



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL CAUSE NO. 128 OF 2010 (JR)**

**IN THE MATTER OF: AN APPLICATION BY SAID MBARAK AWADH FOR JUDICIAL  
REVIEW**

**AND**

**IN THE MATTER OF: THE LAND ADJUDICATION ACT CAP 284 OF THE LAWS OF  
KENYA**

**AND**

**IN THE MATTER OF: KAWALA "A" KADZONZO ADJUDICATION SECTION**

**BETWEEN**

**SAID MBARAK AWADH ..... APPLICANT**

**VERSUS**

**COMMISSIONER OF LANDS ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**DIRECTOR LAND ADJUDICATION AND SETTLEMENT ...3<sup>RD</sup> RESPONDENT**

**DISTRICT LAND ADJUDICATION AND**

**SETTLEMENT OFFICER ..... 4<sup>TH</sup> RESPONDENT**

**DISTRICT LANDS REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**HAMISI MURINZI KOIKOI AND 24 OTHERS ..... INTERESTED PARTIES**

**JUDGMENT**

0. Upon leave granted to file judicial review proceedings, the ex parte applicant by Notice of Motion dated sought orders as follows **ORDERS:**
- a. An **Order of certiorari** do issue to remove into the High Court and quash all the Adjudication proceedings and the consequent Adjudication Register for KAWALA “A” Adjudication Section only in respect of Plot No. KILIFI/KAWALA “A”/32 to include any other Orders, decisions, records or proceedings made concerning the said property Kilifi/Kawala “A”/32 by the Respondents herein.
  - b. (i) An **Order of Mandamus** do issue to compel the Respondents to Rectify their Records and Adjudication Register relating to Plot No. Kilifi/Kawala “A”/32 by removing the names of Hamisi Murinzi Koikoi therefrom as the owner and replacing it with Mr. SAID MBARAK AWADH as the owner of the said parcel of land.
    - (ii) An **Order of Mandamus** do issue to compel the 1st, 2nd and 3rd Respondents to commence investigations in regard to the Register and ownership of parcel No. Kilifi/Kawala “A”/32 particularly with regard to the fraudulent claim and registration of Hamisi Murinzi Koikoi as the owner of the said parcel of land in the said Adjudication Proceedings, Records and Register for Kawala “A” Adjudication section.
    - (iii) An **Order of Mandamus** do issue to compel the 1st, 2nd and 3rd Respondents to issue the Applicant with grant or Certificate of Ownership or Title Deed depicting the Applicant SAID MBARK AWADH as the Registered proprietor of Plot No. Kilifi/Kawala “A”/32.
  - c. An **Order of Prohibition** do issue to prohibit the Respondent from issuing to either the Interested Party herein or to any other person whomsoever and whatsoever with any grant or tile deed or any Certificate of Ownership howsoever and whatsoever except the Applicant hereof SAID MBARAK KAWADH as the registered owner pending hearing and determination of this suit or other than s directed and or ordered by this Honorable Court.
  - d. That costs of and incidental to this Application be awarded to the Applicant.”
0. The Motion was brought against the respondent national and Kilifi district land registration and land adjudication officials and the person registered as owner of the suit property upon the land adjudication process as the interested Party. Subsequently, by a Notice of Motion dated, the 2<sup>nd</sup> - 25<sup>th</sup> Interested Parties successfully sought to be joined claiming a beneficial interest in the suit land as members of the family of the original owner of the suit property.
0. The brief facts of the case are that during the land adjudication process undertaken under the Land Adjudication Act cap. 284 for Kawala ‘A’ Adjudication section of Mariakani area, Kilifi District upon the declaration of the area as an adjudication section on 10<sup>th</sup> August 2007, parcel of land plot no. 32 therein was 27<sup>th</sup> May 2008 on determination of objection proceedings confirmed for ownership to the 1<sup>st</sup> interested party as a guardian for the owner who was then unknown and a letter of confirmation of land ownership with respect to the parcel Kilifi/Kawala ‘A’/32 issued. The plot had initially been demarcated under the name of one Patel whereupon the 1<sup>st</sup> Interested Party filed objection case no. 28 of 2008 which was heard by the land adjudication officer leading to the determination of 27<sup>th</sup> May 2008. Upon learning of this development, the ex parte applicant who claims to have purchased the land from its original owner Dzuha Dzombo Chironda, deceased, lodged protests with the land adjudication officials culminating in the filing of the present suit alleging an attempt to fraudulently deny him his interest in the land. The 2<sup>nd</sup> - 25<sup>th</sup> Interested Parties who claim to be members of the family of the deceased original owner of the land, Dzuha Dzombo Chironda, also claimed an interest in the suit property contending that the 1<sup>st</sup> Interested Party was registered the owner of the suit property on behalf of the family of the late Chironda, and for that purpose successfully sought to be joined in the suit.
0. The ex parte applicant’s case is simply that he purchased the parcel of land of which the suit property is part from its original owner Dzuha Dzombo by an agreement for sale made on 18<sup>th</sup> October 1984 at a consideration of Ksh.23,000/-. He subsequently applied for the setting apart of

