



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**JR. MISC. CIVIL APPLICATION NO. 89 OF 2011**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS**

**IN THE MATTER OF: AN APPLICATION BY KHAIRUNISSA HUSSEIN HAJI LADHA**

**IN THE MATTER OF: L.R.NO. 22056 C.R. NO. 28568**

**REPUBLIC.....**  
**.....APPLICANT**

**VERSUS**

**THE REGISTRAR OF TITLES MOMBASA.....1<sup>ST</sup> INTERESTED PARTY AND**

**KILIFI RESORT LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**NORTHERN LIGHTS LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**SULEIMAN ABDULREHMAN HAJI SULEIMANHAJI LADHA.....3<sup>RD</sup> INTERESTED PARTY**

**EX PARTE KHAIRUNISSA HUSSEIN HAJI LADHA**

**RULING**

The ruling herein arises out of Preliminary objections raised by the interested parties herein. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties filed their notice on the 4<sup>th</sup> October 2011 while the 2<sup>nd</sup> interested party filed its notice on the 18<sup>th</sup> October 2011.

The background of the matter is that on the 19<sup>th</sup> August 2011, the applicant filed a Chamber Summons application dated 12<sup>th</sup> August 2011 seeking for prayers that:-

1. That the applicant be granted leave to institute Judicial Review Proceedings for orders of Mandamus to

compel the Registrar of titles Mombasa to cancel registration of entries No. 2 and 3 on the title to the property known as **LR. NO. 22056, CR. NO. 28565** in favour of 1<sup>st</sup> and 2<sup>nd</sup> INTERESTED PARTIES.

2. That, the leave hereby granted do operate as a stay of any further dealings in respect of the said property known as LR. NO. 22056 CR. NO. 28568.

3. That the costs of this Application be provided for

That Chamber Summons application was heard under a certificate of urgency filed in court on the 2<sup>nd</sup> September 2011, and the court allowed the application in terms of prayers 1 and 2, thereof, upon hearing Mr. Khatib counsel for the Applicant. It is against these background that, the Preliminary objections were raised. It suffices to note that, accompanying the Chamber summons is a Notice of Motion dated, 2<sup>nd</sup> September 2011 and filed in court on 20<sup>th</sup> September 2011. In that Notice of Motion, the Applicant seeks for prayers that:-

1. That pursuant to leave granted on 2<sup>nd</sup> September 2011 an order of mandamus do hereby issue to compel the Respondent to cancel the registration of entries no. 2 and No. 3 of the Title for LR. NO. 22056 CR. NO. 28568.

2. That the costs of this application be to the Applicants.

In the objection raised by the 1<sup>st</sup> and 3<sup>rd</sup> interested parties, they state that:-

1. The order issued herein on **2<sup>nd</sup> September 2011** that leave to apply for orders of Mandamus do operate as stay is in breach or contrary to the law, viz the mandatory provisions of the Law Reform Act and order 53 Rule 1(4) of the Civil Procedure Rules

2. The, Application is misconceived and otherwise an abuse of the court process as the Applicants remedy if any, lies in Private law and not Public law.

3. The Application as filed is incompetent, premature and contrary to sections 62 and 63 of the Registration of Titles Act.

4. The orders sought are oppressive, and ultra vires to the due process set out in PART XIII of the Registration of Titles Act, and particularly section 60 of Registration of Titles Act.

5. The Application is ex facie, incompetent and filed in breach of the mandatory provisions of order 53rule 1(2) of the Civil Procedure Rules.

On it's part, the 2<sup>nd</sup> interested party in it's objection raised the issues that:-

1. Leave to apply for order of Mandamus was granted prematurely and before the Applicants produced written reasons by the Respondent setting out the grounds for refusal to cancel the registration of entries no. 2 and 3 of the Title for Plot No. LR. 22056, CR. NO. 28568.

2. The remedy for order of Mandamus under section 82 of the Registration on the Titles Act, is dependent upon written reasons by the Registrar and no application for such orders can be filled prior to the receipt by the Applicant of those written reasons.

