter dated 28<sup>th</sup> May, 2007 it wrote to the Council requesting for allocation of land for a ranch project. In a meeting held on 20<sup>th</sup> April, 2008 the Planning Committee approved the project and notified it of the approval by a letter dated 14<sup>th</sup> August, 2008.

Eldas Ranch Limited further informed the Court that at a meeting held on 13<sup>th</sup> June, 2008 by the Sub-District Development Committee the question of the land to be allocated to the Applicant or its sister company Blue Bird Limited was deliberated upon. Eldas Ranch Ltd prepared and presented a proposal to the District Development Committee which approved the project at a meeting held on 27<sup>th</sup> June, 2008. He later received a letter dated 2<sup>nd</sup> July, 2008 from the District Commissioner, Wajir West confirming that the District Development Committee had indeed approved the project.

The Interested Party stated that on 20<sup>th</sup> August, 2008 a stakeholders meeting chaired by the local administration and the Council was convened to inform the community of the proposed project and the meeting was attended by members of the Pastoral Association Youth Group, departmental heads, village elders and private sector representatives who unanimously agreed that the project be implemented. It is Eldas Ranch Limited's case that through a letter dated 27<sup>th</sup> September, 2008 the Council confirmed the allocation of the land. By a letter dated 29<sup>th</sup> September, 2008 the Council wrote to the Ministry of Lands requesting it to allocate 3,665 hectares of land for the ranching project.

Eldas Ranch Ltd contends that the project was approved by the National Environment Management Authority (NEMA) after a rigorous process. Eldas Ranch Ltd asserts that among the conditions set by NEMA was that the project be advertised in the Kenya Gazette and the daily newspapers for comments and participation by members of the public and this was done. There was a public meeting convened by NEMA on 20<sup>th</sup> February, 2010 where residents were asked for their opinion on the project. NEMA subsequently granted a licence for the project on 18<sup>th</sup> March, 2010. Through a letter dated 30<sup>th</sup> July, 2010 the Ministry of Local Government wrote to the Commissioner of Land for a lease to be issued. It is Eldas Ranch Limited's case that there are no water pans and other facilities established by the Government for the community on the land in question. Eldas Ranch Ltd avers that the Applicant had initially filed **Petition No. 2 of 2010** at Meru High Court but later withdrew the petition after replies to the petition were filed. Eldas Ranch Ltd contends that after withdrawing the petition the Applicant filed **Meru HCCC No.108 of 2010** which is yet to be heard as the Applicant has not fixed it for hearing.

The director of Eldas Ranch Ltd also informed the Court that one Mr. Ahmed Omar Dore a former clerk of the Council and Mr. Abdulahi Ali Abdi a former chairman of the Council had informed him that they attended the meeting of 26<sup>th</sup> September, 2008 in which the land was set apart. They confirmed to him that the minutes, which he annexed to his affidavit, were a true record of the proceedings of the meeting. The director further averred that the company had already paid the stand premium for the parcel of land in question.

Eldas Ranch Ltd also opposed the application through a supplementary affidavit sworn on 18<sup>th</sup> November, 2011 by one Ahmed Omar Dore who introduced himself as having served as the Town Clerk of the Council between May, 2005 and September 2008. In the said affidavit he averred that he attended a full council meeting on 26<sup>th</sup> September, 2008 which adopted proposals of the Town Planning Committee meeting held on 30<sup>th</sup> April, 2008. The Planning Committee had recommended that the land in question be allocated to Eldas Ranch Ltd.

The Applicant filed a supplementary affidavit sworn on 22<sup>nd</sup> December, 2011 by Abdulgani A. M. Burey. The deponent introduced himself as the Committee Clerk of the Council. He averred that he attended the full council meeting of 26<sup>th</sup> September, 2008 and he does not recollect any deliberation on allocation of land to Eldas Ranch Ltd. He further averred that his signature and that of the chairman in the minutes of the meeting of 26<sup>th</sup> September, 2008 had been forged.

For record purposes, it is noted that the Court (Githua, J) directed on 26<sup>th</sup> March, 2012 that the Council be served as an interested party. On 13<sup>th</sup> June, 2012 counsel for the Applicant informed the Court that the Council was served. Going through the Court file I find that the Council did not file any response to the application.

