



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

JR MISCELLANEOUS APPLICATION NO 16 OF 2011

**IN THE MATTER OF: ORDER LII RULE 3 OF THE CIVIL PROCEDURE RULES,
SECTION 3A OF THE CIVIL PROCEDURE ACT, CAP 25,**

**SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CAP 26 AND ALL OTHER ENABLING
PROVISIONS OF LAW**

**IN THE MATTER OF: APPLICATION BY: BY ABUBAKAR MOHAMED SWALEH AND
SAID MOHAMED SWALEH FOR JUDICIAL REVIEW AND**

FOR ORDERS OF CERTIORARI AND PROHIBITION

**IN THE MATTER OF: ALLOCATION OF PLOTS KNOWN AS LAMU BLOCK 11/273, 274,
275 AND 276**

**ABUBAKAR MOHAMED SWALEH
SAID MOHAMED SWALE.....EX-PARTE
APPLICANTS**

-VRS-

**COUNTY COUNCIL OF LAMU
HON. ATTORNEY
GENERAL.....RESPONDENTS**

AND

MOHAMED SADIQ

AHMED OMAR ATHMAN

ASMAHAN BADIRIA

RULING

The Notice of Motion dated 27th April 2010 seeks for orders of certiorari to quash an order by the Town Clerk Lamu County made on 10th February 2010 in respect of Plot Lamu Block NO.II/273, 274, 275 and 276 which appears to have been allocated to the interested parties through irregular or unlawful channels. The applicant was supposed to be informed by a letter dated 10th February 2010 that he was required to demolish a fence/perimeter wall ostensibly because the plots had been allotted to one **MOHAMMED SADIQ**(1st interested party). The Applicant then contacted the Department of Survey to ascertain what may have happened and the Department noted the following discrepancies.

- (a) Survey for parcels 245-249 represented by F/R 490/31 was carried out by Earth Scope Surveyors and authenticated on 30th July 2011.
- (b) Survey represented by F/R 406/164 for parcel No.273-274 was carried out by KIGURU LAND SURVEYORS and authenticated on 15th January 2002.
- (c) Survey for parcel No.1411-14 was cancelled and replaced by P/No.273-276 yet they are all for different block locations).
- (d) Parcel No.274-276 overlapped parcel No.274-248, while parcel No.273 overlapped No.245.

On the basis of the detected mistake, all transaction were advised to be halted by the Director of Surveyors pending resolution. The 1st Respondent however authorized the interested parties to proceed with development thus instructing the applicant to demolish all fences and structures thereon. The applicants stand to lose their property without any opportunity of being heard and may suffer irreparable loss and damage. The letter requesting a halt to all transactions on the parcels due to the anomalies is dated 18th February 2010 and signed by H.I.Jimba.

This letter was copied to the Commissioner of Land, the Town Clerk Lamu County Council and the District Registrar. There was a letter dated 24th January 2006, written by **EDWARD KIGURU**, the surveyor who detailed how he had carried out new grant surveys of four of the plots referenced to as LAMU/BLOCK 1/1411 -1414. The survey was approved by the Director of Surveys and presented by a Survey Plan No.F/R 406/164. However the same approval letter is the one which exparte applicants had used as a basis of allotment for a different parcel of land in Lamu/Block II/273 – 276 and is annexed as AS3. The surveyor **EDWARD KIGURU** also expressed his reservations on the double allocation of the plots and could not vouch for their credibility. In that letter marked AMS 4 dated 3rd April 2006 he stated in part that;-

“My comments in connection with the issue of double allocation of plots is that, the subject other Grant survey I carried out were based of letters of allotment Registration No.91622/II of 5/5/1998 and (apparently) approved PDP No.206x12.98.....the said documents appear genuine, but I obviously cannot be in a position to determine authoritatively, if they were genuine or forgeries. In any case, the said documents are verified in Nairobi before survey is processed and New Grant titles issued”

The exparte applicant`s case is that in **CRC No. 40 of 1999 Lamu R V MOHAMMED SADIQ MAHADHI & OTHERS** the Court observed that the interested party was able to forge documents(proceedings related to the case are marked AMS 5.) The letter which prompted filing of these proceedings reads in part as follows;-

“The council has made several inquiries for both parties as regards to legal ownership documents of the aforesaid piece of land. Our files prevails that MOHAMED SADIQ has the following documents.....’ Whilst MR ABUBAKAR MOHAMED SWALEH did not have the above documents. It is therefore my considered opinion that the registered owner be given go ahead.....Therefore, the council will extend 7 more days and instruct you to demolition all illegal development...”