3. The 2<sup>nd</sup> interested party acquired the property under a transfer by the proprietor within the meaning of the words "proprietor" and "transfer" as defined in section 2 of the Registration of Titles Act.

4. The Respondent has no power or authority or jurisdiction to cancel entries relating to the ownership of the property by the 2<sup>nd</sup> interested party.

5. These proceedings were designed to overcome the clear provisions of section 60, 61 and 63 of the Registration of the Titles Act.

6. The remedy available to the Applicant, if any against the 2<sup>nd</sup> interested party would be a substantive civil suit for determination of the alleged forgeries.

At the beginning of the hearing it was agreed that, both Preliminary Objections be heard at the same time, thus, were consolidated. The 1<sup>st</sup> and 3<sup>rd</sup> interested parties were represented by Mr. Liko, Mr. Anam and the 2<sup>nd</sup> interested party by Mr. Kinyua whereas Mr. Khatib appeared for the applicants.

Mr. Liko relied on several authorities in support of his clients objection. He cited several cases relating to the Notification of revocation of Land Titles and whether the Registration of titles has the power to revoke the titles.

He submitted that the applicants were jumping the gun by coming to court before exhausting the requirements of section 59 to 64 of the Registration of Titles Act and that the applications can only complain after the Registrar has failed to comply with the said provisions of section 59 to 64 of the Registration of Titles Act.

He submitted further that only the court can cancel an entry after hearing the parties on oath and not through affidavits and therefore Judicial Review is not the proper forum for orders sought for herein. Mr. Liko submitted that the application offends order 53 Rule(1)(2) of the Civil Procedure Rules, the Verifying Affidavit is bare. The counsel cited and relied on authorities.

**(i) Misc. Appl. No. 826/01**

**(ii) Misc. Appl. No. 386/05**

**(iii) Misc. Appl. No. 607/02**

**(iv) Misc. Appl. No. 1267/03**

**(v) Misc. Appl. No. 627/91**

He fortified his submissions that, the powers of Registrar must be exhausted first and indeed the Registrar has no power to cancel the entries in the register. By relying the authorities of:-

**(i) Misc. Appl. No. 386/05**

**(ii) Hccc. (NBI) Judicial Review No. 14/07**

**(iii) Hccc. (NBI) Misc. Appl. No. 922/05 and**

**(iv) Civil Appeal No. 84/10**

In support of the submissions that leave cannot operate as a Stay where the orders sought for are an order of Mandamus, Mr. Anam cited the authority of;

**Court of Appeal Application No. 89 of 2009 (UR 55/09)**

He submitted that the leave operates as a stay only where the order sought for Certiorari or Prohibition.

Mr. Kinyua, submitted on behalf of the 2<sup>nd</sup> interested party to the effect that Judicial Review looks **at the procedure followed** by the inferior body and on **the decision making process**, as to whether it

was within the jurisdiction, and therefore Judicial Review process is not concerned with the end results as to whether it was right or wrong.

He submitted that, in the instant case there was no decision of the Registrar to form the subject of Judicial Review.

He further submitted that a party applying for an order of mandamus must first exhaust the requirements of the provisions of section 62 of the Registration of Titles Act, and that the provisions of section 62 are anchored to section 60 and 61 of the Registration of Titles Act and therefore in the absence of the Registrar's reasons, the application herein is pre-mature hence the applicant is jumping the gun.

He submitted further that as regards a stay, only two things may be stayed

**(i) The proceedings themselves and/or**

**(ii) The enforcement of a decision.**

Therefore the stay order herein amounts to an injunction and therefore the court has descended into the arena it has no jurisdiction in. Finally Mr. Kinyua submitted that, there is no provision for a supporting affidavit to the Chamber Summons in law as herein done.

In opposing the Preliminary Objections raised, Mr. Khatib submitted that, the issues raised were not issues of law but matters that can be canvassed at the main trial. He submitted further that an order of stay is given at the discretion of the court, and that the applicant has come for a Mandamus under section 62 of the Registration of Titles Act. He told the court that if that order was to be interfered with, it has to be through review and not a Preliminary Objection and that, the stay order was given to preserve the property.

