



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MACHAKOS**

**Miscellaneous Application 102 of 2010**

**IN THE MATTER OF AN APPLICATION BY LILLIAN JAFFERY AND LILIAN PRITHPAL SINGH FOR LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF THE TRUST LAND ACT, CAP 306, THE WAY LEAVES ACT, CAP 292, AND THE LAW REFORM ACT, CAP 26**

**IN THE MATTER OF PLOT NOS. 10A AND 10B SULTAN HAMUD, KAJIADO DISTRICT**

**IN THE MATTER OF ORDER LIII CIVIL PROCEDURE RULES, AND ALL OTHER ENABLING PROVISIONS AND PROCEDURES OF THE LAW**

**BETWEEN**

1. LILIAN PRITHPAL SINGH .....APPLICANT
2. LILIAN JAFFERY.....APPLICANT

**AND**

1. COUNTY COUNCIL OF OLKEJUADO..... RESPONDENT
2. MONKOINE TAIKO.....RESPONDENT
3. MOTIKOE KORUTA.....RESPONDENT
4. KEREMPUT KAATA.....RESPONDENT
5. MARAO OLE KISAMPEI.....RESPONDENT
6. METAMEI LONINA.....RESPONDENT
7. CHRISTOPHER SAIGOL.....RESPONDENT
8. JULIUS TUMPEI.....RESPONDENTS

**RULING**

Before me is a Notice of Motion dated 21<sup>st</sup> May 2010, filed by Lillian Prithpal Singh and Lilian Jaffery. The respondents are the County Council of Olkejuado and seven (7) others.

The application was filed by M/s Kilonzo & Company advocates. It was brought under section 8 and 9 of the Law Reform Act (Cap 26) and Order LIII rule 3 (1) of the Civil Procedure Rules, section 177 of the Local Government Act, section 73 of the Trust Land Act, and section 3 of the Way Leaves Act. It seeks the following orders:-

- 1. *Certiorari* directed at the 1<sup>st</sup> respondent to bring to the High Court to be quashed the 1<sup>st</sup> respondents decision in the letter dated 8<sup>th</sup> April 2010 purportedly subdividing Plot No. 10A and 10B Sultan Hamud, Kajiado into Plot Nos.545, 546, 589 and 441 and allotting them to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents respectively.**
- 2. *Certiorari* directed at the 1<sup>st</sup> respondent to bring to the High Court to be quashed the 1<sup>st</sup> respondents decision contained in the letter dated 8<sup>th</sup> April 2010 purportedly subdividing Plot No. 10A and 10B Sultan Hamud, Kajiado into unspecified plots and allocating them to 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents.**
- 3. Prohibition directed to the 1<sup>st</sup> respondent, its servants and or agents or whomsoever from carrying out any further subdivision, replanning, validation or howsoever dealing with Plot Nos.10A and 10B Sultan Hamud Kajiado.**
- 4. *Mandamus* directed to the 1<sup>st</sup> respondent to recall, cancel and revoke all letters of allotment issued to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents in respect of Plot No. 10A and 10B Sultan Hamud, Kajiado.**
- 5. That costs of the application be provided for.**

