



REPUBLIC

-VERSUS-

**DISTRICT LAND REGISTRAR RESPONDENT
EXPARTE**

GHEIDA BINTI OMAR ABED

(On her own behalf and as administratrix of the Estate of the late MOHAMED BIN OMAR ABEID)

FATUMA AHMED

(As administratrix of the Estate of the late AISHA OMAR ABED)

AMINA MOHAMED

(as administratrix of the estate of the late TEFLE BINTI OMAR ABED)

FATUMA BINTI OMAR ABED

SAIDA BINTI OMAR ABED

AZIZA BINTI OMAR ABED

SALEH BINOMAR ABED

MARIAM BINTI OMAR ABED APPLICANTS

1.ABDALLA SAID ZUBEDI

2.SALEH SAID ZUBEDI

3.TAHER SHEIKH SAID INVESTMENTS LTD THIRD PARTIES

JUDGMENT

The outcome of these Judicial Review proceedings rests on the interpretation the Court shall give to the powers of the Registrar under Section 48 of The Registered Land Act (Cap 300) (Now repealed) (hereinafter RLA). That Section provides-

“Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with

Section 110, has been produced to the Registrar:

Provided that the Registrar may, upon receipt of adequate proof, dispense with the consent of the lessor-

(i) if he is satisfied that the lessor is dead and that there is no personal representative of the lessor; or

(ii) if he considers that the consent of the lessor or the personal representative, as the case may be, cannot be obtained or that it can be obtained only with difficulty or at unreasonable expense and shall, after making such enquiries as he may deem necessary in the circumstances, record on the document his reasons for dispensing with the consent and note such dispensation in the register.”

The Exparte Applicants are lessors of land described and known as Mombasa/Block XLV/12,19,20 and 21 (the property) either in their own capacity or in their capacities as administratrix of the estate of deceased lessors. The 1st and 2nd Interested Parties are registered as joint lessees to the property as proprietors in common in equal shares. The term of the lease being 99 years from 1st April 1955.

Desirous of disposing of their interest in the property to the 3rd Interested Party the 1st and 2nd Interested Parties sought the consent of the Applicants. The Applicants responded to this request through their lawyers letter of 24th November 1999 which is reproduced hereunder-

**“Pandya & Talati
Advocates
Fort Mansion
Nkrumah Road
MOMBASA**

**Dear Sirs,
RE: MOMBASA/BLOCK XLV/12, 19, 20 AND 21**

We refer to your letters of 28th September and 26th October, 1999. We have now received our clients instructions.

Our clients are not averse to giving their consent to the proposed transfer by Abdalla Said Zubedi and Saleh Said Zubedi to Tahir Sheikh Said Investments Limited. Our clients are willing to give such consent on condition that:-

- 1. Your clients pay a sum of shillings Five Hundred Thousand (Kshs. 500,000/-) to our clients.**
- 2. The rent be increased from the current Kshs. 1,000/- per month (which is un-economical) to Kshs. 10,000/- per month to also take into account the factor of inflation since the original lease was signed on 1st April, 1955.**

If your clients wishes to have the land transferred to it outright, our clients are prepared to do so. The consideration for such transfer shall be shillings eight million (Shs. 8,000,000/-)

Yours faithfully,

For: Timamy & Company

**Issa Timamy
Cc: Clients”**

There was no agreement reached and the 1st and 2nd Interested Parties presented the transfer for Registration and thereupon the District Land Registrar (the Respondent) herein gave the following Notice

to the Applicants-

**“Timamy & Co.
Advocates,
Mama Ngina Drive,
P.O. Box 87288,
MOMBASA**

Dear Sirs,

MOMBASA/BLOCK XLV/12, 19, 20 & 21

A transfer of Lease documents in relation to the titles above mentioned has been presented to us for registration by the Lessees of the titles mentioned therein.

Your clients being the Head Lessors are required by the law to give consent before the transfers are registered.

In his letter to us Ref. No. T4/232/96 dated 15th June, 2001 (Copy enclosed for ease of reference) M/s Pandya & Talati Advocates have indicated that your clients have refused to accord consent as required.

The terms and conditions of the lease are very clear in that such consent shall not be unreasonably withheld as the case in this matter.

Under the powers vested to me and in accordance with Section 48 Cap. 300 of the Registered Land Act, I intend to dispense with the said consent and proceed to register the transfers within 14 days from the date of this letter unless I receive a court order to the contrary within that period.

Yours faithfully,

***K. K. GITHII
DISTRICT LAND REGISTRAR
MOMBASA***

C.C

***M/s Pandya & Talati
Advocates
Fort Mansion
MOMBASA***

Encl.”

The Registrar’s decision contained in that letter is the subject of the application of 6th September 2001 which is for determination. The prayers sought by the application are-

“(a) An order of certiorari do issue to remove to this court and quash the decision of the District Land Registrar that the Applicants have unreasonably withheld consent to the transfer of the lease over Mombasa Block XLV/12, 19, 20 and 21 by Abdalla Said Zubedi and Saleh Said Zubedi (the lessees) to Tahir Sheikh Said Investments Limited (TSS).

