



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL APPLICATION 2 OF 2012

IN THE MATTER OF: AN APPLICATION BY NURU MOHAMMED

**OMAR AND ZAINABU TSUMA BEGONJA FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

IN THE MATTER OF: ORDER 53 RULES 1, 2, 4 ORDER 50

**RULES 5 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTION 1A, 1B AND 3A OF THE
CIVIL PROCEDURE ACT, THE CONSTITUTION OF THE REPUBLIC OF KENYA, THE
LAND ADJUDICATION ACT**

AND

**IN THE MATTER OF: PLOT NO. KILIFI/KAWALA KADZONZO 'A'/408
BETWEEN**

REPUBLIC APPLICANT

AND

THE LAND REGISTRAR,

KILIFI LAND REGISTRY 1ST RESPONDENT

THE ATTORNEY GENRAL 2ND RESPONDENT

THE ADJUDICATION OFFICER,

KILIFI DISTRICT 3RD RESPONDENT

ABDILLAHI ALI ABUBAKAR INTERESTED PARTY

AND

NURU MOHAMMED OMAR

ZAINABU TSUMA EX-PARTE APPLICANTS

JUDGEMENT

1. In the main Notice of Motion dated the 27th day of February 2012 the Applicant seeks the following prayers-

“1. That the time for filing an application for Certiorari and Mandamus regarding the decision of the 1st Respondent dated 26th May 2008 adjudicating all that plot of land known as KILIFI/KAWALA KADZONZO ‘A’/408 to the Interested Party and the decision of the 1st Respondent dated 9th November 2010 whereby he registered the Interested Party as the owner of all that plot of land known as KILIFI/KAWALA KADZONZO ‘A’/408 be extended and this action be deemed to have been filed within the prescribed time.

2(a) An order of certiorari be granted to quash the decision of the 3rd Respondent dated 26th May 2008 whereby all that plot of land known as KILIFI /KAWALA KADZONZO ‘A’/408 was adjudicated in favour of the Interested Party and an order of certiorari be granted to quash the decision of the 1st Respondent dated 9th November 2010 whereby the Interested Party was registered as the owner of all that plot of land known as KILIFI/KAWAL KADZONZO ‘A’/408.

(b) An order of Mandamus to issue ordering and compelling the 1st Respondent to forthwith register the Applicants, Nuru Mohamed Omar and Zainabu Tsuma as the proprietors of all that plot of land known as KILIFI/KAWALA KADZONZO ‘A’/408 in place of the Interested Party.”

2. This matter revolves around the ownership of land known and described as Kilifi/Kawala Kadzonzo ‘A’/408 (hereinafter the land). It is said by the Applicants that they are the joint owners of the said land. That through carrying out an official search on 25th May 2011 they came to learn that the land had been registered in the name of Abdillahi Ali Abubakar (the Interested Party). They then sought to inquire how this had happened through their lawyers Gikandi & Co. Advocates.

3. By a letter dated 27th May 2011 The District Lands Adjudication & Settlement Officer, Kilifi advised the Applicants lawyers that the property had been registered in the name of the Interested Party after the determination of objection proceedings under the Land Adjudication Act (Cap 284 Laws of Kenya) (hereinafter the Act). A copy of those proceedings and decision were availed to the Applicants. These Judicial Review proceedings attack that decision.

4. These proceedings were served upon the Interested Party who did not participate herein. The Respondents were represented by the Attorney General who opposed the application but never filed any reply.

5. The evidence presented by the Applicants is not challenged. In paragraph 7 of her affidavit she says that she was not aware of the objection proceedings as she was bed-ridden when the hearing is said to have taken place. The record of the objection proceedings indicate that she attended the meeting and made the following statement;

“That I learnt there from that I am the one who supposedly attended the said Tribunal. I have never been informed of any objection nor even attended any tribunal hence the proceedings are a falsehood. Further I have been sickly and the dates that the proceedings are alleged to have taken place I was bed-ridden hence I could not have attended the proceedings.”

6. Neither the Interested Party nor the Respondents have filed any controverting evidence and this court will determine the application on the basis of the Applicants evidence.

