



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**JUDICIAL REVIEW APPLICATION NO. 6 OF 2012**

**IN THE MATTER OF: ORDER 53 RULES 1 AND 2 OF THE CIVIL  
PROCEDURE RULES ACT (CAP 21 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR  
ORDERS OF PROHIBITION AND CERTIORARI  
BY DANIEL RICCI**

**AND**

**IN THE MATTER OF: ARTICLE 23 AND 40 ON THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: CHEMBE/KIBABAMSHE/427**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**=VERSUS=**

**1. LAND REGISTRAR KILIFI**

**2. THE ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**DANIEL RICCI.....EX-PARTE APPLICANT**

**J U D G M E N T**

1. This Judgment is in respect to the Ex-parte Applicant's Notice of Motion dated 10<sup>th</sup> April 2012 and filed on the same day. The Motion was filed pursuant to Order 53 of the Civil Procedure Rules. The Motion is seeking for the following orders;
  - a. **THAT this Honourable Court do issue an order of Prohibition to prohibit the Land Registrar, Kilifi (1<sup>st</sup> Respondent) from dealing adversely with Title No. Chembe/Kibabamshe/427.**
  - b. **THAT this Honourable Court do issue an order of Certiorari for purpose of quashing the decision of Land Registrar, Kilifi, revoking Title NO. Chembe/Kibabamshe/427 contained in the Kenya Gazette Notice No.15444 of 21<sup>st</sup> November 2011.**
  - c. **THAT the cost of this Application be in the cause.**
2. The Application is grounded on the statutory statement, the Ex-parte Applicant's affidavit and on the grounds which are on the face of the Application.
3. The Ex-parte Applicant's case, principally, is that he is the genuine registered owner of all that parcel of land known as Chembe/Kibabamshe/427 (the suit property) and that the Registrar of Lands, Kilifi lands registry exceeded his Jurisdiction when he decided to gazette the revocation of the Applicant's title in respect to his parcel of land disregarding the Applicant's right of ownership.
4. According to the Ex-parte Applicant, the revocation of the title in respect to the suit property was irregular, unlawful and in contravention of Article 40 of the Constitution and further that the Registrar of lands acted in breach of the rules of natural justice in disregarding the interests and rights of ownership of the Applicant in Chembe/Kibabamshe/427 and did not accord the Applicant an opportunity to be heard before the gazette and revocation of his title.
5. The court granted the Ex-parte Applicant leave to commence these proceedings on 19<sup>th</sup> March 2012.
6. The Ex-parte Applicant has deponed in his Verifying Affidavit that he is the registered owner of the suit property; that he bought the suit property from Omar Khamis Baleith vide an agreement dated 21<sup>st</sup> February, 2001 and that before the transfer of the property in his name, he obtained the consent of the Land Control Board.
7. The Ex parte Applicant further deponed that the High Court adjudicated upon the suit property in Nairobi HCCC 3374 of 1994 and ruled with finality that the suit property was private land and not government land.
8. The 1<sup>st</sup> Respondent filed his Replying Affidavits on 29<sup>th</sup> May 2013. Mr. Benrick Ogutu, the Principal Fisheries Officer filed his affidavit on the same day.
9. The 1<sup>st</sup> Respondent deponed that the Gazette Notice number 15444 of 9<sup>th</sup> December 2011 cancelled and revoked the registration of the suit property because the land was acquired irregularly and the allocation was illegal and unconstitutional because the land has always been public land; that the suit property was reserved as a fish landing site and that the Applicant always had knowledge that the suit property was not available for allocation.
10. It was further deponed that the registration section of Chembe/Kibabamshe was marked with serious and graving irregularities during the adjudication process hence prompting the Government to recall and cancel the original adjudication process and opened a new edition of a green card on 22<sup>nd</sup> December 1986; that the suit property was registered on 25<sup>th</sup> October, 1990 but there are no records to show that the Government consented to the allocation of the land to the Applicant; that there was no consent by the Land Control Board for the transfer of the land to the Applicant; that the transfer was never captured in the presentation book and that the Title Deed was issued unprocedurally.
11. The Principal Fisheries Officer, Coast Province deponed that the suit property was revoked because it was reserved for a fish landing site and consequently, the Applicant cannot enjoy the protection of Article 40 of the Constitution as alleged.
12. The Ex-parte Applicant filed two Supplementary Affidavits on 8<sup>th</sup> May 2013 and 17<sup>th</sup> June 2013 and reiterated the depositions he had made in his Verifying Affidavit.
13. The parties herein agreed to dispose of the Motion by way of written submissions. The Ex-parte advocate filed his submissions on 17<sup>th</sup> June 2013 while the Respondent's advocate filed his written