the piece of land in accordance with the provisions of sections 115 - 120 of the former Constitution and the Trust Land Act cap 288 to enable him obtain a freehold title which application the County Council of Kilifi granted its no objection. He therefore contends that all that remains to be done is the issuance of a title deed to him and that therefore the parcel of land was not available for adjudication under the Land Adjudication Act since it was not part of trust land having already been set apart. In addition, he complains of a fraudulent attempt by the 1<sup>st</sup> Interested party whom he claims was his one-time caretaker over the same property to take away the plot of land from him. Noting the irony that the interested parties did not lay a claim to the other portion of the parcel of land that he had purchased, the ex parte applicant alleged that the parcel of land was originally 23.9 acres of which he sold a portion of 12 acres to Kaydee Construction Company Limited leaving the suit property of 11.9 acres which the interested parties now claimed. He objects that the interested parties have no right as family members of the deceased original owner of the parcel of land having not taken out Letters of Administration to his estate.

0. The 1<sup>st</sup> Interested Party did not file a response to the suit.
0. The 2<sup>nd</sup> - 25<sup>th</sup> Respondents who made their claim through him made a replying affidavit and an affidavit in reply to the ex parte applicant's further affidavit, both sworn by one Mbudzya Ngoka Chikoko, the 2<sup>nd</sup> Interested Party. The Interested Parties contend that the adjudication process was properly conducted and the ex parte applicant failed to raise any objection. They denied that the ex parte applicant purchased the land or that the alleged setting apart of the land was completed in accordance with the provisions of the Trust Land Act. Relying on the finding of the District Land Adjudication/ Settlement Officer by his letter of 28<sup>th</sup> February 2011, the 2<sup>nd</sup> – 25<sup>th</sup> interested parties contend that the 1<sup>st</sup> interested parties held the land upon trust for the members of the family of the deceased original owner of the land. Part of the findings of the District Land Adjudication/ Settlement Officer set out in the letter of 28<sup>th</sup> February 2011 was that -

*“A family member, one a Mr. Ali Mwatsahu adduced that the plot owner is Dzuha Dzombo Chironda (late) who was Duruma by tribe. He further stated that the late Dzuha Dzombo Chironda sold portions of land to one Said Mbarak among others which are demarcated as Plot Nos. 26, 33, 34 and 422. He further stated that the portion left which is Plot No. 32, the family endorsed one Hamisi Mrinzi Kokoi to take care of it”*

0. It was also contended by the 2<sup>nd</sup> -25<sup>th</sup> Interested Parties that ‘the land herein having been registered during the adjudication process in the names of the 1<sup>st</sup> interested party Hamisi Murinzi Koikoi to hold for himself and on behalf of the family of Dzuha Dzombo Chironda and the issue of a grant of letters of administration of the estate of Dzuha Dzombo Chironda (deceased) does not arise as the land was not registered in his name.’
0. The respondents did not file any replying affidavit and they urged their case through grounds of opposition which were elaborated in the written submissions dated 30<sup>th</sup> April 2012, setting out principally legal objections as to the ex parte applicant's unexplained failure to lodge within prescribed time an objection against the adjudication process which, it was contended, was regularly conducted in accordance with the Land Adjudication Act and as to the appropriate procedure for determination of disputed matters of fact .
0. The parties then filed written submissions without supplementary oral argument and ruling was reserved.

### **Issues:**

0. In considering the submissions by the parties with the respect to the Notice of Motion for judicial review orders herein, the following issues arise for determination:
  - a. Whether the suit property was the subject of a setting apart for the ex parte applicant within the meaning of the former Constitution and the Trust Land Act;
  - b. If so, whether the statutory process of land adjudication under the Land adjudication Act cap. 284 could be undertaken over a property which had been set apart; and
  - c. Whether the judicial review orders could be granted in the circumstances of the case.