On the issue of a verifying affidavit, as per the Order 53 Rule (1)(2) of the Civil Procedure Rules, he submitted that he had complied with the Provisions of the law.

As regards, the issue as to whether the subject matter forms part of the Estate of the deceased, Mr. Khatib submitted that, it's absence is not fatal and that the grant can be rectified. He denied failing to observe the provisions of section 59 – 64 of the Registration of Titles Act, and told the court that, the Judicial Review is the correct procedure and forum.

He further submitted that, under Article 159 of the constitution, the court is supposed to disregard the technicalities and the High Court has Supervisory Powers over the Subordinate Courts and can summon the Registrar and give directions on the matter, and that the Court should look at the issues herein in totality. He submitted that the Preliminary Objection is meant to deny the applicants their day in Court and that the applicant was not duty bound to wait for the Registrar to give reasons. He prayed that the Preliminary Objection be dismissed.

In the final reply, Mr. Liko submitted that the Preliminary Objection raised is of issues of law and not evidence, and that the applicants have conceded that the subject matter is not a subject of the Succession Cause. He submitted that the Constitution does not support a breach of law.

Mr. Kinyua in his closing submissions invited the court to consider that under schedule six of the Constitution, the transitional provisions, the Constitution did not do away with the law and that for the Applicant to state, that he does not need to seek for reasons thrown out the Provisions of section 62 of the Registration of Titles Act. He submitted that, there is a procedure to follow in fraudulent transaction matters.

At the close of the submissions by the parties, I found that the issues raised in both notices of Preliminary Objection are similar. I therefore propose to deal with the issue in the following consolidated manner.

1. Whether the order issued on the 2<sup>nd</sup> September 2011 as Leave and ordered to apply as a Stay is in breach of the provisions of Law Reform Act and Order 53 Rule1(4) of the of the Civil Procedure Rules.
2. Whether the applicant has jumped the gun by applying for the Order of Mandamus when they have not complied with the provisions of section 60, 61,62, 63 and 82 of the Registration of Titles Act.
3. Whether the matters herein lies in Private Law or Public Law and therefore if the application is misconceived and otherwise an abuse of the court process.
4. Whether the orders sought are oppressive and ultra vires to the due process set out in part XIII of the Registration of Titles Act, and particularly section 60 of that Act.
5. Whether the application is ex facie competent and/or field in breach of the mandatory provisions of order 53 Rule 1(2) of the Civil Procedure Rules.
6. Whether the 2<sup>nd</sup> interested party acquired property under a transfer by the proprietor within the meaning of the words “**proprietor**” and “**transfer**” as defined under section 2 of the Registration of Titles Act.
7. Whether the Respondent herein has power or authority for jurisdiction to cancel entries relating to the ownership of the property by the 2<sup>nd</sup> interested party.
8. Whether the remedy available to the Applicant against the interested party would be a substantive Civil Suit for determination of the alleged forgeries.

I now wish to deal with those issues. I shall deal with issues number 1 and 5 together. The issues relate to the orders given on the **2<sup>nd</sup> September 2011** in relation to the Leave granted and the Stay consequent thereto and in particular, the provisions of the Law reform Act, and Order 53 rule (1)(2) of the Civil Procedure rules.

My ruling on the issues is that, the orders of **2<sup>nd</sup> September 2011** were issued by Hon. Lady Justice M Odero, who is a Judge of same jurisdiction as my jurisdiction. She is still available in the station, consequently I cannot sit on the matter as though I have appellat jurisdiction, neither can I set aside, review or even discharge or confirm or otherwise deal with orders she has made.

Secondly, these issues were raised before Hon. Justice H. Okwengu on the **4<sup>th</sup> October 2011** and she directed that the interested parties do file a formal application. They did not instead they have raised the issue as a Preliminary Objection, I concur with Hon. Justice H. Okwengu’s direction that this is not a matter that can be canvassed on a Preliminary Objection. The interested parties ought to file a formal application.

