



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Miscellaneous Civil Application 381 of 2009**

**IN THE MATTER OF: ORDER LIII RULE 1 OF THE CIVIL**

**PROCEDURE RULES**

**AND**

**IN THE MATTER OF: AN APPLICATION BY KAHINDI KATANA, KUVUNA EDDISON MWANGOLO, KHAMIS MWAKALE KHAMIS, STEPHEN KITI NYALE, MARCOS SEVE AND 28 OTHERS FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AND FOR LEAVE TO APPLY FOR THE SAME**

**AND**

**IN THE MATTER OF: KAHINDI KATANA, KUVUNA EDDISON MWANGOLO, KHAMIS MWAKALE KHAMIS, STEPHEN KITI NYALE, MARCOS SEBE AND 20 OTHERS**

**BETWEEN**

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, KILIFI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KAHINDI KATANA ..... 1<sup>ST</sup> APPLICANT**

**KUVUNA EDDISON MWANGOLO .....2<sup>ND</sup> APPLICANT**

**KHAMIS MWAKALE KHAMIS .....3<sup>RD</sup> APPLICANT**

**STEPHEN KITI NYALE .....4<sup>TH</sup> APPLICANT**

**MARCOS SEBE & 28 OTHERS ..... 5<sup>TH</sup> APPLICANT**

**EX-PARTE**

**FORT PROPERTIES LTD ..... INTERESTED PARTY**

**RULING**

1. The Applicants who are 33 in number are residents of Kilifi-Kijipwa Settlement Scheme. Their

complaint is that the Director of Land Adjudication & Settlement allocated some 20 hectares of that Scheme to an undeserving individual. They have challenged that decision in a Motion dated 6<sup>th</sup> October 2009 and seek the following orders-

**“(a) THAT the Honourable Court be pleased to issue an order of Mandamus compelling the 1<sup>st</sup> Respondent to declare null and void his decision to allocate land known as KILIFI/KIJIPWA/53 to the Interested Party and the 2<sup>nd</sup> 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.**

**(b) THAT in the alternative to (a) above, the 2<sup>nd</sup> 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.”**

2. The Applicants have sought to demonstrate that the decision of the 1<sup>st</sup> Respondent was unreasonable as the original allottee was not a squatter and that it was irregular to allocate him 20 hectares. The Applicants placed before a Court a list showing that other allottees were allocated 2.5 acres each and that the beneficiaries save for Mr. Stephen Timothy Mwakisha (**Mwakisha**) were genuine squatters.

3. Fort Properties Ltd (Fort) is the Interested Party. Through an affidavit sworn on 15<sup>th</sup> November 2011, Mr. V. N. Mulji, who is said to be a Director of the said Company, narrated how Fort bought the suit land from Mwakisha in the year 2009. That land was formally transferred to Fort on 20<sup>th</sup> April 2009.

4. At the close of arguments by Counsel the Court pointed out that it seemed necessary for Mwakisha to be enjoined or at least served with the Motion as he was the initial allottee of the controversial land. Counsel did not think it critical and asked the Court to render its decision without his participation.

5. I start by observing that as correctly pointed out by Counsel for Fort the Notice of Motion was filed outside the time line and in breach of Order LIII Rule 3(1) of The Previous Edition of The Civil Procedure Rules which provides-

**“When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within 21 days by notice of motion to the High Court, and there shall, unless the Judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.”**

Leave was granted on 11<sup>th</sup> September 2009 and the last day for filing the Motion would have been 2<sup>nd</sup> October 2009. The application was filed on 8<sup>th</sup> October 2009 and was therefore about 6 days late. No effort was made by the Applicant to seek the expansion of time. The Court, I would think, has jurisdiction to entertain such an application under its inherent power of ensuring that the ends of justice are met. On that alone the application would fail. But let me consider its merits.