0. On the procedural question whether having not lodged a copy of the decision the subject of the judicial proceedings, pursuant to Order 53 rule 7 of the Civil Procedure Rules the applicant could be allowed to challenge it, I find that in exhibiting the District Land Adjudication settlement officer's letter of 22<sup>nd</sup> April 2010 indication that adjudication with regard to the suit property had been done and that the title deed would be issued in the names of the 1<sup>st</sup> Interested party would be sufficient compliance with the rule. I have noted the decision of B. K. Tanui, J in Kisumu Misc Civil Case No. 196 of 2003 *Republic v. Bondo Town Council ex parte Gordon Ouma Odongo & 5 Ors.* that where the applicants had not complied with Order LIII rules 1 (3) and 7 (1) with regard to the full Council minutes of the County sought to be quashed by certiorari.
0. However, I prefer the view taken in *R v. The Judicial Inquiry into the Goldenberg Affair ex parte Hon Mwalulu and Others* (2004) eKLR and *R v The Commissioner of Lands ex parte Lake Flowers Ltd.* Nairobi HC Misc App. No 1235 of 1998 Council that the provisions of Order 53 rules 2 and 7 only apply to the formal orders mentioned in the rules, and they would therefore not apply to other types of decisions that may be challenged by certiorari. The reason for this is that some decisions may be part of a process and not a single identifiable decision, as in the case of land adjudication decision in respect of a parcel of land, as in this case, which would involve the declaration of the adjudication section, the objection proceedings and the final decision to allocate a parcel of land to a particular person. Order 53 rule 7 (1) of the civil procedure rules refers to specific type of orders as follows:

*“7. (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of **any order, warrant, commitment, conviction, inquisition or record**, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.”*

#### **Whether the suit property had been set apart.**

0. The ex parte applicant considered that the process of setting apart under the former constitution had been completed and all that remained was the issuance of a title deed. The Interested parties however objected that the alleged setting apart could be taken to have been completed in view of section 13 of the Trust Lands Act which required that the setting apart be published in the Kenya Gazette, which had not been done in this case. The interested parties also objected that it had not been shown that there was any setting apart on the suit property as distinguished from any other property because the property the subject of the setting aside was not identified. The respondent contended that the issue of setting apart of the suit property was only raised in the ex parte applicant's further affidavit and it had not been set out in the statement and the verifying affidavit and it should therefore be disregarded.
0. Although, the issue is specifically pleaded in the statement, the Interested parties having responded to it by way of a reply to further affidavit and in their written submissions, the matter was clearly left to the court for determination within the meaning of *Gandy v. Caspair* (1956) 23 EACA 139 and *Odd Jobs v. Mubia* (1970) EA 476.
0. Sections 116 and 117 of the former constitution provided for the setting apart, in accordance with the relevant act of Parliament [Trust Lands Act], by a county council of an area of trust land for use and occupation of any person for purposes beneficial to the persons ordinarily resident in the area, whereupon the rights, interests or other benefits in respect of that land previously vested in a tribe, group, family or individual under African Customary law shall be extinguished.
0. In material parts, section 13 of the Trust Land Act cap 288 is in the following terms:

*“13. (1) In pursuance of section 117 (1) of the Constitution, a council may set apart an area of Trust land vested in it for use and*

*occupation—*

*(a) by any public body or authority for public purposes; or*

*(b) for the purpose of the extraction of minerals or mineral*

*oils; or*

*(c) by any person or persons for purposes which in the opinion of the council are likely to benefit the persons ordinarily resident in that area or any other area of Trust land vested in the council, either by reason of the use to which the area set apart is to be put or by reason of the revenue to be derived from rent therefrom.*

*(2) The following procedure shall be followed before land is set apart under subsection (1) of this section—*

*(a) the council shall notify the chairman of the relative Divisional Board of the proposal to set apart the land, and the chairman shall fix a day, not less than one and not more than three months from the date of receipt of the notification, when the Board shall meet to consider the proposals, and the chairman shall forthwith inform the council of the day and time of the meeting;*

*(b) the council shall bring the proposal to set apart the land to the notice of the people of the area concerned, and shall inform them of the day and time of the meeting of the Divisional Board at which the proposal is to be considered;*

*(c) the Divisional Board shall hear and record in writing the representations of all persons concerned who are present at the meeting, and shall submit to the council its written recommendation concerning the proposal to set apart the land, together with a record of the representations made at the meeting;*

*(d) the 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.*

*(3) Where the council approves a proposal to set apart land in accordance with subsection (2) (d) of this section, the council shall cause a notice of the setting apart to be published in the Gazette.”*

0. It appears from the documents attached to the ex parte applicant’s further affidavit that although the ex parte applicant commenced the process that would lead to the setting apart of a parcel of land LR 14986 in Kawala sub-location in Mariakani location of Kilifi District of 9.726ha, approximately, and for which the county council by a letter of 9<sup>th</sup> November 1988 indicated its no objection and prayed that the applicant’s request for a freehold title be allowed, the matter seems to have rested with the letter by the county council of 18<sup>th</sup> December 1989 calling for the District Land Officer to take necessary action as requested by the Commissioner of Lands to enable him give final advice. In its material part, the letter of 18<sup>th</sup> November 1989 which marked ‘Reminder No. 1’ states:

*“The Commissioner of Lands is waiting for your action and so far as I know the cadastral plan produced by the Surveyors is with you and I hope the topographical plan indicating clearly the position/locality of the shamba should be with you, If that is correct can you forward it to the commissioner of Lands for his final advice.” (sic)*

0. There is no evidence before the court of what advice if any was finally given by the Commissioner

of Lands and it cannot be said for certain that the parcel of land was set apart. Moreover, there was no evidence of compliance with the statutory provisions under section 13 of the Trust Lands Act in relation to the hearing of the people resident in the area and the determination of the proposal to set apart by the council and the publication of the setting apart.

### **Whether Land Adjudication could be undertaken after setting apart**

0. Having held that there is before the court no evidence of complete setting apart, I do not have to decide this issue. However as a matter of law, if the setting apart, the parcel of land ceases to be trust land in terms of section 116 of the former Constitution, the Land Adjudication Act, which applies to trust land, could not apply to such a parcel of land which has been set apart and therefore ceased to be trust land.
0. **Whether the judicial review orders could be granted in the circumstances of the case**
0. Allegations of Fraud. In accordance with the cardinal principle of judicial review that it is not concerned with the merits of the decision but rather the decision making process, the court cannot investigate the claims of fraud set out in the statement. See *The Commissioner of Lands v. Kunste Hotel Ltd*, Court of Appeal Civil Appeal No. 234 of 1995. I agree with the submissions by the respondents that the determination of the applicant's claim to the suit property must be done under an appropriate procedure that allows for the production of oral evidence and cross-examination of witnesses. As observed by Visram J (as he then was) in *R v. Permanent Secretary to the Cabinet and Head of Civil Service and Anor. ex parte Ng'ang'a and Ors.* (2006) LLR 5958; 2 EA 294 the institution of a judicial review is not a bar to seeking other forms of relief. The decision in *Christopher Noel O'Reilly and Ors. v. Eric Wilson Macman and Ors* (1982) WLR 1096, relates to the situation in English law after the 1977 reform of judicial review to empower the court to make declarations and award injunctions and damages in judicial review proceedings and may to that extent not be relevant to Kenya.
0. However, as observed in *Oreilly v Mackman* supra and *Timotheo Makenge v. Manunga Ngoci* (1976-80) KLR 1136 certiorari will issue to quash a determination of an inferior tribunal for error on the face of the record. There is a clear error on the face of the record with regard to the decision of the land adjudication and settlement officer made on 27<sup>th</sup> May 2008 upon hearing the 1<sup>st</sup> interested party's objection that:

*“objection allowed as per prayer of the objector and since the owner cannot be traced to give his name the land in question is hereby registered to Hamisi Murinzi Kokoi to act as Guardian until the real owner comes when the title will be surrendered to him.”*

0. In urging his objection, the 1<sup>st</sup> Interested Party, the said Hamisi Murinzi Kokoi, said he was a caretaker for one Patel whose full names he did not know and who had left for overseas for over ten years and he therefore requested that the land be registered under his name to act as a guardian until when the owner comes when he would transfer the same to him.
0. The mandate of the Land Adjudication Act is to ascertain and record rights and interests in trust land and the registration of a parcel of land in the name of a self proclaimed guardian of an unknown owner to hold as a guardian until the owner comes when he would transfer is a clear breach of the mandate and purpose of the land adjudication under the Land Adjudication Act. The Land Adjudication officer must have, in the words of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* (1969) 2 AC 147, referred to in *O'Reilly* supra, asked the wrong question whether a guardian of an owner of piece of trust land could be registered to hold the land as guardian awaiting the return of the owner and subsequent transfer thereof to the owner.
0. The only question applicable under the land adjudication law was who was the rightful owner of the parcel of land. In not ascertaining the owner of the suit property the land adjudication officers absconded their statutory duty leaving the issue to conjecture as to the true owner of property. Suppose the true owner never came back – it would have gifted the land to a guardian/caretaker as a legal owner. There is a clear error on the face of the record.
0. The matter is muddled up some more when later on the same land adjudication officer in post-mortem investigation of the matter, apparently at the request of the Director Land adjudication and Settlement by letter of 28<sup>th</sup> January 2011. It is not clear what complaint necessitated the

investigation nor the legal provisions permitting such review of the land adjudication officer's decision aforesaid. In his letter of 28<sup>th</sup> February 2011 the District Land Adjudication/Settlement officer indicates that he visited the plot and held meeting with the family of the deceased Dzuha Dzombo Chironda under whom the 2<sup>nd</sup> – 25<sup>th</sup> interested parties claim and representatives of one Patel, a claimant of the suit property and resident of London, and in his findings confirmed that *'the chairman's letter confirming ownership to Hamisi Mrinsi Kokoi is correct'*.