(b) An order of prohibition do issue to prohibit

the District Land Registrar from dispensing with the statutory requirement of the consent of the Applicants as lessors to the transfer of the lease over Mombasa Block XLV/12, 19, 20 and 21 by the

lessees to TSS in purported exercise of the powers vested in him by Section 48 of the Registered Land Act Chapter 300 of the Laws of Kenya.”

What is the scope of the Registrar’s powers under the proviso to Section 48 of The RLA? The Registrar is empowered to dispense with the consent of the lessor-

(i) If he is satisfied that the lessor is dead and that there is no personal representative of the lessor or

(ii) If he considers that the consent of the lessor or the personal representative, as the case may be, cannot be obtained or that it can be obtained only with difficulty or at unreasonable expense and shall after making such enquiries as he may deem necessary in the circumstances, record on the document his reasons for dispensing with a consent and note such dispensation in the register. (emphasis mine)

A plain reading of the second proviso is that the registrar may dispense with the lessors consent where consent cannot be obtained or that it can be obtained but with difficulty or at unreasonable expense. Examples when the lessors consent cannot be obtained is where, say, the lessor cannot be traced or where he/she is suffering form a physical or mental infirmity, which makes it impossible for the lessor to give consent. In my view it cannot extend to where, like here, the Head lessors have expressly refused to give consent.

Similar words are used in Section 110 of The RLA which is on verification of execution. Section 110(3) provides-

“The Registrar may dispense with verification under this Section-

(a) If he considers that it cannot be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed ...”

I give this analogy to show that the law contemplated instances when it would be practically impossible or difficult to obtain the presence (physical, mental or otherwise) of parties to transactions to execute documents or grant certain consents and therefore gave the Registrar dispensation power. The law did not, and could not have, contemplated that the power would be used when a party deliberately refuses to execute a document or grant a consent. That would be to unreasonably stretch the scope of the Registrars power.

The Court agrees with the Exparte Applicants that The District Land Registrar acted *ultra vires* when he decided that he would dispense with consent which they had withheld. The Registrar acted outside the law and in excess of his power.

Evidently a dispute had arisen between the Applicants on the one hand and the 1st and 2nd Interested Parties on the other in respect to the consent. It is the position of the Interested Parties that the Applicants conduct contravenes the terms of the lease as it amounts to an unreasonable, arbitrary and vexatious refusal. The Registrar had no statutory power or business to resolve that dispute. The contesting parties should have sought the intervention of Court.

The Interested Parties were of the view that the Applicants ought to have appealed against the decision of the Registrar under the provisions of Section 150 of The RLA (repealed) instead of seeking Judicial Review. Section 150(1) of the RLA is the relevant part-

“If a person is dissatisfied by the refusal of the Deputy Chief Land Registrar, a Land Registrar or Assistant Land Registrar to effect or cancel any registration, he may, within thirty days of the refusal, appeal in the prescribed form to the Chief Land Registrar, and the Chief Land Registrar may direct that the registration be effected or cancelled as the case may require, or may uphold the refusal.”
(emphasis mine)

With respect, this provision is inapplicable. The Land Registrar has not refused to effect or cancel any

registration. The Exparte Applicants have not requested the Registrar to effect any registration nor has the Registrar effected any registration which the Applicants seek cancellation.

If however it is to be accepted that Section 150 is applicable, the Court is of the view that an appeal thereunder would be in respect to decisions made by the Registrar *intra vires* his powers. *Ultra vires* decisions are a nullity, there is nothing of it to appeal. The route available to the Applicants was the route of these proceedings, Judicial Review.

The upshot is that the Notice of Motion filed on 6th September, 2001 is hereby allowed and I grant the following orders-

(a) An Order of certiorari do issue to remove to this Court and quash the decision of the District Land Registrar that the Applicants have unreasonably withheld consent to the transfer of the lease over Mombasa Block XLV/12, 19, 20 and 21 by Abdalla Said Zubedi and Saleh Said Zubedi (the lessees) to Tahir Sheikh Said Investments Limited (TSS).

(b) An Order of prohibition do issue to prohibit the District Land Registrar from dispensing with the statutory requirement of the consent of the Applicant as lessors to the transfer of the lease over Mombasa Block XLV/12, 19, 20 and 21 by the lessees to TSS in purported exercise of the powers vested in him by Section 48 of the Registered Land Act Chapter 300 of the Law of Kenya.

(c) Costs to the Applicants.

Dated and delivered at Mombasa this 19th day of July, 2012.

**F. TUIYOTT
JUDGE**

**Dated and delivered in open court in the presence of:-
Mutua for Mlandi for the Applicants
Jamii for Eredi for the Respondent**

No appearance for the Interested Parties although notified

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**