7 As a preliminary issue the court must determine whether the Judicial Review proceedings are time barred and if so whether time can be extended to accommodate it. The Applicants have explained the delay in bringing these proceedings. That although the decision was made on 26th May 2008, they only came to learn of it on 13th October 2011 when they received the letter of the Land Adjudication Officer dated 27th May 2011. That thereafter they sought to obtain copies of the objection proceedings and it was made available to them on 26th October 2011. It is their view that the court should reckon time from this day (ie 26th October 2011) and not 26th May 2008 when the decision is said to have been delivered.

8. Mr. Kamau appearing for the Attorney General was of the firm view that the court has no jurisdiction to extend the time provided in Order 53 Rule 2 which reads as follows-

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

9. The time limit for applying for certiorari is a creature of Statute and not subsidiary legislation. Order 53 Rule 2 mirrors Section 9(3) of the Law Reform Act which provides as follows-

“ (2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

10. I very much doubt whether there is power to enlarge the time prescribed by Section 9 of the Law Reform Act. Although I am asked by the Applicants counsel to invoke Section 59 of the Interpretation and General Provisions Act, I am of the view that a court can only extend time where statute allows extension. This is what Section 59 provides and reads as follows-

“Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed.” (my emphasis)

11. Decisions in support of the position that the prescribed time cannot be enlarged are readily available and one was cited by Mr. Kamau for the Respondents. In **Civil Appeal No. 6 of 1995 Wilson Osolo and John Ojiambo Ochola –Vs- The Attorney General**, the Court of Appeal said as follows-

“... applied for extension of time to file the application for such leave. That application was heard ex-parte by Platt, J (as he then was) and was granted. There was quietly clearly a fundamental error on the part of the Superior Court in granting such extension of time as Section 9(3) of The Law Reform Act Cap 26 Laws of Kenya, quite clearly shows that an application for leave to apply for an order of certiorari cannot be made six months after the date of the order sought to be quashed ... It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of The Law Reform Act. Whilst the time limited for doing something under The Civil Procedure Rules can be extended by an application

under Order 49 of The Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by Statute, in this case, The Law Reform Act. There is no provision for extension of time to apply for such leave in the Limitations of Actions Act (Cap 22 Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here. It therefore is apparent that the extension of time granted by Platt, J was a nullity.”

12. This court is however of the view that the debate as to whether or not the court can extend the time prescribed in Section 9 of The Law Reform Act was wholly unnecessary as the Judicial Review proceedings may not be time barred. The Applicant has explained that they received the 3rd Respondents letter advising them of the decision on 13th October 2011. That a copy of the objection proceedings and decision was itself availed to the Applicants lawyer on 2nd October 2011 (?). Although this may be 26th October 2011 as the said Advocates were bespeaking of them in their letter of 19th October 2011. The explanation is neither controverted nor challenged by the Respondents.

13. On my part I have little difficulty reckoning the time from the day the decision was brought to the attention of the Applicants. The Applicants did not participate in the proceedings and could not have been aware of the decision until it was brought to their attention. To hold that the time runs from the date of the decision itself would be to work a definite injustice as the Applicants were not aware of it and could not therefore have moved to challenge it promptly.

14. The Respondents were of the view that even if the court was to take an accommodative approach in computing time, the starting time should be 25th May 2011. This was the day that the Applicants carried out an official search on the particulars of the subsisting entries in the register of title to the land and learnt that it was registered in the name of the Interested Party.

15. The Applicants say that on learning of the changes in the Registry they made inquiries, through their advocates, as to how the changes had been effected. That the very first time they learnt of the objection proceedings was on 13th October 2011 when their advocates received a letter dated 27th May 2011 from the 3rd Respondent. The Advocates expressed their surprise on the time taken for the letter to reach them-

*“District Lands Adjudication &
Settlement Officer,
KILIFI*

Dear Sir,

RE: PLOT NO. 408 KAWALA ‘A’ KADZONZO ADJUDICATION SECTION

“We refer to the above and we acknowledge receipt of your letter dated 27th May 2011. Surprisingly by the same reached our offices on the 13th October 2011 after a whole four months.

Kindly urgently send to us the proceedings of the objection that you have referred to in the said letter dated 27th May 2011.

