



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW 82 OF 2011

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

**REVIEW ORDERS UNDER SECTION 8 AND 9 OF CAP 26 AND ORDER 53 OF THE CIVIL
PROCEDURE RULES, 2010**

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26

AND

IN THE MATTER OF: REGISTERED LAND ACT CAP 300

AND

**IN THE MATTER OF: PLOT NOS. KILIFI/MTWAPA/1948,
KILIFI/MTWAPA/743, KILIFI/MTWAPA/1879, KILIFI/MTWAPA/742, 446 MTWAPA
SETTLEMENT SCHEME
ORKILIFI/MTWAPA/747, KILIFI/MTWAPA/744 KILIFI/MTWAPA/1890 AND
KILIFI/MTWAPA/1891**

REPUBLIC APPLICANT

V E R S U S

CHIEF LAND REGISTRAR 1ST RESPONDENT

LAND REGISTRAR, KILIFI 2ND RESPONDENT

BAKAMOYO LIMITED INTERESTED PARTY

EX-PARTE APPLICANTS:

KENGA KIRAO NYUNDO

DONALD SCAVER MWAKIO

FRANCIS LEWA

ALEX NYANJE

SAMUEL KATANA KIMANDO

MATHIAS NYAMBU

SALIMU SAIDI MWANZUGA

AISHA SHERMOHAMAD JAMI

JUDGEMENT

1. This Court is asked to determine the Notice of Motion of 17th August 2011 whose main prayers are that I grant orders of-

(a) CERTIORARI removing to this Court and quashing the decisions of the Respondents to cancel or to publish notice of cancellation of titles in respect of all those parcels of land known as Plot Numbers Kilifi/Mtwapa/1948, Kilifi/Mtwapa/743, Kilifi/Mtwapa/1879, Kilifi/Mtwapa/742, Kilifi/Mtwapa/747 (also known as Plot NO. 446 Mtwapa Settlement Scheme), Kilifi/Mtwapa/744, Kilifi/Mtwapa/1890 and Kilifi/Mtwapa/1891.

(b) PROHIBITION restraining the Respondents, their servants, agents or representatives from canceling the Ex-parte Applicants Title Deeds or Title documents in respect of Plots Numbers Kilifi/Mtwapa/1948, Kilifi/Mtwapa/743, Kilifi/Mtwapa/1879, Kilifi/Mtwapa/742, Kilifi/Mtwapa/747 (also known as Plot No. 446 Mtwapa Settlement Scheme), Kilifi/Mtwapa/744, Kilifi/Mtwapa/1890 and Kilifi/Mtwapa/1891.”

That Application was filed pursuant to the leave of the Court granted on 3rd August 2011.

2. The Applicants are said to be the registered proprietors and/or beneficial owners of various parcels of land known as Kilifi/Mtwapa/1948, Kilifi/Mtwapa/743, Kilifi/Mtwapa/1879, Kilifi/Mtwapa/742, Kilifi/Mtwapa/747, Kilifi/Mtwapa/744, Kilifi/Mtwapa/1890 and Kilifi/Mtwapa 1891 (All jointly hereinafter referred to as the “Suit Properties”). Shown to this Court were copies of Title Deeds said to be prove of that ownership. It is the position of the Applicants that they lawfully acquired the suit properties for valuable consideration. Details of how each of them did so are not necessary here.

3. The Applicants were alarmed by the contents of a letter dated 4th April 2011 written by the Chief Land Registrar to The District Land Registrar Kilifi. In that letter the Chief Land Registrar was directing the District Land Registrar Kilifi to initiate the process of cancellation of the Titles in respect to the suit properties. The letter is reproduced below-

“REF. No. KLF/A/14/Vol.XVIII/66 4th April 2011

The District Land Registrar

P.O. Box 258

KILIFI

RE: NOTICE OF CANCELLATION OF TITLES KILIFI/MTWAPA/742, 743, 744, 746, 747, 748, 1946, 1947, 1948, 1879, 1880, 1890 & 1891

Reference is made to yours dated 15th March 2011 of which you confirmed after liaising with the Registrar of Titles in Mombasa that Parcel No. L.R. 28/IV/MIN.CR.5097 is still intact. Due to the confirmed status, the above titles were issued under Registered Land Act (RLA) while there is an already existing one Registered on Registration of Titles Act (RTA). Let all the registered proprietors

under RLA be notified of this notice. You can use the Provincial Administration (DO or DC) to notify them in case you have no known address for them. After notifying the proprietors, issue Gazette Notice to Government Printer for the same.

J. K. WANJAU

For: CHIEF LAND REGISTRAR

Copy to: District Land Registrar of Titles

P.O. Box 80053-80100,

MOMBASA – Status for LR. 5097 be maintained

Bakamoyo Ltd

P.O. Box 17555-00500

NAIROBI”

4. The letter of the Chief Land Registrar was a culmination of a complaint raised by Bakamoyo Limited (the Interested Party). The Interested Party is said to be the owner of land known as MN/Section IV/28 (hereinafter referred to as the RTA property). The complaint of the Interested Party is that the suit properties were irregularly created out of the RTA Title which is still intact and in its favour. Their complaint was raised in the letter of 4th September 2010 reproduced below-

“4th September 2010

***Commissioner of Lands,
P.O. Box 30087-GPO
NAIROBI***

Through

***The Chief Land Registrar,
NAIROBI***

RE: ENCROACHMENT ON PARCEL NO. MN/SECTION IV/28 BY MTWAPA SETTLEMENT SCHEME IN KILIFI DISTRICT

We act for the registered proprietors, of the above parcel of land (Bakamoyo Limited) who are the title holders of the aforementioned freehold land, measuring 96.63 Acres and registered at the Coast Land Registry on CR 5097/1 (as per attached copy of the Postal Search).

We are informed that the planning of the Mtwapa Settlement was irregularly carried out and resulted to our clients land being sub divided wholly and creation of Parcel Nos. Kilifi/Mtwapa/742: 743: 744: 747 and 748 and Kilifi/Mtwapa/1946: 1947 and 1948 on the aforesaid land.

It is therefore our clients appeal that the said title should be cancelled and the parcel reverted back to it's original status in order to avoid unnecessary ligation.

By a copy of this letter we are requesting the District Land Registrar, Kilifi, to place a restriction in terms of the provision of scheme 136(a) (b) (c) of the RLA Cap 300 on the said parcel until further notice.

We have enclosed herein a copy of the RIM showing the subdivisions and a copy of the Deed plan reflecting the same for your perusal and further necessary action.

Yours faithfully

Alando & Co. Advocates

P.S.O ALANDO

1. *The Permanent Secretary*
Ministry of Lands
NAIROBI

2. *The Director of Land Adj. & Settlement*

NAIROBI

3. *The District Land Registrar*

KILIFI

4. *The District Land Adj. & Settlement Officer*

KILIFI

5. *CC – Client (Bakamoyo Ltd)*
NAIROBI.”

5. The contention of the Applicants is that the Respondents are not clothed with legal authority to cancel Title. In addition the Respondent acts are unreasonable, irrational and breach of the rules of natural justice.

6. The position of the Respondents, which is supported by the Interested Party, is that their action was intended to correct an irregularity. It was argued that if this Court was to interpose on the side of the Applicants then it would be sanctioning an illegality as the RTA title was not available for allocation as it was and is owned by the Interested Party. Counsel referred me to this often quoted passage in **MaCFoy – Vs- United Africa Company Limited [1967]3 ALL ER 1169** where Lord Denning held as follows-

“If an Act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there it will collapse.”

I was asked to decline the application so as not to aid a cause of action founded on an illegal act. The Court of Appeal in **Standard Chartered Bank Kenya Ltd –Vs- Intercom Services Ltd Civil Appeal No. 37 of 2003** quoted with approval the following passage from Lord Mansfield decision in **Holman – Vs- Johnson [1775-1802]ALL ER-**

“The principle of Public policy is the Ex dolo malo no oritar action. No Court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the Plaintiff’s own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of the country, there the Court says that he has no right to be assisted. It is on that ground that the Court goes not for the sake of the Defendant but because they will not lend their aid to such Plaintiff.”

