



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 380 OF 2009

IN THE MATTER OF: ORDER 53 RULE 3 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: AN APPLICATION BY JOSEPH CHARO, ATHMAN NGONYO, HADIJA OMAR, WILSON C. TEMBO, AHMAD A. NASIR AND MOHAMMED ALI MOHAMMED FOR THE JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF: JOSEPH CHARO, ATHMAN NGONYO, HADIJA OMAR, WILSON C. TEMBO, AHMAD A. NASSIR AND MOHAMMED ALI MOHAMMED

BETWEEN

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT.....1ST RESPONENT

THE LAND REGISTRAR, KILIFI2ND RESPONENT

AND

JOSEPH CHARO
 ATHMAN NGONYO
 HADIJA OMAR
 WILSON C. TEMBO
 AHMAD A. NASSIR

MOHAMMED ALI MOHAMME.....APPLICANTS

EX-PARTE

DICKSON KITHAKA MUGOINTERESTED PARTY

RULING

The application herein is a Notice of Motion dated 2nd October, 2009. The same is brought under Order L111 Rule 3 of the Civil Procedure Rules. It seeks for orders that:

1. **THAT** the Honorable court be pleased to issue an order of Mandamus compelling the 1st and 2nd

Respondents to declare null and void their decision to issue allocate land known as **KILIFI/BOYANI/204** to the Interested party and the 3rd Respondent to cancel the title issued in favour of the Interested Party and they be further compelled to issue new titles in favour of the Applicants for portions of 2.5 Acres each.

2. **THAT** in the alternative to (2) above, the 3rd Respondent be compelled to issue titles in favour of both Applicants and the Interested party for portions of 2.5 Acres each and no more.
3. **THAT** the Honorable court be pleased to issue all and any other consequential orders.
4. **THAT** costs of this Application and of the proceedings for grant of leave be borne by the Interested Party.

The application is supported by an affidavit sworn by one **WILSON CHIBO TEMBO**, the 4th Applicant herein. He depones on behalf of the others. In the said affidavit, the deponents states that, the Applicants herein have resided on the **KILIFI BOYANI** settlement scheme as squatters, for decades. That, sometime back, the Government allocated the locals, the squatters, a portion of 2.5 acres and the title thereof as individual applicant. That, the Applicants as locals, had priority over the other Applicants. That, unknown to them, the interested party herein, not being a local, nor a squatter influenced, the 1st and 2nd Respondents herein and was irregularly allocated fifteen (15) Acres of the land known as **KILIFI/BOYANI 204** Acres, forming part of the said scheme. That, the 3rd Respondent proceeded and issued a title in favour of the interested party. That the said allocation was irregular, unlawful and biased in favour of the interested party, as such the actions of the Respondents are **Ultra Vires**. The Applicants pray that the court do declare these “actions” as null and void because as a result of the said “actions”, the Applicants for whose benefit the programme was initiated have remained landless and are thereby aggrieved. That the Respondents lacked jurisdiction.

In the alternative, the Applicants pray that the said allocation do stand revoked and the Interested party be allocated 2.5 Acres, leaving the rest of the land to be distributed among the other Applicants.

In a further affidavit sworn by **SIFUNA DAVID KINISU**, the Counsel appearing for the Applicants herein, deponed that, the program of allocating Land to squatters in the said scheme was evidenced by a register kept by the Land adjudication office (a copy of which he annexed to the affidavit).

The application was fixed for hearing on 1st December,, 2011. The Respondents and the Interested Party were not in court. The Applicants notified the Court that, they had served them but they were not in Court. I noted, an affidavit of service on record dated 21st November, 2011, made by one **JOHN OCHIENG OUMA** to the effect that he served the 1st Respondent herein. A similar affidavit of service was filed by **KINISU DAVID SIFUNA**, to the effect that he served the 2nd Respondent herein with the hearing Notice. The Interested Party was served through advertisement following a Court order to serve him through substituted service.