The application is opposed and in a replying affidavit sworn by **OMAR TWALIB** (4th interested party) he states that they are the registered properties of the parcels referred to, having leased the same from Government of Kenya as per annexed certificates of leases marked OT1 and the search certificates marked OT2. The applicant is not the owner of plot No.LAMU/BLOCK II/245-249, but there exists plot No.LAMU/BLOCK II/245, 246, 247, 248 and 249 which are separate and distinct from the interested parties aforesaid plots – search certificates are annexed showing the registered owners of Plot LAMU/BLOCK II.245-249(OT3) are **OMAR SHEE OMAR (2) MANSUR ALI BAKI KADI (3) AWADH SAID AWADH (4) SABA BAKARI(5) KASIMU SHARIEF MOHAMED (6) MOHAMED SADIQ(7)AHMED OMAR ATHMAN (8) ASMATHAN BODRA MOHAMED.**

The alleged overlap is termed as totally baseless and the letter by the Director of Surveys dated 18/02/10 is without basis as there is nothing further which can be investigated by the Director of Survey because a letter written by the director of surveys dated 30/03/06 (OT4) answered the queries raised by **KIGURU`S** letter of 24th January 2006(i.e OT3). OT4 is dated 30/06/11 and signed by **E.MOKI** for the director of surveys – it was addressed to **EMJ KIGURU**, a licensed land surveyor (I suppose he is the one who subsequently became Director of Surveys several years later. The letter stated inter alia;-

“During RIM amendment, the area was discovered to be in BLOCK II and not BLOCK 1. Because the plots fell in BLOCK II, this necessitated a change in Lamu BLOCK II/273 – 276 instead of LAMU BLOCK 1/1411-1414. The change in numbering is the anomaly you have mentioned in your letter.” It is the interested parties deposition that the exparte applicants have carried out illegal developments on a piece of land which does not belong to them and are now trying to use the court process to shield his unlawful acts.

The matter was ordered to be disposed of by way of written submissions although I only received written submissions by applicant a counsel in which he states that the substance of the reply by interested parties simply demonstrates that despite the anomalies visiting the process of survey, the impunity has proceeded further and obtained leases for 99 years with effect 1st May 1998. Further that what is deponed by the interested parties in the replying affidavit confirmed the anomaly of numbering and physical area on the surface of the earth.

So was Lamu County Council justified in ordering applicant to demolish 274,275 and 276. (b) Have Respondents acquired good title in the leases comprised in the parcels of land. **MR GICHANA** for applicants submits that there is no justification in the order for demolition without the exparte applicant being given adequate notice and being given a hearing. He refers to the decision in **SUBA CHURCHILL V EGERTON UNIVERSITY(1995-1998) 1EA 303(HCK) and MATIBA V AG (1995-1998) 1 EA 1992(CAR)** to fortify his argument that no man should be condemned unheard.

He points out that from the correspondence there is a dispute as to whether the Respondents had a good title and the way out is through an adjudication process because despite having Title documents, the applicants have been in occupation the suit property since October 1989, as evidenced even by the criminal proceedings in CRC No.40 of 1999 where the issue of trespass was addressed.

The respondents say the applicants are mixed up as regards which plot they are entitled to – saying the members may appear slightly similar, but the order of numeration is slightly different – I suppose that would take the explanation of a surveyor to clarify what he means. Physically the plot being claimed by both parties is one – the question of determining whether they are in actual fact located within different areas could only be determined by giving each side a chance to be heard especially because there are two completely opinions regarding the surveys by persons who both describe themselves as surveyor and a suggestion by one **E.M.J KIGURU** that there is the issue of double surveys, the credibility of the

documents relied on by the interested parties, and the findings in the criminal case which seems to suggest mischief with regard to sale involving the first interested party.

On the other hand is a letter by one **E MOKI** – (actually its not clear in what capacity he signed the letter dated 30/03/06 on behalf of the Director of Surveys) – but he seemed to suggest that there were certain necessary survey procedures done which to the ordinary eye appear like an anomaly but which could technically be explained. I do not think these are matters which Lamu County Council could just decide through an administrative process of sifting through documents without giving the applicants a chance to be heard and to that extent they were in breach of the Principle of National Justice, that no man should be condemned unheard.

Furthermore the dispute herein is by nature such that resolution lies in a proper adjudication legal process which should be through a court process and not an administrative action – after all despite all the previous correspondences, the latest one dated 18/02/10, signed by **H.F.JUMBA** on behalf of the Director of Surveys raised a query about the very anomalies that had arisen in the past and instructed that any instructions affecting the parcels be halted pending investigations – such request was drawn to the attention of the Town clerk.

The Lamu County Council opted to act and determine matters affecting the rights of the exparte applicants thus usurping the powers donated to courts as arbitrators and adjudicators and in so doing exceeded their jurisdiction. Even if it was to be found that Lamu County Council had authority to determine such matters like the existing dispute, then such determination could only be made after giving each party an opportunity to be heard.

I'll paraphrase observations in the decision of **KADAMAS V MUNICIPALITY OF KISUMU CIVIL APPEAL NO. 109 of 1984, (High Court Kisumu) reported in 1985 KLR page 954**, where proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters that would result in a final decision, then relief of certiorari should apply.

Secondly condemning any party without giving them a chance to be heard goes against the principles of natural justice. Consequently the decision by Lamu County Council is hereby quashed an account of these two reasons and orders of certiorari do issue as prayed.

I am not certain the relief of prohibition would arise at his point because the action complained of has already take place and the likelihood of it being repeated is addressed by my finding that the 1st respondent acted in excess of its jurisdiction, so I'll not issue such orders in vain.

The costs of this application shall be borne by the 1st respondents and the interested parties.

DELIVERED AND DATED THIS 20TH DAY OF JULY 2011 AT MALINDI

**H A OMONDI
JUDGE**

Mr Kilonzo Advocate holding brief for Ole Kina for Applicant