- submissions on 31<sup>st</sup> July, 2013.
14. I have considered the said submissions.
  15. The Ex-parte Applicant's main contention in this suit is that the cancellation of his Title Deed in respect to the suit property is a violation of his fundamental rights to own property as enshrined in Article 40(1), 40(2) and 40(3) of the Constitution.
  16. The said cancellation, it was submitted, arbitrarily deprived the Applicant of his property and further that the Ex-parte Applicant's rights under Article 47 (2) were violated as he was not given any written reason before the Title Deed in respect to the suit property was cancelled nor was he given a chance to express himself.
  17. The Ex-parte Applicant's case, as a whole is that the suit property is private land and not Government land.
  18. The Plaintiff has relied on previous Judgments by the High Court which held that the cancellation of titles within the Chembe/Kibabamshe registration section by the Commissioner of Lands in or about 1986 was unconstitutional.
  19. Indeed, the 1<sup>st</sup> Respondent has admitted in his Affidavits that the registration section of Chembe/Kibabamshe had serious and glaring irregularities during the adjudication process hence prompting the government to recall and cancel the original adjudication process that was completed in 1978. The original green card was therefore cancelled and a new edition was opened on 22<sup>nd</sup> December 1986 with the Government of Kenya as entry number one.
  20. I am aware of numerous suits pending in this court on the issue of whether the adjudication process that was done prior to 1986 was valid or not and more importantly, whether the registration section of Chembe/Kibabamshe is Trust Land as defined by the 1963 Constitution and the Trust Land Act or it is Government Land. That is an issue which this court shall determine once *viva voce* evidence has been tendered in those matters.
  21. In the meantime, the fact remains that the Government opened a new edition in respect to Chembe/Kibabamshe registration section with the "government" being designated as the absolute proprietor of the land in the section.
  22. The Ex-parte Applicant annexed on his Verifying Affidavit a Title Deed for the suit property. The said Title Deed was presumably issued on 1<sup>st</sup> March 2001. "Presumably" because the Kilifi Land Registrar has denied that the said Title Deed was issued by his office.
  23. Even if it is true that the Title Deed in respect to the suit property was issued by the Kilifi District Land Registry, the said Title Deed could only have been issued after the 2<sup>nd</sup> edition of Chembe/Kibabamshe was opened in 1986 with the Government being registered in the first entry as the absolute proprietor of the same.
  24. I say so because according to the sale agreement and the Transfer document between the Ex-parte Applicant and one Omar Khamisi Baleth, the suit property was transferred to the Ex-parte Applicant in the year 2001. The ex-parte Applicant did not annex a copy of the green card to show if indeed the initial Title Deed for the suit property was issued to the person who transferred to him the property before the cancellation of all the Title Deeds by the Commissioner of Lands in or about 1986 or it was issued or re-issued after the 1986 cancellation.
  25. Considering that all the Title Deeds that were issued prior to 1986 in Chembe/Kibabamshe registration section were cancelled by the then Commissioner of Lands, and the parties who were affected then have filed suits in this court, it follows that the Ex-parte Applicant's Title Deed could have been issued or re-issued after the government opened the new 2<sup>nd</sup> Edition of the land register on 22<sup>nd</sup> December 1986.
  26. If that is true, then the Ex-parte Applicant cannot rely on the decisions of the High Court, which decisions this court is not bound with, that found and held that the cancellation of the Title Deeds within Chembe Kibabamshe registration section by the Commissioner of Lands in 1986 was unconstitutional.
  27. It is therefore ironical for the Ex-parte Applicant to state that the suit property has never been government land and yet the Title Deed in question is for the year 2001 by which time all the land in Chembe/Kibabamshe had been designated as government land and not trust land.
  28. Indeed, the Government issued and or re-issued Title Deeds within Chembe/Kibabamshe section after opening the 2<sup>nd</sup> Edition of the register. It is possible that the Title Deed in respect to the suit property was issued to the person who sold the suit property to the Ex-parte Applicant in the year