I heard the application ex parte. In the oral submissions in support of the Application, Mr. Sifuna, the Learned Counsel who appeared for the Applicants, reiterated the facts deponed in the two affidavits. He relied on the case of **Kenya national Examination Council –Vs- Republic Ex-parte. CA 266 of 1996**

I have now considered the application in total. I wish to deal with each prayer as sought. First and foremost I find prayer one (1) quite loaded. In it, one can clearly identify three different prayers as follows:

(a) An order of mandamus do issue to compel the 1st and 2nd Respondents to declare null and void their decision to issue allocate land known as **KILIFI/BOYANI/204** to the Interested Party.

(b) An order of mandamus do issue to the 3rd Respondent(I however note the application has only two

Respondents) to cancel the title issued in favour of the Interested Party

and

(c) An order of Mandamus do issue to compel the Respondents to issue new titles in favour of the Applicants for portions of 2.5 Acres each.

I have tabulated the said orders for ease of reference and clarity. I think in my opinion they should have been brought independently. Be it as it were, I will still deal with them according. All these prayers are based on an order of Mandamus .

What is scope of the order of Mandamus? Mandamus compels the performance of a public duty imposed by Statute where the person or body on whom the duty is imposed fails or refuses to perform the same to the detriment of a party who has a legal right to expect their duty to be performed.

In this matter I am told through the affidavits sworn by the Applicants, and their Counsel that, the Respondents having issued **“Excess land”** to the Interested Party herein, that action is ultra vires, irregular, null and void. Is that a complaint that, a duty has not been done or a complaint it has been done wrongly. I find that, the complaint herein is that, that action of allocating the Interested Party 15 acres instead of 2.5 acres was wrong. If that is so, then the order of Mandamus sought for cannot issue. The Applicants are unhappy with that decision. I want to believe, they want that decision quashed. What then is the proper order to seek for? I believe the correct order is **order of Certiorari**.

An order of Certiorari is an Order issued to Quash a decision already made and if so made without or in excess of jurisdiction or where the rules of natural justice are not complied with or similar reasons. That is what I hear the Applicants saying herein. **Yet** they are not seeking for an order of Certiorari. It suffices to say that mandamus is an order issued under Judicial Review. Judicial Review process is not concerned with merits of a decision but the process, therefore, the Court cannot interfere with orders of any of the persons with a public duty or the decision made. The Courts will be more concerned with how the decisions were made.

In that regard I find that, I cannot grant the prayers sought in Prayer 1. The Court cannot tell the Respondents to declare their own decision null and void or to cancel the title deeds issued or even issue new title deeds to the Applicants.

The cancellation and issuance of the title deed is the preserve of the Land Registrar. The same is based on proof of ownership. Ownership is a matter of evidence.

As the Applicants have deponed in the affidavit of **WILSON CHIBO TEMBO** paragraph 15, land is an explosive issue. To quote from that paragraph he depones:

“THAT, the subject matter herein touches on land, which is a highly sensitive and emotive issue in this country as witnessed recently during the post-election crisis and we urge the Honourable court to act with extreme caution and circumspection in determining the instant application”.

Therefore I need to be cautious. I now turn to prayer two (2), which is an Alternative to the prayer 1 (though in the application it is indicated as an alternative to prayer 2). It makes a reference to the 3rd Respondent (although again there is no 3rd Respondent. I shall understand it to mean the 2nd Respondents). That the 2nd Respondent be compelled to issue titles to the Applicants and the Interested Party. I think I have already dealt with that issue under prayer 1. I have also considered prayers (3) and (4) and I have no other Orders to issue.

I find the application herein not supported and I dismiss it. Since the application was heard ex parte I order the costs be in the cause.

Orders accordingly.

G.L. NZIOKA
JUDGE
07/03/2012

Dated, signed and delivered in an open court at Mombasa.

G.L. NZIOKA
JUDGE
07/03/2012

Dated, signed and delivered at Mombasa.

G.L. NZIOKA
JUDGE
07/03/2012

In the presence of:-

Mr. Sifuna for the Applicants

Non appearance for the Respondents

Mokapa court clerk

G.L. NZIOKA
JUDGE
07/03/12