Yours faithfully,

GIKANDI & CO. ADVOCATES

GIKANDI NGIBUINI

*c.c Nuru M. Omar,
MOMBASA”*

16. It is the further evidence of the Applicants that the proceedings and decision were availed to their Advocates on 2nd October 2011(?) although they are said to have been certified as a true copy by the representative of the 3rd Respondent on the 26th October 2011.

17. As I have stated earlier none of the Respondents filed an affidavit in response to the application and so the Applicants version of events is uncontested. And this is no reason given to me to doubt this version. The Court therefore, holds that the proceedings and decision of 3rd Respondent which are the subject of these proceedings were availed to the Applicants after 14th October 2011. This was the date of the letter in which the Applicants bespoke the objection proceedings from the 3rd Respondent. The proceedings and decision themselves are stamped as having been certified on 26th October 2011.

18. I take the view that time starts to run when this decision was availed to the Applicants and not when they learnt of changes in the registry as submitted by the Respondents. It is the proceedings and decision that are the subject of challenge and it would be illogical, and perhaps careless, for the Applicants to commence proceedings attacking a decision whose contents they do not know. The Applicants have also given a satisfactory explanation of how they diligently sought to know how the changes in the registry had been effected and this is how the 3rd Respondent brought the proceedings and decisions to their attention.

19. I reach the decision that these proceedings are within time as the Applicants took out an application for leave within six months of obtaining a certified true copy of the proceedings and decision.

20. I now turn to examine the Applicants grievance. The complaint is that they were condemned without a hearing. It is the evidence of the Applicants that they were neither invited nor attended the proceedings of 26th May 2008. That the proceedings have been falsified to show that the Applicants attended. The 3rd Respondent who is said to have presided over the objection proceedings did not respond to the evidence presented by the Applicants.

21. In response, the Respondents Counsel has argued that the remedy available to the Applicant was an appeal to the Minister under the provisions of the Act.

22. The Respondents counsel further submits that resulting from the proceedings is a first registration under The Registered Land Act (now repealed) in favour of the Interested Party. That an order in Judicial Review cannot be used to defeat a first registration (see Sections 28 and 143 of The Registered Land Act). At any rate, it is submitted, the Applicants should have attacked the Interested Party's title by way of a civil suit where all affected parties would have their day in court and where the issue of fraud will be fully contested by way of evidence.

23. I see the issues now requiring my determination to be-

(i) Were the proceedings conducted in breach of the rules of natural justice or statute?

(ii) Is the decision reached following those proceedings amenable to an order of Certiorari?

(iii) Connected to (ii) above, are the orders of certiorari and mandamus sought efficacious in the circumstances herein?

24. The uncontroverted evidence of the Applicants is that they did not attend or participate in the objection proceedings and that the record is a fraud and false. The proceedings were purportedly called to adjudicate over and determine the ownership of Plot No. 408 in the Kawala 'A' Kadzozzo Adjudication Section. The outcome of the objection proceedings negatively affected the Applicants interests over the land as their names were deleted from the adjudication register and replaced by that of the Interested Party.

25. The effect of the decision is that the legal rights of Applicants were affected without their participation. Section 26 of the Act provides for objection to the Adjudication register;

“26. (1) Any person named in or affected by the adjudication register who considers it to be incorrect or incomplete in any respect may, within sixty days of, the date upon which the notice of completion of the adjudication register is published, object to the adjudication officer in writing, saying in what respect he considers the adjudication register to be incorrect or incomplete.

(2) The adjudication officer shall consider any objection made to him under subsection (1) of this section, and after such further consultation and inquiries as he thinks fit he shall determine the objection.”