And as was observed in **Ridge –Vs- Baldwin [1963]2 ALL E.R. 66**, the consequence of the failure to observe the rules of natural justice renders a decision void not merely voidable.

7. The Interested Party also thought that the application was statute barred. That the prayer for certiorari is caught up by the six months timeline provided by Order 53 Rule 2 of The Civil Procedure Rules, 2010. This is what I should first determine. There is a short answer to it. The letter of 4th April 2011 communicates the decision of the Chief Land Registrar to cancel the Titles. This, if I understand the Applicants well, would be the first formal communication of the decision sought to be impugned. The Applicants filed the application for leave on 3rd August 2011, some four months later, and was squarely within the time limit.

8. The Applicants Titles are registered under the Registered Land Act (Cap 300) (now repealed). These proceedings were commenced before the repeal of the Act and would fall to be dealt with under Section 107(1) of The Land Registration Act, 2012 which provides-

“Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

9. Part X of The Registered Land Act deals with rectification of the Register. Section

142(1) provides the circumstances when the Registrar may rectify the Register or instrument presented for registration. That Section reads-

“The Registrar may rectify the register or any instrument presented for registration in the following cases –

(a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all persons interested;

(c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.”

Under Section 3 a Registrar refers to-

“the Registrar means-

(a) The Chief Land Registrar or the Deputy Chief Land Registrar, appointed under Section 7; or

(b) Where a Land Registrar or an Assistant Land Registrar has been authorized under Section 7(4) to exercise or perform any particular power or duty, that Land Registrar or Assistant Land Registrar so far as concerns that power or duty.”

So the 1st and 2nd Respondents are Registrars for the purpose of Section 142.

10. Quite clearly the power of the Respondents to rectify the register is very limited

and does not extend to the cancellation of Title. The only occasion when the Registrar can cancel Title is under the provisions of Section 142(b), where all persons interested give their consent. No such consent has been given by the Applicants. By dint of Section 143 only a Court of Law that can direct the cancellation of Title. That that is the law is so well settled that it is unnecessary to cite any of the many past decisions which have reiterated it. The Respondents would be overstepping their power and acting ultra vires the law if they were allowed to cancel the Applicants titles.

11. There would be another reason why the action of the Respondents is ultra vires.

Under Article 47(1) of The Constitution every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Even in the absence of this Constitutional underpinning, the rules of natural justice must be applied in any administrative action which affects the rights of an individual. As Lord Diplock said in **Attorney General –Vs- Ryan (1980)AC 718-**

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

The Respondents reached the decision to cancel the Titles of the Applicants without giving them an opportunity to be heard and in the process breached the rules of natural justice.

12.The Interested Party asked this Court not to intervene, as to grant the orders would be construed to be sanctioning the illegal Titles of the Applicants. I would not agree. It is not in the province of Judicial Review proceedings to settle substantive disputes which require detailed evaluation of evidence. The Applicants and the Interested Party have given rival accounts as to their stake to the land. Only a Civil Process can resolve that matter. It is not for this Court to determine the legality or otherwise of the Applicants Titles. In the course of the hearing this Court was told of the existence of **Mbsa Petition No. 69 of 2012** in which the substantive issue is the ownership of the land herein. The Petition is yet to be determined. The parties will have opportunity, I think, to ventilate their positions through evidence. The concern of this Court sitting in Judicial Review is the legality of the procedure that the Respondents are employing in canceling the Titles. I have found that procedure to be outside Statute and in breach of the rules of natural justice.

13.As I allow the application I must emphasize, needless though it may seem, that my decision does not prejudice the right of the Interested Party to agitate its claim in **Petition No. 69 of 2012**.

14.The application dated 17th August 2011 is allowed. Costs to the Ex-parte Applicants.

Dated and delivered at Mombasa this 15th day of October, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-
Omondi for Ex-parte Applicants
No appearance for the Respondents
Kibaara for the Interested Party
Court clerk - Benta

F. TUIYOTT
JUDGE