- 2001 and that the said title deed is valid for all intents and purposes.
29. But as I have held in numerous Rulings, a Title Deed is an end product of a process and for a Title Deed to be protected pursuant to the provisions of Article 40(1) of the Constitution, the holder of the Title Deed has to establish that he followed the laid down procedures in acquiring it. That is the clear reading of Article 40 (6) of the Constitution which provides that the rights of an individual under Article 40 (1) do not extend to any property that has been found to have been unlawfully acquired.
  30. No court, as was stated in the case of **Scott Vs Brown (1982) 2 QB 724 at page 1128** ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court.
  31. It has now been accepted by our courts that even in Judicial Review Proceedings, a transaction tainted with fraud or illegality cannot be enforced and the damage if any must lie where it fell.
  32. It is the Respondents position that the Title Deed in respect to the suit property was illegally acquired; that the Register does not show the existence of the Applicant's Title Deed and that in any event, the suit property was set aside for public purpose and the same was not available for allocation. The public purpose that the suit property was set aside for was indicated in the Gazette notice number 15444 of 9<sup>th</sup> December 2011 to be "for fish landing site."
  33. Meoli J, while quoting with approval the case of **Seastar Malindi Ltd Vs KWS (2002) e KLR in Malindi JR Misc. Application number 27 of 2010; R VS Mohamed Tariq Khan & Fedrica Ferro** held that Judicial Review Proceedings are best suited for matters in which material facts are not seriously disputed.
  34. For the court to arrive at a decision of granting the orders being sought in the current Motion, the court must be certain that indeed the Ex-parte Applicant's title to the suit property is valid and that the land in question was not set aside for public purpose.
  35. I say so because if the suit property was indeed set aside for public purpose, then such land cannot be available for allocation.
  36. Where public land is allocated to a private person, the court has an obligation not to recognise such a title, because as it has been said time and again, public interest in a property will always outweigh an individual's right to own the same property (**See Kenya National Examination Council VS R, EXPARTE Kemunto Regina Ouro, Nairobi Civil Appeal No. 127 of 2009; Kenya Power & Lighting Co. Ltd VS NMG Ltd & 2 Others, Nairobi Civil Application Number 74 of 2010 and National Environment Management Authority (NEMA Vs Peter Bogonko, Nairobi HC Miscellaneous Application Number 153 of 2005.**
  37. In the case of **Peter Bogonko VS National Environment Management Authority (NEMA) Nairobi HC Misc. Application Number 1535 of 2005**, Justice Wendo quoted the Halsbury's Laws of England as follows:

***"Certiorari is a discretionary remedy which the court may refuse to grant even when the requisite grounds for its grant exists. The court has to weigh one thing against the other and see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles."***

38. Weighing the Ex-parte Applicant's claim that the suit property has never belonged to the Government or the public and that indeed he was issued with a valid Title Deed in 2001 and the 1<sup>st</sup> Respondent's assertion that the Title Deed did not exist at all in his register and that in any event the suit property was reserved for a fishing land site vide the fourth schedule of the Fisheries General Regulations, Legal Notice Number 34 of 1991, the Judicial Review orders of prohibition and certiorari are not the most efficacious orders to be granted in the circumstances.
39. Considering that the material facts of this case are seriously disputed, the Ex parte Applicant, in my view, should file a suit and tender evidence on the legality of the title that he holds. It is only vide a suit and after tendering documentary and *viva voce* evidence that the court will be able to establish the proprietary or otherwise of the suit property vis-a-viz the Respondents claim that the suit property was reserved for public purpose.
40. The grant of the orders being sought by the Ex-parte Applicant will in effect confirm that the

Plaintiff's title is valid, which might not be the case. Indeed, such an order will disentitle the public the usage of the land as a fish landing site before hearing *viva voce* evidence, thus subverting the public interests to those of an individual. That is unacceptable.

41.The most efficacious way of determining if indeed the Applicants proprietary rights to own the suit property have been infringed upon is by way of a Plaint or Petition.

42.In the circumstances of this case and considering the issues I have raised and addressed above, I am reluctant to exercise my discretion in favour of the Ex-parte Applicant.

43.For the forgoing reasons, I dismiss the Ex-parte Applicant's Motion dated 10<sup>th</sup> April 2012.

44.Each party shall bear his own costs.

Dated and Delivered in Malindi this **20<sup>th</sup>** day of **September**, 2013

**O. A. Angote**

**Judge**