As regards issues **No. 2 and 4** they relate to the Provisions of the Registration of Titles Act, more so, section 60-63 and 82 thereof. On the face value, and taking into account the preliquisites of the said provisions of Law and the submissions of the parties, one can quickly arrive at the conclusion that indeed those provisions have not been complied, with although the applicant annexed a notice of caveat (to her affidavit in support of her Chamber Summons marked KHSHL5) which she purports the respondent has refused to register But that is an issue of evidence.

As regards the **3<sup>rd</sup> issue 8<sup>th</sup> issue**, namely whether the matter lies in Private Law or not Public Law and whether the applicants remedy lies in a substantive Civil Suit. I find that those issues can only be fully canvassed and understood once the whole matter is argued. To resolve that issue one would require evidence as to the nature of the subject matter herein the issue in contention and evidence in proof. Therefore those issues are not purely points of law.

Again the issue of how the 2<sup>nd</sup> interested party acquired the property is indeed an issue of evidence

and the evidence has to be adduced to resolves as to whether the 2<sup>nd</sup> interested party acquired the property under a transfer by the proprietor within the meaning of the words “proprietor” and “transfer” as per section 2 of the Registration of Titles Act.

As regards, the 7<sup>th</sup> **issue** as to whether the Respondent has power to cancel the two entries, I find it’s is an issue of evidence, and indeed the counsels for the interested parties have cited quite a number of authorities to support that issue.

In conclusion, I find that not all the points raised in the Notices of Preliminary Objection form pure points of law. Some are matters of evidence. That is fortified by the submissions of the parties Mr. Liko while submitting invited the court to note that in deed the suit property does not form part of the property under the Succession Cause. Equally, Khatib invited the court to consider that, there are issues of forgeries herein that require evidence. I do not want to say more on these issues of evidence raised, as the main Notice of Motion is still to be dealt with and as I had directed the parties (record refers), it would have been expeditious to combine the Preliminary Objections and the Notice of Motion in the interest of justice.

The Preliminary Objection however was not in vain, I did observe that indeed some very salient issues were raised and were very well argued, especially on the issue of the provisions of the Registration of Titles Act (section 60-63 and 82 thereof) and on the issue of the purpose of a stay and what can be stayed. Mr. Kinyua did a good job on that.

However, I wish to note as an **obiter** remark that the spirit of the new constitution places “**Wanjiku**” as the “Director” of affairs. Hence the remarks the New **Constitution** is a “Mwananchi Constitution”. The ordinary Kenyan wants to see justice done. The Kenyan is interested in having their day in court. The striking out of pleadings as once stated by justice Madan JA “**should be used sparingly**” as that action is very draconian. The New Civil Procedure have done way with dismissal and termination of matters on “**technicality**” grounds. The oxygen principle; the Section 1A and 1B of the Civil Procedure Act and indeed Section 3A thereof gives the Court wide powers to ensure **Justice is done and seen to be done**.

Again Article 159(1)(d) of the Constitution requires “**Justice shall be administered without undue regard to procedural technicalities**” and further “**justice shall be to all, irrespective of status**”

From, those provision I rule it would be in the interest to let the parties to have their day in court. I dismiss the Preliminary Objection raised.

**G.L. NZIOKA**  
**JUDGE**  
**21/11/2011**

COURT – Dated and Delivered at Mombasa on this 21<sup>st</sup> day of November, 2011.

**G.L. NZIOKA**  
**JUDGE**  
**21/11/2011**

Before

Liko for 1<sup>st</sup> and 3<sup>rd</sup> Respondent

Khatib for the applicant

Koech for Kinyua -2<sup>nd</sup> interested party.

Matano court clerk

**G.L. NZIOKA**  
**JUDGE**  
**21/11/2011**

Mr. Liko: - I seek for leave to file a reply affidavit.

Court – Leave granted as prayed.

Court: by consent of the parties, hearing 19<sup>th</sup> December 2011.

**G.L. NZIOKA**  
**JUDGE**  
**23/11/2011**