The application is grounded on the Statement of Facts dated 5<sup>th</sup> May 2010, and the Verifying Affidavit sworn by Lilian Jaffery, on 4<sup>th</sup> May 2010, both filed with the Chamber Summons for leave. The grounds are *inter alia*, that in 1981 the County Council of Olkejuado issued a letter of allotment for plot No. 10A, Residential Sultan Hamud in favour of the late Prithpal Singh. That on 23<sup>rd</sup> April 1982, the said Council issued a letter of transfer from Mary Murumbi for plot No. 10B, Sultan Hamud, Kajiado District in favour of the late Prithpal Singh. That the said Prithpal Singh complied with all requirements of payments as well as obtaining approval for development plans from the Public Health, the District Commissioner and the Clerk to Council and constructed dwelling premises in 1982 on the two plots which were contiguous. That he died in 2005. That on 25<sup>th</sup> October 2006, the High Court in Succession Cause No. 1625 of 2006, granted probate of his estate to the 1<sup>st</sup> and 2<sup>nd</sup> applicants. That the 1<sup>st</sup> applicant continued to pay the 1<sup>st</sup> respondent the land rates in respect of plots 10A and 10B and the last payment was made on 1<sup>st</sup> February 2010. That the applicants continued to develop the two plots but that on 9<sup>th</sup> March 2010, a group of officials sent by the 1<sup>st</sup> respondent led by the area councillor and a surveyor, visited the 1<sup>st</sup> applicant's home on the plots and requested to see the documents for the plots. That the 1<sup>st</sup> applicant showed them the letters of allotment and transfers for the plots. That by a letter dated 8<sup>th</sup> April 2010, and received on 20<sup>th</sup> April 2010, the 1<sup>st</sup> respondent informed the 1<sup>st</sup> applicant that they had been validating and confirming the plot owners and that the 1<sup>st</sup> and 2<sup>nd</sup> applicants had been allocated five (5) plots and the rest were allocated to the 2<sup>nd</sup> to 8<sup>th</sup> respondents. That this meant that the plots Nos.10A and 10B of the deceased, had been purportedly subdivided and allocated a fresh to other 7 individuals. That the 1<sup>st</sup> respondent did not give the 1<sup>st</sup> and 2<sup>nd</sup> applicants any notice or right of hearing before the purported subdivision and reallocation, contrary to the principles of natural justice. That the subdivision would severely prejudice the 1<sup>st</sup> and 2<sup>nd</sup> applicants.

The verifying affidavit, further amplifies the contentions in the statement. They also filed a further affidavit sworn by Lillian Jeffery on 25<sup>TH</sup> April 2012. It was deponed *inter alia* that the 1<sup>st</sup> respondent did not notify the deceased or the applicants of any discrepancy on the ground. That the applicants were not informed that they encroached into other people's plots. That since the custodians of the plans and maps were the 1<sup>st</sup> respondents, they had an obligation to inform the applicants of any changes done to their plots.

The applicants through their counsel Kilonzo & Company, filed written submissions on 27<sup>th</sup> May 2011,

and further submissions on 25<sup>th</sup> April 2012.

A summary of the surrounding facts were given in submissions. It was contended that Article 40 of the Constitution provided for the protection of private property. Therefore, the decision of the 1<sup>st</sup> respondent communicated vide the letter dated 8<sup>th</sup> April 2010, was unconstitutional and ought to be quashed.

It was contended that the principles of natural justice were not followed. The applicants were condemned unheard. Reliance was placed on the case of **Fahim Yasin Twaha –vs- District Land Registrar Lamu (2011) e KLR**. With regard to the request for *certiorari*, the case of **De Souza –vs Tanga Town Council (1961) EALR 377** was relied upon. It was urged that where the principles of natural justice were flouted, *certiorari* could issue. It was contended that the local authority could not alienate private property and allocate it to 3<sup>rd</sup> parties. Reliance was also placed on the case of **Commissioner of Lands –vs Kunste Hotel KLR (E&L) 1, 249** in which the Court of Appeal held that the grant of judicial review reliefs was meant to ensure that an individual receives fair treatment. In the further submissions, it was reiterated that a decision reached without following due process was void *ab initio*.

The application is opposed. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 16<sup>th</sup> February 2012, by Harambee Kigingo, its Clerk. It was deponed that from the records, the late Prithpal Singh was allotted Plot 10A and bought plot 10B from Mary Murumbi. He had also been paying rates and annual rent for the two plots. That subsequently, it was realized that there was a discrepancy on the physical location of the two plots, between the maps and what was obtaining on the ground. That consequently, the County Council held a meeting, and the Town Planning Committee visited the site and made various recommendations after they discovered that the administrators of the late Singh had taken possession of twelve plots on the ground which did not form part of plots 10A and 10B. That the Town Planning Committee decided to allocate the late Singh two additional plots, considering that they had encroached and put premises onto the adjoining parcels of land. That the plots held by the late Singh had been resurveyed to accommodate allotments to other allottees within the area affected by the survey map. That the 1<sup>st</sup> respondent had no intention of dispossessing the applicants of their father's property.