6. It is said for the Applicants that the decision of the 1<sup>st</sup> Respondent was unreasonable and plainly unlawful as the Scheme was intended to benefit squatters. The Court is told that the suit property was initially under The Settlement Fund Trustee. Nothing was placed before Court to show that the Scheme was exclusively reserved for squatters and that Mwakisha was not a squatter. Perhaps Mwakisha would have explained himself had he been joined in these proceedings. Now it becomes apparent why the Court suggested that Mwakisha be involved herein. I know that the Respondents never fielded any evidence, but that does not exonerate the Exparte Applicants from their obligation of proving the allegations made. The Respondents can choose to remain silent if they think that the evidence presented by the Exparte Applicants is wholly insufficient. The evidence before Court is too weak for the Court to form an opinion that the Director acted unlawfully or unreasonably.

7. There is yet another issue. Annexure “**VNM 4**” to the affidavit of Mr. Mulji is a letter dated 25<sup>th</sup> July 2001 from the Assistant Chief of Kidutani-Mawamba Sub-Location to the District Land Registrar

which reads-

**“Mtwapa Chief’s Office,**

**P.O. MTWAPA  
25-7-2001**

**MT/LNP/16/4/VOL.II/66**

**THE DIST. LAND REG.**

**KILIFI**

**RE: BOUNDARY INSPECTION**

**PLOT NO. 53  
KIJIPWA SET. SCHEME**

**The owner of the above named plot Mr. Stephen Mwakisha would like his plot be re-surveyed so that he gives his squatters a portion. The squatters are:- 1. Moses Mtepe Chidyanga, 2. Gabrael Chidyanga, 3. Martin Chidyanga 4. Kalume Kadenge Hamisi, 5. Kalundi Kadenge Ngari 6. Juma Sudi Bakari, 7. Halima Ngari Juma Beramau, 8. Bubakar Swaleh Mwadzua 9. Mwinga Mwadziwe Tsuma.**

**Yours faithfully,**

**ASSISTANT CHIEF**

**KIDUTANI-MAWAMBA SUB-LOCATION**

**MTWAPA-KILIFI”**

It would seem, from this letter, that Mwakisha was already a beneficiary to the suit property by the year 2001. The Ex-parte Applicants came to Court 8 years later. The delay in commencing these proceedings has not been explained. Delay can lead to change in the circumstances and the complexion of a dispute. In this instance Mwakisha sold the suit property to Fort who are the current registered owners. Fort describe themselves as bonafide purchasers for value without notice. Even if a view was taken that the six (6) months time line prescribed under Order LIII Rule 2 of The Previous Civil Procedure rules is only applicable to formal judgments, Orders, Decree, Conviction and other proceedings (**Nrb Misc. 1279 of 209 Republic –Vs- Judicial Commission of Inquiry into Goldenberg Affair Ex-parte Mwalulu**) the delay here of about 8 years is unreasonable. Good Administration requires that challenges to administrative decisions of Public Officers must be taken up and resolved promptly. That is one of the hallmarks of Judicial Review proceedings. Delay may work unfairness on other persons who are affected by the decision. I have no doubt that the delay herein would prejudice Fort.

8. Lastly, I have to say that even if I had found some merit in the Applicants arguments I would still not have granted the prayers as couched. The Applicants have asked this Court to allocate the suit property to them. It is not for this Court to ascertain or identify who are the deserving persons. That power lies elsewhere. That is a function of the 1<sup>st</sup> Respondent and his Officers. This Court cannot usurp that power or function.

9. For reasons given I dismiss the application of 6<sup>th</sup> October 2009 with costs.

***Dated and delivered at Mombasa this 31<sup>st</sup> day of October, 2012.***

**F. TUIYOTT**  
**JUDGE**

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

**No appearance for Applicants**

**Eredi for Respondents**

**Mrs Kariuki for Interested Parties**

**Court clerk - Beatrice**

**F. TUIYOTT**  
**JUDGE**