The Applicant's counsel submitted at length on the allegation that the allocation of the land in question did not follow the law as laid down in the Trust Land Act. Eldas Ranch Limited also submitted at length that the law was complied with.

I have agonized over this matter at length. The parties are in agreement that the allocation of the land was the subject of **Meru High Court Petition No. 2 of 2010** which was later withdrawn by the Applicant. The parties also confirm that this same issue is the subject of **Meru HCCC No. 108 of 2010**. I have noted that there a dispute concerning the process that was used to set apart the parcel of land. For example, Eldas Ranch Ltd contends that the allocation was approved by the full council meeting of 26<sup>th</sup> September, 2008. The Applicant, on his part has exhibited a letter and an affidavit alleging that the matter was not discussed in the full council meeting of 26<sup>th</sup> September, 2008. The Director of Eldas Ranch Ltd in his replying affidavit averred that the chairman of the Council told him that the matter was discussed. The same chairman wrote a letter saying that his signature on the minutes of the meeting was forged. This matter can only be resolved after witnesses are heard. Judicial review is not an appropriate tool where the facts are in dispute.

Justice R.V.P. Wendoh made an apt observation in **SANGHANI INVESTMENT LIMITED V THE OFFICER IN CHARGE REMAND AND ALLOCATION PRISON, [2007] eKLR** when she stated that:

**“Be that as it may, I do agree with the Respondents that the underlying dispute herein is ownership of land. Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be need for viva voce evidence to be adduced on how the land was acquired and came to be registered in the names of the Applicant; whether the title is genuine or not. In the case of REP V EX PARTE KARIA MISC APPLICATION 534/03, Justice Nyamu, Justice Ibrahim and Justice Makhandia held that in cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land, namely occupation, and disposition, there would be need to allow viva voce evidence and cross-examination of witnesses which is not available in Judicial Review proceedings. Even if the Respondents had filed**

**documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents need to be produced at a full hearing where oral evidence would be adduced.....**

**So that in this case, even though this Application were properly before this court and the Application had merit, the court may not have granted an order of certiorari because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands. It will still require determination by way of filing pleadings and viva voce evidence at another forum preferably the Civil Courts.”**

The statement by the learned Judge is appropriate in the circumstances of this case. The procedure to be used in setting apart land is found in Section 13 of the Trust Land Act. Sub-section 13(2)(d) of the said Section provides that:

**“(d) [T]he recommendation of the Divisional Board shall be considered by the council, and the proposal to set apart the land shall not be taken to have been approved by the council except by a resolution passed by a majority of all the members of the council:**

**Provided that where the setting apart is not recommended by the Divisional Board concerned, the resolution shall require to be passed by three-quarters of all the members of the council.”**

In my view the question as to whether or not the process was followed in allocating the land to Eldas Ranch Limited can only be addressed after the hearing of witnesses. The role of the local authority in the allocation of trust land is very important. From the material placed before this Court it cannot be determined whether the meeting of 26<sup>th</sup> September, 2008 approved the allocation of the land to Eldas Ranch Limited. It is also noted that what the Applicant has challenged through these proceedings is the Respondent’s gazettement of the decision by the Council to set apart the parcel of land in question. Even if the Gazette Notice is quashed, the decision of the Council would still remain intact. The decision itself is not challenged.

The action of the Applicant in filing this matter when there was already in existence a case relating to the same issue can be said to be an abuse of the court process. One would be tempted to conclude that the Applicant did not file these proceedings in good faith. It is agreed that the Applicant may have been reacting to the Respondent’s decision to gazette the Council’s decision. That, however, is not a good excuse for filing a fresh suit. The Applicant ought to have brought this development to the Court in the existing suit.

For the reasons stated above, I find that the application before this Court cannot succeed and the same is dismissed. Despite my observations on the Applicant’s conduct, I note that this matter had a public interest element to it. I therefore direct the parties to meet their own costs.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of March, 2014

**W. K. KORIR,**

**JUDGE OF THE HIGH COURT**