The 1<sup>st</sup> respondent, through their counsel M/s Nyandoro & Company, filed written submissions on 21<sup>st</sup> February 2012. It was contended that though the applicants owned plots 10A and 10B, the position on the ground was that they actually occupied more than 7 other plots. This verification was done through re-establishment of the beacons. It was contended that the applicants had not provided any documentary evidence to show the acreage of the plots. Reliance was placed on the case of **Dorcas Indombi Wasike – vs- Benson Wamalwa Khisa – Eldoret Civil Appeal No. 87 of 2007** wherein the Court of Appeal held that the Council had power to deal with trust land under its control and in particular to determine the acreage.

The other seven (7) respondents did not file responses.

On the hearing date, Mr Mutinda Kimeu who appeared for the applicants and Mr Nyaga who appeared for the 1<sup>st</sup> respondent relied on the written submissions.

I have considered the application, documents filed, the submissions on both sides as well as the authorities cited.

It is not denied that the late Singh was the proprietor of plots 10A and 10B before he died. He paid rates and annual rent. His children, the applicants, obtained succession documents and therefore became the proprietors of those two properties in succession.

Indeed, Article 40 of the Constitution protects rights to private property. There are only limited situations where the State can deprive a person of private property for public purposes and such acquisitions is subject to compensation being paid.

The issue here is principally whether the 1<sup>st</sup> respondent acted within the principles of natural justice in

subdividing the plots and allocating part of the land to 3<sup>rd</sup> parties under the pretext that part of the area occupied by the applicants under plot 10A and 10B was outside those plots. As was held in the case of **Commissioner of Lands –vs Kunste Hotel Ltd KLR (E&L) 1 249 at page 251:-**

**“5. The Commissioner of Lands was exercising statutory powers under the Government Lands Act, when he decided to allot the subject plot to the interested party. The exercise of that power was therefore judicial in nature and he was therefore obliged to hear all those who were likely to be affected by his decision.”**

It is also trite law that where due process is not followed, the action becomes *ultra vires* and orders of *certiorari*, or judicial review reliefs can be granted. See **Yasin Twaha Adbulla –vs- District Land Registrar Lamu (2011) e KLR.**

The County Council herein (1<sup>st</sup> respondent) was acting under statutory authority, that is the Local Government Act (Cap 265). It was bound to follow due process as stated in the above two cases.

From the facts on record, the 1<sup>st</sup> respondent admits that the father of the applicants was the owner of plots 10A and 10B. The official records were kept by the 1<sup>st</sup> respondents. They received rates and land rent. Though they claim that the applicants did not provide documents on the size of the plots, in my view the documents relating to the size and shape of the plots should have been in the custody of the 1<sup>st</sup> respondent. In my view, if there was a genuine error on the size of the plots, the 1<sup>st</sup> respondent would have informed the applicants of the same before they proceeded to purport to rectify the error. They did not. Instead they went ahead secretly and created subdivisions and allocated some plots to third parties. They denied the applicants the right to be heard before they purported to take that action which would adversely affect the applicants. That default of the 1<sup>st</sup> respondent made the whole process of resurvey and subdivision and allocation of plots to 3<sup>rd</sup> parties, in the absence of a fair hearing, a nullity – see the case of **Kunste Hotel** (supra). A nullity is a nullity and cannot be cured. This calls for the grant of judicial review reliefs. I find and hold that all the judicial review prayers sought for *certiorari*, prohibition and *mandamus* herein are justified, and I will grant them. This is the only way to cure the nullity.

Consequently, I allow the application and issue *certiorari* orders quashing the decisions of the 1<sup>st</sup> respondent as requested in prayers 1 and 2. I grant the prohibition and *mandamus* orders sought in prayers 3 and 4. The 1<sup>st</sup> respondent will also pay the applicants’ costs of the proceedings.

Dated and delivered at Machakos this 1<sup>st</sup> day of **August** 2012.

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**George Dulu**

**Judge**

**In the presence of:**

Nyalo – Court clerk

Mr Mutinda Kimeu holding brief for Kilonzo Jr. for Ex-parte Applicants

N/a for Respondents