0. By his conclusion in the letter of 28<sup>th</sup> February 2011, the District Land Adjudication Officer holds that:

*"It is necessary to note that this was an adjudication area where interest and rights over land was ascertained to people who owned land customarily as per Land Adjudication Act cap. 284 Laws of Kenya. Therefore, during the adjudication process rights and interest of this plot should have been associated to the locals who are family members of the late Dzuha Dzombo Chironda. There is every indication that the plot has been under care of somebody who is one Hamisi Kokoi Mrinzi which is agreeable to all interested parties. From the foregoing, the land parcel No. 32 should be under the names of Hamisi Mrinzi Kokoi."*

It is on the basis of this latter finding that the 2<sup>nd</sup> - 25<sup>th</sup> interested parties appear to found their claim to the parcel of land.

0. If the interested parties seek to represent the interests of the deceased owner of the land, the law of succession as expounded by the 5 - judge bench of the Court of Appeal in ***Trouistik Union International & Another v. Jane Mbeya & Another*** C.A No. 145 of 1990 (per Apollo CJ, Kwach, Cocker, Ombolo and Tunoi JJA) which is binding upon this court, require that they be appointed as his personal representatives or administrators of his estate. In the absence of their appointment as such personal representatives they lacked capacity to agitate his rights before the land adjudication officer or before the court in these proceedings.
0. Apart for the doubts as to the legitimacy of this February 2011 review by the District Land Adjudication/ Settlement officer, Kilifi, it is clear that the ex parte applicant was not granted an opportunity to be heard in the review proceedings at which the interested parties were represented. This was despite the ex parte applicants' complaint on the matter by a letter dated 5<sup>th</sup> November 2010 to the Director Land Adjudication & Settlement with copies to the District Land Adjudication & Settlement Office, Kilifi, District Land Registrar, Kilifi and Commissioner of Lands among others and despite his specific mention by a family witness in the meeting during the visit to the plot as stated in the letter of 28<sup>th</sup> February 2011 aforesaid. It was a clear breach of the rules of Natural Justice.
0. However, I agree with the respondents and the interested parties that the ex parte applicant did not demonstrate a good reason as to why he did not present his case to the during the initial land adjudication process which took place between the declaration of the adjudication of completion of register on 19<sup>th</sup> March 2008 and June 2009 when he said that he learnt that someone was claiming the land or 22<sup>nd</sup> April 2010, when the District Land Adjudication/Settlement officer confirmed the registration of the parcel of land in the name of 1<sup>st</sup> Interested Party.
0. Accordingly for the reasons set out above, I find that an order of Certiorari will issue to quash the decision of the Land Adjudication Officer, Kilifi, registering the 1<sup>st</sup> Interested Party as a guardian with respect to the suit parcel of land. The court cannot however make a finding as to the merits of the case whether the applicant is the true owner of the suit property and whether the interested parties' claim is fraudulent. That is a matter for determination through appropriate proceedings in that behalf. I would agree with the respondents that there are triable issues to be determined relating to the ownership of the suit property including the purchase from its deceased original owner and subsequent setting apart thereof as claimed by the ex parte applicant, the fraud claims against the interested parties and their counter-claim as beneficial owners, and the claim by one Patel resident of London. These competing claims must be determined by the court in an appropriate forum outside judicial review which deals only with the legality of the process of decision making rather than the merit of the decision itself.

## **Orders**

0. Accordingly, I grant an order of certiorari as prayed in Prayer (a) and an order of mandamus as prayed in prayer (b) (i) of the Notice of Motion dated 9<sup>th</sup> December 2010 to the extent only that the 1<sup>st</sup> Interested Party is removed from the records and register as owner of the suit property. I decline the prayers for orders of mandamus under Prayers (b) (ii) and (iii) and the order of prohibition under prayer (c) of the Motion. Each party will bear its own costs. The ex parte applicant may, if so advised, file appropriate court proceedings for the determination of the ownership of the suit property.

**Dated and delivered this 31<sup>st</sup> day of March 2014.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Miss Ochieng for Mr. Opolu for Applicants

Mr. Ngari for Respondents

No appearance for Interested Party

Miss Linda - Court Assistant