26. The objection proceedings of 26th May 2008 were, as I understand it, supposedly conducted in pursuance to Section 26 of The Act. Under Section 26(2) of the Act the Adjudication Officer is enjoined, in mandatory expression, to consider and determine objections. Section 12(1) of The Act provides for the procedure to be observed in objection proceedings before the Adjudication Officer. The Section provides-

“12. (1) In the hearing of any objection or petition made in writing, the adjudication officer shall make or cause to be made a record of the proceedings, and shall, so far as is practicable, follow the procedure directed to be observed in the hearing of civil suits, save that in his absolute discretion he may admit evidence which would not be admissible in a court of law, and may use evidence adduced in another claim or contained in any official record, and may call evidence of his own accord.” (my emphasis)

27. The Section requires the Adjudication Officer to substantially follow the procedure observed in hearing of civil suits. The Hallmark of this procedure is a fair hearing and adherence to the rules of natural justice. If it is true, as I have held on the evidence, that the record was falsified to reflect that the Applicants attended when they did not, then the procedure contravened both statute and the principles of natural justice. In addition it was a fraud.

28. The decision made affected the legal rights of the Applicant, the right to own Plot No. 408. As it was made contrary to the essence of natural justice it is made without jurisdiction and is *ultra vires*. That this is a hard-worked proposition was stated in the decision of **Attorney General –Vs- Ryan 2 WLR (1980) 143 at page 152;**

“It has long been settled law that a decision affecting legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority.”

I therefore declare the decision of the Land Adjudication Officer *ultra vires*.

29. The more difficult question is whether I should proceed to grant the orders sought. To enable me illustrate this difficulty I will reproduce the prayers-

(a) An order of certiorari be granted to quash the decision of the 3rd Respondent dated 26th May 2008 whereby all that plot of land known as Kilifi/Kawala Kadzonzo ‘A’/408 was adjudicated in favour of the Interested Party and an order of certiorari be granted to quash the decision of the 1st Respondent dated 9th November 2010 whereby the Interested Party was registered as the owner of all that plot of land known as Kilifi/Kawala Kadzonzo ‘A’/408.

(b) An order of Mandamus to issue ordering and compelling the 1st Respondent to forthwith register the Applicants, Nuru Mohamed Omar and Zainabu Tsuma as the proprietors of all that plot of land known as Kilifi/Kawala Kadzonzo ‘A’/408 in place of the Interested Party.”

30. If I was to grant the prayer on certiorari alone then the orders will be ineffective in view of the

registration effected in favor of Interested Party under the provisions of the Registered Land Act (Cap 300) (now repealed). It is for this reason that the Exparte Applicants have also sought an order of mandamus.

31. The relief in the nature of mandamus sought by the Applicant, is that the Court orders and compels the 1st Respondent to forthwith register the Applicants as proprietors of the land in place of the Interested Party. The Applicants are asking the court to direct the 1st Respondent to reach a specific decision as to who should be registered as the owner of the land. This, I am afraid, I cannot do! These are my reasons.

32. The gravamen of the Applicants complaint is that the fraudulent objection proceedings purportedly carried out under the provisions of the Land Adjudication Act breached the rules of Natural Justice and Statute. If this Court was to quash the decision of the 3rd Respondent then the only logical consequence would be that the 3rd Respondent will have to reconsider the objection afresh. The 3rd Respondent will only be able to do this once the register to the land is rectified by the 1st Respondent by way of cancellation of the entry in favour of the Interested Party. But the order of mandamus sought is not simply cancellation but a replacement of the Interested Party's proprietorship with that of the Applicants!

33. To grant the order of Mandamus as prayed for is to usurp the powers of the 3rd Respondent as the court will have made a decision on his behalf that it is the Applicants and not the Interested Party who are entitled to the land. This is outside the scope of a Judicial Review order.

34. If I refuse, as I have done, to grant the prayer for Mandamus then an order of Certiorari quashing the 3rd Respondents decision will not be effective because the Interested Party remains registered as the owner of the land. It is for this reason that I decline to grant the pray for certiorari as well.

35. It was not without some anxiety that the court has reached this decision because the 3rd Respondent clearly breached the law and it would be unjust that the Applicants be left without a remedy. I am however of the view that Applicants can still mount a challenge against the Interested Party's title to the land by way of civil suit. There is perhaps, also, an avenue for redress against the persons who committed the fraud. The Applicants will have to take advise on which way to go.

36. The upshot is that the Notice of Motion dated 27th February 2012 is dismissed. I, however, make no order as to costs.

Dated and delivered at Mombasa this 27th day of June, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Gikandi for the Applicants

No appearance for the Respondents

No appearance for the Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE